**Claim Number: 3302853/2024
and 3301877/2026**

EMPLOYMENT TRIBUNALS

Claimant: Mr David Livesey

Respondents: (1) Connells Limited
(2) Skipton Group Holdings Limited

Heard at: Bury St Edmunds **On:** 29 May to 5 June 2026; 8 June 2026 (submission); 9-10 and 29 June 2026 (deliberations).

Before: Employment Judge R Wood; Mrs C Smith; Mr D Sagar

Appearances
For the Claimant: Miss Stone KC
For the Respondent: Miss Sen Gupta KC; Miss Plews (Counsel)

RESERVED JUDGMENT

1. The claim of direct age discrimination is well founded and is allowed.

2. The unfair dismissal claim is well founded and is allowed.

DECISION AND REASONS

Claims and Issues

1. Page numbering referred to in square brackets within these reasons are to pages in the main hearing bundles, unless otherwise stated. The reference is first to the bundle number, and then to the page within that bundle i.e. [2-345].

Summary

2. Mr David Livesey ("the claimant") was employed by the First Respondent ("Connells"), which is an estate agency and property services group, from June 1990. He was appointed as Group CEO of Connells in 2008. His employment terminated in 2023 when he was 64 years old. Connells is a wholly owned subsidiary of the Second Respondent, Skipton Group Holdings Limited. The second respondent is a company belonging to the Skipton Group which is headed by Skipton Building Society ("Skipton").

3. By ET1 dated 5 March 2024 following early conciliation commenced on 9 February 2024 and concluded on 12 February 2024, the Claimant brought a complaint of constructive unfair dismissal or in the alternative ordinary unfair dismissal ('the First Claim') against Connells.

4. By ET1 dated 10 December 2924 following early conciliation commenced on 1 October 2024 and concluded on 12 November 2024, the Claimant brings a complaint of direct age discrimination against both Connells and the second respondent.

5. This is a claim of constructive unfair dismissal and direct age discrimination. In essence, the claimant indicated he was to retire and that this was at the end of a catalogue of actions by Connells, which he says involved bullying and undermining the claimant's position within the company. In particular, these were the actions of Mr Stuart Haire, Skipton's CEO from early 2023.

6. There followed a dispute about the way in which his notice of termination and garden leave was dealt with. The claimant alleges that he resigned on 7 December 2023 after the final straw, which was Connells' indication that it intended to treat a public announcement made on 20 June 2023 as the trigger for the start of his notice period pursuant to clause 3.1 of the claimant's service agreement. The claimant asserts that all this constituted a fundamental breach of express and implied terms of his service agreement with the first respondent. It is also suggested that these matters amounted to less favourable treatment on the grounds of his age. He was 64 years old at the relevant time. The claimant also asserts that he was discriminated against on the grounds of age in respect of the way in which the first respondent dealt with a long term executive investment scheme (LTIP)('Condor 3').

7. The first respondent denies that there was any discrimination, or that there was a breach of the claimant's contract of employment, either fundamental or otherwise. It further denies that there was any treatment of the claimant which was bullying or which undermined his position. In the alternative, it is also argued that any discrimination can be objectively justified. The second respondent's liability it is alleged arises out of section 111 or 112 of the Equality Act 2010, which it denies.

The Hearing

8. The final hearing of this claim was heard by the Tribunal sitting at Bury St Edmunds (in person) from 29 May to 5 June 2026; 8 June 2026 (CVP) and on 29 June 2026 (panel only). We heard from a number of witnesses. We first of all listened to testimony from the claimant, as well as Mr David Plumtree (former Connells Group Chief Executive (Estate Agency)); and Mr Howard Newton (former Connells Group Risk and Compliance Director). For the respondents, we heard from Mrs Gwyneth Burr (Skipton Board Chair); Mr Stuart Haire (Skipton Chief Executive); Mr Richard Twigg (former Connells Chief Executive); and Mr Mark Lund (former Connells Chair). All of the aforesaid witnesses submitted witnesses statements which they adopted and are contained in the witness statement bundles ("WS").

9. There had been an application from the respondent to rely upon supplementary witness statements from each of their witnesses. This application was refused for reasons provided at the hearing. In short, the Tribunal concluded that it would not be a proper exercise of a judicial discretion to allow the statements. The respondents had made an application previously before Employment Judge Barran at a

preliminary hearing on 12 January 2026 to be permitted to rely on supplementary witness statements. It was common ground between the parties that this application was refused, albeit there is no express mention of it in the written case management order issued in respect of that occasion. It is only in exceptional circumstances that a Tribunal will go behind a previous case management order e.g. if there has been a material change of circumstances. We were provided with insufficient grounds for interfering with the case. It was our view that there had not been a change of circumstances. Moreover, the additional witness statements had been served very late i.e. in the few days before the start of the final hearing. The current application, and the provision of such documents, demonstrated a disregard for the previous case management order, and in general terms, for the proper timetabling of such important steps in preparation for a final hearing. To have permitted the respondents to have relied upon the extra evidence, which sought to comment on the claimant's witness statement evidence, would be to disadvantage the claimant, albeit that it was difficult to assess precisely the extent of this prejudice. In the round, we took the view that the application should be refused.

10. In terms of the documentary evidence, we were provided with a main hearing bundle which comprises 11 volumes and 7011 pages. We also had helpful opening notes and written closing submission from both Counsel, which were extremely helpful. The opening note bundle comprises 45 pages and includes a chronology, cast list and glossary. Both Miss Stone and Miss Gupta expanded orally upon their written closing remarks. We were also provided with a bundle (with index) which attempted to put the relevant documents into chronological order. This comprised 351 pages. There was also a disclosure bundle which comprises 351 pages. It was a rather disparate selection of documentation.

11. At the conclusion of the hearing, the Tribunal reserved judgment in respect of liability and contributory fault. The Tribunal had hoped to hand down an oral decision, but this had not been possible due to time constraints. The Tribunal apologises that this was not possible in the circumstances.

Findings of Fact

12. Based on the evidence that we heard and read, the Employment Tribunal made the following primary findings of fact relevant to the issues that we had to determine.

General background

13. The Skipton Group provides a diverse range of services, including helping people finance their homes and save for their future. Connells Limited ("Connells"), which employed the Claimant as its Group Chief Executive Officer ("CEO"), is the property services business of Skipton, which arranges the buying, selling and renting of homes. It is a wholly owned subsidiary of the second respondent (and therefore of Skipton).

14. The claimant was employed by Connells until he resigned with immediate effect on 7 December 2023. Prior to that, he had worked at Connells for 33 years, having started in the business in 1990 and having become CEO in 2008. The claimant had a long and successful career at Connells. The claimant's service agreement, which for various reasons, is an important document in this case, is dated 21 December 2012 and appears at [1-229]. The claimant was born on 3 May 1959.

15. Mr David Plumtree was Connells Group Chief Executive (Estate Agency). His date of birth is 17 February 1969. He is therefore about 10 years younger than the claimant. He joined Royal Sun Alliance Property Services in 1988. In 2003, Connells acquired that business. Mr Plumtree's role was focused on the estate agency division. He reported to the claimant, the Group Chief Executive Officer. Mr Plumtree's employment with Connells terminated on 31 March 2025, following a 9-month period of garden leave starting in June 2024. We will return to this later.

16. Mr Mark Lund, first joined the Skipton in January 2014 as a non-executive director of Skipton Financial Services Ltd and subsequently joined the Skipton Board in April 2016. In 2019, He joined the Skipton Board's Remuneration Committee ("Skipton RemCo"). He was also a member of the Skipton Audit Committee. Later, Mr Lund was appointed to the Connells Board in March 2021 as a non-executive director and first held the role of Connells Chair on an interim basis, following the resignation of Stephen Shipperley, at the end of 2022. In May 2023, Skipton appointed Sarah Whitney as a non-executive director at Connells. She then became Chair of Connells in September 2023, at which point Mr Lund stepped down but remained on the Board as a non-executive director. When Ms Whitney left at the end of February 2024, he took up the role of Chair of Connells on a permanent basis until his retirement in February 2026.

17. We note that Mr Shipperly retired in 2022 and was given a 'clean break' option from the relevant LTIP's [12-11].

18. The claimant (in similar ways to the other senior executives at Connells) was subject to a service agreement which appears at [1-229] dated 21 December 2012. Clause 3 relates to the duration of his employment. It states as follows (in so far as it is relevant):

> *"3.1 The Employment shall commence on and, subject to the provisions of this*
> *Agreement, shall continue unless and until terminated by either party giving to the*
> *.-other not less than 12 months' writing:*
>
> *3.2 Connells shall have the discretion to terminate the Employment lawfully without any notice or on notice less than that required by clause 3.:1 by paying to the* Executive a sum equal to, but no more than, the Salary and value of contractual benefits in respect of any outstanding period of notice less any appropriate tax and other statutory deductions. This shall include the Executive's Salary for any outstanding period of notice plus the average amount of any bonus payment paid to the Executive in the previous 2 years (Variable Amount), up to a maximum Variable Amount of 50% of the Salary, plus an amount in respect of any other contractual benefits. Should Connells. exercise its discretion to terminate the Employment in this way, all the Executive's post termination obligations contained in this Agreement, including in particular the restrictive covenants in clause 18 shall remain in full force and effect.*

3.3 At any time during any period of notice of termination served in accordance
hereunder (whether given by Connells or the Executive), Connells shall have the right at its absolute discretion to assign.no duties or reduced or alternative duties to theExecutive-(provided - that any such duties shall be consistent with the Executive's status) and shall be entitled to require the Executive to act • at the direction of Connells including the right to exclude the Executive from its premises, and/or remove the Executive from office as a director"of Connells and from any or all offices held by the Executive in Connells -or in any.other,company in the Group (including if appropriate the office of trustee of any of the pension schemes of Connells) and/or prevent the Executive from • discussing 'its affairs with Connells or any other company in theGroup, their employees, agents, clients, or customers. If Connells shall exercise its right under this clause, the Executive's entitlement to Salary and other contractual benefits shall continue, subject always to the rules of any relevant scheme or policy relating to such benefits. For the avoidance of doubt, at times.during any period of notice of t9rmination served accordance hereunder (whether given by Connells or the Executive); the Executive shall continue to be bound by the same obligations as were owed to Connells prior to the Commencement of the notice period….."

19. In relation to remuneration under clause 7, the service agreement states:

"*7.3 Connells may; at its sole discretion, pay the Executive a bonus of such amount and at such times as may be determined by Connells, taking into account the remuneration principles which apply across the Group from time to time. For the avoidance of doubt, it is agreed that the Executive shall have no contractual right to any bonus payment under this Clause.*

….

The Executives right to receive remuneration in any form under this Agreement shall be subject always to the Society's obligations under the FSA's Remuneration Code (the "Remuneration Code"))."

20. The claimant was also the subject of a long term incentive plan (LTIP). These were Skipton schemes, but which applied to the senior executives of Connells. At the relevant time, the claimant was a member of 'Condor 3' which was a LTIP of which Mr Plumtree was the only other member.

21. Condor 3 commenced on 1 January 2019. As on that date the value of all Connell's shares were determined at about £13m, based on 7.5 times annual EBITDA (a measure of profit). The claimant was given 3.27% of the shares and thus paid £420,000 to Skipton. These were called E shares which was a label to show they were non-voting shares. Mr Plumtree was given 2.18% of the shares (called F shares) and paid £280,000 into the scheme. As such the claimant received 50% more in terms of stake than Mr Plumtree [1-314].

22. Both the claimant and Mr Plumtree held options to sell their shares to Skipton. But they could only sell annually 25% of their shares, starting at end of 2021. Thereafter they had three such annual options to be used in the period of 5 years to the end of 2026 [2-672]. The value they could get for their shares depended on the actual value of the Connells business subtracted by the notional value achieved by adding 7% compound growth each year. Thus at the end of 2021 the notional value would have been approximately £16m. If earnings and cash generated were more, then 25% of the excess would be apportioned to the claimant and Mr Plumtree, if they sold their option. In the four option exercises, the claimant's earnings could not exceed £15m gross and were subject to capital gains tax. Mr Plumtree was subject to a ceiling of £10m.

23. If the claimant or Mr Plumtree were to resign or leave without Skipton's agreement, in the main they would be defined as" Bad Leavers" and not get paid. The claimant was also subject to "Permitted Leaver" status which allowed payment upon an agreed retirement. The options remained available until the end of 2026.

24. For both the claimant and Mr Plumtree, Skipton had a discretion to allow payment through "Permitted Leaver" status for the claimant, and "Good Leaver" status for both men, even if other preconditions were not met. In other words Skipton could deny payment only if someone was a "Bad Leaver", and Skipton choose not to exercise their unilateral discretion to make payments under the scheme.

25. The prospective position for the two men in 2023 was less attractive than it had been in 2021. This seems to have been because Connells had simply not performed as well as had been projected. As such, the best-case scenario the claimant could receive under Condor was £1.835m based on 2022 profits; reducing to £336,000 in 2023; and £561,000 in 2024. Then, based on forecasts, the prospects appeared to improve again: £2.702m for 2025 and £2.844m for 2026 [2-469]. These would be the minimum amounts due to them unless they were "Bad Leavers". Therefore, the returns from Condor had dipped considerably, such that share options values based on 2023 performance would have meant a negative return on their investment for both the claimant and Mr Plumtree.

26. 'Clean-break' was the term used by Connells and Skipton executives for getting a proxy amount early from LTIP's such as Condor 3 (and another LTIP called 'Harrier'). Mr Plumtree was a member of Harrier but not the claimant (he having refused to join). In other words, 'clean break' was a way of not having to wait until any share options vested.

27. From the moment Connells was acquired by Skipton, there had been a clash of cultures between some of the executives and non-executives of the two groups. This was not least the result of the very different sectors in which they operated. The claimant was clear that the buy out of Connells by Skipton (which in part had been funded by Connells management) was on the basis that the subsidiary retained a large degree of autonomy from its owner. This is best demonstrated by a document which was created much later, in 2019, which is entitled the "Principles of Engagement" [7-1032]. The second respondent's case before us has been that this was a rather unusual document in the corporate sense, in that it was one sided in the obligations it enshrined. In other words, Skipton felt that it prescribed a one sided relationship between owner and subsidiary [7-1068]. During her testimony, Mrs Burr described it as a "strange and unbalanced document".

28. Having said that, it appears to have been largely honoured by Skipton until 2022, or thereabouts. This is because the core senior management at Skipton who had been in place at the relevant time, and who in a sense had been privy to the understanding, had maintained Connells' autonomy within the group to a significant extent (or at least to a degree which kept Connells executives happy). The claimant described the acquisition of Connells by Skipton as an “arms length investment”. Skipton needed to know enough but to not meddle in the business. He said this had held true for 15 years but in the 2-3 years before he left, tensions had begun to rise because Skipton executives wanted to “overreach”, as he put it.

29. As stated, this changed from about 2020. It is sufficient for us to observe that the change of mood music between Skipton and Connnells was cemented by a ‘changing of the guard’. Mr Stephen Shipperly, Connells Chair, was replaced by Mr Lund at the end of 2022 and then by Ms Whitney in September 2023. In April 2022, Skipton appointed Mrs Gwyneth Burr as its new Chair. Furthermore, Mr David Cutter (Skipton CEO) was replaced by an interim. Mr Stuart Haire was thereafter appointed as Skipton Group CEO and took up his post on 31 December 2022, after he had served out garden leave at his former employer, HSBC bank (although he was to informally ‘participate’ in some Skipton group activities prior to that, as we shall see shortly).

30. Messrs Cutter and Shipperly had been sympathetic to the Connells view that it should be left to get on with its own business without interference from Skipton. Mrs Burr and Mr Haire we find were less inclined to adopt this approach. Mrs Burr in particular was quite blunt when giving evidence before us. She stated that she had never applied the ‘Principles of Engagement’. Mr Haire explained that he had never seen or been referred to it prior to June 2023, at which point he stated that he “smelled a rat” [6-171], such was his attitude towards its underlying principles. We find that there was a level of suspicion of Connells management on the part of Mrs Burr and Mr Haire. In a ‘WhatsApp’ exchange between the two of them dated 3 May 2023, the latter suggested to the former that they “*needed to keep an eye on them*”. This related to discussions about the manner in which Ms Whitney’s appointment would be announced [5-388].

31. We find that Mr Haire had been mandated to improve the relationship between Connells and Skipton, although it is clear that he saw the route to this objective as closer ties. This was diametrically opposed to the views of the Connells executives, who saw this as Skipton’s ‘tanks’ on Connells’ lawn. It was clear that the claimant and other executives at Connells still rather jealousy guarded their autonomy, epitomised as it was in their view by the ‘Principles of engagement’ document.

32. The claimant had grown increasingly dissatisfied with his situation at Connells. He had refused to join Connells’ most recent long term incentive scheme (LTIP), ‘Harrier’. The claimant also resented what he perceived to be interference by Skipton in respect of Connells’ affairs, particularly where that concerned remuneration for Connells’ senior executives and/or internal audit processes.

33. As far back as January 2022, the claimant wrote that Connells was owned by “the nincompoops in the Bailey” [4/249](Bailey being a reference to Skipton’s head office); that the Skipton NEDs were a “Bunch of weapongrade tossers”, and that he “wouldn’t piss on the Skipton NEDs if they were on fire” [4/277]. Although these were private messages to a small number of friends, we are satisfied that they were illustrative of

a broader attitude on the part of the claimant and some other members of Connells' management. That being said, it was our overview that the claimant had positive and professional relationships with all of those involved in this case. He appears to have kept many of the said views to himself, or within a small circle of confidants.

34. In the past, it had always been considered that Mr Plumtree would be the claimant's successor. This was openly discussed. There was a succession plan that showed Mr Plumtee as both the emergency and long-term replacement for the claimant […..]. However, in around 2020, Mr Plumtree told the claimant and Mr Shipperley that he no longer wished to be considered for this role, because of what he considered to be the continuing overreach of Skipton into Connells' business. In the course of the years preceding the claimant's departure, multiple versions of the succession plan were prepared, addressing the retirements/departures of several senior Connells personnel, including the claimant.

35. Even in 2022, the claimant was on the path to retirement. By this stage, Mr Plumtree had also made clear his intention to leave the business, although his would not be a retirement. The parties had started to talk openly about, and plan for, the claimant's retirement. As early as 2012, the claimant negotiated specific provision for his retirement in a Connells' senior executive LTIP arrangement - Condor 1 [1/252-313], so that in the event he retired from the business before the end of the LTIP, he could leave as a 'Permitted Leaver' and still receive 'Good Leaver' treatment. He negotiated the same provision in Condor 3. The other participant in Condor 3, Mr Plumtree, did not have the same entitlement.

36. For the period in late 2022, and early 2023, the position with regards to the claimant's and Mr Plumtree's attitude to remaining within Connell's improved. The claimant told us that he had temporarily been persuaded to stay. This seems to have been prompted by the arrival of Mr Haire, who had asked the claimant to join an executive committee intended to bring Connells and Skipton closer together. This left the claimant feeling more included and visible. However, this represented a temporary thawing of attitudes between the claimant and Skipton executives. We accept that the claimant again set his sights on retirement between March and May 2023.

Specific Events

37. On 8 June 2022, Justine Shaw (Skipton Group Chief People Officer) sent an email to Mrs Burr stating: "Finally, just for information Helen raised with me that she thinks the exam question is how do we want to avoid paying £10M to DCL [the claimant]." [1-220]. We find that this was a reference to the likely possible payments from Condor 3 to the claimant. Even at this early stage there were those within Skipton whose thoughts had turned to how the claimant's entitlements upon leaving the company might be restricted.

38. On 20-21 September 2022, there was an away day organised for Connells executives. Notwithstanding that he was still on garden leave with his former employer, Mr Haire attended. It is alleged that, by his general conduct, Mr Haire made it clear to the claimant and others present that it was "*his way or the highway*", to coin a phrase. There is no suggestion that Mr Haire actually used these words. It is our understanding that the allegation is based on Mr Haire's general behaviour and language.

39. In March 2023, there was a conversation between the claimant and Mr Haire during which the latter suggested that Mr Twigg, Connells' Chief Financial Officer, was distrusted by their external auditors Ernst and Young. There was a measure of agreement that these comments were made, although Mr Haire suggested that he had been passing on comments made by the external auditors themselves, and that it was not his personal opinion of Mr Twigg [2-174] and [6-48]. We accepted this evidence although we took the view that they must have been opinions with which Mr Haire had sympathy, at least to some extent. They appeared to be views shared by others. Philip Moore (non-executive director of both Connells and Skipton) stated in an email, dated 25 May 2023, that Mr Twigg was someone who was "fine as an FD but .. not operating as a modern CFO" [2/174].

40. In early 2023, Skipton had developed what was an innovative mortgage product called the Track Record Mortgage (which was perhaps the idea of Graham Closier, an employee of Connells). Connells had expressed a desire to have exclusivity in relation to this product for a period of six months. Skipton refused this request.

41. In March 2023, the claimant attended a meeting of Connells audit committee. This meeting was also attended by Philip Moore and Bobby Ndawula. Mr Ndawula is black. It is common ground that Mr Moore made a joke about Mr Ndawula's skin colour i.e. that in dark weather he was not able to see him. This passed unremarked upon at the meeting. The claimant suggests that he found the comment troubling but decided not to say anything at the time. In April, the claimant raised the matter with Mr Haire and Ms Whitney (Connells non-executive chair designate). We accept the evidence that both the claimant and Mr Haire spoke to Mr Ndawula who explained that he was not offended by the comment.

42. It initially appeared that no-one had spoken to Mr Moore and the matter had gone no further than these informal steps. At the hearing, we heard testimony from Mrs Burr and Mr Haire that in fact Mr Moore had been spoken to, albeit not until about nine months later, after the claimant had left Connells, and probably after he had lodged his first claim in the Employment Tribunal. This evidence did not appear in either of their witness statements. Neither was it corroborated by any contemporaneous documentation. To the extent that it is important, we find that Mr Moore was not spoken to about the incident.

43. On 24 March 2023, there was a Connells Board meeting. It so happened that this was the first one attended by Mr Haire after his appointment. We find that he made a comment to the effect that Connells had a "1990's business model". There is some issue as to the precise context in which this comment was made i.e. whether it was about investment in the business infrastructure, or whether it related to operational matters. We find that it was predominantly about the latter. Mr Haire was later to send a message to the claimant stating "I hope you boys were ok with my gentle ribbing. It really is an excellent business you boys have" [5-194]. The claimant told us that he had accepted the half apology (as he saw it), and moved on. We accept this evidence.

44. In April 2023, Mr Fry (Connells Group Managing Director (Estate Agency) and Mr Hart (Group Estate Agency MD) had agreed to give a presentation to the Skipton Board as to decisions made about the Countrywide arm of the Connells group following its acquisition a few years earlier. When told that under-performing members of management had been removed, it is alleged that Mr Moore said views

to the effect “what took you so long”. There is no real dispute that this was said, or at least words to the same effect.

45. On 3 May 2023, the claimant and Mr Haire had a telephone conversation relating to a proposed joint press release between Connells and Skipton. It is accepted by Mr Haire that he told the claimant to “wind his neck in”. The dispute arose in relation to the appointment of Ms Sarah Whitney as non-executive director of both Connells and Skipton. It was proposed that both Connells and Skipton issue a press release. There was a dispute (or perhaps a misunderstanding) over whose press release should be issued first. There is no dispute that the words were said by Mr Haire. What is in issue is whether Mr Haire shouted this comment. We accept the claimant’s evidence on this point. It is likely that this was a mildly ill tempered exchange. In which case, it seems more likely than not that Mr Haire would have raised his voice. This is somewhat mitigated by the fact that Mr Haire was in a noisy public area when he made the comment, and that he may have felt the need to raise his voice in order to be heard. We also find that there was an exchange of messages afterwards in which the claimant makes a light hearted comment about the episode [5-393].

46. We note that there was an exchange of WhatsApp messages between Mr Haire and Mrs Burr on 3 May 2023 about this issue in which Mrs Burr stated “…. It makes you feel you need to keep a constant eye on them..”. Mr Haire agreed with her proposition. We find that this rather aptly demonstrated the relationship between the two organisations [5-388]

47. Also in May 2023, Mr Haire and the claimant had a conversation about appointments to a newly formed remuneration committee of Connells. The claimant had taken Mr Haire to task about the perceived lack of Connells directors on the committee. It is alleged that the claimant was told “we don’t get everything we want”. It seems entirely consistent with the scenario described by both the claimant and Mr Haire that the issue would have been raised by the claimant and that Mr Haire would have responded in that way. It is consistent with the well established dynamic between the two that we have described elsewhere in this decision.

48. In May 2023, there was a dispute between Connells and Skipton about succession planning. There is no dispute that succession planning had been ongoing for years in respect of Connells executives. The written succession plan which appears in its March 2023 iteration at [2-154] was created, reviewed, and approved by the Connells Board on a number of occasions. The plan prescribed, amongst other things, that Mr Normington was the established successor to Mr Newton, Connells’ risk and compliance officer.

49. We find that the Skipton Board, and in particular, the non-executive directors, did seek to change the succession plan in respect of Mr Newton, or at least review it. We also accept that Mr Haire was wary about the proposed course, not least because he had never met Mr Normington. Ms Whitney also seemed to be against the appointment.

50. We find that the dispute caused Mr Newton to indicate his intention to resign in July 2023 when it seemed that the succession plan would be changed. However, it is apparent that the view of the Skipton Board softened somewhat and it was agreed that Mr Normington would be appointed, but only after an intensive personal development plan to prepare him to take on the new role. Mr Newton was persuaded

to stay on in September 2023. He resigned in 2024. His resignation letter appears at [12-168] and is dated 11 September 2024. We note with interest that Mr Newton gave six months written notice pursuant to his service agreement, and that Connells responded in writing on 27 September 2024 [12-169].

The June Announcement

51. On 2nd June 2023, the claimant informed Mr Haire of his plan to leave Connells along with Mr Plumtree [6-70]. There is some dispute as to what was said at this meeting. There is no record of it as it was conducted over the telephone. The claimant suggested that he told Mr Haire that it was his intention to start planning for retirement, and that he gave him several reasons why he had come to this decision. In particular, he explained that he mentioned overreach in terms of remuneration and the audit function. He also stated that he had given Mr Haire some feedback (paragraph 54 of his witness statement).

52. For his part, Mr Haire states that he could not recall the exact words used but that the claimant said something along the lines of "It's time. I have given it six months , but I've made up my mind that I want to retire." The claimant was later to state that "well actually you are part of the problem". The issues with Mr Haire included the lack of progress with a long term incentive plan (paragraph 68-69 of Mr Haire's witness statement). The claimant accepted that he did not mention "bullying" as one of his reasons when he spoke to Mr Haire at that time. The immediate cause of the claimant's indication appears to have been been a 'brainstorming' meeting on 31 May 2023 which the claimant and Mr Plumtree clearly found very frustrating [6-60].

53. The claimant was subsequently appointed to an 'informal' committee of four people tasked with carrying out the process of finding the claimant's replacement [7-969]. The claimant continued working as CEO. There were ongoing discussions about the possible arrangements for claimant's future departure, as well as that of Mr Plumtree. There is a copy of a draft settlement agreement in respect of the claimant at [12-16]; and for Mr Plumtree at [12-36]. Of course, we are not privy to the content or outcome of those discussions. It was later to become apparent that the process of removing the claimant from post, and of negotiating the financial terms of his exit, was named 'Project Chester' by the respondents. It was suggested that the respondents often gave activities project names. We were not given any other examples of this practice though.

54. As part of his testimony, he told us that in the days that followed, he had explained to Ms Whitney that he would like to leave before the end of 2023 but subject to leaving Connells in the best state and that he would stay longer if necessary. He had not mentioned any bullying behaviour by Mr Haire. He later stated that it was "our intention that it would take as long as it would take but most likely towards the end of 2024. We accept this evidence.

55. On 3 June 2023, drafts of a press release regarding the Claimant's retirement were prepared. [6-71]; [6-77] and [3-410 to 412]. There are in varying terms in so far as they seek to describe the nature of the claimant's ongoing status within the business.

56. On 5 June 2023, there was an email exchange between Ms Whitney and Mr Lund in which the former observed to the latter: "*DCL raised the possibility of treating DKP as a retirement for the purposes of Condor, so he would be treated in the same way*

as David. DKP has indicated that he is expecting to give 12 months notice, and would be prepared to work those 12 months if we want him to." In the same email, Ms Whitney states: "*Confirm departure date flexibility for DCL i.e. when replacement arrives*".

57. On or about 7 June 2023, the respondents managed to locate copies of both the claimant's and Mr Plumtree' service agreements [6-118].

58. On the following day, in an email the claimant states: "*FWIW, my expectation is that I stop getting paid on the day I leave, and there are no compensation payments or financial entitlements due to me. I will go as if I had served the years notice. If that makes sense.*"[….].

59. On 13 June 2023, Mr Haire sent an email to Ms Whitney in the following terms: "*I have been reflecting on the conversations you were planning to have with DCL on Friday (the topics you mentioned were (Trading, LTIP, Diversity and Succession)). It might be worth us having a 10 min call tomorrow just to pick back up on these themes. I completely agree with the points you made, however feeding it back to David 'raw' may not have our desired effect. We agreed we need to keep him engaged for the next six months to help continuity and minimise the risks we around his Senior Managers. Knowing his 'brittle mental state' he will likely want to take you on with regard to each of these points and I fear it will just end in collision, with no real winner and the risks crystallised. I fear we are too late to teach him 'new tricks' and any performance type conversations will be strongly reacted to…*" [4-299]

60. On 19 June 2023, Mr Haire sent an email to the Skipton executive committee (amongst others) stating that "*We will be announcing tomorrow that, after over 30 years with Connells and 15 as Connells Group CEO, David Livesey will retire mid 2024. He intends to continue in role over that period while he supports myself and the new Connells Chair, Sarah Whitney, in finding his successor*." […].

61. On the same day, the claimant messaged Ms Whitney stating: "*Briefed ExCo. The message was that by this time next year I will be 65 years old and will have served 34 years with Connells, so it's time for me to start planning my retirement at some point during 2024. So a long time away, but we need to start a search process for my successor which will look both internally and externally, and my no.1 objective will be a good passing of the baton, however long that takes.*"[….].

62. This was announced publicly in a press release dated 20 June 2023 ("the announcement")[6-185] headed "*Connells Group Chief Executive David Livesey announces plan to retire". It goes on to state that: "One of estate agency's most successful figures, Connells Group Chief Executive David* Livesey, has announced his intention to retire during 2024*…..As I prepare to hang up my clogs, I am confident that Connells Group will continue to prosper and grow" says David…..In the coming months David will be working with Sarah and the Executive team to find his successor.*".

63. On the same day, the claimant himself sent out an email announcing his intention to retire [6-192]. It is in similar terms to the press announcement.

64. In August 2023, PWC provided a written presentation relating to the financial options for Mr Plumtree under the various incentive schemes [1-1153]. In essence, it set out

that if he left after 25 October 2023, then his return upon his investment upon leaving would be drastically reduced. It was suggested that his share options would be practically zero.

65. On 11 August 2023, Mr Haire sent an email to Ms Whitney stating: "*I think we need next steps mapping out. I've been seeking draft departure terms for both David's for sometime now. I had hoped that with the input from PWC we'd be in a more straightforward position but as we now know there is a wrinkle. Logic says to me that we first must decide if we want DKP to be a good leaver. It becomes very straightforward if we decide bad leaver. My view and that of Sarah I believe is we want him to be a good leaver. On the assumption that we wish him to be a good leaver with say a June 24 departure date then what will we offer him to do that (along with other conditions such as non-compete) and how will it be formulated….*" [2-560]

66. It is the respondents' case that by early September 2023, it was no longer conducive to the effective running of Connells to keep the claimant in role. It was clear that by 13 September 2023, the respondents were set on a path to removing the claimant imminently [7-1166].

67. Ms Whitney was appointed chair of Connells on 5 September 2023. On 6 September 2023, Ms Whitney sent an email to Mr Lund and Mr Haire, which purported to be a draft script for any conversation with Mr Twigg with a view to him becoming interim CEO as replacement for the claimant. Part of the script addresses the situation where Mr Twigg asks why they have reached the point where the claimant is to be removed from post [2-198]. On this issues she states:

> "• *We agree with you that we should be sharing the money that Livesey would like to take out of the business with the next generation of leaders*
> • *The continued bitterness/rancour with Skipton/Stuart is distracting, unprofessional, damaging to the business, and inappropriate*
> • *His current attitude/behaviour doesn't sit comfortably in a member-led organisation*
> • *We need to start to think about the future of the business, particularly in this market.*
> • *Whilst Livesey offered to stay to help choose his successor and embed them into the role, I am not convinced he is bringing anything to the recruitment process - in particular, he is trying to find a DCL Mk2. That person doesn't exist, and even if they did, we probably wouldn't wish to appoint - and frankly, I would rather that the ExCo/Mark/Stuart/me were the people who helped to embed the new CEO. Livesey carries a lot of baggage, and I don't want that to contaminate a new CEO appointment.*
> • *As you rightly pointed out, there comes a time when people leave, where they become a negative, rather than a positive, contributor to an organisation, and*

68. On 20 September 2023, Mr Lund emailed various Skipton directors to explain that: "*I have spoken to David this morning and worthwhile in the sense that I can report where he's at which will inform our plans for conversations with him next week. He wants to agree a package with us that secures his tenure until the end of 2024 on the basis that finding his replacement is going to take considerably longer than expected.*

In terms of package: 1. Condor clean break based on most recent valuation circa £3m 2. Guaranteed maximum bonus for 23 & 24 at 150% base salary ie a total of £1.77m 3. Ex gratia payment for Countrywide acquisition and integration I have told him that SBS Remco will consider 1. And 3. Of these this week. I have also said that I'll be at the Society for two days next week and then we should meet face to face.".

69. On 22 September 2023, the Skipton remuneration committee met [12-3]. It was proposed that pursuant to 'Project Chester', the claimant was not to be offered a 'Condor clean break' but that he was to be offered 'Permitted leaver' status under the scheme, as part of a settlement agreement package. Further, that garden leave and pay in lieu of notice (PILON) was to be offered. He was to be paid a 2023 bonus but not one for 2024. In relation to Mr Plumtree, he was to be offered a retention agreement with the "emphasis not to be on his exit". This was approved by the committee on 26 September 2023 [12-6].

70. On 22 September 2023, the claimant received his answer in relation to the proposed 'clean break'. He is told in terms that "*SBS remco met this morning and considered two of the requests from you regarding your own compensation. Condor clean break - PWC have advised Remco that a clean break payment runs the risk of jeopardising the tax treatment of the Condor scheme and should it become of interest to HMRC could lead to a challenge not just in respect of yourself but the other Condor members also. Consequently Remco did not agree to a clean break exit from Condor. Reward in respect of the Countrywide acquisition and integration - Remco looked back at the payments received by yourself via the Condor scheme both including and excluding the Countrywide business. It concluded that you were fairly rewarded and therefore would not recommend any further payment. I am acutely conscious that this will not the outcome you had been hoping for. I think the next best step is for a face to face meeting with Gwyn and myself. Would you be able to meet with us on Thursday morning next week in London as we are both there for other meetings and can make time.*" [7-44]

71. On the same day, the claimant responds: "*Re Condor "clean break", I take the point that we cannot do anything outwith the scheme rules, but could you please ask PWC to comment on why we can't use the standard "good leaver" provisions, in the same way that we are considering for David Plumtree? This would mean me leaving my employment with Connells before 25 October 2023 , as per David (NB we still need to agree how that should be handled and we are fast running out of time) Re reward for CWD, noted!*" [7-44]. There does not appear to have been a response to this query.

72. On 27 September 2023, there was a telephone call between Mr Plumtree and Ms Whitney, during which she informed Mr Plumtree that the claimant was leaving Connells immediately, and asked him to stay longer. The discussion was followed up by a letter dated 3 October 2023 [7-1121]. In essence, this offers Mr Plumtree a 'retention bonus' which is in effect a 'clean break' from his LTIP's (i.e. Condor 3 and Harrier). In relation to Condor 3 he was to be paid £1.632m in two instalments to be paid in June 2024 and March 2025, on condition that he remained in employment with Connells on those dates, grossed up for income tax liability.

The September Meeting

73. On or around 28 September 2023, a settlement is agreed with Mr Plumtree in the following terms: "*DKP exits Condor and Harrier • Instead, DKP receives two equal cash amounts (via PAYE) which together make good the amount he would be due (after tax) through Condor, had he resigned in June • One payment of £835k (after tax) to be made in June 2024, one payment of £835k (after tax) to be made in March 2025 (assuming he has not resigned) • Additionally, he will (at RT's discretion) receive a retention payment of 100% of salary in March 2025 (in line with agreed retention payment term for other execs)*" [7-73].

74. Mrs Burr and Mr Lund met with the claimant on 28 September 2023 at a hotel in London. The claimant was given no notice that he was to be told not to return to work. Mrs Burr confirmed that this decision had already been made. There are 'handrail' documents at [7-27 to 7-29]. Mrs Burr recalled having the second version of the notes. According to the witness statements, there appeared to be a difference in the recollections of the claimant and Mrs Burr as to whether and to what extent the handrail notes were used during the discussions. Mrs Burr suggested that they had been, whereas the claimant suggested they had not. However, having listened to the claimant's testimony on this point, Mrs Burr volunteered an alteration to her own statement. In effect, she resiled from her original position (paragraph 65 of her witness statement) that the notes accurately reflected what had been said during the meeting, to saying that "the notes accurately reflected our position going into the meeting". We find that this was an important change to her evidence, in respect of a significant episode. It tended to undermine the view we took as to Mrs Burr's reliability as a witness.

75. We are satisfied that it was Mr Haire who made the decision to remove the claimant from the day to day running of the business. He explained this when giving evidence, repeating it on a number of occasions, before then attempting to change his testimony. We are satisfied that it was a decision made in conjunction with Mrs Burr and Mr Lund. We accept that the claimant was told that Connells wanted him to "go now straight away", or words to that effect, and that he was advised not to attend any further meetings (he had been due to attend a Board meeting of one of Connells' subsidiary businesses later that day). He did not attend work at all after the meeting. As stated, it had been the intention to remove the claimant from the business. We find that the phrase 'garden leave' was not used by either Mrs Burr or Mr Lund. There was no mention of clause 3 of the service agreement. Indeed, Mrs Burr accepted that she was not aware of the contractual significance of clause 3, and that he could not be placed on garden leave unless he was serving a notice of termination. We are also satisfied that no explanation was provided for the decision, in a meeting which lasted only about 10 minutes.

76. Shortly after the meeting had concluded, the claimant's email account was closed down. This decision was reversed very shortly afterwards, and on the same day, his emails were reinstated.

77. After the meeting, the claimant's reaction was professional and friendly [7-99]. It was our impression that so long as any financial settlement was generous, the claimant was happy to leave the business at some point.

78. Also on 28 September 2023, there were public announcements via the regulated news service of the Stock Exchange that Richard Twigg had been appointed interim CEO [7/70] and [7-78].

79. Following the meeting and announcement on 28 September 2023, the claimant was removed from the Connells Board. It is common ground that this was done without the claimant's knowledge, and that this was registered with Companies House on 19 October 2023. This measure was approved by the Board in the afternoon of 28 September 2023 [7-106]. At that meeting, the Board agreed that the claimant would step down immediately and be placed on garden leave; that he would leave on 20 June 2024, 12 months after having resigned; that he would get his entitlements under Condor 3; that he would receive an annual bonus for 2023, payable in 2024 in the sum of £478,500; and that he would stand down as a director of Connells with immediate effect.

80. Intriguingly, by 28 November 2023, the claimant was already contemplating litigation. We know this because he made a DSAR on that date, and because he confirmed as much in cross-examination. We were told that this sprang from a failure of without prejudice negotiations, about which we know nothing more.

The November Letter

81. On 30 November 2023, Connells wrote to C setting out that "*Following discussions between you and Connells Limited (the Company) in June 2023, it was agreed that you would retire as Group Chief Executive of the Company. As agreed with you, your retirement was therefore announced in writing on the Company's website on 20 June 2023, and you had an opportunity to provide comments on that announcement (which you took). The release of this announcement on 20 June 2023 triggered the start of your notice period, evidencing the clear intention of the parties that your employment would terminate on 19 June 2024. The Company hereby confirms the service of notice on you in writing of termination of your employment pursuant to clause 3.1 of your service agreement with the Company dated 21 December 2012 (the Service Agreement). You have been on garden leave since 28 September 2023. You will remain on garden leave for the remainder of your notice period, pursuant to clause 3.3 of the Service Agreement….*" ("30 November Letter") [7/128]. The claimant received this letter on 3 December 2023. Despite our best efforts, it is not clear who made the decisions outlined in this letter. When asked Mr Haire said he didn't know. The rationale behind the content of the letter has been equally difficult to identify.

82. On 7 December 2023, the claimant resigned claiming that he had been constructively dismissed by Connells [1/249]. He described the November letter as a "fabrication" and an attempt to re-write history. He alleged that Connells was in fundamental and repudiatory breach of the "implied duty of trust and confidence", which he was accepting by way of his resignation. He denied that any notice of termination had been triggered in June 2023. He stated that it had simply been his intention to retire. He alleged that Connells were in breach of the provisions of his service agreement in relation to notice of termination.

83. The claimant was paid his wages as appropriate for October, November and December 2023.

84. On 21 December 2023, Ms Whitney wrote to the Skipton Board members informing them that the claimant had resigned with immediate effect and that this was a transfer event pursuant to article 14(b) of the Condor 3 Incentive Plan [12-158]. We note that a notification of a transfer event was not issued previously.

85. The claimant presented his first claim on 5 March 2024, claiming constructive and/or ordinary unfair dismissal [1/12].

86. On 28 March 2024, Mr Plumtree resigned from his role with Connells in writing [12-160]. He gave 12 month’s notice pursuant to his service agreement, to expire on 31 March 2024. Connells confirmed this in writing on 30 May 2024 [1-1206]. He was notified that he was to be placed on garden leave from 1 July 2024 for the remainder of his notice period, making specific reference to the obligations under clause 3 of the service agreement re. duration of employment.. He was told that he would be expected to resign his directorships from 1 July 2024.

87. On 2 July 2024, the claimant was told that his 4.636 E Shares in Connells (for which he had paid £420,000) would be transferred to Skipton for no consideration [1/1215] as there had been a “Transfer Event”. On 18 July 2024, the claimant was sent a cheque for 46p and told that his shares had been transferred from him to Skipton [1/1223]. We were told that this too was all part of “Project Chester” [1/1226].

88. By letter dated 11 September 2024, Mr Newton gave 6 months’ notice of termination of his employment with Connells [12-168]. Connells responded in writing by letter dated 27 September 2024, confirmed that his last day of employment would be 31 March 2025, and that he was to be placed in garden leave from 1 October 2024.

89. The claimant therefore brought his second claim (the “Second Claim”) on 10 December 2024 for age discrimination [1/57] (and the two claims have been consolidated).

Legal Framework
<u>Age *Discrimination*</u>

90. The relevant legislation in respect of the allegations of direct discrimination is contained in the Equality Act 2010 (“the Act”). Age is a protected characteristic as defined by section 4 of the Act. Section 5 defines the protected characteristic of age as follows: “(1) In relation to the protected characteristic of age - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group; (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group. (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.”

91. Sections 39 and 40 prohibit unlawful discrimination against employees in the field of work. Section 39(2) provides that:

> “*An employer (A) must not discriminate against an employee of A's (B) -*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B; or*

(d) by subjecting B to any other detriment."

92. Direct discrimination is defined in section 13(1) of the Act as "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*".

93. Section 136 of the Act provides that:

"*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred".*

This provision reverses the burden of proof if there is a prima facie case of direct discrimination. The application of the principles can be distilled from cases decided by the Employment Appeal Tribunal such as *Madarassy v Nomura International plc [2007] ICR 867; Igen v Wong [2005] 3 All ER 812; and* London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08. Those principles are as follows:

(a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test. The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

(d) The explanation for the less favourable treatment does not have to be a reasonable one. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

(e) It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test.

(f) It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he/she was. However, as the EAT noted (in *Ladele*) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

113. In terms of the appropriate comparator to be adopted for the purposes of section 13 of the Act, there must be no material difference between the circumstances of the comparator and the claimant (section 23(1)). "*All the characteristics of the complainant which are relevant to the way his case was dealt with must also be found in the comparator*'; per Lord Hope in *Macdonald v MoD [2003] ICR 937, HL.* It is not an error of law for the Tribunal not to identify a comparator of any kind, so long as it addresses the core question of 'why' the complainant was treated in the manner complained of' (*Igen Ltd v Wong [2005] EWCA Civ 142*, CA, at para 34).

114. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.

115. The crucial question in every case will be the reason why the complainant was treated as he/she was. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that will be sufficient. It need not be the only reason, provided it is significant, in the sense of being more than trivial.

Jurisdiction: Time Limits

116. As the list of issues suggests, the Tribunal has jurisdiction to deal only with claims that are brought within the appropriate time limits. In the case of discrimination claims,

that is period of three months plus the time taken with early conciliation, or such time as the Tribunal thinks is just and equitable (section 123(1) of the Equality Act 2010).

117. If it is said that there was a series of acts, then the claimant must establish that the acts complained of were linked. One relevant but not conclusive factor, is whether the same or different individuals are responsible for the acts in question. For the purposes of determining when time started to run, an act done over a period of time, or a series of linked acts, are treated as having been done at the end of that period.

118. In deciding whether to extend time, the Tribunal should consider such factors as the prejudice that each party would suffer as part of the decision reached and the length of, and the reasons for the delay.

119. Many of the allegations discussed above were prima facie out of time and so if the claimant was to be able to rely upon them he had to show either (1) that there was a continuing course of discriminatory conduct extending over a period which continued into the primary limitation period for the purposes of section 123(3) of the EA 2010, as interpreted in light of the CA ruling in *Hendricks v Commissioner of Police for the Metropolis [2003] ICR 630*, or that it was just and equitable to extend time under section 123(1)(b) of the EA 2010.

Unfair Dismissal

120. The relevant case law in relation to unfair dismissal is to be found in the Employment Rights Act ("ERA") 1998 at section 98:

> *"(1) In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show–*
>
> *(a) the reason (or if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed to do,*
> *(b) relates to the conduct of the employee,*
> *(c) is that the employee was redundant, or*
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."*
>
> *(3) In subsection (2)(a)—*

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] 2 the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

121. Section 98 of the Employment Rights Act 1996 (ERA) indicates how a tribunal should approach the question of whether a dismissal is fair. There are normally two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2). If the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

122. The reason for dismissal is the set of facts known to the employer or beliefs held by it which cause it to dismiss the employee (*Abernethy v Mott, Hay and Anderson [1974] ICR 323*), or, in other words, the factor or factors operating on the mind of the decision-maker which caused them to make the decision to dismiss, or alternatively what motivated them to do so (*Jhuti v Royal Mail Ltd [2018] IRC 982*).

123. In determining the reason for a dismissal, the tribunal may only take account of those facts (or beliefs) that were known to the employer at the time of the dismissal. This means that no account will be taken of matters coming to light or occurring after the dismissal has taken place

124. An 'SOSR' reason for dismissal is one that 'could be a substantial other reason' *Willow Oak Developments Ltd t/a Windsor Recruitment v silver wood and ors [2006] ICR 1552, CA*. As long as it is not a section 94(2) reason, any reason for dismissal, however obscure, can be pleaded on grounds of SOSR — with the proviso that it must be a *substantial* reason and thus not frivolous or trivial; and must not be based on an inadmissible reason such as race or sex. However, while the reason for dismissal needs to be substantial, it need not be sophisticated — merely genuine.

125. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer: *Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT*. Rather, the test to be applied is whether the employer's decision to dismiss fell within the range of reasonable responses available to it.

126. We are also invited to make a finding of contributory fault by the Trust. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: 'Where the tribunal finds that

the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.'. To justify any reduction under this section at all on account of an employee's conduct, the conduct in question must be shown to have caused or contributed to the employee's dismissal.

127. The EAT has cautioned tribunals to mark a clear distinction between considerations relevant to an investigation of fairness of dismissal on the one hand, and those relevant to an investigation of contributory fault on the other. The latter requires clear findings of fact as to what (if any) blameworthy conduct on the employee's part the employer knew about at the time of dismissal. The question of fairness, on the other hand, entails the tribunal considering whether, in all the circumstances, the employer's decision to dismiss fell within the band of reasonable responses.

128. [DISCRIMINATION]

Constructive dismissal

129. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as 'constructive dismissal'.

130. In the leading case in this area, *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: '*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*'

131. In order to claim constructive dismissal, the employee must establish that:

- there was a fundamental breach of contract on the part of the employer
- the employer's breach caused the employee to resign
- the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

132. A constructive dismissal is not necessarily an unfair one (*Savoia v Chiltern Herb Farms Ltd 1982 IRLR 166*, CA). A fundamental breach of contract by the employer may be an actual or an anticipatory breach.

133. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue. This means that if there is an underlying (or ulterior) reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, a

tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the last straw by itself does not amount to a breach of contract — see *Lewis v Motorworld Garages Ltd 1986 ICR 157, CA*.

DECISION AND REASONS

134. In setting out our decision, we have adopted the structure proposed by the list of issues which can be found at [1-177].

Allegations of Breach of Contract

Paragraph 1.1.1 of the list of issues: "*his way or the highway"*

135. It is alleged at paragraph 1.1 that Mr Haire undertook a campaign of bullying behaviour towards the claimant, aimed at undermining and isolating the claimant, eroding his authority and influence as Connells CEO to force him to resign. This allegation is broken down into seven separate allegations. In general terms, it is our view that there was no campaign of bullying. In fact, it was our firm view that one of Mr Haire's objectives as newly appointed CEO of Skiption was to retain the claimant, Indeed, the claimant had given Mr Haire six months to achieve that objective. As matters transpired, Mr Haire was not successful. However, it was plain to us, that when looked at as a whole, the evidence simply did not support the proposition that Mr Haire intended to undermine or isolate the claimant, or force him to retire, prior to June 2023. It was our opinion that in relation to at least some of these allegations, there has been a tendency to exaggerate either what was said, or the impact that it had on the claimant, whether this was subconscious or otherwise.

136. At paragraph 1.1.1. it was alleged that Mr Haire had made it clear to the claimant and others present at an away day in September 2022 that it was "*his way or the highway*". As we have found, there is no suggestion that Mr Haire actually used those words. It appears to be based on Mr Haire's general conduct at the meeting. It is our view that the allegation is too vague and is unsupported by the evidence.

137. We find that many of the those present at the meeting could properly be described as robust and confident. The claimant describes his own modus operandi in business as 'plain talking' and 'hard nosed'. He suggested that his fellow executives were of a similar vein. He explained that it was a high pressure and competitive environment, rooted in sales performance. The claimant went on to confirm that he was used to dealing with a high level of challenge and would welcome it.

138. It was our impression of Mr Haire that he was intelligent and had a strong personality. As one might expect, he had come to Skipton, from HSBC, with ambitious ideas as to how to improve the business, including Connells. It seems to us likely that at times there was a clash of cultures and personalities. It was apparent that Mr Haire, and some of the other newly appointed Skipton Board members, took a different view as to how Skipton should interact with Connells. We have already made findings about the differing views that both sides took as to the appropriate level of autonomy that Connells should exercise. As incoming CEO of Skipton, he was entitled to take this view, and express it in clear terms (whether it was strategically wise is another

matter). This seems to have been resented, not least because Mr Haire did not have a background in estate agency.

139. We find that this is what occurred at the away day, although there has been limited evidence as to what was actually said, or as to what specifically caused offence. We find that there was insufficient evidence that Mr Haire's behaviour at the away day in September 2022 was intended to bully, undermine or isolate the claimant, or to force him to retire, or that the claimant would have viewed it in this way. We note and accept the evidence of Mr Haire, that he thought the meeting had been positive and successful, and that he had not been privy to any negative observations from Connells executives at the time [3-346]. Before us, Mr Haire seemed genuinely bemused by the claimant's case in relation to this meeting.

Paragraph 1.1.2 (Concerns about Mr Twigg)

140. We have already found that in March 2023, there was a conversation between the claimant and Mr Haire during which the latter suggested that there were concerns about Mr Twigg, Connells Chief Financial Officer, which is said in part to have originated from the external auditors 'Ernst and Young'.

141. However, it was our view that this was not intended to bully, undermine or isolate the claimant, or to force him to retire, or that the claimant would have viewed it in this way at the time. Neither do we think it was part of a campaign with that objective. It amounts to a discussion of the competence of Mr Twigg. We accept that to a large extent Mr Haire was passing on views expressed by others, although we find that he would not have passed them on at all if he had not felt there to be some substance to them. However, he was entitled to have the discussion with the claimant. The concerns had come from a credible source. Negative views having been expressed about a senior executive, it might be argued that Mr Haire was under an obligation to have the discussion with the claimant. We accept that ultimately, Mr Haire said in clear terms that it was the claimant's call as to what he did with that information. We do not accept that he instructed the claimant to remove Mr Twigg, or that he put pressure on him to do so.

Paragraph 1.1.3 (Track Record Mortgage)

142. We accept that Skipton had developed what was an innovative mortgage product called the Track Record Mortgage. Further, that Skipton had refused to allow the product to be used by Connells on an exclusive basis for a period of six months. However, we take the view that Connells, as a wholly owned subsidiary of Skipton, was obliged to defer to the views of Skipton on occasions. This included in respect of decisions as to how Skipton's financial products would be marketed. Mr Haire was under a legal obligation to have regard to the interests of the Skipton group when making such decisions, and not just the interest of Connells. We accept the evidence of Mr Haire who told us that he preferred to issue the product to the whole market, rather than the 8% of the market occupied by Connells.

143. This allegation reflects the underlying clash of cultures between Connells and Skipton, with the former believing that it should be left to do its own thing as if it was an independent business and not part of a group of companies. There is simply insufficient evidence that this decision was intended to bully, undermine or isolate the claimant, or to force him to retire, or that the claimant would have viewed it in this

way at the time. It may have been frustrating for the claimant and Connells, but that is a different matter.

Paragraph 1.1.4 (Mr Haire's PR Profile)

144. To the extent that it is suggested that Mr Haire sought to enhance his own personal profile and/or that he did so contrary to the interest of Skipton/Connells, we find that there was simply insufficient evidence. There was no direct evidence of Mr Haire having given instructions to the PR department to this effect. Neither is it supported by any of the contemporaneous documents.

145. Even if we are wrong about this, we struggled to see how any of this could have been done with the intention to bully, undermine or isolate the claimant, or to force him to retire, or that the claimant would have viewed it in this way at the time. This allegation verges on suggesting that everything Mr Haire did was about the claimant, or with the claimant in mind. One suspects that the role of group CEO was multi-faceted, requiring Mr Haire to carry out all sorts of activities which had no connection at all with the claimant, or Connells for that matter. The evidence we heard was that the claimant and Mr Haire rarely met in person, and communicated infrequently.

Paragraph 1.1.5 ("Wind your neck in")

146. We accept that that this comment was made, and that Mr Haire probably raised his voice when doing so. However, when put into its appropriate context, it would be easy to exaggerate the significance of this exchange. Both Mr Haire and the claimant are strong and robust characters in their own way. It struck us that the whole issue as to the order in which press releases were made in relation to Ms Whitney's appointment was a 'storm in a tea cup'. We are reassured in this view by the fact that there was an exchange of messages afterwards in which the claimant makes a jokey comment about the episode [5-393], making light of it. It seems to us to be indicative of the seriousness of the incident overall. We find that the conversation was not likely to have had the impact attributed to it by the claimant.

Paragraph 1.1.6 ("we don't get everything we want")

147. Firstly, we find that this comment was made. However, we are satisfied that at the time at least, this was not viewed as a significant issue. Indeed, the creation of the remuneration committee had been something which the claimant had lobbied Mr Haire to consider. The testimony we heard was that the claimant accepted the decision not to appoint him to the committee. It would have been unusual for the CEO to have been on such a committee. Neither does he appear to have treated the make up of the committee in a broader sense as an ongoing controversy. It appears to have been a relatively inconsequential issue, which has been attributed greater significance after the event.

Paragraph 1.1.7 (Normington succession)

148. We find that Mr Haire and the Skipton board did seek to change the succession plan in respect of Mr Newton, or at least to review it. However, we do not accept that the intention of Haire was to bully, undermine or isolate the claimant, or to force him to retire, or that the claimant would have viewed it in this way at the time. Mr Haire was clearly part of a process which involved several people, although we accept that he

played a significant role in any decision making. But as we have said, it was an issue in respect of which the Skipton Board were entitled to contribute. We understand that after years of written succession planning, and of these plans being approved by the Connells Board, this must have been frustrating for the claimant. Consistent with the underlying dynamic between Connells and Skipton, it was perceived by Connells as meddling and overreach. However, in our judgment it was not inappropriate. It certainly could not be objectively viewed as bullying by Mr Haire.

Paragraph 1.2

149. We then move on to a separate section of the list of issues in which it is alleged that Mr Haire permitted the development of a toxic, humiliating, discriminatory and/or offensive work environment which the claimant found offensive and unacceptable because of the events listed a paragraphs 1.2.1 to 1.2.4.

Paragraph 1.2.1 (Inappropriate comment by Mr Moore)

150. We accept that this comment was made, and that Mr Ndawula was spoken to about the incident. However we find that the incident was not raised with Mr Moore. There was no formal process undertaken by either Connells or Skipton.

151. Ultimately, this was an unfortunate incident, and anachronistic in the modern workplace. One can easily foresee circumstances in which the matter would have been dealt with on a more formal footing, with repercussions for Mr Moore. However, Mr Ndawula decided not to take the matter further, and we accept that this appears to have been the factor which persuaded those concerned not to take other action. Having regard to the circumstances as a whole, this was not obviously an untenable position from Connells or Skipton’s perspective.

152. If, at the time, the limited steps taken had been unacceptable to the claimant, then as CEO, he could have progressed matters. He did not take obvious offence to the incident at the time, and took a significant period of time to discuss the matter with colleagues. We do not accept that what Mr Haire did (or did not do), contributed to the creation of a toxic, humiliating, discriminatory and/or offensive work environment. It was an unpleasant comment, but it was not one made to the claimant, or about him. There is a danger of extrapolating inappropriately from a single incident. There has been no suggestion that this incident was indicative of a broader discriminatory attitude on the part of Connells or Skipton Board members or employees.

Paragraph 1.2.2 (1990’s business model)

153. We find that that this comment was made. As stated, there is some issue as to the precise context in which it was said. Nonetheless, it was an unfortunate comment, likely as it was to cause offence given the tensions that already existed between Connells and Skipton. In our judgment, it was a rather harsh assessment of a business which so far as we could see had been successful and innovative. We are satisfied that even Mr Haire must have been aware that his words had been poorly chosen given that he was later to send a message to the claimant stating “*I hope you boys were ok with my gentle ribbing. It really is an excellent business you boys have*”.

154. But again, this comment has to be viewed in context and in the light of the characters involved. The claimant told us that he welcomed being challenged. One of Mr Haire's roles was to improve the performance of Connells as a business. The crux of what he was saying was that the operation could be modernised in some respects. Having listened carefully to all of the witnesses, Mr Haire could not have been criticised if he had put the message a little more diplomatically.

155. Ultimately, we find that there is insufficient evidence that the claimant viewed the incident as contributing to a toxic, humiliating, discriminatory and/or offensive work environment. Neither do we find that the claimant found the incident offensive or unacceptable at the time. If he did so, he made no complaint about it until he resigned. Indeed, the claimant told us that he had accepted the "half apology" (as he saw it), and moved on.

Paragraph 1.2.3 ("what took you so long")

156. We accept that Mr Moore did express the said views i.e. "what too you so long" to remove underperforming management within Countrywide. It is our view that it is the role of non-executive directors to challenge executives on operational issues. Whilst it might have been a clumsy expression, we are satisfied that it was unlikely to cause offence. Neither do we think it was acceptable, or could reasonably have been perceived as such. It was not a comment made to, or in respect of the claimant. We did not hear from either Mr Fry or Mr Hart as to whether they were offended. We think it unlikely. It is our view that it is an example (not the only one in this case) of apparent over-sensitivity on the part of executives. In any event, we find insufficient evidence that this could possibly be said to have contributed to a toxic, humiliating, discriminatory and/or offensive work environment.

Paragraph 1.2.4.1 (the September Meeting)

157. We are satisfied that the claimant was told that "we'd like you to go straight away"or words to that effect, at the meeting of 28 September 2023 at which there was an attempt to put the claimant on, what was in effect, garden leave. The meeting was attended by the claimant, Mrs Burr, and Mr Lund.

158. Both during and after the very short meeting, the claimant's reaction was professional and friendly [7-99]. It was our impression that so long as the financial settlement was generous, that he was happy to leave the business. Indeed this is what the claimant told us in terms. There is insufficient evidence that the claimant viewed this meeting, or its outcome, as offensive or unacceptable at the time. We are satisfied that whilst the end had been "abrupt", he had known that he would go at some time in the foreseeable future, and that he was likely to be put on garden leave at some point. In his mind, at this stage he was still expecting to be receive all of this contractual entitlements (or the equivalent). The claimant was happy for the press announcements to go out on the same day [7-94].

Paragraph 1.2.4.2 (Mr Twigg appointed to interim CEO)

159. We accept that following the meeting addressed in paragraph 1.2.4.1 on 28 September 2023, Connells made a public announcement via the regulated news service of the Stock Exchange that in the light of the claimant's intention to retire, Mr

Twigg would be appointed as interim chief executive [7-78]. The claimant alleges that this was done without his involvement, causing significant professional and personal repetitional damage because of the adverse inferences drawn within the property industry that the claimant had been dismissed with immediate effect.

160. The appointment of Mr Twigg was pursuant to Connells succession plan which the claimant had, in part, put together. Mr Twigg was an integral part of the claimant’s team. We heard no evidence that the claimant objected to any part of this announcement, albeit we accept that it was a step taken without consultation with him at the time. The fact of the claimant being removed from day to day involvement in the business meant it was necessary and inevitable that at least an interim appointment would be made immediately. We can see nothing unreasonable (or offensive) about this.

161. We have also found insufficient evidence of professional and/or personal reputational damage. It is always difficult to prove this kind of adverse effect. What there was by way of support was rather vague. In paragraph 78 of his witness statement, the claimant set out the details of an encounter with an associate relevant to this point. He explained that on 22 November 2023, he attended a dinner with, amongst others, the Chair of a major house building company. He asked the claimant for his new phone number, and when the claimant looked puzzled, he said "didn't they take your phone off you when they sacked you". The claimant says that he found this extremely humiliating. We find that this example provides minimal evidence of reputational damage at best.

162. As a matter of fact, the claimant was not sacked at any stage. On a view, he indicated an intention to retire, and then later resigned. In the interim, he was put on ‘garden leave’, which we find is not an unusual step in these circumstances. The announcements and press releases made it clear what happened. The announcement at [7-78] makes no criticism of the claimant, especially when read in conjunction with the previous announcement of 20 June. It was our impression of both Connells and Skipton that they went to some effort to put out the correct information into the public domain.

163. There is little if any other evidence of reputational damage. No other examples were provided by the claimant of adverse inferences being drawn from the circumstance of him leaving Connells. We find therefore that there is insufficient evidence of this type of damage to the claimant. His emails having been reinstated, the claimant was at liberty to send messages to his contacts setting out the correct position if, at the time, he felt that there was any unfairness caused. He did not do so. In any event, the claimant was retiring, so it is likely that there could have been only very limited professional implications. In short, we do not accept that Mr Haire had, in this way, contributed to the creation of a toxic, humiliating, discriminatory and/or offensive work environment which the claimant found offensive and unacceptable

Paragraph 1.3 (removed as a director without his knowledge/consent)

164. Paragraph 1.3 is what was previously labelled paragraph 1.2.5.. The parties agreed that the numbering was wrong in that it was not another example of Mr Haire’s conduct described in paragraph 1.2.

165. It is not disputed that following the meeting and announcement on 28 September 2023, the claimant was removed from the Connells' Board. This was done without the claimant's knowledge, and was registered with Companies House on 19 October 2023 without his consent. This measure was approved by the Board in the afternoon of 28 September 2023 [7-106].

166. In relation to his removal from the Board, we find that the minutes are misleading also in that they infer that the claimant was aware and had agreed to stand down as director. The Board would have been aware at the meeting that none of the matters discussed had been canvassed with the claimant, including his removal as director. In our judgment, it was appropriate and reasonable to have sought and obtained the claimant's knowledge and consent before removing him from the Board. There is no reason to think that this would have been difficult or that the claimant would not have cooperated. To have acted in the way that Connells did was, in our view, unacceptable, especially in the case of a long standing CEO, who had been at the head of a successful business for many years. We also have regard to the fact that his removal as director would have been publicly available information after 19 October 2023. However, the claimant remained unaware that he had been removed until much later. We accept that this would have been embarrassing and humiliating for the claimant [7-88], and that it contributed to the creation of a humiliating work environment which the claimant found unacceptable.

167. We also note that the claimant could only be removed from the Board if he was serving a notice of termination pursuant to clause 3.1 of the service agreement (see clause 3.3)[1-233]. We will return to this issue below.

Paragraph 1.4 (the November letter)

168. Paragraph 1.4 was previously labelled paragraph 1.2.6. for the same reason as paragraph 1.3 above.

169. The allegation is that the claimant had been sent the November letter which falsely contended that the claimant had been given notice of termination on 20 June 2023, when the public announcement of that date could not constitute a notice of termination within the meaning of the service agreement. It was therefore also wrong to state that his employment would end on 19 June 2024.

170. It is not contentious that the November letter purported that there had been a notice of termination on 20 June 2023, and that the claimant's employment would end 12 months later. The allegation is that, as a matter of contractual interpretation, the letter was wrong (false) to do so. In other words, this allegation requires us to arrive at what we regard as the proper construction of events in terms of the service agreement and particularly clause 3.

171. The law in this area has been set out in the parties' written submissions for which we are grateful. There appeared to be little dispute about the relevant principles. Where an employee terminates a contract by resigning, it is essential that his resignation is communicated by words or conduct: *Edwards v Surrey Police [1999] IRLR 456*. The words used must be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation, and the relevant perspective is that of the employer who hears the words of resignation: *Omar v Epping Forest District Citizens Advice [2024] IRLR 92*. It is critical that the Tribunal

examines the best evidence available to it of what was said and done at the time, which means carefully scrutinising the contemporaneous documents.

172. In addition, the respondents rely on the law as it relates to waiver. We have applied these general principles. Where one party voluntarily accedes to a request by the other that he should refuse to insist on the mode of performance fixed by the contract, the court may hold that he has *waived* his right to require that the contract be performed in that respect according to its original terms. Waiver may also be held to have occurred if, without any request, one party represents to the other that he will refrain from enforcing or relying on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation. A waiver may be oral or written or inferred from conduct even though the provision waived is found in a contract required to be made in or evidenced by writing (Paragraph 26-043 Chitty on Contracts Vol.I).

173. We have found the respondents' case in this regard to be confusing. Whereas the claimant's case has been consistent throughout. He asserts that he did not resign in June 2023 but simply indicated an intention to retire in the near future. He argues that this was a return to the position as it had been in September 2022, before Mr Haire arrived at Skipton, when both the claimant and Mr Plumtree had spent many months making it clear that they were on a 'glide path' to an exit from Connells. The claimant avers that in June 2023, he intended to leave as soon as he was able to do so without damaging the business, a view shared by Mr Plumtree. There was no set date for his departure, which was to remain flexible, so that he could participate in the process of finding his replacement. There had been no discussions or understanding about a notice of termination or clause 3 of the service agreement, and there was nothing in writing.

174. The respondents do not dispute that the service agreement dated 21 December 2012 provides that either party must provide 12 months' notice in writing, nor that Connells' right to place the claimant on garden leave or to remove him from office as a director should be exercised during the period of a properly served notice of termination [1/229].

175. The respondents argue that the proper contractual analysis of events is that the claimant resigned to Mr Haire in the 2 June call (although we note that the ET3 argued that the resignation was to Mrs Whitney). It is accepted they did not discuss notice periods, but that it was nonetheless clear to Mr Haire that the claimant was resigning on notice because he was not walking out the door immediately. Whilst no precise date of termination was mentioned, the claimant knew he had a 12-month notice period and told Mr Haire his preference was to leave at the end of 2023. In effect, 12 months' notice of termination had been given by the claimant subject to the parties agreeing an earlier date. Whilst it is agreed by the respondents that the claimant never gave notice in writing, it is submitted that the respondents waived that breach by the claimant and accepted his resignation. That acceptance was reflected in the 20 June announcement.

176. After that, the respondent maintains that the claimant participated in the search for his successor, negotiations about his financial terms on departure began, and nothing more was said about a precise termination date. When the claimant was placed on garden leave at the 28 September meeting, still nothing was said about a precise termination date. The draft settlement agreement reviewed by the Skipton Board

noted that the claimant's notice period ran from 20 June 2023, thereby giving the claimant a few more weeks than if his notice had run from the 2 June call. It is further submitted by the respondents that the 30 November letter was sent to formalise the claimant's garden leave arrangements. It also stated that the claimant's notice period ran from 20 June 2023. In effect then, it is the respondents' case that the 7 December letter, resigning with immediate effect, was in repudiatory breach of contract, and – following the letter on 19 December 2023 checking that was really his intention – the respondents accepted that breach.

177. In analysing the proper construction of the events of June 2023, it is necessary to put them into an appropriate context. Firstly, that the parties had been here before. Prior to the arrival of Mr Haire, both the claimant and Mr Plumtree had made clear an intention to retire (in the claimant's case) or resign (Mr Plumtree). This was in part why the parties were so preoccupied with discussions about long term incentive plans. In the claimant's case, he had negotiated the terms of Condor 3 specifically so that he was not adversely affected by his proposed retirement. It was significant in our view that Mrs Burr confirmed that in her mind, the events of 2 June marked a return to "plan A" in relation to the claimant i.e. the scenario which predated Mr Haire's arrival.

178. The second is that there is a written service agreement which squarely addresses these issues. The parties had agreed written terms as to the way in which the claimant's (and other executives') employment could be terminated. In the clearest possible terms, written notice was required in order to bring employment to an end. It is Connells' document. We infer that it was important for Connells to have these matters formalised in written terms. We can readily see why this would be so. Whether an employee had resigned or not; when that resignation was said to have taken place; and when the notice of termination was to expire; were all highly important issues when it came to calculating the contractual entitlement of senior executives. As we have seen, the returns from long term incentive plans were, to a large extent, dictated by the manner in which employees left Connells, and when. Further, the entitlement to contractual bonuses was also dependent on being in the employ of Connells on set dates. Of course, senior executives enjoyed generous remuneration packages. It was therefore important to have the dates of notice periods clearly stated. It was our view that the failure (if it was a failure) to have these matters properly recorded in writing might cost Connells and/or the employee, in excess of £1M. We therefore think it unlikely that Connells would permit a resignation to pass without some form of written confirmation, either from the employee, or by it responding in writing to any oral resignation. That is the contractual context of this case.

179. We note on this point that there are other examples in the papers of senior executives leaving Connells. Both Mr Plumtree and Mr Newton triggered clause 3.1 in writing. Furthermore, Connells confirmed receipt of the resignation in writing. In other words, in these cases, both parties performed their obligation under clause 3 as one would have anticipated.

180. As stated, the respondents' case as to this question has been confusing. In closing submissions, Miss Sen Gupta suggested that there had been an oral resignation on 2 June, and that the 20 June announcement was, in effect, confirmation that Connells had waived the claimant's breach of clause 3.1. i.e. failing to give notice of termination in writing. However, at the outset of the case, when I asked Miss Sen Gupta to explain

this part of her case, it was her understanding that the 20 June announcement constituted performance of clause 3.1 so far as Connells was concerned in that the announcement itself should be treated as a notice of termination. In our view this is a different case.

181. Moreover, if one looks at paragraph 4 of the list of issues, what is asked is "*Had [the claimant] waived any such breach prior to 7 December 2023 (in circumstances such that there was no subsequent "last straw"*". The allegation is that the claimant waived his right under the contract to accept any repudiation. It is not an allegation under the list of issues that Connells waived a breach on the claimant's part. This is consistent with paragraph 58 of the IT3 [1-51]. In other words, the case in relation to waiver has altered considerably, as has the construction applied to the events of June.

182. Mrs Burr's evidence was that the claimant had advised that he intended to retire, and had not resigned on either 2 or 20 June 2023. When asked about the events of 2 June 2023 in cross-examination, she stated that it had been a shock but that it marked a return to the position in September 2022 i.e. before Mr Haire was appointed. As she put it, it was a return to "plan A'. She said it was their preference to keep him in employment for as long as possible. And that "he was going to be around for a bit". She confirmed that there was no agreed time for him to leave and that it was flexible. Of the June announcement, she explained that it was the business talking to the market, aimed at calming the market. It didn't reflect the conversations going on behind the scenes. In fairness, Mrs Burr was later to say that she viewed it as a resignation by the claimant. She had been surprised that he had resigned.

183. In a sense, it is for the Tribunal to come to view as to the correct construction of these matters based on all of the relevant evidence. However, with the respondents placing such a shifting interpretation of events, it becomes difficult to agree with the underlying theme of their case that there was a clear and mutual understanding the claimant's notice of termination had started on some date in June 2023. We remain uncertain whether the respondent's assert the 2 June or 20 June as the trigger date.

184. We have looked carefully at the evidence as to what the claimant said in discussion on or around 2 June 2023. Miss Sen Gupta asserts that Mr Haire's evidence was clear about this i.e. that the claimant resigned in clear terms. That was not our impression of his evidence. He told us that he did not recall the exact words used but that the claimant said something along the lines of "*It's time. I have given it six months , but I've made up my mind that I want to retire.*". It was not suggested that the claimant had used the word resign, or that he had made clear that he was triggering the commencement of his notice of termination under the service agreement. Mrs Burr was very clear that there had been no such discussion so far as she was aware.

185. We note that the IT3 does not plead the conversation with Mr Haire, but instead relies on discussions between Ms Whitney and the claimant (paragraphs 27-30 [1-46]. Of course, we did not have the benefit of hearing from Ms Whitney, so it was very difficult to assess the quality of her evidence on the point. We were limited to some annotated notes which we found of limited probative value in the circumstances.

186. On the question of what was said, and on the proper construction of the events of June 2023, we preferred the testimony of the claimant, supported as it was by Mr Plumtree (who we found to be a very credible witness). It also seemed to be supported by the documents in the case, not least the jointly issued press release of

20 June 2023. It talks about an intention to retire in 2024. We accept the claimant's evidence that the understanding at the time was that matters would remain flexible; that he had not triggered clause 3 of the service agreement, and would presumably do so later if and when he had helped to find a replacement and/or when negotiations as to the financial terms of his departure had been concluded.

187. No date had been agreed by which he would leave Connells. There was no mutually understanding that clause 3.1 had been triggered. This (the triggering) is not supported by a proper reading of the 20 June announcement, or the documentary evidence of what was happening behind the scenes. At best this evidence is nebulous, which we find cannot support any kind of clear agreement as submitted by the respondents. We accept that the claimant also wished to remain with his replacement for a few months so as to ease his/her introduction into the role. He talked about trying to avoid the 'Alison Platt' effect , which we understood to be a reference to a previous problematic recruitment by Countrrywide just prior to its acquisition by Connells. The claimant stated that this was likely to take until some time in 2024, and perhaps the end of 2024. We accepted this evidence. The claimant was, in the weeks that followed named in a team of four that would lead the recruitment exercise.

188. We also note that the respondents seemed unaware of the terms of the service agreement on 2 June. It is apparent that copies of the service agreement of the claimant were not obtained until about a week later. It is therefore unlikely that those concerned i.e Mr Haire and Ms Whitney were familiar with its terms relating to a written notice of termination. In which case, they could not have come to a clear and mutually agreed understanding about the notice of termination.

189. In summary, it is our judgment that the June 2023 events are only properly explained in circumstances where the parties had returned to where they had been in mid-2022, with the claimant (and Mr Plumtree) intending to leave but without having resigned or providing a notice of termination. We are reassured about this decision by the absence in June 2023 of a document like the one which was sent by Ms Whitney to the Skipton Board on 21 December 2023 informing it that the claimant had resigned and that this was a transfer event pursuant to article 14(b) of the Condor 3 Incentive Plan [12-158]. If, as the respondents maintain, the claimant was treated by Connells as having resigned in June 2023, why was this not treated as a 'transfer event'. Indeed, there was a lack of any kind of activity from either Board in June 2023 relating to an alleged resignation of the claimant or Mr Plumtree.

190. In our judgment, the position in June was that the parties were content to seek a negotiated settlement of the claimant's contractual entitlements. It was only when this looked like failing that the respondents sought to rely on clause 3, albeit retrospectively. It was not until many weeks later that there was any clearly stated intention to treat the June announcement as a trigger for clause 3.1 purposes. We agree with the claimant that this was an attempt to re-write history. There was no contemporaneous (i.e. in June 2023) suggestion that any breach by the claimant had been waived, or that clause 3.1 had been triggered on 20 June 2023.

191. We therefore find the allegation at paragraph 1.4 of the list of issues is made out. This was a serious breach of contract.

Paragraph 2.1.1

192. It follows from what we have said above that the sending of the November 2023 letter to the claimant was a breach of clause 3.1 of the service agreement in so far as it purported to give him 12 months notice of termination, but back dating the commencement of that 12 month period to 20 June 2023. This is because he had not, in our judgment, resigned at that stage.

Paragraph 2.1.2

193. It also follows that in circumstances where the claimant had not resigned in June 2023, and consequently, was not serving out a notice of termination on 28 September 2023, Connells was in breach of contract by purporting to place him on garden leave pursuant to clause 3.2 of the service agreement. Albeit that neither Mrs Burr or Mr Lund used the phrase during that meeting, we find that it was in effect what Connells was seeking to achieve.

Paragraph 2.1.3

194. The same applies to the removal of the claimant as Board member. This was a breach of clause 3.3 for similar reasons.

Paragraph 2.2

195. We have dismissed the allegations which are said to have made up the breach of the implied term, save for those under paragraph 1.3 and 1.4. The latter are also a breach of an express written term.

196. From August 2023 onwards, the respondents had begun to take steps without the claimant's knowledge. It was clear that from an early stage, Mr Haire and other senior executives did not anticipate that the claimant would remain with Connells as long as had been anticipated in June. There was a change in attitude towards the claimant. We take the view that this was in part the result of the views that the claimant had expressed to Mr Haire on 2 June i.e. informing him that he was part of the problem.

197. There was no reason why the claimant could not have been told that he was to be placed on 'garden leave' prior to the meeting of 28 September. Instead, he had been called to the discussion under false pretences, when the decision had already been made. He was then removed from his directorship, again without any consultation, and without his consent. As a long standing and successful CEO, it is surprising that the claimant should have been treated in this way at Board level. There would have been no inconvenience caused in taking the conventional route of informing the claimant and seeking his consent to his removal. In our judgment, this was likely to be very disappointing, upsetting and embarrassing for the claimant, who clearly continued to take his responsibilities as CEO very seriously to the end.

198. As stated, we find that the letter of 30 November was an attempt to re-write history. In other words, it was a disingenuous document. Whether by error or design, Connells had decided not to trigger clause 3 of the service agreement in June 2023. For whatever reason, it changed its view about this and sought to do so retrospectively.

199. When taken together, the matters set out in clause 1.3 and 1.4 constitute a breach of the implied term that neither party will engage, without reasonable and lawful excuse,

in behaviour calculated or likely to destroy or seriously damage the relationship of trust and confidence which should exist between employer and employee. It is material in these circumstances that the claimant was a senior member of management, long-standing, and successful. It has been very difficult to identify the justification for Connells' conduct in this regard. It has not provided any satisfactory explanation. Of course this itself is potentially significant in the context of the discrimination.

200. In summary, we find that there has been a breach of the implied term of the service agreement.

Paragraph 3 (Repudiation)

201. We are satisfied that the matters set out above amount to repudiatory breaches of contract. We take this view about the breaches of the express written terms and the implied term.

202. Both go to the heart of the contract. Breaches of clause 3.1 and 3.2 relate to the claimant's entitlement to notice pay. By attempting to truncate his entitlement to notice, Connell's were reducing the claimant's entitlement to several months remuneration. Given the claimant's position, and his considerable basic pay and bonuses, this was likely to amount to a very significant sum of money. As such the breaches of clause 3 are of a fundamental nature. In our judgment, the same applies to the implied term. The authorities suggest that a breach of the implied term will rarely not amount to a repudiation of the contract as a whole.

Paragraph 4 (Waiver)

203. As stated, it has not always been clear to us how the respondents put their case in relation to waiver. As set out in the Miss Sen Gupta's written submissions (paragraph 60) it is submitted that the claimant waived any breach and affirmed the contract by reason of the fact he delayed resigning until 7 December 2023. Further, that the evidence suggests that he was content to be placed on garden leave on 28 September 2023 and it was only when the parties failed to agree terms of a settlement that he decided to resign with immediate effect.

204. Dealing with delay first, he was not notified of the respondents' intentions to treat the notice of termination as having commenced on 20 June 2023 until the letter of 30 November. We accept that the claimant did not receive this correspondence until 3 December. We take the view that it is difficult to characterise the delay between that and him resigning four days later as a waiver and/or an affirmation of the contract. The claimant was, to say the least, entitled to consider the letter and his position, no doubt taking legal advice, before deciding how to react to the 30 November document.

205. The question of being put on garden leave has more merit. Waiver can be written or oral, and can be inferred from conduct. As we have found, the claimant was friendly and professional at the meeting. Neither did he subsequently dispute what had happened at the meeting. However, the claimant was never cross-examined on the basis that his lack of complaint amounted to a waiving of his contractual rights. He accepted that he was no longer to come into work. However, we take the view that a waiver must be clear. We do not think that anything that the claimant said or did in

the relevant period can be construed as waiving his right to 12 months written notice of termination under clause 3. It does not help the respondents' argument that the claimant had no pre-warning of what would happen on 28 September, and did not have the opportunity to take advice about it. Further, the word 'garden leave' was never used. The situation was barely explained or justified to the claimant, the meeting have lasted only about 10 minutes.

206. At the hearing, it was never explored whether the claimant was aware of the contractual implications of being put on garden leave, or of the significance of not having a written notice of termination. In the end, the claimant stated in his witness statement that he went quietly, fully expecting that Connells would "do the right thing" by him. We do not consider that this is sufficient to amount to a waiving of his right to 12 months written notice of termination of contract. It might have been different if he had been given some warning of the meeting; had been invited to take legal advice; had there been discussion at the meeting of the fact that they were putting him on garden leave in the context of clause 3; and had there been a specific discussion of the terms of clause 3 and that they viewed (if it be the case at the time) the notice of termination as having already been triggered. None of this was discussed. Instead the meeting was an "ambush".

Paragraph 5 (Causation)

207. On causation, the respondent's case is that the claimant decided to resign when parties failed to agree terms of settlement. The weakness of this argument is that although we have been made aware of negotiations taking place, these are without prejudice discussions. We are therefore unaware of the detail, or reasons for the failure, of any such negations. Neither do we know when such discussions failed. It is therefore impossible to come to any firm finding as to the causative significance of the discussion upon the claimant's decision to resign on 7 December 2023.

208. We remind ourselves that the breach of contract need not be 'the' effective cause. The crucial question is whether the repudiatory breach played a part in the dismissal i.e. was the repudiatory breach one of the factors relied upon. The time line suggests strongly that the claimant discovering the breach of clause 3 was at least one of the reasons for the resignation, there being 4 days between the events. The breaches are also the stated reason for the resignation within the letter of 7 December. The letter is clear and robust in this regard. Having listened very carefully to the claimant give evidence on this issue, we accept his testimony, namely that the breaches were the main cause of the resignation.

209. In which case, we are satisfied that the claimant was constructively dismissed on 7 December 2023.

Paragraph 7 (Unfair Dismissal)

210. As we have found that there was a dismissal in this case, we must then consider the reason for the dismissal. Connells argue, in the alternative, that the reason for the dismissal was an irretrievable breakdown in trust and confidence between the claimant and Connells caused by the conduct of the former, and that this amounts to some other substantial reason for the purposes of section 98 of the Employment Rights Act 1996.

211. Connells has failed to persuade us that this was the reason for the dismissal, or that there was some other potential fair reason for the dismissal. The first difficulty with Connells' argument is that it was not a reason put forward at the time. It has been challenging to work the motivation for some of the decision making of Connells. This applies to the decision to place him on 'garden leave'; and to attempt to back date the claimant's notice of termination.

212. Connells have suggested that the break down in the relationship was caused by the claimant's prevailing attitude to a number of issues. They were:

    (i) Discussion about one of Connells proposed long term investment schemes (RRAS);

    (ii) Recruiting the claimant's replacement;

    (iii) Promoting his associates; and

    (iv) Badmouthing Skipton executives

213. It has been challenging to identify solid examples of the alleged continued 'bitterness and rancour' alleged, or of unprofessional behaviour on the part of the claimant between June and November 2023. We find the suggestion that the claimant was damaging the business to be vague.

214. In our judgment, the testimony we heard during the hearing, especially from the respondents' witnesses, did not sufficiently support these propositions. It was our impression that these matters had been exaggerated by the respondents. There was insufficient evidence that there had been a significant change in the behaviour of the claimant between 2 June and 30 November 2023. Mr Haire's evidence on this point was equivocal at best. He certainly confirmed that the proposal in relation to RRAS was still to be put to the July meeting of Connells remuneration committee i.e. that it remained in active discussion. He told us that the discussion about RRAS involving the claimant remained "good natured". He was unable to point towards unreasonable conduct in this regard when pushed to do so by Miss Stone.

215. Similarly, Mrs Burr suggested that the claimant had been unreasonable in the recruitment process. She touched upon this issue in her witness statement at paragraph 61 where she suggested that she had been told by Sarah Whitney that the claimant was being "increasingly difficult". She was able to give one example, namely that of the proposal to re-examine the possibility that Mr Notley be the next CEO. This was explored in some detail by Ms Stone in cross examination, at the conclusion of which Mrs Burr accepted that it had been incorrect to characterise his comments on this issue as 'difficult'. She was able to offer no other examples. Her view had been gleaned entirely from others' experiences since she had been out of the country for most of the summer. We arrived at the same conclusion about the suggestion that the claimant was trying to ensure his long-standing associates were placed in important roles or inappropriately interfering with recruitment decisions.

216. The main criticism appeared to be that the claimant was, during the relevant period between June and the end of November, continually 'badmouthing' members of management within the Skipton group. Again, this was the subject of significant questioning by Miss Stone, at the conclusion of which we were quite satisfied that

there was very little substance to the allegation. None of Mrs Burr, Mr Haire or Mr Lund had ever heard the claimant badmouthing anyone. Indeed, their personal experiences were different. We were offered few specifics as to what it was that the claimant was alleged to have said, when and to whom.

217. In particular, it had been Mr Haire's experience of the claimant that he was friendly, constructive and respectful in his dealings with people at work. Most interesting was the suggestion by Mr Haire that he had heard about the badmouthing second hand from Mr Lund. When Mr Lund was asked directly about this, he denied that he had ever said anything of the sort, and explained that he had not heard the claimant bad mouthing anyone (say for negative comments about Alison Platt of Countrywide), suggesting that 'badmouthing' was not a word he would have used anyway.

218. In short, there was insufficient evidence of unreasonable or inappropriate conduct which we thought might come close to constituting a potentially fair reason for dismissal. The degree of breakdown in the relationship would have to be substantial in this context. In which case, the claimant's behaviour would have to be serious. We could find nothing which came within touching distance of being of the necessary gravity to justify dismissal.

219. We also note that these alleged matters were never raised with the claimant at the time. He was never spoken to, either informally or pursuant to any disciplinary procedure. No other member of staff raised a grievance in respect of these matters. Mr Lund explained that had he heard the claimant badmouthing other colleagues, then he would have raised it. In summary, we find there was no potentially fair reason for dismissal here.

220. Although it is not easy to work out what the reasons were for the conduct which constituted constructive dismissal, it is our view that it was likely to have been the result of a number of factors. As we will set out shortly, we take the view that the claimant's age was one of them. Also, we think it was the result of the claimant explaining to Mr Haire that he was part of the problem. Further, it was a consequence of Mrs Burr having been deeply irritated by the claimant's failure to speak to her in the days that followed 2 June. In addition, we find that the respondents desired to reduce the claimant's entitlement to a financial payment upon leaving Connells. When negotiations failed in this regard, it is our judgement that Connell's sought to remove the claimant as quickly and as inexpensively as possible, even if this meant attempting to breach their obligations under contract. Of course, these are not fair reasons.

221. If it had been necessary, we would have also found that this dismissal was unfair having regard to the provision of section 98(4) of the Employment Rights Act 1998. Connells made no attempt to apply proper process to the dismissal. Although we were not shown it, we are satisfied that the dismissal would have been in breach of Connells' own disciplinary procedure. It certainly contravened a number of facets of the ACAS Code for disciplinary and grievance procedures. In particular, the criticism made of the claimant was not put to him. He was given no opportunity to provide an explanation. As we have noted ourselves, the allegations had limited substance. This was not a case where dismissal would have been inevitable, or that any process and procedures would have been futile or worsened relations.

222. We therefore find that there was an unfair dismissal in this case.

DIRECT AGE DISCRIMINATION

Background

223. At the heart of direct discrimination is the concept of comparators. The claimant is asserting that he was less favourably treated than a comparator, and that the ground (or at least one of the grounds) for that less favourable treatment was a protected characteristic. In this case, the alleged protected characteristic is age. However, it beggars the question as to the appropriate comparator. In this regard section 23 of the Equality Act 2010, relevantly, reads: "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.*"

224. The list of issues invites us to adopt a hypothetical comparator. What then are the characteristics of this hypothetical individual. We have adopted the approach recommended in the cases of *Lock v Department of Work and Pensions [2013] IRLR 941*; and *Donkor v RBS UKEAT/0162/15/M*. We have also been invited to consider Mr Plumtree and Mr Newton as evidential comparators who might be instructive as to the appropriate qualities of the hypothetical comparator were are invited to adopt.

225. In our judgment, the comparator should have the following characteristics: He should be in his mid 50's; be a very senior male executive of the company, of equivalent seniority to the chief executive officer; he must have indicated his intention to leave the company for some reason which is not age related i.e. not retirement; He must have had this expressed intention (on and off) for a very long time; he must also have made clear his dissatisfaction with the way the way Connells was being managed by Skipton; he must also have told the CEO of Skipton that he was part of the reason why he was leaving, in a critical sense.

226. We are then required to consider whether the claimant was less favourably treated because of age in the following ways.

Paragraph 11.1 (28 September meeting)

227. It is alleged that it was discrimination on the grounds of age in telling the claimant to leave immediately in the meeting of 28 September and in announcing his interim replacement without consultation.

228. In our judgment, applying the guidance set out in *Igen*, the claimant has not established a prima facie case that there was less favourable treatment based on age. If we are wrong about this, then the respondents have provided an explanation which is non-discriminatory.

229. The claimant points to the following factors which he says should at least require an explanation from the respondents. It is submitted that references to a '1990s business model' was not about a lack of investment by Skipton into Connells. Together with comments like *"flogging an old business model*" [5-205], it is suggested that age was a ground of decision making. However, we do not see the correlation here. References to business models is precisely what it appears to be at face value, a negative (and perhaps overly critical) analysis of the nature of the Connells way of doing business. It might relate to strategy and/or investment. This does not really matter. What is does not relate to in our view is a comment about the claimant's age.

We take the same view about the reference to the “what took you so long” observation by Mr Moore.

230. There is also an allegation that the phrase “pale, male and stale” was used about the Connells Board members. We find that the evidence in relation to this was vague at best. We accept that the reference to “stale” might, in some contexts, constitute an age related comment. In the same way, the reference to pale and male might amount to race or sex related comments. However, no claims have been brought based on those protected characteristics. In any event, we are not satisfied that the comment was made, or that if so, it was made in relation to the claimant. Although the claimant and Mr Plumtree allege that the comment was heard, both found it difficult to be precise as to who had made the comment, about who it was made, and when or where it was said. In our judgment, this evidence is simply too vague.

231. It is also suggested that there have been attempts to portray the claimant as greedy or overly focused on remuneration. We have some sympathy with this view. It is a trend which has become prevalent since the proceedings have commenced, although there is no doubt that there was criticism of the extent of his contractual entitlements from Skipton executives going back to 2022. We accept that the suggestion that the claimant did not like ‘Harrier’ as it did not pay enough was contrary to the evidence, and the claimant’s decision not to join was contrary to his own financial interests. But again, we see insufficient evidence that this was age related, albeit that it might be unfair and perhaps unreasonable in the circumstances. From the beginning of both Mr Haire’s and Mrs Burr’s tenure, there was a strong focus on the claimant’s intended retirement and matters of remuneration. This included Skipton executives.

232. However, we do agree that references by Mr Haire to the claimant being “brittle”, and that it was “too late to teach him new tricks” could be viewed as indirect references to age. It was clear that Mr Haire viewed the claimant as being inflexible and overly sensitive about some issues. Whilst this is not a view which is necessarily synonymous with being older, it is capable to that interpretation.

233. Mr Haire also appeared to accept that a reference to the claimant and Mr Plumtree as the “two amigos” [2/343], was a reference to them being “old friends”. However, we are of the opinion that in some way this comment in itself betrays an ‘ageist’ discriminatory attitude towards the claimant is to take matters too far. One can be ‘old ‘friends’ in the sense of having been friends for along time, without being old. It is important in these types of cases to be careful to put comments into their proper context.

234. It is true to say that Mr Moore did make a worrying comment about Mr Ndawula. The claimant argues that this was a racist comment and that the respondents, in doing nothing about it, demonstrated a tolerance to discriminatory behaviours which perhaps betrays underlying attitudes to such matters. However, we think it important not to extrapolate too much from this isolated incident. As stated, Mr Ndawula did not wish to take matters further. We accept this evidence. There has been no evidence to suggest that there was systemic discriminatory acts taking place within either respondent. As CEO, if it was the case, then the claimant would be in a position to take action on such matters, at least within Connells. Indeed, if he had been inclined, he could have insisted on a formal step in relation to Mr Moore, but did not.

235. The claimant argues that the reactions to the claimant were "consistently and bizarrely disproportionate to the relevant events", with the respondents leaping to unjustified conclusions. He relies upon the incidents relating to Ms Whitney's announcement, the attitudes about recruiting a successor, the treatment of Mr Normington, the Principles of Engagement, RRAS, and Mrs Burr's reaction to the claimant not calling her immediately after 2 June 2023. In this context, the claimant also points to the fact that Mr Haire repeatedly spoke harshly to the claimant, telling him to "wind his neck in" and that "we don't always get what we want".

236. In general terms, we accept that some of the treatment of the claimant was surprising. There were elements of unreasonable behaviour, as we have stated above. However, unreasonableness is not necessarily grounds for a prima facie case of discrimination. With one exception, to which we will return shortly, we find that the claimant has failed to establish the "something more" required other than a correlation between a protected characteristic and unusual behaviour.

237. To be more specific in relation to paragraph 11.1 of the list of issues, we find that there is insufficient evidence that the claimant was treated less favourably than the hypothetical comparator would have been in the same circumstances. This not least because the two evidential comparators were both treated in similar ways in similar circumstances to the claimant in that both were quickly put on garden leave shortly after they had indicated their intention to leave the business. This includes both Mr Plumtree and Mr Newton.

238. It is our view that the decision to put the claimant on what amounts to garden leave was prompted by the difficulties of his ongoing relationship with Skipton executives and in particular, Mr Haire. The claimant made a number of express criticisms of both Skipton generally, and Mr Haire personally. It is not a criticism of either necessarily that this appeared to sour the relationship. It is a wholly human reaction that the ability of the two parties to cooperate with each other moving forward had been reduced. The claimant had made clear that he intended to retire. It is the Tribunal's experience in such situations that a senior manager will often be put on garden leave in order to make way for a permanent (or interim replacement). This is often thought to be best for the organisation moving forward. The respondents appear to have come to the conclusion that they would be better seeking a new CEO without his input. Again, in our view this was a perfectly understandable decision. We see insufficient evidence that this might be tainted by discriminatory motivation.

239. It follows that we take the same view about the decision to announce Mr Twigg as interim CEO. Once the decision was made to place the claimant on garden leave, an appointment was required, at least on an interim basis. Mr Twigg was one of the claimant's close personal team. He appears to have been one of the potential replacements anticipated by the written succession plan. which the claimant had been pivotal in putting together over the previous few years. Once the decision had been made to remove the claimant from the business, and the recruitment process, that is the end of his active involvement. There is no requirement to consult him about his replacement. In the Tribunal's experience of such matters, this is not surprising at all.

240. In short, there is insufficient evidence of a prima facie case that the claimant was treated less favourably than his comparator would have been in the same circumstances.

Paragraph 11.2: November letter

241. The claimant further alleges that writing the letter dated 30 November 2023 (received on 3 December 2023) asserting that a public announcement of 20 June 2023 had triggered the start of his notice period, amounted to less favourable treatment on the grounds of age.

242. We find that there is a prima facie case of discrimination in respect of this allegation. We have found that Connells breached the service agreement by dealing with the notice of termination in the way set out in the November letter. It is a serious and surprising breach of contract. As the claimant puts it, from his perspective, it comes out of nowhere. It is unreasonable conduct in our view. The evidential comparators were not treated in the same way. There was a clear and timely exchange of written correspondence for both Mr Plumtree and Mr Newton which complied with clause 3 of the service agreement. Together with the findings we will make below about Connells' treatment of the claimant in respect of LTIP's, we find that there is sufficient evidence to establish a prima facie case of discrimination which shifts the burden of proof onto Connells to provide a non-discriminatory intention.

243. It is difficult to find an adequate explanation for the breach of contract. Connells have continued to resist the suggestion that it was a breach of the service agreement before us at the final hearing. As we have stated, their case has not been consistent or clear even at this stage. In our judgment, there was no adequate explanation at the time. Therefore, applying the guidance in *Igen*, we find that Connells has discriminated against the claimant on the grounds of age in respect of paragraph 11.2.

Paragraph 11.3 (Constructive Dismissal)

244. For the same reasons we find that the constructive dismissal is also a discriminatory dismissal. We find that there was a fundamental breach of contract of express and implied terms of the service agreement in that Connells:

(i) Purported to place the claimant on garden leave outside of the conditions set out in clause 3.3;

(ii) Sent the November letter i.e. attempting to truncate the notice period; and

(iii) Removed the claimant as director without his knowledge and/or consent.

245. We find that these were all surprising and unreasonable actions, especially having regard to the seniority, longevity and success of the claimant. The evidence suggests that the comparator would not have been treated in the same way. Connells have continued to argue that these steps were not unreasonable, albeit that there has been limited explanation for their actions. Consequently, we find that the burden of proof has shifted to Connells, who have failed to provide an adequate non-discriminatory explanation.

Paragraph 11.4 (contractual bonus)

246. In this regard, we find for the first respondent. The evidence was clear on this point that the claimant's entitlement to the bonus under the service agreement was dependent on him still being an employee of the company when the bonus became payable. In relation to this allegation, the hypothetical comparator must also be someone who had resigned without notice (or at least had appeared to do so and was treated as having resigned). There is insufficient evidence that the comparator would have been treated differently in those circumstances. What we know of the evidential comparators suggests that the requirement of having to be still with Connells to be paid the bonus was applied throughout.

Paragraph 11.5 (Condor)

247. In this regard, it is alleged that Connells discriminated against the claimant on the grounds of age in that it treated him as a "Bad Leaver" and/or transferring his shares for 46p on or about 2 July 2024 and/or otherwise not compensating him for the loss of his share holdings. This is a reference to the 'Condor 3' incentive scheme.

248. We find that there was discrimination here. This is because one of the evidential comparators was treated very differently, and without adequate reason.

249. As stated, On 20 September 2023, Mr Lund emailed various Skipton directors to explain that: "*I have spoken to David this morning and worthwhile in the sense that I can report where he's at which will inform our plans for conversations with him next week. He wants to agree a package with us that secures his tenure until the end of 2024 on the basis that finding his replacement is going to take considerably longer than expected. In terms of package: 1. Condor clean break based on most recent valuation circa £3m 2. Guaranteed maximum bonus for 23 & 24 at 150% base salary ie a total of £1.77m 3. Ex gratia payment for Countrywide acquisition and integration I have told him that SBS Remco will consider 1. And 3. Of these this week. I have also said that I'll be at the Society for two days next week and then we should meet face to face.*".

250. On 22 September 2023, the Skipton remuneration committee met [12-3]. It was proposed that pursuant to 'Project Chester', the claimant was not to be offered a 'Condor clean break' but that he was to be offered 'Permitted leaver' status under the scheme, as part of a settlement agreement package. The claimant was told in relation to his request for a 'clean break' that "….*PWC have advised Remco that a clean break payment runs the risk of jeopardising the tax treatment of the Condor scheme and should it become of interest to HMRC could lead to a challenge not just in respect of yourself but the other Condor members also. Consequently Remco did not agree to a clean break exit from Condor…."* [7-41]

251. On the same day, the claimant responds: "*Re Condor "clean break", I take the point that we cannot do anything outwith the scheme rules, but could you please ask PWC to comment on why we can't use the standard "good leaver" provisions, in the same way that we are considering for David Plumtree?…..*" [7-44].

252. On 27 September 2023, there was a telephone call between Mr Plumtree and Ms Whitney, during which she informed the Mr Plumtree that the claimant was leaving Connells immediately and asked him to stay longer. The discussion was followed up by a letter dated 3 October 2023 [7-1121]. In essence, this offers Mr Plumtree a

'retention bonus' which is in effect a 'clean break' from his LTIP's (i.e. Condor 3 and Harrier). In relation to Condor 3 he was to be paid £1.632m in two instalments to be paid in June 2024 and March 2025, on condition that he remained in employment with Connells on those dates. On or around 28 September 2023, a settlement was agreed [7-73].

253. In the light of the surprising and unreasonable conduct on the part of Connells in respect of the breaches of clause 3, and the obvious disparity of treatment between the claimant and Mr Plumtree, we find that there is sufficient evidence of a prima facie case of discrimination in respect of this allegation. The burden of proof therefore shifts to Connells.

254. It has been difficult to identify an adequate and non-discriminatory explanation. What there is appears to be based on tax liability, as purportedly set out in advice from the respondents' accountants PWC. However, that advice has not been disclosed, but only reported by witnesses. The advice itself appears to have been redacted from documents in the hearing bundle. We could not understand, in the absence of such advice, why the tax liability risk was so much greater in the claimant's case, as opposed to Mr Plumtree. The email at 7-41 from Mr Lund suggested that providing the claimant with a clean break "*could lead to a challenge not just in respect of yourself but the other Condor members".* However, the only other member was Mr Plumtree, and he had been offered a clean break a few days earlier. Mr Lund was not able to provide an adequate explanation for this apparent contradiction.

255. There was a suggestion that Mr Plumtree's share options were about to "fall off a cliff" in terms of value, if he left after 23 October 2023, and that this would impact upon the company's ability to retain him. However, the evidence is clear that the share holdings for both the claimant and Mr Plumtree were subject to the same market forces i.e. the performance of the business. Because of the deteriorating profits, both men faced a significant devaluation of their interests absent of some kind of negotiated settlement.

256. How the two men were to be treated under the LTIP's upon leaving the company was subject to the terms of the scheme. However, the respondents retained a broad discretion as to how the schemes should apply to any particular individual. The decision to refuse clean break to the claimant, but to take the opposite view of Mr Plumtree has not been explained in our view. It was not affected by the claimant's decision to resign without notice because the decision pre-dates that event. We also note that both men had demonstrated a clear intention to leave the company. In a sense, as someone who was retiring, there was an argument for treating the claimant more favourably. Mr Plumtree was proposing to leave to go to another employer, perhaps even a competitor.

257. In our judgment, Connells have failed to discharge the burden on them in this regard. We find that the decision to refuse clean break was discriminatory on the grounds of age, at least in part.

Paragraph 12: Justification

258. Having found less favourable treatment on the grounds of age, we must then consider whether such treatment was a proportionate means of achieving a legitimate aim. Here, Connells argues that the legitimate aim was the efficient planning and

managing of the departure, and recruitment of senior staff. The less favourable treatment is:

(i) the November letter;

(ii) Constructive dismissal; and

(iii) Condor 3 clean break

259. In contrast to all other protected characteristics, employers can seek to justify direct age discrimination. Section 13(2) of the Equality Act 2010 states that: '*If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim*.'.

260. In *Seldon v Clarkson Wright and Jakes (A Partnership) 2012 ICR 716, SC*, the Supreme Court held that direct discrimination can only be justified by reference to legitimate objectives of a public interest nature, rather than purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness. It identified two broad categories of legitimate social policy objective: 'intergenerational fairness' — which could include facilitating access to employment by young people; enabling older people to remain in the workforce; sharing limited opportunities to work in a particular profession fairly between the generations; and promoting diversity and the interchange of ideas between younger and older workers. Second was 'dignity' — which would cover avoiding having to dismiss older workers on the grounds of incapacity or underperformance and avoiding divisive disputes about capacity or underperformance.

261. A legitimate aim need not have been articulated or even realised at the time the measure was first adopted — it could provide rationalisation retrospectively. The supplement to the EHRC Employment Code gives the following examples of legitimate aims that promote intergenerational fairness and 'dignity':

(i) promoting access to employment for younger people;

(ii) the efficient planning of the departure and recruitment of staff;

(iii) sharing out employment opportunities fairly between the generations;

(iv) ensuring the mix of generations of staff so as to promote the exchange of experience and new ideas;

(v) rewarding experience;

(vi) cushioning the blow for long-serving employees who may find it hard to find new employment if dismissed;

(vii) facilitating the participation of older workers in the workforce (para 3.4.2).

262. Simply establishing an aim that falls within one of the above categories will not be sufficient, however. The employer must then go on to show that it is legitimate in the particular circumstances of the employment concerned. In _Seldon_, the Supreme

Court emphasised that cost reduction and improving competitiveness are not social policy objectives capable of amounting to legitimate aims for the purpose of justifying direct age discrimination. We applied the principles in the case of *Air Products plc v Cockram* *2018 IRLR 755, CA*, concerned a long-term incentive plan (LTIP) under which all unvested awards were forfeited on the termination of employment unless the departing employee was leaving employment 'on or after a customary retirement age for the participant's location'.

263. For discriminatory treatment to be justified under section.13(2) of the equality Act 2010, it must not only pursue a legitimate aim but also be a proportionate means of achieving that aim. Essentially, proportionality requires a balancing exercise, with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment. It must be reasonably necessary. In most cases, an employer will be expected to adduce cogent evidence in its attempt to establish that its stated legitimate aim for subjecting the claimant to less favourable treatment on the ground of age was a proportionate means of achieving that aim.

264. We are not satisfied that either the November letter, or the constructive dismissal can be said to have occurred in pursuit of efficient planning and managing of the departure, and/or the recruitment of staff. We do not think that it is argued as such by Connells.

265. We then turn to the decision in respect of the clean break from Condor 3. We are satisfied that the efficient planning and managing of the department, and/or recruitment of senior staff is potentially a legitimate social policy objective. Throughout the hearing, the respondents described the decision to award Mr Plumtree a clean break as a means of ensuring that he was retained within the business for a while longer. The purposes was to avoid losing Mr Plumtree, who was said to be important operationally, at the same time as the claimant. That is the case made by Connells in terms of justification, as we understand it. In other words, it might be regarded as a facet of intergenerational fairness.

266. However, what we are considering here is not the application of a general rule, as in the case of *Air Products*. In our judgment, the decision in relation to clean break was an individual reason particular to the employer's situation. We have seen insufficient evidence that there is any general policy on the part of the respondents about clean break as a way of ensuring that younger employees are retained ahead of older members of staff. Neither has Connells adduced any evidence which bears out that using the clean break in this way might lead to the achievement of the stated legitimate aim. The idea of the LTIP's in the first place is to ensure loyalty and long service. It is counter-intuitive to think that permitting members to prematurely escape the provisions of such a scheme will assist in retaining younger members as opposed to those at retirement age. One would think that it would have the opposite effect. In our judgment, the exercise of the discretion seems to have been for other reasons. We therefore do not think that the less favourable treatment was a means of achieving a legitimate aim in the circumstances of this case.

267. Furthermore, and if we are wrong about this, then we take the view that the treatment was not proportionate in this case. We note that Mr Plumtree was awarded in the region of £1.6M as a result of the clean break. Denying the claimant the same outcome, costs the claimant a similar, if not a larger amount. The extent of the effect of the discrimination is therefore very considerable indeed. We heard no evidence

that the respondents had considered other ways of achieving the purported legitimate aim, which might have been more proportionate. It is not difficult to imagine ways which might have resulted in a less severe disparity of treatment between the claimant and Mr Plumtree. In short, we find that the less favourable treatment relating to clean break from Condor 3 was not justified.

Time Limits

268. There was an outstanding issue relating to the whether the claim of age discrimination was brought in time, the second claim having been lodged in December 2024. It is accepted that if one of the instances of less favourable treatment fell within July 2024, then it would be in time. The decisions to refuse the claimant a clean break from Condor 3 was not confirmed until July 2024. It is therefore in time.

269. The other acts of less favourable treatment, namely the dismissal and the November letter, are, in our judgment, part of a series of acts for the purposes of section 123 of the Equality Act 2010. The acts of less favourable treatment are all connected to the proposed retirement and then the dismissal of the claimant. The decision making involved the same group of people/organisations, as set above. In which case, we are satisfied that the claim of age discrimination as found above is all in time.

Liability of the Second Respondent for discrimination

270. This part of the claim is put on the basis that the second respondent was a secondary party to the discrimination we found on the basis either of section 111 or 112 of the Equality Act 2010.

271. Section 111 makes it unlawful for a person to instruct, cause or induce someone to discriminate, harass or victimise another person on any of the grounds covered by the Act, regardless of whether the person so instructed, etc, actually does so.

272. Section 111(1)–(3) states that a person (A) must not instruct, cause or induce another person (B) to do in relation to a third person (C) anything which contravenes Parts 3–7, S.108(1) or (2), or S.112(1) of the EqA. This is referred to in section 111(1) as ‘a basic contravention’ which is defined as anything which contravenes Part 3 (discrimination in services and public functions), Part 4(discrimination in relation to premises), Part 5 (discrimination in relation to work), Part 6 (discrimination in education), Part 7 (discrimination in associations), S.108(1) or (2) (discrimination in a relationship that has ended) or S.112(1) (knowingly helping an act of discrimination).

273. In *Sami v Avellan and another case* *2022 IRLR 656, EAT*, it was stated that the purpose of this restriction is to impose liability on A only where A has some sort of authority, influence or power over B. An issue arises in this case as to whether two corporations can be in a relationship within which one can contravene the Equality Act in relation to the other. In *NHS Trust Development Authority v Saiger and ors* *2018 ICR 297, EAT*, His Honour Judge Hand QC stated that he could see no reason why one company cannot commit a ‘basic contravention’ against another, so as to satisfy S.111(7). He noted, in particular, that one corporation can ‘knowingly help’ another to commit a basic contravention, which is unlawful under section.112, and considered it significant in this regard that section.112 falls within the definition of ‘basic contravention’ in S.111(1).

274. We are satisfied that the relationship between Connells and the second respondent, with the former being the solely owned subsidiary of the latter, and with the two having in legal and practical terms a close relationship, that the second respondent has a sufficient position of authority, influence or power over Connells to trigger the application of section 111.

275. We are satisfied that as a matter of fact, the second respondent, Skipton, and its executives played an integral role in the conduct which is said to have amounted to less favourable treatment on the grounds of age. In relation to the November letter, the decision to remove the claimant as a director without his knowledge or consent, the constructive dismissal, and the option to refuse the claimant a clean break from Condor 3, were all fully participated in by the second respondent in the form of Skipton, its executives, Board, and its remuneration committee. In particular, this includes Mr Haire, Miss Whitney and/or Mrs Burr. Mr Haire specifically agreed that he had taken the decision to place the claimant on what amounted to garden leave. We are satisfied that he was pivotal in terms of the other decisions. It is also clear that many of these decisions were being made at Board level, not only the Connells Board, but also the Skipton Board. Condor 3 was a Skipton scheme, and therefore any decision in relation to that LTIP required Skipton Board approval. Of course, the second respondent is an important part of the Skipton group.

276. We are also satisfied that those we have named above were aware of the discriminatory motivation of Connells. They were so inextricably linked to the decision making processes that we find they were aware of, and shared, those motivations. We therefore find that the second respondent either instructed caused or induced Connells to discriminate against the claimant.

277. In the alternative, we are satisfied that s.112 is satisfied. Section 112(2) provides that A must not knowingly ‘help’ B to discriminate. In *Anyanwu and anor v South Bank Student Union and anor (Commission for Racial Equality intervening) 2001 ICR 391, HL*, the House of Lords held that ‘aid’ should be given its ordinary meaning. It meant ‘help, assist, co-operate or collaborate’. Helping someone to do an unlawful act was different from causing someone to do so, and it was not enough to merely instigate a chain of events that leads to discrimination. The Court further observed that aiding requires a much closer involvement than merely encouraging, inducing or procuring discrimination. However, it added that it does not matter if the aid is substantive or productive, provided it is not ‘so insignificant as to be negligible’. It is our view that on the facts set out above, this section is also made out.

Contributory Fault

278. We find that there is no blameworthy conduct on the part of the claimant in this case such as to justify a reduction in any award section 122(2) and 123(6) of the Employment Rights Act 1996. We have rejected the proposition made by the respondents that the claimant acted to breach the implied term of the service agreement that he did not act in such a way as to damage or destroy trust between the parties. Blameworthy conduct need not amount to acts which could amount to a repudiatory breach of contract. However, for the reasons set out, we do not think that any of the claimant’s behaviour amounts even to contributory fault in this context. No doubt the relationship had soured between the parties, and that this was in part because the claimant had explained to Mr Haire why he had decided to leave Connells, and that he was part of the problem. No doubt this was a plain expression

of views. However, all of the individuals in this case appeared to pride themselves on being robust and straight talking. It perhaps comes with the territory. However, we find that there is this insufficient evidence that this can properly be characterised as ‘blameworthy’ or that it caused or contributed to the dismissal in any way.

Summary

279. In conclusion we find in the claimant’s favour in respect of his unfair dismissal and age discrimination claim.

Approved by:

Employment Judge R Wood

Date: 29 June 2026

Sent to the parties on: 21 July 2026

For the Tribunal Office

Notes

All judgments (apart from judgments under Rule 51) and any written full reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here: www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/