EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr Cowie	(1) Vesuvius Plc (2) Agnieszka Tomczak (3) Patrick Andre (4) Vesuvius Holdings Limited	

Heard at: London Central Employment Tribunal

On: 11, 12, 13, 14, 15, 18, 19, 20, 21, 22 October 2021
(8 November, 9, 10, 16 December 2021, in chambers)

Before: Employment Judge Adkin
Dr V Weerasinghe
Ms Zofia Darmas

Representations

For the Claimant: Mr J Susskin, Counsel
For the Respondent: Ms S Belgrove, Counsel

JUDGMENT

(1) The following claims are dismissed on withdrawal:

a. All claims of direct race discrimination;

b. All claims of harassment related to race;

c. allegations 1 and 2 with regard to each previously pleaded cause of action (section 111 Equality Act 2010).

(2) The Tribunal has no jurisdiction in respect of the following claims which were brought out of time, did not form part of a continuing act and in respect of which the Tribunal has not exercised its discretion to extend time under section 123 of the Equality Act 2010 ("EqA"):

a. Direct age discrimination (allegations 4, 8, 9, 12, 14, 15);

b. Harassment relating to age (allegations 8, 9, 12);

c. Instructing, causing, inducing contravention of the EqA pursuant to section 111 (allegations 5, 6, 7, 12).

(3) The following claims succeed against the employer Fourth Respondent:

a. The claim of unfair dismissal brought pursuant to section 98 of the Employment Rights Act 1996;

b. The claim of direct age discrimination pursuant to section 39 of the Equality Act 2010 succeeds in respect of allegation 18 (decision to dismiss);

c. Claims of protected disclosure detriment pursuant to section 47B of the Employment Rights Act 1996 (allegations 19, 20, 21, 23, 27);

d. Claims of victimisation pursuant to section 27 of the Equality Act 2010 (allegations 19, 20, 21, 23, 27).

(4) The following claims succeed against the Second Respondent Agnieszka Tomczak:

a. Claims of protected disclosure detriment (allegations 19, 20, 21, 23) pursuant to section 47B of the Employment Rights Act 1996;

b. Claims of victimisation pursuant to section 27 of the Equality Act 2010 (allegations 19, 20, 21, 23).

(5) The following claims succeed against the Third Respondent Patrick Andre:

a. The claim of direct age discrimination pursuant to section 39 of the Equality Act 2010 succeeds in respect of allegation 18 (decision to dismiss);

b. Claims of protected disclosure detriment pursuant to section 47B of the Employment Rights Act 1996 (allegation 27);

c. Claims of victimisation pursuant to section 27 of the Equality Act 2010 (allegation 27).

(6) The following claims succeed against the First Respondent as agent for the Fourth Respondent:

a. Claims of protected disclosure detriment (allegations 19, 20, 21, 23, 27) pursuant to section 47B of the Employment Rights Act 1996;

b. Claims of victimisation pursuant to section 27 of the Equality Act 2010 (allegations 19, 20, 21, 23, 27).

(7) All remaining claims fail and are dismissed, in particular:

a. All remaining claims of age related harassment pursuant to section 26 of the Equality Act 2010;

b. The claim of indirect age discrimination pursuant to section 19 of the Equality Act 2010;

c. Remaining claims of victimisation pursuant to section 27 of the Equality Act 2010;

d. Remaining claims of protected disclosure detriment to section 47B of the Employment Rights Act 1996.

REASONS

Procedural matters

1. This hearing was fully remote in the sense that all parties, witnesses and the members of the Tribunal joined by CVP from separate locations.

2. For reasons that were given orally, the Tribunal made the following decisions:

2.1. that a bundle labelled "supplementary bundle" relied upon by the Claimant, containing 780 pages of documents that were largely slightly less redacted than versions already in the bundle should be admitted into evidence;

2.2. a refusal of the Respondents' application for a "confidential bundle" to be subject of an order under rule 50 such that it could be referred to "in camera" during the course of the hearing to exclude public scrutiny;

2.3. in relation to documents identified as C93, C103 – that name of a client should be part redacted, that the names of colleagues should not be redacted but amounts in potential settlement negotiations should be redacted;

3. The hearing was listed for 14 days. Unfortunately due to constraints on judicial resources, only 10 days were available for a live hearing. We are grateful to both Counsel for working pragmatically with this reduced timetable in the arrangement of witnesses and for substituting two sets of written submissions for an oral submission stage. It is partly because of this contracted timetable and constraints on the diaries of the members of the Tribunal panel that it has taken longer than might be ideal to promulgate this decision. The panel required four deliberation days during the course of November and December 2021, which unfortunately could not run on consecutive days.

4. By an email dated 25 October 2021, in order to assist the Tribunal by narrowing the issues, the Claimant discontinued each and every claim of direct race discrimination, each and every claim of harassment related to race, and detriments 1 and 2 with regard to each previously pleaded cause of action. The Tribunal is grateful to the Claimant and his advisers for taking a realistic view of these parts of the claim and focusing on stronger parts of the claim.

The Claim

5. The Claimant presented his claim on 12 May 2020 against the First, Second, Third Respondents.

6. By consent, at a case management hearing on 17 February 2021 before Employment Judge Goodman, the Fourth Respondent, the Claimant's employer at the date of his dismissal, was added as a party. The Fourth Respondent is a wholly-owned subsidiary of the First Respondent.

7. According to the case management order made following that hearing, the First Respondent was retained on the basis that he might have been jointly employed by the First and Fourth Respondents, and there was thought to be a potential complication of the fact that the two individual named respondents were employed by those different entities. Mr Andre is employed by the First Respondent. Ms Tomczak is Also at that hearing the Claimant applied to introduce a claim under section 112 of the Equality Act 2010 (aiding contraventions). That application was refused.

8. The basis for the claims against the First and Fourth Respondents are addressed in a letter from the Claimant's solicitor dated 8 January 2021 [HB/373].

9. Claims against the Fourth Respondent Vesuvius Holdings Ltd were pursued on the basis that it was the Claimant's employer, and also vicariously liable for its employees or agents.

10. Claims against the First Respondent Vesuvius plc were pursued on the basis that this entity had sufficient control to amount to a joint employer, for reasons that are set out below.

11. The amended claim was put on the basis that the Claimant was either jointly employed by the First and Fourth Respondent, or that he was employed by one and the other acted as an agent.

12. An amended Response was put in on 26 July 2021 [HB/103]. In this document it was averred that the Fourth Respondent was the Claimant's employer and that he was not employed by the First Respondent.

13. There was an agreed list of issues, which is contained in a separate annex.

Evidence

14. The Tribunal heard evidence from the Claimant Mr Cowie and from Mr William Kelly, a colleague who was Global VP Finance of the Foundry Division.

15. From the Respondents the Tribunal heard evidence from the Third Respondent Patrick Andre, CEO; the Second Respondent Agnieszka Tomczak, Chief HR Officer and John McDonough, Chairman of the Board.

16. As to documentary evidence we received a 8,315 page "document" bundle, a 725 "main" bundle which contains pleadings and correspondence, a 780 page "supplementary" bundle from the Claimant and 36 pages which were agreed extracts from a confidential bundle which was not supplied to the Tribunal. The Tribunal has not attempted to read every document, but have focussed on the documents each side referred us to.

17. References thus [D/123] are to pages in the document bundle; [HB/725] are to pages in the "main" bundle which contains pleadings correspondence and the like; [S/234] to the supplementary bundle and [SB/12] to the special bundle.

18. References to the "Corporate Respondents" denotes the First and Fourth Respondents. References to the "Individual Respondents" denotes the Second and Third Respondents.

Findings of fact

History

19. In 1981 the Claimant commenced employment in South Africa with the Foseco business as a laboratory assistant. There is a gap in his service but that is not relevant for present purposes. He had a long career working for the Corporate Respondent businesses. His background was as a metallurgical engineer. His career progressed successfully over the years through various levels of management.

20. At the times material to this claim the Claimant was Business Unit President Foseco, which is one of four divisions within the First Respondent Vesuvius PLC which is listed on the London Stock Exchange. He reported directly to the CEO Mr Andre.

21. Vesuvius PLC is a listed company on the London Stock exchange with four divisions; Flow Control, Digital Services, Advanced Refractories and Foundry Technologies, trading as Foseco, which mainly serves the steel and foundry Industries. It is a global leader in molten metal flow engineering and technology. It has clients in the automotive industry. It is this division in which the Claimant has had his career.

22. The Foseco brand is the division of Vesuvius which serves the foundry industry. Foseco is described by the Claimant as the world leader in the supply of foundry consumables and solutions. Within the Foseco business which is referred to externally as Foundry Technologies is a significantly smaller division known as Fused Silica, making up no more than approximately one tenth of the division by revenue which had historically suffered shrinking sales.

23. The Claimant transferred from South Africa to the UK in 2000.

24. In 2006 the Claimant left Foseco, but returned in 2008 and moved to the USA as a regional Vice President. The Tribunal has seen his contract of employment dated February 25, 2008 (D/1) in the US countersigned on behalf of Foseco Metallurgical Inc.

25. In November 2014 the Claimant was appointed Global Business Unit President Foseco International.

26. A remuneration committee report dated 5 December 2017 recorded

> "Glenn is an experienced leader, has shown capacity to deliver positive results and is showing a strong dynamism in leading Foundry. He is a key asset for the Group. It is planned to award him a significant increase of 15%"

The effect of this increase was to take the Claimant's salary to US $410,000. His overall remuneration package was significantly more valuable.

27. In 2018, at the insistence of Mr Andre, the Claimant moved to the UK. The circumstances of the Claimant's transfer to a contract of employment in the UK are dealt with in more detail below.

28. The Fourth Respondent Vesuvius Holding Limited is a subsidiary of the First Respondent and is the Claimant's employer, by virtue of a contract of employment made on 14 August 2018 which commenced on 1 September 2018.

Mr Andre's promotion to CEO

29. On 1 September 2017 the Third Respondent Mr Patrick Andre was appointed Group CEO of the First Respondent having previously been President of the Flow Control business and a immediate peer of the Claimant. From this point onward the Claimant reported to Mr Andre.

Mr Chris Young

30. In late 2017 Mr Andre gave Mr Cowie the personal objective (in his personal objective setting for 2018) of dismissing Chris Young Global HR VP Foundry, who was 58 years old at that time. The Tribunal has not heard evidence from Mr Young himself. We are not in a position to make any assessment of his performance in his employment by the First Respondent.

31. Mr Young is a dual British and American citizen. He had been covering a global role as well as VP HR for NAFTA (i.e. North America) for the Foundry Business. The Claimant first met him when he was appointed President of the Advanced Refractory Business where Mr Young was Vice President (HR). The Claimant plainly valued his level of experience and expertise and moved him when he was appointed President of Foundry. Mr Young relocated from Pittsburgh to Cleveland early in 2015. The Claimant says that the company paid for all his relocation costs including house sale costs.

32. Mr Andre does not dispute requesting Mr Young's dismissal. He says that Mr Young rarely travelled out of the US and did not have the right level of knowledge and involvement in the oversight of the non US part of the Foundry division, despite the US being only a small minority of the global Foundry business. Mr Andre says that he believed that Mr Young should be replaced by

a higher calibre employee with a more international outlook. In his evidence Mr Andre says he felt that Chris Young "didn't have the bandwidth and experience".

33. This instruction caused Mr Cowie disquiet and ultimately he did not carry it out. We note that Mr Young was described in contemporaneous documents as an "effective performer" (June 2016) and "very successful" (August 2017).

34. Ultimately Mr Ryan Van der Aa carried out the instruction to dismiss sometime in the third quarter of 2018. Mr Van der Aa then took over Mr Young's role having been demoted from a Global HR for the First Respondent in London. It does not seem to be in dispute between the parties that Mr Van Der Aa is almost precisely the same age as Mr Young; their birthdays being within a week of one another.

35. Mr Van der Aa told the Claimant at the time that he was glad to be out of a toxic environment in the London office.

36. The Second Respondent Ms Tomczak took over Mr Van Der Aa's role as Chief HR Officer for the First Respondent's group in October 2018. Ms Tomczak was several years younger than Mr Van Der Aa.

Mr Umesh Bhat

37. The Claimant says he was instructed in 2018 by Guy Young under the direction of Mr Andre to dismiss Umesh R Bhat in India and Eric Pohlman in the US because there were personal objectives to find new "younger talent". Again, we have not heard evidence from Mr Bhat nor Mr Pohlman nor are we in a position to make any assessment of their performance.

38. Board minutes from the Board Nomination Committee (D/1153-1168) dated 9 May 2018, referred to replacing the India Group Finance Director Mr Umesh Bhat. In 2016 he had been rated as a highly valued performer.

39. The Tribunal has received minutes from the First Respondent's nomination committee, from which it can be seen that there are 7 internal "talents" who are individuals with potential to rise to regional VP. The ages of these individuals are 36, 41, 39, 44, 45, 45, 34. The Claimant makes the point that they are all 45 years or below.

40. The same minute records a decision to change 9 of the 12 Regional VP positions [1154]. The First Respondent's Chairman accepted in his oral evidence that the majority of these changes were not going to be as a result of natural retirement or resignations. It follows that the majority of changes would represent a deliberate management decision. While it is fully understood that the performance of senior managers in any organisation is liable to be scrutinised and it is a fact of life that poor performing senior managers are likely to be "managed out", it is striking amounted to something close to a cull of managers at the Regional VP level was being planned.

41. Mr Andre's evidence is that he had "no opinion" on Mr Bhat having met him in India and "no specific input" into the choice of Mr Bhat's successor. We have not received evidence to the contrary.

Eric Pohlman

42. The Claimant was instructed to dismiss Eric Pohlman by Mr Young at a meeting in November 2017, without any reason being given. Mr Pohlman had been rated as "very successful". The Claimant says that he did not agree and explained this to both Mr Young and Mr Andre, whom he says continued to pressurise him to dismiss Mr Pohlman. Ultimately Mr Pohlman was not dismissed.

43. The Claimant estimated that Mr Pohlman was 55. It seems however that at the material time Mr Pohlman was in his mid-40s, which the Claimant acknowledged in cross examination and withdrew this part of his claim.

Mr SunYong Chung

44. The Tribunal has not heard any evidence from Mr Chung, and we are not in a position to make any objective findings about his performance.

45. The Claimant contends that in or around Q2 2018 - 2019, he was instructed to dismiss Mr Chung (60 years) in Korea with no reason given. In fact he may have been approximately 62 years old at that time and had approximately 35 years' service in by 2016.

46. Mr Chung had been described in a review June 2016 as a Highly Valued Performer (355). In January 2019 however it seems from a contemporaneous email that Mr Chung did not increase a pay increase on the basis that the Claimant felt that his performance was less satisfactory

47. There was a iMessage exchange [D/8121] between the Claimant and Ryan Van Der Aa about Mr Chung, in which the former wrote

> "PA wants me to fire SY in Korea. Could you find out the cost please."

48. The exchange goes on:

> "C: it's getting a bit much
>
> VDA: yes more to come
>
> C: Yes me
>
> VDA: Last man standing!"

49. Mr Andre says at paragraph 47 of his witness statement:

> "I am also not sure who CY Chung is. It could be Sun Young Chung, Business Unit manager Foundry in Korea. If that is the right person, I had some doubts back in 2018 about his

performance but he improved significantly since then and he is still in his position today"

50. While Mr Andre describes his position as "some doubts", it is clear that the team working immediately underneath him believed that Mr Andre was seeking a dismissal. Mr Andre's evidence is that Mr Van Der Aa misinterpreted the instruction.

51. The iMessage exchange is a contemporaneous exchange which evidences what the Claimant understood at the time. We do not detect that this was contrived or produced for the purposes of this litigation. We find that on the balance of probabilities there was an instruction from Mr Andre to dismiss Mr Chung.

Brazilian GEC meeting – February 2018 – comments about "millennials"

52. In 5-9 February 2018 there was a meeting of the Group Executive Committee GEC in Brazil. The GEC generally comprised Chief Executive (i.e. Mr Andre, the Chief Financial Officer, Business Unit Presidents (one of which was the Claimant), the Chief HR Officer, the President of Operations and Technology and the General Counsel/Company Secretary).

53. In the Claimant's claim form he alleged that on a meeting on 5 February 2018, Mr Andre said to the senior managers present "these new millennials will never stop pushing until they have my job and you older guys have to get used to it".

54. The Claimant's witness statement did not fully substantiate the content of the claim form. At paragraph 104 the Claimant states that Mr Andre said: "These millennials will never stop until they have my job and you guys had better get used to it" i.e. omitting the word 'older'. This is significant since it removes an overt and explicit reference to age. Even without the word 'older' however there is still an implicit reference to different age groups.

55. Mr Andre does not remember saying the sentence attributed to him, but does not dispute in general terms that he made comments about new generations pushing to get the jobs of older ones. He says that this was as much directed at himself as the other managers, which is supported by the comment attributed to him. The Tribunal accepts that the words set out at paragraph 104 in the Claimant's witness statement were used by Mr Andre.

Old fogey/old fossil

56. Also at the GEC meeting there was a discussion about HR matters, when the topic of Mr Philippe Bertreau came up, following his resignation the previous day. Mr Bertreau was a manager in his 30's whom the Claimant had hired to perform Fused Silica Director and Head of Strategy for Foundry at Mr Andre's recommendation or at least following Mr Andre's introduction. Mr Bertreau had decided to leave this role after a couple of months, despite Mr Andre's efforts to persuade him to stay. Mr Andre was plainly upset about this.

57. The Claimant's pleaded claim is that at a GEC meeting Mr Andre in front of Mr Young the CFO, told him that he was "an old fogey who doesn't know how to manage millennials".

58. Mr Cowie says that remembers this comment very well as it was so out of the blue and inappropriate. He says that he recalls it as he believed that Mr Andre had got the 'wrong end of the stick' about why Mr Bertreau had decided to leave.

59. At page D/6915 of the document bundle in a kind of diary entry for 12 February 2018 Mr Cowie recorded as follows:

> "I received a 45 minute lecture that I was an "old fossil" and did not know how to deal with millennials. PA realized what he had said and then said "old fossil" me as well."

60. Skipping forward in the chronology, at page D/7291, part of the grievance submitted on 1 October 2019, i.e. over 1 ½ years after the event the Claimant made the allegation "at the Brazilian GEC meeting he also called me "an old fogie who did not know how to manage millennials". The "old fogey" allegation was reiterated in the grievance appeal submitted by the Claimant's solicitor on 9 March 2020 (2 years after the event) [D/7697], where it was said to have been made in front of Mr Guy Young the Chief Financial Officer. The point made was that Mr Young had not been interviewed as part of the grievance process.

61. Mr Andre is a native French speaker whose spoken and written English are excellent. He says that as a non-native speaker he is not familiar with the word "fogey", but he does know the word "fossil", since this word has the same meaning in French. We accept Mr Andre's evidence on this point.

62. Given Mr Andre's evidence on the word "fogey" and also the content of the diary entry, we find that this word was not used and the Claimant must have misremembered it when he put in his grievance.

63. On the balance of probabilities, supported by the diary entry we find that Mr Andre did say that the Claimant was an old fossil and did not know how to deal with millennials, and then went on to say old fossil me as well. We have considered whether the inconsistency between fogey and fossil fundamentally undermines this allegation. In our assessment it does not. Had the Claimant been contriving or fabricating the diary to support his claim he would, in our view most likely have ensured that the wording was exactly the same. The fact that the Claimant has substituted one word beginning with F for another but which has a similar meaning in the context of a message which is otherwise the same in our assessment is no more than a genuine failure of recollection on that single point. It does not in our mind undermine the essential essence that the Claimant was called old and his management of "millennials" was queried.

45 year old recruitment threshold

64. By way of historic background the Claimant himself had, through Project Excalibur, from 2015 onward promoted a programme to employ engineers at trainee level (usually straight from college and typically in their 20s) in every plant around the world. This was to ensure that younger staff were coming through and to offer the business potential long term continuity.

65. The Respondents' case is that succession to senior management positions was something that had been preoccupying the Board since at least June 2016, which pre-dated Mr Andre's promotion to Chief Executive. On the Respondents' case there was an identified concern about a cadre of managers retiring at the same time without suitable successors for GEC (Group Executive Committee) positions.

66. Mr Andre explains the policy in his witness statement in this way:

> 38. Whilst internal development was important, it is inevitable that sometimes external recruitment was also necessary. Given the risks and costs of external recruitment noted above, my preference was that any external candidate had the potential for a long and successful career at Vesuvius, with the potential to rise through the tiers of management when roles became available. That approach is consistent with our internal culture, if we were externally recruiting as **the levels immediately below the GEC**, my preference was that any candidate would have the ability to develop into a candidate for the GEC in due time. This is what I mean when I have referred to a preference for candidates to have sufficient 'runway'.
>
> 39. For this reason, **I agreed with NomCo's preference for external candidates under the age of 45 for roles in levels of management below the GEC**. I am advised that the Claimant refers to an email I sent on 9 May 2018 at 22:11 to him stating, "Following my discussion today with the Board at the Nomco, there is a strong confirmed push for a max 45 year old limit on candidates" D/1178. This e-mail is related to the recruitment for the Regional Vice-President Foundry EMEA position. Consistent with the succession planning process noted above, the preference was that person would be an individual with the potential and opportunity to progress to from Regional Vice-President to the GEC in due time. For this reason, it was obviously necessary to aim for a person with enough time left in their career in order to develop for that GEC role. I have already explained why I had a preference for candidates with potential but this preference was irrelevant to recruitment at the GEC level. I've also used the word "preference" deliberately, this was not a rigid rule and there are many examples of where there was no such age 'ceiling' in recruiting at Regional VP level either. See the notes made from a conversation between Ms Tomzcak and Mr Van der Aa D7536-

> 7537 for a number of roles that were filled by people who would not have been employed had any such age ceiling been applied.

67. Although Mr Andre characterised this as "NomCo's preference", Mr Donough the Chairman of the First Respondent's Board according to his oral evidence did not seem particularly familiar with the under 45 year old requirement and seemed rather to distance himself from it.

68. It is clear that Mr Andre had a sustained focus on bringing in younger candidates into management roles. There are a series of documented instances which show this.

69. In an email exchange in August 2017 Ms Isabelle Clause (executive recruitment agency) wrote to Mr Andrew explaining that she understood the brief for a senior management candidate in China as being young high potential "rather early 40ies", but she may ask for flexibility in age due to the difficulty in recruiting in that age bracket. Mr Andre replied:

> "I would prefer to have a bright 40 year old with a bit less experience of China but the eagerness to learn than an experienced 50 year old, who will not really contribute to the overall group succession issue we need to solve" (658).

70. Ryan van der Aa (HR) added his view that he agreed and noted that another colleague was mid-40s when he took his first China role.

71. In a GEC People Review dated 15 December 2017 the following comments appear:

> "Retiring. Need a HIPO [high-potential employee] …young with good potential". [D/520]

72. Under the heading Flow Control South East Asia the following comment appears:

> "Prefer to have a young [] in this role, someone with potential"; [D/522]

73. Under the heading IP [Intellectual Property]:

> "Young patent attorney required" [530]

74. In an email dated 2 March 2018 Isabelle Clause of Egon Zender sent an email in the context of a candidate for a procurement role. She referred to the "young high potential" criteria and in one sentence wrote:

> "I also understood from Ryan [van der Aa] that Patrick Andre could actually be less strict on the young high potential criteria for this role?"

75. At [D/1142] the minutes of the Board meeting that took place on 9 May 2018 record the following:

> "The Chief Executive outlined his plans for senior management development in respect of P&L positions, highlighting that there are no clear succession candidates for the top P&L positions within the Group, and that at the level below, the vast majority of the 12 Regional 8U VPs, also do not have obvious successors in-house. The CE reported that performance issues also exist at the Regional VP level in certain areas which need to be resolved, and some retirements were imminent so these roles would also need to be filled. The CE reported on the process undertaken at the GEC from which a plan had been formulated to change nine of the Regional VP roles over the course of 2018/early 2019. The CE noted that some of these replacements would be made to ensure the incumbents had the requisite profiles to succeed to the GEC in the future, provided that by then they also had international experience.
>
> …
>
> The Committee discussed the dynamics of succession planning to ensure that individuals receive the right experience at the correct stage in their career, to make sure that there was enough "runway" ahead between Vice President, President and then potentially Chief Executive roles. It was also important to give the new recruits an indication that they had been earmarked for promotion. The Committee also discussed the benefits of gender diversity and the need for this to be a continual focus of the recruitment process."

76. Significantly, Mr Andre wrote to the Claimant and Mr van der Aa, VP HR in an email on the same day in the context of discussion of a couple of candidates for recruitment [D/1178]:

> "Following my discussion today with the Board at the Nomco, there is a strong confirmed push for a max 45 year old limit on candidates.
>
> So I would suggest to concentrate on those meeting this criteria." (*sic*)

"Get younger"

77. Mr Kelly's witness statement suggested that Mr Andre had said in meetings in 2018 that the from a personnel perspective the organisation needed to "get younger". This was referenced by Mr Cowie in his own witness statement.

78. Mr Kelly conceded in answer to a question from the Tribunal that this he could not be sure that these exact words were said, but this was merely the sense of it. We do not find that Mr Andre said the phrase "get younger". We accept that Mr Kelly did understand that this would be the effect of Mr Andre's proposals rather than him saying those words.

"Runway"

79. The Tribunal heard evidence from the Respondents' witnesses, in particular Mr Andre, on the significance of the term "runway". This term, used in the context of recruitment, denotes that candidates for roles needed to have a period where they could get experience of the Respondent business before they could, by analogy with an aeroplane, "take off" into more senior roles. In practical terms this meant that the candidate needed to be sufficiently young for them to gain experience before achieving promotion for a level or two. This seems to be part of the justification for the push for candidates less than 45 years in age.

80. In an email dated 16 April 2019 Sanjay Mathur wrote to the Claimant about four candidates for HR roles "two of them are really good and well within the 45 years limit prescribed".

Relocation to UK & "6 months" dispute

81. On 23 May 2018 while they were both in Japan, Mr Andre told the Claimant about the decision to relocate his role to Europe.

82. There is a dispute between the two men about what was said at this stage. Mr Andre says that he told the Claimant that he had to move to Europe, that he had 6 months to improve and that the Claimant said that he would accept the challenge. The Claimant denies this and says that he simply would not have taken this role with the move to Europe in the circumstances if there was a significant short term question-mark hanging over his future in the Respondent business in this way. He says that he would not have accepted such a challenge without speaking to his Wife.

83. The Claimant was not keen on a move to Europe, given that he was settled with his wife and adult daughters in the US in Cleveland, Ohio. There were serious medical reasons why he wanted to stay in the US, which are personal to a family member and not necessary for the purposes of this judgment to go into in detail.

84. In correspondence between Mr van der Aa of HR and Mr Andre in July 2018 there was discussion about the Claimant's new terms, a discussion of the tax treatment and a likely retirement age, based on the Claimant having indicated a retirement date of 62 (D/1724). He wrote

> "The matters mentioned directly above are not part of that contract but should be confirmed in a side letter. We need to decide which company is going to be the employing company in the UK Vesuvius UK or Vesuvius Holdings."

85. Notwithstanding that Mr Andre indicated to the board on 18 September 2018 that the Claimant had six months to improve his performance, we do not find that this was communicated in clear terms to the Claimant, certainly not in terms that he had six months to improve or face termination. We accept the Claimant's evidence that if he had been put on any sort of performance process

or on six-month notice to improve that he simply would not have moved to Europe.

86. On 17 October 2018 the Claimant moved to UK. In fact he returned to live in a property he owned in the UK which had been rented out while he was working in the US.

Costs of relocation

87. The Claimant's case is that incurred substantial costs associated with his move to the UK. The total is put in the schedule of loss as £274,132.37.

88. The Claimant's written evidence was that the sum he expended relocating from the USA to the UK was £86,267 including house sale costs, furniture, pets, "wife etc" and associated taxes. He also seeks to recover a substantial sum for relocation to South Africa on retirement which is set out as £140,733 (plus tax) in the schedule of loss and £162,980 in the witness statement.

89. The Claimant admits that costs for one container associated with part of his initial move to the UK were claimed and reimbursed in the fourth quarter of 2018, as well as one month settling in allowance was paid. The Claimant alleges that he has only been paid around £13,000 in expenses plus a separate "settling in" allowance of £28,000.

90. The Claimant's case is that when he moved from South Africa to the UK in 2000 and when he moved from the UK in 2008 to the USA, all costs such as move of household effects, help with finding new accommodation, using relocation experts, estate agents' fees, inspection flights for families, costs of relocating pets and legal fees associated with buying and selling a home were covered.

91. The Claimant flagged his forecast "relocation" costs expressly to Mr Andre in an email dated 8 July 2018 (D/1475). On 9 July 2018 £200,000 in relocation expenses were forecast and sent to both Mr Andre and Mr van der Aa (1496-8).

92. On July 19, 2018, Mr Van der Aa sent an email to Mr Andre querying if the company would cover all associated relocation costs after retirement. Mr Van der Aa said he thought this was reasonable provided it was the USA or South Africa.

93. On August 2, 2018, Mr Van der Aa asked the Claimant for his US house sale costs. The Claimant says understood the company would pay all costs associated with the move to the UK including realtor and legal fees as they had done in the past and with other employees, such as Bill Kelly CFO and Chris Young VP HR. Both of these individuals reported to the Claimant.

94. Mr van der Aa's emailed the Claimant on 11 August 2018 (D/7541):

> "I told you that we are willing to assist you in the costs of selling your house but you only sent me the estimate this week. I need to clear this with Patrick".

95. On August 13, 2018, the Claimant had a phone call with Mr Van der Aa. The Claimant enquired about clauses in his relocation contract. Mr Van der Aa told him that the terms were not negotiable.

96. The Claimant's evidence at paragraph 414 of his witness statement was that he and Mr van der Aa agreed orally by telephone in around 12/13 August 2018 that these costs would be paid, and that was what Mr van der Aa meant when he said "the given word binds" (i.e. confirming in writing what had been agreed orally). See [D/2268] and [D/2330]. The Respondents put forward a different interpretation.

97. Following up on the call on August 13, the Claimant sent Mr Van der Aa a summary of his concerns. He enquired why Mr Van der Aa's assurance that the company would pay the closing, legal and realtor fees for the move was not in the contract. The Claimant asked what the chances were of Mr Andre reneging on this. The Claimant had noted that the relocation allowance referred to "long-term assignment", which meant he would stay an employee in the USA, and yet Mr Van der Aa had said this was not possible. He asked whether the relocation support should be as per the permanent relocation policy.

98. A provision for £160k was created to cover the costs of the move which the Claimant says was discussed at every monthly results call

99. On 23 January 2019 £160,000 in relocation expenses were forecast on 23 January 2019 and sent to Ian Lawson (Global Group Financial Controller) (D/3770-1).

100. On 1 February 2019, Gorka Jimenez-Vidal, Global Head of Relocation wrote to Ms Tomczak identifying this same figure of £160,000 in relocation costs "accrued into 2018 results above trading profit" (D/4239).

101. On 27 August 2019, Ms Terry Finley wrote in response to an email from the Claimant who is seeking clarification, "I believe Bill Kelly communicated the initial £125k relocation provision to Guy Young" (D/7180).

102. The Claimant complained about a breach of the relocation policy in his grievance dated 1 October 2019 (D/7295). He wrote:

> "Having minimal pension and I will more than likely have to move back to South Africa at a cost of approximately 170K pounds once you take into consideration selling UK house consolidating in UK house, selling USA house, building new house in South Africa and moving to South Africa, These are all payments legally and contractually due under my contract. The company are required to bear all these costs including a further 57K pounds associated

with purchasing a UK house as I intended to do when I initially moved back from the USA to the UK."

Relocation expenses policy

103. Ms Tomczak attempted to explain the Respondents' stance in this matter by reference to the expenses provision of a travel policy (D/7911).

104. The Claimant draws our attention to the "Employee Relocation Benefit Program Homeowner" (Effective As of November 30, 2020) (D/7969). This, it seems to the Tribunal is much more likely to be the correct type of policy to govern relocation and relocation expenses. Given its date however it cannot have been the policy in force at the time that the expenses were incurred in 2018 and the grievance was raised in 2019. We note that this is version 3. There is also a policy with a similar title which appears at (D/7982).

Appointment of Second Respondent Ms Tomczak

105. On 1 October 2018 the Second Respondent Ms Tomczak was appointed as Chief HR Officer of the Vesuvius group which includes the First and Fourth Respondents. We have been directed to evidence as to which of these two entities is Ms Tomczak's employer, but it is apparent from the circumstances if she was not an employee, she was acting as an agent for the First and Fourth Respondents.

106. On 19 October 2018 Ms Tomczak participated in the Quarterly Business Review for Foundry and on 29th October 2018 she sat in on the 2019 Budget Review for Foundry. She says that she formed a poor impression of the Claimant in his ability to answer questions and handling of his team. She says she remembers telling Mr Andre at the time that in her opinion, the Claimant should be let go sooner rather than later because he was not showing that he had his business unit under control and was bringing confusion to the team. She says however that Mr Andre wanted to give the Claimant more time to see if an improvement could be made.

107. The Tribunal found the speed with which Ms Tomczak apparently came to such a strong conclusion about the Claimant somewhat surprising, given that he was a very experienced senior manager with a strong track record whom she had only recently met.

Business targets

108. The Claimant contends that he was set unfair and arbitrary business targets.

109. The Foundry 2018 Strategic Plan Guidelines dated 19 January 2018 (D/972) contains the following financial objectives:

110. 2017 Sales £535m, Trading profit £72m, ROS 13.5%

111. 2019 Sales £587m, Trading profit £88m, ROS 15%

112. 2020 Sales £625m, Trading profit £100m, ROS 16%

113. It is clear that there was a source of friction between Mr Andre and Mr Cowie with regard to the business targets, specifically Mr Andre's emphasis on return on sales (ROS). The Claimant's witness statement describes the difference of view in the following way:

> 525. Raw material costs were also increasing on a daily basis and in monthly business review calls I made it clear to Mr Andre that I firmly disagreed with making carte-blanche price increases on strategic products such as sleeves and filters. I said each increase had to be considered on a case-by-case basis, taking competitor strength and the business's technical differentiation into account as well as considering market share loss and plant loading. As a result of this prudent approach, we went on to well exceed cost increase with price increases, but there was an inevitable time lag.
>
> …
>
> 557. At almost every monthly business review in front of regional management, I cautioned Mr Andre about his attitude towards price increases and that in the long run we would lose market share with the impending downturn. Despite my prudence, we were very successful with the price increases.

114. On 7 July 2018 Mr Andre wrote to Mr Cowie complaining that although the forecast for the year (based on five months data with seven months to go) forecasted £32 million better than budget, the trading profit was only £2 million better for profit, leading to Mr Andre's conclusion that his instruction to give priority to ROS over top line growth where [i.e. revenue] was not being applied.

115. An email exchange continued the following day Sunday 8 July 2018 in which Mr Andre queried a £1.6m figure for recruitment and redundancy. Mr Cowie acknowledge that this was a "frightening number", but clarified that also included his an allowance for his relocation to the UK. Mr Andre privately dismissed the high figure to Mr van der Aa as a provocation.

116. In a presentation to the Board on 24 July 2018 Mr Andre noted that Foundry Price increase initiative was reasonably successful in Europe, China, South America and South Asia, but that results were not satisfactory in North Asia and NAFTA [i.e. North America].

117. On 2 August 2018 Mr Andre wrote to Mr Cowie in the following terms:

> "The most important point for the Foundry division today is to rapidly improve profitability i.e. ROS (trading profit margin).
>
> The Board is focused on this as are the shareholders (the only negative comments I am receiving from all shareholders I am currently meeting are about the margins of Foundry and the poor drop through : poor TP improvement in relation to turnover improvement).

> The two key levers you have at your disposal to improve this are:
>
> price increases : this should be the absolute priority of the coming weeks, especially in those regions where we know we have specific problems like NAFTA and North Asia (but also other regions). You not only need to put pressure on your regional VPs and their teams but also check yourself personally that this is being implemented by going there and checking the reality of the numbers. Dismiss brutally some people (sales people in particular) to send a message if necessary.
>
> cost decreases : we need to accelerate the dismissal of people in Cleveland and Germany in particular in the framework of the Mc Kinsey project implementation. We can't afford to wait for all the new people to arrive (plants managers etc.) to achieve this as these more performing newcomers will only have an impact next year and we can't wait that long to show results. It will again require physical presence and pressure from you on these sites. The closure of Izurza and Gliewiece also needs to happen on schedule (| have the feeling [redacted] is doing a good job in that respect).

Price, margins & ROS

118. It is clear that there was a difference of view between Mr Andre on the one hand and the Claimant and Mr Kelly on the other on pricing. The Claimant agree with Mr Andre that prices needed to increase given that material costs had increased to mention profitability. The point of difference was regarding the prudent speed of implementation of price increases. Mr Andre's position is that the prices being charged to customers should be immediately passed on to customers to maintain and potentially improve profit margins to a target of 15% or better returns on sales (ratio of trading profit to sales), even if this meant losing revenue, market share or trading profit. His view is that this should be an immediate across-the-board increase in prices as a response to of material cost increases.

119. The Claimant's case is that he and his business unit were trying to implement Mr Andre's instruction to speedily adjust prices upwards, but that there was an inevitable delay caused by adjusting prices on a case-by-case basis and negotiating with customers, to minimise the risk of clients being lost. The Claimant argues, with some justification, that his implementation was successful. Revenue increased, trading profit improved and from October/November 2018 onward prices were being managed upward at a higher rate than material costs were increasing.

120. The Claimant's case, which we entirely understand, was that increasing prices across-the-board in the way suggested by Mr Andre risked alienating customers, losing revenue and market share and trading profit, for which the Claimant would be accountable as President of Foundry. Customers once lost

might not be easily regained. This was all in a commercial context of a softening market from approximately October 2018 onward.

121. As to Mr Andre's rationale, he confirmed in answer to the Tribunal's questions that the focus on return on sales as a metric was based on advice that the Board had received from financial institutions that a better return on sales percentage would be likely to be more attractive to investors and thereby by implication would increase the market capitalisation of the business, based on the way that financial analysts would value the business. He said that this message was made clear to the Claimant. His email of 2 August 2018 is not precisely in these terms. It does however show that Mr Andre had a particular focus on ROS (trading profit margin) and that the views of shareholders is a part of the reason for this focus.

July 2018 figures

122. It is clear from contemporaneous emails Mr Andre continue to raise the question of margin and that Mr Cowie was cascading this message down quite forcefully to his team.

123. When the July 2018 figures came in on 10 August 2018, Mr Cowie communicated his concerns to his team that sales were £1.1m higher than forecast but gross margin was worse. This shows that he was clearly alive to Mr Andre's likely reaction to these results. The following day Mr van de Sluis wrote to a colleague "Glenn [Cowie] is in trouble and Patrick [Andre] lost confidence in him. So he panicked".

124. On 18 September 2018 Mr Andre wrote in his report to the Board [D/2695]:

> "Some progress is being made in Foundry regarding price increases but the overall profitability situation remains unsatisfactory. Glenn Cowie relocated to Europe on September 1 and has been given 6 months to improve the overall profitability of his business."

125. In October 2018 Mr Andre attended a Q3 business review with members of the Foundry management team. Mr Kelly summarised that meeting in an email as follows:

> "In our Q3 business review our primary discussion centered around the fact that foundry generally (most regions) margins have fallen despite large increase in volume and benefits from restructuring programs.
>
> For those who attended you could say the conversation was quite unpleasant. The message is clear from Patrick [Andre] that he is very disappointed in the foundry group this year as we have not been aggressive enough in passing on price increases to maintain our margins.

> The message was made clear that our budget for 2019 will need to reflect a correction of this trend immediately. Even if that means walking away from lower margin business. This is not an option or a debate. We need to be much more aggressive than we have been in most cases."

Background to Mr Andre's decision to replace the Claimant

126. On 17 October 2018 Egon Zehnder, an executive search agency was engaged in relation to a potential replacement for the Claimant. This was described by the Respondents as "initial talent mapping" and was characterised to us as no more than a preliminary investigation. Egon Zehnder sent a letter confirming their instruction dated 17 October 2018 D/3051-3063. The letter stated as follows:

> [D/3054] The first option would be a seasoned leader for whom this would be the last assignment. This would after a few years leave room in your leadership team for your high potentials currently reporting to leadership team, in particular the regional VPs. The second option would be a younger leader with strong potential who would himself be a CEO succession candidate after some years.

127. The timing of this instruction is surprising, given that the Claimant had that month only just relocated to the UK.

128. Although the initiative seems to have come from Ms Tomczak, this instruction to the executive search agency must have come with Mr Andre's approval since this was a significant expense and Mr Cowie was a very senior employee.

129. In fact it was the latter option that was pursued and both candidates that were subsequently considered were in their early 50s rather than younger.

Improvement following relocation to UK

130. On 17 November 2018 Mr Andre sent an email to the Claimant recognising the "clear improving trend for Foundry only results" [D/3270]. He acknowledged that price increases were happening, but queried North Asia on this point.

131. In the Vesuvius Board CE [Chief Executive] Report of 5 December 2018, (D/3571-3611 at page 3596) Mr Andre's reported to the board that

> "Glenn Cowie is showing increased dynamism since moving to the UK".

132. He also goes on to state that:

> "restructuring is progressing as planned".

Commercial context late 2018/early 2019

133. The agreed bundle contains a "Key Financials" document produced by Guy Young (CFO) and Mr Andre for the year 2018 (D/3444). The Foundry Division of which the Claimant was President produced a revenue of £561.3 million for 2018, which represented a 4.9% increase on the previous year. Trading profit was £68.9 million, representing a 5.7% increase on the previous year. Return on sales as a ratio of trading profit to revenue was 12.3% against 12.2% the previous year. The narrative on this page reads:

> "Market share gains in the key product lines of feeding systems, filters and coatings
>
> Overall profitability was however impacted by a time lag in passing on higher raw material prices to customers
>
> Fused Silica, a specialised product line, suffered from significant market weakness towards year end"

134. As at February 2019, the month that Mr Andre decided that he was going to terminate the Claimant's employment, the monthly performance report for February 2019 (D/4423) confirmed that for the year to date (i.e. January and February 2019) revenues of £91.6 million were down 3% against budget and 3% against the previous year. A disproportionate amount of this reduction was due to the Fused Silica business. Revenues for the court Foundry business only was 2% down against budget and 1.4% down against the previous year. Trading profit for the year-to-date was £10.9 million against a budget of £14.1 million and £13.7m the previous year. This represented a return on sales of 11.9%. Overall price increases continued to raw material costs increases.

135. The graph which Mr Andre did allow the Claimant to show to the Board as part of the 2019 Foundry Strategic Plan shows that from October/November 2018 net price increases had outstripped cost increases month on month. By February 2019 cost increases were beginning to flatten whereas price increases continued certainly as far as April 2019 which the graph shows. This showed an implementation of Mr Andre's instructions to the Claimant.

136. These figures must be seen in a wider commercial context. We accept the Claimant's evidence from August 2018 onward there had been a slowdown in the market in which the Foundry business was operating. This is supported by contemporaneous documentation. At the Feb 2019 Board meeting Mr Andre's chief executive presentation contained: (4297)

> "Slowdown of light vehicle market is confirmed"

137. Also (D/4345)

> "Both Steel and Foundry markets are now showing clear signs of slowing down.. … Raw material prices, despite persistent environmental constraints in China, do not increase anymore and, for some of them, have started eroding."

138. This presentation contained a slide "Commercial Activities Foundry" (D/4306) of which contained the following:

> Price increases in January are globally above raw material cost increases, confirming progress made in H2 last year.
>
> North Asia remain, however, a negative exception and is being investigated.
>
> Foundry only (excluding Fused Silica) sales are close to Budget and last year in January but we expect some weakness going forward if slowdown in Heavy Vehicle is confirmed.
>
> Fused Silica sales are strongly decreasing in all regions (-37% in January)

139. It is clear that the First Respondent's markets generally were weakening, not simply the Foundry division. On 11 March 2019 Mr Andre wrote to the GEC in the following terms:

> "In a clearly weakening economic environment, our financial performance beginning of this year is very significantly below both last year and budget.
>
> In this context, it is important to rapidly implement strong costs reduction measures to mitigate the impact of this situation on our results."

140. He then set out a series of significant cost reduction measures relating to recruitment, the use of temporary positions, reduction of business travel, reduction in large business meetings particularly requiring international travel, participation in a trade fair, non-essential operating expenditure, potential redundancies, suspension of training operations, streamlining of manufacturing footprint being accelerated.

141. On 19 March 2019 Egon Zehnder were further instructed in relation to finding candidates to replace the Claimant.

Absence of appraisal

142. By December 2018 Mr Andre had assessed the Claimant as preliminary AIP assessment of 50-55% [D/3897]. It seemed however that he had not communicated this to the Claimant, nor indeed had he communicated to any of the members of the GEC about their own equivalent appraisals, with the result that Ms Tomczak chased him with a reminder by an email of 22 January 2019 about the GEC as a group.

143. Mr Andre says that the Claimant asked for feedback on his performance in 2018 towards the start of May 2019. He says he had forgotten to send the Claimant his AIP scores and did so on 4 May 2019 [D/5206-5208]. This was a final assessment that was slightly lower than the provisional one made in December 2018. He says he also had a discussion with him on the telephone

regarding his performance, in which he gave him detailed explanation about the calculation of the personal objectives achievement.

144. Mr Andre's evidence is that the Claimant was treated no differently to any other member of senior management in this respect and says that he can confirm that any failure to provide the Claimant with a formal appraisal for 2018 was not influenced by the Claimant's age or nationality. Mr Andre says that it was simply the reality of a busy working environment that sometimes the communication on formal appraisals, particularly for very senior employees with whom he was already in regular contact, got delayed. Mr Andre says that the Claimant did not suffer any harm due to this delay; he was paid his correct AIP on time.

145. To some extent the Claimant appears to agree with Mr Andre. (w/s C306). Mr Cowie says that there was in reality no systematic appraisal and performance management system under Mr Andre in 2017 and 2018 to ensure that people were retained and developed based on objective factors, rather than subjective views.

146. On 14 March 2019 the Claimant was awarded a conditional award of shares equivalent to 100% of his annual base salary subject to the Vesuvius Share Plan and a two-year holding period and a requirement that he hold vested shares for a minimum of five year (D/6708).

Decision to dismiss

147. There were a number of monthly discussions in which Mr Andre expressed his displeasure about progress toward the return on sales goal of 15%. The Claimant's perspective on Mr Andre was that in every meeting he expressed dissatisfaction and that was his management style.

148. By the end of February 2019 Mr Andre made a definite decision that the Claimant was going to be replaced. This is when the Egon Zehnder "market mapping" exercise became a search for a replacement for the Claimant. Mr Andre had decided not to notify the Claimant however on the basis that this would be disruptive to the division of which the Claimant was President. He did not discuss this decision with the Claimant until 1 August 2019.

149. Mr Andre contends that the Claimant was working on a period of 6 months where he was expected to improve his performance. However, we do not find that the nature of the discussion between Mr Andre and the Claimant was in terms of a specific concern about performance or a six month deadline for the Claimant to affect a turnaround following which there would be consequences for him. We accept the Claimant's case that he had not been told that there were performance concerns, nor had he been expressly made aware that his employment was at risk.

150. On 2 April 2019, by which stage on any view Mr Andre's suggested six month period must have expired, he wrote to the Claimant by email [D/6931] in the context of an email confirming the vesting of his 2016 LTIP:

> "We now need to succeed in the transformation of the Foundry Division into a world class dynamic, entrepreneurial and agile organisation to help it achieve its financial objectives. I am counting on your full support to meet this challenge."

151. It is difficult to reconcile this with Mr Andre's case that he and the Claimant had a shared understanding that there was six month performance improvement ultimatum which in Mr Andre's mind the Claimant had just failed.

Replacement of the Claimant by Karena Cancilleri

152. By the end of May 2019 heads of terms had been agreed with Ms Karena Cancilleri.

153. It was put on behalf of the Respondents in cross examination and not disputed that Ms Cancilleri was 51 years old at the material time.

154. In approximately mid July 2019 Ms Cancilleri signed her contract of employment with Vesuvius.

June 2019 Claimant prevented from presenting an accurate picture

155. In preparation for the Board meeting on June 2019 the Claimant proposed to show a powerpoint slide with two different graphs. The first graph was entitled "Price Increases v cost increase excluding price decreases" and the second graph "Price Increases and decreases v cost increase excluding price decreases" (D/5419). Mr Andre reviewed these slides and crossed out the first graph put forward by Mr Cowie with the comment "not relevant".

156. The Claimant was trying to represent graphically the work that had to be done to increase prices to customers in situations where the cost of raw materials had gone up – disregarding price decreases. This represented success he had achieved in pushing up prices paid by customers. Mr Andre on the other hand was focused solely on the financial result overall and felt that the first graph was in some way misleading. From his perspective he was only interested in the net position i.e. including cost decreases as well as increases.

157. A practical significance of the difference between the two slides is that the first slide suggested that the Foundry was managing to implement price increases higher than cost increases from approximately July 2018 onwards whereas the second graph suggested that this point only really happened at the end of October 2018.

Krakow dinner - 17 June 2019

158. On 17 June 2019 in Krakow there was a dinner for new employees. Mr Andre said at the dinner table in front of the new employees whilst making general conversation, how, when he has dinner with his the Claimant's wife: "she glares at me [Mr Andre] as he has been such a disruption to our lives". The Claimant says that Mr Andre was "proudly gloating about this".

159. The Tribunal accepts the Claimant's evidence on this point and finds that words to this effect were said by Mr Andre. Given that Mr Andre had objectively caused domestic disruption by insisting that the Claimant relocate from the US to Europe against the latter's wishes it is unsurprising that Mr Andre might have had the perception that Mrs Cowie was less than warm toward him, whether or not she did in fact.

160. We have accepted the Claimant's account on this matter. It would be a bizarre thing for him to make up. We find the Claimant's account of Mr Andre making a joke, albeit one that Mr Cowie found offensive rather than amusing, plausible. We find that it is of a piece with other comments made by Mr Andre, such as being cold-blooded, which emphasise a cold and calculating approach to management and leadership style rather than a warm or empathetic one.

161. We have not put a great deal of store by Ms Tomczak's investigation into what occurred in Kraków, on having spoken to "other attendees" (D/7675) given that she admitted in cross examination that she did not speak to anyone who had been there apart from Mr Andre.

Retirement

162. On 20 June 2019 the Claimant told Mr Andre that he wished to retire at the end of 2020. He says that this was said in despair.

1 August 2019 – dismissal

163. In a discussion on 1 August 2019, when the Claimant said he had been "summonsed" to London Mr Andre informed the Claimant that his employment was to be terminated. Both protagonists in this conversation agree that the reaction of the Claimant was one of shock.

164. The Claimant described this conversation in his excel 'diary' as follows:

> "I was summonsed to London despite telling PA I had not seen my wife for three months and that I was on my way to the USA. At the meeting at 20:00 PA started beating around the bush about me not being happy and affecting my work etc. I told him to get to the point and stop beating around the bush. He stated "Its not working and that the results are not as expected and that he has decided that I will leave on 1ST October and here is a contract for my severance." He was painful in explaining it was not personal when of course it was but the fit was just not there, you have done nothing wrong, you are clearly trying very hard and working very hard but the results are Inadequate." When I responded positively that I understand Its life and at our level things happen and I will do everything possible to make the transition he was visually relieved and said the offered contract was option 1 and option 2 would be option one plus a one year consulting contract reporting directly to him and I could be based anywhere to do that. I did not respond and he went on to mention a figure of $25k per month, still no response from myself. I assured him no matter what I am

> a person of high Integrity, the company has given me a great career and I will never work for the competition or say anything bad about the company. I chose my words very carefully referring to the company and not him."

165. This is the best evidence that we have of what was discussed in this meeting.

166. On August 26, 2019, the Claimant wrote a letter to Mr Andre (D/7196-7210) complaining about the unfair and unlawful way in which he felt he had been treated both before, during and as a result of his dismissal and the stress this had caused to him and his family.

167. By a letter dated 2 September 2019 sent from Ms Tomczak (D/7224), the Claimant was placed on garden leave for 6 months until a termination date of 1 March 2020. During that period he was not to attend any of the Fourth Respondent's premises without prior written approval and could not have any contact with any employee, officer, director, agent or consultant of the Company or any Associated Company (other than purely social contact) without the prior written approval of Ms Tomczak or Henry Knowles. For these purposes 'Company' means the Fourth Respondent. The First Respondent was an 'Associated Company'.

Grievance/appeal (alleged protected disclosure)

168. On 1 October 2019 the Claimant submitted a document addressed to the Chairman of the First Respondent described as a "grievance and appeal against dismissal". This grievance gave a full history of the Claimant's career at the Corporate Respondents, including his numerous commercial successes and his progression through management grades and included the following:

> "I do not consider there to be a good or fair reason for dismissal and I am very concerned that this decision has been partly caused, whether consciously or subconsciously, by unlawful and discriminatory factors involving my age and/or nationality as a US citizen.
>
> …
>
> Starting in 2015 I embarked on a campaign of aggressive cost cutting, in 2016 and 2017 we accelerated market share gain and unfortunately in 2018 our momentum was slowed somewhat due to the unprecedented raw material price increases we experienced. Had we not experienced such drastic raw material increases and market slow down we would have been on track to be close to 16% ROS
>
> When Patrick explains our results to analysts Patrick says it is because Foundry has not delivered on their restructuring plans when in fact at end 2018 we were at 121% of objective. The simple issue is the market is down and we have had ridiculous raw material cost increases, low productivity in Germany as well as

quality upgrade or issues, whatever you like to call it. The 2019 plan for restructuring or Mckinsey project is 8.8 million and we are forecasting 6.4 million.

…

Following the Foundry introduction meeting in Germany on 30 August 2017 I realized Patrick had a personal issue with me and was hence cautious.

The alarm bells started ringing further when on 23 May in 2018, whilst I was together with Patrick in Japan, Patrick told me that my job would be moving to Europe and that I would have to relocate, or I would fail.

I explained that I had been very successful in this position over the last two and a half years based out of the USA and in today's world when you travel 100% it does not matter where you are located.

I also explained to Patrick that [family members were ill].

Patrick countered with:

"I don't care, I am a cold-blooded animal and you have to move".

He was hoping I would not relocate and thus resign."

169. Mr Cowie went on to make serious allegations of discrimination:

3 Age discrimination

Patrick has brazenly embarked on an unlawful campaign of getting rid of older employees and replacing them with under 45 year old staff as per emails and direct instructions to recruiting companies not to employ staff over aged 45 dated in an explicit email dated 9 May 2018 at 22:11pm.

These blatant written instructions are on the record and show an institutional and deep prejudice against older employees. These comments are a direct smoking gun.

Importantly at the Brazilian GEC meeting he also called me

"an old fogie who did not know how to manage millennials ".

This comment is crucial and tells you everything you need to know about his motivations and stereotypical opinions about older employees (if any more evidence was needed on top of the no over 45 year olds memo).

Also, I was instructed to employ Phillipe Bertroux to get "young blood" into our team and when he resigned Patrick again blamed

> me. In fact, it took almost six months to find a young enough candidate (as I was ordered to) to run the fused silica business but eventually we hired an interim manager whom we later took on full time.
>
> Since the introduction early in 2018 of the company's unlawful policy to only employ under 45 year olds it has taken over two years to find the correct candidate for the European Marketing and technology role adding more workload to myself as the VP for Europe, Rafael Carbonell is also new in this role and does not know the products or business. To date we have still not found a suitable candidate, all have been deemed "too old".
>
> I was also instructed to dismiss Umesh in India and Eric Pohlman in the USA simply because I was told there were personal objectives to find new younger talent.
>
> Both these accountants are excellent employees and I managed to stave off their unfair dismissals.
>
> Similarly for the finance director in Japan there is and was no justification in simply dismissing them simply for their age or the excuse given that we require "business partners in these roles"

170. Mr Cowie set out that he believed that there was a systemic and blatant favouritism shown towards French employees compared to American colleagues. He concludes “The anti-American stigma runs deep within our organization and I cite a few further examples below”. Given that the Claimant, reasonably in our view, did not pursue the race (nationality) discrimination claim, we have not set out this aspect in as much detail as the allegation of age discrimination.

171. The grievance document then (D/7293) contained a chronology of events from 23 May 2018 through to August 2018 when he says he signed the UK contract under duress.

172. This document clearly sets out an allegation of discrimination on the grounds of age and discrimination because of nationality as a US citizen. It cannot therefore be in dispute that it is a protected act within the meaning of section 27 of the Equality Act 2010.

173. Mr Cowie explained that he considered himself a good leaver.

174. Mr Cowie signed off this letter:

> “However, I have to say that I have little faith that this grievance and appeal will be dealt with fairly or objectively.

> If the matter is not fairly resolved I will regrettably have to take appropriate legal action in the US and the UK. I do sincerely hope that will not be necessary."

175. By an email sent on 2 October 2019 the Claimant's solicitor Mr Daniels wrote to the First Respondent's solicitor to suggest a suitably independent person to investigate to avoid the risk of a conflict-of-interest and furthermore that instructions to that person should come from someone independent and senior. It was clarified that the report should be treated as a whistleblowing referral as per the company whistleblowing procedures.

176. The Claimant wrote in an email dated 31 October 2019 inviting Ms Tomczak to interview Roel van Der Sluis, Tanmay Ganguly, Guy Young, Gary Wilson, Cedric Woindrich, Ryan van Der Aa, Sanjay Mathur and Vincent Trelut.

Involvement of Chairman & Non-exec Directors in grievance

177. The First Respondent's grievance policy provides:

> "7.2.1.2. If the complaint is against the person with whom the grievance would normally be raised, another suitable line manager will be asked to hear the grievance." [D/8200]

178. The Claimant's terms and conditions of employment contains the following at clause 15:

> "Any disciplinary or grievance matters will be conducted by the Board of Directors of the Company or its designee, in accordance with the principles of the ACAS Code of Practice on Disciplinary and Grievance Procedures and any relevant legislation." [D/2419]

179. The Claimant initially tried to get the grievance investigated without the involvement of Mr Andre. There was an email exchange between the Claimant's solicitor and a solicitor acting for the Respondents. On 4 October 2019 Mr Campbell for the Respondents wrote:

> "I've discussed the position with the GC [i.e. General Counsel].
>
> There is simply no practical way to deal with the allegations raised in Mr Cowie's letter without discussing them directly with, amongst others, Mr Andre. The Company has confirmed that it will treat the letter in line with its usual grievance process. In the first instance this means that it should be provided to the CHRO [i.e. Ms Tomczak], who will decide how to take the complaint forward. As I'm sure you have advised Mr Cowie, the Company understands its own legal obligations that may arise from Mr Cowie's letter"

180. In line with this contractual provision, the Claimant was initially trying to get this grievance to be considered by the Chairman and non-executive directors of the Board.

181. The grievance was passed to Ms Tomczak on 6 October 2019.

182. On 8 October 2019 Ms Tomczak emailed Mr Andre at his private email address with a copy of the 1 October 2019 grievance/appeal against dismissal document [D/7301].

183. The Respondents admit that Ms Tomczak took the decision that she was the most appropriate person to hear the grievance on the basis that she was the most senior HR person. She told the Tribunal in her oral evidence that she did not discuss this matter with the Board.

184. The Respondents seek to justify this decision on the basis that it follows within the operational part of the business.

185. When Ms Tomczak was asked about the possibility of an external person hearing this matter, her evidence was that this would not the procedure in any company, given that this was an internal process. She disagreed that this was a special situation which might justify such an approach. We did not receive evidence that Ms Tomczak was the designee of the Board. This approach seems to clearly fall outside of clause 15 of the Claimant's terms and conditions of employment.

Reasons for dismissal – 9 October 2019

186. The Fourth Respondent employer did not provide the Claimant with a statement of reasons for his dismissal. The Claimant's solicitor requested statement of reasons.

187. On 9 October 2019 a letter was sent by the Respondents' solicitor to the Claimant's solicitor Keystone regarding reasons for dismissal.

188. This letter contained the following:

> You also requested a statement of the reasons for Mr Cowie's dismissal. As President of the Foundry division of Vesuvius, Mr Cowie was a very senior executive (and remunerated as such). Vesuvius took the decision to terminate Mr Cowie's employment because it no longer had confidence in his ability to effectively manage the Foundry business. By way of example, in the period leading up to the decision to dismiss, it became clear that the Foundry division was going to miss its full year profit target for 2019, that key strategic objectives were going to be missed (including the restructuring of the German business) and the business was also going to miss key working capital objectives.

189. Mr Andre accepted during his oral evidence that the reasons for dismissal given in this letter were not accurate. First the decision to dismiss was taken by his own account in February 2019 at which point it was plainly premature to come to the conclusion that the division was going to miss the full year profit target for 2019.

190. Secondly, key strategic objectives were going to be missed was not part of Mr Andre's initial explanation to the Claimant and does not stand up to scrutiny. In December 2018, according to Mr Andre himself addressing the Board, "Restructuring in Europe [was] proceeding as planned" (D/3595).

191. We were taken to an analysis of cost savings achieved against target for the end of 2018. McKinsey, a firm of management consultants, had identified in the region of £10m operational costs savings to be achieved over a three year period 2018, 2019, 2020. The Board had approved a target of £9.2m savings. The management had a slightly more stretching target of £10.6m savings.

192. A 2018 board strategy plan presentation shows that cost savings identified for Foundry as a four year project by McKinsey and Lean initiatives were at 140% of McKinsey/board approved target (121% of management target) for 2018 and expected to be 135% of McKinsey/board approved target (117% of management target) for 2019, i.e. were ahead of plan at that stage.

193. Thirdly, as to key working capital objectives, a document prepared by the CFO Guy Young for the October 2018 Board meeting showed TWC (Trade Working Capital)/Sales of 23.8% compared to budget and 6+6 [half way through the year] target of 23.5% (D/3138). The Claimant makes the point that this is lower than the other divisions of the First Respondent. We entirely acknowledge Mr Andre's point in response which is that these are different businesses and the capital requirement that each is different.

194. If indeed the Claimant had not met his working capital objective, the miss was by a very small margin i.e. 23.5% to 23.8%. We not received any contemporaneous evidence which has led us to conclude that this was regarded by Mr Andre or the Board as a problem significant enough to contribute to a decision to dismiss. It is not dealt with in Mr Andre's witness statement, which we would have expected were this to be an important factor.

Claimant's application for other roles

195. The Claimant complains that the Respondent failed to explore alternatives to dismissal in late 2019 and early 2020, including transfer or redeployment or a sideways move, despite the availability of numerous other roles within the Company, including group Chief Technical Officer; VP Flow Control NAFTA; Foundry Europe M&T Director; M&T Director Flow Control or any other roles of a sales or managerial position.

196. By an email of 17 October 2019 sent to Ms Tomczak the Claimant offered to help

> "When Patrick let me go I informed him the timing was terrible as we had many projects on the go and that I was willing to help with the transition. I am hereby reconfirming my offer to spend some time with my replacement. also have a lot of work and information on my computer which will help my replacement if you would like me to go through it with them."

197. On 26 February 2020 [D/7666] the Claimant wrote to the Second Respondent. This was the week that the termination was due to take effect. In that email he continued to state that his removal was unlawful, discriminatory and unfair and was made without any consideration of alternatives to dismissal.

198. Nevertheless he went on to mention that there were various positions that were unfilled and highlighted his own very broad expertise and experience. He mentioned a number of roles which were junior to the role from which he was being dismissed and reiterated and repeated his application for all available posts within his experience including roles in the US, Europe or the UK. He attached a confidential summary resume highlighting his experience in sales, marketing, operations and management. He said that he was qualified to do any of these roles and was flexible in respect of salary and to conditions given that the market for other jobs externally was tough.

199. Ms Tomczak's oral evidence was to the effect that she did not take this entirely seriously, by implication she did not think this was a serious offer. When she was challenged about not considering the application in her oral evidence she said "there was no point to do that – it was a dismissal for performance – not redundancy".

Grievance investigation and outcome

200. The outcome of the grievance was given to the Claimant in a five page letter dated 24 February 2020. Ms Tomczak told the Claimant in this letter "In the course of my investigation, have spoken to Patrick Andre, Ryan Van der Aa, Geoffroy Godin and Gary Wilson". Some of these conversations were in the periphery of other events, including in the case of Mr Godin a conversation at dinner. Ms Tomczak admitted that he would not have known that she was speaking to him as part of a formal grievance process.

201. During her interview with Mr Andre, Ms Tomczak and wrote the word YES against the allegation "I was instructed to employ Philippe Bertroux to get "Young blood" into our team".

202. Ms Tomczak took no contemporaneous notes of her conversations with Mr Godin or Mr Wilson. This despite the grievance policy which states,

> "It is extremely important, and in the interests of both the Company and the employee to keep written records during each part of the Grievance process" (D/8198)

203. The Tribunal was taken to Ms Tomczak's table which contained various evidence [D/7636]. As to the allegation of age discrimination she wrote:

> "There was not a policy of only employing people under 45 years of age. These were factors to be considered, not obligatory criteria, in fact there were several external and internal candidates who came through who did not fit chose criteria, including: Bill Cousineau, Don Whitesel, Vincent Trelut, Heinz Gaugl and Richard Sykes.

…

You suggest that you were instructed to dismiss Umesh (I presume you mean Umesh K Bhat) and Eric Pohlman to make way for new younger talent. I've found no evidence to support this allegation and note that both individuals are still with the company."

204. As to the management style of Mr Andre she concluded:

"The performance of the business was poor and as CEO, PA had every right to challenge responsible executives. In my opinion, his treatment of you — and the other executives who he was challenging - was tough but did not cross any lines."

205. As to the procedure leading to dismissal she wrote:

"I accept that you were given no prior warning of your dismissal and that you were not put through any form of performance improvement process. Unfortunately, it is rare for senior executives like you to be put through a formal process; the risks to the wider business (and to the share price) of putting a senior executive through a formal process mean that it is almost never followed."

206. As to the reasons for dismissal, Ms Tomczak referred to:

"unsatisfactory results…and your visible inability to accept and address the issues".

"working in isolation and not providing the required leadership".

"Various members of the Foundry leadership team had criticised your leadership of the BU and it was felt that there was a lack of direction and poor communication".

Termination

207. On 1 March 2020 the Claimant's employment came to an end.

Appeal against dismissal

208. On 9 March 2020 solicitors acting for the Claimant submitted an appeal against dismissal and an appeal against the grievance outcome and what he described as a refusal to respond to his whistleblowing report [D/7680]. He (or his solicitors) complained:

209. First, that the stated reason for dismissal was not cogent and was wholly unsustainable.

210. Second, that competitive pressures were not taken into account, in particular a competitive marketplace and competitors who were "holding back" prices.

211. Third, of Mr Andre's unacceptable and unfair abuse towards the Claimant.

212. Fourth, that criticisms of the Claimant's management style were unfair and unfounded.

213. Mr Cowie also raised that very significant changes to the Foundry management team and the lack of an operations director were not taken into account in assessing his performance. He complained that Mr Andre told him in the 1 August dismissal meeting that although he knew that the division could not operate without a VP operations role, he was waiting for Mr Cowie's replacement to appoint a person of their choice.

214. He complained that Mr Young had not been interviewed despite being a witness to instance of Mr Andre harassing him relating to his age.

215. He reiterated his complaint of age discrimination, including being called an old fogey. He listed a "swathe of older staff removed", specifically naming 34 people and a further 4 roles (individuals unnamed) whom he claims had suffered dismissal due to age discrimination.

216. The allegations of nationality discrimination in relation to American staff and favouritism towards French employees were reiterated further or in the alternative.

217. The appeal contained an analysis of the alleged poor performance by the Claimant's division explaining why this was either wrong or unfairly failed to take account of mitigating factors.

218. The decision not to treat the Claimant as a good leader was challenged.

219. By a letter of 11 March 2020 from the Respondents' solicitor the Claimant's solicitors were informed that his appeal would not be heard on the grounds that it was out of time since he had been required to send an appeal to Henry Knowles, General Counsel on or before 2 March 2020, whereas the appeal document had been sent to Mr Campbell at Mischon de Raya on 9 March 2020. [MB/260]

220. The Respondent's grievance policy at 7.2.2.11 provides that the Grievance Appeal Form may be used and submitted within 5 working days of the hearing [D/8202].

Comments made to board members

221. At paragraph 818 of his witness statement the Claimant says:

> "I am also suspicious that a negative briefing campaign against me was underway"

222. At paragraph 820 of his witness statement the Claimant says:

> "I have been informed by employees that they are not permitted to speak with me as they have been told that I am spreading negative information about the company. On 17 June 2020 I rang Swapneel Schelar (Purchasing Director) to congratulate him on the purchase of his first home and he informed me he was not permitted to speak with me as it was being suggested that I was spreading negative rumours about the company."

223. This is consistent with the oral evidence that the Claimant gave this point. We accept that Mr Schelar told that Claimant that he was not permitted to speak with him.

224. We have been referred to page (D/7618) which is a document critical of the growth strategy of Vesuvius. We infer that the Claimant believes that he is accused of having written it and that he did not write it. It is not entirely clear.

225. Mr Andre denies that there is a negative briefing campaign against the Claimant. We have not received cogent evidence from the Claimant to substantiate that there was such a negative briefing campaign.

Good or bad leaver status

226. The Vesuvius Share Plan, a document drafted by Clifford Chance and adopted by the board on 31 October 2021, and amended on 25 February 2015, 10 May 2018 and 4 December 2018 (D/7398) contains the following:

> 14. LEAVERS
>
> 14.1 Good leavers
>
> If a Participant ceases to be a director or employee of a Group Member before the
>
> Normal Vesting Date by reason of.-
>
> (a) retirement with the agreement of his employer;
>
> (b) ill health, injury or disability evidenced to the satisfaction of the Committee;
>
> (c) redundancy (within the meaning of the Employment Rights Act 1996) or any overseas equivalent;
>
> (d) death;
>
> (e) his office or employment being with either a company which ceases to be a Group Member or relating to a business or part of a business which is transferred to a person who is not a Group Member;

(f) for any other reason, if the Committee so decides

then

(i) subject to Rule 9.3 (Restrictions on Vesting: regulatory and tax issues), Rules 9.6 and 9.7 (Malus and clawback and Operation of Clawback) and Rule 15 (Takeovers and other corporate events), his Award shall Vest on the Normal Vesting Date and Rule 14.3 (Leavers: reduction in number of Vested Shares) shall apply; unless

(ii) the Committee decides that, subject to Rule 9.3 (Restrictions on Vesting:

regulatory and tax issues) and Rules 9.6 and 9.7 (Malus and clawback and Operation of Clawback), his Award shall Vest on the date of cessation or on a later date which falls between the date of cessation and the Nominal Vesting Date and Rule 14.3 (Leavers: reduction in number of Vested Shares) shall apply

and provided that where the Committee decides that a Participant's Award shall Vest after the date of cessation, the Committee may determine that Vesting will only occur provided that at any time prior to Vesting the Participant is not deemed by the Committee to be in breach of any restrictions which continue to apply to him after the termination of his employment or office at any time when those restrictions are expressed to apply and where the Committee determines that such a breach has occurred the Participant's Award shall lapse immediately.

Subject to the above proviso, in both cases (i) and (ii) above a Participant's Award shall lapse one year after the date on which it Vests or if a Participant ceases to be a director or employee of a Group Member on or after the Normal Vesting Date by reason of any of the matters set out above, his Award shall lapse one year after the date of such cessation provided that in either case the Committee shall have discretion to set a different period.

227. The Revised Executive Share Scheme Early Leaver's policy December 2014, updated on 29 February 2016 (D/28) provided as follows:

"2. Awards will also be forfeited in the case of an employee who is dismissed for cause. e.g. in circumstances where, due to misconduct or similar reasons, summary dismissal would be lawful under the terms of his/her employment contract;

3. Where an employee leaves by reason of:

- retirement (with the agreement of the Company);

- ill health, 'injury disability;

- redundancy;

- death; or

- his office or employment being with either a company which ceases to be part of the Group or relating to a business or part of business which is transferred to a person who io not part oy the Group,

he/she will be allowed to retain his/her award.

4. Where an employee is asked to leave due to poor performance or for other reasons not amounting to redundancy, he/she will forfeit his/her award unless, in the context of his/her particular termination, it would be in the interests of the Company to allow some or all of his/her award to be retained and exercised at a later date (e.g. whom this would facilitate a swift termination agreement)

5. Where an employee leaves due to mutually-agreed early retirement, he/she will to allowed to retain his/her award;

6. Where an employee is leaving for family reasons, or in compassionate circumstances as determined by the company, he/she will be allowed to retain his/her award;

7. Where an employee leaves in circumstances not covered by any of the above, guidance on the treatment of his/his award must be sought from the Company Secretary. [D/28]

…

11. The Remuneration Committee reserves the right to depart from the above Policy, on case by case basis, in any circumstances where the Remuneration Committee considers this appropriate.

228. As of 21 November 2019, Ms Tomczak appeared to assume that the Claimant would be recommended as a Good Leaver. Her email of 21 November 2019 stated (7376):

> "I just want double check for Glenn,…I think I should confirm his good leaver status but please shout if not."

229. She accepted in her oral evidence that she assumed at that stage that the Claimant would be a good leaver.

230. Mr Andre responded a few minutes later by email:

> "No you should not confirm Glenn's good leaver status.
>
> This should be left open till the resolution of the current situation.

> In case he would sue us, my recommendation to the Remco will be not to grant him the good leaver status.
>
> The Remco will then decide what it wants to do but my recommendation, in writing and for the record, will be negative.

231. In oral evidence, Mr Andre said that the "current situation" concerned two areas of dispute: the "sums to be paid" to the Claimant upon his departure, and that the Respondents "didn't agree with the allegations raised by Mr Cowie in his Grievance", i.e. his protected acts and protected disclosures. He said that after there had been some negotiation there was then a drastic change in tone from the Claimant.

232. There was some without prejudice discussion between the parties which was ultimately not successful. Given that those communications are privileged we have not seen them, which is the usual position.

233. The Respondents have not treated the Claimant as a good leaver with the result that he has lost his entitlement to shares vesting which he says may be worth up to £1m.

Claim

234. On 1 April 2020 an ACAS certificate was issued following notification on the same day in respect of the First Respondent.

235. On 30 April 2020 ACAS certificates were issued following notification on the same day in respect of the Second Respondent Ms Tomczak and the Third Respondent Mr Andre.

236. On 12 May 2020 the claim was presented

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237. We are grateful to both Counsel for their written submissions.

Unfair dismissal / “trust & confidence”

238. In *Leach v OFCOM* [2012] Civ 959 Mummery LJ warned at [3]:

> "The legislation is clear: in order to justify dismissal the breakdown in trust must be a "substantial reason." Tribunals and courts must not dilute that requirement. "Breakdown of trust" is not a mantra that can the be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal."

239. He added at [53]:

> "The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the ET has to examine all the relevant circumstances."

Protected disclosure detriment ("whistleblowing")

240. The Employment Rights Act 1996 contains the following provisions:

> 43B Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
>
> 47B Protected disclosures.
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> 103A Protected disclosure.
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

241. The Court of Appeal in *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979 confirmed that public interest does not need to relate to the population at large, but might relate to a subset, in that case a category of managers whose bonus calculation was negatively affected. It seems that it cannot simply relate to the interest of the person making the disclosure.

242. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal held that a sharp distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy, given than an allegation might also contain information tending to

show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

243. There is an initial burden of proof on a claimant to show (in effect) a *prima facie* case that she has been subject to a detriment on the grounds that she made a protected disclosure. If so, the burden passes to the not to prove that any alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment. Simply because the respondent fails to prove the reason does not act as a default mechanism so that the claimant succeeds. The ET is concerned with the reason for the treatment and not a quasi-reversal of proof and deemed finding of discrimination i.e. there is no mandatory adverse inference mechanism (*Dahou v Serco Ltd* [2017] IRLR 81, CA).

244. The causation test for *detriment* is whether the alleged protected disclosure played more than a trivial part in C's treatment (*Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, CA).

Discrimination

245. The Equality Act 2010 contains the following provisions:

> 5 Age
>
> (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.
>
> 13 Direct discrimination
>
> (1) 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.
>
> (2) 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.

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act— …

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

246. We have considered the guidance set out in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is

unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

247. We have also considered *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> "'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

248. In *Madarassy v Nomura International plc* 2007 ICR 867 CA Lord Justice Mummery held as follows:

> "The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (para 56)

249. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well

have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination.

250. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425.

Age discrimination

251. The EHRC Statutory Code of Practice states at §2.4:

> "An age group can mean people of the same age or people of a range of ages. Age groups can be wide (for example, 'people under 50'; 'under 18s'). They can also be quite narrow (for example, 'people in their mid-40s'; 'people born in 1952'). Age groups may also be relative (for example, 'older than me' or 'older than us')."

252. The IDS Handbook on Discrimination at Work suggests at §5.8

> "there need not be a dramatic difference in age between the claimant and his or her chosen comparator."

Time limits

253. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the discretion under [what is now] S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'

254. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision. At paragraph 18-19 Leggatt LJ said:

> "it is plain from the language used (such other period as the employment tribunal thinks just and equitable) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the

> Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30] [32], [43], [48]; and Rabone v Pennine Care NHS Trust [2012] UKSC 2, [2012] 2 All ER 381, para [75].
>
> That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

255. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ said:

> "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) the length of, and the reasons for, the delay. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

Age discrimination

256. The Equality Act 2010 contains the following provision:

> 5 Age
>
> (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.

257. The Respondents referred us to *ABN AMRO Management Services Ltd v Hogben*, UKEAT/0266/09, unreported. In that case the employer appealed against the decision of an Employment Judge not to strike out all of the allegations of age discrimination. The employee alleged that his relative youth counted against him in a redundancy exercise. Underhill P said in the context of the employer's strike out application at paragraph 11,

> 'it is prima facie implausible to the point of absurdity that an age difference of nine months could make any difference to the question whether the Claimant or Mr Kellett obtained the UK role, and only marginally less implausible that, in the case of the global role, Mr Pettit would be influenced by the fact that the Claimant was 41 or 42 and Mr Pereira 47 or 48'.

Indirect discrimination

258. In *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.

Dual employment

259. In Viasystems (Tyneside) Limited v Thermal Transfer (Northern) Limited [2005] IRLR 983 it was said in the context of a claim for personal injury that:-

> "76…In my judgment, there is no doubt that there has been a long standing assumption that dual vicarious liability is not possible, and in such a situation it is necessary to pause carefully to consider the weight of that tradition. However, in truth, the issue has never been properly considered. There appears to be a number of possible strands to the assumption. Two are mentioned by Littledale J: the formal principle that a servant cannot have two masters; and the policy against multiplicity of actions. As for the first, even if it be granted that an employee cannot have contracts of employment with two separate employers at the same time and for the same period and purposes – and yet it seems plain that a person can (a) have two jobs with separate employers at the same time, provided they are compatible with one another; or (b) be employed by a consortium of several employers acting jointly – nevertheless that does not prevent the employee of a general employer being lent to a temporary employer"

260. That decision was approved by Silber J in the case of *Prison Officers Association & Ors v. Gough & Anor* [2009] UKEAT 0405/09, who upheld the decision of an employment judge that two employees were employed by both the prison service and a trade union.

261. In the case of *Clark v Harney Westwood & Reigels & others* (EAT, 21 December 2020), Choudhury P noted held at [41]:

> "The question, "Who is the employer?", will in most cases be capable of being answered without difficulty. However, in any situation where the corporate structure of the "employer" comprises more than one entity, the answer might not be quite so straightforward. That is perhaps all the more so where the relevant corporate entities are situated in different jurisdictions." After reviewing the authorities, he laid down the following principles [52]:
>
> "a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: Clifford at [7].
>
> b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence: Clifford at [7].
>
> c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: Bearman at [22], Autoclenz at [35].
>
> d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: Bearman at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?
>
> e. In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: Dynasystems at [35]."

CONCLUSIONS

262. The Tribunal has received very extensive submissions in two rounds from both parties. The written evidence in this case is voluminous. We have not attempted to capture every single development in the chronology, nor have we addressed every paragraph of the written submissions. Nevertheless we have read and considered all of the written submissions and dealt in these written reasons with those points which seem to us to be essential ones from each parties' perspective.

Time limits and jurisdiction

263. The Claim was presented on 12 May 2020, following ACAS certificates which were issued on the following days:

263.1. (R1) 1.4.20 notified and issued on a single day

263.2. (R2) 30.4.20 - notified and issued on a single day

263.3. (R3) 30.4.20 - notified and issued on a single day

264. The claim against the Fourth Respondent was added by amendment at the hearing on 17 April 2021. An ACAS certificate would not be necessary (*Mist v Derby Community NHS Trust* UKEAT/0170/15, [2016] ICR 543).

265. It follows that 2 January 2020 is the earliest date in time, unless there were continuing acts. For an act which occurred on 1 January 2020, the three month period would already have elapsed by the time the first ACAS notification was given on 1 April 2020.

266. The dismissal, which took effect on 1 March 2020, was in time

267. We find that the claims about the following allegations were brought out of time:

267.1. Allegation 4 (2018) regarding appraisal;

267.2. Allegation 5 (2018) Mr Young;

267.3. Allegation 6 (2018) Mr Bhat;

267.4. Allegation 7 (2018) Mr Chung;

267.5. Allegation 8 (5 February 2018) millennials/ you older guys;

267.6. Allegation 9 (Feb 2018) old fogey;

267.7. Allegation 12 (May 2018) 45 year max age limit;

267.8. Allegation 14 (2019) unfair/arbitrary business targets;

267.9. Allegation 15 (May 2019) Ms Cancilleri recruited before performance concerns;

267.10. Allegation 16 (June 2019) Board presentation;

267.11. Allegation 17 (17 June 2019) Kraków dinner;

267.12. Allegation 24 approach to relocation and relocation costs.

268. We note that there are substantial gaps between some of the allegations above. We do not find that there was a continuing act or a continuing discriminatory state of affairs affecting the Claimant.

269. We have considered whether it is "just and equitable" to extend time. The burden is on the Claimant to show why we should extend time. An extension is the exception rather than the rule.

270. These allegations have been raised very significantly out of time. This must be viewed in the context of a three month time limit prescribed by Parliament, which is short. Delays lead to faded recollections and often put respondents in a difficult position dealing with allegations years after the event. In this case the allegations set out above were raised in the main 1 – 2 years after material events.

271. The Claimant did not become aware of matters after the event. He was aware of these incidents at the time that they occurred. The Claimant is an intelligent and capable person of considerable resources, who would have been able to take advice were this to be needed.

272. It can also be relevant to the exercise of this discretion to consider whether the Claimant is being shut out of an otherwise meritorious claim on the basis of time. With the exception of allegation 9, for the reasons given in brief below, we have would not have upheld these allegations.

273. We have decided in light of these factors not to extend time on a just and equitable basis.

Merits of out of time allegations

274. Given that we have found that these allegations are out of time, in the interests of proportionality and also of getting a decision to the parties as soon as practicable, while we deliberated carefully, we have dealt in these written reasons with these fairly briefly, in the alternative i.e. if we are wrong in the exercise of discretion regarding the just and equitable extension.

275. Allegation 4 (2018) regarding appraisal - the fundamental problem with this allegation is that the Claimant's evidence was to the effect that Mr Andre simply did not carry out appraisals for his direct reports. This appeared to be a failing wider than simply the Claimant (C306). We would not have found that there was less favourable treatment.

276. Allegation 5 (2018) Mr Young was replaced by Mr van der Aa who was a week younger. We were not satisfied that there was cogent evidence that age was a factor in Mr Young's dismissal.

277. Allegation 6 (2018) Mr Bhat - we had no basis not to accept Mr Andre's evidence that he did not know who this person was. It seems that the Claimant was mistaken in believing at paragraph 152 of his witness statement that Mr Bhat had been mentioned. In fact Mr Bhat was not dismissed.

278. Allegation 7 (2018) we accept the Claimant's case that a fairly clear instruction to dismiss Mr Chung was given. However we have borne in mind that there is evidence that the Claimant himself consider that there was a performance issue which seems to have subsequently resolved and Mr Chung was not dismissed.

279. Allegation 8 (5.2.18) millennials/ you older guys - the language alleged to have been used in the claim form is not fully substantiated by the Claimant's own witness statement which drops the word "older". We do accept however that the contrast being drawn to millennials (i.e. a younger generation) means that the differences between age groups was an implicit subtext. Looking at this as an allegation of harassment, the Tribunal could identify that this was unwanted conduct and that it related to the protected characteristic. It seemed to us doubtful however that what was essentially a rant at an entire team of senior managers would, objectively, amount to harassment. There was no element particular individual being singled out. That a senior colleague rolled his eyes in response according to the Claimant suggested that this particular message was not being taken too seriously by the intended recipients.

280. Allegation 9 (Feb 2018) old fogey - we found that Mr Andre did say to the Claimant that he was an old fossil who could not manage millennials. We note that this is not the allegation as pleaded, and the Claimant did not make an application to amend. Nevertheless there are two crucial ingredients of the pleaded claim here that succeeded, leaving aside the point about fossil or fogey. First, Mr Andre commented negatively on the Claimant's age and second, he commented negatively on Mr Cowie's inability to manage younger employees generally not merely by specific reference to the one individual who had recently resigned. Had this been in time we would have found that this amounted to harassment relating to age. It was an unwanted conduct. It related to age, which is a protected characteristic. We find it created an intimidating and hostile environment for the Claimant. By contrast to the general rant which is the substance of allegation 8, this was directed at the Claimant personally. We find that in all the circumstances it was objectively reasonable to consider that this unwanted conduct had this effect. This is important background for the age discrimination claims that were in time which are considered below.

281. Allegation 12 (May 2018) 45 year max age limit – while this is relevant background to later elements of the claim, it is not clear to the Tribunal what the detriment to the Claimant suffered in May 2018.

282. Allegation 14 (2019) unfair/arbitrary business targets - as has been dealt with in our findings of fact there was a difference between Mr Andre and Mr Cowie on the appropriate speed of implementation on passing on price rises to customers. This plainly generated an amount of friction between them. We would not have found that this was age discrimination in itself.

283. Allegation 15 (May 2019) Ms Cancilleri was recruited to replace C, in or around May 2019, before C was told of any performance concerns or made aware his employment was at risk - we did consider whether this allegation was so closely connected with the decision to dismiss that we ought to consider it as part of the same allegation or at least consider the possibility that there was a continuing act or a continuing state of affairs. Ultimately we concluded that this was a separate and distinct allegation. It had been pleaded as such. The nature of the allegation as we understood is that the Claimant was not told of performance concerns or made aware that his employment was at risk. While

these are factors which feed into our decision that the decision to dismiss was an unfair dismissal, we have formed the impression that this was very much the way that Mr Andre operated with the dismissal of senior managers. He wished to line up a replacement before affecting the dismissal so that there was continuity of management and to avoid the concern of shareholders. We accept that these were the reasons for this treatment and that these reasons were non-discriminatory.

284. Allegation 16 (June 2019) Board presentation - we would have accepted Mr Andre's explanation that he did not think that the way that Mr Cowie was presenting the data in one of the two graphs was fair, and that age was not a factor.

285. Allegation 17 (17 June 2019) Kraków dinner - we would have found that this was at worst a crass joke and poor management style. We would have reminded ourselves that not every instance of unreasonable behaviour necessarily found an inference of discrimination. We would not have found this to be age discrimination or harassment. There was nothing intrinsic to the comment that suggested that it was because of or related to age.

286. Allegation 24 relocation and relocation costs – we would not have found that this was because of the Claimant's age nor did we find that it was an act of victimisation. The Claimant moved from the US to the UK in October 2018. His first protected act was a year later in 1 October 2019.

UNFAIR DISMISSAL

3. Was C unfairly dismissed by R1 and/or R4?

287. (a) What was the reason, or principal reason, for C's dismissal?

288. *Rs contend that R1 and/or R4 dismissed C for "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held", namely that he "was a very senior executive who had lost the trust and confidence of Mr Andre as a result of the performance of the Foundry Division and Mr Andre's view that C should be dismissed was shared by the Board"* (¶92 GOR). –

289. We have considered the guidance of the Court of Appeal in *Leach*. We do not consider that the Respondent has established that there were proper grounds treating this as a trust and confidence dismissal. Indeed Ms Tomczak referred more than once in her oral evidence to the reason for dismissal as being performance, which we find is closer to the truth.

290. We do not find that this is anything like "irretrievable breakdown" situation as discussed in the decision of the Employment Tribunal in *Gallacher v Abellio Scotrail Ltd* (4 Feb 2020) to which the parties have referred us.

291. There are two principal reasons why we find this was outside the range of reasonable responses and therefore an unfair dismissal.

292. The first reason is procedural. The Claimant was not invited to a meeting where he was given in advance written notification of a possible dismissal and the reasons for it so that he could answer and give reasons why should not be dismissed. He was presented with a *fait accompli* on 1 August 2019.

293. Second, it is a basic requirement if an employee is to be dismissed for performance that they be given a warning, guidance and opportunity to improve before the decision to dismiss is taken. We do not find that the Claimant had been given an appropriate warning. Monthly meetings at which Mr Andre raised, on occasions dissatisfaction with the return on sales ratios and other matters do not in our view amount to a warning. We do not find that the Claimant was warned in clear terms that he might be dismissed, and what would be required to avoid that. He was never subject to a formal performance process.

294. For these reasons we find that the decision to dismiss and the procedure adopted fell outside of the range of reasonable responses. This was an unfair dismissal.

Polkey

295. In so far as the Employment Tribunal finds that a fair procedure was not followed, would a fair procedure have made a difference, pursuant to the *Polkey* principle (¶93 GOR)?

296. We anticipate that the Claimant will argue, given the lack of prior warning in appropriate terms that the Fourth Respondent employer could not have fairly dismissed on 1 August 2019 even had a fair procedure been followed. The Tribunal has not determined this point, and will invite submissions at the remedy hearing.

297. The Tribunal will need to consider as part of remedy whether, but for the dismissal, the Claimant would have retired at the end of 2020 as he indicated to Mr Andre in June 2019 or whether some other date for termination but for the dismissal would be appropriate.

AGE DISCRIMINATION

5. Did R1, R2, R3 and/or R4 (as specified in the table in the appendix ('the Table')) treat C less favourably than it/they treated or would have treated others, because of his age (58 years) (section 13 EqA)?

Dismissal (allegation 18)

298. A Tribunal is not obliged to use the operation of the burden of proof under section 136 of the Equality Act 2010 when it is in a position to make a positive

findings whether or not a particular discriminatory act occurred. In this difficult case we considered that there was room for doubt as to the facts necessary to establish discrimination relating to the motivation of Mr Andre. We did therefore consider this as a two-stage process.

Stage 1

299. At stage 1, we considered that the Claimant did make out a *prima facie* case of age discrimination, due to the following matters, which in our assessment could have led a Tribunal to reasonably conclude that an act of discrimination had occurred.

300. First are Mr Andre's comments in February 2018. The GEC was told that millennials were coming for their jobs. This in isolation might have been of little significance. More significantly, however, at the same GEC meeting the Claimant in particular was told that he was an "old fossil" who "did not know how to manage millennials". Had the claim about this second allegation not been out of time we would have found this comment to amount to harassment relating to age (see above). These comments suggest that Mr Andre had a particular preoccupation with "millennials" and with his senior management team viewed by reference to their age group or generation. Specifically with regard to the Claimant it suggested that questions about the Claimant's competence and the Claimant's age or age group were interlinked in Mr Andre's mind.

301. Second is the language used on the occasion of the dismissal. On 1 August 2021, Mr Andre told the Claimant that "the fit wasn't there" and that he "wasn't the right person". The Tribunal accept the submission that this kind of language might be used by an employer when they are seeking to justify discriminatory decisions (*Igen v Wong*).

302. Third are the inaccurate and inconsistent reasons given for dismissal. The letter of 9 October 2019 did not stand up to scrutiny as explanations for the dismissal which applied in February 2019 when the decision to dismiss apparently crystallised in Mr Andre's mind. This letter was important as it was the first opportunity to explain to the Claimant in writing why he had been dismissed. Further, there is a degree of inconsistency or variation in the way that the reasons for dismissal have been described, although we do not accept that this is to the extent suggested in the Claimant's submissions.

303. Fourth, the Respondents' policy of recruiting under 45 years for management roles below the GEC is of significance. The Corporate Respondents were entitled to pursue legitimate succession planning as various appellate authorities confirm. Based on the evidence have heard however it would be a permissible inference that the policy went beyond simply succession planning. In the case of the First Respondent organisation of which the Fourth Respondent was a part, we find that the policy about recruiting under 45 years was something very close to a rule across whole levels of management, to which there were occasional exceptions. This degree of focus explicitly on age so far aware from a more typical retirement age we find is unusual and potentially suggestive of a mindset where assumptions were made about

people and their abilities because of their age. We acknowledge that the 45 year policy did not apply to the Claimant's role.

304. Finally, there is the background of significant management change viewed in combination with the under 45 policy. The Claimant has highlighted changes in senior management positions emphasising that a series of senior managers were dismissed or left by agreement and then replaced with people that were younger. He has identified in his witness over 30 individuals in their 50s or 60s who he believes were replaced with younger successors. Not all of this came up to proof. The Claimant was mistaken about the age of Eric Pohlman for example and may have misunderstood the factual circumstances in other some cases, including situations in which in fact the person had been retained within the First Respondent organisation.

305. There is however evidence of a fairly ruthless approach to the management of senior managers, evidenced not only by the Claimant's witness statement, but also the First Respondents' own documents such as the plan to replace 9 out of 12 regional Vice Presidents and the weary but telling iMessage exchange between the Claimant and Mr van der Aa which suggested a succession of requests from Mr Andre to dismiss managers across the organisation. Based on the evidence we have seen these individuals are very largely in their 50s and 60s.

306. This anecdotal evidence about management change would not be sufficient on its own to establish circumstances from which a Tribunal could conclude, absent an explanation that the Claimant had been subject to unlawful age discrimination. Viewed in conjunction with the under-45 recruitment policy however it does however contribute something to the weight of evidence which satisfied the initial burden of proof on the Claimant at this stage.

Claimant's points not accepted

307. We did not accept all of the submissions or points put forward by or on behalf of the Claimant, some of which are discussed in these reasons.

308. Ms Tomczak very early on in her oral evidence described the Claimant as an "Old-Timer". This might suggest a particular mindset toward the Claimant. Ultimately however we are aware that these words, particularly used in American organisations simply denote someone of long service. We find that this was a sense in which she was using this description. We did not find that this in itself led us to draw any inference about the presence of discrimination.

309. We accept the submission put forward by Ms Belgrove that it would be wrong to draw an inference from a disputed live claim of age discrimination in a different jurisdiction.

310. The Claimant has relied upon lower ages of incoming managers than their predecessors at the level of individuals and average ages particular groups of managers. We have to approach this with a degree of care. It is not altogether surprising that the average age of incoming candidates for senior roles is somewhat below that of their predecessor in the same role. That in itself is

unsurprising and a function of the fact that employees join a particular role then age in it before moving on. A more telling comparison might be between the age of incoming managers at the commencing of a role with the age of their predecessor at *commencement* rather than *departure*. We do not have this data.

311. We do not accept all of the points made about inconsistency of reason for dismissal, as discussed further below.

Stage 2

312. At Stage 2 we have considered whether the Respondent's have discharged the burden on them to show that the treatment was in no sense whatsoever on the grounds of age.

313. Decisions to dismiss are often taken for more than one reason. We find that the decision to dismiss the Claimant is an example of this.

314. Even on the Claimant's own case there were points of difference between him and Mr Andre with regard to the implementation of pricing strategy, in particular paragraphs 525 and 557 of the Claimant's witness statement set out above. It is not altogether surprising that Mr Andre was applying pressure to his direct reports. As a CEO who was fairly recently in the role he was looking to make an impact on financial performance. We detect a degree of frustration on the part of Mr Andre with the Claimant.

315. Following *Igen* we are looking at this second stage for the Respondent to put forward cogent evidence for the dismissal. We are obliged to consider carefully explanations for failures to deal with a code of practice. In this case there was no process leading to dismissal whatsoever. The dismissal has been justified by the Respondents on the basis that this was a "trust and confidence" dismissal. To reiterate, we do not consider that the Respondent has established that there were proper grounds treating this as a trust and confidence dismissal.

316. The Respondents submit that senior executives are frequently dismissed without any conventional process in the interests of business continuity. We acknowledge that this is often what happens in the case of senior executive dismissals. Mr Andre mentioned that it would be risky from a shareholder perspective, which we acknowledge. We have not received evidence from the Respondents of significantly younger employees being dismissed in a similar way. The instances of dismissals that we have seen evidence of relate to people who are older than 45. Of course it may follow that seniority and age are intertwined. The Respondents might argue that there simply are not very senior people who are much younger and that it does not follow that age is the reason for this lack of process.

317. Dealing with the reality of this which was that it was a performance dismissal without any process, we note that the Respondents engaged a recruitment consultant for an initial scoping exercise in October 2018 which was the same month that the Claimant relocated to the UK. We have not accepted Mr Andre's

evidence that the Claimant himself had been told in terms that he was on notice to improve performance over six months or face dismissal, although we accept that the Board was told that six months had been given for an improvement. Nevertheless the Claimant's performance did improve as Mr Andre acknowledged to the board in December 2018.

318. The Respondents argue that the replacement of the Claimant, who was then aged 58, with a 52 year old replacement suggests that age is not a factor. It is clearly relevant that the brief for this recruitment stressed that a seasoned leader and maturity was required. This is a strong point in the Respondents' favour.

319. The Respondent argue that, following *Hogben* the differential of six years in the circumstances ought not to be considered evidence of age discrimination. We do not find that the *Hogben* decision particularly assists us for two reasons. First we are not comparing the situation of Mr Cowie with Ms Cancelleri. She is not his comparator. He was dismissed for "trust and confidence" or as we found in reality performance. She was an external recruit being brought into the organisation. We are looking narrowly at the decision to dismiss. The question we have to ask ourselves is whether the Claimant's age was part of the reason why he was dismissed when he was.

320. Secondly, the comparison in *Hodgen* between 41/42 and 47/48 is not the same as the comparison between 58 and 51 or 52 years old given the specific context of the present case. We accept Mr Susskin's point that proximity to retirement is important context. Individuals who are in early or late 40s would in any typical workplace would be loosely speaking somewhere in the middle of their careers. Comparisons of how long they had left in the workplace would be unlikely to be material. By contrast, in the Corporate Respondents' organisation, notwithstanding that there is no longer a mandatory statutory retirement age, nor as far as we are aware any contractual retirement age, we find that the reality was that there was an expectation that someone who was 58 in a senior position was close to the end of their career.

321. We draw this inference from the evidence we have heard about the age of numerous departing colleagues and for two reasons in particular. First, the focus on recruiting with candidates in their forties who had sufficient "runway" was plainly to ensure that candidates were recruited who were young enough to gain experience of the organisation before they were in a position to 'take off' into more senior roles before retirement. By implication candidates older than 45 years of age would not have sufficient time to do this, which suggests that they would, in the minds of the Respondents have reached an age at which further progress was no longer feasible.

322. Second, the letter dated 17 October 2018 explicitly stated that for a "seasoned leader" this would be "the last assignment". Given that the two candidates considered were in their early 50s it follows that even by that stage they were seen as being approaching the end of their career.

323. In this context, the distinction between 51/52 and 58 years is material.

324. The Respondents argue that there is no evidence of a "grand plan to dismiss the Claimant because of his age", by highlighting that Mr Andre had acknowledged improvements in Mr Cowie's performance in December 2018. Whether or not there was a grand plan to dismiss the Claimant is not determinative of whether that decision was discriminatory or not. There was by the Respondents' admission an undisclosed plan for 5 months from the end of February 2019 onward.

325. Given that we are considering this matter at stage 2 of the operation of the burden of proof, the task for the Tribunal is to assess whether the Respondents have proved that the decision to dismiss which crystallised in late February 2019 and was communicated to the Claimant on 1 August 2019 was in no sense whatsoever because of his age, i.e. that his age was in no way causative of that decision.

Conclusion on discriminatory dismissal

326. The Claimant himself acknowledges in his witness statement paragraph 70 that he did not expect the Tribunal to establish whether there was discrimination in each case of older senior managers being dismissed or in some way edged out of the organisation. That is realistic. The Tribunal cannot do that in the case of the 34 individuals named at paragraphs 249 and 251 of his witness statement.

327. Mr Cowie's witness statement in some cases contains amount of detail. In others it is very light on detail and rather anecdotal. In cross examination the Claimant did concede that there had been some mistakes or misunderstandings. We did not however come to the conclusion that the Claimant was mistaken in his central contention that a significant number of senior managers in their 50s and 60s were coming to the end of their careers within the First Respondent organisation, and not at a time of their own choosing. We find however that there is some contemporaneous evidence that this was occurring.

328. We have exercised a degree of caution about the significance of this, since succeeding managers are likely to be younger than their predecessors in the natural order of things, and very senior managers tend to be older simply by virtue of the fact that they need experience to be in those roles. Nevertheless the combination of these individuals reaching the end of their employment together with the 45 year policy certainly meant that average age of the management team below the GEC was appreciably decreasing. This was, we find, by design.

329. All of this however is background to the decision in the Claimant's case. Recruitment into his role was not subject to the less than 45 year policy. It was a very senior role, requiring someone of significant experience and we have reminded ourselves that the candidates being considered for it were in their early 50s.

330. Ultimately the Tribunal must focus on the decision in the particular case of the Claimant, and specifically on the decision process of Mr Andre, consciously and subconsciously as far as we are able to.

331. Mr Susskin has characterised the Respondents' case as a "kaleidoscope" of different reasons. He identifies seven separate and distinct reasons given for dismissal. He submits that each is different and that this is suggestive of an employer struggling to find a justification in retrospect, rather than an one with a sound and stable reason for dismissal. We refer to these reasons below as reasons 1-7.

332. We do not accept as Mr Susskin submits in reason 4 that ROS had never been set as a priority and that this was new in the Grounds of Resistance. There is contemporaneous evidence that ROS was raised by Mr Andre as a priority in writing to the Claimant. It is clear from Mr Andre's email of 2 August 2018 that ROS had superseded growth as his priority.

333. As to reason 5 it is suggested that trading profit was a new metric for assessment of performance introduced in Mr Andre's witness statement. We find however that trading profit was used as a metric, e.g. it was clearly contained within the Foundry strategy plan in January 2018. Trading profit is one of the two components in the calculation of ROS, so the two are linked.

334. Reason 6 is the failure to implement price rises, which it is argued became the centrepiece of the Respondents' case at Tribunal. The reality is however, that this was an ongoing source of friction between Mr Cowie and Mr Andre as can be seen in contemporaneous documents and in Mr Cowie's own witness statement. Implementing price rises was the central element in achieving Mr Andre's target for ROS.

335. Reason 7 is based on Mr Andre's oral evidence. He told the Tribunal:

> "I was of a different opinion, and I needed to take necessary measures so that my vision be implemented. If one of my executives, even in good faith, had a different opinion, I have only two choices: either succeed in convincing him or change him. I could not succeed in convincing him of my vision; I had to replace him."

336. It is submitted on behalf of the Claimant that this explanation undercut all of the Respondents' previous attempted justifications for dismissing the Claimant. On this account, argues Mr Susskin it was not about trust, or competence, or dynamism, or poor communication, or performance, or any of the other criticisms levelled at the Claimant after the event.

337. We do not accept that the seven reasons for dismissal identified by Mr Susskin are entirely separate and distinct in the way that he suggests. There is a degree of overlap and the various metrics used are interlinked, a point highlighted effectively by Ms Belgrove. Nevertheless, there is a significant difference in emphasis from the reasons given on 9 October 2019 which refer to missed financial and organisational objectives (which transpires were not those in the

mind of Mr Andre in February 2019 at all) and the letter from Ms Tomczak 24 February 2020 which purports to identify an inability to accept issues, identifies for the first time alleged criticism from his leadership team and criticises a lack of direction and poor communication. This was new and was being raised a year after Mr Andre says his decision to dismiss crystalised and over six months after the decision was communicated to the Claimant. Reason 7, put forward by Mr Andre in his oral evidence as a difference of vision is different again from the 9 October 2019 reasons and the 24 February 2020 reasons.

338. We find that the inadequacy and inaccuracy of the reasons put forward for dismissal on 9 October 2019 is significant.

339. The burden on the respondent at the second stage is to show that the treatment was in no sense whatsoever because of the protected characteristic. Given the inconsistencies, the inaccuracy of reasons and the differences in emphasis identified above we do not find that the Respondents in this case have discharged the burden on them. Ultimately we do accept the underlying thrust of Mr Susskin's submissions on dismissal that the explanations we have received are a case of an employer seeking to justify a decision in retrospect.

340. As we have discussed above, this was not in reality a 'trust and confidence' situation. From October 2018 prices were being passed on to customers were rising faster than increases material costs which was a particular priority of Mr Andre. Crucially, the whole market was in a slowdown, which inevitably affected performance across all divisions, not simply Foundry. By February 2019 the First Respondent business was facing challenging markets across all divisions to the extent that the following month cost cutting was required across the whole business. We are not satisfied that "performance" is the entire explanation for the decision to dismiss the Claimant as it crystalised in Mr Andre's mind in February 2019.

341. Taking account of all of the evidence in the case, we find that the Claimant's age was one of the factors which lead Mr Andre to the decision to dismiss.

342. It follows that we find that the decision to dismiss was unlawful age discrimination on the part of the Fourth Respondent as employer and Third Respondent Mr Andre as agent for the Fourth Respondent.

Hypothetical comparator

343. We find that the Respondents have not satisfied burden on them at stage 2 and accordingly the claim succeeds. We have not needed to deal with a comparator in order to make a decision on this claim. Nevertheless the parties have made submissions on a hypothetical comparator, and we deal with that out of completeness.

344. Mr Susskind references the Claimant's unchallenged evidence on favourable and lenient treatment of younger managers at paragraphs 261 – 269 of the Claimant's witness statement in support of his contention that a younger manager (one with longer "runway") would not have been forced out so quickly.

345. Ms Belgrove highlights that this conclusion was not put to Mr Andre in cross examination.

346. We approach the question of a hypothetical comparator then with some difficulty, since the point about more favourable treatment of a hypothetical younger employee in Mr Cowie's situation was not put to Mr Andre, and part of the evidential basis for Mr Cowie's suggestion was not challenged by the Respondents. That is not a criticism of either Counsel given the large number of issues and wide factual scope in this matter and that there was a need to be selective given time pressure in a reduced timetable.

347. The Tribunal did discuss a hypothetical comparator in our deliberations. That this was based on our impression from all the evidence we have heard and not in reliance on the alleged lenient treatment of younger managers in the Claimant's witness statement. Had we needed to rely on a comparator to determine this matter, we would have accepted that a manager in a similar position to Mr Cowie in all material respects other than being in his/her 40s rather than 58 would have experienced more patient treatment from Mr Andre. In the case of that hypothetical manager we find that Mr Andre would not have decided to dismiss in late February 2019.

Other allegations of age discrimination

348. As to the other allegations of direct age discrimination, namely **allegations 19-27**, the Claimant is likely to argue that these matters all flow from allegation 18 i.e. the discriminatory dismissal. That is a matter to be considered as part of remedy later stage.

349. As to whether any of these allegations amounted separately to direct age discrimination in themselves, we have found that they did not. All of these matters arose because of the Claimant's dismissal and in some cases because of the matters that he raised following his dismissal. We do not however detect that the Claimant's age was a reason in itself for that treatment. Indeed the Claimant himself appeared to accept in cross examination that his age was not a factor in some of the post dismissal, post grievance events.

Justification of age discrimination

350. [**Issue 6**] Can R1, R2, R3 and/or R4 show its/their treatment of C to be a proportionate means of achieving a legitimate aim (pursuant to section 13(2) EqA)? In this regard, were age diversity and succession planning legitimate aims and was the treatment of C a proportionate means of achieving those aims?

351. We do not accept that "age diversity" *per se* was an aim of the Respondent at all, since in reality the focus of the recruitment efforts was ensuring candidates below 45 years of age. We do however accept that succession planning, loosely speaking, was the aim.

352. 'Succession planning' is really a process rather than aim. The label "succession planning" in this case denotes an aim of having a pool of experienced internal candidates for the most senior management roles. That is the aim. Was it legitimate? Given that this is a business providing some cases highly technical products and services, ultimately we accept that there was a legitimate aim to provide for internal candidates with experience of the business for the most senior management roles.

353. We can see that it is potentially proportionate for an employer to seek candidates for certain roles of an age that allows for long term progression within the organisation. We have not had to deal with this however, since the allegations of age discrimination to which this justification relates have not succeeded.

354. Was the dismissal a *proportionate means* of achieving those aims? In other words was it appropriate and reasonably necessary?

355. It is not admitted that the dismissal was direct age discrimination. There is an evidential difficulty for the Respondents in justifying it. We do not consider the dismissal which, under another head of claim we have found to be unfair, was appropriate or reasonably necessary. We cannot see that it would be appropriate or reasonable necessary to dismiss an employee out of the blue without any process to make way for a younger employee. This is not analogous to for example a mandatory retirement age which might be appropriate and reasonably necessary depending on the facts of the case.

356. We do not see that the arguments advanced by way of justification in respect of the 45-year-old limit for recruitment apply to the circumstances of the dismissal in this case.

HARASSMENT RELATED TO AGE

357. [**Issues 10-11**] We have not found any allegations of harassment relating to age to be in time.

INDIRECT AGE DISCRIMINATION

PCPs

358. [**Issue 14**] Did R1, R3 and/or R4 apply to C a provision, criterion or practice ('PCP') which is discriminatory in relation to C's age (58 years) (pursuant to section 19 EqA)? C relies on the following alleged PCPs:

359. The nature of a claim of indirect discrimination is that it must relate to treatment which applies to a variety of different employees but causes a particular disadvantage to a group with a protected characteristic as well as causing a particular disadvantage to the claimant himself or herself.

360. We accept the Respondents' submission on this point that the fact that the PCPs alleged in this case applied to the Claimant and that is a fatal blow to the indirect discrimination claim.

361. Alleged PCPs 14(a), (b), (c), (d) did not apply to the Claimant. The reason for him not being considered for other roles was not the application of a policy. Following the terms of *Ishola* this was a one-off event rather than a PCP.

362. Alleged PCP 14(e) performance management procedures – the problem in this case was that Mr Andre did not apply the procedure. This cannot succeed.

363. Alleged PCP 14(f) promotion and PCP 14(g) dismissal procedures we simply do not understand what the case is of practices which applied across-the-board, also applied to the Claimant but had discriminatory effect.

364. The claims for indirect age discrimination therefore fail.

INSTRUCTING, CAUSING OR INDUCING CONTRAVENTIONS OF THE EqA

365. [**Allegations 16-17**] these allegations are out of time.

VICTIMISATION

Protected acts

366. [**Issue 19**] The Tribunal finds that the following were protected acts:

367. First, the grievance and appeal against dismissal dated 1 October 2019; [D/7286]. Given that this does make allegations of age & race discrimination it cannot seriously be in dispute that this is a protected act.

368. Second, the appeal against dismissal and appeal against grievance outcome dated 9 March 2020 [D/7680] reiterated allegations of discrimination and was therefore a protected act.

Alleged detriments

369. [**Issue 18**] Did R1, R2, R3 and/or R4 (as specified in the Table) victimise C, pursuant to section 27 EqA? Specifically, did R1, R2, R3 and/or R4 subject C to a detriment because C did a protected act?

Grievance

370. It is convenient to deal with allegations 19, 20 and 21 which are substantially similar and overlapping.

371. [**Allegation 19**] The failure to involve or brief (properly or at all) the Chairman and/or the Non-Executive Directors about C's grievance submitted on 1

October 2019, appeal against dismissal, whistleblowing report and the allegations of discrimination raised by C.

372. We find that this was detrimental treatment, since the Claimant was contractually entitled to have grievances dealt with by the Board, and what appears to have happened is that the matter was passed to Ms Tomczak, with the Respondent's General Counsel being aware (D/7822). We are not satisfied based on the evidence that Ms Tomczak was the Board's designee, especially given that she admitted that she took the decision to investigate.

373. Why was the Claimant treated this way? Failing to allow the Claimant his contractual entitlement to have the matter investigated by the Board (chairman and/or non-executive directors) is a serious matter and requires an explanation, especially when the grievance was addressed to the Chairman of the Board. We do not consider we have been given a satisfactory explanation for this breach of contractual entitlement. We infer from the circumstances that it was because of the nature of the allegations of discrimination that the Claimant made. The detrimental treatment was because of the protected act.

374. [**Allegation 20**] Rs' failure to deal with, or in any way investigate, C's whistleblowing report submitted on 1 October 2019.

375. [**Allegation 21**] The failure to properly investigate C's grievance submitted on 1 October 2019, which was conducted by R2 who was a direct subordinate of the decision-maker

376. It is convenient to deal with these allegations together. It is not entirely clear whether allegation 20 adds anything to allegation 21.

377. The Claimant did not receive an outcome to his grievance until 24 February 2020, i.e. nearly 5 months after its submission. This is not satisfactory, although we acknowledge that delay in investigations is something that frequently happens, and we would not infer victimisation from this in isolation.

378. Ms Tomczak carried out a superficial investigation in which we find she was not genuinely independent. As noted above, at least one interviewee would not even have been aware that he was being interviewed as part of a grievance process. She only spoke to 4 people when the allegation was of widespread systemic discrimination, being made by a very senior individual. She had a conflict-of-interest given she reported directly to Mr Andre.

379. We accept the Claimant's submission that the grievance outcome contained material inaccuracies. It was stated that Egon Zender were appointed in early 2019, which was false. The suggestion that attendee<u>s</u> *plural* at the Brazilian GEC have been spoken to was misleading. In fact only one person had been spoken to. Ms Tomczak admitted in evidence that she had not spoken to anyone who had been at the Kraków meeting, contrary to the content of the grievance outcome letter.

380. We find that there was a failure to properly investigation the allegations.

381. That the First Respondent's Chairman Mr McDonough subsequently reviewed the findings with the benefit of external advice is not in our view adequate, either under these allegations nor under allegation 19 above.

382. Why was the Claimant treated this way? We infer from the circumstances that it was because of the nature of the allegations of discrimination that the Claimant made. The detrimental treatment was because of the protected act.

383. We do not find that we have a sufficient evidential basis to establish this claim against Mr Andre. We infer that he must have had some awareness of the grievance process, but it was ultimately Ms Tomczak who took these actions. We find that she was acting as an agent for the Claimant's employer.

384. Allegations 19, 20 & 21 of victimisation succeed against the employer Fourth Respondent and against the First and Second Respondents as agents for the Fourth Respondent.

Alternative roles

385. [**Allegation 22**] Rs' failure to explore alternatives to dismissal in late 2019 and early 2020, including transfer or redeployment or a sideways move, despite the availability of numerous other roles within the Company, including group Chief Technical Officer; VP Flow Control NAFTA; Foundry Europe M&T Director; M&T Director Flow Control or any other roles of a sales or managerial position.

386. We have noted that at the meeting on 1 August 2019 Mr Andre mentions possibility of consulting role on £25k per month reporting to him. This did not come to anything.

387. On 26 February 2020 the Claimant wrote directly to Ms Tomczak raising the possibility of him taking up substantive roles lower in the organisation than the one he had been performing, rather than consulting or advisory roles. (D/7666-7)

388. Can we infer from the circumstances that this was because of the allegations raised by the Claimant in his grievance on 1 October 2019?

389. Ms Tomczak's position was that she did not take the Claimant's position seriously, in other words she did not treat these as genuine applications for roles. Furthermore given her view that the Claimant had been dismissed for capability or performance, it would not have been appropriate to put him into a "P&L" role.

390. The Tribunal did not make an assessment of whether this was a fair or reasonable position for the Respondent to take in the circumstances. The question for the Tribunal is why was the Claimant not offered another role, albeit a junior one.

391. The Tribunal accepted Ms Tomczak's evidence as to the reasons why the Claimant was not offered alternative roles. We do not find that this was because of the allegations raised by the Claimant.

392. This allegation fails.

Appeal

393. [**Allegation 23**] The decision to refuse to consider C's appeal against his dismissal and R2's grievance outcome in March 2020.

394. The appeal outcome letter dated 24 February 2020 (D/7676) specified that the right of appeal was to General Counsel Henry Knowles within 7 days of the date of this letter.

395. The Claimant highlights that the grievance outcome document was sent by email on 29 February 2020, which was a Saturday. The practical effect of that, he says was to cut down on the amount of time he had to appeal it.

396. If the Claimant had opened this letter on the next working day after it was sent, i.e. Monday 2 March 2020, the appeal deadline would expire on that day as it was 7 days after the appeal outcome letter dated 24 February.

397. In fact the appeal was submitted on 9 March 2020 to the First Respondent's solicitor. This was seven days from the first working day on which the letter had been received by the Claimant. The ability to appeal the matter was declined on the basis that it was out of time and had been submitted the wrong person.

398. The experience of the Tribunal is that most employers apply a little leeway when internal appeals are submitted late.

399. Had the Claimant had the benefit of a separate independent appeal, some of the matters that he raised might have been looked into more detail. There was always the possibility of resolution. He was denied this. We find this amounted to a detriment.

400. Was this because of the allegations of discrimination. We find that it was. We find that the Respondents were simply trying to "close down" the allegations being made by the Claimant.

401. This allegation succeeds against the First Respondent, Second Respondent and the Fourth Respondent only. We find that the First and Second Respondent were acting as an agent for the Fourth.

Untruthful/damaging comments made to Board members

402. [**Allegation 25**] Untruthful and damaging comments that were apparently made to Board members and/or at Board meetings (falsely) alleging that C wrote to analysts in improper terms and/or was on a campaign to discredit the company.

403. We do not find that the Claimant has made out a *prima facie* case in respect of any the claims brought in respect of this factual allegation. The evidence relied upon by the Claimant is hearsay, although that is not a reason to disregard it. Ultimately however we do not find that we have sufficient evidence which

supports an allegation that untruthful and damaging comments were made to Board members. This allegation fails.

Communication about unvested shares

404. [**Allegation 26**] Rs' failure to communicate with C, adequately or at all, about the treatment of his unvested shares and/or his performance for the purpose of assessing his share rights. The fact that C was not given any right to make representations prior to Rs' decision about the treatment of his unvested shares.

405. The Claimant argues that "natural justice" required communication about his unvested shares. We are not satisfied that this amounts to less favourable treatment or detrimental treatment or that it adds anything to allegation 27 below.

406. This allegation fails.

Bad leaver

407. [**Allegation 27**] Rs' decision to treat C as a bad leaver in respect of his share entitlement, as confirmed in the GOR at ¶37-39.

408. The Respondents' case is that the circumstances of the Claimant's dismissal were not such as to mean that he was automatically a "good leaver". They argue that he was not made redundant. It was not a termination of employment due to ill health.

409. In addition to the stated categories of 'good leaver', the Remuneration Committee had the discretion to allow unvested shares to vest in other situations as described in the 'Early Leavers Policy' for example, the policy permitted the discretionary grant of 'good leaver' status where a swift termination agreement could be agreed. It is argued that the Claimant's departure did not fall within these circumstances either; despite negotiations, a termination agreement (whether swift or otherwise) could not be agreed with the Claimant. The Respondents accept that in addition to the stated categories of 'good leaver', the Remuneration Committee had the discretion to allow unvested shares to vest in other situations as described in the 'Early Leavers Policy' [D/28]. The Respondent submits that this is plainly a commercial matter, and is nothing to do with age or any other unlawful factor.

410. The Claimant highlights that a former colleague Mr van der Sluis, President Flow Control, and of similar age and also a very long-term employee, who left the company within a few months of the Claimant's dismissal who was treated as a good leaver thus retaining all his long-term incentives. Mr van der Sluis did not raise a grievance of discrimination or mention or bring discrimination claims.

411. It is argued on behalf of the Claimant that:

412. The Respondents would typically exercise discretion to treat such a leaver as a Good Leaver in a number of ways – e.g. by declaring him "retired" as they did with Chris Young (who was actually dismissed for performance).

413. The Remuneration Committee's policy provided the requisite flexibility to treat individual cases justly. Their hands were not tied: "The Remuneration Committee reserves the right to depart from the above Policy, on a case by case basis, in any circumstances where the Remuneration Committee considers this appropriate".

414. In November 2019, Ms Tomczak assumed that the Claimant would be recommended as a Good Leaver, irrespective of the rules. But Mr Andre specifically refused to agree that Mr Cowie could be a Good Leaver until "the current situation" was resolved. He wrote "in case he will sue us, my recommendation to the Remco will be not to grant him the good leaver status"

415. The "current situation" was the fact that the parties were in disagreement. A substantial source of the disagreement was that the Claimant had made serious allegations in his Grievance dated 1 October 2019 (i.e. protected acts and protected disclosures). In oral evidence, Mr Andre admitted this. He said that the "current situation" concerned two areas of dispute: the "sums to be paid" to the Claimant upon his departure, and that the Respondents "didn't agree with the allegations raised by Mr Cowie in his Grievance", i.e. his protected acts and protected disclosures.

416. The Claimant only need show that the influence of his protected acts was "more than trivial": *Igen* at [37].

417. It is clear from what Mr Andre said that the Claimant's allegations were a significant part of the reason why the parties had not reached a settlement agreement.

418. We accept the arguments put forward by the Claimant. In circumstances in which was presumed that the Claimant was going to be a good leaver by the head of HR Ms Tomczak, the Remuneration Committee had the discretion to do this and Mr Andre then refused to categorise him as a good leaver, we find that this refusal was a detriment.

419. Mr Andre admitted that it was because of the allegations the Claimant raised.

420. It seems fairly clear that the protected act was a substantial part of the reason for the detrimental treatment. It was certainly more than a trivial cause.

421. This allegation succeeds against the First, Third and Fourth Respondents.

PROTECTED DISCLOSURE DETRIMENT

Protected disclosures

422. [**Allegation 21**] The Claimant relies on his grievance and appeal against dismissal and "whistleblowing report" dated 1 October 2019; [D/7286]

423. We find that the grievance/appeal against dismissal dated 1 October 2019 was a protected disclosure. It disclosed information in relation to the two allegations of discrimination. There were specific factual allegations relating to specific individuals in support of allegations of age discrimination and race (nationality) discrimination. These are enumerated at paragraph 178 of the Claimant's principal closing submissions.

424. The Claimant believed the allegations were true. We bear in mind that a belief may be wrong and yet reasonably held. We find that the Claimant reasonably believed that he had suffered age discrimination contrary to the Equality Act 2010 and that this was part of a wider pattern affecting other employees.

425. Following *Chesterton*, this was in the public interest given that it affected a subset of the population, namely older employers of the Corporate Respondents.

426. Reasonable belief that it tended to show that a person had failed, was failing, or was likely to fail to comply with legal obligations including equality/discrimination laws, failures to investigate the same; code of conduct

427. Similarly, for similar reasons we find that the Claimant's appeal against dismissal and appeal against grievance outcome dated 9 March 2020 was a protected disclosure.

Detrimental treatment

428. The detrimental treatment in the public interest disclosure detriment claim substantially overlaps with the detrimental treatment in the claim of victimisation.

429. The test for causation in detriment because of protected disclosures is be "more than trivial": *Fecitt v NHS Manchester* [2011] EWCA Civ 1190.

430. For similar reasons for those contained above, our findings are consistent with those in the claim of victimisation.

431. Allegations 19, 20, 21, 23 succeed against the First Respondent, the Second Respondent Ms Tomczak and the Fourth Respondent only.

432. Allegation 27 succeeds against the First Respondent, the Third and Fourth Respondents.

Right to be accompanied

433. This allegation is brought out of time. The meeting to which it relates occurred on 1 August 2019. The claim was brought on 12 May 2020.

434. In order for the Claimant to rely upon the "the escape clause" for a claim presented late provided by section 11(2) of the Employment Rights Act 1999

he must show that it was not reasonably practicable to present the claimant time.

435. We do not find that it was not reasonably practicable to present the claim in time, nor that the claim was presented within such a period as was reasonable thereafter.

436. This allegation fails.

CONFIDENTIAL INFORMATION

437. The Respondents have highlighted that the Claimant sent confidential information to himself in August 2019. Indeed the Claimant does not deny it.

438. The Respondent accept that this is a point that goes primarily to remedy, but also to the Claimant's credibility. The Claimant was candid in his answers in relation to this confidential information. We do not find that these matters undermine his credibility. We find in particular that the Claimant during his lengthy oral evidence made appropriate concessions where necessary, even where this clearly undermined the basis of certain of his claims. We do not draw from this point about confidential information being email to the claimant a general credibility point which undermines his evidence. In any event we would make the observation that the majority of our findings are based on contemporaneous emails and other documents. We are not simply reliant on oral testimony in the absence of other evidence.

439. It seems to the Tribunal that these matters are relevant to remedy rather than liability.

Claims against First Respondent: employer or agent?

440. It is not disputed that the Fourth Respondent was the Claimant's employer at the times material to the claims that have succeeded.

441. The basis of the claim against the First Respondent Vesuvius plc was set out by the Claimant's solicitor in the amendment letter dated 8 January 2021, specifically the following actions of the First Respondent [HB/376-377]:

441.1. determination of salary;

441.2. payment on Mr Cowie's payslips;

441.3. effective control through the CEO Mr Andre (Third Respondent) and the Chief HR Officer Ms Tomczak (Second Respondent);

441.4. determination of financial objectives;

441.5. benefits and legal entitlements provided directly, including share rights, relocation benefits and bonus rights by a contractual "Side Letter" dated 14 August 2018 (the same date as a service contract with the Fourth Respondent) set out particulars of Mr Cowie' employment, including his

remuneration, his performance/bonus rights, his relocation rights and other benefits, was provided on Vesuvius Plc headed notepaper, and signed by the CEO of Vesuvius Plc. Communication about his employment e.g. grievance outcome letter dated 24 February 2020 came from the First Respondent's CHRO.

442. Additionally, it was clarified that the claim as to the handling of his share entitlements, under the heads of direct age discrimination, direct nationality discrimination, and victimisation were principally against Vesuvius Plc, which (a) issued the scheme in question, (b) administered it, and (c) took the alleged unlawful decisions (via its Remuneration Committee and/or its officers, agents or employees) i.e. lack of communication and designation as a bad leaver. Further the letter confirming the termination of the Claimant employment, and the Grievance Outcome, both dated 24 February 2020 were authored by Ms Tomczak, "Chief HR Officer", Vesuvius plc, who was understood to have held that title at Vesuvius Plc at the relevant time (as well as a number of roles for other group companies). Elements of the claim, such as the maximum 45 year limit on recruitment candidates were said to be claims against the First Respondent on the basis that this was their policy.

443. Neither party addressed this question in particular detail in evidence or in closing submissions.

444. The Claimant's closing submission in reply dated 5 November 2021 at paragraph 40 appears to mix up the First and Fourth Respondents. This is the only way we can make sense of these submissions. If we are wrong then of course Mr Susskind can take steps to correct our misunderstanding. His argument is, as we understand it that the First Respondent exerted effective control through the Board, including setting salary; that he was subject to the Code of Conduct and Human Rights Policy. He references the "strong confirmed push" and the grievance outcome and the contractual "side letter" dated 14 August 2018 as arguments that the First Respondent was also an employer at the material time.

445. The application to amend to bring a claim under section 112 (aiding a contravention of the Equality Act 2010) was refused at the hearing on 17 February 2021 and does not appear to have been renewed.

446. The potential options are that the First Respondent was a joint employer with the Fourth Respondent, or that it acted as an agent for the Fourth Respondent or neither. If it is agent there is potentially liability under section 110 EqA.

447. The starting position is the contractual documentation. That defines the Fourth Respondent as the Claimant's employer. Albeit that the "side letter" dated 14 August 2018 is written on First Respondent headed paper, given that this was issued on the same day of the contract, i.e. 14 August 2018, it seems that references to the company are references to the Fourth Respondent as defined in the contract.

448. Is there a reason for the Tribunal to conclude that these contractual documents do not reflect the intentions of the parties as at August 2018 when the contractual documentation was being drawn up to reflect the Claimant's relocation to the UK? We do not find that this is a *Autoclenz* sort of situation where we ought to go behind the contractual documents on the basis that that does not reflect the reality of the working relationship or the intention of the parties. We find therefore that the Fourth Respondent was the Claimant's employer at all material times as per the contract. The First Respondent was not the employer.

449. To extent to which the Second and Third Respondent communicated with the Claimant and made decisions such as those relating to his dismissal, these were as agent (if not employee) within the meaning of section 109 and 110 EqA for the Fourth Respondent. They were acting on behalf of the employer and had authority to do so.

450. As to the operation of the share scheme, we find that to the extent that actions were being taken by the First Respondent, e.g. in respect of the handling of the grievance/appeal, treating the Claimant as a bad leaver, this was as agent within the meaning of section 109 and 110 EqA for the Fourth Respondent. The First Respondent was acting on behalf of the employer and had authority to do so.

REMEDY HEARING – CASE MANAGEMENT ORDERS

1. A remedy hearing has been listed on **Monday 9, Tuesday 10, Wednesday, 11 May 2022**.

2. Any difficulty with the date of this remedy hearing should be raised by **28 January 2022**. If it is contended that a crucial participant is not available, e.g. due to an important event which cannot be rescheduled evidence must be provided in support.

3. If any party considers that this listing is inadequate, they are requested to liaise with the other side and provide an estimate for the length of the remedy hearing, agreed if possible.

4. Please note that the Tribunal will retain the electronic bundles from the liability hearing.

5. The Claimant should provide an updated schedule of loss by **16 February 2022** together with an index and copy documents on which he relies in support of his claim, together with any other document relevant to remedy.

6. The Respondents shall produce an updated counter schedule of loss by **9 March 2022**, together with copies of any documents on which they rely, together with any other document relevant to remedy.

7. By **16 March 2022** the Claimant shall provide to the Respondents a draft list of issues for the determination of remedy.

8. Each party should identify which documents they wish to be in the remedy bundle by **23 March 2022**.

9. By **30 March 2022** the parties shall agree and finalise the list of issues fore the remedy hearing.

10. The Claimant shall take responsibility for the remedy bundle which shall be emailed to the Respondents by **6 April 2022**. There is a page limit of **500 pages** for this bundle. Parties are requested to select for inclusion documents that Counsel will actually refer to in the hearing. In the event of any dispute the Claimant may select the 300 pages on which he relies and the Respondents may select their own 200 pages. Parties are reminded that they may refer to documents already contained in the bundles retained by the Tribunal.

11. The parties should exchange witness statements relevant to remedy by **20 April 2022**. The Claimant and the combined Respondents are each limited to **2,500** words in total for their witness statement evidence. Each witness statement will contain a word count on the final page. The Tribunal may simply disregard words in excess of this limit.

12. The parties are ordered to exchange and send to the Tribunal electronically any written submissions on which they rely together with electronic copies of

the remedy bundle, all witness statements, a separate copy of the list of issues for remedy in Microsoft Word and any legal authorities relied upon by **4pm on Wednesday 4 May 2022**, marked in the subject of the email for EJ Adkin. This may be copied to Employment Judge Adkin's skype address for convenience.

13. The Claimant shall arrange for a single double-sided hard copy of the remedy bundle to be delivered to the Employment Tribunal clearly marked for the attention of Employment Judge Adkin by **4pm on Wednesday 4 May 2022**.

14. Each side should provide hard copies of witness statements marked for the attention of Employment Judge Adkin by **4pm on Wednesday 4 May 2022**.

Employment Judge Adkin

Date 21 January 2022

WRITTEN REASONS SENT TO THE PARTIES ON

21/01/2022.

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.