Case Number: 3320662/ 2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Davies**

Respondent: **Melin Homes Ltd**

Heard at: **By video (Cardiff)** **On: 26 October 2022**

Before: **Employment Judge R Harfield (sitting alone)**

Representation:
Claimant: Mr Davies represented himself
Respondent: Mr Jones (Counsel)

RESERVED JUDGMENT
(Strike out & deposit order)

It is the decision of the Employment Judge sitting alone that:

1. The "ordinary" unfair dismissal complaint is dismissed upon withdrawal;

2. The complaints of direct sex discrimination do not have a reasonable prospect of success and are struck out;

3. The complaint of indirect sex discrimination does not have a reasonable prospect of success and is struck out;

4. The complaints of direct age discrimination in relation to:
    a. The decision to dismiss;
    b. Not giving the claimant warning/details of the allegations in advance of the dismissal meeting;
    c. Not adopting an alternative to dismissal

    have little reasonable prospect of success. The claimant will be ordered to pay a deposit on condition of continuing with his direct age discrimination complaints, as set out in the separate deposit order;

5. The complaints of harassment related to sex and/or age summarised at identified as (b), (f), (g), (i), (j), (k), (l), (m), (n), (o), (p) and (q) are dismissed upon withdrawal;

6. The complaints of harassment related to sex of identified as (a), (c), (d), (e), (h) do not have a reasonable prospect of success and are struck out;

7. The complaints of harassment related to age of (a), (c), (d), (e), (h) have little reasonable prospect of success. The claimant will be ordered to pay a deposit on condition with these complaints, as set out in the separate deposit order;

8. The complaint of victimisation is dismissed upon withdrawal by the claimant or alternatively struck out on the basis that it has no reasonable prospect of success;

9. The complaint of trade union detriment has little reasonable prospect of success and the claimant will be ordered to pay a deposit as set out in the separate deposit order;

10. The complaint of unauthorised deduction from wages is dismissed upon withdrawal;

11. The complaint of inducing discrimination under sections 111 and 112 Equality Act is dismissed upon withdrawal;

12. The complaint of breach of contract under section 86 Employment Rights Act 1996 has no reasonable prospect of success and is struck out;

13. The complaint of breach of contract (notice pay) relating to operation of the discretion to pay the claimant in lieu of notice has little reasonable prospect of success and the claimant will be ordered to pay a deposit as set out in the separate deposit order.

14. The case will be listed for a further case management hearing once the claimant has decided whether to pay some or all of the deposit order. For the avoidance of doubt, all of the claims the claimant is pursuing that have not been struck out are subject to deposit order terms.

REASONS

1. Introduction

1.1 The claimant was employed by the respondent as a Property Maintenance Manager from 29 July 2019 to 21 June 2021. On 20 September 2021 he presented his ET1 claim form, indicating he was bringing complaints of unfair dismissal, sex and age discrimination (direct, indirect, harassment and victimisation), a deduction from wages claim in relation to flexi time, breach of contract, and detriment on the grounds related to trade union membership or activities. The respondent filed grounds of resistance resisting the complaints.

EJ Moore conducted a preliminary hearing on 30 March 2022 where the claims brought against 3 named respondents were dismissed as being out of time. EJ Moore clarified the claimant's complaint under s146 TULCRA but had insufficient time to clarify the basis of the remainder of the claimant's complaints. She directed that the claimant file further particulars about his direct and indirect discrimination age and sex discrimination complaints. EJ Moore directed that a further hearing be listed to determine:

1.1.1 Whether to strike out some or all of the claims because it/they have no reasonable prospect of success;

1.1.2 Whether to order the claimant to pay a deposit (not exceeding £1000} as a condition of continuing to advance any specific allegation or argument in the claim if the tribunal considers that allegation or argument has little reasonable prospect of success;

1.1.3 Clarify the remaining claims and make case management orders as well as list for the final hearing.

1.2 The claimant provided some further particulars and a schedule found at [45 to 60] in the preliminary hearing bundle. There then followed multiple pieces of correspondence passing between the parties that are contained in the bundle.

1.3 I had before me a preliminary hearing bundle extending to 170 pages. References in brackets are references to that bundle. I had a further bundle from the claimant extending to 59 pages. References to that bundle are prefixed with a "C" [C]. Both parties provided draft lists of issues. During the course of the hearing I was also provided with a copy of a document called "Our People Strategy 2020-23."

1.4 I spent some time with the claimant clarifying the basis of his complaints, as it is not possible to decide whether to strike out complaints or order payment of a deposit if the essential basis of each complaint is not understood. I heard submissions from both parties. The claimant also gave short evidence under oath as to his means, which is relevant to considering the deposit order application. By this time the 3 hour listing had overrun so I reserved my decision.

2. <u>The legal principles – strike out orders and deposit orders</u>

Deposit Orders

2.1 The power to make a deposit order is provided by rule 39 of the ET Rules, as follows:

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party")

to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

2.2 The test for the ordering of a deposit is therefore that the party has little reasonable prospect success. It was said by the Employment Appeal Tribunal in Hemdan v Ishmail [2017] IRLR 228 that the purpose of a deposit order is " *To identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs, ultimately, if the claim fails"* and it is*" emphatically not…to make it difficult to access justice or effect a strike out through the back door*." A deposit order should be capable of being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise.

2.3 As for the approach the Tribunal should take, in Wright v Nipponkoa Insurance [2014] UKEAT/0113/14 and Van Rensburg v Royal Borough of Kingston-Upon-Thames and others [2007] UKEAT/0095/07 it was said, a Tribunal is not restricted to a consideration of purely legal issues; it is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case

and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. That said there is a balance to be struck as to how far such an analysis can go. It was also made clear in Hemdan that a mini-trial of the facts is to be avoided. If there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested.

Strike Out

2.4 Under Rule 37 a claim or part of a claim can be struck out on grounds that include it has no reasonable prospect of success. A claim cannot be struck out unless the party has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

2.5 Operation of rule 37(1)(a) requires a two stage test. Firstly has the strike out ground (here "no reasonable prospect of success") been established on the facts. If so, secondly is it just to proceed to a strike out in all the circumstances.

2.6 When assessing whether a claim has no reasonable prospect of success the Tribunal must be satisfied that the claim or allegation has no such prospect, not just that success is thought to be unlikely (Balls v Downham Market High School and College [2011] IRLR 217). The Tribunal must take the allegations in the claimant's case at their highest. If there remain disputed facts there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue or the claim is fanciful or inherently implausible (Ukegheson v Haringey London Borough Council [2015] ICR 1285; Merchkarov v Citibank NA [2016] ICR 1121). In other words a strike out application has to be approached assuming, for the purposes of the application, that the facts are as pleaded by the claimant. The determination of a strike out application does not require evidence or actual findings of fact. A strike out application succeeds where it is found that, even if all the facts were as pleaded by the claimant, the complaint would have no reasonable prospect of success. It was said by Underhill LJ in Ahir v British Airways [2017] EWCA Civ 1392 that

> "*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment… Nevertheless it remains the case that the hurdle is high, and specifically that it is higher than the test for making a deposit order, which is that there should be "little reasonable prospect of success."*

2.7 There is a special need for caution in strike out discrimination cases because they are generally fact sensitive, because of the public interest in examining the merits at a final hearing, and because of the shifting burden of proof.

2.8 Where a litigant in person is involved the tribunal should not simply ask the question orally to be taken to the relevant material in support of the claim but should also carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding there is nothing of substance behind it; Cox v Adecco Group UK [2021] 1CR 1307.

2.9 If a strike out application fails the argument about the overall merit of the claim is not decided in the claimant's favour. Both the claimant and the respondent argue their positions on the merits in full and afresh at the full hearing.

3. "Ordinary" unfair dismissal

3.1 The claimant confirmed that he accepted he had less than 2 years service. He said that he knew he could not bring an ordinary unfair dismissal claim and it had not in fact been his intention to do so. Notwithstanding this the box had been ticked on his ET1 claim form. The ordinary unfair dismissal claim is therefore dismissed upon withdrawal.

4. Decision to dismiss the claimant: direct sex discrimination and/or direct age discrimination – summary of the parties' positions

4.1 I will summarise the parties' respective positions about the direct discrimination complaints, before setting out my decision and my reasoning, because there are overlapping themes between the direct discrimination complaints.

4.2 Row 1 of the claimant's schedule of his direct and indirect discrimination complaints is a direct discrimination complaint where the less favourable treatment alleged is the decision to dismiss the claimant, which he was told about on 21 June 2021 (having had no warning about it). The claimant was told he would be leaving the business that day and would be paid in lieu of notice. The claimant alleges that the decision to dismiss him was materially influenced by his sex, and/or by his age.

4.3 The claimant says that the reason he was given at the meeting on 21 June 2021 was that he was not the right "fit" for the future of Melin. He says he asked if he could do anything to change the decision and that he was told there was nothing he could do as the decision ahd been made and he would be leaving that day. He says: "*The claimant took this that he and/or his stereotype did not fit the image that the organisation wished to project and/or fit with the new and future working practices and strategic direction which came about following covid and Melin's 2020-2023 People Strategy*." He identifies that a strategic review had been ongoing for some time and was due to be shared on 24 June 2021. The claimant says that Ms Kirrane, Executive Director People, Homes and Communities, sent an internal email after his dismissal which said "*it was not felt*

that he had the skills to build the team in order to take forward the next phase of service improvement." He considers that his age and gender consciously or unconsciously influenced how he was seen in terms of fit and succession planning for the future, as part of that wider strategic review process.

4.4 The respondent's position, taken from the ET3 rider, is that in May/June 2021 a number of those in the claimant's team had serious concerns about the claimant's management style which they considered amounted to bullying. It is said that some had tendered their notice and some confirmed they were actively looking for alternative employment. They say that there was serious concern within senior management that the claimant's approach to junior staff was very different to the way in which he interacted with management, and that unless decisive action was taken, they risked losing a number of long serving employees. They state that given the claimant's short service and with staff leaving/looking to leave they decided to terminate the claimant's employment with immediate effect on 21 June 2021.

4.5 There is a factual dispute about what the claimant was told at the meeting on 21 June 2021. The respondent asserts that the claimant was told about concerns regarding his management approach and that in response to this the claimant indicated he could change his behaviours. The respondent says the claimant was informed his management style was not in keeping with their values and had already resulted in resignations from a number of staff whilst others had actively indicated they were looking for employment elsewhere [32]. They rely on some handwritten notes they assert Mr Harris took [153-154]. If genuine and accurate, the notes suggest the claimant had been told there were feedback comments about management style that he was a big part of; that over the last week they had become aware that something was very wrong; that there had been exit interviews with staff and the claimant was aware team leaders were looking for new jobs; the common theme in all of that was the claimant; the claimant's approach was at odds with their values; they knew there was work to be done with the claimant but over the last few weeks they had become aware of how serious the issue was and needed to take action before they lost staff; and that people were telling them that the claimant was a bully.

4.6 The claimant says that these notes are not genuine and these things were not said to him. He also disputes that this is the reasoning behind his dismissal. He says these assertions do not match with what he was actually told at the meeting and do not match with, for example, the email that Ms Kirrane sent about the claimant not having the skills to build the team. He says that a subject access request he made did not produce any documents about the alleged complaints from staff or these purported minutes; which again gives him cause to dispute the genuineness of the alleged rationale and record for his dismissal. (As these proceedings are at an early stage there has not yet been disclosure of documents within the tribunal claim.)

4.7 The claimant says the respondent has given conflicting and shifting alleged reasoning behind his dismissal, which he says shows that the respondent's purported reasoning is not the true reasoning. He says that the respondent on the one hand has talked about the claimant not allegedly having the skills to build the team and to take forward the next phase of service development, which implies alleged capability concerns, whilst on the other hand has said there were trade team members complaining about him; which implies conduct. He says that in different accounts given by the respondent across various documents (such as the alleged meeting notes, emails from the time obtained from a subject access request, an email sent by the respondent to their insurer, the ET3 response form, and correspondence sent by the respondent's solicitors in the course of these proceedings) there are discrepancies about who it is said had allegedly complained about him, what the complaints about him allegedly were and when they were allegedly made. He says in one version (for example, the purported notes of the dismissal meeting) it is alleged that people had said the claimant was a bully, when in an email sent by the respondent to their insurers about the case they said that the claimant was not alleged to have bullied anyone.

4.8 The claimant says that the respondent's solicitors [82] have tried to explain the discrepancies away by saying that Ms Kirrane's email was made after he had made a request for his dismissal to be treated as a resignation, and that her email was tailored so as to not conflict with there being a resignation. He says that cannot be correct as he says that request had not been made by the time that Ms Kirrane had sent her email after his dismissal.

4.9 The claimant also alleges he has been in other meetings where comments have been made about the "fit" of other employees and their ages. He alleges [95] that from around September 2000 Mr Roberts had commenced a practice of enquiring about the retirement dates of anyone in his department who was aged late 50s and early 60s. He alleges that Mr Roberts asked the claimant his own retirement plans including an assumption that the claimant would only work a few more years before retirement. The claimant alleges he told Mr Roberts that as he did not have any significant pension he would work on. He says that Mr Roberts had instructed others to enquire about retirement plans within their teams as set out age page [95].

4.10 The claimant relies on a hypothetical comparator for his sex discrimination complaint. I asked him if he was right in his summary of what was said to him at the meeting/ that the alleged notes are not genuine/ his points about alleged conflicting reasoning, what was it that made him think a reason for his dismissal was that he was male. He said that the respondent's people strategy is about retaining staff and promoting women in construction. He asserts that if he had been a female it was more likely that he would have been retained.

4.11 In relation to age discrimination the claimant compares himself to the team leaders, NE, KA and AP who he says were in their 40s, around 50, and late 30s

respectively, who he says had issues with health and safety but were not dismissed. He also referred to a manager, SW, who was about 52, and was allowed to step down in a restructure. He said he would also rely on a hypothetical comparator in the age range 30 to 50, but otherwise in the same material circumstances to him, who he says would not have been dismissed. The claimant is 62. He was 58 when he was initially employed. He asserts that the respondent probably thought he was 50 when they initially employed him, and he supposes that they would have thought that from making assumptions based on his CV. He asserts that the respondent when looking at the next phase of their improvement strategy thought that he would not have sufficient length of service left to see it through.

4.12 The respondent argues that the discrimination complaints about dismissal have no reasonable prospect of success or little reasonable prospect of success. They assert that the claimant is seeking to shoehorn an unfair dismissal claim (that he cannot bring) into an Equality Act complaint. The respondent argues that the claimant does not have a shred of evidence in support of any argument there was less favourable treatment because of age or sex. They refer to the notes allegedly taken at the dismissal hearing where it is alleged the claimant commented the decision was harsh and when he had less than 2 years' service. The respondent argues the claimant was fully aware that the way he was being treated was because he had less than two years service, as it is reflected in the claimant's own comment at the time. The respondent argues it is clear that this was a short service dismissal and the claimant has not provided a cogent, factual basis to assert that the dismissal was discriminatory. The respondent points to the claimant's inability to identify actual comparators in materially the same circumstances as the claimant.

5. Not telling the claimant of the issues prior to dismissal: direct sex discrimination and/or direct age discrimination – summary of the parties' positions

5.1 The claimant identified at the preliminary hearing that the second row in his schedule was an allegation of less favourable treatment, on grounds of sex and/or age, in that he was not told about the alleged issues prior to dismissal or given the opportunity to respond or provide information. He says the outcome was predetermined. He says that if he had been given the opportunity to respond he would have been able to show that he had delegated the management responsibilities below him. He referred to the fact there had been no investigation in his case or following of the disciplinary policy in which dismissal should be the final sanction for gross misconduct. The claimant relies on the same comparator information identified above. He says that others who allegedly raised concerns about him had their concerns investigated, but that in his case there was no investigation as to whether the concerns alleged (if indeed they existed) had any merit or whether any impugned management practices were actually down to the managers in the chain below him, rather than the claimant himself. He alleges

that he was seen as an "old school" stereotype and that issues raised by employees were automatically attributed to him and not the team leaders or supervisors who managed the individuals and who were 15 to 20 years younger than the claimant.

5.2 The respondent's position is summarised above.

6. Not taking a different course of action: direct sex discrimination and/or direct age discrimination – summary of the parties' positions

6.1 The claimant identified at the preliminary hearing that the third row in his schedule was an allegation of less favourable treatment in not taking a different course of action as an alternative to dismissal. He asserts that if he had been younger and/or female, a different course of action would have been taken instead of dismissal to help him gain the skills Ms Kirrane asserted that he needed. He said he considered that respondent took a stereotypical view of his sex and his age at being over 60 that he could not keep pace with changes, so did not consider alternatives to dismissal, such as adding him to the maintenance team development program. He also again referred to the fact there had been no investigation in his case or following of the disciplinary policy in which dismissal was to be the final sanction for gross misconduct, and that these processes should have been followed.

6.2 The respondent's position is summarised above.

7. Decision on strike out application and deposit order application in relation to the direct discrimination complaints

7.1 In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

> (1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

7.2 Sex is a protected characteristic, as is age. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "*there must be no material difference between the circumstances related to each case."*

7.3 It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct

discrimination claim is that there is worse treatment than that given to an appropriate comparator; Bahl v Law Society 2004 IRLR 799.

7.4 Section 136(2) of the Equality Act provides that:

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

7.5 Section 136(3) goes no to say that "subsection (2) does not apply if A shows that A did not contravene the provisions."

7.6 Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37.

Decision to dismiss – direct sex discrimination

7.7 Looking first at the decision to dismiss and the direct sex discrimination complaint, when considering whether the complaint has little reasonable prospect of success I have to take the claimant's case at its highest. His primary case, as I understand it, is that he does not accept that there were any complaints or concerns raised about him, and that this has been constructed after the event to cover up the true reason. He says he was dismissed because he was not seen to have the right "fit" for the respondent's plans going forward and that a material influence on that perception of him and his "fit" is that he is male, not. As I have said above, the claimant points to what he says are discrepancies and conflicts in accounts, and an absence of documentation in support of the alleged complaints about him. His case is that a female in the same position as him would not have been dismissed.

7.8 The claimant has no actual female comparator he can point to who he says was in not materially different circumstances who he says was not dismissed. There is no absolute obligation to have one as a hypothetical comparator can be relied upon. However, he has to establish primary facts from which the tribunal could find that there has been less favourable treatment than a female would be treated in similar circumstances and that a material influence on this less

favourable treatment was sex. The authorities are clear that a difference in treatment is not enough to shift the burden.

7.9 Here I struggle to see how the claimant will show even a primary case of a difference in treatment, with a hypothetical female. He has nothing to point to other than the respondent's strategy document which says (page 9, 7th bullet point) "*We will continue to support more women into construction roles. We will embrace the Tai Pawb Deeds Not Words pledge as part of ensuring that Melin truly represents the communities in which we work."* The claimant says that the strategy document also refers to setting tailored development plans for leaders and managers and that given the desire to support women had he been female he would have been given a tailored development plan rather than being dismissed.

7.10 The respondent's strategy document does, as the claimant identifies, include a positive action statement in an industry in which it is known there is the underrepresentation of women. I struggle to see how that, by itself, can sensibly be used as prima facie basis for saying that if the claimant were female he would have been seen to have the right "fit" going forward and/or that he would have been given a development plan rather than being dismissed. As a proposition it is also called into question by the comparators that the claimant himself relies upon in his age discrimination claim, who he says were more favourably treated than him, as younger individuals, and who he says had their own employment troubles, but whom are largely *male.* Age aside, if the respondent is allegedly that wedded to gender, why would the respondent be protecting those individuals rather than seeing them as not having the right "fit"? It is also not the case, on the claimant's own account of events, that he was replaced by a female who was seen to have the right fit, or that his removal was seen as an opportunity by the respondent to promote females, with or without development plans. He says, in fact, that various promotion opportunities were offered to men, and that his post went unfilled for some time [96].

7.11 In reaching my decision I have reminded myself of the high threshold to strike out a discrimination claim as having no reasonable prospects of success and the case law principles I have summarised above. I am mindful of the fact I have not heard oral evidence from the relevant individuals involved. I am mindful of the usual importance in hearing oral evidence in discrimination cases where there is unlikely to be a "smoking gun" and when establishing the conscious or unconscious mental processes of the individuals involved. However, for the reasons I have just given, even if all the claimant says is correct, I do not see how he has any plausible prospect of shifting the burden of proof to the respondent. The missing piece of the jigsaw is the connection between dismissal and sex. I do not consider it enough to simply point to the type of comments that the claimant has done so in the strategy document. I do consider that the

claimant's direct sex discrimination complaint, as framed by him, is fanciful and I do consider this to be an exceptional circumstance where the direct sex discrimination complaint should be struck out as having no reasonable prospect of success.

7.12 My view of this is the same whether on the claimant's primary case that he had done nothing wrong whatsoever at all and it is all a construct by the respondent to remove him or his secondary case (as I understand it) that if there had been some criticism of him/unjustified criticism of him in some form, if he were a female he would be allowed to stay as the respondent would be more lenient, he says, to female. I would add that if I am wrong about my decision on strike out I would order the claimant to pay a deposit on the basis that the complaint has little reasonable prospect of success.

Decision to dismiss – direct age discrimination

7.13 The claimant's case on age discrimination is that he asserts that if he was not over the age of 60 he would be seen as having talent and part of the fit for the respondent going forward. He relies on the strategy document which says in the first bullet point on page 9: "*Ambitious and resilient people will be key to our success now and into the future. We will further develop processes to recruit, develop and engage ambitious and resilient people. Do our leaders of the future already work for us? We will develop people and processes so that we can be confident that this is the case."* The claimant says that older people at the respondent were not seen as ambitious or resilient. He asserts the respondent was not going to invest in him due to his age or his potential short service to go. He says that he was seen as an "old school" stereotype, whereby behaviours of other managers were attributed to him (if indeed there were complaints about him at all), and that he was seen as not being able to keep pace with change. He says age related stereotypes were inappropriately applied such as him having a more traditional skill and mindset and not being able to adjust to innovation.

7.14 If I take the claimant's case at its highest, here I do not find that the direct age discrimination complaint has no reasonable prospect of success. I accept that one analysis of it being said the was not the right "fit" or that it was not felt the claimant had the skills to build the team in order to take forward the next phase, could potentially involve considerations that include age related assumptions or stereotypes. There is a qualitative difference here, when compared with the sex discrimination claim, in terms of the link between "fit" and the protected characteristic of age, compared with the protected characteristic of sex. On the claimant's account, taken at its highest, he says he can give examples of questions being asked, including the claimant, about retirement plans. I appreciate the respondent's point that they say they recruited him at age 58. But that does not mean, again taking the claimant's case at its highest, that he

cannot argue that the respondent may have taken a different view when looking at the next phase of their strategic planning.

7.15 I do, however, consider that the complaint has little reasonable prospect of success and I do consider that it is appropriate to make a deposit order payable on condition of the claimant pursuing this complaint to final hearing. When considering whether to make a deposit order, I can weigh into the equation the respondent's position. I appreciate the various arguments the claimant seeks to make about potential inconsistencies and contradictions he sees in the account he had received from the respondent so far. I appreciate the complaints the claimant makes about the process that was followed. However, it seems to me inherently plausible that with an employee with less than 2 years service, an employer can and with some frequency often will, when in receipt of some sort of concern raised about the employee, decide to short cut their processes and proceed to dismiss. Indeed employers may do so in an even more peremptory way, without much by way of an investigation into the allegations, when the 2 year qualifying period is fast approaching. That may sound morally wrong, but it is a consequence of the 2 year qualifying period for unfair dismissal claims. In my judgment, notwithstanding all the points the claimant makes, it is inherently more plausible that is the situation here based on the undisputed parts of factually what happened. If I am wrong, and the claimant's age at least materially influenced the decision making process, the claimant will of course have the opportunity to pay the deposit and make good his case at Tribunal. I have set out my assessment of the amount of the deposit order in my separate case management order which is designed to be payable rather than operating as a bar to continuing with the complaint.

Not telling the claimant about any issues prior to dismissal and not taking a different course of action as an alternative to dismissal

7.16 My analysis here is very similar to the above as factually and evidentially these points are all intertwined, given their link to the actual decision to dismiss.

7.17 I consider that the direct sex discrimination complaints about not telling the claimant about any alleged issues prior to the dismissal meeting, and not taking an alternative course of action (such as a development plan) to dismissal have no reasonable prospect of success. Taking the claimant's case at its highest for the reasons already given I struggle to see how it would establish a prima facie case. The link to showing if he was female that the respondent would have chartered a different course is simply not, in my judgment, made out. (If I am wrong about that I would find it has little reasonable prospect of success and that there should be a deposit order made).

7.18 From a direct age discrimination angle, again my analysis repeats that in relation to the dismissal. I cannot say that, taking the complaints at their highest, they

have no reasonable prospect of success, I would however find that these two additional age discrimination complaints have little reasonable prospect of success and that it is appropriate to order the claimant to pay a deposit on condition of continuing with the complaints. This is because again fundamentally I consider it inherently plausible here that the respondent took the actions they did because they were effecting a short service dismissal.

8. Decision on strike out /deposit order application: Indirect discrimination

8.1 The claimant's schedule identifies 3 potential "provisions, criteria or practices." The first one is set out as being "Melin People Strategy 2020-2023." This is the same strategy document referred to above in relation to the direct discrimination complaints. I explained to the claimant that what he had identified was not a provision, criterion or practice, and asked him to identify it further. I provided a summary of how the law relating to indirect discrimination works and had a discussion with the claimant about how he identified any provision, criterion, or practice, that he said either placed men at a particular disadvantage compared with women, or people in a particular age group at a particular disadvantage compared with other age profiles (and was a particular disadvantage he was also placed in).

8.2 The claimant ultimately said that the provision, criterion or practice, he was relying on was a policy of supporting women in construction. He referred to the strategy document which says (page 9, 7th bullet point) "*We will continue to support more women into construction roles. We will embrace the Tai Pawb Deeds Not Words pledge as part of ensuring that Melin truly represents the communities in which we work."* He considers that this amounts to indirect sex discrimination.

8.3 The claimant talked through other aspects of the strategy document about development plans, and talent management. I asked the claimant how the respondent having a policy of offering tailored development plans would place men at a particular disadvantage compared to women. The claimant then said that this particular complaint was about age not gender. He said that it was about length of service, and older workers not being seen to have the length of service left for development. He talked about how he thought that older workers would be overlooked because of their length of service left, or were not seen to have talent or resilience or ambition. But he ultimately said that more related to his direct discrimination complaints (considered above), rather than being indirect age discrimination complaints. He said the same about the performance management strategy that he had attempted to identify as another PCP, and also about the formal performance management process, identified in his schedule as a third PCP.

8.4 In the event therefore, the claimant said he was only pursuing the one complaint of indirect sex discrimination.

8.5 The respondent says the strategy document identifies a positive action step to ensure females are developed and integrated into the construction industry, and that an argument that this is indirectly discriminatory against men is absurd. The respondent says there is no evidence that any men are disadvantaged by the positive action statement.

8.6 I consider the claimant's remaining indirect sex discrimination complaint has no reasonable prospect of success. I do not consider that a policy of supporting women in the construction industry is a neutral PCP that would the respondent would apply to both men and women and which would place men at a particular disadvantage when compared with women. It is something that the claimant says positively advances the cause of women in the workplace, he would say to the detriment of men including himself. If so, then it is a policy that is aimed at women, and not everyone in the workforce. It is not of neutral application across the group. If the policy is inherently about people with a specific protected characteristic (here women) would be a complaint of direct sex discrimination (subject to any positive action initiative defence under sections such as 158 and 159 Equality Act) not a complaint of indirect sex discrimination.

8.7 Further I struggle to see how the claimant would establish that men were placed at a particular disadvantage. He has no evidence, beyond his assertion, that for example, females are not being dismissed but are instead being promoted and given development plans, when men are not.

8.8 The complaint is in my judgment, speculative and has no reasonable prospect of success and should be struck out. If I am wrong about this then I would have ordered the claimant to pay a deposit on condition of continuing with the complaint.

9. Decision on strike out /deposit order application - Harassment related to age and/or sex

9.1 The claimant's harassment complaints as presented are set out at [19] in (a) through to (q). In the course of discussing these during the hearing the claimant withdrew the following: (b), (f), (g), (i), (j), (k), (l), (m), (n), (o), (p) and (q) and they are dismissed upon withdrawal. (l) the claimant said was already covered by (a).

9.2 The claimant's position on the remainder of the harassment complaints is as follows. (a*) "The treatment of the Claimant during the meeting of 21/5/2021 including stating to the Claimant that he was going to be dismissed and without any reason."* The Claimant relies on the same points he makes in relation to his direct discrimination complaints, and says that if he had been a female and/or had a younger age profile then the respondent would have been more sympathetic in the meeting and more supportive of him and acted with more sensitivity.

9.3 (c) "*The humiliating treatment of the Claimant by escorting him from the office and to his car in view of colleagues and subordinates; who were outside the building or who viewed the exit through the windows"*. The claimant makes the same points in relation to this.

9.4 (d) and (e): This is about the alleged refusal and/or failure to use disciplinary/dismissal procedures or capability procedures. The claimant here again alleges that if he had been female or had a younger age profile one of these procedures would have been followed.

9.5 (h): *"The treatment of the Claimant when arranging the meeting of the 21/6/2021 without any invite or prior warning*." Again the claimant here makes the same points.

9.6 The respondent says the claimant's allegation about his treatment at the dismissal meeting is factually untrue because the reason why he was dismissed clearly appears in the handwritten note. The respondent says the claimant cannot point to a single piece of evidence to show that what he complains about was related to sex or age. The respondent says the reason for the treatment complained about by the claimant is that it was a short service dismissal.

9.7 Section 26 of the Equality Act defines harassment as where person A engages in unwanted conducted related to a protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the conduct has the impugned effect the tribunal must take into account the perception of B, the circumstances of the case and whether it is reasonable for the conduct to have that effect. The phrase "related to" a protected characteristic encompasses conduct associated with the protected characteristic even if not caused by it; Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] ICR 1234.

9.8 My analysis of the harassment related to sex complaint is similar to the direct sex discrimination complaint. The conduct that the claimant complains about in relation to the handling of the meeting on 21 May 2021 was clearly unwanted conduct and it is also clear from his personal perspective how what has happened has deeply upset him. But whilst I appreciate that the test for harassment is a looser test than that for direct discrimination, the conduct complained about must still be related to sex. I do not see, taking the claimant's case at its highest, how he would show a prima facie case that he would not have been dismissed, or that he would have had more warning, or a formal invite to the meeting, or that he would have been spoken to or treated with more sensitivity (including the way in which he was escorted from the premises) or that the respondent would have stopped and followed a formal disciplinary or capability procedure were he to be female (which is how the claimant frames "related to"). I do not consider the positive action statement in the strategy

document provides this, and it is in my judgment, simply speculation on the claimant's part. I therefore consider the complaints of harassment related to sex have no reasonable prospect of success and should be struck out. If I am wrong about this, I would alternatively have found the complaints had little reasonable prospect of success and would have ordered the claimant to pay a deposit.

9.9 Turning to the alternative harassment related to age complaints, in the direct age discrimination complaints discussed above, I decided that it was not inarguable, taking the claimant's case at its highest that a decision he was not the right "fit" going forward could be related to age. I accept an analysis that could flow from that is that the respondent would otherwise not have affected a short service dismissal and therefore would not have adopted the process that the claimant complains about. I therefore would not, again this is all based on taking the claimant's case at its highest, say that the harassment related to age complaints have no reasonable prospect of success.

9.10 I do, however, consider that they have little reasonable prospect of success. For the reasons I have given I consider it inherently more plausible that the respondent will establish that the process it was adopting was, as insensitive as it may be, a short service dismissal process unrelated to considerations of age. I do therefore consider it appropriate to order the claimant to pay a deposit on condition of continuing with these complaints.

Decision on strike out/ deposit order application - Victimisation

10.1 I struggled to understand the claimant's victimisation claim at the hearing. He identified the protected act as being that the respondent believed he may do a protected act in the sense the respondent believed he may bring an Employment Tribunal claim. He referred to an email where the respondent said they would pay the claimant for accrued flexi time in recognition of risk. The email is at [C17] and is an internal email dated 22 June 2021 where Mr Roberts says "*we accepted Mark's resignation[1] effective yesterday, and will pay him lieu of notice and we also agreed to pay for his flexi leave, which isn't within policy, but we agreed given the circumstances it reduced risk and was the right thing to do."*

10.2 But the belief has to be that the claimant may bring an Employment Tribunal claim *of breach of the Equality Act*, not simply an Employment Tribunal claim. I was left unable to understand why the claimant was saying that concern about a risk of a claim about payment of flexi time meant that the respondent believed the claimant would bring an Equality Act complaint. I really struggle to see how the claimant asserts that the respondent was anticipating that he was going to bring, for example, an age discrimination complaint or a sex discrimination complaint. If

they had, logically it may have made them more inclined to follow a lengthier dismissal process, rather than doing what the respondent says they did in following a shortened process because the claimant had less than 2 years qualifying service.

10.2 In relation to detriments, the claimant alleges that the respondent dismissed him because they believed he would bring an employment tribunal claim. Here I struggled to understand the sequencing of events as the email about paying the flexi payment, and the analysis of risk, post dates the dismissal decision, rather than pre-dating it. The claimant's analysis appeared to become that the respondent believed that if they dismissed him the claimant would bring an Equality Act complaint, and so because of this, they dismissed him, following an informal, summary procedure. But that logic appears circular.

10.3 The claimant ultimately said that if I was struggling to make sense of the complaint then he did not see that he could pursue it. On the face of it he was potentially withdrawing it, but I did also say to him that I was not trying to pressure him into withdrawing claims; I was simply trying to understand their basis to deal with the strike out /deposit order applications and to give him the opportunity to set out his case to me.

10.4 My understanding is that the claimant was content to withdraw the victimisation complaints, but if not, then I would in any event strike them out as having no reasonable prospect of success. I cannot identify a sustainable basis for a victimisation complaint based on what the claimant put forward. In reality it seems to be a complaint that the respondent rushed through a dismissal at a point at which the claimant had less than two years service, to deprive him of unfair dismissal rights. The respondent's admitted position is that they followed a shortened process because of the claimant's service. But that does not make it a victimisation claim under the Equality Act.

11. Inducing discrimination – sections 111 and 112 Equality Act

11.1 The claimant in his "details of claim" document makes various references to sections 111 and 112 Equality Act. He confirmed during the preliminary hearing that he was not pursing these complaints. They are therefore dismissed upon withdrawal.

12. Decision on strike out /deposit order application - Trade union detriment

12.1 This was summarised by EJ Moore as follows [39]:

"*S146 TULCRA provides:*

[1] It was agreed, after the event, between the parties that the claimant would be treated as having resigned, however, neither party in this litigation argues that the claimant resigned; both parties accept the dismissal on 21 June was an effective dismissal at law

1) [A worker] has the right not to [be subjected to any detriment as an individual by any act or deliberate failure to act, by his employer if the act or failure takes place] for [the sole or main purpose] of –

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for not doing so, or]

1.1 The claimant says he was a member of the GMB trade union. The detriment is the manner of the dismissal (with no pre warning of the meeting) which the claimant says was designed to prevent him from accessing trade union representation in respect of his dismissal"

12.2 The claimant said at the hearing before me that he considered this wording needed to be amended to add in that there was no pre warning of the issues too. He says the dismissal was done without following a fair process that the union would have said was needed.

12.3 The respondent says the claimant has failed to identify an individual with a conscious mindset to act/fail to act for the sole or main purpose of preventing the claimant from making use of trade union services or how it is said the dismissal process adopted was for the sole or main purpose of preventing the claimant accessing those services.

12.4 The essence of this complaint is that the claimant asserts the respondent decided to follow a short, quick process, without giving the claimant warning of the meeting or warning of the issues as a deliberate act done for the sole purpose of preventing the claimant was making using of a trade union representative at the meeting. He says that otherwise the union would have intervened to say the respondent should have followed a fair process.

12.5 Taking the claimant's case at its highest, and given I have not struck out the age discrimination claim, I do not consider I can say this complaint has no reasonable prospect of success to strike it out (because it could be argued that, for example, wishing to avoid trade union representation as a cover for an age discriminatory motivation could make avoiding the trade union representation the main purpose for the conduct in question). I do, however, consider that the complaint has little reasonable prospect of success and that it is appropriate to order the claimant to pay a deposit. Again, this is because I consider it more plausible that the respondent's actions were not done with the main purpose to deprive the claimant of representation but because they were simply affecting a short service dismissal.

13. Unauthorised deduction from wages

13.1 The claimant confirmed he was no longer pursing a complaint of unauthorised deduction from wages, which is therefore dismissed upon withdrawal.

14. Decision on strike out/ deposit order application - Breach of contract

14.1 EJ Moore understood that the claimant was bringing breach of contract complaints relating to (a) not following disciplinary and dismissal procedures, and (b) a notice pay claim. The claimant told me it was only notice pay issues that he was pursuing as he accepted that the disciplinary and dismissal procedures were not contractual.

14.2 I understand that the claimant is seeking to bring a breach of contract notice pay claim on two basis. Firstly, a statutory notice pay claim under section 86 Employment Rights Act 1996. The section is entitled "rights of employer and employee to minimum notice." Section 86(1) says that the notice required to be given by an employer to terminate the contract of an employment of a person who has been continuously employed for one month or more is not less than one week's notice if his period of continuous employment is less than two years. It therefore incorporates, if needed, a minimum 1 week's notice period into the claimant's contract. Under section 86(6) the section does not affect the right of either party to treat the contract as terminable without notice by reason of the conduct of the other party i.e. a summary dismissal for gross misconduct. Under section 86(3) a provision for shorter notice in any contract has effect subject to subsections (1) and (2) (i.e. if necessary the reading in of the minimum notice period), "but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice."

14.3 The claimant's contract gave him the equivalent right to 1 week's notice (albeit the respondent paid him four). This is not a case where the respondent argues they were entitled to, and did, summarily dismiss the claimant without notice on conduct grounds. They paid the claimant 4 weeks, which I do not understand that he disputes that he received. The respondent also does not argue that the claimant waived his notice rights. Contractually they rely upon the clause in the contract which says "At the absolute discretion of the Association, payment in lieu of working notice may be made." I do not therefore see how it is arguable, even on the claimant's case at its highest, that section 86(6) was engaged. It was not dismissal without notice, but a dismissal with a payment in lieu of notice.

14.4 I do not consider it arguable in those circumstances that section 86 operated to incorporate into the claimant's contract some term other than the already express term that at the absolute discretion of the Association they could pay in lieu. Section 86(3) does not, in my judgment, incorporate some term (if that is what the claimant was arguing) that he had to accept a payment in lieu. What it is seeking to do is in cases, where section 86 needs to click into action, to give an employee minimum notice (which is not the case here), and to still preserve the possibility of the parties contractually agreeing to waive notice or have pay in lieu of notice terms.

14.5 The complaint under section 86 ERA has no reasonable prospects of success and should be struck out.

14.6 The claimant's alternative notice pay breach of contract claim relates to the operation of the clause "At the absolute discretion of the Association, payment in lieu of working notice pay be made." On the face of it that clause does what it says; it gives the respondent the absolute discretion to pay in lieu. Here, however, the claimant argues that the exercise of that discretion had to be exercised in accordance with public law principles summarised in Braganza.

14.7 Braganza was a shipping case concerned with death in service benefits. However, the point of principle taken from it is that when a court or tribunal is assessing the exercise of a contractual discretion it may involve implying a contractual term to moderate the exercise of that discretion. What term is implied with depend upon the facts of a particular case, however, any decision making function entrusted to an employer has to be exercised in accordance with the implied obligation of trust and confidence. When assessing whether an employer is in breach of that implied duty, public law principles of rationality will apply. This means that the decision must be made rationality, in good faith, and consistent with its contractual purpose. Assessing rationality in that public law sense means considering whether relevant matters (and not irrelevant matters) been taken into account and is the result such that no reasonable decision maker could have reached it? In Patural v DG Services (UK) Ltd [2015] EWHC 3659 (QB) Mr Justice Singh held that these principles from Braganza applied to disputes about the exercise of contractual terms in relation to, for example in an employment contract context, the payment of discretionary bonuses.

14.8 A sustainable claim here would be a high hurdle for the claimant to reach. The very purpose behind a contractual clause entitling an employer to pay in lieu of notice is to give that discretion for an employee not to work out their notice period. But I do accept it is not inarguable for the claimant to say that if (taking his case at its highest) it was exercised as a cover for an underlying discriminatory motivation the operation of the discretion was not rational or in good faith. I therefore do not find the complaint has no reasonable prospect of success, on the claimant's case at its highest. I do, however, consider that it has little reasonable prospect of success. I say this because, again it seems inherently more plausible to me that the respondent was operating a short service dismissal and in doing so simply made legitimate use of the contractual discretion to pay in lieu (which I have said is the purpose for which the contractual right generally exists) rather than the claimant work his notice.

18.9 Secondly, I fail to see what remedy the complaint would offer the claimant. This is a breach of contract claim and falls to be determined by standard contractual principles. The claimant would be entitled to his losses on the basis as to what would have been his contractual entitlement if the respondent were not in breach

(presupposing of course a breach could be established). This is evaluated on the basis of what is the least burdensome to the respondent/least profitable to the claimant. The respondent could have had the claimant work for a week for which he would have been entitled to a week's pay. It is not about what would have happened to the claimant if a fair procedure had been followed as that is not how damages are assessed in a contractual claim (unless it is a contractual procedure being enforced; which the claimant accepts it is not). The claimant had been paid four weeks pay in any event. As I expressed to the claimant at the hearing I therefore cannot see what the purpose of the complaint would be, other than to obtain a finding that there had been a breach (if indeed that is established).

19. Conclusion

19.1 I have issued a separate deposit order. The case will be listed for a case management hearing once 28 days have expired so that the claimant has time to consider what, if any, claims he wishes to pay the deposit for and continue with. I appreciate these are difficult topics and the claimant is a litigant in person. I recommend that he considers getting some professional advice (from his union or otherwise) about his situation and what claims he pursues from here.

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Employment Judge R Harfield
Dated: 6 December 2022

JUDGMENT SENT TO THE PARTIES ON 7 December 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche