EMPLOYMENT TRIBUNALS

Claimant: Mr W Gilmour

Respondent: Syspal Ltd

Heard at: Birmingham via CVP
On: 6 – 10 March 2023

Before:

Employment Judge Bennett
Ms J Malatesta
Mr R White

Representation:

For the Claimant: in Person
For the Respondent: Mr Wayman (Counsel)

JUDGMENT ON LIABILITY

1. The Claimant was unfairly dismissed by the Respondent.

2. A 33% reduction in the compensatory award for unfair dismissal will be made under the principles in **Polkey v A E Dayton Services Limited [1988] ICR 142**.

3. The Claimant's complaint of direct age discrimination under s13 Equality Act 2010 fails and is dismissed.

4. The Respondent did not subject the Claimant to any detriment on the ground that he had made a protected disclosure and his complaint to that effect is not well founded and is dismissed.

5. The Respondent did not subject the Claimant to any detriment on the ground that he had done a protected act under s27 Equality Act 2010 and his complaint to that effect is not well founded and are dismissed.

6. The Claimant's complaint of breach of contract is not well-founded and is dismissed.

7. Remedy for the successful unfair dismissal complaint is to be assessed if not agreed, and:
    a. The parties should liaise to seek to agree remedy;
    b. If the parties agree remedy they should notify the tribunal forthwith;
    c. If the parties are not able to agree remedy they must attend the remedy hearing which has been listed for Tuesday 16 May 2023 via CVP.

REASONS

Claims and issues

1. The Claimant brought claims for

    (a) Unfair dismissal

    (b) Direct age discrimination

    (c) Victimisation

    (d) Whistleblowing detriment

    (e) Damages for breach of contract over failure to pay commission.

2. The issues the Tribunal will decide are set out in the attached appendix. It was agreed during the hearing that issues relating to remedy would be considered at a separate remedy hearing as appropriate.

The Hearing

3. Due to the significant amount of pre-reading in this case the Tribunal took the first day as a reading day before commencing the Respondent's evidence on Day 2.

4. The Tribunal heard evidence from 5 witnesses for the Respondent. These witnesses were:

    (a) Mr Paul Roberjot, Director of Syspal Capital Limited and the Claimant's manager;

    (b) Mr Ashley Ball, Sales Engineer;

(c) Mr Craig Bate, Divisional Manager of the Respondent's Mechanical Handling Division;

(d) Mr Nick Cook, also Divisional Manager of the Respondent's Mechanical Handling Division;

(e) Miss Vicky Martin, the Respondent's HR Manager.

5. The Claimant carried out very competent cross-examination of the Respondent's witnesses before giving evidence on his own behalf. We considered the Claimant to be a truthful witness, although we found that his answers suffered from inaccuracies at times due to imprecision in his use of terminology and his focus on what he considered to be the most important elements of his case rather than the details of what he had been asked. Overall we were impressed with the way he presented his case as a litigant in person, and we consider that he attempted to answer questions honestly and to the best of his ability.

6. The Claimant submitted a witness statement from his son, a Mr Tommy Gilmour, which appears in the bundle at page 382. Mr Tommy Gilmour was not called as a witness and the Panel explained to the Claimant that this would affect the weight which the Tribunal would place on his witness statement. The Claimant indicated that he understood this.

7. There was an agreed trial bundle of 692 pages. In addition we were referred to the record of a preliminary hearing before Judge Hena on 13 January 2023. The Claimant confirmed that he had been emailed a copy of this record by the Tribunal.

8. It became apparent on the second day of the hearing that Mr Paul Roberjot was referring in his evidence to documents that had not been disclosed. These were disclosed by the Respondent in accordance with its ongoing duty of disclosure the following day. The documents comprised 6 pages consisting of 2 invoices and 1 order confirmation from 'Brokelmann', which is the German supplier of the 200l buggies for the 'Greencore' order which forms the Claimant's breach of contract claim.

9. The Respondent sought to admit these documents into evidence on the basis that they were relevant to the breach of contract claim. The Claimant objected to their inclusion due to the late hour at which they had been produced. He also suggested that they were not reliable on the basis that:

(a) he had made multiple data subject access requests in which information confirming stock levels of the 200l buggies had not been provided. The Claimant considered that if stock levels were consistent with the information provided then there would be no reason for the Respondent to have withheld the documentation; and

(b) the documents show only part of the Respondent's order from Brokelmann and not the whole order.

10. Upon reflection the Panel concluded that the new documents were clearly relevant to the breach of contract claim. The Claimant has provided no evidence to support his assertion that the documents show only part of a larger order. It is recognised that the documents have been produced at a very late stage and that there is no good explanation for this. The Panel decided to admit the documents into evidence and we allowed the Claimant to recall Mr Roberjot the following morning to ask him questions arising from these new documents.

11. A further procedural matter arose on the morning of the fourth day. Having discussed the matter the Panel were in agreement that the facts as pleaded by the Claimant were not fully reflected in the list of issues as drafted. In particular it appeared that the Claimant's victimisation complaint had been drafted by reference to his protected disclosure rather than by reference to his Employment Tribunal complaint. This was the case despite 1) an email from the Respondent to the Tribunal shortly after the list of issues was originally drafted (page 56) pointing out that the whistleblowing event is not a protected act; and 2) a subsequent email in response from the Claimant (page 61) confirming that the detriments he relied upon (although we note that at this point he described them as 'harassment') arose from the Claimant making the protected act of bringing an Employment Tribunal claim.

12. In view of the above the Panel proposed that 'bringing or proposing to bring a claim under the Equality Act' should be added to the list of issues as a protected act at para 6.1.1 (see List of Issues in the Appendix). Representations were taken from Mr Wayman on the matter. After pausing to discuss, the Panel confirmed that the amendment would be made. We based our decision on the following:

    (a) all of the facts are the same as already pleaded;

    (b) Although the Claimant said he did not know exactly why the alleged detriments took place he was clear from early on in his claim that one reason could have been because he made an employment tribunal claim;

    (c) As we had only just started to hear the Claimant's evidence there was opportunity for him to be cross-examined on the matter by Mr Wayman and it could also be addressed in closing submissions with no prejudice to the Respondent.

13. Overall we found that it was in accordance with the overriding objective of dealing with the case fairly and justly and in particular of putting the Claimant on an equal footing seeing as he is a litigant in person.

Findings of fact

14. We find the relevant facts to be as follows. Some of these are agreed between the parties, others we have decided on a balance of probabilities. References to page numbers are to the agreed bundle of documents.

15. The Respondent company manufactures stainless steel and aluminium equipment for hygiene conscious industries at its site in Shropshire. It currently employs approximately 170 people.

16. The Claimant has been employed by the Respondent on three occasions. The first between 1986 – 1988. The second between 1990 – 1992. On the most recent occasion he was employed from 15 November 2018 in the role of Regional Sales manager. He worked as part of a team of regional sales managers (also known as regional sales engineers, or field engineers) consisting of 5 people, namely the Claimant, Ken Harvey , Paul Balfour, Ashley Ball and Paul Roberts. The Claimant had a written contract of employment.

17. The Claimant was dismissed on 17 June 2021 and was paid in lieu of his 1 month notice period. He also received payments in respect of accrued but untaken holiday allowance and a statutory redundancy payment.

18. The Claimant contacted ACAS on 10 July 2021 and lodged a claim with the Employment Tribunal on 11 September 2021.

The background to the redundancies

19. The Respondent made 22 employees redundant in 2020 as a result of unfavourable business conditions caused by Brexit and Covid. This was done by way of a collective consultation exercise. None of the sales team engineers were involved in the redundancy exercise at this time.

20. The Respondent filed an annual report and financial statements at Companies House at the end of October 2021 in respect of the year ended 31 March 2021 (the Report, page 343). The Report paints a generally optimistic picture of the company's finances at the time, reporting that "following the dramatic downturn in Q1, Q2 business has bounced back to pre-pandemic levels" and describing expansion plans that are underway. This is consistent with the pictures in the bundle referred to by the Claimant and which Paul Roberjot agreed were pictures of "*a site next door to the existing site that we are developing with an additional 65,000 square feet*". It is also clear from the Report, and it was agreed by Paul Roberjot in cross-examination, that the financial key performance indicators showed little impact from a full year of Covid and forecasted turnover for the following year was expected to grow by approximately 17%.

21. The Report also refers to challenges faced by the Company as a result of the pandemic and describes how sales and marketing had to 'quickly adapt to changing circumstances' resulting from 'restrictions regarding customer visits and travel'.

22. The Report states (at 346) that

> *"although the business was challenged by the circumstances surrounding the pandemic, efforts continued towards improving efficiency when the opportunity was taken to review how the business should be structured to respond to changing customer requirements as the upturn in business commenced."* and *"The Directors continue to review operational efficiency."*

23. The Respondent in 2021 found itself in an uncertain economy due to Covid. It enjoyed a relatively strong financial position as a result of the actions it had already taken to adapt and survive the challenges of Covid and we accept Paul Roberjot's evidence in this regard that the healthy figures were a result of the cut in overhead costs of making people redundant and the effect of placing people on furlough where their costs were being funded by the government. We find that the Respondent was continuing to actively review ways in which it might be able to adapt to remain viable and increase efficiencies.

24. During Covid the working practices of the sales team changed. The need for face to face customer visits reduced - although this had started increasing again by the time of the Claimant's dismissal. The Respondent wished to re-organise its operations to reflect the changes in working practice by hiring more people to work internally and by reducing the number of sales people travelling out to customer sites.

Appraisal meetings

25. The Claimant had an appraisal meeting with Paul Roberjot in April 2021. During this meeting Paul Roberjot told the Claimant that he was considering whether to reduce the number of people in the sales team and he asked the Claimant's views on that. The Claimant indicated that this would ultimately be a business decision for Paul Roberjot. Paul Roberjot told the Claimant that he would let the sales team know if anything was to be done.

26. The Respondent says that Paul Roberjot had a similar conversation with all 5 members of the sales team during their appraisal meetings in April 2021 however we find that this is not the case. There are only notes on the HR file of two appraisals having taken place. For the other members of the sales team there are no records of self-appraisals nor notes from the appraisal meetings. Vicky Martin prompted the Claimant for his self-appraisal form on 1 April 2021. We would presume that she would have prompted any other person having an appraisal in the same way and they would have been likely to return the forms (or she would have continued prompting until they did).

27. Ken Harvey's email formally requesting voluntary redundancy dated 18 June 2021 suggests that Ken Harvey was not aware that redundancies were in contemplation before this time (256). We also found Ashley Ball's evidence of his appraisal in April 2021 unpersuasive in that he said an appraisal had taken place and he did not accept that he could have been confused about the date, yet he said he had 'no idea of the date' and gave little further detail. We find this hard to reconcile. We also note that Paul Roberjot accepted that not all of the sales team had appraisals.

28. Given the evidence that we heard from the Claimant about the sales team being very competitive and how Ken Harvey would ring around the sales team every week to compare sales figures, we consider that it would have been discussed amongst the team if they had all been notified of a potential redundancy and the Claimant would have known that the others were aware. This was not the case. Looking at matters in

the round we conclude that Paul Roberjot did not raise the matter of potential redundancies with any member of the sales team besides the Claimant.

Voluntary redundancies

29. It was clear to the Respondent from the outset that Ken Harvey would have opted to take voluntary redundancy if this had been offered. We make this finding of fact on the basis of the email at page 256 in which Ken Harvey formally requests voluntary redundancy and states "After repeatedly asking and being told to F…off, I thought now I would put this in writing and request again as stated above"

30. We also take into account Paul Roberjot's evidence that Ken Harvey indicated on several occasions that he was going to retire, but then backed out. We consider that Paul Roberjot would have anticipated that Ken Harvey would be willing to be made redundant. The Company had even taken on an additional salesperson, Paul Balfour, to take over Ken Harvey 's work in anticipation of his departure.

31. Finally we refer to the transcript of the final consultation meeting on 17 June 2021 in which Paul Roberjot makes clear when the Claimant is out of the room that he (Paul Roberjot) knows that Ken Harvey wants to take redundancy, that Ken Harvey has asked Paul Roberjot repeatedly to make him redundant, and that "there is no way in the world I am gonna let the Company in with the cost of making Ken Harvey redundant…".

32. We find that the responses that Paul Roberjot gave the Claimant during the consultation meetings when the Claimant raised the issue of Ken Harvey being a potential alternative candidate for redundancy, as well as Paul Roberjot's responses in cross-examination about whether he knew that Ken Harvey wanted to take redundancy and the distinction between whether he wanted 'redundancy' or 'retirement', were deliberately misleading.

Paul Balfour

33. Paul Balfour was the newest member of the sales team. He started employment with the Respondent on 1/10/2019 and had been employed for less than 2 years at the time of the Claimant's dismissal. It was Paul Roberjot's evidence that Paul Balfour was taken on to take over Ken Harvey's role but when Ken Harvey changed his mind about retiring at that point Paul Balfour was assigned accounts previously belonging to the other sales engineers and he joined the sales team. If Paul Balfour had been made redundant instead of the Claimant it is likely that he would not have been entitled to statutory redundancy pay and that he would not have been able to bring a tribunal claim for unfair dismissal.

Documentation

34. The Respondent's redundancy plan for the sales engineers appears at page 208. Vicky Martin said she made this plan before the redundancy process started in order to

provide a guide to the process. Chris Truman said in the appeal meeting that this document was 'updated throughout' (329). We consider on balance of probabilities that this document was not used as described by the Respondent, and that it was in fact created after the dismissal was confirmed, for the following reasons:

35. The plan is dated June 2021. It states on it 'Meet with Paul (virtually/phone call) to discuss how to use a selection matrix…' and the date assigned to this action is 04/06/2021. It then states 'Apply selection criteria to pool' and the dates assigned are Saturday 05/06/2021 & Sunday 06/06/2021. Vicky Martin couldn't explain in her oral evidence why she had picked the dates she had, or why she thought it was appropriate to specify weekend dates for applying the selection criteria to the pool. In addition to this objection by the Claimant, which we find has some force, we consider it inconsistent that these actions are dated *after* most of the selection criteria has already been applied – as evidenced by the documentation at pages 200- 207 which includes emails between Mark Roberjot, Paul Roberjot and Vicky Martin discussing the scores.

36. Scores for all Service Engineers were entered into the redundancy matrix according to following criteria:

    (a) Sales performance,

    (b) technical knowledge and expertise

    (c) skills & performance

    (d) disciplinary records

    (e) length of service.

37. In relation to the scoring key at page 214, we find that the 'skills and performance' category is specifically targeted at sales employees. The Respondent chose to use the 2 criteria of 'number of calls' and 'number of visits' and excluded the other 5 suggested criteria. The Claimant doesn't dispute the scoring of 'disciplinary record' or 'length of service'.

38. We find that the selection criteria were produced and applied in May 2021 before any conversation had taken place between HR and Paul Roberjot as to how to carry out a fair procedure. All scores except those relating to the technical scoring category had been completed by 24 May 2021. Based on the email at page 207 we find that Vicky Martin assessed all of the scores and entered them into the matrix except in relation to the 'technical knowledge and expertise' category. We also find that she filled out the individual scoring sheets at pages 215-219.

39. In relation to the 'technical knowledge' category, at the same time that Vicky Martin asked Mark Roberjot and Paul Roberjot for those scores she also made them aware of the scores 'to date' of employees in the pool (page 207). It was therefore apparent to Mark Roberjot and Paul Roberjot how the technical scores they gave would affect

overall scores and they were able to calculate which employee would score the lowest as a result.

9 June meeting

40. Once the scores had been inputted into the matrix the Claimant received the lowest score and he was notified in a phone call from Vicky Martin at approximately 4pm on 7 June 2021 that he was provisionally selected for redundancy. The Claimant later received a letter at around 5.30pm on the same day inviting him to a consultation meeting on 9 June 2021.

41. The Claimant felt that he needed more time to prepare before the consultation meeting but upon speaking to Vicky Martin he was reassured that nothing would be decided in the meeting and so he agreed to go ahead.

42. The first consultation meeting took place on 9 June 2021. The Claimant was given in advance a copy of the scoring key and the Claimant's individual scores on the redundancy matrix, a list of current vacancies and a provisional schedule of his payments should he be made redundant. The Claimant was not told anyone else's scores.

43. The meeting was chaired by Paul Roberjot who was present via Zoom, and this meant that he was unable to use his computer to access documentation and so he relied on Vicky Martin to access data and relevant documents during the meeting. The Claimant challenged his scores on 'sales performance', 'technical knowledge and expertise' and 'skills and performance'. He scored 10 in each category and in relation to the first two criteria he believed this score should have been 15. From the notes of the meeting at page 229 it is apparent that Paul Roberjot was not comfortable discussing the details of how the scores were calculated and he said that he would get back to the Claimant on several points.

15 June 2021

44. The Claimant then received a letter dated 14 June 2021 inviting him to a meeting at 3pm the following day (242). The Claimant had contacted Vicky Martin on several occasions since the first consultation meeting to ask for confirmation of what commission payments were owing to him but this information was not provided prior to the meeting on 15 June 2021.

45. At the end of the meeting the Claimant was invited to a final consultation meeting the following day, 16th June. The Claimant indicated that he wished to explore his legal position and that this timescale did not allow him to do so, nor did it give him time to find a colleague or trade union representative to accompany him. Paul Roberjot did not agree to extend the time before the next meeting and stated that "we can end the meeting now and move straight to making a decision this afternoon if you want."

46. Following the meeting the Respondent agreed that the final consultation meeting would be pushed back by a day until 17th June and we find that the Respondent agreed to this having considered advice from HR/Legal.

17 June 2021

47. By a letter dated 16 June 2021 the Claimant was invited to a final consultation meeting the following day. It was confirmed in the meeting on 17th June 2021, and again by letter dated 18 June 2021, that the Claimant's employment was terminated with immediate effect on 17 June 2021.

48. Paul Roberjot chaired the meeting and discussed with the Claimant regarding potential alternative employment options however we find that, as in the previous meetings, Paul Roberjot did not genuinely consider any suggestions that were put forward by the Claimant in order to avoid the Claimant's dismissal. We have had regard to Paul Roberjot's statement in the transcript at page 523 that "This whole thing is a process that we are going through, that we have no choice but to go through it the way we are going through it so I have got to ask you the question."

Procedure

49. The redundancy process took 10 days from the date the Claimant was notified that his role was at risk of redundancy to the date his employment was terminated.

50. The Claimant encountered IT issues after his first consultation meeting. According to the email at page 238, whose contents we accept, these IT issues meant that the Claimant was unable to access the Respondent's database meaning that he could not log into the system to register enquiries, make changes or access contacts and numbers. We find that this impeded the Claimant's ability to prepare for the consultation meetings. The Claimant made the Respondent aware of the issues that he was having and the Respondent states that the Claimant's IT issues were unrelated to the redundancy procedure and that it was taking steps to resolve the problem. We find on a balance of probabilities that the Respondent actively stopped the Claimant's IT access in order to prevent him from accessing customer accounts. We consider that this conclusion is supported by the emails showing the Claimant was not told of quotes that came in during this period in relation to his accounts (at pages 240/241).

Scoring matrix - 'Sales performance'

51. This scoring criterion was calculated in accordance with the relevant sales person's sales targets for the year and showed what percentage of the target sales the sales person had achieved.

52. The Claimant said at various times that he had not been given a sales target. We find that this is not the case and that all sales employees had been notified verbally of their sales target at the start of the sales year. Although they were not given anything in writing we find that all sales engineers were aware of their targets and, broadly, their progress against those targets at any time.

53. The scoring key at page 214 sets out how the category of 'performance based on sales' will be marked. It states

*"**15 points** – meets performance targets most of the time (i.e. meets more than half of performance targets)."*

*"**10 marks –** Meets performance targets some of the time (i.e. meets fewer than half of performance targets)."*

54. It is common ground that the Claimant achieved 52% of his sales target in the year in question. In the scoring chart the Claimant was awarded 10 marks. The Respondent at different times gave different explanations for not, on the face of things, following the scoring key:

(a) In the letter dated 16 June 2021 inviting him to the final consultation meeting, it is explained that the Claimant received 10 points in this category because he had actually only achieved 36% of his sales target and not 52% due to taking account of the fact that only 75% of the sales engineers' sales are influenced directly by them because approximately 25% of input happens internally. It was stated that 'this was the method used for all Sales Engineers'.

(b) In his oral evidence Paul Roberjot explained that the scoring system was a comparison between employees and the Claimant only just got 50% so it was reasonable to give him 10 marks to differentiate him from those who got a significantly higher percentage.

55. We find that the explanation set out in the letter of 16 June is confusing and is not a true explanation of why the scores are as they are. The letter states that the same calculation was done for the other engineers, but (although we recognise that their scoring would be as shown in the scoring matrix) no 75% figures are shown for the Claimant (or the other salesmen) anywhere. We consider that this was a misleading and false explanation put forward by the Respondent to try and justify to the Claimant why his score didn't tally with the guidance on the scoring key.

56. In the appeal the Claimant challenged the relative score of Paul Balfour on this criterion (436). As Paul Balfour achieved less than half of the Claimant's total sales the Claimant concludes that Paul Balfour can only have achieved a higher percentage score if his sales target was much lower than the Claimant's. Bearing in mind Paul Roberjot's evidence that the sales targets took into account the opportunity that each sales person had, we are satisfied that Paul Balfour's targets were indeed much lower and that the Respondent envisaged that the opportunity available to Paul Balfour was less than that available to the Claimant.

57. In the appeal hearing Chris Truman re-scored all of the engineers in accordance with the scoring key. This resulted in the Claimant being given a score of 15 marks as well as everyone else, as they all achieved over 50% (but less than 100%) of their sales targets.

'Technical knowledge and expertise'

58. We find that the scoring for this criterion was done by Mark and Paul Roberjot. Mark Roberjot provided a score in relation to core products and he suggested that Paul Roberjot 'involve Nick or Craig on the KG side'(207). We find that this was not done and that Paul Roberjot/Vicky Martin simply used the scores provided by Mark Roberjot to complete the matrix.

59. There was no indication of how Mark Roberjot arrived at the scores that he did in relation to the core products and we find that he simply gave his own opinion of the relative technical capability of each sales person. As is stated above, we have also found that Mark Roberjot was aware of the running total of each salesman's score before he provided his assessment.

60. Paul Roberjot claims to have spoken to the technical team to ask for their input prior to completing the overall technical score. We do not consider that this is the case because:

    (a) The original overall scores for technical knowledge/expertise are not consistent with the scoring as done by the technical team for the purposes of the appeal, and as shown at page 330. In particular, the Claimant does not come out bottom in the table created by the technical team whereas he is the only salesman ranked 10 points in the original matrix (and also by Mark Roberjot in his email at page 207);

    (b) In the second consultation meeting Paul Roberjot stated that he had phoned Craig Bate after the first consultation meeting to get his view of the Claimant's technical ability. In our view if the Respondent had already specifically garnered views regarding the relative competencies of the salespeople in order to fill out the redundancy selection matrix, as he claimed, he would not have needed to speak to Craig Bate again after the first meeting;

    (c) We accept the evidence of Craig Bate, who we found to be measured, fair and honest. Bate stated that he and Paul Roberjot spoke regularly but he could not recall a specific conversation in which Paul Roberjot asked him for his opinion with a view to entering scores on a redundancy scoring matrix. Although we accept that Craig Bate and Paul Roberjot may have had conversations regarding the Claimant's technical ability, we consider that Bate (and any member of the technical team) would have given their opinion with a higher degree of precision and care if they had understood that it was not just an 'off the cuff' discussion concerning recent events but something that could determine someone's future employment. This did not happen.

61. We find that it was not suggested to the Claimant at any time that his technical ability was poor or that he was relying on the technical team too much for assistance. Mark Roberjot purported to give an example of the Claimant's inferior technical expertise during the second consultation meeting but we accept the Claimant's contention that

this example did not in fact relate to the period in consideration for redundancy scoring purposes.

62. Chris Truman re-scored the criterion of 'technical knowledge' for the purposes of the appeal. After re-scoring, the Claimant comes out equal third out of the five salesmen. No explanation is given for why the Claimant was previously only given 10 points when the other salesmen were given 15 or 20.

Skills & performance

63. The criterion in the selection matrix relating to 'skills and performance' was assessed by the Respondent solely in relation to the number of calls and number of visits that each salesperson carried out.

64. There was considerable discussion during the hearing about whether the redundancy matrix was 'weighted' and we find that this discussion was caused by a misunderstanding on the Claimant's part about what the term 'weighted' refers to in a redundancy context.

65. The redundancy selection matrix was not weighted. Each of the 5 criteria carried equal weight in the overall assessment. However, the criterion relating to 'skills and performance' set out seven examples of measurables that could be used when assessing people in relation to 'skills and performance'. The Respondent opted to use just two of these measurables, namely numbers of calls and numbers of visits. The Claimant contends that this means the matrix was 'weighted'. In a sense he is correct, but this is not how the term 'weighted' is commonly used in connection with a redundancy matrix and we consider that this is how all of the confusion about whether the matrix was weighted or not, and the Claimant's belief that he was being given conflicting explanations from Vicky Martin, Mark Roberjot and Chris Truman, came about.

66. The number of calls/visits was assessed for each of the salespeople. This is an objective measurable metric based on clear data. However, as applied by the Respondent, the scores given to each sales person did not correspond directly to the total number of calls/visits and the Claimant was awarded a lower score than a fellow employee who had made fewer total calls/visits.

67. The Respondent's scoring mechanism in this respect incorporated an element of discretion to allow it to take into account the 'opportunity' that each salesperson had to make calls/visits according to the number of accounts that he had. It was not explained to the Claimant during the consultation that this was how the scoring criteria worked and nor was the Claimant told the number of accounts that each of the other sales people had, or how the number of calls/visits vs 'opportunity' was calculated.

The Appeal – 29 June 2021

68. The Claimant lodged an (8 page) appeal letter on 23 June 2021 and his appeal was heard on 29 June 2021. The appeal meeting was chaired by Chris Truman, managing director, and also attended by Vicky Martin, HR manager. The meeting was recorded with the consent of both parties.

69. The Claimant was given the details of the other sales employees' scores during the appeal meeting. He had not specifically asked for the information to be provided to him prior to the appeal meeting but when he asked how he could have been expected to prepare for the appeal without the information Chris Truman told the Claimant that he could take time to process the information and make comments after the meeting.

70. The Claimant was given an opportunity to voice his concerns in the appeal and, as the Claimant agreed, Chris Truman listened purposefully to the Claimant with a view to understanding his concerns, before investigating them and reaching a decision.

71. As part of the appeal process Chris Truman contacted the managers in the Respondent's mechanical handling division and asked them to provide a skills matrix to compare the technical ability of the sales engineers. (468).

72. The result of the appeal was that the Respondent confirmed the dismissal decision and the Claimant was sent the outcome of his appeal on 9 July 2021. In the appeal the Claimant's scores in relation to 'sales performance' and 'technical knowledge and expertise', were each increased to 15 points. This did not, however, change the outcome, as the Claimant still received the lowest overall score from amongst the 5 sales engineers.

Age discrimination

73. It is agreed that the redundancy selection matrix did take into consideration face to face customer visits, under the selection criterion of 'skills and performance'.

74. Of the 5 sales engineers in the team at the relevant time, 2 of them were aged under 50 (Ashley Ball and Paul Roberts) and the other 3 were aged over 50, namely Paul Balfour, Ken Harvey and the Claimant. All were assessed using the same selection criteria.

75. As well as face to face visits, the 'skills and performance' selection criteria in the redundancy matrix also took into account the number of calls that were made.

76. The Claimant has suggested that, as a male over the age of 50, he was more vulnerable to Covid than those under 50, and he was therefore less able to make face to face visits to customers. He has provided evidence in the bundle in the way of news articles to show that even if this wasn't known to be the case at the start of the Covid pandemic, it had become apparent by the time of his selection for redundancy in June 2021.

77. We accept that the evidence put forward by the Claimant shows that the risk of Covid increased with age. This is shown clearly, for example, in the chart at page 136 which

the Claimant took us to in his closing statement. The article is from a reputable source and we accept it as evidence. However we do not accept that aged 50+ males were in their own separate category of enhanced risk. The article on page 135 states "Coronovirus also appears to disproportionately affect men in their 50s and 60s to a certain degree, although they are not singled out as a high risk group".

78. The Claimant did not suggest to the Respondent at any time either before or during the consultation that he was less able to make face to face visits because of his age. He also did not raise this as an issue in the appeal meeting. When explaining both in the consultation meetings and in his evidence to the tribunal in the hearing why his number of customer visits was low his explanation focussed solely on the impact of the lockdown and the 'boosting' effect that might have been caused to other salesmen's scores as a result of fraudulent mileage claims. He didn't suggest at any point in his oral evidence that he was concerned about doing face to face visits. He did emphasise how difficult it was for him to get in to customers and how the lockdown was affecting his area disproportionately.

79. During the time period in consideration it is clear to us that the Claimant's concerns about Covid from a work perspective arose because the pandemic was impacting customers' willingness to see him and his ability to arrange visits when lockdown measures were in place. In the notes from the first consultation meeting (232) we note the Claimant's comments that "…people are reluctant to see me. I like seeing my customers but they are paranoid about Covid and I didn't want to push it." We find that he was a conscientious employee during this period, concerned about being flexible and doing his job as well as he could. He did not shy away from visiting customers as a result of any fear that he may be exposed to Covid himself.

80. We find that the Claimant was not treated less favourably than any other person in the sales team.

Victimisation

81. The Claimant lodged an employment tribunal claim on 11 September 2021.

September commission

82. Following the termination of the Claimant's employment the Respondent paid him commission in the June, July and August 2021 payrolls (392).

    The Claimant was not paid commission in the September payroll and the Respondent blamed this on IT issues. There is no other evidence that the Respondent tried to avoid paying this commission – the email at page 423 states that any customer orders missed in September have been paid in October and we find that the amounts due were in fact paid in the October payroll.

83. On a balance of probabilities we consider that the late payment of the September commission was due to an administrative or IT error.

Greencore

84. At the point that the Claimant's employment was terminated he was expecting a large order for 200l stainless steel buggies to be placed by a customer know as 'Greencore'. The Claimant discussed with Paul Roberjot in the third consultation meeting who would take over the Greencore order. Paul Roberjot was aware of the anticipated Greencore order.

85. It being the Respondent's position that commission was not normally payable to employees after their employment had ended, Paul Roberjot explicitly agreed with the Claimant in the third consultation meeting that the Claimant would receive any commission for deals that came in during the period that would have been his notice period i.e. he would receive commission on orders received up to 17 July 2021. This was confirmed in the dismissal letter. The Claimant was aware of the terms applicable to commission payments generally, and we find that the parties intended that these terms would continue to apply to any commission payments made after the termination of the Claimant's employment.

86. The Claimant was paid in lieu of notice and clearly told that his employment would end on 17 June 2021. He was however asked to carry out handover duties during the period up to 17 July 2021.

87. The Greencore order was placed on 7 July 2021 (425). The Respondent intended to source the buggies from its supplier 'Brokelmann' and, as the Claimant was aware, the Respondent had obtained a quote from Brokelmann which would ensure that a good profit was made on Greencore's order.

88. By the time Greencore placed its order with the Respondent, however, the quote from Brokelmann had expired and the price of the buggies had significantly increased. As Greencore did not want to take delivery of the product until the following March 2022 the Respondent did not confirm its own order with Brokelmann and held off from ordering in the hopes that the price would drop. In the event the order was placed by the Respondent with Brokelmann on 1 December 2021, by which time the Respondent felt it had no choice but to go ahead or else it would risk the buggies not being delivered to the customer's required deadline. The price paid by the Respondent per buggy was EUR 302 (which equates to approximately £259 using the exchange rate for 5 June 2021 of 1 GBP = EUR 1.1639 as set out at page 400) and they were sold to Greencore for £255, which represents a loss to the Respondent of approximately £4 per unit, even before taking into account any additional shipping costs etc. The Respondent did not aim to make a loss on the order but it considered that it was in the best interests of the business to proceed in this way.

89. The Claimant disputes this version of events and submitted that the Respondent's failure to respond to the Claimant's data subject access request (in which he asks for details of stock levels of the 200l buggies held by the Respondent) indicates some subterfuge on the Respondent's part. We do not agree. We accept Paul Roberjot's explanation in his oral evidence that all he had thought was relevant at the start of the

hearing was whether or not the Respondent had made a profit. During the hearing he asked in the Respondent's office for a copy of the order confirmation and invoice relating to the transaction and when these were produced they were put forward into the bundle. Paul Roberjot explained that it would not be normal for the Respondent to buy large quantities of stock in advance as it does not have the facilities to store it for 9 months.

90. We have considered in particular whether the Respondent's failure to provide information to the Claimant in accordance with the data subject access request casts doubt on the Respondent's position. Bearing in mind that the Respondent's failure to provide the information that the Claimant requested is not limited to the issue of stock levels in respect of the Greencore order we consider that this does not call into question the veracity of the documents produced. We also do not find any evidence to support the Claimant's allegation that the documents provided show only part of the picture.

William Atkin

91. We accept that the Claimant's ex-father-in-law William Atkin received a letter which refers to legal proceedings between the Claimant and Syspal but we cannot surmise who it was from or what it related to.

92. We have read the statement from Tommy Gilmour (382) and accept that it is an accurate reflection of his understanding. We bear in mind that Tommy Gilmour was not called to give evidence but we also recognise that such evidence would have been of limited use given that Tommy Gilmour does not profess to have seen the letter that is alleged to have been sent from the Respondent to William Atkin.

93. Paul Roberjot and Vicky Martin were both clear and straight-forward in their evidence that they did not send the letter to Mr Atkin. The Claimant in his submissions pointed out that Paul Roberjot did not say that he had not 'authorised' a letter, only that he did not send one. We do not consider that this argument has force. Paul Roberjot in his witness statement confirms that "we did not" [write the letter], by which we understand him to refer to the Respondent company.

94. On the evidence we have heard we also find that there would be no perceived benefit to the Respondent in contacting Mr Atkin for information about the Claimant and there would be no obvious reason for them to do so.

Protected disclosure

95. The Claimant was consistent in his description of going to Vicky Martin's office after a consultation meeting and that Mark Roberjot popped his head in before quickly retreating. The Claimant told us repeatedly that he said 'This is a protected disclosure' and Vicky Martin said 'you can't say that, Bill'. We have considered the Claimant's oral evidence that he also recorded this meeting but that given the difficulties he had in getting the other recordings accepted into evidence he did not feel it appropriate to also ask to include this one. We consider that Vicky Martin was quite short on detail and vague in her evidence on the matter of the protected disclosure. Although she

remembers the Claimant coming in to her office she could not remember details of what they talked about.

96. We have taken into account that the Claimant's account changed. He first stated (in his letter of appeal dated 23 June 2022, page 268, and then in the appeal meeting on 29 June 2022, transcript at page 309) that he went to Vicky Martin's office after the first consultation meeting. He later changed this to say that he made the disclosure after the second meeting. As Vicky Martin accepts that the Claimant did visit her office we do not consider that this is an important inconsistency, and we accept the Claimant's explanation that he later realised it could not have been after the first consultation meeting because Mark Roberjot was not in the first consultation meeting.

97. We accept that the Claimant did suggest to Vicky Martin that other sales engineers were making fraudulent mileage claims and we find that this was after the second consultation meeting in the context of a more general conversation about the redundancy process. We consider that he did not refer to it as 'a protected disclosure' and that the manner in which he relayed the information did not make clear that he seriously believed what he was saying or that he wished it to be investigated. We find that Vicky Martin does not recall the incident because she understood him to be speaking lightly and did not recognise the import of what he was suggesting.

98. We have considered the Claimant's oral evidence on the matter and find that it is consistent with his claim form and his witness statement. These all focus on the impact that fraudulent mileage claims would have on the Claimant. At page 17 of his witness statement the Claimant states, after multiple paragraphs discussing how the fraudulent mileage claims may have skewed the redundancy scoring, merely that "It may also be a concern for the HMRC, if mileage claimed isn't truly for business mileage."

99. In view of the above we are satisfied that the Claimant made the disclosure because he thought it may have an impact on his scores in the redundancy process.

Relevant Law

Unfair dismissal

100. Section 98 ERA says:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) [which includes that the employee was redundant] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

> (4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case".

101. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers, leading them to act as they did in effecting the Claimant's dismissal. If and when the employer shows the reason for dismissal as above, it must then be established by the employer that it falls within one of the fair categories of dismissal set out by section 98(2) ERA (here the Respondent relies on redundancy).

102. Section 139 ERA defines redundancy. As far as relevant to this case, the cases of **Safeway Stores plc v Burrell** [1997] ICR 523 and **Murray v Foyle Meats Ltd** [1999] ICR 827 establish that there are three questions to consider in determining whether the Claimant was dismissed by reason of redundancy. First, was he dismissed? Secondly, had the requirements of the Respondent's business for employees to carry out work of a particular kind ceased or diminished? Thirdly, was the Claimant's dismissal wholly or mainly attributable to that state of affairs?

103. If the Respondent shows the reason and establishes that it was a reason falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

104. In a redundancy situation, that will entail a number of issues being considered. The decisions of the House of Lords in **Polkey v AE Dayton Services Ltd** [1988] ICR 142 and the Employment Appeal Tribunal ("EAT") in **Williams v Compair Maxam Ltd** [1982] IRLR 83 identified some of the key issues as:

    - Whether objective selection criteria were fairly applied;
    - whether employees were warned and consulted;
    - whether the trade union (if any) was consulted;
    - whether any alternative work was available.

    The EAT in **Williams** confirmed that in relation to each issue the focus should not be what the Employment Tribunal would have done but what the Respondent did, asking whether this was within the range of conduct a reasonable employer could have adopted. It is also well known, since **Polkey**, that in most cases it is not open to a Tribunal to say that failing to act reasonably in a particular respect would have made no difference to whether the Claimant would have been dismissed; that will normally go to the question of remedy only.

105. In relation to the pool for selection, an employer has considerable flexibility. The question is whether the employer applied its mind to it and determined a pool that was reasonable in the circumstances. As the EAT said in **Taymech Limited v Ryan** [1994] EAT/663/94, the question of how the pool should be defined is primarily a matter for the employer to determine. It added, "It would be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem". Of course, who carried out the work that was ceasing or diminishing is relevant as is interchangeability of roles and the fact that other employees not placed in the pool were doing similar work to the dismissed employee. **Capita Hartshead Ltd v Byard [2012] ICR 1256** held that it was not the function of the tribunal to decide whether it would have thought it fairer to act in some other way: the question was whether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

106. As to selection criteria and their application, it was held in **British Aerospace plc v Green** 1995 ICR 1006:

    The industrial tribunal must, in short, be satisfied that redundancy selection has been achieved by adopting a fair and reasonable system and applying it fairly and reasonably as between one employee and another; and must judge that question objectively by asking whether the system and its application fall within the range of fairness and reason (regardless of whether they would have chosen to adopt such a system or apply it in that way themselves) …

    … in general, the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him. Every system has to be examined for its own inherent fairness, judging the criteria employed and the methods of marking in conjunction with any factors

relevant to its fair application, including the degree of consultation which accompanied it. One thing, however, is clear: if such a system is to function effectively, its workings are not to be scrutinised officiously.

… The tribunal is not entitled to embark upon a reassessment exercise … it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based.

107. It is well-established that consultation means the employer being open to hearing the views of the union and affected employee and giving them time to make their views known before final decisions are taken. In particular, there should be opportunity for such consultation regarding the employee's selection for redundancy (before it is confirmed) and ways in which redundancy might be avoided such as by redeployment, as well as an opportunity to address other matters which may be of concern to the employee. Consultation does not oblige agreement but requires openness to change and therefore must be at a time when change is at least possible.

108. Regarding voluntary redundancies, an employer will not necessarily be acting unreasonably if it does not invite volunteers before making compulsory redundancies. We have had regard to the case of ***Lintin v Imagelinx UK Ltd ET Case No.2603643/08***, in which an employment tribunal found that an employer had acted within the range of reasonable responses when, on efficiency grounds, it discounted the possibility of making voluntary redundancies, given that it had kept an open mind during the consultation process.

109. However, case law suggests that the reasonableness of dismissal in such circumstances will depend on the particular facts of the case and we have considered ***Stephenson College v Jackson EAT 0045/13,*** and ***Levene v Moffat Publishing Co Ltd ET Case No.3201397/15*** in which the employment tribunals found that the employer had acted unfairly by first, failing to accept a volunteer for redundancy in the Claimant's place, and second, failing to ask for voluntary redundancies in circumstances where it seemed likely that some would be achieved.

110. An employer should give consideration to alternatives to dismissal. The search for alternative employment in particular should be such as is reasonable in all the circumstances and should continue until the termination of the employee's employment.

111. Finally, the Tribunal should consider the process followed by the employer generally, including the appeal. The case of **Whitbread & Co v Mills [1998] ICR 776** is authority for the proposition that appeals can correct unfairness at the dismissal stage.

112. In summary, what is important is to answer the question posed by section 98(4), as summarised above, and in doing so to make an overall assessment of the facts as we have found them to be. The size and administrative resources of the Respondent are an explicitly relevant consideration.

Age discrimination

113. Section 13 of the Equality Act 2010 provides:

    (a) 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.

    (b) 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.

114. By virtue of section 5 of the Equality Act 2010, age is a protected characteristic. The Respondent has not pleaded a legitimate aim.

115. Section 23 (1) provides:

    (a) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

116. Section 136 provides

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

    (b) 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.

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

    (d) We refer to the case of *Igen Ltd v Wong [2005] IRLR 258.* That case says that the Tribunal must consider all the evidence before us to determine whether the Claimant has proved facts from which we could conclude that the Respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the Respondent's explanation.

    (e) If we are satisfied that the Claimant has proven such facts, it is then for the Respondent to prove that the treatment suffered by the Claimant was in no sense whatsoever on the grounds of his age.

Victimisation

117. Victimisation is prohibited in order to encourage workers to challenge or complain of discrimination or harassment without fear of repercussions.

118. Victimisation as set out in s27 of the Equality Act 2010 has a very technical meaning:

(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.

119. "Protected acts" are defined in subsection (2) as:

2.1 Bringing proceedings under the Equality Act;

2.2 Giving evidence or information in connections with such proceedings;

2.3 doing any other thing for the purposes of or in connection with this Act; and

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

120. It is not a protected act to make a false allegation in bad faith.

121. The Claimant is not protected against victimisation for simply complaining about unfairness in a general sense.

Protected disclosures

122. Section 43A of the ERA defines a 'protected disclosure' as a qualifying disclosure made by a worker in accordance with one of sections 43C to 43H. Section 43B then defines what counts as a 'qualifying disclosure'. For the purposes of this case, this is "*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 that…(a) a criminal offence has been committed, is being committed or is likely to be committed*" or that *(f) information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."*

123. As noted, a "qualifying disclosure" is a protected disclosure if made in accordance with one of sections 43C to 43H. as far as relevant to this case, section 43C applies if a qualifying disclosure is made to the worker's employer.

124. It is of course for the Claimant to satisfy the Tribunal that he made a protected disclosure. As the legislation and related case law makes clear, there are a number of matters for the Tribunal to consider in this regard.

125. A "qualifying disclosure" requires first of all a disclosure of information by the worker.

126. The next question is whether the two remaining requirements of s43B set out above were satisfied. The first such requirement is whether the Claimant reasonably believed that the disclosure of information was in the public interest. The second requirement is whether the Claimant reasonably believed that the information he disclosed tended to show either 1) that a criminal offence had been, is being or is likely to be committed

OR 2) that information tending to show this had been, was being or was likely to be deliberately concealed.

127. On the first of these requirements, as made clear in **Chesterton global limited (t/a Chestertons) v Nurmohamed [2018] IRLR 837**, the test is whether the claimant reasonably believed that his disclosure was in the public interest, not whether it was in fact (in the Tribunal's view for instance) in the public interest. The worker must actually believe that the disclosure is in the public interest and the worker's belief that the disclosure was made in the public interest must have been objectively reasonable. Why the worker makes the disclosure is not of the essence, and the public interest does not have to be the predominant motive in making it. Tribunals might consider the number of people whose interests a disclosure served, the nature of the interests affected, the extent to which they were affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

128. The second of these requirements is assessed very similarly. It is well established that in order for the Claimant to demonstrate that he reasonably believed the information he disclosed tended to show that a criminal offence was being committed it is not necessary that this actually be true, although of course the factual accuracy of what is disclosed may be relevant and useful in assessing whether he reasonably believed that what he said tended to show that a criminal offence was being committed. The cases of **Darnton v University of Surrey [2003] IRLR 133** in the EAT and **Babula v Waltham Forest College [2007] ICR 1026** in the CA make clear that a disclosure may be a "qualifying disclosure" even if a worker is mistaken in what they disclose, provided they are reasonably mistaken, in other words that they have the required reasonable belief. This is a question of fact for the Tribunal, looking at the Claimant's state of mind at the time he made the disclosures.

129. In relation to Section 43B(1)(a)), 'criminal offence', we recognise that it is not necessary that the criminal offence believed by the worker to have been committed even exists, let alone has been breached. It is sufficient that the worker reasonably believes that a criminal offence has been committed. For the same reason, to amount to a qualifying disclosure, it is not necessary that the worker spells out the precise criminal offence that they have in mind.

130. Finally we note that the Claimant must have the required reasonable beliefs in relation to each alleged disclosure.

Detriment

131. The test the Tribunal has to apply in determining the detriment complaint is whether any protected disclosure had a material influence on any conduct which the Claimant is able to establish amounted to a detriment. The question is not whether the protected disclosure was the reason or principal reason for that conduct.

132. The correct approach seems to be:

133. The burden of proof is on the Claimant to show that what happened amounted to a detriment and that a protected disclosure was a ground for (that is, more than a trivial influence upon) the detrimental treatment to which he says he was subjected. In other words, the Claimant has to establish a prima facie case that he was subjected to a detriment and that a protected disclosure had a material influence on the Respondent's conduct which amounted to that detriment.

134. If he did establish that, then by virtue of section 48(2) ERA the Respondent must show the ground on which the detrimental treatment was done. If it does not do so, inferences may be drawn against it.

135. As with discrimination cases, inferences drawn by a Tribunal in a protected disclosure case must be justified by the facts it has found.

Breach of Contract

136. The contractual jurisdiction of employment tribunals is governed by s3 of the Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. A contractual claim can only be heard by a tribunal under these provisions where the claim arises or is outstanding on the termination of the employee's employment and relates to any of the following:

    (i) a claim for damages for breach of the contract of employment or other contract connected with employment;

    (ii) a claim for a sum due under such a contract; or

    (iii) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

Analysis and conclusions

137. Working through with reference to the issues.

What was the reason for the dismissal?

138. We are satisfied that the principal reason for the dismissal was redundancy. We are mindful of the dangers of analysing too closely and legalistically that which is properly a business decision. Looking at the evidence before us we are satisfied that the Respondent's approach was to actively manage the risk created by uncertain market conditions during Covid. It did this by carrying out extensive redundancies in 2020 and we have found that it was continuing to respond to changing market conditions in 2021 by re-organising its sales team – which had in any event inadvertently grown immediately prior to the pandemic with Paul Balfour's recruitment - in order to reflect the reduction in demand for sales people to do face to face visits and the increased need for internal sales. We therefore find that the requirements of the Respondent's

business for field sales engineers had diminished and that the Claimant's dismissal was mainly attributable to that state of affairs.

Did the Respondent act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the Claimant?

139. We find that it did not, and that it was outside the range of reasonable responses to dismiss the Claimant for redundancy. This is due to both substantive and procedural failings with the redundancy.

140. First and foremost, we consider that the Claimant's selection for redundancy was pre-determined. We consider that this is apparent from the Respondent's failure to ask for volunteers, or to have a specific conversation with Ken Harvey in circumstances where it knew it was likely that Ken Harvey would wish to take voluntary redundancy. Paul Roberjot's comments at the end of the 3rd consultation meeting make clear that Ken Harvey was not in reality included in the pool for redundancy as Paul Roberjot had no intention of paying him the redundancy payment that would have been due.

141. We also conclude that there was never any real prospect of Paul Balfour being selected for redundancy. Even though he was the latest to join the Respondent and had less than 2 years' service by June 2021, meaning that he would not be entitled to either a statutory redundancy payment nor to bring a claim of unfair dismissal, this was not considered by Paul Roberjot. Paul Roberjot made clear in his evidence that he is a business man and what matters to a business is profit. He was clearly keenly aware of the cost of making Ken Harvey redundant. If all of the sales team were genuinely potential candidates for redundancy in Paul Roberjot's eyes then we consider he would have opted for Paul Balfour as the lowest cost and lowest risk option. We also consider that there would have been a consideration of total overall sales figures, on which measure Paul Balfour could be seen to be significantly less profitable than the Claimant, rather than sales figures against targets.

142. That there was a pre-determined outcome is also shown by the Respondent's failure to discuss the possibility of future redundancies with all of the sales team in April. We have found that Paul Roberjot raised the issue solely with the Claimant and we conclude that this is because he knew at this early stage that it would be the Claimant who would be selected for redundancy.

143. In relation to the selection criteria, we have found that the bulk of the scoring exercise (namely, the generation of most of the scores and the entry of the scores into the matrix) took place before Vicky Martin had even explained to Paul Roberjot how to use a selection matrix according to the dates on the 'redundancy plan' at page 208. We have found that the redundancy plan is unreliable and we consider that it was provided to create a misleading impression about the steps the Respondent had followed during the redundancy process. In our view this significantly undermines the fairness of the process and causes us to further doubt that there was a genuine effort by the Respondent to follow a fair and objective process.

144. In contradiction to the Respondent's case that Paul Roberjot formulated the scores for the selection criteria, we have found that all scores except those relating to the technical scoring category were assessed and used to populate the matrix by Vicky Martin. This conclusion is supported by Paul Roberjot's lack of knowledge of how the scores were arrived at when the Claimant probed him in the first consultation meeting. Even if we are wrong in this respect, we are satisfied that the explanations given for how the various scores were arrived at do not stand up to scrutiny.

145. In relation to the scores for 'technical knowledge', we have found that these were assessed by Mark Roberjot and Paul Roberjot with full knowledge of how the marks would impact the overall matrix, and without reference to any objective or transparent criteria other than their opinions. Prior to the scoring exercise Paul Roberjot did not make any member of the technical team aware that he was seeking to compare the abilities of the sales engineers for the purposes of a redundancy consultation. Any conversation that he may have had with the technical team at this time was therefore purely informal and, we believe, not a fair or reasonable source of information on which to base a redundancy decision.

146. The absence of a fair and objective scoring process is also shown by the Respondent's failure to follow the marking system described in the 'scoring key' shown on page 214. The Respondent adopts the 5 criteria used in the redundancy matrix but then exercises discretion in how it awards scores, thereby undermining the objectivity and fairness of the matrix. There is a complete lack of transparency as to how the Respondent has arrived at scores which is then made worse in the Claimant's second consultation meeting when Mark Roberjot attempts to justify the Claimant's score of 10 points for the 'sales performance' criterion by reference to the 25%/75% split between the source of orders. This explanation is at odds with that given by Paul Roberjot in his evidence to the Tribunal - Paul Roberjot explained that he gave 10 points because the Claimant's score was so close to 50% and Paul Roberjot was using the scores for comparison purposes – and we consider that it was misleading and disingenuous.

147. In relation to the 'skills and performance' criterion, we do not consider that the decision to use just 'number of calls' and 'number of visits' to assess this criteria was a calculated move in order to exclude other measurables in which the Claimant would score more highly, as the Claimant suggests. It was open to the Respondent to assess by reference to just these two measurables, which are objective and transparent. What makes the scoring of this criterion unfair in our view is the introduction of an element of discretion by the Respondent to allow it to take into account the 'opportunity' that each salesperson had to make calls/visits. It was not explained to the Claimant during the consultation that this was how the scoring criteria worked and nor was the Claimant told the number of accounts that each of the other sales people had, or how number of calls/visits vs 'opportunity' was calculated. As such, the scoring of this criterion lacked all transparency.

148. We are satisfied on a balance of probabilities that the scores in the redundancy matrix were not generated fairly and honestly with an open mind about what the final matrix would show. They were produced with a view to satisfying the formalities of the

process and the overall scoring process lay well outside the band of what would be expected of a reasonable employer.

149. The Respondent submits that suitable alternative roles were considered for the Claimant. The Claimant accepts that he was told about other positions, although he made clear he did not consider them to be suitable. From the comments made in the recorded transcript of the third consultation meeting at approximately lines 221 - 230 we infer that there was some reluctance on the Respondent's part in relation to the Claimant taking the 'project engineer' job and we consider that it is more likely than not that the Respondent did not want to redeploy the Claimant internally. However, as the Claimant accepts that he was given information about other positions and he does not contest that there were genuine attempts to find him alternative work, and as the matter was not put to Paul Roberjot during his evidence, we do not consider it appropriate to consider it further here.

150. This was not a situation where the Respondent could be described as having a good idea about who would end up being selected for redundancy because that person was clearly the weakest performer. Indeed, the Claimant took the panel at length through his sales achievements and we agree that he seemed at least as successful as Paul Balfour and Ken Harvey and possibly more so given that his 2020/21 sales target was significantly higher than Paul Balfour's and almost identical to Ken Harvey's, and he claimed to have the highest total sales out of all 5 sales engineers in the previous year. The Claimant was not the obvious weakest candidate. We do not make a finding as to why it was decided he should be the one to be made redundant. We do not consider that there is enough evidence to conclude on a balance of probabilities that it was due to his age, as the Claimant says. We consider it equally likely to have been a clash of personalities or interpersonal difficulties, or a genuine but unsubstantiated belief that the Claimant was the weakest performer. In any event, we consider that what happened is that upon identifying a redundancy situation the Respondent viewed it as the ideal opportunity for the Claimant to be moved on.

Procedural unfairness

151. The whole redundancy consultation process took 10 days from when the Claimant was first told that he was at risk to the date that he was dismissed. This is an extremely short timescale in circumstances where we can see no business reason for timings to be so tight. This again undermines the Respondent's claim to have been running a genuine open-minded consultation. During most of this time the Claimant was unable to access the Respondent's database which we have found impacted his ability to prepare for the meetings. The Claimant indicated on several occasions that he would like to take legal advice, or that he had not had time to find someone to accompany him. Although the Respondent on one occasion pushed a consultation meeting back by one day, and offered to free up a colleague if the Claimant wished to be accompanied, we nonetheless conclude that the very short time scales and the relentless pushing forward of the process regardless of concerns raised by the Claimant in these circumstances was outside the band of reasonable responses.

The Appeal

152. The appeal procedure managed to remedy many of the original problems with the redundancy procedure and we have considered whether it was sufficient to undo the unfairness of the original decision to dismiss. Ultimately we conclude that it was not.

153. The rescoring exercise carried out by Chris Truman went a long way towards correcting the failures of the original scoring process. However, the following factors lead us to conclude that the decision to dismiss, as upheld in the appeal outcome letter at page 330, remained outside the range of reasonable responses:

    (a) The scores in relation to the third selection criteria – 'skills & performance' were not transparently explained during the appeal process. Although Ken Harvey 's score was changed in relation to this criterion on appeal it is apparent from the appeal outcome letter that the Claimant continued to be marked as 10 on this criterion, whereas 'Employee 3' – Paul Balfour - who achieved a lower total number of visits and calls received a score of 15. On the face of it this is unfair. Any further reasoning behind the scoring is not presented to the Claimant in the appeal letter except for saying "whilst considering the opportunities and size of areas I am satisfied that you are scored fairly…". The scoring for this category therefore still relied on a subjective assessment by the original scorer i.e. Paul Roberjot/Mark Roberjot or Vicky Martin, who we have found had a pre-determined outcome in mind when creating and populating the matrix. In addition, the number of accounts of each sales person is still not stated, the percentage of calls/visits to accounts, for instance, cannot be determined and the Claimant cannot compare the data for each sales person. The scoring is impermeable to challenge and as such lies outside the band of reasonable responses;

    (b) We have found that the original decision to dismiss was pre-determined and that, in reality, other sales engineers were unjustifiably excluded from the selection pool. Even if the selection criteria was completely re-scored during the appeal process this does not take account of the possibility that Ken Harvey or Paul Balfour, or anyone else, may have been selected on a voluntary basis if a fair and genuine redundancy process with an open-minded employer had taken place;

    (c) Finally, we point to the fact that the Claimant only received the data relating to the other salesmen's scores during the appeal meeting. He was not able to consider it at any length or to take the time to prepare any challenges to the data.

154. In summary, the Claimant was dismissed by reason of redundancy, but the dismissal lay outside the range of reasonable responses that were open to the Respondent. The complaint of unfair dismissal is therefore well founded.

Polkey

155. We have considered whether there is a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed. In answering this

question the tribunal must again have regard to the case of **Polkey.** As has been made clear in cases such as **Software 2000 Ltd v Andrews [2007] ICR 825** this entails asking how long the Claimant would have been employed but for the dismissal, or applying a percentage deduction to reflect the possibility that the Claimant would have been fairly dismissed. Either way the Tribunal's assessment must be based on the evidence presented to it. As the EAT put it in **Andrews**, the task is for the Tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. The EAT acknowledged that there will be cases where a tribunal may reasonably take the view that reconstructing what might have been is so fraught with uncertainty that no such assessment can be made, but it must be recognised that in any such judgment an element of speculation is involved.

156. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274** the EAT notes that a Polkey reduction has the following features:

"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on the spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done… The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal on the assumption that the employer would this time have acted fairly though it did not do so beforehand… The potential fairness of any decision is not the issue: it is the chances of a particular decision being made at all."

157. We have found that there was a redundancy situation and we consider that if a fair consultation had taken place the Claimant would certainly have been employed for another two weeks, and he should be compensated in full for that.

158. The second part of our analysis is that there would at that point have been an approximately 1 in 3 chance that the Claimant would have been dismissed. Our key conclusions on liability which lead us to this conclusion are as follows:

(a) The Respondent was actively monitoring ways of making efficiencies and adapting to the changing market demands caused by Covid. Customer demand for face to face customer visits had decreased significantly and the Respondent had decided to increase the number of internal sales people whilst reducing the number of sales engineers in order to reflect the changing nature of customer demand. We cannot tell the Respondent how to run its business and we accept this was a rational commercial decision by the Respondent.

(b) Despite the significant shortcomings with the Respondent's selection matrix it was explicitly accepted by the Claimant that Paul Roberts and Ashley Ball were in another league in terms of both their performance and their corresponding scores. The Claimant made clear that he would not have expected either of these

sales engineers to have scored lowest in the selection matrix even if it had been fairly and objectively applied, and we consider that this is right. Whilst there may have been the possibility that either of these employees might have volunteered for redundancy if the chance had been given, we heard no evidence to this effect and it is therefore not something that we consider likely.

(c) Whilst we recognise that employers are not obliged to ask for, or accept, volunteers in a redundancy process, we consider that a fair process requires an employer to at least keep an open mind on the matter. We have found that Ken Harvey clearly wanted to retire and had approached Paul Roberjot repeatedly about leaving the business. We note that he did in fact retire shortly after the Claimant's departure. On this basis we consider that there is at least an equal chance that he would have been made redundant in the context of a fair process;

(d) We have also found reason to believe that Paul Balfour would have stood a chance of being selected for redundancy in a fair process. He achieved significantly lower sales than the Claimant as well as having fewer numbers of calls and visits. He was also the most recent sales engineer to join the Respondent and had less than 2 years' tenure. Given that Paul Balfour did in fact leave approximately 6 months later we also consider that there is a chance that he would have volunteered for redundancy if this option had been available.

Protected disclosure

Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

159. Although it is not clear how direct the Claimant was when he raised his concerns to Vicky Martin, we find on the balance of probabilities that the Claimant did disclose information to the HR manager on 15 June 2022 about alleged fraudulent mileage claims.

160. The second part of the test concerns whether the Claimant believed the disclosure of information was in the public interest. The Claimant has said that he believed the disclosure was in the company's interests, in HMRCs interests and also in his own interests. The disclosure concerned two or three people's wrongdoing at most. It was relatively limited in time to the period during lockdown. Any harm to the general public would be minimal and indirect. In contrast to this, the Claimant was explicitly and acutely aware of the impact that inaccurate statistics regarding visits could have on the redundancy scoring matrix.

161. We are satisfied that the Claimant made the disclosure during his redundancy consultation process because he felt that it might partially explain how some of the other sales team members had achieved such high numbers of visits in spite of the difficulties presented by the various lockdowns. Whilst recognising that a disclosure can be made in the public interest even if that is not the predominant purpose for which it is made, in the current case we find that the Claimant's sole reason for raising the issue at that time was in order to investigate whether the number of visits of the

other sales people could be proven accurate or not, because this would impact on the Claimant's relative score in the redundancy matrix. As such, the Claimant did not believe that the disclosure of information was made in the public interest and it was therefore not a qualifying disclosure for the purposes of s43B ERA.

162. Because there was no qualifying disclosure, the Claimant's detriment claim also falls away.

Age discrimination

163. We turn now to consider the Claimant's age discrimination claim. It is common ground that the Respondent created a matrix for redundancy selection which included the number of face to face customer visits undertaken. The question is whether the use of this metric was less favourable treatment because of age.

164. Two of the other sales engineers were under 50 years old. Two of them, however, were – like the Claimant – over 50. All of the sales engineers were subject to the same assessment according to numbers of visits done. There is no evidence from which we can conclude on a balance of probabilities that the Respondent subjected the Claimant to less favourable treatment because of his age.

165. Further, even if indirect discrimination is considered, we have found that the Claimant did not at any point during the redundancy consultation suggest that it was unfair to measure him according to the number of face to face visits on the basis that his age meant that he was less able to visit customers during Covid. There is no support in the evidence for the Claimant's case that he was less able or willing to make visits due to his age. All of the evidence shows the Claimant to be a conscientious salesman who was willing and eager to make face to face visits and was frustrated by his inability to do so as a result of the various lockdowns.

166. The reference in the redundancy selection criteria to the number of face to face visits carried out by the salespeople did not therefore put the Claimant at a particular disadvantage.

167. In light of the above the age discrimination claim is not made out.

Victimisation (Equality Act 2010 section 27)

168. We have found that the Claimant did not make a qualifying disclosure for the purposes of his whistleblowing claim. Further, even if we had found that there was a protected disclosure we consider that this would not amount to a 'protected act' as is required for a claim of victimisation under the Equality Act.

169. It is common ground however that the Claimant brought an Employment Tribunal claim on 11 September 2021 alleging, amongst other things, a breach of the Equality Act 2010. We are satisfied that this was a protected act for the purposes of the victimisation provisions of that same Act.

170. We turn to consider whether the Respondent subjected the Claimant to a detriment because of that protected act. There are two detriments alleged. First, that the Respondent withheld commission payments. With regard to the September 2021 payment we have found that this payment was late due to an administrative or IT error and it was not withheld. We therefore conclude that any detriment that may have been caused was not because of the protected act.

171. In relation to the alleged withholding of commission relating to the 'Greencore' account we accepted the explanation given by the Respondent for why the Greencore order did not end up being profitable despite the earlier expectations of both the Claimant and Respondent. We have found that the Respondent took business decisions in relation to this deal which, although with hindsight may not have been the best decisions, were rational and taken in the best interests of the business. On the basis of our findings we are satisfied that commission was not payable to the Claimant in respect of the Greencore order under the terms of the Respondent's commission scheme. The failure to pay the Claimant commission cannot therefore properly be classified as a detriment. Even if it could be understood to be a detriment, this was not because the Claimant had done a protected act.

172. The final alleged detriment concerns the letter to the Claimant's ex father-in-law, William Atkin. The Claimant, understandably, feels extremely aggrieved to think that Mr Atkin has been contacted by the Respondent and drawn into the Claimant's litigation. Going on the evidence before us however we are simply unable to conclude on a balance of probabilities that the Respondent had anything to do with the letter that was received by Mr Atkin.

173. We have found that a letter was sent to Mr Atkin referencing the Claimant and his dispute with the Respondent. However it is far from clear that this letter was sent by or at the behest of the Respondent. We cannot conceive of any reason why the Respondent would do the act that is alleged. We consider that it is implausible that the Respondent would want to approach someone who has not been in close contact with the Claimant for years or that they could have found out the address of such person even if they had a reason for doing so.

174. Taking into account the consistent denials from Vicky Martin, Paul Roberjot and, we understand, the Respondent's solicitor, and given the vagueness of the information about what was contained in the letter, we consider that the letter is most likely to have a more mundane origin. We consider for instance, organisations known as 'ambulance chasing' firms who may see that a tribunal claim has been lodged and try and elicit custom by contacting those involved, or information relating to e.g. the Claimant's pension that may have been produced using an old address. We are in any event satisfied that the Respondent did not subject the Claimant to a detriment by sending the letter as alleged.

175. The Claimant's claims of victimisation therefore fail.

Breach of Contract

Did this claim arise or was it outstanding when the claimant's employment ended?

176. At the time of the Claimant's termination of employment Paul Roberjot entered into an agreement with the Claimant that he would receive commission on any orders that came in during the period that would have been his notice period, had he not been terminated with immediate effect and paid in lieu of notice. We consider that this means that the claim for commission on the Greencore order, which was placed during the relevant period, has a sufficiently close nexus to the end of employment so as to be properly described as having arisen when the Claimant's employment ended.

Did the Respondent fail to pay commission? Was that a breach of contract?

177. It is common ground that the Respondent failed to pay commission to the Claimant in respect of the Greencore order. We have concluded (see above) that the Greencore order was not a profitable order for the Respondent and in accordance with the terms of the commission scheme, commission was therefore not payable to the Claimant. We do not consider that any steps were taken with the deliberate intention of reducing the amount of profit to be made or withholding commission from the Claimant.

178. The failure to pay commission was therefore not a breach of contract and the breach of contract claim fails.

Employment Judge **Bennett**

19 March 2023

APPENDIX

LIST OF ISSUES

1. Unfair dismissal

1.1. What was the reason or principal reason for dismissal? It is agreed that the Claimant was dismissed. The respondent says the reason was redundancy or some other substantial reason, namely business reorganisation.

1.2. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.2.1. The respondent adequately warned and consulted the claimant;

1.2.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

1.2.3. The respondent took reasonable steps to find the claimant suitable alternative employment;

1.2.4. Dismissal was within the range of reasonable responses.

1.3. Remedy for unfair dismissal

1.3.1. Does the claimant wish to be reinstated to their previous employment?

1.3.2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

1.3.3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

1.3.4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

1.3.5. What should the terms of the re-engagement order be?

1.3.6. If there is a compensatory award, how much should it be? The Tribunal will decide:

1.3.6.1. What financial losses has the dismissal caused the claimant?

1.3.6.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

1.3.6.3. If not, for what period of loss should the claimant be compensated?

1.3.6.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

1.3.6.5. If so, should the claimant's compensation be reduced? By how much?

1.3.6.6. Does the statutory cap of fifty-two weeks' pay apply?

1.3.7. What basic award is payable to the claimant, if any? The claimant has received his redundancy payment and the respondent contends this extinguishes the basic award.

2. Protected disclosure

2.1. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1. What did the claimant say or write? When? To whom? The claimant says he made disclosure on this occasion:

2.1.1.1. On 9 June 2021 the claimant made an oral disclosure to Vicky Martin and LB in HR that "two of the salesperson (AB and Paul Roberjot) have been fraudulently making milage claims for driving to customer without appointments and without the visits taking place." The claimant's case was that they were just claiming mileage. They were the only salespeople who had bought their own cars. The lease payments on the cars were paid for by the mileage claimed.

2.1.1.2. Did he disclose information?

2.1.1.3. Did he believe the disclosure of information was made in the public interest?

2.1.1.4. Was that belief reasonable?

2.1.1.5. Did he believe it tended to show that:

2.1.1.5.1. a criminal offence had been, was being or was likely to be committed;

2.1.1.5.2. information tending to show any of these things had been, was being or was likely to be deliberately concealed

2.1.1.6. Was that belief reasonable?

2.1.1.7. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer. If so, it was a protected disclosure.

3. Detriment (Employment Rights Act 1996 section 48).

3.1. Did the respondent do the following things:

3.1.1. Failed to investigate the disclosure thereby compromising the fairness of the redundancy selection procedure.

3.2. By doing so, did it subject the claimant to detriment?

3.3. If so, was it done on the ground that he made a protected disclosure other prohibited reason?

4. Remedy for Protected Disclosure Detriment

4.1. What financial losses has the detrimental treatment caused the claimant?

4.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

4.3. If not, for what period of loss should the claimant be compensated?

4.4. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

4.5. Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

4.6. Is it just and equitable to award the claimant other compensation?

4.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.8. Did the respondent or the claimant unreasonably fail to comply with it?

4.9. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

4.10. Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? Bywhat proportion?

4.11. Was the protected disclosure made in good faith?

4.12. If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

5. Direct age discrimination (Equality Act 2010 section 13)

5.1. The claimant's age group is 50 years and over and he compared himself with people in the age group below 50. Did the respondent do the following things:

5.1.1. created a matric for redundancy selection which included the number of face-to-face customer visits undertaken. [not contested]

5.2. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant says he was treated worse than Paul Roberjot, [Paul Balfour] and AB who were not selected for redundancy but were aged under 50

5.2.1. If so, was it because of age?

5.2.2. The Respondent has indicated that it will not seek to argue that the treatment was a proportionate means of achieving a legitimate aim.

6. Victimisation (Equality Act 2010 section 27)

6.1. Did the claimant do a protected act as follows:

6.1.1. The whistleblowing event described earlier?

6.2. Did the respondent do the following things:

6.2.1. Withholding of commission payments.

6.2.2. In late August 2021 the respondent wrote to Mr and Mrs A (the parents of the claimant's deceased ex-wife) making enquiries about the claimant's character to use in court proceedings.

6.3. By doing so, did it subject the claimant to detriment?

6.4. If so, was it because the claimant did a protected act?

6.5. Was it because the respondent believed the claimant had done, or might do, a protected act?

7. Remedy for discrimination or victimisation

7.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant?

7.2. What should it recommend?

7.3. What financial losses has the discrimination caused the claimant?

7.4. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.5. If not, for what period of loss should the claimant be compensated?

7.6. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.7. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.8. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.9. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.10. Did the respondent or the claimant unreasonably fail to comply with it?

7.11. If so is it just and equitable to increase or decrease any award payable to the claimant?

7.12. By what proportion, up to 25%?

7.13. Should interest be awarded? How much?

8. Breach of Contract

8.1. Did this claim arise or was it outstanding when the claimant's employment ended?

8.2. Did the respondent do the following:

8.2.1. Fail to pay commission

8.3. Was that a breach of contract?

9. How much should the claimant be awarded as damages? The claimant estimates about £4,500 and a more precise figure will be given once disclosure takes place.