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## EMPLOYMENT TRIBUNALS

V

*Claimant*

*Respondent*

Mr A Angeli

AND

- (1). The Orthopaedic Footwear Company Ltd
- (2) Mr S Robinson

**HELD AT:**

**London Central**

**ON:**

29-31 January 2019  
1, 5 & 6 February 2019

**BEFORE:**

Employment Judge Goodman  
Mr D. Schofield  
Mr S. Ferns

***Representation:***

**For Claimant:** Mr S Stevens, counsel  
**For Respondent:** Mr S Robinson, in person

**JUDGMENT** having been sent to the parties on 6 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure.

### REASONS

1. The Tribunal has sat to hear evidence and decide claims for unfair dismissal, age discrimination, sex discrimination, race discrimination and disability discrimination.

2. The claims were denied. There were two preliminary hearings before Employment Judge Hemmings to clarify the issues. At the first, on 13 September 2018, the Claimant was asked to use a table supplied by the judge to give details of the less favourable and unfavourable treatment. At second, on 13 December 2018, the Claimant, by his daughter, said he had not done so, on advice from ELIPS (a group of volunteer lawyers who attend the tribunal), and so it was left that the issues would be clarified at this Hearing.

The Claimant, by his daughter, did provide narrative further and better particulars, and a list of provisions, criteria and practices in support of his claims of indirect discrimination and failure to make adjustments, and from those it is clearer what the claims were. Nevertheless, there being no structured list of what was claimed, and no opening at the start of this case, on conclusion of the evidence the Tribunal asked the Claimant to make the first submission, so as to set out what, in his view, were the issues. The Respondent was to reply, with a final say for the Claimant.

3. In opening, the Claimant by Counsel (who had been instructed about a week before) withdrew the claim for sex discrimination; on closing he withdrew the claim for race discrimination.

4. In outline the main issue is whether the Claimant was dismissed for gross misconduct as the Respondent says, and whether his age has been a cause of discrimination in treatment prior to dismissal, or a reason for the dismissal. The Claimant, who was over statutory retirement age, was over the years prior to dismissal being invited by the respondent from time to time to cut his working hours and make a retirement plan. In essence, the Claimant's case is that the Respondent has seized on the conduct for which he was dismissed as an opportunity to achieve this aim.

5. As for disability, the Claimant, by his daughter, provided a list of conditions alleged as disability. None was admitted. They are: hearing loss, a heart pacemaker, rheumatoid arthritis, frequency of urination, cataract, and (we deduced from other parts of the proceedings) a hernia. As clarified in closing, it was submitted that there was a case for reasonable adjustments for disability not having been made by: failure to provide an induction hearing loop at work; not providing a platform by which the Claimant could reach a lever on his machine; forcing him to use a welting machine; denying him the right to be accompanied at hearings, and by dismissing him.

6. Several events prior to dismissal were alleged as discrimination because of age or disability. The respondent argues that many are out of time and that the tribunal does not have jurisdiction. In addition, in closing, it was put, as an alternative to discrimination because of age or disability, that the Claimant had been harassed on those grounds. We have allowed that as an amendment, though formally, Claimant's counsel did not apply.

## Evidence

7. To decide these claims the Tribunal heard evidence from:
- Angelis Nicolaou Angeli**, the claimant, through a Greek interpreter
  - Christodoulos Nicolaou Angeli**, his son
  - Ionut Stoica**, a former employee of the Respondent, about working practices, and a request made to him to increase his hours on shoe repairing
  - Athanasisa Nicolaou Angeli**, the Claimant's daughter who has acted as his advocate both when the Claimant was employed and subsequently. Her witness statement contained little that was not hearsay or

submissions that could be garnered from her correspondence with the Respondent both before and after dismissal.

**Steven Robinson** the First Respondent's Managing Director who is the Second Respondent. He made the decision to dismiss.

**Robert Elek**, Head of Shoemaking, and in effect the workshop foreman, assisted by a Hungarian interpreter

**Steve Apeah** a pattern designer and orthopaedic shoemaker, who gave evidence about risks to health and safety in shoemaking processes..

8. We had bundles of documents, three supplied by the Claimant and another by the Respondent, there was some overlap in content. Although some attempt at indexing had been made the Claimant's bundles were disordered, and some documents incompletely copied, whether by accident or design was not clear. We have referred to them extensively. There were useful photographs of the machine in question prepared by the local authority's environmental health department which made a post termination visit to the premises. From time to time the Claimant sought to refer to documents which were not available in Tribunal. We admitted some of this material when adequately copied and with notice to the respondent.

### **Conduct of the Hearing**

9. The Claimant was assisted throughout by a Greek interpreter. At the preliminary hearing the claimant's daughter had specified an interpreter in Cypriot Greek, but on the first day the translation agency retained by the Ministry of Justice had not been able to source an interpreter in Cypriot dialect, and it was thought that the case could not proceed and would have to be adjourned off to October. In the event, at the Claimant's request, an interpreter in standard Greek attended instead, and from our observation he seems to have been able to communicate adequately with the Claimant. Throughout the hearing he translated the evidence, submissions and judgment for the Claimant's benefit.

10. The first day was spent reading the written materials. After a short case management hearing on day two the start was postponed to 1p.m. for want of an interpreter. On days three, four and five, the Tribunal heard evidence. On the afternoon of the fifth day we heard submissions from each party. On day six we adjourned to deliberate. On day seven judgment was given with reasons, following which the Respondent applied for an order for preparation time. As it turned out that counsel for the claimant had to leave for the day at 12.40 for a prior hospital appointment, the decision on that application was reserved.

11. In the course of the hearing the Claimant sought production of the draft of Mr Elek's witness statement. It was ruled that the Respondent need not disclose the draft on the basis that it was privileged. It had not been prepared until a few weeks ago, well after proceedings had commenced, and it is not therefore a document which is necessary to decide the issues in the case.

### **Findings of Fact**

12. The Respondent is a small employer making bespoke shoes, mainly for orthopaedic use, at premises in Marylebone which consist of a shop at street level and a workshop in the basement. There is a staff of eight, some of whom work part-time. Bespoke shoe making demands hand crafted work and these skills are rare. We noted that many of the staff had trained abroad, whether in Germany, as with Mr Apeah, or Finland for Mr Wallenius and Mr Niemen, in (we presume) Hungary for Mr Elek; the Claimant and a predecessor repairer are Greek speakers. Mr Stoica is Romanian.

13. As for administrative resource, the Respondent relies on a contracted book-keeper, but otherwise Mr Robinson does the administration himself. He bought the business in August 2011, and at that stage had no particular knowledge of crafts skills or the operation of the machinery, his own background being in technology and marketing, including 3D foot scanning and shoe design. For the shoe making technicalities, he relied on Robert Elek.

14. The Claimant was born on 12 December 1942 and at dismissal in March 2018 was aged 75. He is a Greek-speaking Cypriot who came to the UK in 1961. His daughter said that he had had seven years of education in Cyprus, and had worked as a shoe repairer from the age of 13. His English language competence is basic; we understood that he cannot read and write English. By reading a transcript we could see that he could converse in basic English with workmates but he would need translation for anything complex or contentious. It was not clear to us that he was literate in Greek: at one point his daughter claimed that he was in fact illiterate, but then modified this to saying that he made spelling mistakes. He is also hard of hearing, of which more later, and he wears bi-lateral hearing aids. It was evident that by reasons of limited language skill, and possibly also hearing loss, there were communication difficulties for the Claimant and his employer - and indeed those representing him.

15. We will discuss these in greater detail later, but it seemed to us from the transcript evidence of the two interpreters who assisted at the disciplinary hearing, and indeed some frustration on the part of the interpreter during the course of this hearing, that while some lack of understanding is due to lack of English language, that there was also a problem with intellectual ability, in not being able to focus and answer a question, replying instead on some tangential matter. That may be something developed through effective isolation, spending more time with his own thoughts than interacting with others.

16. The Claimant has worked for the Respondent from 9 January 2006. He was then 63. He was to work three days a week, from 10am-5pm, and paid £85 per day. The contract of employment describes him as a shoe repairer/maker, and his tasks as: "Repairing footwear and other associated tasks such as alterations. Generally, assist with the smooth running of the business. Your responsibilities will only be altered after due consultation with you".

17. The contract includes a list of what the Respondent deems to be gross misconduct. That includes “serious or persistent breach of safety rules”.

18. The Claimant was dismissed for allegedly unsafe use of a Hardo finishing machine, thereby creating a fire hazard, and its therefore necessary for us to describe and make findings as to the operation of the equipment, activity in the workshop and safety hazards.

19. The Hardo machine, which is made in Germany, is a finishing and sanding machine, and will be familiar to customers of the national shoe repair chain, Timpsons, which seems to have one behind every shop counter. It stands about five foot high, and in the version photographed and used by the Claimant, ran three abrasive wheels, one very small on the left, and then two, one with a coarse surface, another a fine surface for sanding. There was some confusion as to whether a “sander-finisher” was the same as a “scouring machine” as described in a newspaper report of one that caught fire and burnt out a shop. Having heard much evidence, and read many of the documents turned up in the Claimants daughter’s research, in our finding the Hardo machine operates in the same way whatever attachments (fine for sanding, coarse for scouring) are fitted to it. It is used to remove debris from shoes being manufactured, or for repair, and to trim and finish the soles, or the heels a general shoe surface. Inevitably this creates debris and dust derived from the materials of the shoe, whether that be leather, rubber, cork, wood, glue, or in some cases, nails. On the machine, immediately below each abrasive wheel, is a vent in the vertical plane, which has an exhaust draft to suck the dust coming off the abrasive wheel into a series of ducts leading into a filter unit, a bag within the machine which provides suction. The dust then collects in the drawer at the bottom. We were told that from time to time the bag is knocked, by pulling a rope, to knock surplus dust off into the drawer. Once a year the bag is emptied of any dust which clings to the bag’s surface. In addition, in the horizontal plane, below the wheel, is a grille into which drops heavier debris falling under gravity. The evidence was that this ends up in the same drawer as the fine dust. We were told that the drawer is emptied about once a day.

20. The purpose of extracting dust by suction is to prevent operators having to inhale it, which is a hazard to health.

21. The hazard related to the dismissal in this case is the risk of the dust catching fire. This can occur when metal is being ground on the abrasive wheels, creating sparks which are extracted into the ducting with the dust and fall in to the dust drawer. The claimant, by his daughter, denies that this is a risk, but the hazard is described by the manufacturers in correspondence with the daughter: “The metal causes sparks and therefore it is necessary to close the dust suction hole in any case of sparks or even suspect of sparks because the chance of fire is always there”. To remove this risk, the operating instructions provide for closing (by a lever) the flaps across the extraction vents, to stop dust being drawn in while metal is ground on the abrasive wheel, which might otherwise cause a fire in the fine dust in the tray. Another precaution is to empty the dust daily. Overall, the manufacturers say it is

dangerous to grind any metal parts, and should that be done and if there is a change sparks would occur, then close the flaps. The operating manual for a Hardo machine, (though the manual we had was not the exact manual for this machine) says "in case of flying sparks caused by sanding metal parts you have to close extractor flap", and then there is a fire hazard sign.

22. Of other evidence presented to us, there was a report from a German institute (which appears to be the equivalent of the UK's Health and Safety Executive or a social insurance advisory body which states that leather will smoulder at 310 degrees and will ignite at 350 degrees. The dust sample in the report we were shown was 70% leather and 30% rubber. Of course, the exact mix of the dust in the Respondent's work processors is not known, but from this it was denied by the Claimant's daughter that the risk of a dust fire in machine was more than negligible, at times asserted even that there was no risk. Apart from the manufacturers' material showing there was some risk of fire, and that flaps should be closed to reduce this risk, we heard from Mr Apeah that he had experienced two such fires in these machines when working in Germany, one in Hamburg in 2008 when working for a private employer, another at the International Shoe Competence Centre in Pirmasens in 2011. There was also a newspaper account, from November 2016, showing a burnt-out scouring machine - which looks very like a Hardo machine - which had caught fire in a shoe shop in Teddington in Outer London. As to other evidence of fire known to be a hazard, the two Finnish employees who come into dismissal story had both trained at a college in Finland and understood that was a risk of fire if the dust extraction flaps were not closed before grinding metal.

23. We were shown a short internet report which referred to the Dust and Explosive Substances Regulations which was not clear as to whether leather dust itself presents a risk of explosion. But what we do understand from reading some of this material is that while dust in a solid heap may not ignite, the presence of oxygen in the air in dust may give rise to a risk of sudden ignition. More often the risk is that a spark may ignite some dust which smoulders and when warm enough will become a real fire.

24. Our conclusion is that sparks falling into leather dust mixed with other shoe debris is a real risk of fire, and that it is industry practice to take precautions against sparks falling into fine dust. We have read the extensive research conducted by the Claimant's daughter, often in dialogue (after dismissal) with other shoe repair and manufacturing companies, but her view that there was no fire hazard does not seem to be accepted by most people in the industry, who maintain at the very least that there is a low risk and some assess it as medium risk.

25. Sparks can be created when making or repairing shoes because nails and studs may be found in the soles and heels. What the Claimant was doing to cause sparks, and which led to the eventual dismissal, was using the abrasive wheel to sharpen his knife. Shoemakers and repairers use sharp knives on leather and rubber, and from time to time of course they need to be sharpened. The evidence was that the experienced men used the abrasive wheels on the Hardo machine for this purpose; that included both the Claimant

and Robert Elek. We heard that less experienced people are less likely to do this because in unskilled hands the process risks losing the edge of the knife altogether. The Hardo machine is not designed for knife sharpening, but knife sharpening is tolerated both by the Respondent and other employers. Knife can and apparently does give off sparks. The Claimant and his daughter asserted that the sparks given off by knife grinding are “cold” sparks, with no fire risk, but there was no other evidence supporting this.

26. As outlined, the practice to reduce this risk was to close the vents. There were variously known as “fire doors” or “dust flaps”; as far as we can see there is no difference. This is done by operating a lever on the machine. The Claimant (possibly because he is not tall and had trouble reaching the lever, though his evidence does not describe this) had devised an alternative method, which was to use wooden boards, sometimes referred to as blocks, wedging one over the dust extractor vent, and another to cover that part of grille at the bottom which was immediately below the wheel in use. This prevented sparks either being extracted into the dust ducts or falling in to the drawers where the extracted dust collected. There is no suggestion that this use of boards as an alternative method was either unsafe or not countenanced by the Respondent.

27. The Claimant generally worked at a bench where his hand tools were set out, but from time to time like all operatives, move across to use the Hardo machine for a particular task, whether to grind a blade or abrade soles and heels.

28. We turn now from an assessment of fire risk and precautions to the narrative of the Claimant’s relations with the Respondent, in particular after Mr Robinson bought the business in 2011. At that stage the Claimant was 68.

29. In 2012, the Claimant then being 69, on 15 August Mr Robinson had a meeting with the Claimant about his plans for the future, from which he understood that the Claimant had agreed to move down to a two day week, and then to one day a week with a view, as he confirmed in a letter, “to you retiring fully towards the end of the year”. In December that year he would turn 70. The letter confirming this was sent, and there was no dispute about it until in November 2012, following, we assume, the reduction in hours, his daughter noted that his wages had gone down too; she made enquiries as to why this was, and on then learning that he was reducing his days, and on the payroll department saying to her that “the exact leaving date had yet to be agreed”, there seems to be some discussion, but we can see from the documents bundle that the Claimant did not then retire, and certainly by March 2013 he was back to working three days a week. Neither side was able to remember the detail of what happened, or how the Claimant came not to retire.

30. These matters rested until 19 September 2013, so a year on, when Mr Robinson wrote to the Claimant’s daughter with a proposal that he reduce his hours to two days a week, because there was not enough work, adding “it is always difficult to discuss these things with him directly due to the language

issue". He asked her to discuss this with her father, and said "I will write to confirm". We observe that the tone of this letter is amicable and consultative. We would not describe it as aggressive. The daughter replied that the Claimant was concerned that reducing his hours might increase his workload, as there seemed to be no reduction in shoe repair work, but "he will do two days as you requested from 1 October and also, he is nearing the end of his working life, so as you previously planned to recruit someone else to do his job it is his hours but please do not kill him off". We thought this might be a reference to not overloading him when reducing his hours. On 20 September 2013 Mr Robinson spoke to the Claimant, and then told his daughter that they had had a chat, and "we will carry on with three days as before". He mentioned that he would be increasing the prices for shoe repairs to cover the costs of the Claimant's time, so introducing a note that perhaps the Claimant might not be working as fast as Mr Robinson wished.

31. On 18 December 2013, in a letter to the Claimant's daughter about holiday booking, Mr Robinson added "Your dad is doing a great job by the way".

32. Moving on a year, to 15 October 2014, Mr Robinson wrote to the daughter (in the context of holiday request and the possibility of an upcoming operation to repair a hernia) saying, "however I do need to broach the issue of retirement I am afraid". He voiced his "gut feeling that the problem on the Claimant's return to work after surgery would be that there might be issues concerning speed of work etc and I would rather not have to go in to that with him". It seems to be a reference to the need to have a capability discussion, but adding "it has been a long a very pleasant association and I do not want to put him under any unreasonable pressure and end on a sour note", saying that this was a "heads up that they might need to bite the bullet" and have a retirement discussion after the operation. There is no recorded reply to that email, perhaps because the Claimant did not in fact have the operation and indeed still has not had the operation; he carried on working three days a week.

33. Nearly a year after that, on 30 September 2015, the Respondent wrote about the changing balance of the work, that there were fewer repairs to be done and more work was needed on bespoke shoes, and adding (in writing to his daughter), "I am not sure he understands fully" and he was concerned about the time taken in repairs. There was discussion of a build up of new work leading for a time to repairs were being outsourced, with the Claimant helping out on bespoke shoes. The Claimant, replying by his daughter, mentioned the fact that this might have been misread, because someone else had been off for three months. We also know that in 2015, according to Ionut Stoica, he had been asked to take on repairs as part of his job while working five days; it was suggested by Mr Stoica that this meant he would be doing shoe repair work for five days, which might suggest a plan to delete the claimant's job; Mr Elek said that this was in addition to new shoes, but in any event, it never came to pass.



34. Towards the end of the year, on 6 December 2015, Mr Robinson asked his daughter in for an informal chat, saying "I would like to get a feel for your dad's plans and thoughts. It is always a bit tricky to do it directly because of the language issues etc so I wondered if you and I could talk initially". They met to talk, and next day, 13 January 2016 Mr Robinson wrote to the Claimant saying he already had a chat with Ana (the daughter), and "I am writing to raise the issue of retirement with you"; he said that the work was demanding a wider range of skills and duties, that he was reluctant to make "demands of you at this stage of your career" and in the light of his age and health, he wondered if retirement might be a better option. He added that the Claimant had no legal obligation to retire and it was "a judgment for you as to what was in your better interest". He added that if the Claimant chose to retire he could be employed as a freelance worker maybe one day a week; he suggested that they could have a further meeting involving his daughter, and reassured him there was no reason for concern as his work record was excellent. On 18 January 2016 the Claimant met Mr Robinson to discuss it, and Mr Robinson later emailed the Claimant's daughter: "he seems happy to retire at the end of March and then work one day a week, but does this match with your discussions with him", checking the Claimant had understood, "before we formalise things"; he asked her to let him know he was happy to meet again. On 25 January 2016 the daughter, having had a discussion with the Claimant, emailed to say that he wanted to carry on with three days a week.

35. The Tribunal comments that so far the tone of the discussions was thoughtful, consultative and amicable. Mr Robinson was concerned to assess whether he had in fact understood the Claimant's wishes correctly by inviting the daughter into the discussion.

36. Early in May 2016 Mr Robinson had a third discussion with the Claimant, and confirmed the content in a letter on 11 May 2016; he referred to a decline in cemented work on shoes, and to the purchase of a welting machine, ( a machine that stitches shoes - hitherto stitching work for repairs was sent out, and it was now planned to use this machine to do stitching, when required for repairs, in-house. The Claimant was invited to operate it after being trained. It seems that he said no because he had a knee problem, although his daughter has said he had been misunderstood and in fact the problem was with his ankle. There is no contemporary mention of either difficulty. What is advanced by the daughter in these proceedings is the Claimant was not able to work the welting machine because he had a heart pacemaker. This does not feature in the documents at the time; difficulty operating the welting machine because he is small in stature was mentioned. But it seems then to have been recorded by Mr Robinson as having been agreed that if he did not work the stitching machine he would reduce his hours from three days to one day, effective from 16 May, though but if the cementing work subsequently increased, his days could be increased.

37. This initiative resulted in the Claimant, by his daughter, lodging a grievance. On 27 May the daughter wrote to say that when the Claimant had agreed to a reduction he had thought this was a one-off arrangement because he had a hospital appointment. She asked whether this was redundancy, and

complained that it was being imposed at very short notice, that she was being cut out of the loop, and that the new machine was for making new shoes not for repairs. The letter concluded by proposing that there should be a financial package and a settlement agreement. On 31 May 2016 Mr Robinson responded, saying that he would be adding cemented work, and if the Claimant would agree to work on new shoes as well as repairs they could go back to three days a week (he would not be operating the welting machine). He would be required to make one (new) pair a day, and work to Robert Elek's instructions. We have heard some evidence about how many pairs of new shoes would be prepared each; it seems that some people could make two or three a day, and one a day is not a demanding requirement.

38. He answered the grievance that he had thought the Claimant had fully understood, there was no redundancy issue, in fact there was plenty of repair work.

39. By 21 June 2016 the Claimant's daughter said that she was taking legal advice; her father was unhappy and working under protest. At this point, we understand, the Claimant had gone to ACAS under the early conciliation procedure to complain about a reduction in his hours. It is this event (reference to legal advice and a demand for a settlement agreement with a package) that seems to have led to a breakdown in relations, hitherto cordial, between Mr Robinson and the Claimant's daughter. Mr Robinson wrote to say that in future he would deal with the father direct.

40. On 6 July, after the initiation of the early conciliation of procedure, he wrote to the Claimant to say that the proposal to cut his hours was not being imposed, it was entirely voluntary; he was invited to a grievance meeting bringing a colleague or trade union representative.

41. On 10 August 2016 Mr Robinson wrote to the Claimant's daughter noting the Claimant's height concerns about operating the welting machine and his concern about lack of familiarity with the new process, he was increasing the bespoke work (new shoe production) to two days, so that the Claimant will be able to work three days a week either on repairs or on new shoes.

42. The dispute seems to have proceeded no further, and the Claimant worked to this pattern – three days a week, not required to use the welting machine - thereafter.

43. In January 2017 there was some dispute over the Claimant taking holiday, it is referred to by the Claimant's daughter in written material for this claim, but we are not aware of the detail, and we do not understand it to form part of this claim. It was the subject of a grievance in February 2017, and the Respondent wrote to the daughter about it, but it seems that in the early months of 2017 the Claimant was off sick, because there was an issue about his sick pay; following a letter from the daughter Mr Robinson conceded that she had been right on sick pay point. He also proposed a meeting about a holiday dispute, and we know he offered a Greek-speaking co-worker, Nicolaou, as an interpreter for the meeting.

44. There matters seemed to have rested until the incident in October 2017 which eventually led to the Claimant's dismissal. We note that by this point there were poor relations between Mr Robinson and the Claimant's daughter - although they were still communicating - and that this must have exacerbated existing communication difficulties. Nevertheless, the Respondent was still proposing an interpreter to assist in meetings.

45. The incident occurred on Friday 27 October 2017. Mr Robinson was in Scotland and that afternoon received a telephone call while he was driving, from Vivi Wallenius, a Finnish employee in the workshop. She said it was urgent. She said the Claimant was persistently sharpening his knife on the sanding machine without closing the safety gates, and sparks were falling into the dust capture. As reported, she said it was not for the first time, and she and Serkko a Finnish intern, had repeatedly told him to desist. As to what happened, either on Friday 27 October or on Monday 30 October, there is no account in the Claimant's otherwise lengthy witness statement.

46. On the morning of 30 October Mr Robinson, now in London, spoke to Vivi Wallenius about what she had meant about this and the previous occasion, and also to Robert Elek, Head of Shoemaking, who confirmed that the risk of ignition of dust by sparks was a serious risk, but adding that there was no record of the Claimant having done this before. Mr Robinson then spoke to the Claimant, but not for long. What the Claimant said, as recorded by Mr Robinson, is to the effect that it did not matter if sparks fell in to the leather dust, there was no petrol in it and it would not catch fire. The interview did not last long because the Claimant developed chest pain, and it was adjourned.

47. Mr Robinson then suspended the Claimant. The letter confirming the suspension says that this was because there was a real risk of fire from this practice and the Claimant had not responded to warnings not to do it. It proposed a future discussion in an organised way, with a translator, to explore what he said had happened.

48. On 1 November 2017 Mr Robinson sent a detailed letter describing the risk that he apprehended of sparks falling in to the dust. It was accompanied by a one page statement which reports what Ms Wallenius had said. On 3 November 2017 we see Ms Wallenius's witness statement, in which she said she had repeatedly asked him to desist, and that she had told the Claimant, firstly on an occasion before Serkko had started his internship (which we know lasted about three weeks), secondly, that Serko himself had yelled at the Claimant, as had Ms Wallenius, to close the flaps when grinding a knife on the wheel, and thirdly on the afternoon of 27 October. There is some uncertainty whether this constitutes three or four occasions, depending on whether Serkko and Ms Wallenius yelled to the Claimant on two occasions or on one.

49. On 8 November 2017 the Claimant's son-in-law rang "to mediate", as he put it, but he was covertly recording the telephone conversation, and we have a transcript. Mr Robinson, obviously unaware of the recording, referred to the

fact that this had occurred in a privately tenanted multi-storey building with a huge real risk of loss of life from fire, that was the brutal reality. Having discussed the risk and the seriousness of the episode, he went on to say that he knew that the Claimant struggled a great deal in all sorts of ways “but with support you know he is able to continue working to a reasonable standard, we have had our ups and downs a little bit whenever there has been a change in circumstances but we have resolved all that”. He said he was “rambling along in a sort of happy way for a year or so I think”, but that this was “something extraordinary in the work shop with the equipment and he has been doing it persistently”. The disciplinary hearing was to be on the Monday, as had been put in the letter. The son-in-law suggested this was heavy handed, Mr Robinson said the risk of fire and death was serious. The son-in-law having mentioned redundancy, Mr Robinson confirmed there was plenty of shoe repair work. They discussed whether the son-in-law could accompany him, Mr Robinson conceded he had the right to bring a friend in his contract, but he was not comfortable with family members. At times Mr Robinson was challenged that he had made decision already - he said no, he was having a hearing.

50. The Claimant went sick with stress. The hearing was postponed on several occasions therefore. Eventually the Respondent insisted that there must be a hearing, whether the Claimant was fit for work or not.

51. On 8 February 2018 ACAS were involved again under the early conciliation procedure in respect of the Claimant’s suspension. On 19 February 2018 the Claimant lodged a grievance, by his son-in-law, saying: “you are deliberately using this incident as an excuse to dismiss me as I refuse to retire”, then reviewing the previous discussions about retirement. He also complained about the process - there had not been an investigation meeting about the accident.

52. On 21 February 2018 Mr Robinson sent the Claimant a copy of Ms Wallenius’s witness statement, and offered Greek speaking Nicolaou, who was by now a former employee, who had previously assisted with translating; he said that he would get Ms Wallenius to answer any questions the Claimant wished to put to her, but she was suffering from stress. The same day Mr Robinson emailed Serkko who was by now back in Finland, who then replied: “I saw and did mention to Angelo (the Claimant) a couple of times myself to shut the gates so did Vivi, (Ms Wallenius), and I remember Vivi told Robert about it too.”

53. The disciplinary hearing took place on 5 March 2018. Mr Robinson was there accompanied by Robert Elek, Head of Shoemaking, Nicolaou was there to translate. The Claimant came with Chris Ioannou, a Cypriot neighbour; this whole meeting was covertly recorded, and the transcript is in the bundle. We assume that it was the neighbour and driver, Chris, who made the recording, because it starts right from their entry at the front door in reception, continues through general introductions in the waiting period, then the hearing itself, then Claimant descending to the basement to carry out a demonstration, where some of the conversation is captured, although it seems that Chris could not accompany him, and the Claimant’s subsequent conversations with other

workers, including Vivi Wallenius, after the hearing, before the Claimant left the premises. Chris was introduced as someone who came for moral support, but who was also able to translate; we can hear Mr Robinson exploring his role in the conversation. As the meeting developed, Chris became the Claimant's advocate, we can see that on some occasions both Chris and Nicolaou were translating from English into Greek, and the Claimant's Greek replies into English. We comment as to the adequacy of the Claimant's understanding of Greek when spoken by people who are not Cypriots, that there seems to be no difficulty with Nicholaou's understanding of the Claimant, as the interpreter at this hearing seems to have no difficulty communicating with the Claimant, indeed did on one occasion Chris Ioannou, who speaks Cypriot dialect, asked Nicholaou for the Greek word for dust.

54. As well as what is now a transcript (prepared by Maria Ioannou) of this lengthy and full recording, which appears to be verbatim, we have the Respondent's summary note prepared in ignorance of it. While it is a short, one page note, it does not seem to omit any essential feature of the direction of the discussion.

55. The Respondent told us that he had been sent the recording so he could check the transcript, he had not in fact checked it in detail, but he did not dispute it. It is difficult to read, because the person who typed the transcript does not ever identify who the speaker is, or indeed when the speech is in Greek, translated into English by the transcriber (who we understand to be a Greek speaker) or whether the speech is in English. (None of the transcript is in Greek, though the claimant was speaking it). With attentive reading it is usually possible to identify who is speaking and what is being translated. The members of the Tribunal took particular care to read this transcript together, because we were not taken to it in any detail by either side in the evidence. In doing so we were mindful of the caution we are enjoined to adopt when reading a covert recording in **Singh v Singh 2016 EWHC1432**, that: "covert recordings must be approached with some caution, as there is always a risk that where one party knows the conversation is being recorded but the other does not, the content may be manipulated with a view to drawing the party who is unaware in to some statement that can be taken out of context. But there can be great value in what is said in such circumstances where the parties plainly know the truth of the matters they are discussing and are talking, at least from one side, freely about them". We bore these warning comments in mind when trying to understand what was being said.

56. First, before the hearing, the Claimant met Vivi Wallenius who was on the premises, she said that she was around if she was wanted. We note that during the hearing it was not suggested by the Claimant or by Chris that Ms Wallenius should be brought in. After the hearing the Claimant met her again, and she addressed him in English, saying "in my school in Finland I was told to close the gates and I know if there is a fire everyone will die so I could not take that chance, I have nothing against you and I am really sorry that you are in this situation".

57. Of the pre-hearing conversation, we note that it is also recorded that the

Claimant spoke to Ibrahim, who is also in his 70's and who works one day a week on piece work. He said to Ibrahim: "problem when I start to sharpen knife, and the young girl sees lights, very scared, and come on top of my head and closed the drawer without letting me close it you know". This encapsulates the Claimant's understanding of the case he had to meet.

58. Robert Elek was present throughout but did not orally contribute.

59. As to the hearing itself, Mr Robinson opened with a statement of the problems as he perceived it, and it then proceeded to discussion. The Claimant said that Ms Wallenius had closed the gate (the dust flap) before he could have the opportunity to do so. After discussion of this, Mr Robinson then pressed the Claimant to speak of the previous occasions mentioned by Ms Wallenius. There were a number of interventions by Chris Ioannou, the Claimant's neighbour, as the question was asked, and returned to by Mr Robinson a number of times when there was no direct answer. First Chris intervened by saying that there was a need for bench grinder to sharpen knives, Mr Robinson replying that he had no objection to workers sharpening their knives on the machine, the objection was the sparks given off falling into the dust chutes. When the question was put again, Chris Ioannou answered that employers should expect that experienced employees will sometimes take short cuts, and that annual training was needed to update them on the risk of safety – by his it seems to have been passively conceded that the Claimant had not blocked the vents before creating sparks with his knife. When he was asked again about the previous warnings, the answer from the Claimant, through interpreters, was that he used the blocks. He explained this in the context of grinding the "spring" which is the word either used by him, or as translated; in context it probably means the metal insert to a shoe, and that when that is ground down to make it smaller it will create sparks. The Claimant's answer on the use of blocks does not seem to have been in the context of sharpening a knife. We note that eventually the question about previous episodes was answered by the Claimant saying that Vivi could not see when he was using the boards, because she stood opposite to him. We also note that at an earlier point in the discussion he referred not to using the boards, but to blocking the vent with a piece of leather. There was also discussion which appears to have been to the effect that he used boards because if he used the lever to block the flaps, other workers coming to use the machine would forget to unblock them and dust would then spray all over the place. Mr Robinson then moved to contrasting this explanation with what the Claimant had told him on 30 October - that in effect there was no fire hazard, and in effect he did not block the vents. The Claimant then said that he had "lied" - this is the word he used - to protect Vivi Wallenius.

60. At this point the Claimant offered to demonstrate what he had been doing by going down to the workshop. Mr Robinson accompanied him there, we have some record of the dialogue, but of course no pictures. According to Mr Robinson the Claimant started the wheel and brought the knife close to the wheel, but without closing the flaps or applying the blocks, and at this point Mr Robinson apprehended that he was about to apply the knife to the wheel and so create sparks without either being done, and at this point he intervened

and stopped the demonstration.

61. We comment that it is possible that this reinforced Mr Robinson's concerns that the Claimant had not even now grasped that sharpening a knife caused a fire hazard. It may even have been the claimant's intention to demonstrate that dust did not ignite when he did this, but the claimant does not deal with why he had not used the blocks, which he had suggested was his practice.

62. The parties then returned upstairs, and we can hear the discussion with Ms Wallenius and some discussion about the Claimant collecting tools.

63. After the hearing, on 6 March Mr Robinson asked Ms Wallenius about the use of blocks, as this had been now raised for the first time, and she made a further witness statement. She said no leather or wooden panel blocking the dust chute had been present at the episode she had witnessed, the sparks were falling into the machine, that was why she had reported it. Mr Robinson put the same question to Serkko Niemen by email, who replied by email: "I personally shouted at Angelo on a couple of times, no wood plate weren't in front of the vacuum hole".

64. On 9 March 2018 Mr Robinson wrote to the Claimant dismissing him for gross misconduct, specifically, that he had "seriously and persistently breached safety rules in respect of the sanding machine and in doing so endangered the lives of yourself, your co-workers and other tenants of the building". It is accompanied by a detailed four page summary of his reasons for doing so. Trying to summarise that document, he said it had been established as a fact that it was a danger that sparks fall in to the dust, that he had not mentioned the use of blocks on 30 October, though he did on 6 March, that he had said that was because he was protecting Vivi, but that was a false story, that Vivi and Serkko had confirmed that wooden panels were not being used when they saw the hazard; there was no coherent reason why blocks should be used rather than flaps if others worked on the machine later; that Robert Elek commented that he had done the job safely hitherto, so it appeared that there was no need for training as he understood the risk; it was emphasised that it was not a question of his age, as Ibrahim, who was older, operated a machine safely, nor had he concluded that it was a problem of language; the Claimant had understood the safety points. He referred to demonstration, saying that he had been within a second of sending hot sparks into the dust bags and that it was exactly the same safety breach being demonstrated. He said that he could not reinstate him (meaning, not dismiss him) because he could not take the risk of recurrence. He said he had concluded that the Claimant could not be trusted to deliver the safety requirement; his work would be dangerous and unpredictable; he was unable to provide constant supervision of the Claimant; he had had support, and as an owner he had to deliver safety to all.

65. The letter of dismissal offered the Claimant the opportunity to appeal, and a written appeal was lodged. We understand it was drafted by the daughter, perhaps with some help. Among the complaints made were that

there was no witness statement available for Serkko, Ms Wallenius had not been at the hearing, that there was no witness statement from Robert Elek or from Ibrahim, there were not enough knives, so they had to be sharpened from time to time, that there was no training or any operating manual available, that the family had been excluded from the hearing, and that the companion selected was unsuitable, that fire doors had been fused with flaps and that the block method was not understood by the younger staff, that the Claimant had been forced to attend the hearing when he was unwell. We can read this that the Claimant does not in effect accept that the risk was serious: it was said that it was not accepted that sparks cause a danger and will burn and "a small spark that last seconds has no chance". The Claimant said: "I did not cause a fire and no one died I did not kill steal anything", and that leather was not flammable.

66. A hearing date was set for the appeal but in the event it did not proceed, because the Claimant was unwell, we understand from stress. The failure to proceed to an appeal has not been the subject of complaint in these proceedings.

### **Relevant Law**

67. Against these facts we consider the remaining claims made: dismissal, age discrimination, both in relation to dismissal and the earlier pressure to retire, either as detriment on grounds of age, or harassment related to age, and the complaint of disability discrimination, which we understand to be a claim of direct discrimination and of failure to make reasonable adjustments for disability.

68. We discussed the age discrimination and unfair dismissal together, so as to analyse the reason for dismissal. Neither side referred to any law, but it is right to set out the law when making a decision so that the parties understand why it is made.

69. Section 98(1) of the Employment Rights Act 1996, which concerns the right to claim unfair dismissal, provides that in determining whether a dismissal was unfair it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. It must be one of the potentially fair reasons set out in that section, which includes a reason relating to the conduct of the employee.

70. The Equality Act 2010 defines direct discrimination in section 13: 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. The protected characteristics in this case are age and disability.

71. Section 13(2) provides that where the protected characteristic is age an employer may show he did not discriminate if the treatment was a proportionate means of achieving a legitimate aim. That is not relied on by the Respondent in this case. Treatment can be compared with an actual person, or with a hypothetical comparator. We understand that we are invited to



construct a hypothetical comparator, although a number of other individuals both old and young are alluded to as evidence.

72. As explained in **Abernethy v Mott, Hay and Anderson**, a reason is a set of facts, or as the case may be, beliefs, known to the Respondent that cause him to dismiss.

73. In deciding whether age, or as the case may be, disability, was a reason when making the decision to dismissal or subject to detriment, we note from **R v Birmingham City Council ex parte Equal Opportunities Commission (EOC) [1989] IRLR 173** that intention or motive are not necessary conditions for liability; as in **ex parte E v Governing Body of JFS 2010 IRLR 136** grounds for discrimination are the factual criteria applied by the discriminator in reaching his decision. Again, it is reinforced in **James v Eastleigh Borough Council 1990 IRLR 288** that the test is objective, and the discriminator's motive is irrelevant.

74. Because discriminators are unlikely to state their reasons are unlawful, and because indeed they may not recognise that discrimination is the reason for their decision, the Equality Act provides a special burden of proof: 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, but not if A shows that A did not contravene the provision. This codifies earlier law as in **Igen v Wong (2005) IRLR 258**, that it is for the Claimant to prove facts from which the Tribunal could conclude that discrimination occurred unless the Respondent at that stage is able to show an explanation that justifies the dismissal but does not involve discrimination.

75. Having established the reason for dismissal, and if it is not a discriminatory one, the Tribunal must then consider whether a reasonable employer would dismiss for that reason, having regard to s.98(4) of the Employment Rights Act. We have to consider the circumstances including the size and administrative resources of the employer's undertaking, and we have to make the decision in accordance with equity and the substantial merits of the case, whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. **British Home Stores v Burchell (1978) ICR 303**, in the context of conduct dismissals, analysed that Tribunals must consider: did the employer believe in the Claimant's guilt of the offence charged, did he have reasonable grounds for that belief, and was that belief founded on sufficient investigation in the circumstances. We must next consider whether a reasonable employer would dismiss for that reason, while bearing in mind that there may be a range of responses by reasonable employers, and we must be careful not to substitute our own view for that of a reasonable employer, having regard to **Iceland Frozen Foods v Jones (1983) ICR 17**.

76. When considering how the facts of this case, as found, should be applied having regard to the law, we scrutinised the Respondent's reasons with great care, because of background of retirement discussions which might

suggest, as the Claimant has, that the Respondent seized the opportunity of Vivi Wallenius's telephone call to be rid of the Claimant because of his age. We know that for some years the Respondent had initiated retirement discussions almost on an annual basis with the Claimant, because he may have perceived with or without evidence and justification, that the Claimant was unable to adapt to new processes, or was working more slowly. On the face of it the Claimant had worked satisfactorily, without concerns about safe practice, for many years, further, no fire or other damage has in fact been caused, so on the face of it, this was a harsh decision.

77. We also take account of the fact that in matters of safety an employer does have to balance the risk to other workers, and indeed other people generally, against the Claimant's need for employment. The fact that a fire had not occurred before does not mean it would not happen at any time in future if the claimant was not careful to block the suction exhaust before sharpening a knife on the wheel. In a basement workshop, a fire, could have catastrophic consequences.

78. On the facts we have concluded that, contrary to some of the arguments advanced by or on behalf of the Claimant, there is a known risk that sparks in dust can cause smouldering, fire, that such fires can start quickly or smoulder for hours or days if unnoticed before coming serious, and we have sufficient evidence both that such fires have occurred, and that it was taken for granted by the manufacturers at least that this is a risk which should be controlled for, by closing the vents when grinding metal.

79. We had to consider whether the Respondent was genuine when using this known risk as a reason for dismissing the Claimant. Would he have dismissed a younger man? As expressed, he felt that it was not safe to retain him, as he could not trust him to follow safe practice. Mr Robinson had been given two separate stories, as the first time the Claimant said that sparks falling in to dust was not in fact a fire hazard, and that the blocks explanation came very late in the disciplinary meeting in March. When the claimant said the first account he gave was not true, so as to protect Ms Wallenius, it must have made it difficult for the respondent to know whether he could believe or trust what the claimant said. Nor is it clear from what he said that this was in fact he had done. Despite the communication difficulties, the Claimant had answered the persistent breaches question indirectly or not at on several occasions, and it was not clear that he had in fact used blocks when sharpening knives, as against grinding metal springs. He also did not place the blocks in position before putting the knife to the wheel when he volunteered his demonstration, which indicates he was not demonstrating that he had a safe method which Ms Wallenius had understood, but that sparks did not cause fires. Even taking in to account that there may have been communication difficulties in the absence of an interpreter on 30 October, when this story was put to the Claimant in the March meeting his response was not to say "that's not what I said", or "you did not understand about the blocks", only that he had made up a story, he had lied, as he put it, to protect Ms Wallenius.

80. There was evidence from Ms Wallenius and Serkko. Ms Wallenius could have attended, being on the premises, but the claimant did not ask her to be there or suggest she did not tell the truth, only that she could not properly see what he was doing. Mr Robinson checked the new information with her before making his decision. He did not get a statement from Robert Elek, who would perhaps best know what the claimant usually did when sharpening knives, but he was present at the hearing, and the claimant could have asked him to state the position if it was his habit to use blocks when grinding knives. So we concluded that the Respondent was genuine in believing that the Claimant did not appreciate the safety risk or alternatively that not trust him even when he had been told there was a risk to always use the blocks when sharpening his knife.

81. As whether the Respondent's belief is based on reasonable grounds, we note that he had the evidence of Vivi Wallenius's call on 27 October, and discussion on 30 October, there was a written statement on 3 November, and she had confirmed after the hearing and on being told the claimant's explanation. She was also available for the hearing even if neither side actually called on her. Serko Niemen was absent, but his evidence had been obtained before and after the hearing. Robert Elek had confirmed that the Claimant followed safe practice before; he had not observed what happened on 27 October. For investigation with the Claimant, it was brief on 30 October, there was no interpreter, and it was cut short by the Claimant's chest pains, but the Claimant had been sent a detailed account on 1 November, so that he was able to see that the problems not just what happened on 27 October but the report that he had been told on previous occasions that this was unsafe and he had taken no notice. In February 2018, well before the dismissal hearing in March, he had seen Ms Wallenius's actual statement, so that he was free to challenge what she had said. The Disciplinary Hearing went in to a great deal of detail and covered the real points of concern, such as knowledge of the risk, that there had been persistent breaches, the risk of repetition and the change of story. This gave an opportunity for the Claimant to cover the ground if it had not been covered on 30 October. We considered that there was adequate translation at the hearing: one, Mr Ioannou, a Cypriot who was familiar with woodworking machinery if not shoe making machinery, being himself a carpenter, and another, Nicholaou, who had knowledge of the workshop itself and whose Greek was readily understood by the claimant. We noted that although the family had been excluded, because of the difficult history, Chris Ioannou performed an active role as an advocate, and he was not shut down nor asked to desist. We can see that when successively the question about previous warnings not to use the knife without closing the flaps had been put, the Claimant had avoided answering. We do not know if this is because he wished to avoid answering the question, or because he was easily distracted, or because of the intervention of Chris Ioannou, but he had the opportunity, because the Respondent returned to the point on several occasions.

82. As for the absence of Ms Wallenius, and indeed for the silence of Mr Elek, there is no reason to think this was because they were intimidated by Mr Robinson. The Claimant was well liked, and this was a very small outfit; they

may well had mixed feelings about speaking at the disciplinary hearing while aware that what the claimant did was a safety risk. Ms Wallenius certainly expressed her view voluntarily after the hearing, and the Claimant was aware of her presence, and either he or Chris could have asked for her to be brought in.

83. As to whether he had reasonable grounds, the Respondent had followed up this detailed meeting by investigating the new material, that is the use of wood blocks, with Ms Wallenius and Mr Niemen, both were clear that the Claimant had not used them and as Mr Niemen was no longer dependent on Mr Robinson for a job or goodwill there was no reason to think that he altered his evidence because put under pressure. The boards were an accepted alternative to the use of flaps, as confirmed by Robert Elek in his evidence of the Tribunal, but the reason for concern is that it does not appear that the Claimant in fact used them when sharpening his knife.

84. As the lack of any appeal hearing, which would normally be part of a fair process, we note that the Claimant makes no complaint about this and it is possible that there was no hearing because he did not want one. In any case, the material supplied by the Claimant in his appeal letter tends to confirm the Respondent's understanding that there was in fact a problem, namely the denial that this way was in fact a risk of fire, which tends to support the view that whatever the Claimant said he was doing with the blocks he did not see that there was a need to use them. Nothing else has been said at the this Tribunal Hearing that would assist us in finding that anything would have come out of an appeal hearing to reverse the decision.

85. In considering the Respondent's reason for dismissing, they made sense and were careful and logical. The Claimant did not accept that he had done anything wrong, the demonstration was not reassuring. If he had pleaded memory lapse in failing to use the board on a particular occasion the Respondent did not have the resources to supervise him, but it was never the claimant's case that this was a temporary lapse. If it had been, it is arguable that against a good record a reasonable employer might give him a stern warning and not dismiss. It is important that there was a small risk of a catastrophic result. If the employee did not accept that his practice was wrong, and if the employer had reason to doubt the blocks were in use, or would be used in future for this task, it was reasonable to dismiss given the small but real risk of catastrophic fire. Some employers would have opted for retraining, or some kind of supervision, or a final written warning, but it cannot be said that no reasonable employer would have chosen not to dismiss against these facts, and we do not find that this dismissal was unfair.

86. We go on to consider the age point. As a hypothesis we considered whether if the Claimant had been a younger man, whether 35, 45, or 60, the Respondent would have acted differently, and whether a similarly experienced man who would have done these would not have been suspended, disciplined and dismissed. We saw no ground for thinking that the Respondent would have been more lenient with such a man. This is despite the discussion immediately following suspension with the son-in-law about the Claimant's

retirement. This comment followed on a lengthy explanation of why the fire hazard was real, and why this episode was different in quality from the previous retirement discussions. It seemed to us that this was genuine, particularly as Mr Robinson was unaware that he was being recorded. The mention that his career could be at an end does not mean the result was prejudged, it was an attempt to convey why it was serious and required suspension and investigation. We considered that of Ms Wallenius or Robert Elek had given same answers, namely it was not really a risk, that the sparks from the knife were cold and would not ignite, that leather would not burn, that he had lied on the first occasion to protect Ms Wallenius when he omitted to mention he was using blocks, and the introduction of blocks as an alternative method late and with an ambiguous explanation. It was hard to see how the Respondent would not have made the same decision in those circumstances.

87. We make this finding against the background that the Respondent had previously reassured the Claimant's family that he was a valued employee, that beyond occasional discussion of his future he had been allowed to carry on as before, suggesting there was no plan to remove him. The Respondent had not shown hostility to the Claimant personally, but only to his family when they had taken a more aggressive line, and continued to consult them when there were difficulties in communicating at work. The knife sharpening episode was an opportunity to solve the respondent's concern that in time the claimant might have to be dismissed because no longer up to the job, but there was no reason, other than coincidence, to hold that he prejudged the position as related to the claimant's age.

88. We have to consider points specifically made in the context of unfair dismissal and age and disability discrimination, about whether the Claimant should have been accompanied at the meeting by a family member. The ACAS Code restates that an employee has a right to be accompanied by a trade union representative or by a current colleague, not by anyone else. The Claimant's contract provides that he may be accompanied by a friend or by a trade union representative at a disciplinary interview. The Respondent had previously been content to involve the family in discussion and consultation about the Claimant's working time and retirement discussions, he had ultimately from mid 2016 refused to accept a family member; we thought this was reasonable. The experience of dealing with the daughter (and indeed the son in law) was such that he could not be confident that communication was passed on to or from the daughter adequately, and the son in law appeared to be looking for settlement rather than addressing what he saw to be a substantive disciplinary issue. The Claimant's need for assistance with communication was met by providing a Greek interpreter who was also knowledgeable about workshop practice, and he was no longer employed and so he might not be dependent on Mr Robinson's goodwill. The Respondent accepted the man who turned up unannounced who was permitted to act as the Claimant's advocate and as well as translator. We conclude that the exclusion of the family was not because of the Claimant's age or disability but because of the unfortunate history, which had become confrontational rather than interpretative. We did not conclude that the reason for excluding the family from the hearing was either age or the Claimant's disability.

### Treatment before Dismissal – Discrimination of Harassment?

89. We then turn to consider the earlier treatment in the context of age. This is alleged as harassment, in that the Claimant was persistently pressed to retire. Section 26 of the Equality Act provides that harassment is unwanted conduct related to a relevant protected characteristic which has the purpose or effect of creating an intimidating, hostile, degrading humiliating or offensive environment for the worker. Judging whether conduct has that effect must take into account the Claimant's perception, the circumstances of the case, and whether it is reasonable for the conduct to have that effect.

90. The Claimant's witness statement does not describe his feelings on having these discussions. The tone of the letters is always conciliatory, and we would not describe it as intimidating, let alone hostile. Retirement was raised, but the Claimant was never required to retire, or indeed work fewer hours. If there was such a period, there has been no claim for unlawful deductions from wages. The tone was always consultative, though it may have been firmer in May 2016, precipitating the grievance. Nevertheless, the Respondent did not insist and the Claimant was able to continue, apparently without adverse comment or hostile treatment, for well over a year before other circumstances intervened which led to his dismissal. We did not conclude that the tone of this in any way amounted to intimidation. There is no suggestion that disability was behind any such discussion. Given that it was about the possibility of retirement, it may be related to age, but it cannot be said that *any* discussion with an older worker about his retirement plans is harassment, and this discussion was entirely consultative, save possibly from the beginning of May 2016 when not much notice was given and the Claimant had agreed without involvement of the family as had been done before.

91. Nevertheless, even if that did amount to harassment, it was out of time. It does not form part of an act extending over a period, being a one-off, concluded in August 2016. Although at that stage the Claimant contemplated bringing a claim because of the involvement of ACAS in early conciliation, no claim was brought, no reasons have been given why that did not occur, and in the circumstances, if we had to consider, as we did, whether it would be just and equitable to allow the Claimant to proceed out of time, there was no reason given why the Claimant could not have brought a claim at that point. If the answer is that the Claimant did not consider it significant at the time, that suggests that little is to be weighed in the balance of prejudice on whether he should proceed out of time, while for the respondent, he must defend a stake claim where the claimant's witness statement says nothing that is not in the emails which do not tell us how the claimant experienced events because written by his daughter. It is equitable that he had had this material treated as background evidence to considering whether dismissal was because of age.

92. The same argument would apply if we were invited to consider whether the retirement discussions, or the request work on a wetting machine, were less favourable treatment because of his age. We considered if the treatment consisted solely of having a discussion, that is not less favourable. An

employer might have such a discussion about changes in the content of the work or indeed working time, with an employee of any age, and as stated, although retirement was considered at this point, the Claimant was never required to work less. If the short notice in May 2016 was discriminatory because of age, it is out of time for the reasons already given.

## **Disability**

93. We turn to the disability claims. The claimant has provided a list of conditions said to be disabling. On closing it remained unclear whether all these were claimed as breaches of section 13, section 15 or section 20, the duty to make adjustments, and we have done our best to discern what claims have been made, working from the facts found.

94. Although the Claimant has had a number of health issues, it is stated by his daughter that he had never had time off sick, and indeed, that he was so fit that he was able to dig his allotment for several years, and still does, despite his hernia.

95. We deal first with the claim based on hearing loss. We must make a finding in respect of each disability whether the Claimant is disabled within the meaning of s6 of the Equality Act, namely that he suffers from a mental or physical impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities. Neither the witness statement of the Claimant nor of his daughter, though both are very long, deals with his ability to carry out normal day to day activities. Instead they referred to letters in the bundle from hospitals, some of which are incomplete. For example, there is a letter from his GP of December 2018 stating that he is fit for a hearing which refers to an attachment, which is not in the bundle, which would have provided a list of his health conditions. Nevertheless, we understand in respect of hearing loss that there is a letter from a specialist registrar at a hospital dated August 2000 referring to the Claimant having bilateral severe hearing loss, attached to a number of audiograms, without the interpretation to say what they show; the consultation in August 2000 concerned a possible ear infection. The letter does not mention hearing aids. A letter from University College Hospital of 24 August 2016 mentions hearing aids, but not the level of loss. We observe from our own knowledge that some levels of hearing loss can impair normal day to day activities in that individuals may not be able to understand or hear what people are saying and so be at a disadvantage. We observe here that when the Claimant is wearing his hearing aid there appears to be no difficulty in hearing what people say: in the hearing he has been able to converse with the interpreter without apparent elevated volume over the course of several days without difficulty. We have noted that both the two interpreters at the disciplinary hearing and the professional interpreter at the Tribunal had difficulty getting the Claimant to answer questions, not a language difficulty it seems, nor apparently a hearing difficulty. The occasional frustration of interpreters that he was not answering a question has been evident both in reading the transcript and at the hearing. Mr Robinson added to his note of hearing on 5 March 2018 that the Claimant "made other statements during this hearing but neither interpreter was able to

understand them sufficiently to make a translation". We observe that it is possible that some of the Claimant's communication difficulty is not language or hearing but by some lack of intellectual ability in being able to concentrate, or focus on the direction of the question and give a coherent answer. Although it is difficult to discern the level of impairment, we are prepared to accept that not being able to hear can have a substantial effect on ability to carry out day to day activities, but it is difficult for us to make a finding whether the Claimant's impairment is because he cannot hear, or because of his lack of English language competence. He can read that he was able to converse with his workmates outside the hearing of 5 March. For the purpose of the Equality Act where there is a correction to hearing loss we have to consider the deduced effect (what if he did not have aids), and we do. We are prepared to accept on that basis that the Claimant was disabled by reason of hearing loss, although the exact effects of that are difficult to discern.

96. We must next consider whether the Claimant was at a substantial disadvantage by reason of the hearing loss. The Equality Act provides at s.20 that there is a duty to make reasonable adjustments for disability where a provision criterion or practice of the Respondent puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; the employer has to take such steps as it is reasonable to have to take to avoid the disadvantage.

97. This is the first of the reasonable adjustments proposed in closing by the Claimant's representative is that the Respondent should have installed a hearing loop in the work shop, alternatively one should have been available for the hearing. On this we conclude that there is no evidence that a loop is required to assist the Claimant's hearing. There is no evidence that when wearing both hearing aids he suffers an impairment. The point was not raised at any stage until these proceedings, or during the years that the Claimant worked at the premises. It was not observed to be a difficulty at the tribunal, and we were not asked to find an alternative room. A point made by Mr Robinson is that when in the workshop a hearing loop could put the Claimant at a substantial disadvantage because it would amplify the background noise of the machines. To conclude, there was no substantial disadvantage by failing to provide a hearing loop, and it was not therefore necessary to adjust for the Claimant's hearing loss by providing one.

98. If it is contended there was less favourable treatment because of not being able to hear, we note that the Respondent was wholly unaware that this was required. The difficulty was always the lack of language. It is not shown, or argued, that the claimant could not hear on 30 October when asked for an explanation, or in the disciplinary hearing. If this concerns any earlier discussion, say on proposals to cut working time, it is (1) not shown to have been detrimental (2) out of time, and (3) not just and equitable to extend time, given the lack of evidence that this was the problem, and was not raised before.

99. The next disability contended for is in relation to the pacemaker. Again



we have to rely on scattered hospital letters. There is one from University College Hospital of 24 August 2016 on review which notes that there are no cardiac symptoms, and says that he is not dependent on the pacemaker. In the notes there is a review letter from 26 January 2018 noting that it was inserted originally for possible atrial systole, with normal pacemaker checks since. Page 2 of this letter is missing. In the 2016 letter it is noted that at the consultation the doctor at the hospital was told by the Claimant's daughter that at work he had been using a machine and it is powered by 230 volt variable speed for his job as a shoemaker, and "we advise from a pacemaker perspective due to the fact that this can inhibit or create noise within the pacemaker system we would prefer that Mr Nicolaou did not work with this equipment". He was discharged from cardiology (i.e. there would be no further review unless referred by the GP) on the basis that his heart was satisfactory. Given deduced effect, the claimant is for this purpose disabled by a heart weakness

100. Counsel for the claimant put to Mr Robinson that the claimant could not use the welting machine because the thumping noise of the machine would inhibit the pacemaker. Mr Robinson replied that he had always used the Hardo machine which runs on 440 volts, without complaint or ill effect. The Tribunal observes from our knowledge that pacemaker provides a small electrical charge to stimulate the beating of a weak heart; the reference to "noise" means noise as a term used by engineers to mean some electromagnetic field that will affect equipment or confuse a signal. The daughter asked the question of the doctor at a time when her father was being asked to operate a welting machine and she may have been looking for a reason why he should not. The doctor was not informed of regular use of a machine which may have had a similar effect. He has not suffered any ill effects. He was not required to use a welting machine in any event. There is no evidence the respondent was told the pacemaker was a problem when using a welting machine. There is no less favourable or unfavourable treatment here, and no duty to make any adjustment.

101. We add that in the further particulars it is said the claimant could not reach up because of recent surgery. It is not said this lasted up to 12 months, so is not a disability. The rest of the evidence indicated that any inability to reach a lever was because the claimant is short in stature, not because of surgery. This was adjusted for by a stool. It is not relevant that he had made this himself some years earlier. If it solved the problem there was no duty on the employer to do anything else. There was no evidence before the tribunal that with his stool he could not reach any part of the machine.

102. Of the remaining conditions on the claimant's list, rheumatoid arthritis does not feature in any evidence of how it disables the claimant. There is nothing on which we can find the degree of impairment or that he was disabled. Even if he were, there is no suggestion he could not do his job because of joint pain. As for reaching a lever, he had a stool, and he had devised the block system as an alternative to the flaps, which was an adjustment accepted by the employer. No disadvantage is shown, nor any need for adjustment. "Frequent urination" is not mentioned in any doctor's

letter we could see. There is no evidence how it impairs the claimant's ability to carry out activities. It is not related to any disadvantage at work. No duty to adjust arises and we cannot see any allegation that the claimant has been unfavourably treated because of it. Cataract appears on the list. It seems that at some time he has had surgery for cataract. There is no evidence when this was, or that it was not entirely successful in restoring sight loss, nor is there any evidence that the claimant's sight was impaired at the time of the events complained of. Finally, hernia. There is no evidence that the claimant was at a substantial disadvantage by reason of this – as his daughter said, he could still carry out heavy work despite it. It is only mentioned at work in the context that he might need time off for an operation, but he has not had the operation, it is not shown how he was at any disadvantage, or that anything needed to be adjusted. If it is suggested (and it is not clear that it is) that it led the respondent to propose a need to discuss retirement when he returned, we have already stated our reasons why this was not harassment, there was no less favourable treatment, and if there were, it is out of time.

103. The disability claims do not succeed.

### **Costs**

104. After the Judgment and Reasons had been delivered in Tribunal the Respondents made an application for preparation time.

105. Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides that a Tribunal may make a preparation time order and shall consider whether to do so where it considers that a party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceeding or part or the way that the proceedings or part have been conducted. In making that order Rule 84 provides that we may have regard to the paying party's ability to pay when deciding whether to make a preparation time order and if so in what amount.

106. The Rule 76 is a two stage process: we must first decide whether the paying party has crossed the threshold of acting vexatiously etc, and secondly, we exercise discretion as to whether we choose to make an order if that threshold is crossed.

107. The Respondent is in person, in the form of the Second Respondent, Mr Robinson is owner. He has stated both before and now that the conduct of the case by the Claimant's daughter has been aggressive and unlawful. His points can be summarised as follows:

1. The Claimant does not understand his own case and even his own witness statement, what is said on his behalf is not his case.
2. Calls were made by or on behalf of the Claimant's daughter to Westminster Borough Council and the London Fire Brigade saying that there had been a fire on his premises, so prompting an on the spot

inspection, for the sole purpose of acquiring information for the case by means of subsequent freedom of information request.

3. Covert recordings were made. These are the recordings made by the Claimant son in law following his suspension, of which a transcription appears in the bundle, secondly the covert recording of the entire disciplinary proceedings
4. Although the Claimant acts in person, had he obtained any kind of legal advice he would have tailored his claim and not brought some claims.
5. In effect the conduct has been vexatious because the daughter believes him to have persecuted her father and in turn has persecuted him.

108. He says that the case required considerable effort in preparing documents, preparing many witness statements, arranging for witness attendance, and spending seven nights in London himself; it has “cost a fortune”. For now, he has not prepared a schedule of his time.

109. Mr Stevens, on behalf of the Claimant, replied that possibly the Claimant should have taken legal advice earlier than he did, he might then have obtained better expert advice on the flammability of leather or indeed the risk of fire, as it was uncontroverted evidence that the Claimant has always cleaned his machine before sharpening his knife. There would also have been more medical evidence.

110. It is denied that the daughter controlled the witness statements; the Claimant would have needed help because of his language difficulty and also intellectual ability; he was humiliated by being dismissed after being employed so long, and himself wanted to bring a claim.

111. On recordings, it was not the driver who took the recording at the disciplinary hearing but the Claimant who recorded it on his daughter’s phone – he had been shown by her how to turn it on as he would not otherwise know how. The son in law made his call from the office where all calls are automatically recorded. The Claimant and his daughter deny responsibility for the calls to Westminster Council: that was done by the neighbour who drove him to the hearing (Mr Ioannou, apparently of his own initiative).

112. Finally, the Tribunal is urged to exercise discretion in the Claimant’s favour, and have regard to the fact that he is now 76, he has not been able to find work, although his daughter has made a number of applications on his behalf, and he lives on a basic state pension.

113. We were not provided with information about his savings. Challenged by the Tribunal that it appeared from the record of the preliminary hearings that the Claimant had had some advice from a disability charity and from ELIPS (volunteer lawyers who attend the tribunal one morning a week to assist

unrepresented litigants), it was said that he had a meeting with ELIPS and had not been told the claim was hopeless.

114. Asked why Mr Robinson was not asked or told that the call or hearing were being recorded, the answer was “there was no evil purpose”, it was to have a transcript of what was said. “People do record things so there can be no dispute”. The family wanted to find out what was said at the hearing. This is the answer given after it was put by the Tribunal that it might be considered that not to ask before recording a conversation was both socially unacceptable and a breach of the Article 8 right to private life.

115. As the Claimant’s counsel had then to leave for a prior appointment, the Tribunal reserved the decision.

### **Discussion and Conclusion**

116. We do not consider that the core of the claim was unreasonable; it was always an arguable case that a dismissal on the basis of an event which had not caused actual damage after otherwise good service, against a background of successive retirement discussions over several years, might be considered unfair or age discriminatory.

117. It has been evident from all the paperwork, and the conduct of proceedings, that the Claimant’s daughter is running this claim. Of course a litigant in person who cannot speak English adequately needs help, and family members are appropriate persons to do this. Nevertheless, the cumulative nature of the daughter’s support has meant that his witness statement, for example, seems to have been made without much reference to the Claimant or his experience of events at all. As evidence it contains little or no information about how he runs the machine, about his practice or when he uses the boards, nothing on what happened on 27 October or 30 October, to name but a few important omissions in an otherwise lengthy witness statement. Of course, it occurs that this litigants in person are unable to distinguish fact from opinion from submission, but there were many submissions which come from the daughter not from the father, they are diffuse and often lack logic. This was unhelpful, as it clouded the case. We could understand that she wanted to research and produce some kind of expert evidence on his behalf.

118. The disability case was always weak; there was little or no evidence that the Claimant was in fact a disabled person. Allegations were scattered and unfocused, unrelated to a particular disability. It was not fully clarified until closing and in parts not even then. It can however be said that perhaps because of the lack of evidence, whether from medical records or the Claimant himself, this did not occupy much time in Tribunal, only in deliberation.

119 The general lack of clarity as to the discrimination allegations (several protected characteristics, both direct and indirect claims, as well as s.15 and s.20 were alleged right up to the opening) meant this appeared a far more

substantial case than it was, and caused the Respondent unnecessary anxiety.

120. Thus far we would not have said that this was is a case which crosses the line of unreasonable conduct on a part of a litigant in person dealing with a complex area of law. It is unfortunate that despite two preliminary hearings, it was not possible to get the Claimant to commit to identify the unlawful treatment alleged, particularly in relation to race and sex.

121. We were concerned by the false reports (apparently) to Westminster Borough Council and London Fire Brigade with a view to obtaining evidence, which may also have been perceived by the Respondent as malicious, in seeking to punish them in some way. The claimant and his daughter cannot avoid responsibility by saying that the calls were made by their neighbour – even if we believe this was without their knowledge - when they have then relied on the material. Nevertheless, both have the ability to carry out safety inspections on request, even if there had not been a fire. It was underhand, and arguably a waste of public resources, given that the claimant's case is that there has never been even a risk of fire. We do not know if either inspection was useful in flagging up any improvements to safety, their proper purpose.

122. We were particularly concerned by covert recording. It is now easy to make recordings, because of mobile phone technology. That does not remove the duty to inform the other party to a conversation that it is being recorded, even to obtain their permission to doing so. Not to do so is regarded in Britain (we do not know whether it is acceptable in Cyprus) as outrageous, and arguably, as is put to the Claimant, it is also a breach of Mr Robinson's Article 8 right to private life. Had Mr Robinson been asked, he could either have refused to continue the telephone discussion, or he would at least have been aware that he was on the record. No explanation was given for why permission was not requested, even when Mr Stevens was invited to give one. The Tribunal has considered whether to make some order in Mr Robinson's favour for this.

123. We have decided not to for several reasons:

- (1) the Claimant's ability to pay is so limited that any order we could make would only be a token and not meet his expenditure,
- (2) if the purpose of the son-in-law's call was to trap Mr Robinson, it has backfired because it demonstrated his genuine safety concern at the time,
- (3) but for the transcript of the disciplinary hearing there was a real possibility that the Tribunal would have decided that this was an unfair dismissal and that in the absence of explanation why the Claimant's version was not accepted, the wish to retire him because of age was the reason. The availability of a full transcript of the conversation illustrated to us, as Mr Robinson's own very brief summary did not, that the Claimant's answers to his relevant and structured questioning were inadequate, and supported the Respondent's belief that he could not be trusted to work

safely, further that the claimant and his companion played an active part in explaining his case. Mr Robinson has thereby had his reward. For this reason, though we strongly disapprove of covert recording, we have decided not to make an order that the claimant pay the respondent's preparation time in these particular circumstances.

124. We comment that employers with larger administrative resources than this respondent will customarily bring in a note taker to a disciplinary meeting to make a longhand note, or will (with the knowledge of all concerned) record and then transcribe the proceedings themselves. We recognise that this is not a reasonable expectation of a small employer but it is possible to make a recording, make a short note for one's own purposes, and offer the recording for transcription if an employee required it.

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Employment Judge Goodman

Dated: 22 February 2019

Judgment and Reasons sent to the parties on:

25 February 2019

For the Tribunal Office

