



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D. Crawford

**Respondents:** World Platinum Investment Council Ltd

**Remote Hearing (CVP):** London Central  
**On:** 14-15, 18- 20 January 2021

**Before:** Employment Judge Goodman  
Mr. F. Benson  
Mr. P. de Chaumont-Rambert

## Representation

**For the Claimant :** Mr. D. Brook, counsel

**For the Respondent:** Mr. A. Smith, counsel

## JUDGMENT

1. The claims of detriment and unfair dismissal for making protected disclosures are dismissed on withdrawal.
2. The disability discrimination claim does not succeed.
3. The age discrimination claim does not succeed.
4. The unfair dismissal claim succeeds. The basic award is £1575. The compensatory award is £13,552. Both awards are reduced for conduct and contributory action by 60%. The respondent is ordered to pay the claimant £8761.20 as compensation for unfair dismissal.

### ***Rule 50 revisions – 11 May 2021***

*Having regard to a request from the respondent on 9 March 2021, the claimant not objecting, for anonymity of the names of former employees referred to by others but who did not give evidence themselves, it is considered proportionate to open justice, to protect their convention right to private life by identifying them only by initials.*

## REASONS

1. The claimant was dismissed by the respondent without a hearing on 20 September

2019. The respondent's reason for this was that relations between the claimant and the rest of the senior team were broken and they could no longer trust him. The claimant's case is that this was because of his comparatively young age, or his mental health, amounting to a disability

2. The claims before us at the start of this hearing were unfair dismissal, dismissal and detriment for making protected disclosures, discrimination because of disability, and discrimination because of age.
3. In the pleaded case, settled by counsel, the protected disclosures (about treatment of black women) were stated to be the watershed setting off the course of detrimental treatment. However, questions about the disclosures were not put to the respondent's witnesses, and at the conclusion of the respondent's case on day three of the hearing, the claimant withdrew the claims of detriment and dismissal for making protected disclosures; accordingly they were dismissed under rule 52. The focus changed to age and disability discrimination.
4. The issues had been discussed and clarified at a preliminary hearing before E J Henderson in July 2020, and we worked from the list she drew up. An application after that hearing to add a claim of unfair dismissal because the claimant had accompanied a colleague to a grievance hearing in 2017 was refused.
5. Originally the disability claim was pleaded by reference to sections 13,19, 20 and 26 of the Equality Act. All but section 13 had been abandoned by the time of the preliminary hearing, as recorded in the order. There has never been a section 15 claim.
6. On the list are twenty-two allegations of less favourable or detrimental treatment caused by age or disability. They range in time from early 2018 to dismissal in September 2019; the respondent argues that many are out of time.

### **Evidence**

7. The tribunal was provided with several bundles of documents, in all nearly 1,900 pages.
8. We heard live evidence for the respondent from **Paul Wilson**, the chief executive, **David Badham**, chief administrative officer, and **Bhavick Morjaria**, an independent IT contractor, as well as from the claimant. We also read witness statements from **Sally Singer**, a former employee, from **Marguerite Perin**, a solicitor, setting out what she had been told by former employee Nicholaj Sebrell, from **William Rhind** of Granitshares, a product partner of the respondent, and from **Benny Oeyen**, a non-executive director of the respondent.
9. Permission to adduce a further statement from the claimant about some events in October 2020 was refused on the ground that it did not assist us on whether at the material times the disability was long-term, while evidence on the level of any award for personal injury and injury to feelings was to be determined at a further hearing.
10. This was listed as a hearing on liability only, but the tribunal indicated nevertheless that any representation as to *Polkey* or contribution should be made at this hearing.

### **Conduct of the Hearing**

11. There were relatively few technical hitches. Members of the public observed proceedings from time to time.
12. Reasonable adjustments for disability had been raised at a preliminary hearing. No

request had been made by the claimant for specific adjustments. It was clear to us that, perhaps by reason of ongoing depression, he found cross examination particularly difficult, and there were several breaks in the course of cross examination so that he could compose himself and carry on when ready.

13. A hearing in person in September 2020 had to be abandoned on day two when counsel for the claimant was taken ill. One of the lay members had to be substituted for this (remote) hearing, and so we started afresh.

### **Factual Findings**

14. The respondent develops and promotes investment products in platinum, a precious metal. It was set up in 2014 by a number of companies, which between them mine about 80% of the world's platinum, and each of the mining companies that funds the respondent has a seat on the board. Despite its name, the respondent is a very small operation, with seven employees and five consultants in London, plus a small office in China.
15. The claimant was first employed in June 2016 after a period of consultancy. He had previously worked for the London Metal Exchange and knew a great deal about platinum. He was a product manager responsible for market development, reporting to MG.
16. In October 2017 the claimant had a long discussion with the CEO, Paul Wilson. He explained his view that MG was no longer doing the job – he had “checked out”. Mr Wilson concurred, and a month later MG left. The respondent set about recruiting a replacement.
17. In May 2018 the claimant was appointed as MG's replacement. The job title was now Director of Product Partnerships. He was 33. There were a number of external candidates; the claimant had been the only internal candidate, and was much the youngest of those shortlisted. At the time of appointment the claimant was 33. The ages of the shortlisted external candidates have been estimated (from the dates of their education) at 55, 39, 41 and 51.
18. Paul Wilson was then around 67, David Badham 57, and Weibin Deng 43.
19. It is important to note, in charting the claimant's relations with colleagues over time, that the appointment was not without controversy. Paul Wilson supported the choice. In his view the claimant had good and less good characteristics: he was the only one in the field with knowledge of platinum, and he was ambitious, but was “by no means the finished product” and “very obviously a self-promoter”. He was thought to be secretive. Others were concerned that he was not appointable at all. David Badham was concerned that he had a lot to learn to equip himself for a senior role, saying: “it is important he genuinely buys into undertaking some substantial personal development as leader of others with a broader and less self-centred perspective. Otherwise the risk is that his forcing behaviour is so demonstrably successful that he may not be sufficiently motivated to move away from overreliance on it, in which case we will struggle to achieve the level of mutual trust and respect needed for the leadership team to be collectively successful/effective”. His concern stemmed from the claimant having earlier pushed for pay rises and responsibility, and the way he had gone about removing MG by going behind his back, plus an episode in September 2017 over some draft documents on compliance where the claimant had been confrontational and uncooperative. Trevor Raymond was concerned he was more motivated by his own career than what was good for the firm as a whole, but thought he might develop. Weibin Deng, based on the way the claimant had treated one of his team, AT, was of the opinion that the claimant: “lacks the capacity to lead and organise a team for success”. If he was appointed, it should be on the basis of acting head for one year while they looked for someone more suitable. In short, while

Mr Wilson championed the claimant, the others had to be convinced.

20. Having regard to these concerns, the claimant was offered the job subject to 6 months' probation. The new salary was £155,000, plus £15,000 towards the cost of benefits, and 3% pension contribution. Another change on the previous position was that he was no longer to work a day at home each week. The claimant responded to the offer by seeking to negotiate an increase in salary, which Paul Wilson found disappointing, and rejected, telling him he was "in danger of misreading the situation and potentially missing the opportunity to join a new peer group with a positive spirit and a focus on how we can collectively take this council forward to achieve its goals".
21. Paul Wilson explained the 6 month period of probation in these terms: "I see real challenges for you in transitioning to a managerial role where your relationships with me and the other directors will change and where your relations with Andrew will be on a different basis". He offered his support and suggested that if all went well probation could be concluded in three months, not six.
22. AT was a member of the claimant's team and had been his peer before the promotion. Difficulty in their relationship arose almost immediately. Paul Wilson had not wanted AT to apply for the role, and had not told him it was available, while at the same time encouraging the claimant to apply. When AT was told by the claimant, in a taxi in Dubai, that now he was the boss, he was resentful. The claimant's response was far from emollient, and only stoked his ire. Later, on an occasion when AT had missed a meeting, the claimant's behaviour was ferocious, berating him in open office. Paul Wilson's solution to this was for AT to report to him separately, but it was an unhappy arrangement, and in September 2018 AT, then aged 39, left the respondent's employment at the claimant's request. Paul Wilson says that he agreed to the request because the claimant was new in the job and needed support in his managerial decisions.
23. At the same time there was conflict in September 2018 between the claimant and David Badham over a recruitment process. The claimant felt "attacked and belittled", while David Badham was exasperated by the claimant first wanting third party testing of candidates, then not accepting the result.
24. MG had had three staff, but with MG and AT leaving, the claimant was down to one. The claimant's workload increased. Some of the previous workload had been eased by the appointment of Weibin Deng for the China work, but there was still a need for an extra person. The Respondent had started a recruitment process for an extra person in his team in June 2018, but shortage of funds led to many budget plans being paused in November 2018, with the aim of restarting in February 2019.

### **The September Collapse**

25. On Thursday 27 September 2018 the claimant collapsed on the tube coming to work. He was taken to Guy's Hospital, where, in the light of a reported history of heart murmur, tests were made for a suspected heart attack, although in the event he was discharged to the care of his GP later that day with a diagnosis of vaso-vagal syncope (faint). The claimant reported to the respondent on the day that he was being treated for a suspected heart attack, and that he had been advised to rest at home the next day, Friday. The respondent later learned, from the expense claim, that he had in fact taken a client out to lunch that day. This had the unfortunate effect of fuelling suspicion among some that he had not in fact been taken ill.
26. He returned to work on the Monday. He explained that there was a crisis in his marriage. Paul Wilson followed up on the discussion, expressing "tremendous sympathy for the very difficult situation you find yourself in". He was allowed to work from home, but asked to be in the office at least two mornings a week. Recruitment for

his team continued, and in the meantime he was offered help from David Badham and Sally Singer. The claimant said this was not necessary and they would not be useful: "David really doesn't have a good way with our partners and often creates barriers not bridges. Sally doesn't have the relationships or the background". He reassured Paul Wilson that he was able to work effectively.

### **Extension of Probation October 2018**

27. According to Paul Wilson, by the end of September and into October 2018 his concerns about the claimant's performance and conduct since promotion were growing. This was based on his handling of AT, and more recently, mistakes and unexplained absences in early October, though he attributed some of these to the crisis in his marriage. The claimant's probation was due to expire 9 November 2018, and while in Boston together on a business trip, Paul Wilson explained to the claimant on 29 October that he was going to extend probation by a further six months. He said the claimant had been poor at communicating, in that he often heard about client meetings after the event and from others, he had not built an adequate contact database or arranged meetings and contacts, he had not arranged enough meetings for the Boston conference, he had failed to manage AT, and then attended a client lunch when supposedly resting at home following a heart attack.
28. Much of this is confirmed in a long letter on 30 October formally extending the probation period. It tells the claimant he needs "to make significant changes to improve your performance, which largely pertains to your conduct. To become a trusted and effective member of our leadership group, requires that you show you have reliability, team orientation and desire to apply the time fully in to the role". His behaviour: "often lacks transparency to the point of appearing secretive and does not engender trust". Mr Wilson wanted the claimant to be "active and entrepreneurial" but not to "act alone or be so highly selective as to whom else you involved. This is a small organisation and we need to communicate openly, share tasks and involve each other". A covering email says: "let's continue our discussions. I want you to succeed". The claimant says that in this discussion Mr Wilson said he was "lucky at his age" to have risen so far, and was slighting about the claimant's former boss at the London Metal Exchange, also young for his seniority. The tribunal accepts there was mention of his age.
29. There was a further discussion on 6 November, in the context of recruiting to his team. Paul Wilson was pausing recruitment into the claimant's team until February, and referred to the conflict with AT. There was some constructive comment on what he was doing with his colleague in China, but Mr Wilson had also been going into the claimant's expenses, and complained that on two occasions he taken his new colleague, Sally Singer, out for lunch and then charged the company (£117 and £120 on each occasion). The first occasion was forgiven, as a way of welcoming her to the company, but the second occasion was the claimant's birthday when the claimant had used his own credit card, not the company's, and alcohol was taken. The tribunal notes that the claimant was not in fact asked to repay either amount, even though on other occasions senior colleagues were asked or had volunteered to refund overclaims. At the end of the year a cap of £20 on expensed lunches with colleagues was suggested.
30. In the 31 October cover email Mr Wilson asked the claimant not to discuss the reasons for sending probation with anyone else. He reinforced this in a follow up on 8 November, saying that discussing his promotion with others "would be a failure of judgement in a leadership position", and asking for specific assurance that this was not the case. However, the claimant had already discussed it with Bhavick Morjaria, an IT contractor who worked for the respondent to 3 days a week. On 5 November, he had taken him to a coffee shop and produced the 30 October letter, then discussed the content, saying he thought there were two leadership teams, one of Paul Wilson, David Badham and Trevor Raymond, and the other himself and Sally Singer (41). He then said: "if he (Paul) takes me down, I promise you I will take the whole fucking

business down”, and that he had shown a the letter to “a top employment lawyer who knows his shit”. The claimant disputes the exact words but agrees that this was the gist of the conversation. Bhavick Morjaria in reply suggested getting some professional coaching, which he himself had found helpful, and on the personal difficulties, that he contact Relate for marriage guidance counselling. Bhavick Morjaria was however worried at the threat to take the business down – and his own position as a contractor - and so he reported the conversation to Paul Wilson on 8 November.

31. At the same time, Paul Wilson learned from an accounts executive that the claimant had been loudly and openly querying the challenges to his expenses claims. Paul Wilson was now exasperated by the claimant’s indiscretion and arranged to meet him at a hotel on 12 November. He challenged him about it. The conversation was hostile and the claimant spoke of legal action. In a ‘note to self’, Paul Wilson recorded “it is quite unclear to me whether David will be able to address his apparent conduct sufficiently to establish his credibility with David Badham, Trevor Raymond or myself. I have been clear with him that I want him to succeed but he needs to be more straightforward and less duplicitous”.
32. His worries were to be reinforced by a confidential memorandum sent to him by Massimo Fedeli, a consultant, (dated 16 November but not sent until 15 December) questioning the wisdom of appointing the claimant to the director role. He said: “I can’t comment on his honesty and diligence for the results he is delivering, but if one of the key tasks of a director is to make decisions for the benefit of the company and its members and to promote the success of the business, then he does not appear to be doing either of those things”. He was engaged in “divisive behaviour”, in that he was blaming AT, and the Board of Directors for the limited resources, and complaining of Paul Wilson’s lack of sympathy; he was also saying he suspected the company wanted to get rid of him.
33. Another episode indicating the difficulty of relations at this time comes from the claimant querying with David Badham the amount of legal time that had been booked against his budget for drafting a contract. He copied the email to Paul Wilson. Paul Wilson responded with irritation that this could have been checked three months earlier, he sat in the same office as the people he was querying the budget with; he did not need to send a “showboating” memo; at the same time he referred to delays in another agreement - the claimant replied that he was not responsible for any delay in the other agreement. It turns out the claimant was right to raise the query, as of the three hours booked against his budget, two were misattributed. It is a storm in a teacup, but indicates the state of relations at the time. The tribunal agrees that copying Paul Wilson into a query of this detail was unnecessary.
34. In December Sally Singer asked Paul Wilson for the name of a contact at a firm called Brewer Dolphin, so she could make preliminary sales contact. He did not reply straight away, and she then asked the claimant, who made a contact for her to follow up. Meanwhile Paul Wilson made contact direct, with the result that Brewer Dolphin were bemused to be contacted by two people on the same errand. Paul Wilson was irritated and saw this as an example of lack of communication making the respondent look foolish. In his irritation he said to Sally Singer that the claimant should ‘get no credit for this’. Apart from this episode, the documents do show the claimant reporting progress on marketing contacts in a shared file.

### **The request for medical records November 2018**

35. A feature contributing to the claimant’s upset at this time was the suggestion from some colleagues (though not initially Paul Wilson) that the report of a heart attack on 27 September was a sham, as he had gone out to lunch the following day. The claimant even showed colleagues photographs of himself in hospital to convince them he was genuine. At the same time, the respondent was genuinely uncertain whether

his absence was a health issue, or was because of marital difficulty. He had been offered the chance to take time off work for an extended period, but had refused it. He was also due to fly to China in November, and the question of a heart condition impacted on the insurance position. Thus David Badham, who had responsibility for HR within the company, prepared a letter asking for the claimant's "consent to us obtaining a report from a relevant medical specialist, so that we can examine the precise nature and consequences of any conditions which you may be suffering". He was asked in the letter if his GP would be the correct person to approach, or another specialist who had been involved in his diagnosis and treatment. He was also asked to sign a consent to disclosure of his medical records to the medical expert. The consent form makes clear that he could ask to see the report before the company received it, that he can ask the doctor to amend it, and that the doctor will only reveal it to the company with the claimant's consent. This letter was handed to the claimant on 14 November. It is an indication of his tense state at the time that until he opened it he thought it was a letter of dismissal.

36. He refused to agree to disclosure of his medical records, and has taken great objection to the request. He thought his employer would see the records. During the hearing the claimant revealed some personal history which helped us understand why he reacted with such hostility to any risk of losing the confidentiality of his medical records. Instead of agreeing to disclosure and examination, he arranged for his GP to write a letter (16 November) to the respondent which said:

"I am currently treating Mr Crawford. Based on my knowledge of his case I can confirm I believe he is fit to continue in his current office based employment and is currently fit to travel overseas on business.

As a point of good practice I would suggest that his employer shall carry out a stress risk assessment with respect to his role. Advice on this can be found on the HSC website or from your occupational health advisers".

This report does not state what the claimant was being treated for, whether there was any concern about his heart, or why he might need a stress risk assessment. Thus it tells the employer even less than a standard NHS fit note, which would mention the health condition, if only to say there was none. If some of the respondent's directors suspected that talk of a heart condition was a story, it was reinforced by this reticence. They did not go on to investigate why a stress risk assessment would be good practice. Paul Wilson emailed the claimant (who was off sick that day) about the doctor's letter, saying: "I'm very concerned about your well-being generally, particularly at this time with your difficult domestic situation and our concern that you told us you had a heart attack only a few days ago. The doctor doesn't mention anything about your heart attack, but I must assume he is fully aware". They accepted the doctor's view that the claimant was fit to fly to China, but "I just want to make very clear that I would be prepared to cancel the trip if you felt the trip you have agreed with Weibin was too stressful for you at present, or could in any way cause any issue for you. It is a trip that you arranged and you are free to decide whether you go or not". On other points, about work in the office, (which seems to be a reference to the stress risk assessment), "I would suggest that these are addressed on your return".

### **Relations December – March**

37. It does not seem that they were. Rumours about the fainting episode continued to swirl. On 13 December the claimant went to Paul Wilson upset, having heard from another that Trevor Raymond had told him that the claimant had told lies about the fainting incident. Paul Wilson said of the fainting incident that he did not agree "that there was conclusive evidence" that the claimant had lied about it, but in a private note he recorded there was reason to doubt that he had ever had a heart attack, as first suggested, and that he was going around telling people about his heart and his marriage breakdown, and that "Paul Wilson and David Badham do not give a damn

about his state of health or mind” “in an apparent effort to gain sympathy”, which he thought unfair when he had offered flexible working and an extended break. He concluded with a reference back to an earlier episode when the claimant had told a meeting that he had spoken to a contact, and later admitted that he had not in fact, an example of “lying”.

38. This note was made on 20 December, when the claimant reports that Paul Wilson, walking back from a business lunch, and arising from queries the claimant raised about his budget, told him that “he was the fucking CEO”, and the claimant should know his place. The cause of the dispute seems to have been that the claimant had not realised that his spending budget for a particular ‘partner’, had been cut by half as part of the economies from mid-2018, or that he was expected to negotiate a reduction.
39. Other evidence of the state of relations at the time comes from a report by Amanda Palmer, Mr Wilson’s PA, and in effect the office manager. She monitored who was at work in any particular day, as shown by a number of messages to her from time to time from the claimant. She had earlier in 2018 reported that the claimant seemed to be recording a conversations with colleagues (the claimant now says the recording she overheard was a podcast). In a lengthy memo to Paul Wilson on 9 January 2019 she recorded that there was “constant whispering” in the office and the kitchen, and “a poisonous and divisive atmosphere” with “toxic politics and backstabbing”, affecting productivity. She identified the claimant in particular, and listed a number of incidents of the claimant loudly losing his temper over personal calls, and an episode on 21 November when he had stormed out after talking to Massimo Fedeli. She also identified Sally Singer as a culprit.
40. Sally Singer was made redundant in February 2019, though she served her notice into March. At the end of February the respondent reactivated the recruitment exercise for the claimant’s team.
41. There was a performance review on 15 February 2019. The claimant was told that he would receive bonus for the proportion of work done between January and May 2018, but none for the period since he had been promoted, because performance in the promoted role was not satisfactory. The £16,000 bonus was, by concession, all paid in February, rather than the usual half then and half in August. At the same time the claimant was told there would be an additional bonus of up to £50,000 in June 2019, dependent on his sustaining the “very recent and essential improvement in your conduct as a member of WPIC’s leadership team”. The claimant resented that his efforts since May 2018 went unrecognised and that the June bonus seemed to be dependent on a subjective view.
42. His perception of unfair treatment continued when a week or so later Paul Wilson emailed saying that he felt “rather out of touch with what is going on with the bulk of your PP relationships”, he didn’t recall seeing any email traffic about the matters the claimant had reported at a meeting that morning. The claimant replied at length referencing where he had in fact prepared updates, and the email traffic. Paul Wilson had the grace to reply: “very helpful, and you are right that we have discussed much of this recently”. He told the tribunal that nevertheless the claimant had been providing very few of the agreed weekly reports taking the period from May 2018 as a whole.

### **III Health Absence March- April 2019**

43. Towards the end of March Paul Wilson told the claimant and Sally Silver to “get control” of an upcoming marketing event. This seems to have precipitated a crisis with the claimant (already taking time off and at home for childcare) feeling he was being unfairly criticised, and next day he arranged to meet one of the respondent’s



non-executive directors, Benny Oeyen, to discuss his unhappiness. He said he was being bullied by Paul Wilson and Trevor Raymond, and complained of the probation extension. Benny Oeyen was surprised, and wondered if the claimant was overreacting because of problems in his personal life. He advised the solution was either mending his relations with others, or deciding to look for another job. He kept this to himself, believing that reporting this back to Paul Wilson would not improve a difficult relationship.

44. The claimant was then signed off from work from 28 March to 16 April 2019 with anxiety, depression and work-related stress. The fit note does not recommend altered hours or a phased return, or that the claimant needed to be reviewed by the doctor before returning, but did say "I would advise referral to an occupational health physician for support and review". The claimant reported to Paul Wilson that he had been signed off work (without sending the fit note or giving a reason) and said he would review matters early the following week, and would be available meanwhile to assist with emergencies. He was told that he should not do any work until the doctor said he was fit, and asked him to send the fit note. The note was the first mention to the respondent that the claimant suffered anxiety and depression, rather than the general term "stress". The tribunal not accept that he had told Paul Wilson before that his health was affected.
45. While the claimant was away the respondent continued with the recruitment exercise and lined up a shortlist of four candidates for the claimant to interview on his return.
46. There was a return to work meeting on 17 April. The claimant went back over the events of the past six months saying he was the victim of the culture of the respondent, and that the decision to extend probation had been harsh. He brought up that some thought he had been lying about the incident on the tube, and said he did not trust the respondent with his medical records, his physical health was fine, and his emotional state was by reason of Mr Wilson's treatment of him. Mr Wilson and Mr Badham tried to focus on the way forward, and proposed different reporting procedures, and having someone sit in with client meetings to help with the workload. The claimant says he asked for a staged transition back to work, then learned that he had to interview the candidates for his assistant the following day.
47. On 24 April the claimant was sent a note of the return to work meeting, so he could amend it for accuracy, and he was asked again if the company could get "a medical report from the appropriate expert", adding: "for the avoidance of doubt, it is not the company's intention to request access to medical file itself. If you gave consent the company will send a letter to your GP or other medical expert nominated by you, asking certain questions about your medical condition, its possible impact on your role and any support we could reasonably offer to you. I wish to clarify this point, in case that was your reason for declining to consent".
48. The claimant did not consent. In tribunal it was noteworthy that when asked to read out this email, to show he had *not* been asked to send his records to the respondent, he was unable, on three attempts, to read out the words "or other expert nominated by you" - either he rephrased them, or he skipped them altogether. The claimant is literate and intelligent; the tribunal noted that he could not accept he had been mistaken about what the respondent wanted.
49. On 29 April the claimant emailed Paul Wilson, asking to meet him to discuss "an improved working relationship and an atmosphere in the company". As for his medical health: "my GP deemed it fit that I return to work on 17 April and as far as I'm concerned that is an end of the matter".
50. On 30 April Paul Wilson asked the claimant for a response on the meeting note – if the claimant disagreed on any point, it was better recorded in writing. The claimant

replied that he disliked the formality and wanted a meeting about what was said in the notes of the return to work meeting. He said his anxiety depression and work-related stress was largely caused by the corrosive working culture of the organisation. He reviewed in detail events from September 2018 on, and said criticism of his performance was unfair. He was disappointed not to be included in an upcoming marketing event. He was going to apply for flexible working one day a week at home for childcare.

51. Later that day the claimant emailed Benny Oeyen again, and at length. He reported there had been no progress, and he was seeking legal advice as Paul Wilson was “trying to unfairly construct my dismissal”. He then made a very wide attack on Paul Wilson’s conduct and ability: he was damaging the organisation both internally, and in its effectiveness and reputation within the marketplace, leading to “a growing groundswell of a negative feeling” towards the respondent; he was barely in the office, nor involved or well-informed. He kept no minutes of meetings. He was engaged in “multiple conspiracy theories”.
52. Benny Oeyen decided to keep his distance.

### **Further Extension of Probation May 2019**

53. Paul Wilson arranged to meet the claimant on 7 May. He told him his probation was to be extended for another six months, to November 2019. The reason given in the follow-up letter was that “to date, your team leadership is largely untested”. In effect, this was about there being no one in his team to lead since AT left, with a replacement starting in June. He proposed another meeting to discuss the points raised in the 30 April email.
54. The next day the claimant was asked to collaborate with a colleague on a draft presentation from Paul Wilson to make the following Wednesday. He wanted a draft by Monday morning. The claimant protested that he was already working on strategy papers which would be finished by the end of the day, he was going to be out of the office, and had a series of business meetings, it was very short notice, and he did not know what to prioritise. The event had been arranged in mid-April, the claimant resented being asked to write Paul Wilson a speech at such short notice.
55. At the same time however he was able to prepare a five page note with chronology of relations between him and Paul Wilson to date, protesting his achievements, complaining of his treatment, and asking if they could meet. He then asked Benny Oeyen if they could meet for another discussion. They met very briefly at a trade event; the claimant then sent him the note. Benny Oeyen decided not to reply and not to intervene. Thus Paul Wilson did not know the claimant had denounced him to a director.
56. Next day the claimant and Paul Wilson went for lunch with the Royal Mint. On the way back, taking the claimant to task for not assisting with the presentation, Paul Wilson called him a ‘grinfucker’, explaining it was a Texan expression meaning someone who was duplicitous. The claimant told him he had seen his doctor that morning about depression and that he had not refused to help. The claimant has said ‘grinfucker’ was uttered on two other occasions. He made a note for himself about it on *this* occasion. Paul Wilson is clear he only said it once though he could not remember when. We conclude the claimant has in retrospect mixed up conversations and we accept it was said once, and on this occasion. The claimant also asserts he was told by Paul Wilson he was too “young for the role” and that he was beginning to question his commitment.

57. On 30 May he was asked by Paul Wilson and David Badham to stay behind following

a weekly leadership team meeting. He was told that the department year-to-date performance review had been cancelled because Mr Wilson had all the information he needed. Mr Wilson took issue with the claimant's failure either to sign off return to work meeting notes or supply his own version. He took him to task for not being prepared "to move on", and not showing enough "maturity". Not signing the return to work meeting notes showed he was devious. This was followed up by a long letter from Paul Wilson on 15 June. The letter deals expressly with what the claimant had said in his two earlier letters. The factual issues are dealt with point by point. Among these, that the lack of medical information meant he did not know what they should do about his health, that they sat down with him regularly; the lack of assistance in his team was in part because he had put AT on performance review leading to his exit, and in part because the secondee working in his team had asked to be moved elsewhere as the atmosphere was so unpleasant, and he had taken no steps to start recruitment in February or March despite David Badham having taken the initiative in starting it when the claimant did not. There was detail with praise and reservation of the handling of particular partners (customers), including a long addendum on a particular partner. The letter concludes that replying to each other at length was highly time-consuming and "the pattern is clearly neither sustainable nor justifiable going forward given the business pressures we need to manage. We clearly will never agree in our interpretations on much of what has gone before and more correspondence won't bridge that gap, only increasing it. It also deflects us from important tasks to accomplish this year". He discussed how they should proceed based on monthly reporting to ensure the new recruit was given proper exposure, coaching and instruction. In the next few weeks he would learn the level of conduct related bonus payable, and his performance review would, like all others, take place before the end of July.

58. On 28 June the claimant was told that that his conduct related bonus was limited to £5,000, rather than £15,000. He was congratulated for an improvement in day-to-day interactions with team members and for the induction of his new colleague. He was given three reasons for not awarding the full amount, including not providing a draft presentation for the May speech, and for 'dropping the ball' with the partner who had been subject of the detailed addendum.
59. Relations continued to be poor. There was conflict on 16 July when a meeting was scheduled which conflicted with a counselling appointment. As we understand the evidence, the respondent would not have known that the counselling appointment had been moved. At the same time, the claimant had been criticised for taking "too many unnecessary long lunches". David Badham's own notes in advance of performance review show that in his view the claimant's work hours were "shrinking over time" as he arrived late, took long breaks for lunch and exercise, then left early. The same note, which is balanced and detailed, notes the lack of sophistication in understanding the issues when negotiating with partners, that he had not organised any presentations or speeches, and while his conduct had been poor before, with shouting in the office, it had been less disruptive recently. Paul Wilson rated his performance at 2.3 on a scale of 1 to 5. There was a list of short-term targets to be achieved.
60. Early in July the claimant was reminded that they needed his self-assessment for the half yearly review. He had not prepared it by the appraisal meeting on 31 July. On 14 August he completed it and sent it to Paul Wilson, rating himself 4 (out of 5), and saying how the respondent's treatment had damaged his mental health.
61. Paul Wilson returned from holiday on 28 August and read the performance assessment. He noted an unusual format in presenting the figure for his product ounces (a measure of successful marketing activity) , which included a JPEG of part of the spreadsheet, rather than the underlying material. He asked to see the underlying spreadsheets themselves, and saw that product ounces to the end of

June (when the review period closed) fell below target, and the claimant had included additional ounces from the next two months in his total. He concluded that misstating the figures for the end of June was no accident, and was angered by the attempt to mislead. He discussed it with David Badham and Weibin Deng, who agreed. Having heard the evidence, the tribunal agrees that the respondent was right to be concerned that the claimant was trying to pull the wool over whether he had achieved one of the review targets.

62. Coupled with the claimant's comments on the form, including that Paul Wilson had shown him "disrespect bordering on bullying", Paul Wilson sensed "Groundhog Day", meaning that despite his earlier attempt to get back on track, they were no further forward, still facing attempts to apportion blame retrospectively for what has happened. He concluded he had lost faith and trust in the employee's honesty, that the claimant would not accept that concern about his performance or conduct were well-founded, and the claimant did not trust or respect him. He could no longer manage him effectively. It was a small organisation. He decided that the claimant should be dismissed and spoke to Board members about it.
63. He drafted a dismissal letter, which is dated 20 September. On that date he called the claimant in to a meeting and announced his decision. He was to leave straight away, with a payment in lieu of notice.
64. The claimant appealed by letter of 27 September 2019. He rejected the assessment of his achievements, and said that Mr Wilson was out to "malign and professionally discredit him", because he "cannot work with a man not in his own image". From the time of the September collapse he had been harassed with letters and fabricated stories. His GP had suggested a stress risk assessment which had been ignored. There was a critical assessment of the specifics of the performance review.
65. On 10 October an appeal hearing was set for 31 October, to be chaired by Roger Baxter, the chairman of the board. He summarised the topics for discussion as whether there was an unfair personal vendetta, or unfair evaluation, and lack of the process in dismissal. It would be a review and a rehearing.
66. The claimant then supplied an 11 page letter giving more details of dates and events, with a large number of supplementary documents. On 20 October Mr Baxter pulled out, on the basis that he had too many current commitments for such a wide-ranging review.
67. The claimant immediately sent an angry response which he sent not just to Mr Baxter but copied to all the non-executive directors and the CEOs of the platinum producing companies. He said it was astonishing that no one independent could be appointed. It was the whistleblower (he was referring to the matter which has been withdrawn) who should be protected. He accused Paul Wilson of "systematic incompetence". Paul Wilson, he said, "barely turns up, is incapable of understanding commercial deals, universally disregarded... personally responsible for wasting in excess of \$2 million". He sent this denunciation not just to the respondent's solicitors, but to all the respondents non-executive directors, who were their product partners, and their CEOs.
68. The respondent's solicitors replied asking to correspond only with the solicitors. Evidently he had a lot of company information, they said, which should be returned. The claimant sent a calmer email back, but to Roger Baxter, not the solicitors. The respondent then said a barrister (Michael Lee of 11 KBW) was to be appointed to chair the appeal as an independent. There followed some acrimonious correspondence about return of the papers, with the claimant asking how a lawyer paid by the respondent could be independent. He was being forced "to go down the legal route".

69. A date was set for 29 November. The next wrangle was over representation. The respondent's procedure allows only a trade union representative or colleague, following the statutory provision. The claimant asked if his father could accompany him. This was allowed, as an exception, provided he signed a deed which restricted the use of confidential information obtained through the process. Angrily the claimant said he had taken legal advice and they could not be expected to sign this.
70. At the start of the appeal meeting the claimant was told that he would not record proceedings, but he would be sent the notes which he could review and amend. He would be permitted to phone his father for discussion during breaks.
71. In the course of a long interview with the claimant about the history of the relationship, the claimant denied that relations were broken down and that he was prepared to go back to business as usual. On the particular issue of his product ounces, he accepted that he had included in the figures ounces after the end of the review period, but said that by his dismissal in September, respondent should have been taking quarter three into account anyway. Mr Lee then interviewed Paul Wilson, David Badham, Brendan Clifford (over the draft presentation for Mr Wilson) and Benny Oeyen. He noted the competing narratives, and concluded that relations had deteriorated significantly and latterly broken down altogether. He thought the claimant was unrealistic about the prospects of working in future. He noted the abrupt tone of communications from Mr Wilson, and that both sides held entrenched positions.
72. In a scrupulously detailed outcome letter of January 2020, he conceded that there was, to a degree, right on both sides. Not all Mr Wilson's criticisms in the dismissal letter could be justified, for example in relation to performance. At the same time, although Mr Crawford had appeared to concede some of Mr. Wilson's points at an earlier stage, he has 'not recognised any real legitimacy' in the issues he raised. Discussion at meetings had probably been more emollient than what either side had put on paper subsequently. The medical records issue could have been better handled, perhaps by more detailed explanation, but the claimant's response was defensive and he could see in retrospect how this contributed to the impression that he was not being frank about what had happened. The relationship had broken down gradually over time, no one person bore responsibility for that, but the claimant had contributed to that state of affairs. On process, he thought that someone other than Mr Wilson should have decided whether dismissal was the right decision. He also thought the claimant should have been allowed to see the file notes prepared at the time the probation reviews. He concluded that while in some cases a dismissal could be overturned, in this case it was the only practical outcome. The relationship with the CEO was "fundamentally broken". In a small leadership team it was not possible to change reporting lines. Nor was it practical to recommend that leadership team be replaced so that the claimant could return to work.
73. The claimant agrees that the appeal process carried out by Mr Lee was balanced and fair.
74. We now set our findings on disability, and consider in the light of the law whether the claimant was disabled. After that we return to the findings above to consider the discrimination and unfair dismissal claims generally.

### **Disability**

75. Disability is defined in section 6 of the Equality Act 2010 as where "a person, P, has a mental or physical impairment which has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities". Substantial means more than trivial. Long-term means ( see Schedule 1, part 1, paragraph 2) that it has lasted for

at least 12 months, or is likely to last for at least 12 months. The assessment must be made of disability at the relevant time, not the date of the hearing.

76. The list of issues is clear that the claimant's case is that at the relevant time the disability had lasted at least 12 months, and this is the case put in closing submissions.
77. As evidence of impairment we had a set of redacted extracts from the GP notes, a short report from the GP dated May 2020, and the claimant's impact statement.
78. The first entry in the medical records is in October 2018, immediately after his collapse on the tube. On 2 October 2018 he told the GP that he had discovered that his wife had been having an affair, work was pressurised, the GP noted anxiety and some suicidal ideation, that there were two young children, and he was keen to continue work. The GP prescribed medication to help him sleep. On 15 October he reported he was a bit better. On 5 November he said his wife moved out, that he was working OK, had been promoted. His probation had been extended -he was OK on KPIs, but there were issues with some softer points. Work was aware of his home situation.
79. After that there is nothing in the medical notes about anxiety or depression, despite an attendance on the GP in February with a cold, until 21 March 2019, when a note is made of anxiety and depression. The doctor made a note that his boss was not supportive and was bullying him. He had taken advice from an employment lawyer friend. On 26 March 2019 (the date he was signed off from work) he reported that he was worse at work; they had declined to refer him to occupational health. He was tearful and struggling to cope. On 15 April 2019 (just before he returned to work) it was noted that the medication prescribed in March had another two weeks to run. He was reviewed on 13 May when he was back at work, and noted as saying there had been no additional support and no stress risk assessment, with requests to work at midnight. On 10 June 2019 he reported he was better, with group sessions with a counsellor. On 15 July he told the GP he was having group CBT (cognitive behaviour therapy), his boss had eased off a little, but he would look to leave in future. On 19 August he said there were ongoing issues at work with the mid-year review; he was being criticized, despite meeting all his objectives. The CBT was helpful.
80. On 20 September he reported the dismissal, and an antidepressant was prescribed. There were reviews on 30 November 2019, 27 December and 11 February 2020. In a very short report of 12 May 2020 the GP notes that without treatment the claimant would have found it extremely difficult to perform normal day-to-day activities, but this report does not say when.
81. The claimant's statement says that from September (2018) onwards he suffered insomnia, panic attacks and received treatment. By March 2019 he was no longer able to function. On his return to work in April 2019 he had immediately been given a huge workload in the form of the recruitment day. He had been on edge and had become very tidy, even sanitising his phone regularly. (This does not appear in the GP notes).
82. In closing, his counsel submitted, based on some brief asides the claimant made when answering different questions, that he had suffered from anxiety and depression for at least five years. The tribunal has decided it cannot rely on this: the claimant had the option of including material about any earlier illness in his witness statement, or in medical records he could have disclosed, but he had not, with the result that neither the respondent or the tribunal could test the truth of this.
83. On the evidence of the medical records, there was no substantial impairment between the end of October 2018 and the end of March 2019. During that period he

was not receiving medication. His evidence about anxiety and panic attacks during that time is unsupported by his doctor. The tribunal noted other evidence suggesting that the claimant's memory of sequence of events is not always accurate (by way of example, the grinfucker remark, noted on one date in his own contemporary note, and several months earlier in his pleading and witness statement; or his recollection of an "athlete" remark, linked to organizing a charity event which the emails show happened about 9-10 months later than he said in his witness statement). In the absence of comment on panic attacks and other anxiety symptoms in this period in the otherwise detailed GP notes we concluded that he was reading back to an earlier period his later and undoubtedly more severe symptoms. This means that by the date of the dismissal, and even the appeal, his mental impairment was substantial, and had been for a month or so in October 2018, and then again from mid-March 2019 onward, but at the relevant time it was not substantial for a long term. When including the time that has elapsed since then, it is probably *now* long-term – though we have no medical records after 11 February 2020.

84. Despite the way the claimant's case was put, we did consider whether during the dates of the treatment complained of, that is, until dismissal in September 2020, it could have been said that the condition was likely to last at least 12 months. This is hard to say. At the time the claimant clearly related his condition to his treatment at work. He had found CBT helpful. It might well have been said at the material time that the future was unpredictable, and with removal of outside causes he would recover from an unpleasant episode, or that he had improved with CBT and would have continued to do so but for the dismissal.
85. We concluded that the claimant does not establish that he was a disabled person within the meaning of the Act.
86. Nevertheless, in case we are wrong about that, when we went on to review the list of detriments and the fact of dismissal in relation to the protected characteristic of age, we did also consider whether disability had caused or contributed to any treatment.

### **Discrimination**

87. Direct discrimination is defined in section 13 as where "A treats B less favourably than A treats or would treat others". By section 23, when making comparisons, there must be there must be "no material difference between the circumstances relating to each case".
88. Discrimination can be hard to prove, as the discriminator may not recognise, let alone admit, that he is discriminating, and the Act provides in section 136 that if there are facts from which the court could decide, in the absence of any other explanation that (A) contravened the provision concerned, the court must hold that the contravention occurred (unless) A shows that A did not contravene the provision. This consolidates earlier decisions in **Igen v Wong** and **Barton v Investec**: it is for the claimant to prove facts from which the tribunal could conclude that discrimination occurred; if so, it is then for the respondent to establish a non-discriminatory explanation. Difference in status and difference in treatment do not by themselves give rise to an inference of discrimination – there must be something more – **Madarassy v Nomura International plc, (2007) IRLR 246**. In **Pnaiser v NHS England and anor UKEAT/0137/15**, discrimination need not be the only inference from the facts before requiring an explanation. A tribunal need not take the stages in that order, but may focus on explanation. It must address the "reason why" the employer acted as did, rather than "but for" causation. There must be no discrimination whatsoever in the reason.
89. When deciding an employer's reason for acting – or not acting - the Tribunal is required to make a careful evaluation of the reasons. This is in essence a finding of

fact, and inferences to be drawn from facts, because a reason is “a set of facts and beliefs known to the respondent” - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA**. The real reason may not be the label attached to it by the employer, nor the reason advanced by either party. It is for the Tribunal to make a finding – **Blackbay Ventures Ltd v Gahir (2014) ICR 747**. The tribunal must be careful to avoid “but for” causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425**. However, it is not necessary to show that the employer acted through conscious motivation – just that the protected act (or in discrimination cases, protected characteristic) of was the reason for the dismissal – **Nagarajan v London Regional Transport (1999) ITLR 574**.

90. Age is a protected characteristic, as is disability.

### **Discussion**

91. We have worked through the list of issues to establish whether there were detrimental treatment, and if so, the reason for it. There are no named comparators, so to assist in deciding the employer’s reason, we had to consider whether someone materially similar, but older or not impaired, would have been treated that way.

92. Before doing so, we comment on the use of the term “maturity” or “immature”, complained of from time to time. We are well aware that these terms may be code for youth, and reflect a stereotypical view of people’s age. But we also note that in general people discuss mature or immature behaviour with regard to whether the conduct is appropriate to the actual age. For example, we refer to someone having an old head on young shoulders, or being “wise beyond his years”. We might comment disapprovingly on an intemperate outburst as “47 going on 3”. Most people recognise self-centredness or recklessness or irresponsibility as characteristic of adolescents, and expect older people to have grown out of it. We might say someone is “old enough to know better”, while excusing a young person for foolish behaviour. They would also view wanting an older or more senior person to adjudicate on a relationship difficulty with someone else, or even punish or rebuke another, rather than trying to deal with it themselves or person-to-person, as childish behaviour.

93. When questioned, the claimant insisted that ‘mature’ simply meant old in years. It did not characterize behaviour. Calling his behaviour ‘immature’ was stereotyping disapproval of his relative youth. Thus we understand his case to be that an older person who behaved like this would not be “immature”.

94. The respondent points out that while the claimant was younger than the other directors (although not markedly younger than Weibin Deng), Paul Wilson had championed his promotion knowing his young age, and told us that he had had his first big job at 37.

95. We concluded, when examining the occasions when Mr Wilson had referred to maturity, or lack of it, he had in mind the claimant’s abrasive approach to colleagues, rather than seeing relations with others as something to be negotiated and managed. We found it telling that when the claimant met difficulty with personal relations he brought in a more senior person, even on small matters. The fact that Paul Wilson was able to point to examples as reasons for his concern about the claimant’s ability to lead a team suggests that his view was not that he was too young for the job, but that he lacked experience of leading others to work effectively together to achieve a target, or the ability to learn how to do it, rather than the solo performance he had demonstrated hitherto.

96. Taking the detriments one by one, the first is about an episode early in 2018, when the claimant accompanied a colleague to a grievance hearing. Paul Wilson, it is said,



asked the claimant where his loyalties lay - with employees or with the respondent. In our view this was an incautious remark, as it might have been interpreted as an attempt to intimidate and dissuade the claimant from assisting his colleague, but we cannot see its relation to age or disability, and it was no bar to the promotion which followed some months later. This episode is a relic of the abandoned whistleblowing claim.

97. Two of the detriments (2 and 9) concern Paul Wilson questioning the truth of the claimant's account of the collapse on the tube in September and hospitalisation. As a matter of fact, Paul Wilson did not question the truth at the time, and had offered genuine support. The question came from Trevor Raymond, who was rebuked for this when it came to Paul Wilson's attention. Paul Wilson's doubts arose later in the context of conflicting accounts for the collapse, and the refusal to provide medical confirmation of that. There were reasons for his doubt, which had nothing to do with age. Nor was the cause disability, although disability (had we concluded the claimant was disabled) was the occasion. Detriment 11 is on a similar theme, that David Badham doubted the authenticity of the GP letter of November 2018. David Badham's reasons for this, in our conclusion, were that the claimant had refused access to his medical records for a medical expert, and the GP letter said nothing as to whether it was a heart attack or a mental health condition, as suggested by the history of collapse. At the same time there was an element of suspicion about the claimant's occasional absences from work for long periods; he was also probably disliked for how he had treated MG, the way he treated AT, and his conflict with David Badham in the lack of cooperation over the compliance documents. All these were far more plausible reasons for expressing doubt, rather than the claimant's youth, or any be disabled. The treatment is related to his health, which is the occasion of the doubt, but doubting him is not because of "disability" or age, but because the reason for his absence was opaque.
98. The next complaint is of the various formal letters Paul Wilson wrote about his performance, and that the criticism was without justification. In our conclusion the various letters, which related to the extension of probation, are detailed in their reasons. We were not clear that failing to keep Paul Wilson in the picture was always fair criticism, but thought it had more to do with his attendance three days a week and frequent travel, rather than a stereotypical view of the claimant's age. It was undoubtedly fair to criticise the claimant's abrasive relations with others in a small organisation, in particular the way he handled AT, and his tactic of criticising others in front of Paul Wilson, rather than dealing with them one to one. In context, we note that other directors disliked the way the claimant had complained about MG to Paul Wilson and then taken his job, and the claimant seems to have been repeated the tactic, though unsuccessfully, by complaining to Benny Oeyen about Paul Wilson. We did think Paul Wilson could have managed his own anger and irritation better when dealing with the claimant, but this was not to do with the claimant's age.
99. Of the next detriment, that the claimant was told that the budget would be reconsidered when his performance improved, the claimant agreed that there were financial reasons for the budget cuts at the time. We thought it unwise of Paul Wilson to link the pause in recruitment to the claimant's ability to lead, as it was not going to improve his relationship with the claimant to say so, but we did not think the reason for pausing recruitment was the claimant's youth or disability.
100. The fifth detriment (which is more appropriate to harassment but there is no harassment claim), is that Mr Paul Wilson commented that the claimant was extremely lucky to be where he was at his age. This was an accurate comment. The claimant took it ill in the context of an extension of his probation. In the context of the claimant not yet being ready to manage other people and his own role, when the claimant was being loud and disruptive, and had not managed to keep AT in his team, it did not betray a stereotypical view, but was a true assessment of his performance.

101. In the next detriment, we thought extension of probation was based on reasons unrelated to age. There were reasons for his views about the claimant's performance as a manager and a colleague, given the conflict with AT and David Badham, for example. As for disability, as of 30 October Paul Wilson had no concerns at all whether the claimant's collapse was genuine.
102. After that, it is asserted that requests for replacement staff were routinely refused. First of all, budget constraints, as the claimant admits, halted a recruitment exercise which had just begun. The claimant was offered help from Sally Singer and David Badham which he rejected. The respondent did start recruitment again in February, though the claimant was slow to progress that; and they did speed it up while the claimant was away from work, with the result was an assistant did start in June. We do not accept that there was routine refusal, or that if there was detriment in not replacing AT straightaway, the claimant's youth or disability was the reason.
103. Detriment 12 concerns getting credit for arranging a meeting with Brewer Dolphin. This remark to Sally Singer was unnecessary and a little bad tempered, as the mix-up was more due to bad luck and misunderstanding, but is best understood within the context of the claimant's now resentful and uncooperative approach to Paul Wilson because of the promotion extension, not age or impairment. Detriment 13 is similar, in that Paul Wilson asserts to the claimant that he is "the fucking CEO" and that the claimant should know his place. The respondent agrees that the language was intemperate. The context was the conflict over the "showboating" memo. This is seen as a senior telling a junior to show respect, but in the context of conflict between directors it was not inappropriate for the CEO to tell a direct report in firm terms that his decision is final.
104. Detriment 14, a complaint about the 'grinfucker' remark, said to have occurred in February 2019. In our finding that occurred on 13 May, the occasion of detriment 18, when the claimant complains that he was told he was too young for the role of director and that Paul Wilson continued to doubt his commitment. This conversation took place in the context of an argument about the renewed probation extension, the dispute about the return to work meeting, and a reluctance to assist with the conference presentation. In our finding, this was a comment related to the claimant not wanting to move forward but insist on reviewing events for the past eight months, and must be seen in the context of what was now a very poor relationship, as evidenced in what the claimant was telling Benny Oeyen at the time. It was about his relationships with others, and Paul Wilson in particular, not his age, or disability. Our views on detriment 19 (30 May 2019, Paul Wilson again saying the claimant was not showing off maturity) are similar. The claimant insists that 'maturity' meant that he was too young, but we do not agree. Paul Wilson meant that it was immature to continue to argue with colleagues and his line manager about past events.
105. Detriment 15 is that Paul Wilson told the claimant in February 2019 that he felt out of touch with his department. Paul Wilson conceded this was unfair, as noted. It was a mistaken criticism, but we did not think that age or any mental impairment has anything to do with it. It was a symptom of their now poor relations, mostly caused by the extension of probation.
106. The next detriment, 16, is about the failure to refer the claimant to an occupational health practitioner, as recommended by the GP on the fit note of March 2019. The respondent did start to do this by asking the claimant to disclose medical records to an expert. He was not specifically referred to an occupational health physician. An occupational health physician will have had to ask some questions about the nature of disability (anxiety and depression) and will have wanted access to at least some of the records in order to assess what needed to be done. The process was

obstructed by the claimant's fear of disclosing his records, understandable to the tribunal, but which will have been seen as unreasonable by the respondent, when the claimant just told them he was fit for work and there was an end of the matter. There was a detriment to the claimant, as there might have been some measures that could be taken - although in the tribunal's experience where the dispute arises from conflict at work, occupational health reports often say that the stress will last until the conflict is solved and until that happens other measures are ineffective. The claimant's relations at the time with Paul Wilson were difficult. We do not believe that the reason why there was no referral was that the claimant was young, or that he was mentally impaired.

107. The next detriment, 17, is about the further extension of probation in May 2019, as his leadership was untested. So far, it was untested - he had got AT to leave, his secondee had asked to work elsewhere, recruitment had been delayed by budget cuts, and so there was no one else to lead. Given the concerns of Paul Wilson's colleagues at the time of promotion, which led to there being a period of probation to start off with, it was not unreasonable to extend the probation period to test whether he could lead. It was unfortunate that it had to be extended for a third time. The respondent's alternatives were to demote him, or to consider whether to dismiss him and recruit a replacement. These reasons are not related to the claimant's youth or any mental impairment.
108. Detriment 20 is Paul Wilson telling the claimant on 7 June 2019 that he did not keep up to speed and was a poor performer. By now their relationship was difficult because of the claimant's resentment of the further extension; Paul Wilson is still trying to be encouraging, though ineffectively. We did not think this was because of the claimant's age, or because of any mental impairment.
109. Detriment 21 is the claimant's performance being rated at 2.3. We note Michael Lee's view on appeal that this was probably on the low side. We also note that at the performance review the claimant had not yet completed the self-assessment that was normally done. There was a long and detailed contemporary list of pros and cons indicating why Paul Wilson reached this conclusion. It may have been unfairly low, but it was based on events, and the claimant's 4 was probably too high. Given the very difficult state of relations by this time, and our earlier conclusions, we find the reason for the low mark was irritation at the long emails complaining about the past, not age or disability.
110. Detriment 22, the last, is a complaint that throughout the employment Paul Wilson would routinely refer to the claimant in a derogatory and sarcastic tone as an *athlete*, for going for a run once a week at lunchtime. This is probably better put as a harassment claim. Paul Wilson denies any sarcasm, and this is difficult for us to assess. The claimant regularly went for runs during working hours. In the past he had competed in athletics events. He had tried to organise a team from the respondent for the JP Morgan Challenge, a charity running event. He had not complained about being referred to as "our athlete". We do not accept it was hostile, or discriminatory.
111. There is a claim that the dismissal was because of age (or disability). We discuss this together with the unfair dismissal claim.

### **Unfair Dismissal**

112. Unfair dismissal is set out in section 98. It is for the employer to show the reason for dismissal was:

"either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

113. In this case the respondent relies on “some other substantial reason” justifying dismissal, namely a complete breakdown in the relationship. In this respect, the tribunal is referred to **Ezsias v North Glamorgan NHS Trust 2011 IRLR550**, to **Perkin v St Georges Healthcare NHS Trust 2005 IRLR 934** and to **Harper v Coal Board 1980 IRLR260**. In **Perkin**, there had been a complete breakdown in confidence between the claimant, a senior executive, and the chief executive. When the executive, and which is actually a potentially damage the operation or had led to colleagues been unable to work as a team, that could be some other substantial reason, even if it was not lack of capability. In **Ezsias**, there was a complete breakdown between the claimant, a surgeon, and his colleagues after he had made frequent and vehement allegations of incompetence and even fraud against them. He was found to have been dismissed for some other substantial reason, rather than the making protected disclosures as he asserted. In **Harper**, the dismissal of an employee who suffered epileptic fits in which he unwittingly attacked others and who had refused ill-health retirement terms could be dismissed for some other substantial reason where the employer genuinely believed that his health condition meant he could not work safely with others, even though in this case the medical report was not supportive because the doctor did not know about the recent attacks in which he attacked others.

114. By section 98(4), once the reason is shown:

“the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

115. Here, the tribunal is concerned with the process by which the decision was reached, as well as the merit of dismissing for that reason. In **Perkin** for example there was an issue as the involvement of the person who conducted a hearing. If there was unfairness in the process, tribunal should find unfair dismissal, even if it holds that with a fair process the outcome would have been the same. The well-known case of **Polkey v AE Dayton Services Ltd (1987) UKHL8**, is an example, being a dismissal for redundancy where there the outcome is likely to have been the same even if the employee had been consulted in the process.

### **Dismissal – Discussion and Conclusion**

116. Here, we consider whether the dismissal was discriminatory, that is, the reason was age (or disability if we are wrong about disability), or whether the reason was that alleged by the respondent, namely a complete breakdown in confidence in working relationships.

117. In our finding, Paul Wilson already had a very difficult relationship with the claimant, which had been difficult ever since the first extension of promotion and which had got worse with the argument arising from the return to work meeting, which raged back over months, and went over old ground. He was still trying to keep things going, in the hope that the claimant could prove himself by managing the newly recruited member of staff, and the last straw (he called it the catalyst) was the attempt to mislead over the product ounces target. It was then that he decided to dismiss. In effect, the claimant provided evidence that his earlier suspicion that he was duplicitous was correct. He decided the relationship was broken and that the claimant should be dismissed. It was telling that his objection to the falsification of his product ounces figure was not that the figure was inadequate, because it was only just below the target, but that he had deliberately misled him, and on this, the claimant has only said that the next two months “should” have been

included in his measure against target. This might have been a reasonable explanation at the time of why his actual achievement should be viewed leniently, but it demonstrates that he did not understand why presenting the figures in a misleading way, as if that was what he had achieved, was wrong.

118. We cannot see how this has anything to do with age. An employee closer to Paul Wilson in age who had done this would also have severely undermined his confidence.
119. Of course this episode was the last straw, but we do not see the difficulties in the relationship that began with the extension of probation as having anything to do with the difference in age. As already noted, other directors, including one was much closer to the claimant in age, had profound reservations about his promotion, and it was Paul Wilson, much older, who had championed him. The difficulties that occurred were precisely those that Paul Wilson's colleagues were concerned about, namely relationships with colleagues and subordinates. This is shown by the reluctance of the second day to work with him, the angry altercation with AT, his uncooperativeness with Mr Badham, Amanda Palmer's concern at angry shouting and conspiratorial whispering. There are a number of other examples, large and small, of going on the attack when there was disagreement with others: he went behind MG's back, when he wrote challenging memos to others he copied them to Paul Wilson, when he came into conflict with Paul Wilson, he went behind his back to a non-executive director, and when dismissed, he denounced Paul Wilson's competence all to all the other directors and their company's CEOs. In some workplaces these difficulties can be tackled early by moving personnel, by warning and counselling, or by mediation. In such a small workplace, where the conflict was between the claimant and his line manager, who was himself the CEO, these were not options. There was no work for either to go but to leave the organisation. Paul Wilson seems to have made strenuous efforts to record his concerns so that the claimant could understand what he was doing wrong (in Mr Wilson's eyes), and to flag up his determination that the claimant should succeed. From time to time he seems to have lost patience, but most of the difficulty was on the claimant's side; he could not see, despite Mr Oeyen's advice, that the relationship had to work. Instead he raked over old ground to continue the argument rather than focus on doing the job going forward.
120. It is not for us to say how much was contributed to by his personality, his difficult domestic relationships, or the depression in March 2019. The claimant in closing asked us to consider that on the facts the respondent had constructive knowledge of disability, such that it was a reason for dismissing. Had we found that the claimant was disabled, it is possible we would have looked at whether the respondent should have considered depression as the cause of his angry and uncooperative behaviour. We might have concluded this was not reasonable, when the claimant refused any medical advisor's involvement, and asserted he was well. We would also have found it hard to see how an employer should think that a blatant attempt to mislead on whether he had achieved a target was caused by depression.
121. In short we concluded the reason given by the employer was genuine, not discriminatory, substantial and justified dismissal.
122. Was the dismissal for that reason unfair? The prominent unfairness was that it was Mr Wilson who made the decision. Other unfairness was that he offered the claimant no warning that such a decision was contemplated, or any opportunity to state why Mr Wilson might be wrong or to argue that things could get better. He was simply told what the decision was. The decision is one that could have been referred to a non-executive director, who would have heard from both, and may well have concluded the relationship was unworkable. Simply to inform an employee that he is to leave, immediately, because of a poor relationship with the person dismissing, offends against the most minimal requirements of fairness. A third party

may have reached the same conclusion, but it would have injected a measure of objectivity into the process. The respondent could have suspended him pending a decision by a third person.

123. Of this was not the whole process. The claimant took up the offer of an appeal which was both thorough and fair, though it took a long time. A fair appeal can cure the defects of a dismissal, for example by investigating points that may have been overlooked, or making sure the employee has understood – **Taylor v OCS Group (2006) EWCA Civ 702, Adeshina v St Georges (2017) EWCA Civ 257**, urging us to look at whether substantive justice has been done. In this case, where there was no initial process at all, it is hard to conclude it rendered the dismissal fair overall. One of the unfortunate consequences was that the claimant was so incensed by unfairness and lack of independence of decision makers that he fired off his denunciation of Mr Wilson, by which he burned his boats, leaving him no way back should an independent appeal manager find that the relationship should be given another chance. The unfair dismissal claim succeeds.
124. We then considered what difference fair process would have made to the outcome. Our conclusion was that any independent decision maker would have concluded in September 2019 that the relationship between the claimant and Mr Wilson had broken down, and could not be repaired. The claimant could not accept that Mr Wilson acted in good faith or was not a bully. He could not accept any criticism. Mr Wilson had lost faith that the claimant could put the past behind him and work harmoniously with others, or even be truthful about his achievements. There was some evidence that he had difficult relations with others, not just Mr Wilson. In a small organisation there was nowhere else to go, and in any case the other directors had always had reservations about his ability to work with others. Removing the chief executive was not an option. It was also likely that even starting the process would have led the claimant to some kind of outburst about Mr Wilson, similar in tone to his letter of 20 October, which would have corroborated what Mr Wilson said about the relationship being unworkable.
125. We concluded that had the respondent asked a third person to review the position and make the decision, it would have taken 4 weeks at most to hear from the claimant, Mr Wilson, and others, about the difficult relations, then come to the conclusion that employment should be terminated, and that should be the limit of the compensatory award.
126. We were also asked to consider reducing awards for conduct and contribution. For a basic award, by section 122 (2)
- Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.
127. For the compensatory award, by section 123(6)
- Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
128. **Nelson v BBC (no 2) 1980 ICR 110** specifies that in this context, conduct means culpable or blameworthy conduct, perverse or foolish, that the conduct contributed to the dismissal, and that it is just and equitable to reduce an award.
129. In conclusion the claimant's behaviour towards Mr Wilson showed little respect for a line manager and chief executive. His argumentative responses, taken cumulatively as they increased from December to May, were at the very least foolish behaviour in a subordinate. Mr Wilson did not know at the time about the accusations the claimant made to Mr. Oeyen, but they were disloyal and showed misconduct. His attempt to misstate and cover up the product ounces is conduct which any employer would view poorly at any level and there is no excuse for it. We do not think it equitable to reduce the award by 100%. From time to time Mr Wilson

was also at fault, using harsh language, sometimes hasty, and perhaps not explaining face-to-face the full written reasons for extending probation. In the autumn of 2018 he misconstrued some of the claimant's actions (not keeping in touch for example) which may be due to the fact that he worked three days a week, but also to loss of trust when he found the claimant had claimed a lavish birthday lunch on expenses.

130. We concluded it was just and equitable to reduce both the basic and the compensation awards by 60% to reflect these factors.
131. We are invited to increase the award for failure to follow the ACAS code of discipline and grievance. The claimant was not disciplined, and did not lodge a grievance; it would not have been appropriate for Mr Wilson to lodge a grievance about the claimant. If it did apply, the failings are those of not having a meeting before the dismissal, in which case it may be said that the Respondent is in any case having to pay compensation for not following process at first instance and should not be doubly liable. The other failing is that the claimant was not accompanied at the appeal meeting. The statutory right is only to be accompanied by a colleague or trade union representative, and the claimant's father was neither. In fact the respondent were prepared to let him attend if he would agree not to disclose confidential information, which is not unreasonable when a work colleague at the trade union representative would understand the duty to maintain confidentiality. Further, the claimant was permitted to telephone his father from time to time during the appeal process, which made up in part for not having a companion in the room. We do not consider an uplift for failure to follow ACAS code is just and equitable.

### **Remedy**

132. This was listed as a hearing on liability only, with the addition that the parties were invited to address us on contribution, **Polkey**, and whether there had been any breach of the ACAS Code indicating an uplift or reduction in any award was appropriate. At the conclusion of the hearing, remedy hearing was listed for 22 April 2021.
133. The conclusion we have reached means that the remedy issues are more straightforward than they might have been. The tribunal considered it would be in the interests of justice to assess the award in the light of the information on salary available in ET1, ET3 and the schedule of loss. This would bring the litigation to an earlier conclusion, and save the parties the trouble and expense of a further hearing. However, if there is some point the parties would have wanted to address that we have overlooked - for example, the claimant's figures for salary and pension may be disputed - it is open to either party to seek reconsideration of the award under rule 71 on the ground that this would be in the interest of justice to hear them.

### **Basic award**

134. At the date of dismissal the claimant had been employed just over three years, and was aged under 40. He is entitled to 3 weeks pay subject to the statutory £525 per week, so the basic award before reduction is £1575. Reduced by 60% it is £630.

### **Compensatory award**

135. According to the claim form and the schedule of loss the claimant's weekly earnings at the date of dismissal of £3,298. In addition the respondent contributed £4,696 per annum to his pension scheme, which is £90 per week. So compensation per week for lost earnings should be £3,388. Over four weeks 13,552. Reduced by 60%, the compensatory award is £8131.12.
136. The total of the reduced awards is £8,761.20, and the respondent is ordered to pay the claimant that sum. 5

Employment Judge - Sarah Goodman

Date: 24<sup>th</sup> Feb 2021

Revised under rule 50

Employment Judge - Sarah Goodman

\_11<sup>th</sup> May 2021

JUDGMENT SENT TO THE PARTIES ON

.12<sup>th</sup> May 2021..

FOR THE TRIBUNAL OFFICE