



EMPLOYMENT TRIBUNALS

Claimant: Mr P Frankland
Respondent: Nexia Scientific Limited
Heard at: Leicester by CVP
On: 8, 9, 10 and 11 March 2021
Before: Employment Judge Hutchinson
Members: Sean Connor
Helen Andrews

Appearances

For the Claimant: Melinda Frankland (daughter)
For the Respondent: Sarvani Morgan, Consultant

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

The Employment Tribunal gave judgment as follows: -

1. The claim of unfair dismissal under section 94 Employment Rights Act 1996 (“ERA”) succeeds. The Respondent is ordered to pay: -
 - Basic award £5,512.50
 - Compensatory award £33,298.00

The Recoupment provisions do not apply.

2. The Claimant was dismissed in breach of contract in respect of notice and the Respondent is ordered to pay damages to the Claimant in the sum of £3,526.18.

3. The claim of automatic unfair dismissal under section 103A ERA is withdrawn and is dismissed.

4. The claim that the Claimant suffered whistleblowing detriments under section 47B ERA is withdrawn and is dismissed.

5. The claim of unlawful deduction of wages is withdrawn and is dismissed.
6. The claims of direct age discrimination under section 13 Equality Act 2010 (EQA) fails and is dismissed.
7. The claim of indirect age discrimination under section 19 EQA fails and is dismissed.
8. The claim of harassment under section 26 EQA fails and is dismissed.

REASONS

Background and issues

1. The Claimant presented his claim to the Tribunal on 21 November 2019. He had been employed by the Respondent as a Senior Maintenance Technician from 13 November 2011 until his dismissal on 22 August 2019.
2. He made the following claims and it was not in dispute that these were the issues in the claims: -

2.1 Unfair dismissal under section 94 ERA.

2.1.1 It was not in dispute that the Claimant was dismissed on 22 August 2019. It was for the Respondents to establish that the Claimant was dismissed for a potentially fair reason which they say was misconduct in accordance with the provisions of section 98(2) ERA.

2.1.2 It was then for the Tribunal to determine in accordance with the provisions of section 98(4) ERA whether in the circumstances, taking into account the size and administrative resources of the Respondent and having regard to equity and the substantial merits of the case whether the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant. We would have to be satisfied that dismissal was within the range of reasonable responses of a reasonable employer. We would also have to be satisfied that the Respondents adopted a fair procedure in accordance with the principles set out in the **British Home Stores Ltd v Burchell**. 1980 ICR 303

2.1.3 If he was unfairly dismissed we had to determine whether the basic award and compensatory award should be reduced because of contributory conduct under sections 122(2) and 123(6).

2.1.4 The Tribunal was also invited to consider whether the compensatory award would be affected by the principles of section 123(1) ERA and those set out in the leading case of **Polkey v A E Dayton Services Limited** 1988 ICR 142.

2.2 Automatic unfair dismissal contrary to section 103A ERA. This claim was withdrawn during the proceedings and has therefore been dismissed.

2.3 Protection from suffering detriment under section 47B ERA. This claim was also withdrawn during the proceedings and has therefore been dismissed.

2.4 Indirect age discrimination under section 19 EQA.

2.4.1 It was alleged that the Respondents had the following PCP's:

-

(a) the practice of only investing in equipment for employees with shorter service history than the Claimant.

(b) the practice of only investing in training and opportunities for employees with shorter service history than the Claimant.

2.4.2 The Tribunal had to determine whether the Respondent had applied the PCP's to people who did not have the same protective characteristic as the Claimant, namely his age.

2.4.3 If so did the PCP's put the Claimant and persons of his age at a substantial disadvantage when compared to younger employees?

2.4.4 If so has the Respondent shown the PCP as a proportionate means of achieving a legitimate aim?

2.5 Direct age discrimination. The Claimant complains of the following acts of less favourable treatment: -

2.5.1 His dismissal;

2.5.2 A failure to provide the Claimant with training and development opportunities that younger staff in similar roles were offered including: -

(i) attending a course in Germany to learn about new CTS products;

(ii) training on new calibration equipment to complete their own in-house calibration of the Respondent's Yokogawa Data loggers and Rotronic Probes relevant to UKAS standards.

(iii) Training or other CTS products more widely used.

2.5.3 Failure to provide the Claimant with the following electronic equipment: -

- (i) laptop;
- (ii) printer;
- (iii) mobile telephone;
- (iv) company e-mail address.

2.5.4 Frequent references to the suggestion by the Respondent the Claimant could be replaced by a more junior engineer on a considerably lower salary.

2.5.5 The disciplinary action commencing against the Claimant shortly after the Claimant turned 64.

2.5.6 The removal of the company car the Claimant had and the alternative offered being of a considerably lower standard.

2.5.7 If so, was the less favourable treatment because of the Claimant's age?

2.5.8 If so, can the Respondent show that the less favourable treatment was a proportionate means of achieving a legitimate aim?

2.6 Harassment. The Claimant alleges that he was the victim of the following unwanted conduct: -

2.6.1 Frequent references to the suggestion by the Respondent that the Claimant could be replaced by a more junior engineer on a considerably lower salary.

2.6.2 The removal of the company car the Claimant had and the alternative offered being of a considerably lower standard.

2.6.3 If so, did that unwanted conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

2.6.4 If so, was it reasonable for the conduct to have that effect taking into account the perception of the Claimant and the other circumstances of the case?

2.6.5 In relation to these discrimination complaints, were these acts extending over a period of time? If not continuing acts, were the claims presented out of time and would it be just and equitable for the Tribunal to extend the statutory limitation period to hear such complaints in accordance with section 123(1)(b) EQA.

2.7 Wrongful dismissal. It is accepted by the parties that the Claimant was contractually entitled to 7 weeks' notice pay: -

2.7.1 Did the Respondents dismiss the Claimant in breach of contract in respect of his notice pay.

2.7.2 In dismissing the contract without notice, were the Respondent's entitled to do so because of the Claimant's fundamental breach of his contract of employment.

2.8 Unlawful deduction of wages. This claim was withdrawn during the proceedings and dismissed.

Evidence

3. The Tribunal heard evidence from the following: -

3.1 Neil Dexter, Technical Director and owner of the Respondent.

3.2 Xiaolin Wang, Director and partner of Neil Dexter.

3.3 Lee Jones, Principle Projects Engineer of the Respondent.

3.4 Peter Frankland, Claimant.

4. There was an agreed bundle of documents which is referred to by page number in this judgment and reasons.

5. The events in question took place a long time ago and clearly it was difficult to recall exactly what happened for all witnesses. Although there were some inconsistencies in the Claimant's evidence, overall in respect of the crucial evidence in this case we preferred his evidence to the evidence of Mr Dexter and Ms Wang whose evidence was at times not credible and not consistent.

The facts

6. The Respondent is a small company and employs 4 Engineers and 2 Directors. It is a service support provider for temperature and humidity test equipment owned by major pharmaceutical companies.

7. At the time of his dismissal Mr Frankland was 64 years old.

8. He had previously worked for another company owned by Mr Dexter known as Quorn Environmental from 2007. He left that company and joined the Respondent company when Mr Dexter set up the company in 2011. Mr Frankland commenced his employment on 13 July 2011 as a Senior Maintenance Technician. His contract of employment is at pages 76 to 78.

9. Although the Respondents have a grievance policy (pages 79-80) there is no disciplinary procedure even though at page 78 the Claimant's contract of employment refers to one.

10. The clause “termination of employment” sets out that where the disciplinary procedure has been implemented there would be a process of warnings and states that instant dismissal could occur for a number of misdemeanours which included: -

- Theft and wilful damage or negligence to equipment or company property.
- Drunkenness or drug abuse
- Fighting or physical abuse
- Gross insubordination or failure to perform direct instructions
- Fraud against the company

11. The provision refers to a right of appeal.

12. At page 77 there is reference to a company vehicle. It states:

“The role of “Senior Maintenance Technician” includes the private use of a company vehicle”.

13. The Claimant could use his vehicle for private use and he had the benefit of a car throughout his employment. Apart from one short temporary period when he used a van for a few months because his car had been written off, he had a high-quality motor vehicle throughout his employment. The vehicles included a BMW 320d, a Citroën C4 Grand Picasso and an Audi.

14. The Claimant’s role involved him travelling to customer premises around the UK and validating pharmaceutical rooms and chambers. He was testing the rooms to determine how they would perform under certain conditions including different temperatures and humidity. He was a trusted and loyal employee who had known and worked for Mr Dexter for over 12 years. There had never been any issues with his performance and he had not been disciplined or had any warnings.

15. Each week he would complete a time and expense sheet, examples of which are at pages 103-106, 111-112.

16. Only very brief details were required on the time sheet. He completed the customer details, his mileage and travel times which included the number of hours that he spent on site. The time sheet did not provide for any other activities that he undertook including working from home, making additional visits and preparing reports. We noted that there was no comments box for him to be able to refer to that. There is some mention of working from home on some of the time sheets but he was not asked to provide extensive details of what he did. The customers were not paying for his work on an hourly basis. They paid a flat contractual rate each year for the work that was necessary for him to undertake. At no time during his employment was he ever challenged about the completion of the time sheets.

17. The time sheets were completed by him at home and he would keep his laptop at home so that he could prepare reports on his laptop when he got home.

18. Mr Frankland’s contractual hours were 40 hours per week and if he did extra hours he would record it. The principle was that he could take time off in lieu (TOIL).

19. It can be seen from the time sheet that he built up additional time and we are satisfied that he built up this time throughout his employment and was never challenged about it. The Respondents knew that he was building up large amounts of TOIL but never said anything. He was never paid for this TOIL and often it was simply written off. The company had never taken any disciplinary action either formal or informal about this and no concerns had been raised about his time keeping either by clients or Mr Dexter.

20. We are satisfied that he and Mr Dexter had always got on well and that he also got on well with Ms Wang. Everyone was aware that the Audi motor vehicle that the Claimant was using was coming towards the end of its 3-year lease at the end of June 2019. Mr Dexter was aware that Mr Frankland would not accept a van as a replacement for it. Whilst other engineers had vans Mr Frankland enjoyed using the vehicle for his private use and Mr Dexter was aware of this.

21. On the week commencing 3 June 2019 Mr Frankland was engaged with the Respondent's customer Envigo at their premises in Alconbury. His time sheet at page 112 shows that he spent the whole week at the site. He was undertaking some validation work on some equipment there. There was a problem with a water leak. Mr Frankland met with Mr Dexter on Friday 7 June 2019 and told him about this problem. Mr Dexter was told that Mr Frankland had not been able to resolve the water leak issue and that the leak may continue over the weekend causing issues for the customer and it was likely that Mr Dexter would be called out over the weekend when he had other activities planned. Mr Dexter then visited the customer's site on the following Monday 10 June 2019. He found water all over the floor due to a blocked drain. He believed that this could have been fixed easily and should have been by Mr Frankland.

22. He decided to investigate the length of time that Mr Frankland was taking to complete tasks comparing service reports and time sheets. He believed that he had come across certain discrepancies in Mr Frankland's time sheets which were at pages 96 to 104. He also looked at signing in sheets and decided to have an informal chat with Mr Frankland about this.

23. He did not tell Mr Frankland about this in advance and he also did not tell him that he proposed taking his vehicle away from him early and provide him with a van to replace it. The van was a Fiat Fiorino which was 8 years old and had done 131,000 miles. It had recently been issued with an MOT certificate at page 119.

24. No minutes were taken of this meeting which took place at Mr Dexter and Ms Wang's house on 19 June 2019 at around 2:30 pm. Mr Frankland was simply invited in and at this meeting he was accused of defrauding the company and of failing to repair the water leak at the Envigo premises.

25. Mr Frankland had been surprised by the allegations and we are satisfied that he did his best to answer. He explained that when he worked on customer work over the weekend or in the evenings he simply allocated it to the day he had been with the client. He told Mr Dexter this was common practice and certainly one that he had carried out for several years with Mr Dexter's knowledge. He pointed out that he did not receive overtime payments for this and did not profit in any way from it. The purpose was to ensure that the Respondent knew how much time had been spent on each client.

26. Many of the events that he was questioned about had occurred some months before particularly allegations of events that had happened in November 2018 which he had difficulty recalling.

27. After dealing with these accusations as best he could he was told that he needed to return the car and that he would now have a van that was outside the premises. This was an old vehicle which was nothing like the vehicles that he was used to. The Respondents say that they told him that this was a temporary measure but we are satisfied that they did not. Mr Frankland did not say to Mr Dexter that he had made a commitment to drive his 90-year-old parents together to Oxford Radcliffe Hospital for heart surgery and that he was worried how he would be able to visit them from his home in Northampton.

28. Mr Frankland was, we are satisfied, shocked and upset about the lack of warning about this change in vehicle and the way he had been accused at the meeting.

29. He went out to his car to transfer his personal items over to the van. Whilst there he decided that he was not going to accept the van. He went back to the house and handed in his telephone and as he moved away from the house he was told that they wanted the car keys to the Audi and he threw them to them. We are satisfied that there was no intention to harm Mr Dexter and that it was not done in a violent manner. They were all clearly upset at the time.

30. Ms Wang then had a discussion with Mr Frankland outside and tried to calm the situation.

31. Having refused to accept the vehicle Mr Frankland returned home on the train and Mr Dexter was aware that he would not have a vehicle for work for the following day.

32. No action was taken by Mr Dexter and Mr Frankland was not suspended.

33. Mr Frankland was due to attend a customer's site on the following day 20 June 2019. We are satisfied that Mr Frankland was aware of this before the meeting with Mr Dexter and Ms Wang. He had been informed on his telephone via the scheduling software team App. Another engineer had been booked to go on the site originally but this was changed due to another customer calling with an urgent repair. We are satisfied that the job was allocated to the Claimant at 12:30 pm just before the meeting with Mr Dexter and Ms Wang.

34. When Mr Frankland arrived home, he e-mailed Mr Dexter at 21:49 to tell him that he could not attend the client, West Midlands Police, because he had no vehicle with a valid parking permit (pages 124-125).

35. The following morning Mr Dexter responded at 9:10 saying:

"I do not accept having no parking permit for the vehicle as an excuse for your behaviour yesterday, having discussed the inconsistencies on your timesheets which I have still to consider, you refused to drive home in the company vehicle provided and stormed out having insisted on giving your company phone and literally thrown the key at me."

36. Mr Dexter said that he was not sure whether he had resigned and if he had not that the company would be considering its options going forward regarding his failure to attend (pages 123-124).

37. Mr Frankland responded at 11:03 clarifying that he had not been informed in advance about the explanation about the time sheets and about the car and that he was not resigning (page 123).

38. After a further e-mail from Mr Frankland that evening at 7:44 pm (page 122) Mr Frankland wrote on 21 June at 15:17 (page 121).

39. In this e-mail he apologised for his “emotional response to the shock of the unexpected request to return my car on Wednesday”.

40. He explained about his family issues and how he needed to use the car for his 90-year-old parents.

41. He complained about how other staff had been given laptops, printers and phones which he had not been offered and a company e-mail address. He had never complained about this before.

42. He apologised for not being at work yesterday and today saying that he had been unwell due to the stress and the sudden upset all this had caused. He said that he had not been aware about the assignment until he had returned home but we are satisfied that this was not correct. He concluded by saying:

“I appreciate the tone of some of recent interactions (both verbal and e-mail) had been somewhat heated. This was not intentional and I am sorry for any upset caused. As mentioned before, it was a sudden reaction to news which has a large knock-on effect for me and my family.

I am on holiday now for the next week, so will be returning to work on 1 July and will await further instructions.”

43. On 1 July 2019 Mr Dexter wrote to Mr Frankland (page 126). The meeting would take place on 4 July 2019 at Claret Lodge. The allegations were: -

43.1 Discrepancies found on his time sheets indicating systematic fraudulent claims.

43.2 Aggressive behaviour towards a senior member of staff to include the throwing of vehicle keys at the company Director.

43.3 Insubordination at work with refusal to accept driving a company vehicle and therefore being unable to perform duties resulting in failing to attend site the following day.

44. No minutes had been taken of the meeting on 19 June 2019 so these were not provided. The extent of the documentation was the time sheets at page 96 to 104. There was no statement about the allegation relating to the throwing of the vehicle keys and no synopsis of the allegations and his response. There was no statement from Mr Dexter or Ms Wang and no other investigation into the allegations.

45. Mr Frankland responded on 3 July 2019 (page 127).
46. He asked to be able to bring a companion who was not a company employee and asked for it to be held at an external location rather than Mr Dexter's home. He asked that the meeting be conducted by an independent party and asked about what the disciplinary procedure was. He also asked for a copy of the notes from the meeting on 19 June 2019.
47. Mr Dexter responded later that day (page 128-129).
48. In particular he said: -
- 48.1 Mr Frankland could not bring someone else to the meeting.
- 48.2 It would not be held at an external location.
- 48.3 The meeting would not be conducted by an independent party but by the two company Directors.
- 48.4 He told him that summary dismissal may be appropriate as a result of fraud, aggressive behaviour and insubordination.
- 48.5 Notes would be taken.
- 48.6 There were no notes of 19 June meeting.
49. In response Mr Frankland wrote again later that day (page 127).
50. We are satisfied that prior to 19 June 2019 the Claimant had never raised any issues with his employer but now accused his employer of age discrimination and wished to raise a formal grievance in respect of it. These complaints were confirmed in a letter sent that day at pages 132-133.
51. On 4 July Mr Frankland wrote with his responses to the 3 allegations at pages 137-138.
52. As a result of his grievance Mr Dexter decided to postpone the disciplinary hearing and conduct a grievance meeting. This is confirmed in his letter of 5 July 2019 (page 139). This would be conducted on 16 July 2019.
53. Mr Frankland had prepared some notes prior to the meeting at pages 142-143. At the meeting no notes were taken. The outcome letter is at pages 144-153 and deals with all the allegations that the Claimant made. The outcome was sent to the Claimant by e-mail on 24 July 2019 (page 155).
54. On 24 July 2019 Mr Frankland wrote to say that he was not happy with the outcome of the grievance (pages 156-159).
55. In respect of the matters that he complained about we are satisfied with the Respondent's explanations.

56. In respect of the laptops, a laptop had been purchased for each engineer but Mr Dexter's laptop developed a problem which meant that he needed a replacement as soon as possible. The other engineers needed a laptop out in the field to communicate with certain test equipment but Mr Frankland's laptop was simply used by him at home to complete validation reports and Mr Dexter decided to use the laptop that had been purchased for Mr Frankland. He had been consulted about this at the time and agreed to it.

57. In respect of company mobile phones all the engineers have their own personal mobile phone and work phone but Mr Frankland had always been using his company mobile phone and was also provided with a new blackberry mobile phone.

58. So far as the e-mail addresses were concerned everyone was offered a work e-mail but Mr Frankland chose not to use it.

59. In respect of the training there had never been any issue about this. Mr Frankland was a capable and experienced service engineer and any decisions about training staff did not relate to the Claimant's age. Mr Frankland was aware of the training provided to others and never raised any objection to this.

60. The Claimant appealed against the outcome of the grievance by way of letter dated 2 August 2019 (pages 162-163). The grievance appeal meeting took place on 8 August 2019. Again, no minutes were taken at that meeting and the outcome confirmed the position. The appeal hearing had been conducted by Mr Carey, Principal Northern Engineer for the Respondents. The outcome letter was sent to the Claimant by e-mail on 12 August and is at pages 165-167.

61. Mr Dexter then wrote to the Claimant on 18 August to reconvene the disciplinary hearing (page 170).

62. Again, no further documents were sent to the Claimant. He himself provided his own account in writing of what had happened (page 173).

63. At the disciplinary hearing no notes were taken but a recording was made and the transcript is at pages 174-201.

64. There had been no further investigation into the allegation and no additional documents provided or statements obtained. We are satisfied that the Claimant was not aware of the precise allegations.

65. We are satisfied that Mr Dexter and Ms Wang had already decided that they would dismiss the Claimant. This is evidenced by the fact that they did not take any notes of the meeting and simply adjourned for a few minutes before they confirmed the decision.

66. There was no consideration of what they had before them, nor any question of any further investigation and the letter confirming the decision dated 22 August 2019 (page 202) does not set out why they had made their decision and why they had not considered any alternatives to the decision to dismiss without notice. There are no findings of fact and he was not provided with any right of appeal.

67. The reason for the decision to dismiss was the alleged gross misconduct set out in that letter: -

67.1 It did not set out why Mr Dexter felt that the completion of the time sheets indicated systematic fraudulent claims for the number of hours worked.

67.2 It did not explain why the throwing of the vehicle keys on 19 June 2019 was so serious.

67.3 It did not explain why he felt the Claimant's conduct in refusing to accept the company vehicle amounted to insubordination.

68. He was dismissed without notice with immediate effect on 22 August 2019 and not paid his notice pay.

69. Mr Frankland did not contact ACAS until 6 October 2019 and the date of issue of ACAS of the certificate was 9 October 2019. He presented his claim on 21 November 2019.

70. As a result, any events that occurred before 7 July 2019 are out of time.

The law

Unfair dismissal

71. The claim for unfair dismissal is made under section 94 of the ERA.

72. Section 98 provides: -

“(1) In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show: -

(a) the reason (or if more than one the principle reason) for the dismissal and;

(b) that it is 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.

(2) A reason falls within this section if it: -

(b) relates to the conduct of the employee.

(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): -

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

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

73. If we found that the Claimant had been unfairly dismissed the basic award is calculated in accordance with section 119 ERA.

74. Section 122 ERA provides: -

“(2) When 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.”

75. Section 123 deals with compensatory award and provides: -

“(1) Subject to the provisions of this section and sections 124, 124A and 126 the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

(6) When the Tribunal finds 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.”

Age discrimination

76. Section 13 EQA provides as follows in respect of direct discrimination: -

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

77. Section 19 EQA deals with indirect discrimination and provides: -

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

(2) For the purpose of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if:-

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

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

- (c) it puts or would put B at that disadvantage and;
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

78. Harassment is defined in section 26 EQA. This provides: -

“(1) A person (A) harasses another (B) if: -

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

(b) the conduct has the purpose or effect of:-

(i) violating B’s dignity or;

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

(4) In deciding whether conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account: -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

Breach of contract

79. The law relating to breach of contract is governed by common law. It is for the Respondent to show that the Claimant committed a fundamental breach of his contract of employment entitling them to terminate his contract of employment without notice.

Our conclusions

Unfair dismissal

80. We are satisfied that the Respondents have established that the reason for dismissal was conduct. That is a potentially fair reason for dismissal.

81. We are not satisfied that the dismissal fell within the band of reasonable responses.

82. We are not satisfied that the employer had a genuine belief on reasonable grounds that the Claimant had committed the act of misconduct complained of.

83. They were not entitled to believe that the Claimant had been completing his time sheets in a fraudulent fashion. He had been completing his time sheets in the way that he did for many years without complaint. The time sheets themselves were very basic and only required him to provide very little information. There was no evidence that he had committed any fraud on the company or indeed on any client of the company.

84. Similarly, there was no genuine belief on reasonable grounds that he had committed aggressive behaviour towards Mr Dexter or that he had thrown the keys at him. What happened was in the heat of the moment when Mr Frankland was under the most intense pressure from his employer.

85. We are similarly not satisfied that they had a genuine belief, on reasonable grounds that he had committed insubordination at work by refusing to accept the van that he was provided with. They did not tell him that this was a temporary arrangement and we are satisfied they did it to punish him for what had happened on the Envigo contract where he had not corrected the water leak. By doing so they had created the situation whereby he refused to accept the van as they knew he would.

86. There was no reasonable investigation into the allegation and they did not give him a fair hearing. He was “ambushed” in respect of the investigatory meeting having been invited to Mr Dexter’s home and not being told that he would be confronted with these serious allegations as the Respondent’s saw them. They had not provided him with details prior to the hearing and when the disciplinary hearing was reconvened they did not carry out any further investigation.

87. The Respondents had also made their minds up before the disciplinary hearing took place that they were going to dismiss him and when they did dismiss him they gave him no right of appeal.

88. The Claimant had been a long serving, loyal employee of the Respondents and was treated in an appalling fashion by people who he trusted.

89. There was no consideration of his mitigation particularly the circumstances that he was in at the time of the incident on 19 June 2019 and they did not take into account his sincere apology afterwards that he had lost his temper.

90. There was no consideration of any alternatives to dismissal.

91. We are satisfied that Mr Frankland did not contribute in any meaningful way to his dismissal. The Respondents alleged that the Claimant was the “author of his own destiny”. We do not accept that. We are in fact satisfied that the Respondent’s were the author of their own destiny and it was not surprising he acted in the way that he did and we are satisfied that the Respondents should have known that he would react in the way that he did.

92. We have considered whether there should be a **Polkey** reduction in this matter because the Respondents say that if they had followed a fair procedure they would have dismissed him in any event. We do not agree with that contention. Having heard all the evidence we are satisfied that if any reasonable employer had followed a fair procedure then the Claimant would not have been dismissed. They would have addressed the issues, if there were any, about the completion of his time sheets by way of a sensible discussion with him without accusing him of fraud. That would have avoided the situation whereby there was the incident concerning the keys and the subsequent inability of him to be able to go to the West Midlands Police job.

Remedy

Basic award

93. The Claimant is entitled to a basic award. He had 7 years' service at the time of dismissal and was 64 years old. His gross pay was £640.35 per week. The basic award is therefore $7 \times 1.5 \times £525$ which is £5,512.50.

Compensatory award

94. We are satisfied that the Claimant has done what he can to mitigate his loss and no evidence has been produced by the Respondents to contradict his assertion that he has sought to obtain alternative employment. His net pay was £503.44 per week. The Respondents paid pension contributions of £249.07 per month and his company car is valued at £177.44 per month

95. His losses are as follows: -

Loss to the date of the hearing

Loss of basic salary -	80.5 weeks x £503.44	£40,526.92
Pension loss -	£249.07 x 17 months	£4,626.95
Loss of company car	- £177.44 x 80.5	£14,283.92
Loss of statutory rights	-	£500.00

96. We have not calculated future losses because the statutory applies at £33,298.00 ($52 \times £640.35$)

Notice pay

97. We are satisfied that the Respondents were not entitled to terminate his employment without notice. He had not committed a fundamental breach of his contract entitling the Respondents to terminate his contract without notice. He is therefore entitled to 7 weeks' notice pay at £503.44 which is £3,524.08.

Age discrimination

98. In respect of his claims of age discrimination we are satisfied that all the allegations are out of time other than his dismissal and that it would not be just and equitable to extend time. These were individual complaints that he had not complained about at the time. We are satisfied that the Claimant was aware of the time limits. His daughter is an HR professional and has represented him at the Tribunal. There is no excuse for him not making an application in time in respect of those complaints.

99. So far as his dismissal is concerned which is the only matter that is in time we are satisfied that it did not relate to his age in any way.

100. The claims therefore for age discrimination fail and are dismissed.

Harassment

101. We are satisfied that the behaviour of the Respondent towards the

claimant's does not amount to harassment on the grounds of his protected characteristic of age. We are not satisfied that there were frequent references to the suggestion that the Claimant could be replaced by a more junior engineer on a considerably lower salary. We are also satisfied that the removal of the car and being offered an alternative of considerably lower standard also did not amount to harassment because of his age. This did not amount to intimidating, hostile, degrading, humiliating or offensive environment for the claimant. That claim therefore fails and is dismissed

Employment Judge Hutchinson

Date 5 May 2021

JUDGMENT SENT TO THE PARTIES ON

7 May 2021

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FOR THE TRIBUNAL OFFICE

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