EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100373/2021

Final Hearing in Glasgow by Cloud Video Platform (CVP) on 28 and 29 June 2021

Employment Judge: R McPherson

Members S Gray

J McCaig

Mr Gordon McPherson	**Claimant** **In person**
Workflo Records Management Ltd	**Respondent** **Represented by:** **D Alexander** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that;

1. The claimant's claim for unfair dismissal is dismissed.

2. the claimant's claims in terms of s13 of the Equality Act 2010 (EA 2010) direct discrimination because of protected characteristic age do not succeed.

3. In relation to the claimant's claims of unlawful deduction of wages (s13 Employments Rights Act 1996 (ERA 1996) and s23 ERA 1996) and/or breach

of contract (Regulation 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994);

a. in relation the March Furlough Agreement, the claimant is entitled to payment in respect of breach of contract in the sum of **£250 (Two Hundred and Fifty Pounds),** in respect of monies contractually due for June 2020; and

b. the claimant's remaining claims for unlawful deduction of wages (s13 Employments Rights Act 1996 (ERA 1996) and s23 ERA 1996) and/or breach of contract do not succeed.

REASONS

Introduction

Preliminary Procedure

1. The claimant's ET1 was presented **Monday 21 January 2020** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Friday 15 January 2020** and issue of the ACAS Certificate on **Wednesday 20 January 2020**) against the respondents following termination of his employment with the respondent as a Sales/Record Specialist on **Friday 30 October 2020**.

2. The claimant brings a complaint about discrimination in respect of protected characteristic of age and unauthorised deduction of wages.

3. He asserted that his employment was terminated unfairly.

4. The claimant argues (in the alternative) that he was employed under contract of employment in place before TUPE transfer from **Espedair Group Ltd,** which is agreed to have taken place in January 2020, having started on **Monday 18 February 2019.**

5. The claimant confirmed in the course of this hearing that his claim for age discrimination is on the grounds narrated in his ET1 (at page 10 of the bundle), namely that:

    1. the respondent engaged the Sales Director and Head of Sales without advising the claimant; and

    2. respondent did not allow the claimant to apply for the Sales Director or Head of Sales role.

6. The claimant seeks compensation.

7. A case management Preliminary Hearing was held **Thursday 25 March 2021** and issued to the parties **Wednesday 14 April 2021**.

8. The case management Preliminary Hearing **Thursday 25 March 2021,** identified that issues included:

    1. Unauthorised deduction of wages/breach of contract:

        1. The claimant argues that his contract terms provided for payment of £42,000 per annum plus expenses; and

        2. In the alternative, it was argued by the claimant that he was employed under the pre-January 2020 TUPE contract, with a dispute as to the interpretation of that the relevant clause (the claimant maintaining that the word *"turnover"* referred to turnover of the whole business; and, thus he would be entitled to commission post-TUPE reflecting the total respondent turnover, while the respondent argues for a narrower interpretation reflecting the claimant's own sales. It was identified that so far as it may become relevant, how the applicable clause was to be interpreted as an issue for the Tribunal.

    2. Issues in relation to discrimination claims.

1. It was identified that the claimant brings a claim in terms of s13 EA 2010 **Direct Discrimination** because of **Age.** The claimant subsequently identified that he considers that the respondent discriminated by not advising him of the recruitment of a Sales Director and Head of Sales and not allowing him to apply for those roles due to his age.

2. Issues in respect of the s13 EA 2010 claims included:

    1. Was that treatment "*less favourable treatment*," i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

    2. Does the claimant rely on hypothetical or actual comparators?

    3. If so, was this because of the claimant's age and/or because of the protected characteristic of age more generally

Time Limits

9. It was for the Tribunal to consider whether any or all the claimant's existing complaints presented were within the time limits as set out in Sections 123(1)(a) & (b) of EA 2010.

    a) Dealing with this issue may involve consideration of subsidiary issues, including whether there was an act and/or conduct extending over a period and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

    b) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **Friday 16 October 2020**, was potentially brought out of time so that the Tribunal may not have jurisdiction to deal with it.

c) Some claims may be argued to have been lodged out with 3 months less one-day time limit (allowing for the operation of ACAS early conciliation). The provisions of section **207B of ERA 1996**, since 2014, provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect, initiating early conciliation "*stops the clock"* until the ACAS certificate is issued. If a claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present her claim.

10. At the case management Preliminary hearing, the claimant confirmed that he would be calling Mr. Moncrieff and Mr. Lockerbie additional to himself. While the claimant attended having provided a witness statement, no witness statements were provided for Mr. Moncrief or Mr. Lockerbie, and neither attended to give evidence. The respondent had said they would call Mr. Andrew Field and Mr. Steven McPherson, both of whom provided witness statements and attended to give evidence.

11. Following the case management Preliminary Hearing **Thursday 25 March 2021,** the claimant issued a 4-page statement of Further and Better Particulars, which set out the claimant's position, including confirmation that the claimant accepted that he did not have the 2-year qualifying service for ordinary unfair dismissal; and that his discrimination claim was **s13 EA 2010 Direct Disability Discrimination,** identifying two comparators relied upon as Mr. Ross Lockerbie then Sales Director of the respondent and Mr. Andrew Moncrieff Head of Sales at the respondent.

12. In response to the claimant's Further and Better Particulars, the respondent issued Further Information document setting out in 29 numbered paragraphs the respondent's responsive Further and Better Particulars

13. The Tribunal was provided with a written witness statement from the claimant. For the respondent, the Tribunal was provided with written statements for Mr. Michael Field and Steven McPherson, the witness statements having been agreed by Tribunal as set out in Note of **case management Preliminary**

Hearing Wednesday 14 April 2021 parties being directed to exchange the witness statements simultaneously **Monday 14 June 2021.**

14. Each of the 3 witnesses attending confirmed their written witness statement at the Final Hearing with limited supplementary oral evidence being given and were then subject to cross-examination and re-examination.

15. An agreed joint bundle was provided, which was supplemented, in the course of the Hearing, with a document being a Furlough Agreement (the March 2020 Furlough Agreement).

16. Following the evidential element of the Final Hearing, parties were permitted to exchange their respective written submissions with each other, it being a matter of agreement and, in accordance with the overriding objective, that the respondent would set their position out to the claimant in the first instance, addressing the claimant's claims of unfair dismissal and in terms of s13 EA 2010. Thereafter, both parties provided final written submissions to the Tribunal. While there was a slight delay in the respondent's issue of its' final submission to the respondent and the Tribunal, the Tribunal concludes that the delay did not cause prejudice to the claimant.

17. The Tribunal's private deliberation took place at Members' Meeting on **Friday 3 September 2021,** final written submissions being available by that date, and following the postponement for administrative reasons of previous scheduled Members Meeting Thursday 19 August 2021, this being the earliest mutually available date for the full panel of the Tribunal.

Findings in fact

18. The claimant has long-established experience of operating document management businesses through his family, including previously as owner-director of such businesses, which operated using the initials TRM (the initials of the claimant's late father).

19. In 2019 the claimant agreed terms with Lynn Smith to be operationally engaged as sole salesperson with a new company **Espedair Group Ltd,**

established in 2019, adopting the trading name TRM Doc. Man then associated with the claimant, providing archive storage services to around 55 corporate clients.

20. On **Monday 18 February 2019**, the claimant commenced employment with **Espedair Group Ltd,** trading as TRM Doc. Man based Paisley. The claimant's formal role was that of Sales, with Lynn Smith (now deceased) taking the formal position of his Line Manager.

21. The agreed remuneration terms negotiated by the claimant for the Espedair Group Ltd trading as TRM Doc. Man (Espedair) were contained within statement of terms co-drafted by the claimant and signed by the claimant on **Monday 8 April 2019 (the April 2019 contract),** set out:

"Your basic salary is £576.92 per week + commission dependent on sales achieved at a rate of 20% of turnover per week based on average weekly sales from commencement of financial year) worked during the normal hours of work specified in clause 4.1. You will not be paid for lunch breaks. You will be paid in arrears each Friday by means of direct credit transfer to your bank or building society account". £576.92 per week equates to £30,000 per year. It provided for a review date of Friday 31 March 2020.

22. The claimant was the sole salesperson at Espedair reflected the claimant's direct sole efforts. The April 2019 contract was designed to reward the claimant for sales he achieved. It was unnecessary to specify that such sales were achieved through his efforts. The April 2019 contract terms operated to incentivise the claimant for his efforts.

23. In mid-2019, Mr. Steven McPherson, the claimant's son, had been offered a contract of employment with Espedair as a production manager. However, he had been reluctant to work with his father and, in consequence, had not signed the contract of employment offered.

24. In **August 2019,** Mr. Michael Field sent a message to the claimant's son through a professional social media site, responding to an "*open to work"* type banner placed by Steven McPherson. Steven McPherson intimated in

response that he would be interested in working with Mr. Field, that he was dissatisfied with Espedair's arrangements advising that while it was formally owned by Ms. Lynn Smith, his father, the claimant, operated the business day-to-day.

25. On **Tuesday 15 October 2019,** the claimant's son Steven McPherson, Mr. Michael Field, and the claimant had a short meeting of around 10 minutes in a pub around the possibility of purchase. At this time, the claimant intimated that he intended to work for no more than 2 years. There was a brief discussion around pay expectations, with the claimant intimating that he wished to retain his current salary, which he described as around £42,000, including commission. The claimant did not provide Mr. Field with any payslips to confirm the same. There was no discussion around any fixed term of employment.

26. The respondent provides a document record management service to corporate customers and, from 2020, has increasingly focused on digitisation of records additional to traditional archiving and storage facilities.

27. On **Wednesday 11 November 2019**, a series of emails were issued between the claimant and Mr Field as the respondents' Managing Director regarding the possible sale of Espedair to the respondent; (the Wednesday 11 November 2019 emails)

    1. The claimant set out 9.18 am in an email to Michael Field that the claimant's son had "*forwarded your letter of offer for Espedair Group Ltd and as Lynn flies off tomorrow, she has asked that I review the letters…"* it described would be an initial purchase payment on signing with follow on payments in the next 2 years so long as profit was £47k" and under heading "CONDITIONS" noted that *"there is no guarantee of employment for Lynn Smith and"* the claimant *"as was discussed at initial meeting only a vague statement that both would remain in Company if Workflo required them. Initial meeting was for 2-3 years."*

2. Mr. Field responded to the claimant, "*My initial thoughts were a value in the region of £47 with a % being based on profit"* he confirmed that he was content to accept personal guarantee liability subject to them being for good/services required for the business and *"employment terms will be agreed in the due diligence period, job roles, remuneration. All terms to be agreed prior to completion"*

3. The claimant responded, confirming that the personal guarantees were for equipment used exclusively for the business, including van scanners and lease for premises. He further described, "*Renumeration is something you have a note of already. Job roles are always fluid and I would assume you would be looking to put" the* claimant's son "*in to Manage the unit to give you continuity moving forward. I would assume you would be looking at TUPE for staff moving forward to ensure retention.? Due diligence will be open an=d forthright and therefore do not forsee any hidden liabilities… I will speak to Lynn once you send through the amended form which you wish signed."*

4. Mr. Field responded "*the financials of Espedair will remain independent of the other group companies and net will be calculated on 'actual business' TUPE is my intention, again this will be addressed in due diligence and staff numbers assessed. Management will be retained with a view to*" the claimant's son *"leading the business growth."*

5. The claimant responded, "*A lot clearer now. For Management are you insinuating Lynn Smith"* and the claimant *"? as per initial discussions. i.e. for the minimum 2 years discussed."*

6. Mr. Field responded, "*Hi, Lynn, Gordon and Steven for 2 years. Yes."*

7. The claimant responded, "*They will be emailed this afternoon to you*."

The **Wednesday 11 November 2019** emails confirmed that any proposals were contingent on agreement being achieved in the diligence period. It transpired that the claimant's son would not transfer by that time. The claimant himself described that job roles were fluid.

28. On or around **Thursday 16 January 2020,** Espedair entered into an Asset Sale and Purchase Agreement (the January 2020 Asset Sale) with the respondent and Ms. Lynn Smith, which identified that

    8. The TRM trading name associated with the claimant, and his family, would be transferred as intellectual property to the respondent.

    9. Espedair Groups' employees being two Production Operators and the claimant transferred to the respondent. The claimant's job title was identified as Sales, with a start date wrongly specified as 8 April 2019 (the date of the April 2019 contract) and salary specified as £576.92 per week. Mr. Steven McPherson was not listed as he had not signed a contract with Espedair Group Ltd

29. Espedair Group Ltd was known to the claimant to be loss-making from its inception in 2019 through to the January 2020 Asset Sale. As the claimant was not a director of Espedair, he did not take an active role in the January 2020 Asset Sale. The implementation of the January 2020 Asset Sale was complicated because; (Invoice) Factors, which Espedair had utilised for cash flow (through the sale of rendered invoices), were reluctant to confirm that they would not crystallise Espedair debts, and an indication of unpaid wages, other than in respect of the claimant as the highest-paid employee.

30. In consequence of the **January 2020 Asset Sale**, on or around **Thursday 16 January 2020,** the claimant's employment was transferred because of the operation of TUPE to the respondent.

31. Following the claimant's transfer, on or about **Thursday 16 January 2020**, (**the January 2020 contract discussions**), Mr. Field discussed expectations in terms of salary with the claimant. The claimant described his pre-January

2020 Asset sale salary amounted to £42,500 per annum, including his earned commission. Mr. Field had no reason not to accept the claimant's description. It was agreed that the claimant would be paid a basic wage of £30,000 per annum (being £576.92 per week set out in the April 2019 contract terms). In addition, it was agreed that the claimant would be eligible to receive a potential bonus of £12,000 per year, dependent on his personal sales turnover achieved and calculated as set out in the April 2019 contract. There was no target imposed before the claimant would receive 20% of the turnover of the sales he achieved, in addition to his basic pay as provided by the April 2019 contract. There was no economic, technical or organisational reason proposed for such a variation to the April 2019 contract.

32. During those discussions, the claimant indicated that he envisaged working for no more than two years. Mr. Field acknowledged the claimant's intention. However, no fixed-term contract employment was discussed or agreed upon with the claimant.

33. At this time, the claimant was provided with a business card via Mr. Field for use with potential clients, which gave the claimant's job role as **Record Specialist**, a term to assist the claimant in engaging with potential clients who it was considered might have been put off by the word "*salesperson."* There was no contractual change at this time.

34. The respondent's expansion plans at this time included recruitment of a Sales Director in the period April to May, to whom the claimant would report (reflecting the claimant's focus on generating client sales) and who would be focused on building relationships with new clients and increasing market presence and reputation.

35. In the period following the **January 2019 asset sale**, the respondent had been unable to reconcile the available records of **Espedair Group Ltd** and was unable to confirm what, if any, sales-related bonus the claimant may have been entitled to beyond the basic pay as agreed between the claimant and Ms. Lynn Smith. As a gesture, the respondent made the payment on an assumed basis, including reflecting the effect of the April 2019 contract;

specifically, the respondent paid the claimant:

10. **Friday 31 January 2020** in the sum of **£1,615.38** reflecting the balance post-transfer balance; and

11. **Friday 28 February 2020** in the sum of **£5,115.38**

36. On **Monday 23 March 2020**, the Government announced a national lockdown arising from the onset of the Coronavirus pandemic.

37. That week the UK Government created the Coronavirus Job Retention Scheme ("CJRS"), a new concept within UK employment law, and the respondent elected to offer the then-applicable version of Furlough to the claimant that week and all other staff except for Mr. Steven McPherson and Mr. David Sawers as they were able to carry on production working from home.

38. With effect from **Friday 20th March 2020,** the claimant agreed to a variation of his contract by Furlough Leave Agreement and confirmed by email on **Tuesday 31 March 2020** (the March 2020 Furlough Agreement); this was at the time, a new concept in UK employment law reflecting the UK Treasury Directions made under ss 71 and 76 of the Coronavirus Act 2020 and was in consequence of the Covid 19 Pandemic. The reason for the March 2020 Furlough Agreement was not the January 2020 Asset Sale nor the TUPE transfer of the claimant.

39. The March 2020 Furlough Agreement set out that the claimant agreed that with effect from **Friday 20th March 2020,** he would be on Furlough Leave and as such would not carry out any work for the respondent, save for any education training, while the respondent would "*pay you and provide you with benefits in accordance with clause 3 of the agreement and your normal entitlements to pay and benefits under your employment contract will be suspended…"*.

40. Clause 3 of the March 2020 Furlough Agreement set out that the respondent "*shall pay you, wages/salary in accordance with the Minimum Scheme*

Requirements. The Minimum Scheme Requirements are the minimum payments we must make to you to in order to receive reimbursement from the Government for your weekly wage salary costs…. In all cases the wages/salary payable to you in terms of the Minimum Scheme Requirements shall be capped at ***£2,500*** *per month before deduction."*

41. The March 2020 Furlough Agreement further provided that, if the respondent was offering to pay more, this would be set out at Clause 4, which in turn set out that the respondent "***will:*** *Top up the percentage of your wage/salary payable to you in each pay period up to 100% of your basic salary until the scheme ends*" referencing the arrangement whereby via the Furlough Scheme HMCTS would fund up to 80% of a furloughed employee's salary and the respondent agreed to meet the balance of basic pay up to a cap of £2,500. It did not describe that the respondent was offering to pay more than the cap of £2,500.

42. On **Wednesday 31 March 2020,** the claimant received Monthly Basic Pay of £3,500 together with mileage and expense claimed. This reflected, a decision to pay the claimant monthly equivalent to his maximum monthly income calculated on the January 2020 contract discussions (and consistent with his pre-Asset Sale asserted annual salary), although this was the first month following the January Asset Sale that the respondent had been able to reconcile sales information.

43. On **Monday 30 April 2020,** the claimant received Furlough Pay, calculated as £2,000, representing 80% of the capped sum of £2,500, together with a £500 employer contribution, as provided by the March 2020 Furlough Agreement. The claimant was provided with a monthly payslip setting out that calculation. As the claimant was on Furlough in terms of the March 2020 Furlough Agreement, he was not working. He was not entitled to any mileage or other expenses. In the period of Furlough, the claimant did not make any sales as he was not working.

44. **On Monday 30 April 2020,** there was an email exchange (**the Monday 30 April 2020 email exchange**) the claimant having queried why the furlough

pay was capped at £2,500, including**:**

12. at 5.04 pm Michael Field in response to the claimant raising query on the Furlough Pay calculation, set out that *"I believe you've been paid in line with your contract basic salary. Additions were based on revenue (topping out at a gross of £42k*" and requested that Ms. Meldrum the respondent's Finance Manager confirm whether she had a copy of the claimant's employment contract; and

13. At **5.10 pm,** the claimant responds, "*I would be interested to see the*" employment contract "*also. I am under impression I am not on sales revenue as was never discussed but merely on a basic salary for the period discussed with you."*; and

14. At **5.13 pm,** Michael Field, issued an email to the claimant, copied to both Ms. Meldrum, the respondent Finance Manager and the claimant's son Steven McPherson setting out, "*You asked for TUPE which is what took place"* confirming that Ms. Meldrum, was forwarding the employment contract separately: and

15. At **5.30 pm,** the claimant emailed Michael Field "*I may be wrong but I am working on the salary payslip for last month which confirms basic salary is £3,500 which x 12 equals the £42k. I am only looking for is clarity. Your email re the furlough situation stated that Workflo would be paying 100% basic salary"*: and

16. at **5.33 pm** Michael Field replied "*Your basic salary is outlined in your Employment contract which I've sent You receive a bonus based on sale turnover, we agreed a cap of £42k presale. You were insistent that you wished a TUPE. Thus we must abide by it. The wording on payslip is no* ***more than tha I'm afraid.*** *You will continue to receive bonus as per contract upto £42k.".*

17. The claimant's statement that he was on basic referred to his then-current period of furlough under the March 2020 Furlough Agreement. The basic pay was, as set out in the March 2020 Furlough Agreement,

capped at £2,500.

45. The claimant continued to be paid under the March 2020 Furlough Agreement.

46. In June 2020, the respondent concluded that it was no longer financially viable to provide a top-up of salary to 100%. The respondent reduced the top-up to 10%, with the effect that the claimant received 90% of wages for June 2020 and so received £2,250 pay rather than the previous month's £2500. The March 2020 Furlough Agreement did not provide for any such reduction, describing as above, that the respondent "*will*" top-up to £2,500.

47. On **Friday 3 July 2020**, the claimant signed a Flexible Furlough Agreement (**July 2020 Flexible Furlough Agreement**), effective from Thursday 23 July 2020, providing that the claimant would carry out some work on a part time basis but would remain on Furlough for the remainder of his usual working hours. The July 2020 Flexible Furlough Agreement superseded the March 2020 Furlough Agreement. The July 2020 Flexible Furlough Agreement set out that (a) "*During any Working Period, you shall be paid your normal remuneration for the work you perform, in accordance with your employment contract… you shall only be paid for the hours your actually work"* (d) "*in all cases, the wages/salary payments payable to you … shall be capped at £2,500 per month, before deductions*."

48. The July 2020 Flexible Furlough Agreement provided that if the respondent offered to pay more than the capped £2,500, this would be set out at Clause 4. Clause 4 made no provision for any increase. The July 2020 Flexible Furlough Agreement did not provide that the respondent would pay all or any of the 20% balance of basic pay. The respondent initially maintained the reduced top-up of 10% (rather than 20%) as implemented in June 2020.

49. While the **July 2020 Flexible Furlough Agreement** had been agreed upon,

the respondent did not at this time identify a business need for the claimant to work flexibly due to the ongoing pandemic. As such, the claimant remained effectively furloughed.

50. The reason for the **July 2020 Flexible Furlough Agreement** change was not the TUPE transfer; the reason was the Covid 19 Pandemic and the availability of modified furlough scheme. Against the background of the pandemic, the reasons for this variation were economic (the pandemic's impact on business), technical (the claimant being unable to carry out any work without the Flexible Furlough Agreement in place), and organisational (being the respondent's response to the pandemic).

51. On **Saturday 1 August 2020,** Mr. Field engaged **Mr. Ross Lockerbie** as Sales Director, a new and senior role to the claimant. Mr. Field identified Mr. Lockerbie's experience in digital transformation services with specific expertise in transition from a paper environment to digital, was a key area for expansion. Mr Lockerbie was not engaged for reasons related to his age. He was engaged due to his specific experience in digital transformation services. The claimant was not offered the role of Sale Director. The claimant did not have equivalent experience in digital transformation services. The reason the claimant was not offered the role of Sales Director was not due to the claimant's age. Mr. Ross Lockerbie was tasked with generating new leads, building relationships, and increasing the presence and reputation of the respondent in the relevant market. The claimant would have reported to Mr. Lockerbie upon return from Furlough. Mr. Lockerbie was in his 40s**.** Subsequently, and shortly after commencing his employment, the respondent became aware that Mr. Ross Lockerbie intended to leave his job.

52. In early August 2020, before intimating that he was leaving, Ross Lockerbie called a Sales Meeting at the respondent's boardroom in Paisley; during that meeting, Mr. Lockerbie intimated that the claimant should not approach new and should focus exclusively on established customers.

53. On **Tuesday 11 August 2020**, following Mr. Lockerbie intimating that he would be leaving the respondent as Sales Director, the respondent was

contacted by a recruitment agency from which contact, **Mr. Andrew Moncrieff**, was engaged by the respondent as Head of Sales, reflecting Mr. Moncrieff's significant managerial and digitisation experience including in areas of the public sector which the respondent identified as specific relevance to the development of the respondent's market. Mr. Moncrieff skill base included working with one of the largest digitisation companies in the UK, dealing directly with NHS delivering large projects providing digital solutions to primary and secondary health providers and NHS Boards across the UK. The respondent did not offer the role of Sales Director to Mr. Moncrieff due to his age. Mr. Moncrieff was engaged due to his significant digitisation experience, which the respondent had identified as specific relevance to the development of the respondent's market. The respondent did not omit to offer the role to the claimant due to the claimant's age. The claimant did not have equivalent digitisation experience.

54. During the claimant's period of flexible Furlough, the respondent did not notify the claimant of the appointment of either Mr. Ross Lockerbie or Mr. Andrew Moncrieff as it did not consider there was an operational need to do so.

55. While both Mr. Ross Lockerbie and Mr. Andrew Moncrieff carried out, in a limited way, some work which the claimant would have carried out, this was only a small element of their day-to-day role.

56. On **Sunday 23 August 2020,** Michael Field notified the claimant that *"having reviewed the data collected since the turn of August, it is necessary for us to place you back on Furlough…as of Monday 24 August 2020 … lockdowns in Aberdeen and Oldham have ceased activities in these regions and prospective document management. Rest assured, I am working with the Team in Livingston to review regularly".* Mr. Field copied Mr. Scott Patrick of the respondent's external accountant, instructing him to update furlough records to reflect the same.

57. On **Monday 24 August 2020**, the claimant returned to work on Flexible Furlough basis as provided for in the **July 2020 Flexible Furlough**

Agreement. Upon the claimant's return to work on Flexible Furlough basis, the respondent notified the claimant of the appointment of Mr. Andrew Moncrieff, there not having been an operational need to do so previously.

58. In **August**, the claimant was on Working Periods for around 6 out of a possible 21 working days, during which time the claimant made around 7 phone calls from the office phone to existing customers. In August 2020, while operating on Working Periods, the claimant successfully concluded 2 commercial deals for the respondent with a cumulative turnover of £6,043.86.

59. While the April 2019 contract provided that the claimant would receive 20% of the sales turnover, the July 2020 Flexible Furlough Agreement set out at 1b that "*Flexible Furlough Leave is a period agreed between the Company and you, during which you will carry out some work on a part time basis bit will remain on furlough leave for the balance of your unworked hours"*. That encompassed both the non-working and working periods on Flexible Furlough. At 2 b, the July 2020 Flexible Furlough Agreement, set out that "*we shall pay you and provide you with benefits in accordance with clauses 3 and 4 of this Agreement and your normal entitlement to pay and benefits under your contract of employment will be suspended"*. The July 2020 Flexible Furlough Agreement varied the April 2019 contract, including creating a cap of £2,500, of which the Government would agree to meet 80%

60. Through the efforts of other employees, the respondent was able to generate substantive sales from January 2020 to the date of the claimant's termination. The claimant was not entitled to 20% of sales turnover achieved by others.

61. On **Friday 28 August 2020,** the claimant raised a query with Mr. Field regarding the August 2020 payslip noting that "*it appeared I was earning less whilst working part time on Furlough as against when I was on full furlough"*. The claimant's query reflected the respondent's operation of flexible Furlough.

62. On **Monday 31 August 2020,** the respondent's external accountants set out to Mr. Field that "*In line with the government reduction in the contribution to the company under the furlough scheme, the company removed the topup of wages in August.*

In July" the claimant "*was on full Furlough receiving £2000 funded by Government and £25 (10%) topup.*

In August" the claimant "worked 6 days out of a possible 21, being furloughed for the remainder.

Without topup his salary in August would be lower."

63. During the period of Furlough, the respondent continued to incur costs that were not wholly set off by the Government contribution towards the claimant pay while on Furlough.

64. Mr. Field, reflective of the ongoing impact of the pandemic on business and lack of sale, did not allocate further Working Days to the claimant in the months of **September** and **October.**

65. In **September** and **October,** the respondent, for business reasons, including the ongoing impact of the pandemic on the business, which had been loss-making in the preceding year, decided to pay no top up with the effect that the claimant received 80% of basic pay for those two months.

66. On **Friday 30 October 2020,** the respondent reflecting the ongoing challenges faced by the business, issued termination notice (the October 2020 termination letter) to the claimant headed *"Your employment with Workflo Records Management Ltd"* and set out that the respondent was terminating the claimant's employment "*Given the current situation with the Covid-19 virus, and the economic difficulties which lie ahead we need to make cut back and given your role in sales, we do not have work for you at this time. Unfortunately we do not expect this to change in the foreseeable future*." It incorrectly set out that with (statutory) notice, the claimant's employment would end on Monday 2 November and that while Furlough

would end on 31 October the claimant would be paid in full for (only) Monday 2 November 2020. The claimant was entitled to 1 weeks' notice, and while Furlough would not operate in that period, the claimant's employment terminated on **Friday 6 November 2020**. The October 2020 termination letter set out the respondent calculation of accrued holiday pay of **£2,215.38.**

67. Further on **Friday 30 October 2020,** Mr. Field further intimated to the claimant, in the context of the possibility of the claimant making contact post-termination with respondent clients, that "*Whilst there is no legal basis to restrict you from doing so"* that that claimant was *"under on going restrictions pursuant to clause 14 of your employment contract in respect of non-disclosure company information."*

68. On **Monday 2 November 2020** the claimant acknowledged the termination letter, raising issues around what he described as his "bonus based on sales turnover." The claimant did described that the sale turnover was that of the whole of the respondent. The claimant was not required to work the notice period to **Friday 6 November 2010,** with the respondent intending to make payment in place of notice.

69. The claimant was aged 66 at the date of termination.

70. On **Monday 30 November 2020,** reflecting errors in the final payment for the period to **Friday 6 November 2020**, the claimant was issued with a further payslip identifying a balancing payment of £115.38 and accrued (untaken) holiday pay of £2,215.38, from which payments the respondent made income tax deduction.

71. On **Sunday 31 January 2021,** reflecting non-payment for Monday 2 November 2021, the claimant having been on Flexible Furlough to Friday 30 October 2020, a further payment was made of £115.38 with no tax deduction. The claimant was provided with a payslip for that payment dated 31 January 2021.

72. On **Sunday 28 February 2021,** reflecting an incorrect calculation of basic pay for the notice period expiring Friday 6 November 2020, a final payment

was made of £346.16. The claimant was provided with a payslip for the same dated 28 February 2021.

Submissions

73. Both the claimant and respondent provided written submissions. The Tribunal considered that it was appropriate for the respondent to provide its written submissions to the claimant in draft format who was unrepresented to enable him to have the opportunity to set out his submissions after that. The respondent agreed to this model. The Tribunal does not consider it necessary to set out the full term of each party's submissions.

74. **The claimant,** in essence, argued in his detailed 14-page submissions that the Tribunal should uphold his complaints, arguing that the Tribunal should accept that they were in time, including describing his reasons for issuing the claim when he did and helpfully setting out his calculations for his claim 2-year fixed term contract claim and his position in relation to TUPE.

75. **The respondent** argued, in their 17-page submissions, that the claims intimated and in respect of which notice was given should be rejected and further argued, relying upon ***British Coal v Keeble*** [1997] IRLR 336 (**Keeble**), ***Robertson v Bexley Community Centre*** [2003] IRLR 434 (**Roberston**),.***Ahmed v Ministry of Justice*** 2015 WL 4111158 (**Ahmed**) and ***Southwark v Afolabi 2003*** [2003] IRLR 2003 (**Afolabi**) that the claimants' claims including respect of age discrimination are time-barred. The respondent further argues that the claimant has not discharged the burden of proof as set out in s136 of EA and refers to ***Ayodele v City Link*** [2017} EWCA Civ 1913(**Ayodele**), **Igen v Wong** [2005] IRLR 258 (**Igen**), *O'Neill* ***v Governor of St Thomas Moore Roman Catholic Voluntary Aided Upper School*** [1996] IRLR 372 (**O'Neill**), ***Nagarajan v London Regional Transport*** [1999] IRLR 572 (**Nagarajan**). The respondent argued that the asserted comparators could not be relied upon referring to **Madden**

v PTG [2005] IRLR 46 (**Madden**). Further it was argued that the claimant's dismissal was effective when he acknowledged the termination notice, referring to **Gisada Gyf v Barrett** [2009] (**Barrett**) and argued that the date of termination should be objectively determined, referring to ***Fitzgerald v University of Kent*** [2004] IRLR 300 (**Fitzgerald**). The respondent also made submissions on what level of injury to feelings award would be appropriate if the discrimination claims were upheld by reference to ***Vento v Chief Constable of West Yorkshire Police*** **(No 2)** [2003] IRLR 102 (**Vento**)

Relevant Law: Contract/TUPE

76. In terms of **Reg 4** of **TUPE 2006** the subsequent employer (the transferee) inherits all the accrued rights and liabilities connected with the contract of employment of the transferred employee. Thus, terms and conditions with the previous employer would, where **Reg 4** of **TUPE 2006** applies, automatically become the terms and conditions with that new employer.

77. **Reg 4(4)** and **(5)** of **TUPE 2006** provides there may be an agreed variation to the terms and conditions of employment following a transfer provided that the reason for the change is not the transfer itself, unless the reason for the variation is an economic, technical, or organisational change entailing changes to the workforce (or the terms and conditions of that contract permit the employer to make such a variation).

Relevant Law Furlough

78. Since the innovation of Furlough, there have been different versions, and for present purposes, these are

    18. Version 1 (Furlough)– Sunday 1 March to Tuesday 30 June 2020 prohibited employees working and provided that the Government would meet 80% of salary subject to a cap of £2,500 per month: and

    19. Version 2(Flexible Furlough) – Wednesday 1 July to Saturday 31 October 2020 permitted employees to be allocated Working Periods (for present purposes working days) and provided Government would

meet 80% of salary for hours not worked subject to a cap of £2,500 per month.

Neither version of the scheme required the employer to meet the 20% pay balance.

Relevant law.

The statutory basis of EA 2010 claims

79. The Tribunal considers it helpful to set out the statutory provisions of ss 5, s13, s 23 and s39 of EA 2010.

80. **Section 5 Age:**

In relation to the protected characteristic of age—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

81. **Section 13 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

82. A complaint may be brought, relying on the protected characteristic of age, under s13 EA 2010.

83. **s39** of **EA 2010** provides: :

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

84. **s23 (1) of EA 2010** provides that "*On a comparison of cases for the purposes of s13 [direct discrimination], there must be no material difference between the circumstances relating to each case."*

EA 2010 Relevant Case Law

85. In ***Madarassy v Nomura International plc*** [2007] IRLR (**Madarassy**) Mummery LJ held at [57] that '*could conclude'* [The EA 2010 uses the words '*could decide,'* but the meaning is the same] meant: *'[…] that "a reasonable Tribunal could properly conclude" from all the evidence before it.'*

86. However, a simple difference of treatment is not enough to shift the burden of proof. Something more is required: **Madarassy** per Mummery LJ at para 56: *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

EA 2010 Time Issue

Statutory provision;

87. In terms of s123 of the EA 2010, where allegations of discrimination stretch over a period, only part of which falls within the primary limitation period the Tribunal requires to assess whether individual allegations together constitute an *"act extending over a period* "or else are to be treated as a series of discrete or isolated specific actions each with its own time limit.

88. As set out above, a complaint about something that happened before **Friday 16 October 2020** was potentially brought out of time, so the Tribunal may not have jurisdiction to deal with it.

Relevant Law

Time limits /Just and Equitable

89. Tribunals have a broader discretion under discrimination law than in unfair dismissal cases; the Employment Rights Act 1996 provides that the time limit for presenting an unfair dismissal claim may be extended where the claimant shows that it was *"not reasonably practicable"* to present the claim in time.

90. At para 23 of the submission, the respondent reference was made to **British Coal Corporation v Keeble (1997) IRLR 336 (Keeble)**. In that case, the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33(3) of the Limitation Act 1980, which consolidated earlier Limitation Acts. Section 33(3) deals with the exercise of discretion in civil courts and personal injury cases in England & Wales. It requires the Court to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

1. the length of and reasons for the delay; and

2. the extent to which evidence for either side is likely to be less cogent, than if the action had been brought within the time allowed; and

3. the conduct of the party defending the action after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the party bringing the action for information or inspection to ascertain facts which were or might be relevant to the party bringing that claim; and

4. the duration of any disability of the party arising after the date of the accrual of the cause of action; and

5. the promptness with which the party bringing the action acted once s/he knew of the facts giving rise to the cause of action; and

6. the steps, if any, taken by the party bringing the action to obtain appropriate professional once s/he knew of the possibility of taking action.

91. The Limitation Act 1980, to which **Keeble** refers, does not apply in Scotland, the equivalent legislation being the ***Prescription and Limitation Scotland Act 1973*** **(the 1973 Act)**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, s19A simply stating:

> *"19A Power of Court to override time-limits etc.*
>
> *(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the Court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."*

92. Section **123** of **EA 2010** does not refer to either the Limitation Act 1980 or the 1973 Act. It does not seek to define itself by reference to either statutory model.

93. Factors that are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the respondent per ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194 at paragraph 19. However: *"There is no … requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard (Abertawe at para 25)"*. A Tribunal doesn't need to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

94. If the claim has been brought outside the primary limitation period, the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers "*just and equitable."*

95. In ***Robertson v Bexley Community Centre t/a Leisure Link*** [2003] IRLR 434, the Court of Appeal identified that for Tribunals considering the exercise of this discretion, *"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."*

96. More recently, the Court of Appeal in ***Adedeji v University Hospital Birmingham NHS Foundation Trust*** in 2021 reviewed existing case law around the extension of time in the context of s33 of the Limitation Act 1980. In that case, a surgeon resigned after a lengthy capability and conduct investigation. Having taken legal advice and been advised twice of the time limit, he presented his claim 3 days late. The Tribunal dismissed his claims as out of time. The EAT and Court of Appeal rejected his appeals. The Court

reviewed several recent cases involving the list of Limitation Act factors cited in *British Coal v Keeble*, commenting:

"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [Equality Act] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay." If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

97. The Tribunal has a broad discretion under the *Equality Act 2010* to consider whether to allow a claim out of time. The relevance of the factors in ***Keeble*** depends on the facts of the particular case.

Conclusion on witness evidence

98. The Tribunal accepts the evidence of both Steven McPherson and Michael Field the respondent's witnesses as straightforward and credible in their evidence. The claimant gave his evidence honestly reflecting his view of the respondent and his recollection. The Tribunal however, preferred the evidence of the respondent witnesses as being wholly straightforward to that of the claimant where there was any dispute of fact.

Discussion and Decision.

Unfair dismissal

99. The claimant does not have the necessary 2 years qualifying service, taking his period of continuous employment from **Monday 18 February 2019** to the date of termination being **Friday 6 November 2010,** for unfair dismissal.

Contractual claim/ TUPE

100. The ET1, which does not identify any representative, does not set out the statutory basis of the claimant's complaint.

Interpretation of contract

101. The claimant asserts that April 2019 contract he co-drafted and which expressly transferred provided him with a percentage of all company sales. The Tribunal does not accept this interpretation. When he and the then-effective director drafted the contract, he was the sole salesperson. There was no requirement to state the percentage reflected only his sale. The April 2019 contract for a review date of 31 March 2020. The April 2019 contract was co-designed by the claimant to provide the claimant with both a certainty of income by the fixed weekly sum (equating to £30,000 pa) and an incentive to achieve sales being 20% of the sales turnover he, as the sole salesperson, achieved.

102. The claimant made representations to Michael Field at a brief informal meeting on **Tuesday 15 October 2019,** that his actual income since the commencement of his employment on **Monday 18 February 2019** (a period of some 9 months) equated to £42,000 per annum. That represents an annual commission income over 12 months of £12,000 above the expressly agreed basic pay provided set out in the April 2019 contract terms.

103. The claimant held to that precise annual income figure, including in January 2020, when discussing matters with Mr. Field after the TUPE transfer on or about **Thursday 16 January 2020** and beyond.

104. As confirmed in the Wednesday 11 November 2019 email, any proposals were contingent on agreement being achieved in the diligence period. It transpired that the claimant's son would not transfer by that time. The claimant himself described that job roles were fluid. There was no agreement

that the claimant would be employed for a fixed period of 2 years either at the brief informal meeting **Tuesday 15 October 2019** or otherwise.

105. The Tribunal accepts that the respondent encountered difficulties reconciling information as part of the January 2020 Asset Sale. The respondent, in good faith, made payments for the balance period of January and again in February 2020.

106. After the respondent was able to reconcile financial information in the month of March 2020, it paid the claimant £3,500 for March 2020 (equating to his asserted annum income of £42,000 pa).

Variation of Contract/ TUPE

107. The claimant asserts that he was employed under the contract term in place before the TUPE transfer of his employment from Espedair.

108. The reason for the March 2020 Furlough Agreement and the July 2020 Flexible Furlough Agreement was not the transfer; it amounted to an unforeseen economic and organisational change to the terms and conditions of that contract permit the employer to make such a variation

109. The claimant, along with some of his colleagues, elected to accept being was placed on what is now well known as Furlough but which was at the time a new concept in UK employment law reflecting the UK Treasury Direction of 15 April 2020 made under ss 71 and 76 of the Coronavirus Act 2020).

110. The claimant asserts that in April 2020, his income dropped to £2,500 without explanation. The Tribunal does not accept this. In simple terms, his income dropped because he agreed to be placed on Furlough.

111. The March 2020 Furlough Agreement was an agreed variation to the contract. It was a permissible variation in accordance with Reg 4 (4) of TUPE 2006. The reason for the change was not the TUPE transfer itself; the reason was the Covid 19 Pandemic and the creation of the furlough scheme. Against the background of the pandemic, the Tribunal concludes that the reasons for the variation were economic (the pandemic's impact on business), technical (the claimant being unable to work), and organisational (being the respondent's response to the pandemic).

112. There was an effective cap where HMRC would pay up to 80% of £2,500 Furlough. The claimant agreed to March 2020 Furlough Agreement. That created a monthly payment cap of £2,500. This variation was not exercised irrationally; the claimant was unable to work in consequence of the pandemic.

113. The claimant consented to the change, including agreeing not to work and emailing his confirmation on **Tuesday 31 March 2020**. The contract was varied.

114. In June 2020, the respondent reduced the top-up to 10%, with the effect that the claimant received 90% of wages for June 2020 and so received £2,250 pay rather than the previous month's £2500. The March 2020 Furlough Agreement did not provide for any such reduction, describing as above, that the respondent "*will*" top-up to £2,500. That reduction in June 2020 was a breach of the contractual terms. The non-payment of £250 in June 2020 was a breach of contract.

115. The Monday 30 April 2020 email exchange did not alter the March 2020 Furlough Agreement.

116. After June 2020, the claimant agreed to the **July 2020 Flexible Furlough Agreement**, which contract superseded the March 2020 Furlough

agreement. The **July 2020 Flexible Furlough Agreement** did not set out that the respondent "will" top-up to £2,500. It continued to operate with a basic pay cap of £2,500, with the Government meeting 80% of the £2,500. However, the July 2020 Flexible Furlough Agreement removed the complete bar to the claim working, with the possibility of the claimant working and generating sales to support the respondent business.

117. The July 2020 Furlough Agreement was an agreed variation to the contract. It was a permissible variation in accordance with Reg 4 (4) of TUPE 2006. The reason for the change was not the TUPE transfer; the reason was the Covid 19 Pandemic and the creation of the furlough scheme. Against the background of the pandemic, the Tribunal concludes that the reasons for the variation were economic (the pandemic's impact on business), technical (the claimant being unable to work), and organisational (being the respondent's response to the pandemic).

118. After the **July 2020 Flexible Furlough Agreement**, the respondent initially maintained the reduced top-up to 10% and reduced it to nil. This was permissible under the **July 2020 Flexible Furlough Agreement.** There was no requirement that the respondent would (will) maintain the top-up, unlike the March 2020 Furlough Agreement. In doing so, the respondent did not act in breach of contract.

119. The July 2020 Flexible Furlough Agreement suspended the claimant's normal entitlement to pay and benefits. The **July 2020 Flexible Furlough Agreement** suspended the claimant's entitlement to additional pay (beyond his basic, which was then capped at £2,500) calculated as 20% of his sales turnover.

Age Discrimination complaint

120. The claimant identifies that he relies upon **Section 13** of the EA 2010: direct discrimination because of a protected characteristic of Age

121. The initial issue for the Tribunal is to consider whether the respondent treated the claimant in a particular manner (as specifically alleged)? After that, it falls to the Tribunal to consider; was that treatment "*less favourable treatment*," i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? For this second element, the claimant asserts that he relies upon Ross Lockerbie (formerly Sales Director) and Andrew Moncrieff (Head of Sales) as actual comparators. The Tribunal accepts the respondent's position that as both were employed at different times and not in materially the same job as the claimant, they cannot be relevant comparators, in accordance with s23(1) of EA 2010.

122. The Tribunal has considered whether, although no notice is given, it would be appropriate to consider a hypothetical comparator. The Tribunal notes that the claimant is unrepresented. The Tribunal has reminded itself of the guidance set out by Mummery LJ in ***Stockton on Tees Borough Council v Aylott*** [2010] IRLR 944 (**Aylott**) "*the circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or decision which is complained of."*

123. The Tribunal considers that the correct approach is to start by identifying the reason for the treatment the claimant complains of (as described in **Aylott**).

124. In short, the reason for the treatment complained of was not *because* of the claimant's age and/or because of the protected characteristic of age. The claimant was offered the opportunity to go onto initially furlough and after that flexible furlough because of the pandemic. He accepted those offers.

125. The reason, so far as it may be relevant that the claimant did not receive pay, as set out in his April 2019 contract, at the relevant times was not due to his age. It was because he had agreed to be placed on furlough with the contract

varied accordingly.

126. The reason the claimant was not initially advised of the appointment of the Sales Director and then Head of Sales was because he was on furlough. The reason that the claimant was not offered the role of either Sales Director or Head of Sales was not due to his age; it reflected different areas of expertise to that of the claimant.

127. The claimant's employment's employment was not terminated due to his age. The reason for the termination of the claimant's employment was, as set out by the respondent "*Given the current situation with the Covid-19 virus, and the economic difficulties which lie ahead we need to make cut back and given your role in sales, we do not have work for you at this time."*

128. In these circumstances, it is unnecessary to identify a hypothetical comparator.

129. None of the actions complained of were *because* of the claimant's age and/or because of the protected characteristic of age more generally.

130. The claimants claim in terms of s13 EA 2010 does not succeed.

Relevance of s39 (2) of EA 2010

131. The Tribunal concludes that the claimant has been unrepresented at all material times. He did not give express notice of any claim in terms of **s39(2)** of the **EA 2010. s39(2)** identifies discrimination may occur (b) in the way that A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; at (c) by dismissing B; and at (d) by subjecting B to any other detriment.

132. There was no breach **of s39(2)** of EA 2010 in the way the respondent afforded opportunities for promotion or any other benefit. The claimant was furloughed for reasons unrelated to his age. The reason the claimant was not offered either role was unrelated to his age. The respondent offered the role of Sales Director to Mr. Ross Lockerbie, a new and senior role because his experience,

which was different and more extensive than the claimant, in digital transformation services with specific expertise in transition from a paper environment to digital, which was a key area for expansion. The respondent offered the role of Head of Sales to Mr. Andrew Moncrieff, was engaged by the respondent as Head of Sales, reflecting Mr. Moncrieff's significant managerial and digitisation experience (which was different and more extensive to the claimant), including in areas of the public sector which the respondent identified as specific relevance to the development of the respondent's mark The recruitment of Mr Lockerbie and Moncrieff was unrelated to age.

133. The claimant was not dismissed or subjected to any other detriment due to his age. The claimant was dismissed for the reasons the respondent set out, being "*Given the current situation with the Covid-19 virus, and the economic difficulties which lie ahead we need to make cut back and given your role in sales, we do not have work for you at this time."*

134. Any claim in terms of **s39 (2)** EA 2010 does not succeed.

Time Issues for Final Hearing

Discussion and Decision

135. As above dealing with this issue may involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

136. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before, **Friday 16**

October 2020, is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

137. However, in all the circumstances, including having regard to the overall conclusions of the Tribunal, it is not considered necessary to address that issue further.

Conclusions

138. The claimant's claims, except for breach of contract claim in respect non-payment of £250 in June 2020, do not succeed. The claimant's claim for breach of contract in respect of non-payment in June 2020 of £250 succeeds.

139. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment. The Tribunal has done so applying the relevant law.

140. If there are further submissions that either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

Employment Judge: Rory McPherson
Date of Judgment: 20 September 2021
Entered in register: 22 September 2021
and copied to parties