EMPLOYMENT TRIBUNALS

Claimant: Mr J Rawnsley

Respondent: Queniborough Aluminium Services Limited

Heard via Cloud Video Platform **On:26, 27 and 28 April 2021**

Before: Employment Judge Brewer
Ms B Tidd
Mr M Alibhai

Representation

Claimant: Mr M Anastasiades, Solicitor
Respondent: Mr A Beall, Managing Director

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claim of unfair dismissal succeeds.
2. The claim of age discrimination succeeds in part.
3. The claim for notice pay succeeds.
4. The claim for holiday pay succeeds.

The claimant is awarded the following sums:

1. Two weeks' notice pay @ £353.00 per week - **£706.00**.
2. Four days holiday pay @ £70.60 per day - **£282.40**.
3. Loss of statutory rights in the sum of **£450.00**.
4. A basic award of **£780.00**.
5. A compensatory award of **£4,651.56**.
6. Injury to feelings in the sum of **£1,000**.
7. Interest on the above injury to feelings of **£80.00**.

REASONS

Introduction

1. By a claim form presented on 18 December 2019 the claimant brought claims against the respondent for unfair dismissal, direct age discrimination, notice pay and holiday pay. The final hearing was listed before us over three days. We heard evidence and submissions on the first two days and dealt with judgment and remedy on day three.

2. We heard evidence from the claimant on his own behalf and from Mr Beall who gave evidence for the respondent. Both witnesses had provided written witness statements which they affirmed as true. The Tribunal had read the witness statements in advance of the hearing and so they were taken 'as read'. There was an agreed bundle of documents to which we were referred. At the end of the evidence, we heard and have taken into account submissions by the representatives.

3. At the outset of the hearing, we explained, in particular to Mr Beall, the nature and purpose of cross examination and set out the procedure we would be following. Mr Beall confirmed that he had previous Tribunal experience. We also set out the issues and the parties agreed that the issues we set out below were those we had to determine in this case.

Issues

4. Over two preliminary hearings the parties agreed the following list of issues.

    a. Was the claimant dismissed?

    b. If the claimant resigned did this amount to a constructive dismissal? If so, the claimant relies on the respondent's breach of the implied term of trust and confidence.

    c. If the claimant did not resign, was he dismissed by the respondent? If so, what was the potentially fair reason for dismissal.

    d. If the claimant was dismissed, was the dismissal fair under section 98, Employment Rights Act 1996?

    e. Is the claimant owed notice pay?

    f. Is the claimant owed pay for 4 days accrued untaken annual leave?

    g. Did the respondent directly discriminate against the claimant because of his age as follows:

        i. By calling the claimant a "jumped up know it all spoiled child";
        ii. By Mr Beall striking the claimant on the face;
        iii. By dismissing the claimant?

Law

5. In relation to **direct age discrimination**, for present purposes the following are the key principles.

6. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) the less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

7. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

8. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

9. In relation to the reason for the less favourable treatment (the reason why), in **R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors** 2010 IRLR 136, SC, the Supreme Court identified two ways in which direct discrimination can arise: where a decision is taken on a ground that is *inherently* discriminatory or where it is taken for a reason that is *subjectively* discriminatory. In determining the reason why, the Supreme Court identified that in some cases, there is no dispute at all about the factual criterion applied by the respondent. In other words, it will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. In other cases, the reason for the less favourable treatment is not immediately apparent, i.e., the act complained of is not inherently discriminatory. Here, it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

10. The reason why need not be the sole or even principal reason for the treatment complained of. The House of Lords in **Nagarajan v London Regional Transport** 1999 ICR 877, HL, held that where a protected characteristic has had a 'significant influence on the outcome, discrimination is made out'.

11. By virtue of section 136 EqA, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, *absent* any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

12. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. age) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious

motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

13. We note that although allowed for by section 13 EqA in a claim for direct age discrimination, the respondent does not rely on any defence of justification.

14. Turning to constructive dismissal, we note the following legal principles.

15. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

16. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'*

17. In order to claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer
    b. the employer's breach caused the employee to resign
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

18. Note that a constructive dismissal is not necessarily an unfair one — **Savoia v Chiltern Herb Farms Ltd 1982** IRLR 166, CA.

19. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd** 1986 ICR 157, CA.

20. In **Western Excavating (ECC) Ltd v Sharp** (above) the Court of Appeal expressly rejected the argument that S.95(1)(c) introduces a concept of reasonable behaviour by employers into contracts of employment. This means that an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.

This was confirmed in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

21. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue. This means that if there is an underlying (or ulterior) reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

22. Sometimes there is more than one reason why an employee leaves a job. For instance, he or she may feel some dissatisfaction with the present job and have received an offer of something that promises to be better. Where there are mixed motives, a tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. However, the breach need not be 'the' effective cause — **Wright v North Ayrshire Council** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in **Abbycars (West Horndon) Ltd v Ford** EAT 0472/07, '*the crucial question is whether the repudiatory breach played a part in the dismissal'*, and even if the employee leaves for '*a whole host of reasons'*, he or she can claim constructive dismissal '*if the repudiatory breach is one of the factors relied upon'*.

23. At common law, an employee wishing to claim wrongful constructive dismissal must resign without notice — see, for example, **Brown v Neon Management Services Ltd** 2019 IRLR 30, QBD. However, the situation as regards unfair constructive dismissal is different because S.95(1)(c) ERA provides that a dismissal will take place where an employee resigns with or without notice 'in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct'.

24. In relation to unfair dismissal, the relevant statute law is set out in sections 94, 98, 119, 120, 122, 123, 124 and 124A Employment Rights Act 1996 (ERA). We need not set out the text of those sections here.

25. In terms of case law, the relevant test in a conduct case is as follows:

    a. Did the respondent act reasonably in all the circumstances in treating the claimant's actions as a sufficient reason to dismiss the claimant and in particular:
    b. Did the respondent genuinely believe in the claimant's guilt;
    c. Were there reasonable grounds for the respondent's belief in the claimant's guilt;
    d. At the time the belief was formed the respondent had carried out a reasonable investigation;
    e. Did the respondent otherwise act in a procedurally fair manner;
    f. Was dismissal within the range of reasonable responses?

    (see **British Home Stores Limited v Burchell** [1978] IRLR 379; **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439; **Sainsburys**

Supermarkets Limited v Hitt [2002] EWCA Civ 1588 - I refer to other relevant case law below)

26. We remind ourselves that we should not step into the shoes of the employer and the test of unfairness is an objective one.

27. If there is an unfair dismissal and a compensatory award, how much should it be? The Tribunal will decide:

    a. What financial losses has the dismissal caused the claimant?
    b. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    c. If not, for what period of loss should the claimant be compensated?
    d. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    e. If so, should the claimant's compensation be reduced? By how much?
    f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    g. Did the respondent or the claimant unreasonably fail to comply with it?
    h. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
    i. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
    j. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    k. Does the statutory cap of fifty-two weeks' pay apply?

28. What basic award is payable to the claimant, if any?

29. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

30. In relation to the breach of contract, this is a claim for notice pay. The issues are as follows:
    a. What was the claimant's notice period?
    b. Was the claimant paid for that notice period?
    c. If not, was the claimant guilty of gross misconduct so that the respondent was entitled to dismiss without notice?

31. The burden of proof is on the clamant to prove that the respondent acted in breach of his contract.

32. Finally, in relation to the claim for holiday pay the issue is whether the claimant was owed pay for accrued untaken statutory holiday as at the effective date of termination of his employment and, if so, how much is owed?

Findings of fact

33. We make the following findings of fact (references in square brackets are to page numbers in the bundle).

34. The respondent is a small employer employing around 36 employees. The respondent also contracts with a number of sub-contractors. The respondent is a part of the building trade and works in conjunction with other businesses on building works.

35. Mr A Beall is the managing director and major shareholder in the respondent.

36. The claimant was employed by the respondent from 1 January 2015 as a Factory Operative. In 2018 he was given the tasks of keeping the stores clean and tidy and ordering fixings, a small part of the respondent's equipment needs. The claimant was managed by Luke Atton, who was in turn responsible to Mr Beall.

37. In January 2019 the claimant, along with a number of other employees, asked for and was given a pay rise.

38. The claimant's contract contains a provision for notice of 4 weeks [48c].

39. On Thursday 17 October 2019 there was a confrontation between the claimant and Mr Beall. The cause of the conflict was that the claimant had complained that staff were not keeping the stores area clean and tidy, he had been asking for help with keeping the area clean and tidy and for other staff to assist him; and in particular he had asked a group of staff, the fitters, to keep the area tidy and to clean it up, which they did from time to time. Mr Beall considered that the fitters should not be cleaning up the stores area because a) that was part of the claimant's role and b) when the fitters returned from a job, if they remained at work cleaning up, he would be paying them overtime rates. Mr Beall explained this situation to the claimant. For his part the claimant insisted that he needed help.

40. After around 10 or 15 minutes Mr Beall lost his temper, he struck the claimant's face, pushed him and told him to get out.

41. The claimant left work. He clocked out and wrote on his clocking out card:

> *"Attacked by owner. No longer feel safe here!"* [54]

42. Later that afternoon the claimant exchanged text messages with a colleague known as Flash. Those appear at [62a]. We shall refer to those messages in further detail in the discussion below.

43. The claimant also went to the police to report the assault. They advised him to have no further contact with Mr Beall.

44. Mr Beall sent a text message to the claimant on the afternoon of 17 October 2019. It read:

> *"Jake, this is Tony. Apologies for my half in our incident. It is my intention to pay you for today and tomorrow and you can resume work Monday. I will assume if I don't hear from you and you don't show Monday you have decided to move on. I will need a change*

> *in attitude from you and I am willing to work with you on this. This is called a cooling off period".* [59]

45. The claimant did not respond to this email.

46. On 18 January the claimant went to his GP and was given a fit note signing him off with stress from 18 October until 1 November 2019 [49].

47. On 21 October 2019 the respondent sent the letter to the claimant which appears at [59/60]. In this letter Mr Beall states that the claimant was a "*jumped up, know it all, spoilt child*" and ends with:

> *"So the QAS official position is as of today you have resigned, should this not be the case you would be dismissed for gross insubordination"*

48. Early conciliation commenced on 15 November 2019 and was completed on 3 December 2019.

Discussion and conclusions

Unfair dismissal claim

49. We first turn our minds to the question of whether the claimant resigned or was dismissed by the respondent.

50. We have determined that the claimant resigned on 17 October 2019 when he left the workplace following the confrontation with Mr Beall.

51. We reach this conclusion considering the documentary evidence. First, we note that the claimant wrote on his clock card that he no longer felt safe in the workplace [54]. We consider that the act of writing on the clock card is so unusual, and the comment so clear that we infer from this that the claimant formed an intention not to return to work. He was, as it were, burning his bridges.

52. Second, we refer to the text messages at [63]. We asked the claimant about the messages which were exchanged prior to those which appear in the bundle, for it is obvious from the content that there were prior messages. The claimant confirmed that the employee known as Flash had seen the clock card. He messaged the claimant asking him what had happened, and the claimant said in oral evidence that he explained what had transpired between him and Mr Beall. He said in his evidence: "*at this point I thought my career was over. I went to the police to report the incident about an hour later*". Although the claimant said that he had not decided to never return to work, he said he was unsure. Given the documentation we do not consider that this is credible.

53. The text messages start with Flash saying: "*what u going to do for a job mateee*". The claimant replies "*No idea*". He does not say anything like he still has a job, or he is not sure whether he is going to return to work. Flash continues with: "*You defo sure u anit coming back*" and he goes on to refer to the fact that he, Flash, lent the claimant his "*stereo*" and if the claimant is not

coming back, he will retrieve it. The claimant responds: "*Yeah you can have it back mate. Thanks for letting me use it*". The text messages end with the claimant stating: "*it's a shame cuz I like working with you guys*". We infer from this exchange that the claimant had indeed left work for good and did not intend to return.

54. The final document we refer to is the claimants schedule of loss at [63] in which he says:

"Date of termination – 17th October 2019"

55. We consider that looked at in the round, the writing on the clock card, reporting his employer to the police and the content of the text messages all support the proposition that as at the time the claimant walked out of work on Thursday 17 October 2019, he resigned by his actions having considered himself to have been constructively dismissed. We do note that the claimant obtained a fit note but weighed against the other evidence both documentary and oral, we consider that it is not credible that the claimant believed he would or could return to work for a person who had assaulted him.

56. We find therefore that the effective date of termination of employment was indeed as set out in the schedule of loss – 17 October 2019.

57. We turn then to the question, if the claimant was dismissed on 17 October 2019, was that dismissal unfair?

58. As we have set out above, in order to claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer
    b. the employer's breach caused the employee to resign
    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

59. The claimant says in his claim form that if there was a constructive dismissal he relies on breach of the implied term of trust and confidence. In this case the Tribunal need not spend long determining this issue. The Tribunal is firmly of the view that an assault on a subordinate by a Managing Director who then pushes him towards the door telling him to go amounts to a clear breach of the implied term of trust and confidence. Thus, the respondent was in fundamental breach of contract, the claimant was entitled to resign and to treat himself as having been dismissed.

60. It was also clear to the Tribunal from all of the evidence that no suggestion was raised that the cause of the resignation was anything other then Mr Beall's conduct on 17 October 2019. No issue of affirmation or waiver of the breach of contract arose in this case.

61. That leaves the question of whether the dismissal was unfair. We find that it was. There was no justification for Mr Beall assaulting the claimant, much as

he may have later regretted it. We find it difficult to envisage circumstances in which such a dismissal could be anything other than unfair.

62. Therefore, we find that the claimant was unfairly dismissed on 17 October 2019.

63. We turn to the question of the effect of the letter of 21 October 2019. Can it be said that this is evidence that, had the claimant not resigned on 17 October 2019, the claimant would have been dismissed on 21 October 2019 instead? We think that this is the clear intention of the letter of 21 October 2019. We paraphrase what Mr Beall states in his letter: *as you did not return to work on Monday 21 October, I consider that you have resigned, and if that is wrong then I am dismissing you in any event.*

64. That purported dismissal, which was said to be for gross insubordination:

    a. Does not set out what the gross insubordination was;
    b. Did not entail any investigation;
    c. Did not afford the claimant a chance to explain himself at a hearing;
    d. Did not afford him the right to be represented; and
    e. Did not allow him an appeal with all of the attendant rights that also would have entailed.

65. So, while we find that had the claimant not resigned on 17 October 2019, he would have been dismissed on 21 October 2019, we cannot say that such a dismissal would or might have been have been fair; further, had it been unfair we cannot say it would only have been procedurally unfair and therefore we cannot say that the claimant would have been fairly dismissed had a fair procedure been followed; nor can we say therefore that there is any basis to limit compensation either on a **Polkey** basis (see **Polkey v AE Dayton Services Ltd** [1987] IRLR 503) or for contributory conduct. Had the respondent followed a fair procedure it is perfectly possible that the parties could have been reconciled. We find this on the basis that we found Mr Beall to be a credible witness and he made it clear he had given employees many chances before and he can clearly be forgiving once his raised temper has passed, as is clear from his text sent on the afternoon of 17 October 2019 from which we conclude his apology was genuine, even if the claimant was not inclined to view it so.

66. For all of those reasons we find that the claimant was unfairly constructively dismissed.

Notice pay claim

67. The claimant resigned without notice as he was entitled to do, and he has satisfied the burden on him to show that the respondent was in breach of contract. He is therefore entitled to recover his notice pay having been constructively dismissed in breach of contract. We note however his concession that he was paid until 1 November 2019, so he accepts that he was paid for 2 weeks of his 4 week notice period [64]. Notwithstanding that the claimant had a fit note for the period until 1 November 2019, and Mr Beall's submission that the claimant would have been paid sick pay, we consider that because of the effect of section 87(4) Employment Rights Act 1996 (ERA)

(which disapplies the sections dealing with rights during the notice period if under the contract of employment the employee is entitled to a notice period which is at least 1 week longer than the statutory minimum notice period) , the provisions of sections 86 to 91 of the ERA apply to the claimant.

68. The upshot of that is that as the claimant had 4 complete years' service as at the effective date of termination, he is statutorily entitled to a minimum of 4 weeks' notice by virtue of section 86(1)(b) ERA. As his contract entitles him to a 4 week notice period, section 87(4) does not apply to him and, as we have said above, the full force of the provisions of sections 86 to 91 of the ERA apply to the claimant. Thus, by virtue of section 88 the claimant is entitled to his normal hourly rate of pay during what would have been his 4 week notice period irrespective of whether he would have been off sick and in receipt of statutory sick pay.

69. For those reasons the claim for notice pay succeeds in the sum of 2 weeks' pay.

Holiday pay claim

70. It also follows from this that the 2 weeks pay which the respondent paid to the claimant after the termination of his employment was not sufficient to discharge the liability to pay the accepted outstanding 4 days accrued untaken holiday pay claimed by the claimant.

71. For those reasons we find that the respondent is liable to pay to the claimant 4 days pay representing compensation for the 4 days accrued untaken holiday pay outstanding at the effective date of termination.

Age discrimination claim

72. Finally, we turn to the claims for age discrimination.

73. There are three allegations of direct age discrimination, that is the respondent discriminated against the claimant as follows:

    a. By calling the claimant a "jumped up know it all spoiled child";
    b. By Mr Beall striking the claimant on the face;
    c. By dismissing the claimant.

74. We turn first to the dismissal. In submissions we understood Mr Anastasiades to argue that Mr Beall was a bully, that bullies pick on those that are younger than them and that Mr Beall would not have hit the claimant had the claimant been older. He asked us to draw an inference that the claimant suffered age discrimination because of his particular age from the comments made by Mr Beall in his letter of 21 October 2019 where he refers to a "*clip round the ear*" and to the claimant as a "*spoilt child*".

75. We have considered those comments and the wider context of the claimant's resignation. First, we do not find that Mr Beall was a bully as Mr Anastasiades alleged. We find he had a temper which, when lost, causes him to, to use the colloquialism, "lose it", which is what happened on 17 October 2019. We asked

Mr Beall about other confrontations he had had and he recalled an incident where he had struck an employee of a similar age to him, around 40 years old. During Mr Anastasiades' submissions we made the point that this was Mr Beall's unchallenged evidence, that is that Mr Beall had the confrontation described above. Mr Ananstasiades pointed out that this evidence came out through the Tribunal's questioning of Mr Beall and he had not been cross-examined about it. We point out that Mr Anastasiades did not seek permission to re-open his cross-examination. Further, he did not expressly put to Mr Beall during his cross-examination that he treated the claimant differently from how he treats or has treated others because of his young age, he merely asserted that the treatment of the claimant was because of age, which Mr Beall vehemently denied. There is a subtle but important difference between alleging that Mr Beall hit the claimant because the claimant was young and putting to Mr Beall that he has not hit anyone older than the claimant, thus putting the positive case that Mr Beall treated the claimant less favourably, not merely unfavourably. Had he done so he would have got the answer Mr. Beall gave to the Tribunal when we questioned him. As to the inference which Mr Anastasiades invited the Tribunal to draw from the comments made by Mr Beall in his letter of 21 October 2019, we do not find that they assist. Even if Mr Beall saw the claimant as a young person, we find that the reason why Mr Beal struck the claimant was because he lost his temper with him. He did not lose his temper because of the claimant's age, but because he became frustrated by the claimant's attitude to his work, and thus the reason for the claimant's resignation, and his constructive dismissal, was that he was struck as a result of Mr Beall's loss of temper which we find was unrelated to the claimant's age for the reasons set out above.

76. We therefore find that the respondent did not directly discriminate against the claimant because of his age by dismissing him.

77. In answering the dismissal allegation, we have necessarily dealt with the allegation that the assault was less favourable treatment because of age. We have found that it was not. On his evidence, which we accept, Mr Beall's temper has caused him to have at least one other similar confrontation with a person considerably older than the claimant. Even if we had not had that evidence, there is no credible evidence that Mr Beall only argues or loses his temper with people who are 20 years old as the claimant alleges.

78. For those reasons the claim that the act of Mr Beall striking the claimant's face was direct age discrimination also fails.

79. Finally, we turn to the allegation that the comment "*jumped up know it all spoilt child*" made to the claimant in the letter of 21 October 2019 was direct age discrimination. By the time this occurred the relationship of employer and employee had, of course ended, but we consider that this is covered by section 108, EqA. To that end liability for discrimination remains.

80. We note Mr Beall's evidence that he meant that the claimant's behaviour was 'like' a spoilt child. We do not find this aspect of Mr Beall's evidence credible. If that is what he meant to say so be it; it is not what he said. The letter says at three points that the claimant <u>was</u> a "spoilt child".

81. We consider this comment to fall into the category of inherently discriminatory conduct. In other words, it is obvious to the Tribunal why the claimant received the less favourable treatment, his age, and for that reason this claim succeeds.

Remedy

82. We heard evidence and had a written statement from the claimant on the issue of remedy. We also had an updated schedule of loss and various documents to consider. The Tribunal asked the claimant a number of questions about his efforts to mitigate his loss. The Tribunal noted that despite having had legal advice from the outset of these proceedings, and despite providing documentation for both the final hearing and on remedy, there were no documents provided evidencing any efforts to mitigate loss other than the pay slips sent on the afternoon of day 2 of the hearing.

83. The Tribunal having deliberated make the following awards which we consider just and equitable in all the circumstances.

84. Two weeks' notice pay @ £353.00 per week - **£706.00**.

85. Four days holiday pay @ £70.60 per day - **£282.40**.

86. Loss of statutory rights in the sum of **£450.00**.

87. For unfair dismissal the claimant is entitled to a basic award of **£780.00**.

88. We make a compensatory award for unfair dismissal in the sum of **£4,651.56** made up as follows:

    a. Loss of earnings for the period 14 November 2019* to 14 January 2020, (Period 1) 8 weeks @ £353.00 per week is £2,824.00;
    b. Loss of earnings for the period 15 January 2020 to 23 March 2020, (Period 2) 10 weeks @ £353.00 per week is £3,530.00 less income of £2,129.46) which equals £1,400.54;
    c. Loss of earnings for the period 4 August 2020 to 17 October 2020 (Period 3) 10 weeks @ £353.00 per week is £3,530.00 less income of £3,436.48 which equals £93.52
    d. Pension loss for Periods 1, 2 and 3 is 28 weeks @ £11.93 per week which equals £334,04.

89. The Tribunal has not awarded loss for the period 24 March 2020 to 3 August 2020 as there is no evidence that, and the Tribunal was not satisfied that the claimant made any or any reasonable efforts to mitigate his losses in this period.

90. The claimant agreed that there was no uplift for non-compliance with ACAS CoP.

91. We award injury to feelings for single act of age discrimination in the sum of **£1,000**. The Tribunal considers that the comment about the claimant being a spoilt child is at the very lowest end of the **Vento**** bandings.

92. We award interest on the above injury to feelings @ 8% per annum of **£80.00**.

93. The total awarded is **£7,949.96**.

*loss runs from this date as the claimant received 2 weeks' notice pay from the respondent and is being compensated for 2 further weeks' notice. EDT was 17 October 2019, 4 weeks later is 14 November 2019
**Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871

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Employment Judge Brewer

Date: 28 April 2021

JUDGMENT SENT TO THE PARTIES ON

29 April 2021

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FOR THE TRIBUNAL OFFICE

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