THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondents*
Mr D Dixon	**AND**	(1) The Croglin Estate Co Ltd (2) Mr Michael George (3) Mr Angus Gunning

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Newcastle upon Tyne **ON:** 5-8 December 2011

EMPLOYMENT JUDGE Johnson **MEMBERS:** Mr S Abbas
Mrs A Tarn

Appearances

For the Claimant: Ms S Allen of Counsel

For the Respondent: Mr P Gorasia of Counsel

RESERVED JUDGMENT

1 The claimant's complaint of unfair dismissal against the first respondent is well-founded and succeeds.

2 The claimant's complaint of unlawful age discrimination against the first, second and third respondents is well-founded and succeeds.

3 The claimant's complaint of victimisation is not well-founded and is dismissed.

4 The first respondent is ordered to pay compensation to the claimant as follows:-

4.1 Basic Award £11,400.00

4.2	Loss of statutory rights (the right not to be unfairly dismissed)	£ 400.00	£ 11,800
	The first, second and third respondents are ordered jointly and severally to pay to the claimant compensation for unlawful age discrimination as follows;		
4.3	Compensation for loss of earnings	£74,530.00	
4.4	Injury to feelings	£20,000.00	
4.5	Aggravated damages	£ 4,000.00	£ 98,530
			£110,330

5 This matter shall be listed for a hearing to consider the claimant's claim for costs, with a time estimate of three hours. By not later than 6 January 2012 the parties' representatives shall provide the Employment Tribunal with details of their availability to attend a Costs Hearing between 1 February and 31 March 2012.

REASONS

1 The claimant was represented by Ms Allen of Counsel, who called the claimant himself, his wife Mrs E Dixon, Mr K Buckingham, Mr S J Colmer and Mr J M Osborne to give evidence. A witness statement was submitted from Peter Fawcett on the basis that the Tribunal should only attach such weight to that statement as was appropriate in the circumstances, taking into account the fact that Mr Fawcett was not present to confirm under oath the accuracy of his evidence, nor to be cross-examined by the respondent's representative or to answer questions from the Tribunal. The respondent was represented by Mr Gorasia of Counsel, who called Mr Angus Gunning, Mr Michael David George, Mr Scott Jopling and Mr Nicholas Kenneth Baikie to give evidence. There was an agreed bundle of documents marked R1. The claimant's outline submissions were marked C1 and the respondent's outline submissions were marked R2.

2 The claimant brought three claims:-

2.1 Unfair dismissal.

2.2 Unlawful age discrimination.

2.3 Victimisation pursuant to section 27 of the Equality Act 2010.

3 The issues to be decided by the Tribunal were as follows:-

3.1 What was the reason for the respondent's dismissal of the claimant?

3.2 Is that reason a potentially fair reason?

3.3 Was that dismissal because of the claimant's age?

3.4 Was the claimant victimised by the respondent because he alleged that the respondent had contravened the Equality Act 2010?

3.5 Was evidence of what was said in meetings between the claimant and the respondent on 5 and 9 February 2011 inadmissible as being covered by the "without prejudice" rule?

3.6 Would the claimant have been dismissed in any event?

3.7 Did the claimant by his own conduct contribute to his dismissal?

3.8 What remedy is the claimant entitled to and in particular has the claimant mitigated his loss and when will the claimant be likely to obtain alternative employment?

3.9 Should, and if so in what amount, the claimant be awarded compensation for injury to feelings?

3.10 Should, and if so in what amount, the claimant be awarded compensation by way of aggravated damages?

4 At the commencement of the Hearing, Mr Gorasia on behalf of the respondent formally conceded that the respondent had failed to follow any fair procedure or indeed any procedure at all, before dismissing the claimant for reasons of capability and that accordingly the respondent's dismissal of the claimant would be unfair. No explanation was given by the respondent as to why this concession had not been made earlier, despite the fact that there had been two Pre-Hearing Reviews in this case and that both parties had been aware of the Hearing date since the telephone case management discussion which took place on 21 October 2011.

5 Mr Gorasia confirmed that the respondents maintained that the claimant had been dismissed for reasons relating to his capability. Mr Gorasia also indicated (and indeed subsequently argued in his closing submissions) that this had caused the respondent to lose trust and confidence in the claimant and that this also amounted to "some other substantial reason" pursuant to section 98(1)(b) of the Employment Rights Act 1996.

6 Two rather unusual issues arose during the course of these proceedings. The first related to discussions which took place between Mr Gunning and Mr George on behalf of the respondent and the claimant, at meetings which took place on 5 and 9 February 2011. The respondent maintained that those discussions were "without prejudice" and that accordingly nothing said in the course of those discussions was admissible as evidence in this case. The claimant denied that any such discussions were "without prejudice", and it was submitted on his behalf that, in any event, the content of the discussions should not be protected by the "without prejudice" principle. The second issue related to an admission made by the claimant during cross-examination, that he had deliberately lied when giving his evidence about the level of his losses and that he had been claiming job seekers allowance whilst falsely declaring to the DSS that he had not been carrying out any remunerative

employment. Mr Gorasia for the respondents submitted that such deliberate mendacity meant that wherever there was a conflict between what was said by the claimant and what was said by the respondent's witnesses, then the evidence of the respondent's witnesses should be preferred. Ms Allen on behalf of the claimant argued that the claimant had been no more than "stupid" in seeking to conceal what amounted to a relatively small amount of earnings and that, whilst this may taint the claimant's evidence about both his loss to date and future loss, it should not automatically mean that the claimant was not to be believed on those issues where his evidence of fact conflicted with that of the respondent's witnesses. It is appropriate to deal with those issues before setting out the Tribunal's findings of fact.

7 The "Without Prejudice" Issue

7.1 It was common ground between the parties that there had been two meetings between Mr Gunning and Mr George on behalf of the respondent and the claimant himself. Both meetings had taken place at the claimant's home. The first took place on 5 February 2011 and the second took place on 9 February 2011. The claimant was notified by telephone at 4:30pm on 4 February that Mr Gunning and Mr George would call to see him the following morning at 10:30am. No explanation was given as to what the meeting was about. The claimant presumed that it was no more than one of the regular meetings which took place between himself and Mr Gunning/Mr George to discuss routine matters. It was again common ground that the claimant had not been notified in advance, that during this meeting there would be discussed the termination of his employment. The claimant was not advised of his right to have someone present during this meeting. Nothing was set out in writing from the respondent to the claimant either before or after the meeting. At 3:30pm on 8 February the claimant received a telephone call from Mr Gunning telling him that Mr Gunning alone would visit him between 10:00am and 10:30am on 9 February. The claimant asked if he could have a witness attend with him on that occasion and Mr Gunning agreed that Mr Buckingham could attend as the claimant's witness.

7.2 It was conceded by the respondent that the decision to dismiss the claimant had been taken some time before the first meeting on 5 February. Mr George and Mr Gunning hoped to persuade the claimant to accept a sum of money by way of compensation upon the termination of his employment. The claimant's evidence was that at no time during this meeting did either Mr George or Mr Gunning tell him that any discussions would be "without prejudice". The claimant stated that he would not in any event know what that phrase meant. Both Mr Gunning and Mr George stated that once the claimant had been told that his employment was to be terminated, Mr Gunning had stated that discussions from that point would be on a "without prejudice" basis. The second meeting on 9 February was attended by Mr Gunning, the claimant and Mr Buckingham. Mr Gunning's version of that meeting was that when he arrived he informed the claimant and Mr Buckingham that before any discussions took place, "it was important that this meeting was entirely without prejudice". Mr Gunning said that neither the claimant nor Mr Buckingham objected to that. The claimant's version was that the words "without prejudice" were never mentioned in his presence and that he only learned

from Mr Buckingham later that day that, after the meeting had ended, Mr Gunning had told Mr Buckingham that he considered the meeting to have been "without prejudice". Mr Buckingham's evidence was that the meeting between Mr Gunning and the claimant had finished and the claimant had indeed left the room before Mr Gunning mentioned for the first time, "we have only had two without prejudice meetings". Mr Buckingham had informed Mr Gunning that if he had intended the meeting to be "without prejudice", then he should have arranged the meeting on that basis and made it clear at the beginning of the meeting that Mr Gunning believed that to be the basis upon which the meeting had taken place.

7.3 During their evidence both Mr Gunning and Mr George stated that they were accustomed to dealing with employment matters and both had some experience in both engaging and dismissing employees. Both had far more commercial acumen than the claimant. Both however undoubtedly found the dismissal of the claimant an uncomfortable and unsettling experience. No explanation was given by or on behalf of the respondent as to why it had not made it clear from the outset that a decision had been taken to dismiss the claimant and that the purpose of these meetings was to attempt to negotiate terms of settlement so as to smooth the way for the claimant's departure. There was certainly no "without prejudice" correspondence. The Tribunal was therefore left with a straightforward decision as to whose version of those events was to be preferred. The deciding factor for the Tribunal was the clear, unbiased and unequivocal evidence of Mr Buckingham. The Tribunal found Mr Buckingham to be an honest, credible and reliable witness whose evidence was given in a particularly straightforward and unassuming manner. If Mr Buckingham was to be believed then the claimant's version of events was more likely to be correct and the version proffered by Mr Gunning and Mr George was not. The respondent challenged the credibility of the claimant's evidence on other matters which, the respondent said, would reflect on the reliability of the claimant's evidence with regard to this point. Similarly, the conduct and evidence of the respondent's witnesses (as is set out below) was at times less than persuasive, less than credible and lacking in consistency. Balancing all of those matters, the Tribunal found that the claimant had not been informed before either of those meetings that they were considered by the respondent to be "without prejudice".

7.4 In any event, it was argued by Ms Allen on behalf of the claimant that the nature of the discussions and the manner in which they were conducted was such as to remove the "without prejudice" privilege sought by the respondent. It was acknowledged by both sides that parties to any dispute should be encouraged so far as possible to settle that dispute without resorting to litigation and should not be discouraged by the knowledge that anything said in the course of negotiations may be used to their disadvantage in the course of legal proceedings. That is a matter of public policy and essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions of liability. It is therefore a prerequisite that there should be in existence a dispute between the parties. The claimant of course was blissfully unaware (until part of the way through the first meeting on 5

February), that a decision had been taken to dismiss him. Without that knowledge, he could not be said to be "in dispute" with his employer. Anything said to him before he was informed that he was to be dismissed, could not attract the privilege or protection of "without prejudice" negotiations. Certainly there were no figures discussed at the first meeting. All the claimant did was disagree with Mr George, telling him that he was still very fit and more than capable of doing his job in response to Mr George's comment that, in his opinion, the Head Gamekeeper's job was "a young man's job".

7.5 Furthermore, whether a communication is "without prejudice" or not depends to a large extent upon the substance of the communication – ie whether it forms part of a genuine attempt to settle. The label will not attach privilege to a document or statement which is not "without prejudice" in nature. Further still, it is permissible in a discrimination claim for the events in a "without prejudice" meeting themselves to be acts of discrimination. That was the case in **BNP Paribas v Mezzotero [2004] IRLR 508 – EAT**. The Employment Appeal Tribunal found that the Employment Tribunal was entitled to admit evidence of what occurred at this meeting as, at the point when the meeting occurred, there was no dispute between the parties and therefore the meeting could not have been in furtherance of settlement of a dispute. What was important was the subject matter of the exchanges between the parties. It was acknowledged by the Employment Appeal Tribunal that discrimination legislation seeks to eradicate what the Court of Appeal had previously referred to as the "very great evil" of discrimination and that it was very much in the public interest that allegations of unlawful discrimination in the workplace are heard and properly determined by the Employment Tribunal to whom complaint is made and that further, it is widely recognised that cases involving allegations of discrimination are peculiarly fact sensitive and can only be properly determined after a full consideration of all of the facts. The primary facts from which inferences of unlawful discrimination could be drawn are therefore a vital part of any complaint of direct discrimination before an Employment Tribunal. An employer should not seek to use the cover of "without prejudice" language as cover to pursue a course of action which is itself blatantly discriminatory. That would bring the respondent's conduct within the accepted exception to the "without prejudice" rule, which exception is known as "unambiguous impropriety". That phrase was first used by Hoffman LJ in **Forster v Friedland** when Lord Justice Hoffman stated;

> "One party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of what the other said or wrote would act as a cloak for perjury, blackmail or "unambiguous impropriety"'.

In **Mezzotero** Mr Justice Cox found that the respondent employer's arguments to attempts to conceal what was clearly discriminatory conduct by using the without prejudice rule was a cynical abuse of its purpose.

7.6 The Tribunal was satisfied that the respondent in the present circumstances could not seek the protection of the "without prejudice" principle to prevent admission in evidence of what was said by Mr George and

Mr Gunning in these two meetings as to why the claimant's employment was being terminated. To do so would allow them to conceal their oppressive and dishonourable conduct in the way they dealt with the claimant. That would be an abuse of the process by which protection is made available in genuine negotiations to resolve a dispute.

8 The Claimant Lying Under Oath

8.1 In his written statement, the claimant deals with the loss of his employment with the respondent, his attempts to obtain alternative employment and his prospects of obtaining future employment. At paragraph 45 of his statement he states;

> "I had hoped that I might pick up at least some work at a level of income on which I could live, through speaking to my contacts and searching in the local area and I would be spared the humiliation of having to sign on. After a few weeks I realised that this was hugely optimistic of me. I did then register for Jobseekers Allowance. We are living off our savings".

8.2 At paragraph 49 of his statement he states;

> "I have also made sure that I have 'kept my hand in' at gamekeeping by volunteering to help some of my friends on other Estates at shoots over this season. I have been paid a small amount of money on each day which has barely covered my expenses (vehicle, dogs, clothing etc) with at best a nominal amount on top".

8.3 On the morning of the first day of the Hearing the claimant produced a schedule (pages 90-91 in the bundle) showing dates in August, September and October when he had been paid for helping out on the Muggleswick and Allenhead Grouse Moors. There appears in the bundle at pages 55-57 an extract from the claimant's Jobseekers record.

8.4 Under cross-examination from Mr Gorasia, the claimant was asked whether he had carried out any work between 21 November and 5 December. The claimant replied, "No". It was then put to the claimant that he had been seen working on the Bollihope Moor between 24 and 26 November. The claimant conceded that he had in fact been working at Bollihope between those dates. When asked why he had lied under oath to the Tribunal the claimant's response was, "I thought nobody would know or find out". Under further cross-examination the claimant was forced into further concessions that he had in fact been working on Bollihope on other dates which were not listed on the schedule at pages 90-91 in the bundle. It was then put to the claimant as to whether he had disclosed to the DSS (bearing in mind that he was claiming Jobseekers Allowance) that he was in fact receiving payment for work carried out on a considerable number of days between August and December. The claimant admitted that he had not informed the DSS. His explanation was that he could not manage on the Jobseekers Allowance

alone. The claimant admitted that he had intentionally not told the DSS of this additional income and was aware of his obligation to do so.

8.5 Mr Gorasia submitted that such conduct by the claimant was a deliberate and intentional attempt by the claimant to mislead both the respondent and the Tribunal as to the true level of his losses. Not only was his statement and schedule misleading but he had lied under oath on two distinct occasions whilst giving his evidence. Mr Gorasia submitted that the claimant's conduct impacted upon all of his evidence, including any issue relating to liability where there was a direct dispute between him and the respondent's witnesses. Mr Gorasia argued that the claimant's conduct amounted to perjury and that it should be taken into account in assessing whether or not it was just and equitable to award compensation to the claimant and if so in what amount. Mr Gorasia pointed out that the claimant had deliberately told a series of untruths over a concerted period of time. That amounted to the claimant attempting to undermine the legitimacy of the Tribunal's judicial process and was trying to dishonesty influence the outcome of these proceedings.

8.6 Ms Allen for the claimant, whilst no doubt as taken aback by this development as was the Tribunal, sought to persuade the Tribunal that the claimant's transgression should not be viewed in such a way as to completely dilute the quality of his evidence with regard to other matters. Ms Allen described the claimant's conduct as "stupid" and "an error or judgment". Ms Allen submitted that this one error should not dilute the credibility of the entirety of the claimant's evidence, nor indeed his schedule of loss.

8.7 The Tribunal was shocked and gravely concerned at the claimant's conduct. The claimant presented himself as an upstanding, hardworking and honest individual, who was the victim of a grave injustice at the hands of his employer. The Tribunal was particularly concerned and disappointed at the ease with which the claimant told blatant lies and attempted to conceal them until presented with irrefutable evidence to contradict his own evidence.

8.8 The Tribunal had to consider whether, and if so to what extent, this impacted upon the claimant's credibility with regard to other issues of fact, where his own evidence may be determinative. In particular, the Tribunal had to consider this when deciding whose version of events was to be preferred with regard to what was said at the two meetings on 5 and 9 February, referred to above. As things turned out, the claimant's evidence was not solely determinative with regard to those issues. As is stated above, the Tribunal had doubts about the accuracy and credibility of the evidence of both Mr Gunning and Mr George with regard to those meetings, but did have the benefit of the most persuasive evidence given by Mr Buckingham. Accordingly, the claimant's conduct in the witness box in this regard, whilst both reprehensible and totally unacceptable, was not disregarded by the Tribunal in considering its findings of fact on liability, but was given greater significance when assessing the credibility of the claimant's evidence on his claim for compensation.

9 Findings of Fact

Having heard the evidence of the parties and their witnesses, examined the documents to which it was referred and carefully considered the closing submissions of the parties' representatives, the Tribunal made the following findings of fact on a balance of probability:-

9.1 The first respondent, The Croglin Estate Company Limited, is the owner of Stanhope Grouse Moor in Weardale in County Durham. The company is owned and managed by Mr Michael David George and his father. In recent years Mr George (Junior) has taken over responsibility for the management of the company. The company employs Mr Angus Charles Gunning as its Agent in dealing with the company's several property interests, including the Grouse Moors. Mr Gunning is also a Director of the company.

9.2 Grouse shooting is an expensive and somewhat exclusive pastime. The cost of a day's shooting can run to several thousand pounds. It is now almost impossible to acquire a grouse shooting moor in the north of England. The capital value of a grouse moor is said to be approximately £4,500 per brace of grouse. If that is correct, then the capital value of Stanhope Grouse Moor at the end of the 2011 shooting season would be approximately £24,750,000.

9.3 Grouse inhabit the upland heather moors of Northern England and Scotland. Heather provides the environment within which the grouse nest, breed and proliferate. The shooting season lasts from 12 August to 10 December each year. The number of shooting days in any season depends upon the number of grouse available. Responsibility for the management of the moor lies with the Gamekeeper. The Gamekeeper is responsible for creating an environment within which the grouse may successfully breed in sufficient numbers to provide sport for the owners and their guests during the shooting season, leaving sufficient numbers for successful breeding the following year.

9.4 The Gamekeeper's duties include management of the heather, control of vermin, prevention of parasites and disease, construction and maintenance of shooting butts and the organisation and supervision of shooting days.

9.5 The claimant was employed by the respondent company as its Gamekeeper for the Stanhope Moor. The claimant had worked on Stanhope Moor since 1 April 1979 as an Under Keeper. He became Head Keeper in 1990 when the previous Head Keeper retired. For the purpose of these proceedings the claimant has continuous employment from 1 April 1979 and was aged 58 when dismissed on 8 June 2011.

9.6 It was accepted by all parties that the position of Gamekeeper was, to the claimant, more than a job or livelihood, but was as he put it, "my whole life". The claimant and his family lived in a house on the Moor. The house was owned by the respondent and all of its outgoings were paid by the respondent. It was acknowledged that the life of the Gamekeeper is one of

total devotion, with long hours and arduous physical work, often in the most difficult conditions. From the evidence given throughout these proceedings it was clear that the claimant was held in high regard by his neighbours, colleagues and peers as a decent, hardworking and competent Gamekeeper.

9.7 There are a number of other grouse moors close to Stanhope Moor. Those include Muggleswick, Bollihope, Walsingham and Allenshead. Those moors are owned by different companies or syndicates and managed by different Gamekeepers. Certain moors are much larger than others, some have much better heather cover and some are better equipped than others. The success of any grouse moor tends to be measured in the number of brace of grouse shot in any particular season.

9.8 When the respondent company acquired Stanhope Moor ten years ago, the previous ten year average annual bag was 1,855 brace. After the respondent acquired the Moor, the ten year average fell to 1,215 brace per annum. Using the formula referred to above, Mr George (Junior) calculated that this represented a reduction in the capital value of the Moor of some £2.5 million. This became a matter of great concern to the respondent company, both in financial terms and in terms of the quality of the sport being made available to the Directors and their guests. The Directors felt that the general performance of Stanhope Moor was falling in comparison to the adjoining moors, particularly Muggleswick and Walsingham. The Directors formed the view that this "reflected poorly on the management team". Although the "management team" was never specifically identified by the respondent's witnesses, it is clear that the responsibility was being placed with the claimant alone.

9.9 Mr George (Junior) produced a report, known as the "Maxcap" report, a copy of which is attached to his first statement. It is dated 3 September 2009. Mr George said in his evidence, "A formal review of the company was carried out in September 2009 by its Directors". The report states at page 5;

> "We need fundamental change because David Dixon is unlikely to change and does not understand our quest for constant improvement in all areas. He is very set in his ways. He is a keeper not an organiser. You cannot see DD doing all the GPS computer work, general organisational excellence we should really expect. DD is a nice experienced loyal keeper but he is not performing".

On the following page of the report, under the heading "Personnel – Dissolution" the proposal states:-

- "DD does another two seasons.
- He moves to his house which we subsidise (although the claimant lived in a house belonging to the respondent, he owns his own house in a nearby village).
- We have no head keeper during this interregnum period.

- We hire a new senior new hire whom we expect to become head keeper by Christmas 2011".

The report then continues sets out various recommendations for grouse management and poses a series of questions for Mr Gunning to deal with as the first respondent's Agent.

9.10 The respondent accepted that there had been absolutely no consultation whatsoever with the claimant before this report was prepared. The contents of the report were never disclosed to the claimant prior to his eventual dismissal in March 2011. Accordingly, the claimant was never given the opportunity to comment upon the concerns expressed by the Directors of the respondent, nor to make any proposals as to how those concerns may be addressed. The Tribunal found that by September 2009 the Directors of the first respondent had already formed the view that the claimant should be replaced as Head Keeper. The use of phrases such as "set in his ways", "unlikely to change" and "he is a keeper not an organiser – you cannot see DD doing all the GPS computer work" indicated that the respondent's Directors had formed the view that the claimant was old fashioned and either unable or unwilling to learn more modern methods. No evidence was produced by the respondent to support these conclusions. The Tribunal found that by this time the respondent's Directors had already begun to form the view that they wanted a younger, fresher Head Keeper to replace the claimant.

9.11 An annual general meeting of the respondent company took place on 18 May 2010. Mr George (Junior), Mr Gunning and the claimant were in attendance. No mention is made in these minutes of the Maxcap report. No mention is made of any dissatisfaction with the claimant's performance. Mention is made of the hiring or a new Beat Keeper (John Forster). There was already one Beat Keeper (Ian Smith) working under the claimant. This would mean that, for the first time, the claimant would have two Beat Keepers to assist him. The claimant acknowledged that he had initially been resistant to the idea of employing an additional Beat Keeper. The claimant was concerned that the volume of heather on the Stanhope Moor was gradually being eroded and his view was that the cost of employing another Beat Keeper may have been better utilised in providing more modern equipment for the management of the heather.

9.12 The 2008 season produced 2,052 brace; the 2009 season produced 748.5 brace and the 2010 season produced 1,525 brace. The respondent considered the 2010 results to be disappointing and less than what they considered to be the true capability of the Moor. They decided to commission an independent study from NKB Upland Sporting Limited. The report was prepared by Mr Nicholas Baikie. Mr Baikie gave evidence. A copy of his report appears at page 58 in the bundle. Mr Baikie spent three days on the Moor, the majority of which was spent in the company of the claimant. Mr Baikie was said to have been given "a very wide brief", although no formal letter of instruction was ever provided. Mr Baikie stated that his instructions

had been received by e-mail and/or telephone. The Tribunal found this to be somewhat unusual. The Tribunal found that it was more likely than not that the respondent were looking for evidence to support the view which they had already formed, namely that the poor performance of the Moor was due to the claimant's poor management.

9.13 Mr Baikie's report dealt with a number of matters relating to the management of the Moor. These matters were also dealt with by those witnesses who gave evidence for both the claimant and the respondent. The evidence of Mr Jopling (who replaced the claimant as Head Keeper of the Stanhope Moor) and Mr Colmer (Head Keeper of the adjoining Muggleswick Moor) were particularly helpful to the Tribunal. The Tribunal preferred their evidence to that of Mr Gunning and Mr George (Junior). Mr Gunning is both a Director of the respondent company and acts as its Agent in the management of its grouse moors. The respondent's criticisms of "the management team" must include Mr Gunning and to a certain extent Mr George (Junior), as well as the claimant. Both had a proprietary interest to protect and Mr Gunning in particular had some considerable responsibility for the management of the claimant. Mr Jopling and Mr Colmer on the other hand were found by the Tribunal to be totally credible, honest and reliable witnesses.

9.14 Mr Baikie's report highlighted the following matters;

i) The quality of the heather cover on Stanhope Moor. This was adversely affected by overgrazing by sheep, overgrazing by rabbits and poor burning technique by the claimant. The Tribunal found that the claimant had little, if any, control over the overgrazing by sheep. A number of local farmers have legal rights to graze their sheep on Stanhope Moor. Those rights may only be extinguished by formal agreement. This would usually mean the respondent company acquiring those legal rights, or acquiring replacement grazing pastures on nearby land. It was accepted by all parties that overgrazing by sheep was by far the main cause of the deterioration in the volume and quality of heather cover on Stanhope Moor. The claimant was responsible for attempting to persuade the local farmers to minimise sheep grazing in particular areas at particular times. This was widely regarded to be a most difficult task. Certainly Mr Colmer from the adjoining moor stated that it was a task he would leave to his employer. The Tribunal found that the allegation that the claimant had failed in his duty in that regard, was not substantiated.

ii) With regard to rabbits, all three Keepers who gave evidence confirmed that rabbits were a constant problem. However, whilst they do eat heather, they are not a major cause of deterioration in the volume or quality of the heather. Rabbits are controlled by natural wastage in harsh winters, Myxomatosis and by shooting. Mr Jopling confirmed that since he took over management of Stanhope Moor he and his team have shot several thousand rabbits. It was accepted that this number of rabbits shot was particularly high. The claimant had never received any formal warning about his alleged failure to control

the rabbit population. The Tribunal found that the claimant's alleged failure to control the rabbit population was not substantiated.

iii) The claimant was also criticised in the report for failing to properly control vermin on the Moor. Vermin includes foxes, stoats and weasels, all of which prey upon grouse. Again, the evidence given to the Tribunal strongly contradicted any allegation that the claimant was failing to properly control such vermin. The Tribunal found that the claimant was controlling such vermin as well as could be expected.

9.15 The claimant was criticised for his management of the medication given to the grouse to prevent worms and other parasites. The grouse are treated for such parasites by being supplied with medicated grit or by direct dosing (which involves treating each bird individually by netting and tagging). The claimant had been a supporter of direct dosing. That procedure involves a vast amount of work during the hours of darkness which, it was acknowledged by all, the claimant was willing to undertake. Again, the Tribunal found that the respondent's criticism of the claimant in this regard was unfounded.

9.16 Adverse comment was made about the claimant's lack of organisation on the shooting days themselves. Mr George (Junior) described one of his clients as having described the claimant as "the laziest gamekeeper I have ever come across". Mr George (Junior) alleged that shooting days were not organised very well or efficiently. The Tribunal found these comments to be totally unjustified and contradicted by the independent evidence of Mr Jopling and Mr Colmer. The Tribunal found that, had there been any fault with the claimant in the way in which he organised the shooting days, then those concerns would have been rapidly brought to his attention either formally or informally by the respondent's Directors or by Mr Gunning.

9.17 In his discussions with Mr Baikie, the claimant gave the opinion that Stanhope Moor was under capitalised in comparison with adjoining moors, in that the respondent had failed to provide sufficient, modern equipment to assist him in his management of the Moor. He also indicated that he had a poor working relationship with Mr Gunning and the Directors, mainly based upon the fact that he saw little of them. The claimant felt that to a large extent he was left to his own devices. He trusted his Beat Keepers to deal with their particular area of the Moor. The claimant acknowledged that he would sometimes go for a couple of weeks without seeing the other Beat Keepers.

9.18 The claimant did express an opinion that in recent years Stanhope Moor had been "overshot". The claimant's view was that too many birds were being shot at the end of the shooting season, which meant that there was insufficient breeding stock left to produce adequate birds for the following season. Mr Baikie did not state in his report whether he considered this to be accurate or not. All he did was suggest that management should discuss with the claimant the number of birds counted in July, before the shooting season started. The Tribunal found that it was more likely than not that the claimant was correct in his assertion that the Moor was being overshot and that this

was a material factor that contributed towards the poor performance of the Moor.

9.19 Mr Baikie's conclusions in his report included the following:-

- "The current negativity in the staff whether just or not will undoubtedly be having a detrimental effect on the Moor and its advancement and requires to be sorted out immediately.

- We are convinced that the key to increasing/improving the grouse numbers on Stanhope Moor is for the management efforts to focus around the targeting and removal of winter sheep pressure.

- The Moor itself is capable of being very effectively keepered by three full time men on each of the two beats known as the Westend and the Eastend, which are capable of producing three days shooting over 7,660 acres. We would not advocate employing anymore keeping staff on the Moor.

- We found David Dixon to be a knowledgeable and competent Grouse Keeper during our time with him with an intimate understanding of the Moor.

- DD is convinced that over the past few years Stanhope Moor in his opinion has been overshot. We feel it is vital that the July counts are discussed in detail with the Head Keeper before the season begins in order to assess the usually planned shooting programme ahead.

- It is clear to us that DD felt he was under real pressure/scrutiny from his employer and their agent this season in terms of his grouse moor management capabilities. He openly admitted to us that he did not feel like the Head Keeper of Stanhope Moor and felt he had been systematically undermined for a long time by the owner and management. DD feels unappreciated and his morale is low (despite his assurances to us that it was not affecting his job). He has clearly lost respect for his employer (and agent) which will inevitably be having an effect on his commitment to the business.

- Stanhope Moor is a prolific grouse moor which has been performing (in terms of quantities of grouse) well over the last ten years but has not mirrored the recent achievements of similar neighbouring properties. The Moor itself under the head keepership of DD has decreased in productivity which DD would attribute to the poor performance of the Eastend, overshooting and habitat loss (we believe in that order of importance).

- The Moor itself has suffered from very visible, extensive overgrazing (both historic and current) which has and will be reducing its productivity as a grouse moor.

- The main question which this report highlights (and a recurring issue throughout) is the Head Keeper abilities of David Dixon and perhaps as importantly the management of him. We have little doubt that DD is a competent grouse moor keeper which is partly borne out by the grouse bags which have occurred during his career at Stanhope. However there are some serious questions/issues over the relationship between DD, Angus Gunning and Mr George. If these relations have broken down we feel it is impossible to drive the business forward and maximise the grouse productivity until these issues are addressed.

- Throughout my time with DD he came across as a competent and knowledgeable grouse keeper although lacking in direction, energy and management".

9.20 The final conclusion on the last page of Mr Baikie's report states as follows:-

> "We feel that there are two scenarios open to the Estate if they are intent on maximising the productivity of Stanhope Moor. The first is to reach an agreement with DD to stand down as head keeper replacing him with a new candidate. The second scenario is to work with DD and improve his management and accountability within the business".

9.21 Mr Baikie's report was never disclosed to the claimant and its contents were never discussed with him.

9.22 Mr Baikie's report was produced in November 2010, towards the end of the shooting season. There were no further developments until February 2011 when Mr George and Mr Gunning decided to visit the claimant and inform him that he was to be replaced as Head Keeper. In his evidence, Mr George stated that it was Mr Baikie's report which triggered the decision to remove the claimant as Head Keeper. It was clear that neither Mr George nor Mr Gunning had any intention of discussing with the claimant their perception of his alleged shortcomings and/or providing him with any opportunity to respond or indeed to improve his performance. A meeting was organised by telephone the previous evening. At no time was the claimant given any indication whatsoever that his employment was to be terminated. The claimant was never told the purpose of the meeting nor was he given the opportunity to be accompanied at a meeting when his employment was to be terminated. For the reasons set out above, the Tribunal found that it was never indicated to the claimant before the meeting began that its contents were to be "without prejudice".

9.23 Mr George (Junior) and Mr Gunning arrived at the claimant's house at 10:30am on 5 February. Mr Dixon served them with coffee and biscuits and retired to the kitchen. After exchanging pleasantries and discussing the recent direct dosing programme, Mr George informed the claimant that he needed to change the subject of the discussion. In the claimant's words, Mr George informed him "that they had made a decision and that they wanted a new head keeper as he thought that at 58 years of age I was too old, and he thought the work was too hard for me. He continued that in his opinion it was a young man's job". Mr Gunning and Mr George's version of this exchange was that Mr George was merely repeating what the claimant had himself said on a previous occasion, namely that the Head Keeper's role was indeed "a young man's job". The Tribunal found that the claimant's version was more likely to be correct. In any event, whichever version was the more accurate, it was clear that the claimant's age was undoubtedly a factor which had been taken into account by the respondent when it decided to terminate the claimant's employment. Mr George and Mr Gunning informed the claimant that the respondent would be prepared to offer him "a good package to go".

9.24 At that point Mrs Dixon came back into the room and was told by the claimant that his employment was being terminated. Mrs Dixon's recollection of Mr George's (Junior) comment upon the reason was that "he wanted a fresher, younger keeper". Mrs Dixon asked Mr George whether he was putting youth before age and experience and Mr George confirmed that that was correct. Mrs Dixon became upset and the conversation became a little heated. Mrs Dixon left the room and then Mr George (Junior) left the room, asking Mr Gunning to explain to the claimant his rights as an employee and advising him to appoint a good Solicitor. Mr George and Mrs Dixon returned to the room later when Mr George confirmed that he still thought highly of the claimant and his experience but insisted that he wanted "a younger team leader" and there was "no other reason".

9.25 The claimant received a further telephone call on the afternoon of 8 February from Angus Gunning, telling him that Mr Gunning would visit him again the following morning to discuss matters further. The claimant asked if his friend Mr Buckingham could be his witness at this meeting and Mr Gunning confirmed that he would agree to that. At the meeting itself, discussions took place about the terms of a severance package. The claimant asked Mr Gunning whether Mr George had changed his opinion since the previous meeting, namely that the claimant was "too old" and that the Head Keeper's position was "a young man's job". Mr Gunning confirmed that Mr George had not changed that opinion. Mr Buckingham then pointed out that "this was ageism and unlawful". Mr Gunning agreed that it was. Again, the Tribunal records that, for the reasons set out above, this meeting was not to be regarded "without prejudice".

9.26 The Tribunal at this point records that the discussions between Mr George, Mr Gunning and the claimant (on the second occasion in Mr Buckingham's presence) clearly showed that the claimant's age was at least a factor, if not the principal factor, in the respondent's decision to terminate the claimant's contract of employment.

9.27 It became clear to Mr Gunning that the claimant was unwilling to accept the terms which were being offered to him. Mr Gunning informed the claimant in no uncertain terms that his alternative was to commence Employment Tribunal proceedings which, according to Mr Gunning, would take up to a year to conclude and in which the claimant's level of compensation would be limited to £68,000. Mr Gunning gave the opinion that the Employment Tribunals rarely, if ever, awarded damages of that level. Mr Gunning also made it clear that the claimant would have to vacate the house which he occupied. He also suggested the claimant may be willing to sell his own house in the village to the respondent for it to house the new Head Keeper.

9.28 There was an exchange of correspondence between the claimant's Solicitor and the respondent. Copies appear at pages 47-54 in the trial bundle. The first letter is dated 22 February from the claimant's Solicitor to Mr Gunning. Mr Gunning replied on 2 March and the claimant's Solicitor replied again on 7 March. In the letter of 7 March the claimant's Solicitor made reference to the "contemporaneous notes from the meetings", copies of which appear at pages 19-22 in the bundle. By letter dated 8 March (the following day) Mr Gunning wrote direct to the claimant informing him as follows:-

> "I am writing to advise you that your employment as a keeper for the Croglin Estate Company at Stanhope is going to be terminated with effect from 8 June 2011. The reason for this is poor performance. On a consultant's review severe weaknesses have emerged in the management of the other keepers on the Estate and the ability to work as part of a team. We have been concerned for a long period of time about the poor relations you have had with graziers on the Moor and the vermin have not been controlled properly despite several requests. I am sorry that we feel that we have no other choice but to come to this decision".

The letter then set out the claimant's right to appeal. By letter dated 11 March from his Solicitor, the claimant confirmed that he wished to appeal, although indicated that he had little if any confidence in the respondent's procedures particularly with regard to what was described as a "sham dismissal process".

9.29 The claimant was never invited to an appeal meeting. It was accepted by the respondent that no appeal hearing was ever organised. The claimant, through his Solicitor, served a statutory questionnaire on the respondent. Mr Gunning denied ever receiving that questionnaire, even though it was sent to the same address as previous correspondence. Mr George (Junior) however, acknowledged that the questionnaire had been received. His explanation for the respondent's failure to answer it was that their Solicitor had advised that the points would be dealt with in their response to the claimant's complaint to the Employment Tribunal. Employment Tribunal proceedings were issued on 5 April 2011. The respondent's response form was presented on 3 May 2011. In its response, the respondent admitted dismissing the claimant and stated that "His dismissal was due to poor performance over a long period of time. The claimant's dismissal is not by reason of his age and is not discriminatory

and the decision to terminate the claimant's employment was not as a consequence of the claimant raising concerns about age discrimination".

9.30 Within a matter of weeks, the respondent engaged Mr Scott Jopling (aged 42) to replace the claimant as Head Keeper.

The Law

10 Unfair Dismissal

Section 94(1) of the Employment Rights Act 1996 states that "an employee has the right not to be unfairly dismissed by his employer".

Section 98 of the Employment Rights Act 1996 states:

"98(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

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

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do.

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

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

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

11 As is stated above, at the commencement of the first day of this Hearing the respondent conceded that its dismissal of the claimant was unfair, in that the respondent had failed to follow any or any fair procedure pursuant to section 98(4). However, the respondent still maintained that its reason for dismissing the claimant under section 98(1) and (2) related to the claimant's capability for performing work of the kind which he was employed by the respondent to do. In the alternative, the

respondent argued that its dismissal of the claimant was for "some other substantial reason" as set out in section 98(1)(b).

12 Where an employee is dismissed for reasons relating to his capability, it is not for the employer to satisfy the Tribunal that the employee was in fact incapable. It is sufficient for the employer to show that it genuinely believed on reasonable grounds after a reasonable investigation that the employee was in fact incapable. The burden of proof lies with the employer, however, to show that genuine belief on reasonable grounds after a reasonable investigation. In the present case, the Tribunal was not satisfied that the respondent had discharged that burden. It is not sufficient for an employer to state that it genuinely holds a belief in its employee's incompetence of incapability. There have to be reasonable grounds for that belief. Without a reasonable investigation there cannot be any reasonable grounds for the belief.

13 In the claimant's case, the evidence from the vast majority of the witnesses (including the respondent's) was that the claimant was a hard working, knowledgeable and competent Keeper. Each of the allegations against him made by the respondent was either unsubstantiated or exaggerated, if not fabricated. The concerns expressed in the Maxcap report of September 2009, the AGM minutes of May 2010 and the Baikie report of November 2010 were never raised with the claimant. He was never given the opportunity to challenge or even comment upon the allegations being made against him. From the evidence given by the claimant and the other witnesses (including some from the respondent), the Tribunal found that the claimant would probably have been able to respond fully to each of those allegations. The Tribunal found that it was the respondent's knowledge that the claimant would probably be able to respond to those allegations, which prevented the respondent from providing the claimant with that opportunity. Neither the Maxcap report nor the Baikie report could be described as a reasonable investigation into the allegations against the claimant. The respondent's dismissal of the claimant on capability grounds was not simply procedurally unfair, but substantively unfair. The respondent has failed to show that the reason for its dismissal of the claimant (or its principal reason for so doing) was a reason relating to the claimant's capability.

14 Having failed to discharge that burden, the respondent then sought to argue in the alternative, that its dismissal of the claimant had been for "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held". Although not pleaded in its ET3, the respondent sought to argue this reason in its closing submissions. The respondent's position was that there had been a total breakdown in trust and confidence between the respondent and the claimant as its Head Keeper. The respondent argued that there had been an irretrievable breakdown in trust and confidence between Mr Dixon and Mr George and/or Mr Gunning. In support of that argument, Mr Gorazia put forward the following matters:-

(a) Mr Baikie in his report had found that there had been a potential breakdown in relations between the claimant and Mr Gunning and Mr George.

(b) Mr George makes specific reference to the claimant's relationship with management, including Mr Gunning.

(c) The weight of the evidence indicates that there was a breakdown in working relations between the claimant and Mr George/Mr Gunning to such an extent which would justify a dismissal on SOSR grounds.

15 The Tribunal was not persuaded by this argument. The allegations of this irretrievable breakdown were not supported by the evidence. Up until the date when they told him that his employment was being terminated, both Mr Gunning and Mr George were happy and willing to discuss the general management of the Moor with the claimant. Almost 18 months had elapsed from the Maxcap report to the date when the claimant was told he was being removed. During that time, the respondents had never complained to the claimant about his management style or working relationship. The comments and observations by Mr George and Mr Gunning to the claimant were no more than the usual working tensions which are likely to exist between an employer and its employee in circumstances such as these. The Tribunal was satisfied that the respondent had made a commercial decision to remove the claimant and that this did not amount to a "substantial" reason. In fact, the respondent's position was that it believed its working relationship with the claimant had broken down because of his poor performance. As is set out above, the respondent had not satisfied the Tribunal that the claimant's performance had been so poor as to justify even raising it with him, let alone dismissing him for it. It was disingenuous of the respondent to attempt to justify an unfair dismissal on capability grounds as a dismissal for "some other substantial reason".

16 Accordingly, the respondent's dismissal of the claimant was both substantively and procedurally unfair.

17 <u>Age Discrimination</u>

The claimant claims direct age discrimination and victimisation pursuant to sections 5, 13, 27 and 39(2) of the Equality Act 2010. The claimant alleges that the dismissal was less favourable treatment because of his age, contrary to section 13 and discrimination contrary to section 39(2)(c) by dismissing him. The claimant alleges that he was victimised for complaining about age discrimination in that he was refused the opportunity to appeal against his dismissal because he had made allegations of age discrimination.

18 For the reasons set out above, the Tribunal found that the respondent had not dismissed the claimant for reasons relating to his capability/performance, nor for "some other substantial reason". Again, as is set out above, the Tribunal found that the claimant's age was, at the very least, a material factor in the respondent's decision to dismiss him. The Tribunal found that comments/observations were made by the respondent to the effect that the role of Gamekeeper "is a young man's job", and the claimant was "set in his ways" and "unlikely to change" and "you cannot see DD doing all the GPS computer work". The Tribunal found that those were phrases which had clear connotations about the claimant's age.

19 Because discrimination cases are notoriously difficult to prove, there are special rules which apply to the burden of proof in discrimination cases. Now known as the "reverse burden of proof", the relevant provisions are contained in section 136 of the Equality Act 2010. Section 136(2) states that, "if there are facts from which the Court could decide in the absence of any other explanation that the respondent has contravened the provision concerned, the Court must hold that the contravention occurred". Section 136(3) states that "subsection (2) does not apply if the respondent shows that the respondent did not contravene the provisions".

20 Important guidance on the changed burden of proof was provided in **Barton v Investec Limited [2003] IRLR 332**. In that case, the Court of Appeal issued 13 separate guidelines as to how the Tribunal should assess whether the claimant has proved, on the balance of probabilities, facts from which it could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination. Those guidelines were usefully set out by Ms Allen in her closing submissions document. It is not necessary to set those guidelines out verbatim. Suffice to say that it is for the claimant who complains of age discrimination to prove on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful or which is to be treated as having been committed against the claimant. If the claimant does not prove such facts he will fail. In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts. Those inferences can include in appropriate cases any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire. The Tribunal should assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that age was not a ground for the treatment in question. The Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal would need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

21 The Tribunal has set out above its primary findings of fact in this case. In particular, the respondent has failed to discharge the burden of proof in the unfair dismissal claim as to what was its true reason for dismissing the claimant. It was certainly not capability, nor was it some other substantial reason. Comments and observations were made in documents and to the claimant which showed that the claimant's age was at the very least a factor which influenced the respondent's decision to dismiss the claimant. In the absence of any adequate explanation from the respondent, (including its failure to reply to the statutory questionnaire), the Tribunal found that the burden of proof in this case would transfer to the respondent to prove that it did not commit any act of less favourable treatment because of the claimant's age. The respondent has failed to discharge the burden of proving that it did not dismiss or should not be treated as having dismissed the claimant because of his age. The respondent's dismissal of the claimant was an act of direct

discrimination contrary to section 13(1) of the Equality Act and section 39(2) of the Equality Act.

22 The claimant alleged that his dismissal and the respondent's failure to provide him with an appeal against that dismissal, were acts of victimisation contrary to section 27 of the Equality Act. The Tribunal was not satisfied that this case had been made out. For the reasons set out above, the Tribunal found that the decision to dismiss the claimant was taken long before the meetings in February 2011. As the claimant was unaware of his dismissal until then, he could not have carried out a protected act, namely making an allegation that the respondent had contravened the Equality Act. Furthermore, the Tribunal was not satisfied that the respondent's refusal to permit the claimant to have an appeal hearing was because he had complained about a breach of the Equality Act. The respondent's decision to dismiss the claimant was taken long before the meetings in February. That decision was absolute. There was nothing the claimant could have said or done which would have changed the respondent's mind. As Ms Allen on behalf of the claimant properly argued, the entire process was a "fait accompli" from the outset. Having found in the claimant's favour on that point, it could not be correct that the respondent's refusal to change its mind, amounted to an act or act of victimisation.

23 Accordingly, the claimant's complaint of unlawful age discrimination is well-founded and succeeds.

24 Contribution

It was argued by Mr Gorazia on behalf of the respondent that if the Tribunal were to find that the respondent's dismissal of the claimant was unfair and that the claimant is entitled to financial compensation, then the Tribunal should take into account the extent to which, if any, the claimant has by his own conduct contributed to his dismissal. Mr Gorazia argued that the claimant had at least in part contributed to his dismissal in that he had at least in part contributed to the breakdown in the working relationship which acted as the catalyst for his dismissal. The Tribunal did not accept Mr Gorazia's arguments in this regard. From its findings of fact set out above, the Tribunal was not satisfied that there was any substance to the respondent's allegations about the claimant's performance. Whatever difficulties there may have been in the working relationship between the claimant and the respondent, responsibility for them could not be fairly or reasonably laid at the claimant's feet. At no time prior to his dismissal had there been any criticism of the claimant about his performance or working relationship. Any difficulties with that working relationship which concerned the respondent, could have been raised with the claimant by the respondent so that the claimant had at least an opportunity of considering them, commenting upon them and if appropriate agreeing a programme for improvement. The Tribunal found that the claimant has not contributed by his conduct to his dismissal.

25 Remedy

The Tribunal has found that the claimant was unfairly dismissed and that he was the victim of unlawful age discrimination. The claimant is entitled to a basic award under section 119 of the Employment Rights Act 1996. The claimant is entitled to a

compensatory award for unfair dismissal under section 123 of the Employment Rights Act 1996. The statutory cap of £68,400 in respect of the compensatory award set out in section 124 of the Employment Rights Act 1996 (for unfair dismissal claims) will not apply in this case as the claimant has succeeded in his complaint of unlawful age discrimination (**D'Souza v London Borough of Lambeth [1997] IRLR 677**) (Section 124(2)(b) Equality Act 2010).

26 In assessing compensation for unlawful discrimination, the general principle is that the claimant should, as far as possible, be put in the position he would have been but for the unlawful act (**Chagger v Abbey National Plc [2010] IRLR 47).** The financial compensation must be adequate in the sense of allowing the loss and damage actually sustained as a result of the discrimination, to be made good in full.

Compensation is calculated as follows:

(i)	Basic Award:	£ 11,400.00
(ii)	Compensatory Award;	
	Loss of statutory rights (the right not to be unfairly Dismissed)	£ 400.00
	Loss of earnings from date of dismissal to date of hearing (8 June 2011 to 8 December 2011) 5 months @ £2,950 per month	£ 4,750.00
	Future loss of earnings – 2 years from 8 December 2011 to 7 December 2013	£70,800.00
		£85,950.00
	Less earnings to date & potential future earnings	£10,980.00
		£74,530.00

(iii) The recoupment provisions apply to this award. The prescribed element is the sum of £4,750.00. The prescribed period is from the 8 June 2011 to the 8 December 2011. The excess of the monetary award over the prescribed element is £69,780.00.

27 In calculating loss to date and future loss, the Tribunal accepts the figures set out in the claimant's schedule of loss at page 27 in the bundle. The Tribunal has included an annual figure of £9,000.00 for the loss of the rent-free four bedroom detached house. No evidence was given by either side as to the value of this property. The figure of £9,000.00 is based upon the Tribunal's knowledge and experience of the housing market in the locality. Taking account the size and location of the property, the Tribunal considers this to be a reasonable figure. That gives a total annual loss of £47,198.00. The Tribunal has deducted £11,800.00, being 25% tax and National Insurance contributions, giving an annual loss of £35,398.00.

28 The Tribunal carefully considered the evidence of the claimant, Mr Baikie and Mr Osborne on the question of the claimant's prospects of obtaining future employment. Although they maintained throughout the Hearing that the claimant was dismissed for poor performance and incapability, the respondent's position on remedy was that the claimant is a well known and well respected as a Head Keeper and should therefore be able to obtain similar employment in the foreseeable future. Mr Baikie agreed. Mr Osborne (in his capacity as an expert land agent) said the claimant's age would prevent him from securing a full time role as a Head Keeper. The Tribunal found that the claimant had deliberately misled it in his evidence about his calculation of his losses. This impacted upon his evidence about his future prospects. The Tribunal found that the claimant should be able to obtain full time employment on similar terms as those he had with the respondent, within two years of this Hearing.

29 The Tribunal finds that from the effective date of termination up to the date of Hearing the claimant could or should have been working a minimum of two days a week at £60.00 per day, totalling £120.00 per week. That gives earnings to date of £2,400.00. The Tribunal finds that the claimant is capable of finding work at the rate of £60.00 per day for two days per week for the next two years, giving a total of £12,240.00. That amounts to £14,640.00. From that should be deducted 25% (as above) in the sum of £3,660.00, giving earnings to be deducted from the loss calculated in the sum of £10,980.00.

30 The claimant claims damages for injury to feelings and aggravated damages. The Tribunal is aware of the guidelines in **Chief Constable of West Yorkshire v Vento [2001] IRLR 124** as amended **Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19**. The Tribunal took into account the following matters:-

(a) The respondent's failure to follow any kind of formal procedure before dismissing the claimant.

(b) The stress, strain and worry imposed upon the claimant and his family as a result of his peremptory dismissal.

(c) The claimant's length of service and in particular the fact that he would have to vacate the house where he had lived for so many years and which had become his family home.

(d) The manner in which Mr Gunning and Mr George had approached the negotiations with the claimant, namely by ambushing the claimant and presenting him with a "take it or leave it" proposal.

The Tribunal has already recorded that the Gamekeeper's job was not simply the claimant's livelihood, but his life. The Tribunal was satisfied that the appropriate award for injury to feelings is within the lower end of the upper bracket of the **Vento** guidelines. The Tribunal found that the appropriate award is £20,000.

31 The Tribunal was satisfied that the respondent had behaved towards the claimant in a high-handed, insulting and oppressive manner in committing the acts of

discrimination. There was a total failure to follow any kind of procedure. Both Mr Gunning and Mr George were well versed in dealing with the hiring and firing of employees. They would have been fully aware that their treatment of the claimant showed a total and utter disregard for any sense of fairness. The claimant was pressurised into negotiating terms of settlement without the benefit of any prior indication that his employment was to be terminated. He was pressurised by Mr Gunning, who stated that if the claimant did not accept the offer that was being put to him, then it would take many, many months to obtain compensation via the Employment Tribunal procedure and that in any event the Tribunal would be unlikely to award a sum anywhere near that which was being offered. Mr George (Senior) also sought to put pressure on Mr Colmer's employer with a view to persuading Mr Colmer not to give evidence on behalf of the claimant against the respondent. Such conduct clearly satisfies the definition of "high-handed, insulting or oppressive behaviour". The claim for aggravated damages is made out. The Tribunal is aware that its award of aggravated damages should be proportionate to the award of injury to feelings. The Tribunal was satisfied that the sum of £4,000, representing a 20% uplift on injury to feelings, was appropriate in this case.

32 The award of compensation for unlawful age discrimination totalling £98,530 is against the first, second and third respondents jointly and severally.

33 The total award of compensation ordered to be paid by the respondents to the claimant is £110,330.

34 Ms Allen on behalf of the claimant submitted an application for the claimant's costs to be paid by the respondent on the basis that the respondent had in its conduct of these proceedings acted vexatiously, abusively or otherwise unreasonably. Ms Allen drew the Tribunal's attention to the order for costs made against the respondent in respect of the first Pre Hearing Review and to the decision to reserve the question of costs in respect of the second Pre Hearing Review, to this Tribunal. Ms Allen also relied upon the respondent's persistence in pursuing a case of capability/performance until the last possible moment at the commencement of the first day of the Hearing. After the final day of the Hearing the claimant's representative submitted a written schedule of costs on 9 December, amounting to £23,286.48. The Tribunal is aware of the limit on costs which may be determined by the Tribunal, which sum must not exceed £10,000 (rule 41(1) Employment Tribunals (Constitutional Rules of Procedure) Regulations 2004). Mr Gorazia on behalf of the respondent indicated that the respondent may be submitting a claim for costs against the claimant because of the claimant's unreasonable conduct relating to his evidence in the calculation of his losses. In all of those circumstances it is appropriate for there to be a separate Costs Hearing before the same Tribunal with a time estimate of three hours.

G Johnson

G Johnson EMPLOYMENT JUDGE

RESERVED JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 23rd March 2011.

Case Number: 2502955/2011

JUDGMENT SENT TO THE PARTIES ON

.....4th January 2012.....

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS