EMPLOYMENT TRIBUNALS

Claimant: **Mr J Barnett**

Respondent: **Parkside Flexibles Europe Limited**

Heard at: **Leeds** **On:** **3-6 & (deliberations only) 7 April 2017**

Before: **Employment Judge Maidment**

Members: **Mr M Weller JP**
Mr M Brewer

Representation:

Claimant: **Mrs S Garside, Lay Representative**

Respondent: **Ms C Davies, Counsel**

JUDGMENT

1 The claimant's complaint of unfair dismissal is well-founded and succeeds. The claimant would however have been fairly dismissed by the respondent in any event had the defects in its redundancy process been corrected albeit after a period of two weeks further employment to allow reasonable consultation to have taken place.

2 The respondent failed to comply with its duty to make reasonable adjustments in respect of its scoring in the redundancy selection exercise of the claimant (the counting of the period of unauthorised absence). The claimant's complaint of disability discrimination therefore also succeeds to such extent. The claimant's further complaints alleging victimisation, a failure to make reasonable adjustments and/or discrimination arising from disability pursuant to section 15 of the Equality Act 2010 fail and are dismissed.

3 This case shall be listed for a remedy hearing with a time estimate of three hours.

REASONS

1 The claimant firstly brings a complaint of unfair dismissal. The claimant accepts that his employment was terminated by reason of redundancy but contends that his selection for redundancy was predetermined by the respondent and in particular that his selection for redundancy and the consultation process adopted was unreasonable.

2 The claimant maintains that his dismissal also constituted an act of unlawful disability discrimination arising out of an alleged failure to make reasonable adjustments in not adjusting the scores afforded to the claimant in the category of unauthorised absence and in the respondent's failure to identify alternative employment for him. Such claims are brought in the alternative as discrimination arising from disability pursuant to section 15 of the Equality Act 2010. The claimant finally asserts that he was victimised pursuant to section 27 of the Act in his dismissal. The claimant maintains that in his seeking reasonable adjustments and raising a grievance he made a protected act and that he was dismissed because of his raising of those issues.

3 The claimant also brings a number of freestanding and separate complaints of disability discrimination primarily alleging a failure to make reasonable adjustments. The claimant relies on four identified PCPs in a requirement to work nights or a regular shift; a requirement to work 12 hour shifts; a requirement to work alone and finally a return to work following a period of sickness which ended in December 2015 without a staged return. In terms of reasonable adjustments sought the claimant lists the respondent's alleged failure to follow its own policies regarding lone working and to allow the claimant some form of mobile communication, a shortening of the claimant's shifts from 12 to 8 hours and a removal of the requirement on the claimant to work nights. In the alternative, such claims are pursued as complaints of discrimination arising from disability pursuant to section 15 of the Act. As regards such complaints it is contended on behalf of the respondent that they have been brought outside of the requisite time limit in circumstances where it would not be just and equitable for the Tribunal to extend time. The claimant's primary position is that there was a continuing course of conduct up to and including his dismissal.

4 **The evidence**

The Tribunal had before it an agreed bundle of documents comprising of some 400 pages. A small number of additional documents were submitted and included within the bundle produced both on behalf of the respondent and the claimant and including an e-mail from Mr James Campbell to the claimant of 22 June 2016 on its face confirming that he had had no input in scoring the claimant in the redundancy exercise. Such documents were added to the bundle without any objection being raised by either party.

5 Otherwise, the Tribunal having briefly identified the issues with the parties and explained the procedures took some time to privately read into the witness statements and relevant documents so that when each witness came to give evidence he/she could do so simply by confirming his/her statement and subject to brief supplementary questions would then be open to be cross-examined. On behalf of the respondent the Tribunal heard firstly from Rosemary Grace, HR director, Louise Robinson, HR adviser, Nick Fisher, logistics manager, Tony Owen, shift manager, Steve Hill, shift manager, Richard Fitton, at the time of the claimant's redundancy another shift manager and Alex Henderson, former operations director and now no longer with the respondent. On behalf of the claimant the Tribunal then heard from Mr Paul Fleming, former G2 coordinator. The Tribunal

then heard from the claimant himself albeit the evidence of Mr James Campbell, former shift manager, was interposed.

6 It was brought to the Tribunal's attention by Mrs Garside that on a previous day of the hearing the claimant maintained that he had overheard a conversation between Mr Fitton and Mr Hill which was relevant to the issues before the Tribunal. The claimant wrote out and submitted a further written statement as regards such alleged conversation which was admitted also into evidence and upon which the claimant and indeed in due course Mr Hill and Mr Fitton were questioned.

The facts

7 Having considered all relevant evidence the Tribunal makes the findings of fact as follows:-

7.1 The respondent is in business in the printing and production of packaging materials, in particular for the tobacco industry. It employs in the region of 110 employees at its manufacturing and warehousing site in Normanton, West Yorkshire.

7.2 The claimant was employed by the respondent as a fork lift truck ('FLT') coordinator. He commenced employment with the respondent in 1992 and was promoted to a role then known as an "administrator" around 1995 which role subsequently evolved and was retitled to become that of FLT coordinator. Whilst the claimant also himself drove fork lift trucks he held a supervisory role over separate dedicated FLT drivers and was responsible for ensuring the smooth receipt and processing of raw materials through to the warehouse and the receipt of finished products ready for onward delivery to customers. The role included a level of administrative tasks and stocktaking which involved the use of the respondent's computer system.

7.3 The respondent operated a three shift system with in excess of 20 operatives employed on each of the A, B and C shifts. The respondent provided coverage 24 hours a day over five days each week, Monday to Friday and did so by way of a rotating shift system whereby in a three week rotation an employee on each of the shifts would typically work three days in one week, three nights in the second week and two days followed by a day of rest and then two night shifts in the third week. The pattern allowed employees up to four days off between shifts.

7.4 The claimant has been described as a vocal character and as at times a good storyteller and someone who liked an audience. He might accurately be described as someone who is plain speaking and direct in his approach.

7.5 The claimant's maintenance in his grounds of complaint that he had an exemplary record at work was not wholly accurate albeit at the time of his dismissal there were certainly no live disciplinary warnings on his record. In June 1995 the claimant had received a final written warning for a safety issue in the operation of a fork lift truck. In August 2009 the claimant received a verbal warning for his behaviour in disparaging language used to a finance manager. In September 2013 he was given a verbal warning by Mr Nick

Fisher regarding the manner in which he had spoken to a delivery driver.

7.6 From 2009 the claimant began to experience health issues which resulted in him undergoing tests and a diagnosis of a heart condition for which medication was prescribed. Clearly and unsurprisingly the claimant was concerned about his health and asked the previous operations manager, Robert Adamson, to ensure that contact was maintained with him during the nightshift. As a result, Mr Adamson sent an e-mail on 16 June 2010 to shift managers asking that they keep in regular contact with the claimant particularly on nights and advising on numbers to call in the case of a need for medical assistance.

7.7 The claimant worked from an office with a landline telephone at one end of the warehouse, but generally on his own at that location. He would in accordance with production demands ensure that materials were removed from the warehouse stacking and placed in a position at the end of the warehouse to be collected by the FLT drivers and transported to the production area. The claimant might at times during his shift see those FLT drivers but by no means on every occasion they came to collect materials. A CCTV camera monitored activity in the central part of the warehouse but this did not cover the aisles to the sides of the warehouse. There was more activity in the area on dayshifts particularly due to the arrival and departure of vehicles to deliver raw materials and collect finished product from the respondent.

7.8 As already noted, the claimant as part of his routine shift pattern worked a number of 12 hour nightshifts. There was also the need from time to time for FLT coordinators to work additional hours or in particular to cover the absence of other FLT coordinators due to either, for instance, sickness or holiday. Whilst the Tribunal does not doubt that from time to time the claimant provided such cover, Mr Fisher's evidence was convincing to the extent that the claimant had always made it clear that he preferred to cover dayshifts rather than nightshifts such that Mr Fisher would seek to avoid asking the claimant to cover nights and would instead seek to use the other two FLT coordinators. This preference/practice originated prior to the claimant's ill health but certainly as the claimant's medical condition came to be identified and recognised, an understanding had developed that there were now health reasons which made it preferable for the claimant, when cover was required, to be asked to cover day rather than nightshifts.

7.9 However, until May 2015, the claimant raised no significant issue in terms of the effects his work might have on his health. On 8 May 2015 the claimant went to see Rose Grace following an appointment he had had with his doctor and to tell her that his doctor had told him that the 12 hour nightshifts were not good for him because he was not getting enough rest and had advised regarding the risk of a stroke. The claimant reported that he been advised that he could not work his nightshifts. The claimant said that he could get a report from his doctor. Ms Grace said that the Respondent would indeed seek such a report and asked for the

claimant's doctor's opinion of whether the claimant was fit to do his job. Ms Grace highlighted that if there was a recommendation that he did not work nights, then the respondent would have to consider the availability of alternative roles. Ms Grace explained that the respondent would not be obliged to create a job for the claimant. She went on to explore roles which might be possible alternatives if vacancies arose including in slitting and loading. The claimant stated that those roles were unsuitable because of their physical nature. The claimant also said that he was not "an office person". Ms Grace explained that the worst case scenario was of there being no alternative role available. The respondent would then have to give the claimant notice of termination. She said that whilst she did not wish to alarm him, she wished him to fully understand the implications.

7.10 Ms Grace duly wrote to the claimant's doctor on 12 May 2015 requesting a report and explaining the claimant's role and working pattern.

7.11 The Tribunal accepts that the respondent's note of the meeting the claimant had with Ms Grace, also in Ms Robinson's presence, on 8 May 2015 is accurate. The Tribunal rejects the claimant's contention that he was told by Ms Grace that if he could not go back to the nightshift there was no job and her saying: "I'm going on holiday and when I come back I am sacking you." It is extremely unlikely that Ms Grace with her human resources experience would have used those words or said such a thing, even indeed if she thought it. The claimant might have taken from her mentioning of alternative employment and the raising of the possibility of termination of employment if the claimant could not do his role or find an alternative role, that his employment might be ended but Ms Grace did not use the words attributed to her and was seeking to make the claimant aware of all the possibilities and where his situation might ultimately lead. The claimant did not subsequently raise that this is how he had been spoken to by Ms Grace including in his grievance of 23 July (as will be described) and it is unlikely that he would have omitted what he now maintains was a direct threat made to him in circumstances also where he also has told the Tribunal that he believes his ultimate redundancy dismissal was engineered by Ms Grace.

7.12 Having sought the advice of the claimant's GP this was received by way of a letter dated 19 May 2015. Dr Marlow records advising the claimant that nightshifts were disruptive to any individual "perhaps more so when older and those with a cardiac dysrhythmia." He said that a further assessment by an occupational health professional might be the appropriate next step. An occupational health assessment was indeed arranged for 30 June 2015.

7.13 In the meantime, Ms Grace spoke to Mr Nick Fisher regarding the concerns which the claimant had raised and asked him to ensure that those managing the claimant were keeping in touch with him throughout his nightshift. On 22 June 2015 Mr Fisher confirmed to Ms Grace that he had reminded the claimant's shift manager James Campbell to keep in touch with him periodically through the

nightshift. Mr Fisher had reported back that this arrangement had been in place for a few years since the claimant's health problems started. Mr Campbell had said that he had been checking up on the claimant now and then but would do it more in the future. The claimant's evidence indeed was that Mr Campbell, unlike other shift managers, did carry out those checks and indeed the claimant had no complaint as regards Mr Campbell keeping an eye on him.

7.14 An occupational health report was issued on 2 July 2015. This referred to the claimant having an underlying medical condition which caused an irregular heartbeat and symptoms of dizziness and tiredness on occasions. This was said to be exacerbated by tiredness. The claimant's condition was said to be managed by medication and with the correct medical management "it should be a well controlled risk". Tiredness was said to be the main issue for the claimant, with the three nightshift pattern the most problematical for him. The claimant was said, in common with ageing workers, to be less able to sleep when working nights but had no problems when working days. Karen Coomer, occupational health specialist, concluded: "In my opinion this is the main issue rather than a causative effect from his medical condition." She continued that the claimant was fit to carry out his duties and indeed was fit to work nightshifts albeit given the problem of sleeping, split night working was said to be preferable. She stated that the claimant did not want to disrupt the shift pattern of his colleagues so could only suggest that this was discussed further with the claimant. Ms Coomer also noted that the claimant was concerned about lone working on nightshifts. She suggested that radio contact with a shift manager was considered to alleviate the claimant's concern about an incident happening when he was away from the telephone. Ms Coomer confirmed that the claimant was likely to be a disabled person for the meaning of the Equality Act 2010.

7.15 A further meeting was then arranged with the claimant which took place on 8 July in the presence of Ms Grace, Ms Robinson and one of the shift managers, Tony Owen. The medical reports were fully discussed with the claimant with reference being made to the confirmation that the claimant was fit to carry out his role as well as the nightshift but that sleep deprivation was problematical. The Tribunal accepts that the claimant at no stage in this meeting or otherwise suggested that the three FLT coordinators move to a five day per week rotating 8 hour shift pattern. The claimant's express view was that he did not wish to interfere with the shift patterns of his FLT coordinator colleagues. Indeed, the claimant was aware that the current shift pattern, where longer shifts were worked but in return for a number of consecutive days off work, was a popular one and that at least one of the claimant's FLT coordinator colleagues who lived in Selby would not be well disposed towards having to travel to work five days per week rather than the current arrangement where the majority of working weeks would require his attendance on only three occasions.

7.16 During the meeting the claimant mentioned that Ms Coomer had talked about the benefit of him having a "monitor" by which the claimant simply meant to refer to her suggestion regarding radio

contact. This caused an element of confusion, in this and future discussions, as the respondent believed that the claimant was referring to some other form of monitor and in particular some form of medical appliance. There was a further discussion of potential alternative roles, but these were not considered by the claimant to provide a solution and at the conclusion of the discussion the claimant said that he wanted to stay doing his current job but without the nightshift. Ms Grace explained that this might not be easy to accommodate without disrupting the shift patterns of others which he had confirmed he did not want to do. However Ms Grace undertook to look into this further.

7.17 She wrote to the claimant on 9 July confirming the nature of the discussions and noting: "Ultimately your request is to do your current job but on days only pattern." Ms Grace said that she would be on annual leave from 10-27 July and would get back to the claimant on her return. Again, the Tribunal does not accept there was any form of threat to "sack" the claimant arising out of this further meeting.

7.18 Ms Grace also sent an e-mail to James Campbell and to other shift managers and Louise Robinson on 10 July regarding the claimant and nightshift working. She referred to being aware that Mr Campbell checked on the claimant periodically when on nights to make sure that he was okay but said she was copying the message to the other shift managers to see if they could do the same when they covered for 'A' shift. She however also mentioned that medical reports confirmed the claimant's fitness. Ms Robinson was asked to follow up with Ms Coomer what was meant by the provision of a monitor.

7.19 Indeed Ms Robinson followed up on this request and reverted to Ms Grace to say that there might have been a confusion as she had referred to a two way radio. Ms Robinson referred to having spoken to the claimant to clarify this. Ms Robinson subsequently was advised by Nick Fisher that the issue of radios had been looked into but he believed there was some doubt as to whether they were intrinsically safe so he had decided not to proceed. It is understood that certain radios run the risk of emitting sparks which can be dangerous in the presence of chemicals. Whilst no inflammable chemicals were located in the claimant's area of work, that might not necessarily be the case as regards a shift manager working elsewhere onsite and receiving a call. On Ms Grace's return to work she asked the health and safety manager, Clive Hart, to assess the situation.

7.20 The claimant, however, prior to Ms Grace's return from holiday, wrote a letter of grievance dated 23 July addressed to her. Firstly he confirmed that he accepted that the reports concluded that he was fit to carry out his current role. The claimant then concentrated on the issue of lone working stating that he had made it clear that he was fully capable of doing his current role but was seeking an assurance that he would be provided with a "monitor/radio" to give him the security of being able to contact someone if help was needed. He said that there were long periods of time during

nightshifts where he did not see anyone. He reiterated that save for the need to implement a policy on lone working and provide him with the means of communication, he was happy to continue in his present position on his current shift pattern.

7.21 Ms Grace acknowledged his grievance by letter of 4 August 2015. She stated that having read the letter she thought that the issues had narrowed in that the claimant had accepted that he was fit to carry out his current role on the day/nightshift pattern which was also in line with the medical advice. She stated, therefore, that there was no longer a need to consider redeployment to remove him from nightshift working.

7.22 She went on to refer to the only outstanding point as being the communication issue. She said that she intended to arrange a meeting on her return from a trip abroad.

7.23 However, before any further meeting could occur the claimant had himself departed on his holidays and on 24 August 2015 the respondent received a call from the claimant in Spain notifying them that he had been in intensive care and remained in hospital due to his heart condition. The claimant was in fact absent due to sickness until a return to work on 23 December 2015.

7.24 In his absence, on 22 October 2015, Mr Clive Hart conducted a lone working general risk assessment. With operatives reporting to shift managers by appropriate means at regular intervals he considered that there was a low risk of danger in terms of an operative suffering from a medical condition whilst working alone. He noted however that consideration should be given into the purchase of two-way ATEX approved radios to facilitate communication or another system which might be suitable.

7.25 The claimant continued to be signed off as unfit for work until 4 December 2015 albeit with a declaration from his doctor that he might be fit if benefiting from a phased return, amended duties, altered hours or workplace adaptations.

7.26 The claimant contacted Ms Robinson to give an update as to his fitness on 19 October 2015. He explained that he had two weeks' holiday booked in November and asked if he could move those to December. The claimant explained to the Tribunal that he was concerned that he would lose seven days of holiday which remained to be taken in that year and in circumstances where ordinarily only one day's leave could be taken in December. Ms Robinson undertook to speak to Nick Fisher to gain authorisation for the claimant taking this leave which she ultimately received and passed on to the claimant. Therefore, an arrangement was made whereby, whilst the claimant's absence certification expired on 4 December, he would use his annual leave so that the first day he was expected back at work was 23 December 2015. There is no basis upon which the Tribunal could conclude that Ms Robinson herself promoted to the claimant his taking six hours of leave entitlement for each shift after 4 December so as to return him to work at an earlier date albeit on a phased basis. Ms Robinson denies any such conversation initiated by herself and indeed the

claimant's evidence as set out above confirmed his own desire to take his annual holiday so as to delay a return to work. When the claimant contacted Ms Robinson in October it is clear from her note of that conversation that she had not anticipated any return to work. The only suggestion regarding holidays was the claimant's.

7.27 The claimant duly returned to work at 9:00am on 23 December 2015 to work a normal 12 hour shift. Indeed, he worked such shift and a reduced six hour shift on 24 December on account of the respondent closing early on Christmas Eve.

7.28 The claimant met with Ms Robinson and Mr Fisher for a return to work interview on 23 December. A standard interview form was completed and signed off by the claimant as part of which the claimant confirmed that he believed that he was fit to do his job. At this meeting the claimant made no reference to a desire for a phased return. He did mention that he had some equipment which he was keeping in his car and which monitored his heart rate/blood pressure. It was arranged that the claimant would undergo an individual lone working risk assessment with Clive Hart.

7.29 Indeed, this personal risk assessment took place later that day and involved Mr Hart observing the claimant undertaking some of his routine work tasks. The claimant confirmed that he had seen the general risk assessment undertaken but that he had two concerns, namely a lack of coverage of the warehouse area by CCTV and poor lighting. The claimant confirmed that his concerns in this regard were not specific to himself but could affect any individual working in the warehouse area. Mr Hart expressed the view that it would not be practicable to provide CCTV coverage across the whole of the area and a discussion progressed onto the issue of appropriate lighting. In his report Mr Hart noted the claimant's repeated assurances that he was medically fit and was allowed to continue driving. In his recommendations, Mr Hart referred to regular contact with the shift manager when lone working and making such procedure formal for anyone working alone. The claimant did not during this meeting raise the issue of a need for a radio or other communication aide.

7.30 The claimant was due to work a nightshift commencing at 6:00pm on 8 January 2016. The claimant rang in and spoke to a colleague around 25 minutes after the shift commencement time to say that he had just woken up. The claimant did not attend work that shift. This was recorded within the respondent's absence management systems as an unauthorised absence for which the claimant did not receive any payment.

7.31 On his return to work, at his next rostered shift on 13 January 2016, the claimant completed a self certification form giving lack of sleep as the reason for his absence. He then met for a return to work interview with Mr Fisher. The claimant recorded himself as being fit for work. He also made a number of additional comments. He said that he believed that he should have been phased back to work noting that he had never been asked about this. The claimant did not suggest that he had himself suggested a phased return. He also complained that Tony Owen had not phoned or otherwise

checked on him on the previous Thursday nightshift he had worked. He referred to lack of sleep being caused by the medication he was taking which required him to make frequent toilet trips. The claimant said that he believed that going forward this might happen again and that whilst he would be okay working an 8 hour shift, 12 hours was too much until he got into a routine.

7.32 Ms Robinson subsequently discussed the return to work interview with Mr Fisher. They decided not to treat the unauthorised absence as a disciplinary issue which would ordinarily have been the case for someone who had not complied with the absence reporting requirements. They felt that the reason given for the claimant not attending work made disciplinary action inappropriate. She told Mr Fisher that she would speak to Tony Owen about checking up on the claimant and indeed e-mailed him on 14 January saying that the claimant had mentioned that he had not been checked as he ought to have been as a lone worker. Mr Owen responded regarding his actions on the shift in question saying that he had only worked until midnight and had seen the claimant twice in the canteen area.

7.33 On or around 15 January 2016 the claimant contacted Ms Robinson by telephone saying again that he felt he might struggle with working 12 hour shifts. He said that he wanted a phased return. Ms Robinson explained that if the claimant was unable to fulfil his contractual hours he might need to revisit his GP. She told the claimant that he had already return to normal working on 23 December, in terms of any request now for a phased return, in circumstances where his GP had confirmed he was fully fit to work his normal duties.

7.34 Ms Robinson spoke to the claimant again on 19 January and, during this conversation, the claimant said that he would continue to carry out the full duties of his FLT coordinator role. He said, however, that he did not wish to work any overtime or cover should people be on holiday/sick. Ms Robinson explained that the respondent appreciated his position and would only expect him to fulfil his own role. Ms Robinson confirmed these conversations to Mr Fisher by e-mail of 20 January 2016.

7.35 After such date the evidence is that the claimant continued to work his shifts for the respondent. There is no evidence of him having any difficulty from a health point of view or otherwise in completing those shifts. There is no evidence of him making any requests to the respondent for any adjustments to his working pattern or in any other respect. The claimant's evidence before the Tribunal was that his own shift manager, James Campbell, contacted him during his shifts to check that he was alright albeit he maintained that when working and being covered by other shift managers this did not always occur. The claimant confirmed that for the majority of his shifts, Mr Campbell was the shift manager to whom he reported.

7.36 During 2015 and continuing into 2016 the respondent was concerned regarding the level and profitability of work it would have to complete. This arose partly from a change in legislation to introduce plain packaging for tobacco products and the closure of Imperial Tobacco's plant in Nottingham. It was clear to the

respondent from around March 2016 that the business was not attracting enough work to cover the decline of incoming work from the tobacco industry and the respondent conducted a review of all areas of the business to try to identify cost savings which could be made of £100,000 per month. This review included staffing but also ways of increasing efficiency elsewhere.

7.37 The respondent operated a staff consultative committee with elected representatives from different parts of the business. The defined scope of the committee included consultation on proposed redundancies.

7.38 At a committee meeting on 7 April 2016 there was a summary of challenges facing the business.

7.39 At a board meeting on 18 April 2016 a significant loss was forecasted for June 2016 with the result that the respondent was to look at a reduction in headcount. This led to Ms Grace preparing a timetable for a redundancy programme.

7.40 A further board meeting took place on 3 May 2016 at which it was decided that there was no alternative but to implement a programme of redundancies. It was proposed at this point to make 39 posts redundant.

7.41 On 3 May 2016 a meeting of the staff consultative committee was arranged and proposed redundancies were announced followed by the respondent's managing director making the same announcement to all employees that day and again the following day to catch those working alternative shifts.

7.42 On 5 May 2016 a notice was issued to all staff requesting volunteers for redundancy whilst reserving the right for the respondent to refuse any individual application.

7.43 A further meeting of the staff consultative committee took place on 9 May where new proposed structures were put forward. The respondent's initial proposal originating from Mr Alex Henderson was to remove the role of FLT coordinator completely and to continue simply with six fork lift truck drivers, two working on each of the three shifts. That was part of the first proposal presented to the staff consultative committee on 9 May.

7.44 However, shortly afterwards Mr Henderson, Ms Grace and Mr Fisher met to discuss increases to Mr Fisher's own responsibilities. In their discussions Mr Fisher expressed concern about removing FLT coordinators and a particular concern regarding the loss of their assistance with administrative tasks. The FLT drivers would not be familiar with FLT coordinator duties and could therefore not readily absorb those additional duties.

7.45 They discussed such issue and the need still to make the necessary reduction in costs. A revised proposal then emerged of reducing the number of FLT coordinators to one, working a dayshift only between 8:00am to 4:00pm, but that option was dismissed as there would be no cover for the FLT coordinator when absent from work. Alternatively, there was a proposal to reduce the number of FLT coordinators from three down to two, but altering their shift

patterns so that one would work 6:00am to 2:00pm and the other 2:00pm to 10:00pm, recognising that the majority of work they undertook related to supervising the transportation of goods in and goods out which activity was timetabled from 6:00am to 12:00pm. That was the proposal the respondent wished to implement and the organisation chart was amended to reflect this change and circulated to the staff consultative committee at their next meeting on 16 May 2016.

7.46 Proposed selection criteria to assess all production operatives had been tabled at the staff consultative committee meeting on 9 May 2016 for the representatives' consideration. The draft criteria proposed reflected previously agreed criteria which had been used in a redundancy exercise in 2009. The criteria were further discussed at the next consultative committee meeting on 13 May 2016. The selection criteria were agreed by the representatives with only one change made from an earlier draft whereby listed behaviours were to be assessed in accordance with three grades referred to as *"outstanding/exceeds/meets expectations*" rather than *"excellent. satisfactory. below standard."*

7.47 The published criteria envisaged the employees being split into appropriate selection pools with relevant skills and behaviours being scored and separate assessments being carried out for attendance over the two year period from 1 March 2014 to 30 April 2016 and disciplinary records over the preceding two year period. Essentially absence and disciplinary warnings would result in a deduction of points otherwise awarded under the headings of skills and behaviours.

7.48 For absences of single days or periods of up to three days, a deduction was to be made of 10 points per day, whereas in respect of sickness of four days up to and including a two week period the deduction, Ms Robinson confirmed in evidence, was 5 points per occasion. This reflected the respondent's consideration that shorter but more frequent intermittent absences were most problematical to it. Where sickness was of a single period of more than two weeks a deduction of 10 points per occasion applied. Instances of unauthorised absence for a full or part day was to attract a deduction of 15 points per occasion.

7.49 Further deductions were made of 20 points for a verbal warning, 40 points for each live written warning and 80 points for each live final written warning. Reduced point scores under each category were to be allocated for spent warnings. As regards skills, a list of relevant skills was to be drawn up in respect of each department and assessed. The Tribunal has seen no evidence of any formal skills list being compiled for the claimant's area of work. Ten points were to be awarded for each machine/operation in which the person was fully competent and five point for each machine/operation where the employee could be considered only as partly competent. It was envisaged that an additional score of zero to 20 points could be awarded depending on performance rating with a note in such regard that criteria were to be set.

7.50 Behaviours were to be scored in accordance with the three grades set out above with again an indication that criteria were to be set *"behind each one"* and a statement that the scoring would require supporting evidence. It is uncontested that no criteria were set as envisaged either to define the grades available for the 'behaviours' or the performance ratings which might be assessed under the 'skills' headings. The 4 behaviours to be assessed were listed as *"initiative, flexibility/multi skills, attitude and quality."*

7.51 The claimant was placed in a pool as one of three FLT coordinators. It is uncontested that they all carried out exactly the same duties but merely worked on different shifts to each other. The FLT drivers were placed in a separate selection pool. Whilst the FLT coordinators on occasion drove fork lift trucks their main responsibilities involved ensuring that wagons were unloaded following delivery, that materials were recorded in the Respondent's systems and allocated, then delivered to the appropriate production area to ensure efficiency in the production process. The FLT drivers merely moved materials from the warehouse to the location designated by the FLT coordinator and brought the finished product back to the warehouse for storage prior to delivery to the customer.

7.52 After the redundancy announcements Mr Henderson and Ms Grace met with James Campbell, 'A' shift manager, Richard Fitton, 'B' shift manger, Tony Owen, 'C' shift manager and Steve Hill who managed the conversion department. The selection pools of the production operatives were explained and they were all asked to carry out the scoring process for the skills and behaviours sections of the selection criteria. It was considered that they were the individuals best placed to assess each of the employees' skills and ways of working given that they worked with them on a daily basis. They all agreed to perform this task and that they would do so collectively to ensure that the selection criteria were applied to each employee consistently and to avoid any one shift manager scoring his own shift's operatives more or less generously.

7.53 Ms Grace and Mr Henderson explained that the behaviours ought to be graded as 'meeting expectations', 'exceeding expectations' or 'outstanding' corresponding to a score of 10, 20 or 30 points. That message was not understood by the shift managers who proceeded when they met to conduct the assessments to rank individuals on a score of 1-3 with 1 being the highest. Alex Henderson asked Nick Fisher to carryout a separate scoring of his own of the employees who worked in the warehouse because it was considered that Mr Fisher ought to be involved given he had managed the area alongside the shift managers for a long period and had specific knowledge of the employees' skills and what was required in the performance of their roles.

7.54 The shift managers and conversion manager met together in a room close to the respondent's reception area and in around three hours conducted the scoring of around 60 shopfloor workers. The process they adopted was for each shift manager to take the lead in terms of suggested scores for the workers on his shift and for those scores then to be discussed and agreed or adjusted before a final

score was then written down on a form being completed by Mr Hill. FLT drivers and coordinators were assessed under a department heading of "FLT" but with an appreciation that they formed two separate pools. As regards skills, it was determined that the FLT coordinators could be regarded as carrying out two distinct skills those being fork lift truck driving and administration. Since all three were able to carry out those two tasks they were each rated with a score of 20 points. FLT drivers however could only drive FLT vehicles and therefore attracted just one score of 10 points for that ability. Turning to behaviours, the claimant was awarded a top score under the heading of initiative and likewise under the heading of quality, but the bottom score under both flexibility and attitude. In contrast his FLT coordinator colleagues were rated like him as scoring top marks under quality but were rated in the middle category of assessment for the other three behavioural factors assessed. It is clear from the evidence of the shift managers that they understood that in giving ratings of 1, 2 and 3 they were assessing the individuals as either 'excellent', 'good' or 'poor'. The claimant's top score under initiative reflected the view that the claimant planned ahead in his work and was also able to solve problems as and when they arose. Similarly, the quality of his work in terms of achieving what was required was regarded as excellent. However, he was assessed at the lowest level under flexibility and attitude. In this regard the shift managers believed him to be inflexible in that he had a set view of how the work ought to be performed and was reluctant to change that and react quickly to changes in production needs. If further material was required within the production area the claimant would query why and would assert that sufficient material had already been delivered to complete the job. The claimant might have good reason to raise queries in circumstances where, if further material was used on a job, that may reduce the amount of raw materials available to complete other forthcoming orders. However, it was recognised that it was a priority for orders to be completed and if as a matter of fact more material was required to fulfil a production run, for instance in circumstances where a mistake might have been made or there might have otherwise have been some wastage, then that was the priority. There was also the view that the claimant could be inflexible in terms of taking breaks when lorries were queued up or expecting assistance with loading or unloading. As regards attitude the shift managers believed again that the claimant could be intransigent when asked to do something or to change his priorities to reflect production needs. There was a view that the claimant could react intemperately and awkwardly to such requests and all of them had examples of the claimant being more than a little vocal in his frustrations. For those reasons they marked him down.

7.55 Following the meeting, Mr Hill put together a spreadsheet which was stored on the respondent's network and password protected. Within that he set out the scores which had been awarded under each of the criteria and left a space where the shift manager of each employee would take responsibility for inputting comments by way of explanation of the scoring of the individual shift members. The comment inserted against the claimant's name was: *"Caused*

me no problems, but has caused others problems. His knowledge of the warehouse is second to none."

7.56 The Tribunal heard evidence from Mr James Campbell, called on behalf of the claimant. He had completed an appraisal for the claimant in June 2015 albeit with reference to a period covering March 2013-March 2014. He, like other shift managers, had been tasked with completing appraisals but the work had not been completed in a timely manner and his completion of the claimant's appraisal was delayed for some months. Indeed, the respondent in determining the appropriate selection criteria considered that the use of employee appraisals would not be appropriate given that they had occurred across the site in quite a haphazard and irregular fashion and in circumstances where they would reflect the view of one individual shift manager in circumstances where again there was the risk of some shift managers being more generous in their assessment of employees than others.

7.57 In any event, Mr Campbell, it is clear from the claimant's appraisal, regarded him as a very good warehouseman who knew the systems in great detail and worked to a very high and consistent standard. He expressed the view that the claimant's knowledge of warehousing and organisation were his main strengths. He noted no areas requiring improvement, commenting on the appraisal that if the whole of the warehouse worked like the claimant the place would run smoother. The claimant was assessed as exceeding expectations in knowledge of work, organisation and dependability and in meeting expectations in terms of communication, teamwork, decision making, adaptability and flexibility.

7.58 When Mr Campbell gave evidence, it was clear to the Tribunal from what he said that the claimant had strong and clear views as to how the work ought to be organised. Mr Campbell referred to having occasionally questioned how things were to be done but that the claimant always turned out to be right in his view. The impression created was of Mr Campbell deferring to the claimant's effectively superior knowledge in terms of the coordination of warehouse operations. Mr Campbell was, from his evidence, aware that others had had some disagreements with the claimant over decisions taken within the warehouse area.

7.59 Mr Campbell maintained that he had not played any part in scoring the claimant. He had, however, been at the aforementioned meeting of shift managers and the conversion manager at which the scoring took place. His recollection was that there was no need to score the FLT coordinators because during the meeting there was an interruption where they were told that there had been a further volunteer for redundancy which meant that they now had the right number of FLT coordinators and there was no need for a selection to be made. That, as a matter of fact, is inaccurate. There was a need to reduce the number of ordinary FLT drivers down from six to three but ultimately one agency employee departed early on in the redundancy exercise and two other FLT drivers volunteered for redundancy so that within that group there was ultimately no need for an assessment to be made, albeit the

FLT drivers were all in any event individually scored. Mr Campbell may have been confused by that. Certainly, when the claimant became aware of his selection for redundancy he asked Mr Campbell for confirmation of his role in the exercise to which Mr Campbell quite straightforwardly replied that he had not been involved in the scoring. He made a similar response when questioned by Ms Grace to explain his involvement when this was raised during the consultation/appeal process. He did not, when explaining his role to either the claimant or Ms Grace, refer to the fact that there was never any need to score FLT coordinators given the number of volunteers in that area.

7.60 Again, as a matter of fact, the FLT coordinators were scored and the Tribunal concludes that the scoring put forward was that of Mr Campbell in circumstances again where the evidence was that each shift manager led as regards the employees they directly managed. None of the shift managers or conversion manager have any recollection of any particular discussion or argument regarding the scoring of the claimant. At the very least the scores attributed to the claimant were scores with which Mr Campbell acquiesced.

7.61 The Tribunal considers that the comment entered onto the spreadsheet in respect of the claimant was that of Mr Campbell and, contrary to Mr Campbell's evidence, it was physically entered by him. Again, each shift manager took responsibility to enter comments for employees on their shifts. The Tribunal accepts that the other shift managers did not enter comments for employees not under their ordinary management. Furthermore, the comment in question can only have come from Mr Campbell in circumstances where none of the other shift managers would have been at all likely to have made such a positive comment about the claimant and have referred to 'others' having difficulty with the claimant rather than they themselves.

7.62 The Tribunal also heard evidence from Mr Paul Fleming on behalf of the claimant. It was the claimant's assertion that Mr Fleming ought to have been part of the team scoring him. Mr Fleming was employed as a coordinator ostensibly at a similar level to the claimant but in fact at a more senior level in that his coordinator role involved responsibility across the whole of the warehouse area and where he undertook some management tasks in relation to the employees, monitoring, for instance, absence, holidays and hours of work. He was not, however, the claimant's shift manager and indeed worked day shifts rather than on rotation with the 'A' Shift or any other shift.

7.63 Mr Fisher separately scored the claimant's skills and behaviours. He awarded to the claimant and both of his FLT coordinator colleagues a score of 30 points under skills in circumstances where he distinguished between two different types of fork lift trucks used as well as the need to be able to operate the computer to complete administrative tasks. He then gave the claimant the top mark of 30 points under initiative reflecting, in his mind, the claimant's ability to anticipate in advance and plan for the amount of product required, which indeed merited him being assessed at a higher level than the

medium level of 20 points given under this category to the other FLT coordinators. However, as regards flexibility, attitude and quality the claimant was given the lowest ranking of only 10 points whereas both of his FLT coordinator colleagues were given the top ranking under flexibility and attitude and one the top and one the middle ranking under the criterion of quality.

7.64 As regards flexibility, as well as the aforementioned factors taken into account by the shift/conversation managers, Mr Fisher had regard to the claimant's historic unwillingness to cover nightshifts in circumstances of absence or sickness and his preference, predating his health issues, to cover only for dayshifts. Mr Fisher recognised that this was historic in circumstances where the claimant now, due to his health condition, was only expected to work his own shifts and had previously due to his health issues been expected, if providing cover, to cover days only. As regards quality, Mr Fisher considered that this ought to be rated at the lowest level to reflect the lack of flexibility and his considerations of the claimant's poor attitude towards others as again coinciding with the assessment made by the shift/conversion managers. He inserted his own comment on his score sheet as *"good operator but is inflexible won't cover holidays/sick also has a poor attitude to the job, fellow workers and delivery drivers".*

7.65 Louise Robinson separately scored all of the operatives in respect of their attendance and disciplinary records. She did not disclose her scores to the shift/conversion managers.

7.66 She did not record any deductions to be made on account of the claimant's disciplinary record in circumstances where all the disciplinary sanctions he had received, as earlier described, fell outside the two years of assessment. However, as regards absence, she deducted 15 points for the claimant's unauthorised absence on 8 January 2016. In doing so she relied on the information recorded on the respondent's electronic system which simply flagged up an instance of unauthorised absence. Whilst she had the claimant's personnel file in front of her, the return to work meeting note compiled by Mr Fisher, which recorded the claimant as having failed to make his shift in time due to him sleeping in due in turn the medication he was taking for his heart condition, was not physically on the file. She knew that it had been on the file at some earlier point and indeed had seen it. She could only assume that someone, probably Mr Fisher, had removed it when conducting his separate assessment of the claimant. She did not at the point of her scoring remember the background to the claimant's recorded unauthorised absence, in circumstances where she had been aware fully of the reasons behind the absence from her contemporaneous discussions with Mr Fisher. She said in evidence that, had she had that information in front of her or remembered, she would have considered it appropriate to not apply any deduction recognising the fact that it related to the claimant's disability.

7.67 Certainly, she had discounted the claimant's lengthy period of absence from August to December 2015 which she recognised was

disability related and ought to be disregarded as, she understood, a reasonable adjustment.

7.68 She scored the claimant as requiring a 5 point deduction on account of a distinct absence from work due to him suffering from shingles. She also however recorded a points deduction of 40 points due to a separate absence due to the claimant suffering a back injury. The claimant's absence had started part way through his shift such that he was absent in effect for 3.5 days. The respondent's practice was to treat any part performed shift as a full day's absence. She recognised that therefore she ought to have regarded this as a four day absence, but she had then applied a deduction applicable of 10 points per day which was in fact the deduction to be made in respect of absences of up to three days. Given that this was an absence of four days a total deduction instead of only 5 points should have been made. Ms Robinson described this as an oversight and/or administrative error which the Tribunal accepts. The Tribunal does not consider that Ms Robinson would have sought to manipulate scores in a manner which could so readily be ascertained by any observer (diligently) reviewing the scoring.

7.69 Mr Henderson was provided with Ms Robinson's scores as well as those of the shift/conversion managers and Mr Fisher. Having converted the shift/conversion managers' scores to reflect the 10, 20 or 30 points intended to be available he added those together with the other scores to come up with total scores. The claimant on his final spreadsheet, which also included the comments made by Mr Campbell and Mr Fisher, was assessed as scoring 130 points against his two FLT coordinator colleagues who scored 210 and 250 points respectively. The claimant was therefore identified as the FLT coordinator at risk of redundancy.

7.70 On 19 May 2016 Ms Robinson received an e-mail from Mr Fisher reporting that he had heard the claimant saying that he was not putting in for voluntary redundancy because he wanted the respondent to make him redundant *"so I can have them for constructive dismissal".* This was not raised with the claimant at any stage in the forthcoming consultation process and by this point the claimant had been scored as part of the redundancy selection process. The claimant denies that he ever made such comment.

7.71 On 25 May 2016 the claimant was met and taken to a meeting room where he met with Ms Robinson, Mr Fisher and Mark McMain, Operations Manager. The claimant requested the presence of a colleague, Mr Martin Edwards, to which the respondent agreed. When the claimant was fetched to attend this meeting he instantly recognised that this would be a meeting to inform him of his potential redundancy and it was clear from the outset that he was not about to be given any good news. The claimant, however, formed the view instantly that he was being informed of a decision to make him redundancy rather than any potential selection for redundancy which might be reviewed during and following a period of consultation.

7.72 As soon as the meeting commenced the claimant said that he had seen this coming a long time ago and referred to the change in the proposal as regards the staff to be retained in the warehouse. It appears that when the claimant was made aware of the first proposal which would preserve six FLT drivers he assumed that this meant the retention of the three coordinators together with three FLT drivers rather than the retention of six FLT drivers. He thought initially therefore that he was safe, only to consider that there was a second proposal which involved reduction from three to two FLT coordinators which made him vulnerable. The reality as referred to already was that it was the second proposal that gave the claimant the chance of being retained. Mr McMain sought to explain the selection criteria used and said that the claimant had scored lower in comparison with the other coordinators. Mr McMain had with him the large spreadsheet listing all of the operatives assessed but with names redacted. This was shown to the claimant across the table at the meeting such that the claimant did take on board that attendance and indeed behavioural factors had been scored. The claimant commented that: *"attitude is probably scored lower because I don't say hello or talk to some people - but carry on".*

7.73 Ms Robinson went on to explain the possibilities regarding alternative employment but the claimant was again quite upset and agitated saying at one point that he was not interested in the selection criteria and asking if he could leave. At one point he said: *"Have you finished now, I want to get home as Emmerdale is on at 7".* The right of appeal was explained to the claimant who confirmed he did not have any further questions and just wanted to go. The meeting was then closed. The claimant was not given a copy of the scoring to take away. Nor was he subsequently sent a copy of his individual scores.

7.74 The claimant e-mailed Ms Robinson on 27 May 2016 stating that he wished to appeal the decision to make him redundant citing discrimination on medical grounds as his ground of appeal as well as the system by which he was scored. He referred to not having been told that he was able to have a copy of his scoring sheet and asked for this prior to his appeal meeting.

7.75 However, the respondent always intended that there be a second and final individual consultation meeting with the claimant on 2 June 2016 which, unless the situation changed, would also be his last day of employment. This meeting duly occurred with the claimant again accompanied by Mr Edwards. Reference was made to the claimant having appealed the redundancy decision and requesting a copy of the selection criteria which were handed to the claimant in a form where the scores of those employed in an FLT coordinator capacity were extracted from the complete spreadsheet.

7.76 The claimant was asked if he would like an explanation of the criteria again but the claimant said that he did not require this as he understood the criteria, although he did not agree with them. He said he was challenging the low score on flexibility as he believed

he had remained flexible up until his medical condition the previous year. During the meeting the claimant queried why the respondent could not reduce salaries. This was put forward in the sense of a reduction of salaries as a means of avoiding a redundancy exercise rather than the claimant making an offer to reduce his own pay to preserve his individual employment.

7.77 Ms Robinson took some time to explain the vacancies within the business and elsewhere locally. The claimant asserted that he believed his redundancy was personal. Ms Robinson attempted to persuade him that it was not. Arrangements were then discussed for the claimant's appeal.

7.78 Ms Grace wrote to the claimant by letter of 2 June 2016 confirming his redundancy effective on 2 June and setting out his redundancy pay and notice entitlements.

7.79 Also on 2 June 2016 Mr Fitton completed a leaver notification form in respect of the claimant where he answered in the negative to the question of whether the claimant would be considered for re-employment stating *"very poor attitude"* to be the reason. In another section of the form he rated the claimant as 'very good' under the headings of ability, workmanship and initiative, 'fair' under timekeeping but 'poor' against the criteria of conduct and communication skills.

7.80 The claimant duly attended an appeal hearing with Mr Alex Henderson on 16 June 2016. Louise Robertson was present to take notes and the claimant was accompanied by Mr Chris Daly of his trade union.

7.81 Initially the claimant had an issue regarding Ms Robinson's attendance at the meeting but withdrew any objections. Mr Henderson approached the appeal on the basis that he would listen to the claimant's grounds of appeal but would not reach any conclusion that day. He would put any outcome in writing following further investigation.

7.82 Where the claimant maintained that he had been discriminated against on the grounds of his health, he asserted that since he had been ill nobody had been in touch with him. Mr Daly then said that the claimant did not understand how the scoring had been arrived at. There was then a discussion on the change of proposals regarding the continuing need for FLT coordinators. The claimant then raised the issue of lone working.

7.83 The discussion moved on to look at the claimant's attendance record. The claimant referred to the unauthorised absence as being an occasion when he *"slept in"* which he said should not have been taken into account. Mr Daly said that if the absence related to the claimant's heart condition it ought not to have been counted against him.

7.84 Mr Henderson noted that the claimant had in fact not attended work at all on that day recorded as unauthorised absence. The claimant said that he had explained that he was exhausted and needed to go back to bed. Ms Robinson confirmed that the particular circumstances had been taken into account and the respondent

had decided not to commence any absence management procedures against the claimant as a result of this absence.

7.85 There was then a discussion of the claimant's scores under skills and the behavioural factors. The claimant asked who had scored him in response to which Mr Henderson said that all three shift managers, the conversion manager and Mr Fisher as transport manager had done so.

7.86 Mr Daly suggested that the scores did not fairly reflect the claimant's work and that he wanted to submit an appraisal dated 2015, as referred to above, which showed the claimant's efforts at work. The appraisal was reviewed and it was noted that it covered a period of 2013 to 2014. Mr Henderson confirmed to the claimant that when scoring employees in line with the selection criteria they had looked back over two years only and he would not therefore have taken into account the claimant's performance in 2013 to 2014. The claimant then went on to say that the comments set out against his scores were personal in their nature. Mr Henderson referred to an occasion when the claimant had been disciplined because of a display of poor attitude. He also referred to the e-mail sent from Mr Fisher to Ms Robinson regarding the claimant allegedly referring to wanting *"to take the company for constructive dismissal".* The claimant's response was to say: *"Unbelievable".* At this point the claimant got up from his seat and left the room followed by his union representative. They came back shortly afterwards to say that the claimant wished to conclude the meeting as he felt uncomfortable with his heart at this point. Ms Robinson suggested rearranging the meeting.

7.87 Before concluding Mr Daly said that he felt the dismissal to be unfair as the claimant's behaviour and skills had been underscored, the dismissal was personal and people were trying to *"get back at him"*. Finally, he questioned whether there was a legitimate redundancy situation.

7.88 It was agreed that there could be a breathing space given to the claimant before a rearrangement of the meeting.

7.89 In fact the claimant made contact with Ms Grace and the appeal was rearranged for 29 June 2016.

7.90 At this meeting the claimant read out an e-mail from his phone which he had received from Mr Campbell in which Mr Campbell stated that he did not have any input in the scoring of the claimant. He further stated that he had a good working relationship with the claimant.

7.91 The claimant said that he believed that his redundancy stemmed from his raising a grievance and contended that the respondent did not treat him appropriately when he was absent on his prolonged period of sickness in 2015.

7.92 As regards the redundancy scoring, the claimant continued to assert that he ought not to have been penalised for the day recorded as unauthorised absence. He also complained about the

back injury absence being taken into account and said that he did not understand the attitude score. He asserted that the staff consultative committee was not properly elected, there had been a failure to consult and explain the scoring system and there had been discrimination on the grounds of disability in his scoring. His other points related to allegations of unfair treatment in respect of his ill health including in terms of the respondent's attitude to his lone working. He maintained that he had been threatened by Ms Grace with dismissal after she had returned from her holiday in 2015.

7.93 Following the meeting Mr Henderson spoke with Ms Grace regarding the points raised. They decided that they would speak to Mr Fisher and Ms Richardson regarding the scoring and consultation meetings. They met with them indeed on 9 July 2016 and went through a series of questions. These partly related to the claimant's attitude to the consultation process and whether the respondent had attempted to explain his selection for redundancy. The offer of alternative positions was also discussed. The claimant was described as being *"uninterested, rude, arrogant, wouldn't listen, made it clear he wasn't interested in the criteria at all"* as regards the first consultation meeting.

7.94 When Mr Fisher was asked to summarise his scoring of the claimant he described scoring him highly on initiative because the claimant was very good at the job. The low flexibility score he attributed to the fact that the claimant would not work overtime and would not change shifts to cover others as well as the way he dealt with things, him being inflexible, giving the unloading of wagons and taking of breaks as an example. As regards, attitude Mr Fisher commented that: *"If it didn't suit John then he wasn't interested",* and maintained that the claimant made derogatory comments about the respondent in front of him. As regards quality, this was referred to as being a joint score from Mr Fisher and Mr Campbell. Mr Fisher commented that his *"knowledge of the warehouse was high".*

7.95 Mr Henderson failed to recognise that Mr Fisher had in fact given the claimant the lowest score available under the quality criterion. No one recognised that the scoring of the claimant's absence for his back injury was inaccurate. There was no consideration of the circumstances of the claimant's unauthorised absence which was counted against him. Mr Henderson simply noted that the claimant had telephoned to leave a message that he had slept in. Nothing was found on the personnel file relating to this absence.

7.96 Ms Grace spoke to the shift managers regarding the contention that Mr Campbell had not been involved in the scoring. She was aware that all of the shift managers had sat together in a meeting room when the scoring was carried out. The shift managers informed Ms Grace that they all remembered a discussion of the scores in respect of the warehouse team. The comments placed next to each individual's score were said to be completed by the shift manager responsible for the individual concerned.

7.97 Mr Henderson considered that there had been a thorough and proper process of consultation with the staff consultative committee

which was properly constituted for the purposes of redundancy consultation. He considered that there had been proper individual consultation with the claimant and that there had in fact been a lack of engagement and interest in the process from the claimant. Mr Campbell's recollection of his non-involvement in the scoring was believed to be mistaken. He rejected any allegation of disability discrimination. As regards the unauthorised absence, he considered that the record did not indicate that the absence was connected to his heart condition. He was satisfied that the negative scoring in respect of the back injury and shingles absences were unrelated to the claimant's disability. He did not consider that Mr Fisher had scored the claimant negatively for flexibility for any reason related to the claimant's medical condition noting that there were a number of reasons for the claimant's refusal to work overtime and cover others shifts and a lack of flexibility was illustrated by the claimant's resistance when he was ever asked to change shifts, to adapt to busy periods (simply continuing with his duties in his own way without working with others) and his resistance to adjusting breaks to attend to delivery wagons which had arrived. He did not accept that Ms Grace had threatened the claimant at any earlier stage with dismissal.

7.98 On this basis Mr Henderson concluded that the claimant's appeal should not be upheld and wrote to him by letter dated 14 July 2016 confirming that decision.

7.99 The Tribunal heard evidence also from the claimant that during the early part of this Tribunal hearing whilst he was taking a toilet break and in a cubicle on one lunchtime, he heard Mr Fitton and Mr Hill in conversation at or around the urinals. His evidence was that Mr Fitton said that he could manage a week of sitting about getting paid to which Mr Hill answered: *"With all the planning and work we have done to get rid of him but could do without it".*

7.100 Mr Fitton and Mr Hill denied being in the toilet at the time the claimant thought he had overheard this conversation. In any event, they denied the conversation. On balance, the Tribunal does not consider that this conversation was invented by the claimant but, even if the claimant's hearing of what was said was accurate, the words used do not lead the Tribunal to a conclusion that Mr Hill was asserting that the claimant had been effectively engineered out of the business and/or that the assessment of him had been tailored to do so. From Mr Hill's point of view the claimant was certainly the right person to have left the business and it is unlikely that Mr Hill was, from a work point of view, sorry to see the claimant go. It is factually correct that the respondent spent a significant amount of time in planning and implementing a redundancy process obviously for a significant number of people in addition to the claimant but including the claimant himself.

Applicable law

8. In terms of legal issues, Section 98(1) of the Employment Rights Act 1996 ("the ERA") provides:

"*(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 that 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."

9. Redundancy is a potentially fair reason for dismissal pursuant to Section 98(2)(c) of the ERA. Redundancy itself is defined in Section 139(1) of the ERA.

10. In **Murray –v- Foyle Meats Ltd 1999 ICR 827** the House of Lords considered the test of redundancy and Lord Irvine suggested that Tribunals should ask themselves two questions. Firstly, does there exist one or other of the various states of economic affairs mentioned in the section? Secondly, was the dismissal wholly or mainly attributable to that state of affairs?

11. "Section 98(4) of the ERA provides:

"(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."

12. The Tribunal in a redundancy case will be concerned with reasonableness in the advance warning of redundancy, in the quality of individual consultation, the method of selection for redundancy and in the employer's efforts to identify alternative employment. How this test ought to be applied in redundancy situations has been the subject of many judicial decisions over the years but some generally accepted principles have emerged including those set out in the case of **Williams –v- Compair Maxam Ltd 1982 IRLR 83**

where employees are represented by an independent union. In the Williams case it was stated:

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

13. If there is a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of Polkey applies widely and beyond purely procedural defects.

14. In the Equality Act 2010 ("the EA") discrimination arising from disability is defined in Section 15 which provides:-

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that treatment is a proportionate means of achieving a legitimate aim."

15. The duty to make reasonable adjustments arises under Section 20 of the EA which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

16. The Tribunal must identify the provision, criterion or practice applied/physical feature/auxiliary aid, the non disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant.

17 The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

18. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

19. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor legislation, the Disability Discrimination Act 1995, when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."*

20. The Tribunal should confine itself to those issues raised and agreed as the reasonable adjustments sought by the claimant. It is not permissible for the Tribunal to seek to come up with its own solution without giving the parties an opportunity to deal with the matter (**Newcastle City Council –v- Spires 2011 EAT**).

21. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to

prevent the PCP/physical feature/lack of auxiliary aid creating the substantial disadvantage for the claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

22. Pursuant to Section 27 of the EA a person victimises another if he subjects him to a detriment because he has done a protected act. The claimant's written grievance is sufficient to qualify as a protected act and is relied upon as such.

23. Section 123 of the EA provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the expiry of the period in which the person might reasonably have been expected to implement the adjustment. The Tribunal has an ability to extend time if it is just and equitable to do so, but time limits are strict, the person seeking an extension needs to provide an explanation for the delay and there will be a balance to be conducted between the parties in terms of the interests of justice and the risk of prejudice.

24. Applying those findings of facts to the legal principles the Tribunal reaches the following conclusions.

Conclusions

25. The respondent has shown to the Tribunal's satisfaction that the reason for the dismissal of the claimant was redundancy. The claimant does not put forward that there was any other reason for dismissal although he maintains that his selection for redundancy was engineered and, in particular, that this was the outcome which Ms Grace was seeking.

26. The respondent certainly had a pressing business need to reduce costs and, having considered all other cost saving measures which might be taken, came to a considered view that there was a need to reduce staffing levels.

27. As regards the claimant's area of work, there was a proper consideration as to the respondent's needs going forward and indeed a first proposal removed from the structure entirely the role of FLT coordinator. This was on the basis that the respondent could continue with two FLT drivers on each of the three shifts with Mr Fisher and those FLT drivers, also in part, absorbing the administrative workload previously undertaken by the FLT coordinators. In fact, following further legitimate and genuine consideration Mr Fisher's view that it would be difficult to cope with the loss of the FLT coordinators' administrative expertise prevailed. However, cost pressures caused the respondent to look at the coverage required by FLT coordinators such that only two would be required going forward to cover each other and the core hours when the warehouse was busier in terms of deliveries in and goods out. The proposal thus became a reduction of FLT coordinators from three to two.

28. Again, this process was entirely genuine and developed over time with consideration given to the respondent's real needs and without any aim of arriving at a proposal which would remove the claimant individually from his position.

29. The respondent then entered into a meaningful and productive period of consultation with the staff consultative committee formed of elected representatives of the workforce and in circumstances where it was envisaged that this standing committee would be the appropriate forum with which to consult in the event of a redundancy proposal (as indeed it had been used before). Selection criteria were agreed with the committee.

30. However, the criteria envisaged further refinement so that a list of relevant skills in each department would be drawn up and an assessment made based on individual performance of the skills, again with criteria to be set. This never happened.

31. Furthermore, under the behavioural factors to be assessed, criteria were to be set to assist in the definition of the grades available, but never were. Nor was there any clear scoring set against each grade. Indeed, the grading settled upon was not what was applied in practice. The lowest category of grading was that of "*meets expectations*" which clearly did not give reasonable scope to the assessors to reflect an individual failing to meet expectations or where improvement was required. None of the assessors considered it to be open to them to give any individual a 'zero' score to reflect such assessment of them. The assessors in practice departed from the defined grading so as to score individuals on the basis that there were three scores available reflecting straightforwardly a 'high', 'medium' or 'low' assessment or alternatively, in the case of the shift managers, reflecting whether someone was 'excellent', 'good' or 'poor'.

32. The assessments made therefore did not coincide with what had been agreed at a collective level and the omission of the setting of performance criteria for skills meant that fewer points were available under this category.

33. Saying that, whilst there might have been consideration in devising the selection criteria as how the criteria ought to be weighted in terms of the emphasis given to the "hard" factors of absence and disciplinary as against the factors with more scope for subjectivity (in particular the behavioural factors), the Tribunal does not consider that those involved in devising the criteria applied their minds to that issue or had any rigid view regarding weighting. For instance, the weighting would alter dependent upon the department assessed and the number of individual specific skills identified and to be scored within that department. Thus, when Mr Fisher was tasked with conducting a separate assessment the effect of which, given that his scores were added to those of the shift managers, was to increase the weighting applied to the skills and behavioural factors, that was not in itself unreasonable.

34. More problematical to the Tribunal is the lack of explanation/definition of the behavioural factors. What was to be considered under the heading of 'flexibility' as opposed to 'attitude' was unclear and the definition of flexibility as involving an assessment of "multi skills" appears to have been overlooked by the assessors. The risk of inconsistency produced by such lack of definition is best illustrated when looking at the criterion of 'quality'.

35. The Tribunal accepts that the respondent acted reasonably in arranging for the assessment to be undertaken by the group of shift/conversion managers. Those were the individuals who had knowledge and a wider overview of all of the shopfloor operatives. The claimant had the benefit of his own shift manager, James Campbell, being involved in the scoring as indeed, on the Tribunal's findings of fact, he was. Involving all the shift/conversion managers in a collective assessment militated against any one manager being overgenerous or over critical in the assessment of his staff. It laid each manager open to challenge by his peers on the scoring assessments.

36. It was not unreasonable not to involve Mr Fleming in the assessment exercise. Whilst he was an individual with particular knowledge of the claimant, other operatives elsewhere within the business might point to individuals in intermediate positions in the management structure who might have particular knowledge of them. The shift/conversion managers were able, to a greater or lesser extent, to comment on the performance of all of the shopfloor operatives. Mr Fleming would not have been in such a position.

37. Nor was it unreasonable for the respondent to ask Mr Fisher, at a more senior level, to conduct his own independent assessment of the warehouse area. Again, he had particular knowledge of all the employees in that area and was able to conduct an independent assessment of this group. He had a legitimate interest in ensuring the retention of the individuals in the warehouse best able to assist in its efficient operation going forward.

38. However, the problems caused by a lack of definition of criteria is illustrated by the view he took of the people he was assessing as opposed to that taken by the shift managers.

39. Mr Fisher thought that when assessing 'quality' he was looking at the way in which the work was carried out rather than the end product of whether a good job was done. Therefore, he regarded the ratings given to the claimant under flexibility and attitude as impacting negatively on the assessment of quality. Clearly Mr Fisher thought the claimant was a very capable employee with good knowledge, as reflected in the initiative score where Mr Fisher recognised that the claimant was, in contrast to his other colleagues, more able to plan ahead and anticipate fluctuations in need proactively. He gained no benefit for such ability when Mr Fisher scored quality. This is in contrast to the shift managers who thought clearly that they were looking at whether or not the job was done to the necessary standard. They assessed the claimant as deserving the highest available rating under the quality category.

40. The lack of definition within the behavioural criteria therefore allowed managers to put their own interpretation on what was being assessed in a manner which produced inconsistent assessments.

41. The Tribunal considers the shift managers to have correctly interpreted what was intended to be assessed under the quality heading and Mr Fisher's assessment as outwith any band of reasonableness in that his assessment of quality in the claimant's case produced a further overlapping negative score due to the relevance given to flexibility and attitude which obviously had already been separately assessed.

42. The application of the selection criteria was not just problematical in terms of those factors requiring assessment from experience and observation. In terms of those criteria which were essentially factual and, in particular, against the criterion of absence the assessment was straightforwardly flawed and inaccurate. Due to the claimant's back injury being assessed as an absence of four days attracting a negative score of 10 points for each day of absence rather than an (accurate) score of just 5 points to reflect the single period of absence, the claimant suffered an additional deduction from his points of 35. There were numerous opportunities during the redundancy process for a number of people to have picked up on this mathematical error and incorrect allocation of scores, but no one ever did.

43. The claimant's loss of 15 points for an unauthorised absence is also problematical for the respondent. The respondent correctly recognised that it ought, as a reasonable adjustment, to discount the claimant's lengthy period of sickness from August to December 2015 from its assessment on the basis that it arose out of the claimant's disability, i.e. his heart condition.

44. The claimant's inability to attend work on 8 January 2016 when he overslept and reported in after the commencement of his shift and did not attend that shift was also an occurrence which arose out of and was related to his heart condition. The claimant was struggling with medication provided which involved him needing frequent trips to the toilet such that he was quite exhausted at that time and struggling to sleep with the result that he had then overslept and had been unable to come into work because he needed to catch up on his sleep. Furthermore, the respondent certainly at the return to work interview of 13 January was aware of that. That interview was conducted by Mr Fisher but was discussed with Ms Robinson and indeed they agreed that this was not an absence in respect of which any form of action under the attendance management procedure was appropriate due to the reason for it. This was all noted on the return to work interview form which unfortunately was missing from the claimant's personnel file at the time of the redundancy assessment. Ms Robinson appears to have forgotten the circumstances of this absence. She had a significant number of employees to score in terms of absence from work and nothing registered with her in her scoring of the claimant. On the other hand, such an omission might be said to be more surprising given the relatively rare occurrence of unauthorised absence amongst this group of employees.

45. Such ignorance cannot in the circumstances be regarded as of itself reasonable or somehow excusing the respondent from not giving consideration to the reason for the absence which again was not picked up by anyone during the consultation and appeal process.

46. The Tribunal does conclude that in failing to discount the unauthorised absence, the respondent failed to make a reasonable adjustment to the application of its scoring criteria. The scoring criteria for absence amounted to a relevant provision, criterion or practice which clearly put the claimant at a substantial disadvantage when compared to someone who was not disabled in that his disability caused and made it more likely that he would have difficulty in both attending work regularly and complying with the respondent's start of shift times. The deduction of points for this

absence certainly put the claimant at a substantial disadvantage in that it gave him a lower score in a competitive selection for redundancy exercise. That disadvantage cannot be said to disappear merely because it was not in itself decisive in the claimant's selection for redundancy. It would have been reasonable for the respondent to not penalise the claimant for this one off occurrence which was clearly and accepted, close to the time of the absence, to be linked to his disability. The respondent clearly thought it reasonable to discount the separate long period absence which arose out of the claimant's heart condition. Ms Robinson herself straightforwardly accepted before the Tribunal that if she had realised at the time of her scoring that the unauthorised absence arose out of the factors described above she would not have counted it against the claimant. She herself now recognises that it would have been reasonable for her not to penalise the claimant and the Tribunal must agree and conclude that in failing to do so the respondent did not comply with its duty to make a reasonable adjustment. This must also feed (negatively) into the Tribunal's consideration regarding the fairness of the claimant's selection for redundancy.

47. The Tribunal next looks at the process of individual consultation adopted by the respondent. Whilst there was a full and proper period of collective consultation, the period of individual consultation is characterised by a desire to get through a process at the greatest possible speed but without the necessary depth of consideration of an individual's at risk situation. The claimant's attitude to consultation is characterised by the respondent as one of disinterest and obstructiveness. A review of the notes of the consultation meetings renders that a not entirely inaccurate picture, but a picture which ignores the number of questions and issues the claimant did raise during the consultation meetings.

48. The first consultation meeting was clearly and ought to have been reasonably obvious to the respondent not a forum where the claimant could absorb the basis for his selection and make any representations or raise any queries in support of an adjustment to the scoring or his retention in employment. The claimant was clearly/foreseeably shocked at this meeting which was the first notification that he was at risk of redundancy. Whilst the score sheet was available at the meeting and shown to the claimant such that he understood the categories against which he had been scored and the points he had been awarded, he was not in a position to understand how those scores had been arrived at sufficiently to be able to make any representations. The Tribunal has over the course of this hearing had to spend a significant amount of time listening to and probing witnesses' explanations for the scoring until it has become clear to the Tribunal how the claimant had been assessed. The scoring, even in respect of absence, was of sufficient complexity that the respondent managed to score inaccurately and fail to realise it had done so. It was a lot to expect of the claimant for him to be able to engage in meaningful consultation at this first meeting.

49. Whilst the claimant it appeared was keen to bring this first consultation meeting to a close given his state of upset and agitation, as was evident to all present, and therefore the respondent did not have an opportunity to give the claimant a copy of his scoring, no attempt was made to provide the claimant with his scores prior to the second consultation meeting. Indeed, at the second consultation meeting it appears to the Tribunal that

the scores were provided to him only because he had by that stage already appealed against his redundancy dismissal.

50. The respondent arranged the second consultation meeting only a week after the first in circumstances where the claimant was aware that it was intended that this would be not only his last opportunity to address the respondent regarding his selection for redundancy but also his last day of employment.

51. Whilst again the claimant's scores were now provided to him at the second consultation meeting in a form which could be taken away by him, the claimant had realistically no opportunity to consider and digest the scoring or formulise coherent arguments against how he had been assessed prior to his dismissal.

52. Whilst the claimant appealed against his redundancy and two further meetings were held with him, including where he was represented by his trade union, Mr Henderson's approach to the appeal displayed a lack of analysis of the claimant's scoring such that this cannot be said to cure any earlier procedural defects. Again, the mathematical/calculation errors in the absence scores were not picked up upon. Nor was Mr Fisher effectively questioned or his scoring considered. It appears to have been accepted that the claimant had been scored highly against quality of work, whereas, in reality, Mr Fisher had scored him with the lowest points available.

53. For all of these reasons (particularly the flaws in the selection criteria and their application, the failure to make a reasonable adjustment and the lack of meaningful individual consultation) the claimant was unfairly dismissed and, again, suffered unlawful disability discrimination in the respondent's failure to make a reasonable adjustment in respect of the unauthorised absence scoring.

54. There was, however, a reasonable attempt to identify alternative employment for the claimant with all available positions raised for his consideration but ultimate (albeit not necessarily unreasonable) rejection. The respondent sought to identify any external opportunities available locally. There was at this point no failure to make a reasonable adjustment and none has been identified by the claimant.

55. It is still, however, necessary for the Tribunal to consider applying the principles set out in the case of **Polkey** whether, had the respondent conducted a fair redundancy process, the claimant might still have been fairly dismissed in any event and with what degree of certainty.

56. This has not been a straightforward task for the Tribunal. The Tribunal was satisfied that had there been a further period of consultation that would not have produced any additional arguments or representations on behalf of the claimant which would have changed the redundancy situation. The issue is more complicated however when the Tribunal comes to analyse the defects in the scoring process.

57. In the assessment exercise the claimant was given a score of 130 points in circumstances where he would have required 210 points to be level with a colleague FLT coordinator, Mr Barrett. As regards sickness absence the claimant should have suffered a deduction of 5 points rather than 40 points in respect of his back injury, which, when added to his 5 point deduction for the shingles absence, would have produced an overall

deduction of 10 points. Of course, as already stated, the deduction of 15 points for the unauthorised absence ought not to have been reasonably applied. The overall effect is that instead of a deduction of 60 points which was applied in the selection exercise the claimant should have suffered a total deduction of only 10 points such that his total score would have been 50 points higher at 180 points. This still clearly falls 30 points short of Mr Barrett.

58. As regards the skills and behaviour scores, the Tribunal obviously has to consider both the scoring given by the shift managers and the separate scoring given by Mr Fisher. It is not for the Tribunal to determine the scores which it would have awarded to the claimant.

59. Mr Fisher scored the FLT coordinators as all deserving 30 points under 'skills' and the shift managers as all deserving 20 points purely on the basis of the number of skills they scored. The Tribunal does not consider such scoring to be unreasonable in that, whilst there was an inconsistency as between Mr Fisher and the shift managers, each did assess the operatives consistently within their own assessments and on justifiable grounds.

60. As regards initiative the claimant achieved the highest possible score in both assessments. As regards flexibility and attitude the shift managers scored the claimant at the lowest level in circumstances where they regarded the claimant's colleagues as deserving the middle rather than the highest rating. Whilst some of the same examples might be and were used to illustrate both flexibility and attitude, the Tribunal accepts Ms Davies submission that there is nothing unreasonable in that. The Tribunal was satisfied that the shift managers' assessments were carried out within a band of reasonable responses in that they had a reasonable basis for the scoring and indeed for differentiating between the claimant and his two colleagues in terms of flexibility and attitude.

61. The Tribunal then looks at the assessment of Mr Fisher of the claimant under the criterion of flexibility. This was in substantial part due to his evidence based view of the claimant not liking to change his way of working or adapt to changing circumstances. It was, however, also influenced by the claimant's historic unwillingness to cover alternative shifts and particularly nights when others were absent due to holidays or sickness. This was indeed historic only in that any current lack of flexibility arose from the claimant's medical condition. The respondent itself in the assessments recognised the importance of looking at current matters when making the assessment, hence the two year period for assessment of disciplinary and absence. The Tribunal cannot consider it reasonable for Mr Fisher to penalise the claimant, as he clearly has done so, under the heading of flexibility for historic factors which were no longer relevant within the workplace. Nevertheless, that does not suggest that his reasonable assessment of the claimant would have been at the top level. Indeed, the Tribunal considers that if Mr Fisher had acted reasonably in his scoring, the claimant would have earned an additional 10 points but no more. This would reflect the fact that the claimant was, on evidence, reasonably viewed by Mr Fisher as behind the other two FLT coordinators. It also produces a result consistent with the scoring of the shift managers in terms of them putting the claimant at one rather than two levels below the other FLT coordinators in terms of flexibility.

62. Whilst Mr Fisher's score of attitude for the claimant puts him two levels below that of the other FLT coordinators rather than the one level below, as assessed by the shift managers, the Tribunal cannot say that such assessment by Mr Fisher, again based on the evidence of examples he considered, was outwith a band of reasonableness.

63. The Tribunal has already commented regarding Mr Fisher's assessment of 'quality'. The claimant was assessed at the lowest level by him whereas one FLT coordinator was assessed at the mid level and the other at the highest. The Tribunal's view was that the quality score applied by Mr Fisher had not reflected the claimant's ability to do a good job and had in essence been in part a rescoring of the claimant against flexibility and attitude. However, on consideration the Tribunal cannot justify as reasonable a score of the claimant greater than that in the middle band which is consistent with one of the other coordinators – effectively a reasonable assessment would have produced a further additional 10 points. It was reasonable for Mr Fisher to not put the claimant at the highest level in view of his genuine issues regarding the claimant's quality of work around queues and bottlenecks developing within the yard area and reflecting at least to some extent that the claimant's attitude towards others and to shifting needs within the workplace on a day to day basis did impact upon how his work might be viewed objectively from a quality perspective.

64. The Tribunal has considered carefully whether this reassessment of scoring is an act which involves too much pure speculation so as to be impermissible but believes that on the basis described above it is not indeed so speculative and that the Tribunal can indeed assess that if a fair process had been undertaken in terms of assessment against the criteria the claimant would have achieved a score enhanced by 20 further points under the behavioural factors.

65. This of course brings the claimant to a score of 200, still short of the 210 points necessary for him not to be automatically the person under consideration for redundancy. On this basis, the Tribunal must conclude that if a fair process had been followed the claimant would still have been selected for redundancy.

66. The Tribunal in coming to this conclusion has rejected the argument advanced on the claimant's behalf that the scoring which was undertaken was manipulated so as to result in the claimant's dismissal i.e. that the scoring was not a genuine exercise at all. The Tribunal has noted that Mr Fisher and the shift managers scored the claimant independently and, without any collusion, fed their results to Alex Henderson who populated the final spreadsheet. They conducted their assessments without any awareness of the scores which had been given by Ms Robinson under the headings of absence and disciplinary which of course would and did have a significant impact on the total scoring. Whilst the assessors might have had some idea of levels of absence of those they were assessing, such as they might be able to guess at their likely scores, this would have been for them an exercise of some speculation and again, given how complicated the actual point scoring was under absence, the Tribunal cannot conclude that the shift managers and Mr Fisher made their assessments anticipating that they would result in the dismissal of any particular individual. It follows further that the claimant's selection for redundancy

was not in any way connected to his previous grievance – it was not an act of victimisation and that complaint pursuant to Section 27 of the Equality Act must fail.

67. The Tribunal concludes that had a fair process been followed the claimant would have had the benefit of an additional two weeks of employment to allow a proper and full period of consultation to take place but that at the end of that period of consultation he would still have been dismissed by reason of redundancy.

68. The Tribunal has come to such conclusions mindful of the separate free standing disability discrimination complaints being pursued by the claimant. The Tribunal does not consider that these impacted on the claimant's selection for redundancy. They are indeed freestanding complaints and, in essence, ones alleging a failure to comply with the duty to make reasonable adjustments. Whilst they are brought in the alternative as complaints of discrimination arising from disability it has not been articulated in evidence or submissions how such complaints might be founded.

69. The fundamental difficulty the claimant has in pursuing these discrimination complaints is that they are significantly out of time. When viewed as complaints of reasonable adjustments the time must run from January 2016 which is the time by which if the duty arose, reasonable adjustments ought to have been made. In fact the claimant confirmed that he was fit to work his shifts in his 23 July 2015 grievance letter, his return to work following his lengthier period of absence was on 23 December 2015 and he was told he would remain on 12 hour shifts on 15 January 2016. The claimant's complaints to the Tribunal were lodged only on 1 September 2016.

70. Certainly, the claimant worked from January until the point of his redundancy dismissal without raising any difficulties related to his medical condition and without seeking any adjustments to his working hours, working pattern or duties. It is clear to the Tribunal that had the claimant not been selected for redundancy, there would have been no complaint of disability discrimination pursued by him. Indeed, the claimant has provided no explanation for not bringing a complaint to the Tribunal at an earlier stage. In submissions, but without any basis in evidence, Ms Garside asserts that the claimant was unaware of his ability to bring a complaint but she then herself accepts that this does not provide a reasonable explanation.

71. The Tribunal would note that the claimant had access to trade union advice and undertook no investigations himself as to steps he might take in circumstances where he was aware that he was seeking reasonable adjustments and that he had been categorised as a disabled person for the meaning of the Equality Act 2010.

72. In the absence of any explanation the Tribunal cannot conclude that it would be just and equitable to extend time for the pursuance of these discrimination complaints whether brought on the basis of a failure to make reasonable adjustments or pursuant to section 15 of the Equality Act.

73. In any event, having made relevant findings of fact, the Tribunal would comment as regards the disability discrimination complaints as follows.

74. The claimant on the medical evidence presented was fit to perform his duties at all material times and able to do so working nightshifts, on a rotating shift pattern and on the basis of working 12 hour shifts. He did so indeed without any difficulty evidenced from January until June 2016. Nor was he disadvantaged in his return to work in December 2015 by a lack of a phased return. The claimant had indeed delayed his return to work by taking leave and at the point he returned was fit to do so according to medical evidence and subsequently the claimant's own confirmation. The claimant in January confirmed his ability to carry out his duties on his existing shift patterns provided that he was not asked to work anyone else's shifts in addition to his own as cover for sickness or holiday, a condition to which the respondent readily agreed and complied with.

75. Finally, the issue regarding lone working revolved around the claimant's fear and concern that he might become ill in a situation where this would not be evident to others and where assistance might not be able to be quickly provided to him without someone being made aware of his condition. There was however on the claimant's own evidence, including in the health and safety risk assessment, no particular additional likelihood that he would, when working alone, have any greater risk of difficulties than anyone else. He was still fit to drive his car alone. Furthermore, the claimant worked in an area which was partially monitored by CCTV, where he did even during nightshifts come into contact with others and where he was for significant periods office based with access to a landline telephone. The only possible additional solution put forward by the claimant was the provision of a two-way radio for contact to be made when he was working down the aisles of the warehouse away from his office and out of CCTV coverage. However, the claimant's possession of a radio would not have alleviated his fear or indeed the risk of him becoming ill without people being aware in circumstances where of course it was quite foreseeable that if the claimant had suffered from a significant difficulty relating to his heart condition he would not necessarily have been physically capable at all of communicating that to anyone else. The provision of additional communication methods would have had no impact on the claimant's ability to carry out his duties. The respondent did of course consider the issue of the use of radios and from the claimant's return to work in December the claimant gave no indication that he still felt this would assist him – during the lone worker assessment he commented that he now the least likely person to collapse at work. The respondent did put in place an arrangement for shift managers to keep in contact with the claimant during his night shifts. Whilst this may have broken down on occasions, the claimant agreed that his usual shift manager, Mr Campbell was diligent in his monitoring of the claimant.

76. Regardless of the time limit issues, therefore, such complaints would not have succeeded.

77. Remedy for those complaints which are well founded remains to be determined. On the Tribunal's findings the claimant's financial loss is limited. The Tribunal has come to no conclusion as to the level of award for injury to feelings in the single reasonable adjustment complaint which succeeded and any determination will require further evidence and submissions. In an effort, however, to be helpful to the parties in achieving now an agreed resolution it would comment that, on the basis of the evidence heard by the Tribunal (in particular as regards the major

sources of the claimant's upset) up to this point, any award is likely to fall within the lower **Vento** band.

Employment Judge Maidment

Date: 19 May 2017