Case Number: 2500619/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr R Meikle	**AND**	**Bel Valves Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 8, 9, 10 & 23 November 2017**
[23 November 2017 – Deliberations]

Before: **Employment Judge Reed** **Members:** **Mrs L Georgeson**
Mr G Gallagher

Appearances

For the Claimant: **Mr H Trory of Counsel**
For the Respondent: **Mr S Goldberg of Counsel**

RESERVED JUDGMENT

The unanimous decisions of the Tribunal are:

1 The claimant was not unfairly dismissed.

2 The complaints of unlawful discrimination are not well-founded.

REASONS

1 This is an application by Mr Ronald Meikle which he began by the presentation of his claim form on 26 May 2017. In that form he described the causes of action on which he seeks determinations by an Employment Tribunal as unfair dismissal and disability discrimination. At this hearing he was represented by Mr H Trory of counsel. Only he gave evidence in support of his application.

2 The respondent is Bel Valves Limited. That company denies any form of unfairness or discrimination and disputes the claimant's contention that he is disabled in respect of two impairments (Plantar Fasciitis and IgA Nephropathy. It concedes disability in relation to the claimant's osteoarthritis. At the hearing the respondent was represented by Mr Simon Goldberg of counsel. Evidence was given on its behalf by:

- Mr Bruce Heppenstall, Deputy Chief Executive Officer;
- Mrs Kate Simpson – from May 2015 to 31 May 2017 employed by British Engines Group as Group Director – HR Projects, Learning and Development/HSE. As one of her projects she moved from the central office to the business of Bel Valves and Bel Engineers (UK) Limited.
- Mr William Christian Dacre – presently employed by the respondent as Assembly and Testing Manager;
- Mr Brian Macklin – employed by the respondent since 1990 in a variety of roles. His latest post was as an Inspector – and that from 13 September 2010 until his retirement on 3 March 2017. Additionally and from August 1999 until his retirement he was a trade union official with Unite. It is appropriate at this point to record evidence which he gave as it is material to his involvement in these proceedings. Mr Macklin said:

  "*2 From August 1999 until my retirement I was a trade union official with Unite, initially in 1999 as a shop steward and then six months later as the Union Convenor. I participated by way of the Union Committee, dealing with pay negotiations, consultations on terms and conditions and restructure/redundancy proposals.*

  3 In my time as union convenor, I was involved in around 14 restructure/redundancy processes and I took a leading part in the collective consultation process that started in September 2016."

  [The redundancy process to which Mr Macklin referred as having started in September 2016 is that which figures in these proceedings].

3 Before the Tribunal was an agreed bundle of documents comprising 397 pages. In addition and by e-mail dated 7 November 2017 the respondent supplied two documents: one of them relates to and is entitled "*IgA Nephropathy*" and the other "*Plantar Fasciitis*". Further and on the morning of the first day of this hearing – 8 November – the claimant produced:

- A letter dated 16 September 2016 by Dr H Haffmans;
- A letter dated 1 November 2017 by Stephen Hannant, Podiatrist;
- A letter dated 6 November 2017 by Professor D Kavanagh.

4 On 14 August 2017 in a private preliminary hearing arranged for case management purposes matters in issue between the parties were recorded as follows:

"***Unfair dismissal (s98 Employment Rights Act 1986)***

- *Did the respondent have a reason for dismissing the claimant which could be fair?*

- *If so, what was that reason?*
- *Taking into account the size and administrative resources of the respondent did the respondent act reasonably in dismissing the claimant?*

Disability discrimination

- *Was the claimant disabled at the material time as a consequence of*
  - *Plantar Fasciitis*
  - *IgA Nephropathy*
  - *Osteoarthritis.*

Discriminatory dismissal (section 39(2)(c) Equality Act 2010)

- *Did the respondent discriminate against the claimant by dismissing him?*
- *Did the respondent dismiss the claimant because of his osteoarthritis and because the respondent was aware that he was due to have an operation on his hip because of his osteoarthritis that would result in a period of absence?*

Unfavourable treatment (section 15 & 39(2)(c) Equality Act 2010)

- *Was the claimant treated unfavourably because of something arising in consequence of his disability?*
- *If so, can the respondent show that the treatment of the claimant was a proportionate means of achieving a legitimate aim?*

Reasonable adjustments (section 20 Equality Act 2010)

- *Did the respondent operate a provision, criterion or practice:*
  - *which applied equally to employees who were not disabled*
  - *which put the claimant at a substantial disadvantage*
  - *if so, can the respondent show that it took such steps as were reasonable to remove the disadvantage?*"

5 At the outset of this hearing:

5.1 The parties agreed that the issues joined between them are adequately stated in the order made on 14 August 2017 and set out at paragraph 4 above. No deletion, correction or addition was called for.

5.2 The parties agreed that only liability should be considered at this hearing.

5.3 The parties suggested that the claimant should present his case first and the Tribunal agreed.

The hearing proceeded in accordance with the agreements and suggestion set out above.

6 Expressed briefly, at the heart of these proceedings is, according to the respondent, a redundancy situation in its workplace where the claimant worked. A procedure was formulated and agreed. It included a points system to be applied to those affected by the redundancy situation. The claimant's case is that

he was selected for dismissal unfairly and that the scoring and its outcome left him as a victim of discrimination because of his disability.

7 In setting out its reasons the Tribunal will work to a greater or less extent to the following scheme:

There will be:

7.1 a description of the factual scenario as found by the Tribunal.

7.2 reasons relating to the allocation of scores to the claimant and whether there was any unfairness.

7.3 reasons as to whether any scoring was defective because of the claimant's impairment(s) or disability(ies) and whether for the purposes of this case he was disabled.

7.4 consideration as to whether there was any unfairness.

7.5 consideration as to whether there was any discrimination.

8 **The factual scenario**

8.1 The respondent is a limited company and a division of the British Engines Group which offers the design and manufacture of valves and actuators for critical onshore, offshore and sub-sea applications.

8.2 The claimant was employed as a Fitter by the respondent at its premises at St Peter's, Newcastle upon Tyne. His employment began on 18 October 2004 and terminated on 31 December 2016. The claimant had completed 12 years of employment and at the date of termination was 63 years of age.

8.3 On 28 September Mrs Kate Simpson completed and served an HR1 form.

8.4 On 29 September Mr Neil Kirkbride (Chief Executive Officer) acting consistently with the HR1 gave notice to Mr Brian Macklin of a proposal that involved 20 or more employees being made redundant within a period of 90 days. The pool for fitters comprised 18 employees. Seven redundancies from that pool were proposed.

8.5 The letter (at pages 83 and 84 of the bundle) provided a reason for the proposal as follows:

> "*… We have seen a continued downturn in the Oil & Gas Market and as a consequence a reduction in both current and future demands for our products and services. This has resulted in a significant reduction in orders for the Bel Valves Ltd business*."

8.6 The letter said further:

> "*The proposed redundancies would affect 47 out of a total of 261 employees who are employed at St Peter's.*"

8.7 On the same day an announcement was made in writing by the company to all affected employees. A copy of that notice appears at pages 70, 71 and 72 of the bundle and is signed by Mr Kirkbride and dated 28 September 2016. The announcement provides the same information and describes the titles of the jobs affected, the relevant pool size, the jobs at risk and the potential termination date.

8.8 On 29 September Mrs Simpson met with Mr Macklin to carry out the first collective consultation meeting. Minutes showing what was discussed were produced at pages 80-82 of the bundle. It is appropriate at this point to note and record that the minutes include:

> "*Reference the Appendices and Group Service the points to be awarded against the criteria needs to be agreed. Kate stated that she will with (sic) what the reps feel is right as long as within the law. Brian is wanting to talk to Mark re this. Running through points to change for the redundancy selection criteria Kate raised attendance points may need to be changed. Looking at 13 week period before announcement.*"

8.9 A second collective consultation meeting took place on 3 October 2016. Minutes of that meeting were produced at pages 85-87 of the bundle. The meeting was led by Mrs Simpson and amongst others Mr Macklin and representatives of Unite including Mr James Grant (who represented the claimant throughout in individual consultation meetings) were present. Consultation arrangements were discussed. It was proposed that the redundancy procedure that had been followed in past processes would be used to a large extent as the policy had proved itself and people were familiar with it. The policy was produced and appears at pages 56-69 of the bundle.

8.10 It was agreed at the meeting that the detail of how the respondent would treat length of service, time keeping and attendance would be reviewed as part of early collective consultation discussions. It was further agreed that the procedure would then be put on the intranet of the respondent when all matters had been finalised. The respondent accepts that the criteria made mention of disability related absences and lateness being treated differently.

8.11 Mrs Simpson said that the selection assessment would be about "*the skills and what best fits with the company needs moving forward*".

8.12 A further collective consultation meeting took place on 4 October and minutes of that meeting were produced at pages 88-90 of the bundle. Particular details of the attendance criteria and the timekeeping criteria and the points that would be awarded were considered. It is convenient to note that the minutes include:

> "***3 Attendance criteria***
>
> - *It was agreed by both parties that attendance will be judged over a 12 month period. It was agreed that the categories for scoring would be:*
>
> *2 occasions or less – 20 points*
>
> *3-5 occasions – 10 points*
>
> *6 occasions or more – no points*
>
> - *Any pass outs beyond 2 occurences are classed as an absence.*
>
> ***4 Timekeeping criteria***

- *It was agreed by both parties that timekeeping will be judged over a 12 month period on occasions and not by minutes. It was agreed that the criteria would be:*

  3 occasions or less – 20 points

  4-7 occasions – 10 points

  8 occasions or more – no points

  If necessary, for exceptional factors, such as extreme weather conditions, if they occurred in the assessment period would be agreed with Union Representatives in advance, before the scoring commences. It was agreed that there had been no such exception in the reference period being discussed (from 28 September 2015 to 28 September 2016)."

8.13 Representatives for consultation for hourly and paid employees (the works group) and monthly paid employees had been appointed and these all attended that meeting.

8.14 A further collective consultation meeting took place on 5 October and minutes were produced at pages 91-96 of the bundle. At that meeting among others were Brian Macklin and James Grant [and John McKie, Bob Scope and additional trade union representatives]. The meeting was chaired by Mrs Simpson and matters discussed and agreed included the consultation process including what the process would include and the contents of the proposed redundancy procedure. Those matters were agreed.

8.15 A further collective consultation meeting took place on 11 October and minutes were produced at pages 101-103 of the bundle. That meeting included the representatives of the works group.

8.16 Further collective consultation meetings took place on 13 and 17 October with the works group and outstanding matters were agreed enabling individual consultations to start.

8.17 A letter dated 13 October and appearing at page 114 of the bundle was written to the claimant. It warned him that his role has been identified as being 'at risk' of redundancy. The letter reads:

"*<u>Strictly Private and Confidential</u>*

Dear Ronald

The recent company announcement on Wednesday, 28 September 2016 outlined the company's proposal to reduce its workforce by reason of redundancy. In order to mitigate this number and reduce the number of roles at risk, we have been able to accommodate the volunteers, details of which were included in the company announcement dated 10 October 2016.

As part of our collective consultations with your representatives, and clarification on the pools of employees, I write to confirm that regrettably your role has been identified as being 'at risk' of redundancy.

We will continue to collectively consult with the agreed representatives to explore ways to further mitigate the proposed redundancies. At the appropriate time we will organise an individual consultation with you to confirm your employment position to you having taken into account all relevant matters.

Details of this will be sent in due course.

Should you have any further queries at this stage please raise them with your manager as soon as possible."

8.18 A letter dated 3 November was written to the claimant. A copy appears at pages 115 and 116 of the bundle. The Tribunal is satisfied that that letter is of material significance and that the claimant was given all necessary information for consultation purposes. This comprised:

- His consultation sheet which included service, time keeping and attendance together with the Redundancy Selection Criteria form.
- A copy of the Selection Criteria guidance for Section A and B.
- A copy of the agreed Selection Criteria for Section C.
- A copy of the Redundancy Policy which included guidance around the treatment of service, attendance and timekeeping.
- The (then) current group vacancy list.

8.18.1 Leaving aside the letter of 3 November for the moment the Tribunal notes and records that it paid particular attention to the method by which the provisional scoring was carried out. The Tribunal was impressed with the arrangements made and is satisfied that two officials William Dacre and Martin Cain were responsible for assigning scores to individuals in the pool which included the claimant. More particularly the Tribunal is satisfied and finds that Mr Dacre initially scored the claimant's criteria, that Mr Cain then reviewed Mr Dacre's scoring and that there was an arbitration which involved Human Resources. Mr Dacre said "*I assessed Mr Meikle – so did Martin Cain*. *Then there was an arbitration with Human Resources and whenever scores assigned by Mr Cain and myself differed we agreed a final score*". Mr Dacre referred the Tribunal to page 114A in the bundle and explained that all of the handwriting on that page is his. He explained further that: "*The note includes comments recorded during the first consultation meeting with the claimant and recorded his comments. I then took his comments away and gave further consideration to his case*." The Tribunal makes particular note of these its findings for part of the claimant's case was that Mr Dacre deliberately set out to score down his marks or some of them and that his intention was to ensure that the claimant would be dismissed because of a then forthcoming period of absence for a hip operation. The Tribunal rejects any such suggestion. It is satisfied that it is farfetched to suggest that Mr Dacre, Mr Cain and the arbitration procedure including Human Resources were all tainted by bad faith to achieve the claimant's dismissal.

8.18.2 Returning to the letter of 3 November 2016, the Tribunal notes and records that that letter includes:

"*Further to your brief meeting today with your Line Manager, I write to confirm that regrettably following the assessments undertaken, you have been selected as being 'at risk' of redundancy. This is due to the business review which could result in fewer employees being required to carry out the type of work for which you are employed. A copy of the agreed criteria and assessments are attached.*

We now wish to meet with you as part of the individual consultation arrangements. The meeting will take place with Martin Cain (Site Operations Manager – A & T) and a member of the HR team on Tuesday, 8 November 2016 at 02:00pm in Meeting Room 1 (just off the Reception). The meeting will serve as an opportunity for you to raise any questions you may have relating to your 'at risk' position, discuss any alternatives to redundancy you may have identified and to discuss whether you would be interested in any vacancies within the Group for which an up to date copy of the current vacancies throughout the Group will be available at the meeting.

Attached to this letter are the following:

1 Your Consolidation sheet, which includes service, timekeeping and attendance, together with the Redundancy Selection Criteria form;

2 A copy of the Selection Criteria guidance for section A and B;

3 A copy of the agreed selection criteria for section C;

4 A copy of the Redundancy Policy which includes guidance around the treatment of service, attendance and timekeeping (see pages 10, 13 and 14);

5 The current group vacancy list.

I am now going to set out a summary of your position following the provisional scoring exercise which is part of the selection process. I emphasise the scoring is provisional and no final decisions will be taken until after the consultation process has been completed. Would you please note:

(A) Your Pool for Selection: BEL Valves: Fitters.

(B) The total number of employees in the pool: 18.

(C) Number of proposed redundancy places in the pool: 7.

(D) Number of volunteers from the voluntary severance programme: 2.

(E) Number of employees in the revised pool: 16.

(F) Revised number of proposed redundancies: 5.

(G) Your place in the pool after the provisional scoring: You are in 13th place. On the basis that the highest score is first place, by way of the provisional scoring you are presently ranked in a redundancy place.

(H) Details of the material gap: You are 5 points below a not at risk place, ie not a redundancy place.

This information is supplied by the documents contained in attachments 1 and 2 that I stress have been prepared on a provisional basis in line with the matters that have already been agreed during the consultation process.

At this meeting you will have an opportunity to challenge or accept your provisional scoring. If you wish to challenge the scoring it is important that you prepare sufficiently for that meeting and come with evidence that can be considered with regards to your challenge.

Following the consultation process we shall finalise the selections for redundancy and will confirm your employment position to you having taken into account all relevant matters such as any points that you have raised or may raise during the consultation period.

You have the right to be accompanied at the meeting by a fellow worker or an accredited trade union official."

8.19 The Tribunal has no doubt and finds as a fact that the claimant was made fully aware of the relevant selection pool, the total number in the pool, the number of proposed redundancy places, the number of volunteers from the voluntary severance group, the number of employees in the revised pool, the revised number of proposed redundancies, the claimant's place in the pool after the provisional scoring and the number of points by which the claimant fell short of avoiding a place not at risk of redundancy. The Tribunal is equally satisfied that the claimant was referred to relevant information in documents which were supplied and that at the first individual consultation meeting he would be given the opportunity to challenge the scoring and that should it be his wish to do so he should be sufficiently prepared and should attend with evidence to support his challenge. The Tribunal is satisfied and finds as a fact that with the letter of 3 November was provided with a consolidation sheet – which gave details of provisional scoring – pages 189-190, a blank assessment form as part of the redundancy policy – page 66, the selection criteria – pages 119-120, and the redundancy policy including guidance relating to attendance – page 68. Mrs Simpson said that the document at page 117 is the completed selection assessment form (page 66) marked up by the claimant and presented to the first meeting by reference to the provisional scores that had been provided on the consolidation sheet at pages 189 and 190. (It appears that the entries at page 117 are incorrect – though the totals at page 118 are correct).

8.20 It is appropriate to describe the selection criteria as detailed on the consolidation sheet.

The first section involved an assessment by line managers as to:

- A Job proficiency.
- B Application.
- C Specific skills.

The second section was calculated by reference to factual details and figures involved:

- Group service.
- Attendance.
- Timekeeping.

8.21 The claimant scored a total of 33 in relation to the items under the first section and a total of 42 in relation to the items described in the second section.

8.22 The first individual consultation meeting took place on 8 November 2016. Details of the arrangement of that meeting appear in the letter by the respondent of 3 November at paragraph 3.

8.23 Minutes or notes of that meeting appear at pages 124-132 of the bundle and the Tribunal notes and records that present were Will Dacre and Lindsay Carr for the respondent and the claimant and his companion/representative Mr James Grant.

8.24 The minutes include a number of significant remarks made by the claimant including as follows:

- *Q: Do you accept the information given to you so far is sufficient for you to engage in effective and meaningful consultation?*
- *Happy with the paperwork and happy to move forward.*

It is right that the claimant did request other documents some of which were provided and others which were not. In this connection it is sufficient to quote from the statement of Kate Simpson who said:

"*54 (1) Mr Meikle's request to be provided with the names of the other fitters who were on the selection list in the order of scoring, but this was turned down as not being necessary and not appropriate under data protection legislation.*

(2) In respect of alternatives to redundancy, Mr Meikle accepted the business and operational justification of the proposal and did not put forward any business or personal alternatives to redundancy; and

(3) Mr Meikle requested copies of pass outs as he wanted to review them and said he would then feed back … and the copies were provided.

55 …

56 Although requested it was decided that copies of appraisals were not relevant to his pool as they were last done too long ago and the period of assessment agreed with the union was the last 12 months. Where performance documents were relevant and up to date for some other groups, they were used, but here they were not relevant and this was clearly explained to Mr Meikle at the time.

57 In respect of training, Mr Meikle asked for details and this was provided to him …".

8.25 It is clear from the evidence and from the notes of the meeting that the scores assigned to the claimant by the respondent were carefully if not minutely discussed and where there was disagreement on the part of the claimant notes were made accordingly and what the claimant says should have been scored noted. A note of the scoring that was challenged was compiled and listed by Lindsay Carr and that list appears at page 136 of the bundle. In its material part the note reads as follows:

> "*Challenged the following scores:-*
>
> *A1 – scored 6, thinks s/b 8*
>
> *A2 – scored 4, thinks s/b6*
>
> *A3 – scored 3, thinks s/b 4*
>
> *B1 - scored 3, thinks s/b 4*
>
> *B2 – scored 5, thinks s/b 6*
>
> *B3 – scored 1, thinks s/b 5*
>
> *B4 – scored 3, thinks s/b 5*
>
> *C1 – scored 3, thinks s/b 4*
>
> *C5 – scored 1, thinks s/b 3*
>
> *Question re accrued untaken holidays – will be paid/compensated.*
>
> *Generally all holidays should be taken as discussed on collective consultation.*"

Additionally it is clear that the claimant scored 10 for attendance, challenged that score and the details of the challenge and the conclusion figure large in these proceedings. They are dealt with separately below.

8.26 At the close of the first individual consultation meeting the claimant made a comment that he would see if the company wanted him. Lindsay Carr explained that it was not whether the company wanted him or not, it was more the need to reduce the workforce. Lindsay Carr also explained that the selection and assessment process would help give them the decisions of who were in redundancy positions in a fair way. It is obvious that the selection criteria played a key part in the decision.

8.27 It is not for the Tribunal to seek to re-score items in the selection criteria nor to second guess what score might or should have been given. That said it is convenient at this point for the Tribunal to note and to make findings of fact in relation to the single point scored by the claimant against the criterion of attitude. First of all the Tribunal notes that at page 117 the score for attitude to work appears as zero. It was acknowledged by all that that scoring represents a clerical error and that in fact the score should have been 1. Under cross-examination Mr Dacre was questioned closely about so low a score. Suggestions were made including that Mr Dacre deliberately underscored the claimant to engineer an overall low score to ensure that the claimant would be selected for dismissal as redundant. In support of the claimant's challenge is a letter dated 8 November 2016 by Beverley Ord appearing at pages 137 and 138 of the bundle. That letter shows that it had been requested by the claimant who

had asked her "*to compile a personal statement regarding his contribution to the PTC project over 4+ months; from June 2016 to September 2016.*" There is no doubt that the letter speaks in complimentary terms and describes the claimant's enthusiasm, honesty, forthrightness, preparation for meetings, working closely with lesser experienced fitters, thinking outside of the box, working at home in his own time and of his own volition etc. The Tribunal however cannot overlook the penultimate paragraph of that letter which reads "*Ronnie was outspoken at times, however delving deeper in to understand why he is sometimes so negatively outspoken you find that the underlying cause is (in my opinion) that he has not been listened to in the past, is very passionate and cares deeply about what he does, the department as a whole and particularly the training and treatment of young apprentices within BEI.*" Mr Dacre under cross-examination was asked how so low a score could be given by him, Mr Dacre, for the claimant's attitude in light of the positive terms of Ms Ord's letter. The Tribunal is satisfied that Mr Dacre far from wanting to diminish the claimant was diffident about having to record so low a score. He explained that the difference between Ms Ord and himself was that the claimant and Ms Ord were working 1:1. Mr Dacre was watching the claimant on the shop floor with others. He gave evidence that one colleague approached him saying that he did not want to work in the same team as the claimant which represented a problem to Mr Dacre who he says was trying to build more of a team bond. Mr Dacre commenting on Ms Ord's remarks said "*This statement is from a person who spent time with the claimant. I am happy with that but Beverley Ord did not spend 80% or 90% of her time with the claimant on the shop floor as I did and the workforce*". He went on to say that he was told particularly by three people on the shop floor that they did not want to work with the claimant and that he had never had a complaint like that before. It was put to Mr Dacre by the claimant's counsel that the remarks against the claimant were no more than banter. It was put to Mr Dacre that he never discussed any such problems with the claimant. He replied "*I did but I kept in-house – also discussed with Martin Cain – but tried to keep in-house. I know feelings run high when redundancy comes out but things were getting vicious then*".

Nor can the Tribunal overlook the fact that the scoring was not exclusively the work of Mr Dacre. As stated above scoring was done by Mr Dacre and Mr Cain and was then the subject of arbitration which included those two men and an officer from Human Resources. The Tribunal rejects any suggestion that the score of 1 was a device deliberately adopted by Mr Dacre to engineer the exit as redundant of the claimant.

8.28 Following the first meeting serious attention was given by the respondent to the items challenged by the claimant as detailed in page 136 – the relevant parts of which are quoted above. A further arbitration meeting was held on 14 November for the scores to be reassessed. The details are noted at pages 139, 140 and 141 of the bundle. Present at the meeting were Mrs Kate Simpson, Ms Lindsay Carr, Ms Elaine Roy, Mr William Dacre and Mr Martin Cain. The notes show each criterion considered, the score originally assigned, the employee's requested

score, comments discussed and the final score. It is right that many of the scores remained unaltered but two were changed. In relation to the criterion of self motivation the claimant challenged a score of 3, required a score of 4 and that score was indeed increased to 4. The notes show that the meeting had "*taken on board his comments …*". Equally the score for C1 valve knowledge was considered, the claimant's comments were again taken on board and the score was increased from 3 to that requested by the claimant namely 4. The Tribunal is satisfied that careful consideration was given to the criterion of attitude and that there was no change of the score of 1. Consistent with thinking throughout the note of the considerations as to attitude shows "*consistently negative, confrontational, opposed to change ie assembly shop moves.*" It follows that the score represents the original thinking of Mr Dacre, left untouched by Mr Cain or the first arbitration, challenged but then left untouched by the second arbitration including the personnel detailed, Kate Simpson, Lindsay Carr, Elaine Boyd, Elaine Roy as well as Messrs Dacre and Cain.

8.29 A second individual consultation meeting was to take place. By a letter at page 142 dated 15 November 2016 by Rachael Conn arrangements for that meeting were described. It was to take place at 3:00pm on Wednesday, 16 November 2016. The letter showed that Mr Meikle had the right to be accompanied at the meeting by a fellow worker or an accredited trade union official.

8.30 The meeting took place and notes or minutes of it appear at pages 144-149. Present at the meeting were Mr W Dacre, Ms Lindsay Carr, the claimant and Mr James Grant.

8.31 At that meeting and for the first time, and surprisingly, the claimant challenged those who had assessed him. The notes follow a standard pattern and include a record that at the first round of consultation meetings the claimant understood why staffing levels had to be considered and why the proposal had come about. It was noted:

> "*6 In consultation with both Union and Employee Reps, it was accepted that the pool was correctly drawn, the assessors were the correct people and that the proposed selection criteria were appropriate to select on the basis of fairness and objectivity.*
>
> *7 Has your position on any of these matters changed?*".

A note then appears "*Thinks unfair for Martin and Will to assess him as they don't know him – Ronnie feels Martin can't assess him. Will explained the assess process – 2 assess Mgrs.*"

8.32 The Tribunal makes specific note of the fact that this was the first mention of any challenge to those who had assessed the claimant. Further it expresses surprise for it seems that any doubt about the assessors must have been of prime importance to the claimant and it is difficult to imagine why he did not raise the matter before the second meeting. It is further surprising because as stated both at the first and second individual consultation meetings the claimant was accompanied and represented by Mr James Grant. It is beyond doubt that during collective consultations a

number of matters was agreed between the company and union representatives and Mr Brian Macklin expressly says:

> "*In respect of selection criteria, on 11 October, the assessors for each pool were agreed, and for Mr Meikle's pool, these were Will Dacre and Martin Cain - …*".

The summary of minutes of the meeting (pages 101 to 103) held on 11 October 2016 show as attendees Kate Simpson, Rachael Conn, Peter Ivey, Brian Macklin, Chris Williamson, James Grant and Howie Trotter and as Note Taker Debbie Gill. For emphasis it is noted that Mr Grant was at that meeting. The summary of the minutes show that Peter Ivey:

> "*Detailed the names of the proposed assessors for the pools, detailed* as follows –
>
> - *Fitters: Martin Cain and Will Dacre*.
> - *There was agreement from the reps to the names which had been put forward as assessors.*"

For the avoidance of any misunderstanding the Tribunal notes and records that the two men who assessed the claimant and whose assessments were twice the subject of arbitrations were appropriately chosen and agreed. The Tribunal is satisfied that proper training was given to the assessors and that they were held strictly to what was required by the company of them.

8.33 A number of other remarks of telling significance were made at the meeting on 16 November and again it is appropriate to refer to the notes at pages 144-146A. It is hardly necessary to do more than to record the relevant parts of the notes:

> "*9 During the first consultation meetings, we gave you the opportunity to put forward ideas as alternatives to the redundancies including reducing hours/pay for example.*
>
> *Either*
>
> *You have not put forward any ideas – is this still the case? Yes.*
>
> *10 Are there any further comments you want to make in relation to the proposal that are redundancies? No.*
>
> *11 We have not been able to identify any feasible alternatives to making redundancies. Before we discuss your provisional scores do you have any further alternative to redundancy you want to suggest? Either happens or doesn't happen*."

The minutes show a note obviously directed at the company personnel completing the form "***Take a full note of all alternatives and say that you will consider and revert. Do <u>not</u> dismiss any proposal at this stage …***".

The notes continue:

"*12 At the last consultation meeting you raised no issues that we needed to feed back on in relation to your at risk position, possible job opportunities or general questions. Do you agree? Yes.*

14 Before we move on from the scores, is there anything else that you wish to add or challenge, because it would not be our intention to come back to you in a further meeting before reaching final decisions. The final decisions will be taken after we have consulted with everyone who remains affected in the pool.

*[**Again take a full and detailed note of everything that is said and advise that you will consider in due course. Do <u>not</u> dismiss suggestions at this stage …**]*

20 Do you have any further questions regarding what we've discussed today? No …".

8.34 A note appears at page 146B and includes;

"*LC gave RM opportunity to close score reviews or to revisit points. RM asked for adjournment to discuss with James Grant.*

Adjourn 4.10pm.

Reconvene 4:15pm.

RM discussed with JG and confirmed 'agree to disagree' on points.

RM asked if he could have an outline of his entitlements, notice pay, holidays – leave date."

8.35 During this meeting details of the second arbitration and reconsideration of scores appear at pages 147-149. Again it is appropriate to note that after a confidential meeting between the claimant and Mr Grant the claimant said that he did not wish to make any further challenges and that he was going to agree to disagree on points.

8.36 In light of the matters raised in these proceedings the Tribunal records specifically that the attendance score was not one that Mr Meikle pursued. The Tribunal is satisfied that neither he nor his representative raised any further issues with regard to the attendance score. Further the Tribunal is satisfied that at no point did the claimant ever contend that the score for attendance was wrong because absences were disability related. In this connection it is appropriate to remember that beyond any doubt –

8.36.1 the claimant was aware of his score for attendances; and

8.36.2 he was aware of the absences he has had and the reason for them; and

8.36.3 his representative Mr Grant belonged to the union which had been involved in discussions in relation to selection criteria.

8.37 The respondent then moved towards a final individual consultation meeting which took place on 23 November 2016. Notes of that meeting appear at pages 151, 152, 153 and 154 of the bundle.

8.38 Present at the meeting was the claimant accompanied by his union representative Mr James Grant and for the respondent Mr Dacre and Lindsay Carr.

8.39 The Tribunal is satisfied that Mr Dacre was under strict instructions from the Human Resources Department not to move to a final decision on the scores and his overall decisions until he was sure that Mr Meikle had received all of the information and feedback, had exhausted his opportunity to challenge scores and that there was nothing else that he wanted to be the subject of consultation.

8.40 The final consultation meeting was in two parts. The first began at 8:00am and ended at 8:20am. The second began at 8:25am and ended at 8:50am. In the light of those strict instructions which the Tribunal finds were enjoined upon Mr Dacre it is of particular importance that the Tribunal notes and records what was said at the first part of the meeting. There can be no doubt that the claimant and his representative appreciated that this was to be the final meeting. The opportunity for the claimant to raise any concerns or challenges must have been obvious both to him and to his representative. What therefore the claimant and/or his representative said or failed to say must be of material importance. It is appropriate therefore to have regard to the notes of the meeting at pages 151-154 of the bundle. The notes of that meeting include:

> "***1*** ***HR:*** *Thank you for attending this consultation meeting. Again I have a guidance sheet which will help ensure I provide a consistent and accurate message to employees. If I can't answer your questions during this meeting I will feedback responses to you as a matter of urgency.*
>
> ***2*** ***HR:*** *Just to recap on the current situation on 26 September 2016, the company announced that it needed to reduce the workforce in response to the reduced requirement for its products and services. As a result of the proposal, you received a letter confirming that you were being placed at risk of redundancy.*
>
> ***3*** ***HR:*** *Today's meeting will provide you with:*
>
> *The right to representation*
>
> *Feedback on any issue raised at the last consultation meeting*
>
> *Review of possible opportunities*
>
> *The opportunity for you to make additional representations*
>
> *The opportunity for you to make additional points*
>
> ***Representation***
>
> *A I can see that you have chosen James as your companion for today's meeting. Your companion is here to support you through the meeting and may address the meeting, but not answer questions on your behalf, although you may confer if you wish to do so.*"

The purpose and the opportunities provided at the meeting are clear. The note goes on:

"***4 Manager:*** *At the last consultation meeting you raised no issues that we needed to feed back on, in relation to your at risk position, possible job opportunities or general questions. Do you agree?*

Yes.

(If the employee disagrees, ask them what they would like feedback on and commit to getting back to them prior to the end of this meeting).

Ronnie agreed nothing outstanding.

Possible opportunities

7 Manager: *Other than the vacancy list at this stage we are still unable to confirm any job opportunities either within BEL Valves or other parts of the group.*

Are you able to identify any alternative roles?

No.

Additional representations from you

8 Manager: *Do you have any final representations you would like to make in relation to your at risk position?*

No.

Additional points from you

9 Manager: *Are there any additional points or questions or anything you would like to raise before the company make their final decision?*

No.

HR: *We will now make a decision regarding your at risk position. Can we have an adjournment and ask that you wait in reception whilst we consider everything that you have raised during the consultation process. I must make you aware that following the adjournment we will confirm the decision. The decision will be one of 2 decisions. 1 may be that you are no longer considered at risk of redundancy and you return to work as normal – as if you had not been placed at risk. The second may be a decision that the company will confirm your position as redundant. Do you understand what will happen when you return? Do you have anything else to add?*

No."

The Tribunal is satisfied that the claimant who had been accompanied throughout each of the individual consultation meetings left the representatives of the respondent without any doubt that there was nothing that he wanted to raise or to have addressed by the company.

8.41 The Tribunal is satisfied and finds that Mr Dacre during the adjournment considered matters further and proceeded on the following bases:

- The claimant agreed that the parties had reached a point where there were no more issues on which he needed feedback or information.
- There were no live issues for him in relation to his at risk position.
- He did not have any general questions and he did not believe that there was anything outstanding at that date requiring further consultation.
- There were neither additional points nor questions nor anything that the claimant wanted to raise before final decisions were made; and
- The claimant was not able to identify any alternative roles.

8.42 In the adjournment period Mr Dacre reached a number of conclusions as follows:

- The decision to select the claimant for redundancy was taken after a process of collective consultation with trade union representatives in which the selection criteria to be applied were agreed and accepted as fair and reasonable.
- The selection criteria were fair and objective and the selection criteria were applied fairly and reasonably.
- The claimant did not object to the selection criteria.
- The claimant was advised of the provisional scores together with facts and circumstances that substantiated the scoring and although there was an increase of two points he was unable to provide any further evidence that would justify any further increase.
- The final score of 77 did not alter his at risk position.
- There had been a genuine and meaningful consultation process which was exhausted; and
- The claimant had not raised any grievance or complaint that was justified.

8.43 The meeting was reconvened at 8:25am and Mr Dacre told the claimant that the decision had been taken to terminate his employment because of redundancy and Lindsay Carr that the decision would be confirmed in writing and details of redundancy payments and of the right to appeal would be given. The claimant was told:

> "*You have the right to appeal against this decision and if you wish to do so you should state in writing the grounds of your appeal. This appeal letter must be addressed to the Human Resources Department and reach them no later than 5 days on receipt of the termination letter. You will then be informed of, by whom and when your appeal meeting has been arranged with.*"

8.44 The Tribunal has no doubt that the right to appeal and the method by which to appeal were made clear to Mr Meikle. He gave evidence in statement form:

> "*I accept that I did not appeal. The reason that I did not appeal was because I was informed at the dismissal meeting that it was not worth writing an appeal in because my points would not change anyway. I was told this by both Will Dacre and Lindsey (sic) Carr.*"

The Tribunal is satisfied that no such advice was given by Mr Dacre or by Lindsay Carr. In this connection the Tribunal took particular note of the claimant's description of what he says was said to him. In fact he agreed that there was an understanding that if any person was in doubt as to whether or not to appeal the doubt should be resolved in favour of appealing. He said to the Tribunal:

> "*I knew I should have appealed and Mr Grant knew that as well. I didn't appeal because I didn't think the situation would be overturned and I would still be made redundant. At my final consultation on 23 November 2016 I said what's the next step to W Dacre and Lindsay Carr and J Grant was there.*"

The Tribunal asked the claimant to rehearse what he says was said. He said:

> "*My question – is it worth writing in because the points situation wouldn't be changed. My points would never be increased and in my opinion the outcome would be the same. They said the points would stay the same – both said this.*"

Whatever belief the claimant may have formed as to that conversation the Tribunal rejects any suggestion that he was discouraged from appealing. Any shadow of doubt would in any event have been dispelled by the letter of dismissal which was written on 29 November and appears at page 165 of the bundle. That letter is factual and does not need to be rehearsed in this decision save for noting that it expressly records:

> "*If you wish to appeal against your redundancy please notify the Human Resources Department in writing within 5 working days setting out briefly the reasons for your appeal.*"

8.45 There was no appeal.

8.46 Since the termination of the claimant's contract of employment he has raised matters which he had not raised before. It is appropriate to record those matters and save for the score for attendance to deal with them at this juncture:

8.46.1 During the redundancy consultations three fitters at risk of redundancy volunteered to leave and in consequence the claimant reached a position which was only one position from safety.

8.46.2 Those three were James Douglas, Eric Dent and Michael Porthouse.

8.46.3 This left four compulsory redundancies with Ryan Oliver, Peter Clavering, Daniel Marshall and the claimant in those places.

8.46.4 On the morning of 21 November another fitter, Alan Moorhead, requested voluntary redundancy which appears at page 164G in the bundle.

8.46.5 The voluntary redundancy process had been extended beyond the initial deadline of 5 October but consideration was then given to closing it as the business position had not got better. As a result a decision was made to close the voluntary redundancy process and Mr Moorhead's request was refused.

8.46.6 The claimant began by making much of the refusal of Mr Moorhead's request alleging that he understood that someone had given the nod to Mr Moorhead's manager to say that he would be accepted. Had that acceptance taken place then the claimant would not have been at risk nor dismissed as redundant. The claimant alleges that the respondent deliberately refused Mr Moorhead's request for voluntary redundancy because they wanted rid of him, the claimant. In fact at the very conclusion of the claimant's representative's submissions the claimant's representative conceded that the claimant could not pursue that argument and abandoned the point.

8.47 In his witness statement the claimant says:

> "*79 After I was given notice of dismissal I went on leave. The respondent then advertised temporary roles. I was not informed by telephone, post, text or e-mail that vacancies were available at any stage by the respondent and my employment terminated at the end of December 2016.*"

The remarks could not be clearer and call for no explanation by this Tribunal. That said the claimant spoke differently under cross-examination. He was referred to page 166B in the bundle – an e-mail by Rachael Conn headed "*Temporary Fitter and Tester Vacancies*". It is addressed to everyone at Bel Engineering and everyone at Bel Valves. It says:

> "*Please see attached advertisement for temporary Fitter and Tester vacancies and a supporting Q&A document.*
>
> *Can managers please ensure that this is displayed on company notice boards urgently for those employees who do not have access to company e-mail.*
>
> *Any questions please let me know.*"

It was put to the claimant that the e-mail had been sent to everyone and appeared on all machines on the shop floor. The claimant replied that that was not to his knowledge and that he did not see or hear about this e-mail. It was put to him that it was a request for short term fitters. He replied: "*I read that the following week – I didn't reply. I have read Kate Simpson's statement where she says that there were eight spaces to be filled, that only six were filled and that if I had applied I would have been appointed.*" The claimant said: "*I took a conscious decision not to apply.*"

Again it follows that the argument which the claimant originally sought to pursue was misconceived and abandoned.

9 **Scoring**

The Tribunal sets out separately findings of fact and its analysis of the scoring in general and of the scores assigned to the claimant in particular. Save in relation to scores for the claimant's attendance the Tribunal is satisfied that there is nothing to be said except that the scheme of scoring was fully discussed and agreed and the method of scoring in general and in relation to the claimant properly applied. It is unnecessary to rehearse what has already been said except for briefly noting:

- Those who were to score the claimant were agreed by representatives of the claimant's union with the respondent.
- Those who were to effect the scoring were briefed in minute detail and given express instructions as to what was required of them.
- The scoring then became the subject of what was spoken of as arbitration and a final score was agreed by the officers charged with the responsibility and the arbitration.
- The scores proposed were shared with the claimant who was at all times represented by his union representative. That representative in turn had participated in the formulation of the redundancy procedure including the scores and scoring schemes.
- The claimant's challenges to scores and the scores which he proposed for himself were taken away, reconsidered by the scorer and that rescoring and reconsideration became the subject of another arbitration.

The Tribunal is satisfied that it would be wholly inappropriate if it were to attempt to rescore for the various criteria formulated.

10 Scores for attendance need particular consideration. Findings of fact in that connection and interwoven findings of fact relating to the impairments relied on by the claimant to support his contention that he is or at material times was disabled are as follows:

10.1 The method by which attendance of individual employees would be reckoned and scores for attendance are set out at page 68. It is sufficient to set out the following details ever bearing in mind that all was with the agreement of the claimant's union:

> "*The duration of assessment or 'period of evaluation' will be the 12 months commencing from the last Friday prior to the date of the announcement.*
>
> *NOTE: AN 'OCCASION' RELATES TO A SINGLE PERIOD OF ABSENCE IRRESPECTIVE OF THE PERIOD ie ONE DAY OR 1/2/3 etc WEEKS.*
>
> *Continuous absence will be classed as one 'occasion' irrespective of the length of the absence, ie 5 days of continuous absence will be classed as one 'occasion'. If the absence is continuous ie*

1/2/3/4/5/6 etc weeks this will be classed as one 'occasion' for the purpose of the points assessment.

Points will be scored for attendance as follows:

6 or more occasions of absence within the 12 month evaluation period.	*0 points*
3 to 5 occasions of absence within the 12 month evaluation period.	*10 points*
2 occasions of absence within the 12 month evaluation period.	*20 points*

NB:- <u>DAY SHIFT AND NIGHT SHIFT</u> – Pass outs (Works) or permission to leave (Staff), for part of the first or second half of the shift will constitute a half shift of absence. This will now be treated as a half shift of absence where the first or second half of the shift is lost. Where a pass out or permission to leave is given during the first half of the shift and the person does NOT resume work for the rest of the shift, this will constitute a full shift of absence. This will now come under the Absence element.

Pass outs or permission to leave of up to 2 per annum of the period in question will be disregarded, ie the first two Pass Outs, irrespective of whether they cover a half or a whole day of absence, will be excluded from the points assessment.

Absence related to a recognised disability for the purposes of the Equality Act 2010 will be mitigated from the evaluation period."

10.2 That attendance criterion needs to be read in light of the redundancy policy produced at pages 56-67 and the exclusions as detailed at page 60 as follows:

"*With regard to Attendance and Timekeeping criteria, the points allocated for absences will exclude the following components:*

1 …

2 …

3 Time lost or absence relating to disability, pregnancy, maternity or paternity.

4 Personal hospital appointments.

5 …

6 …

7 …

8 …".

10.3 The claimant scored 10 for attendance and the five occasions of absence which led to that score are listed in the first page of the Human Resources data set out at page 155 of the bundle. The period of evaluation was 12 months before 23 September 2016 being the Friday before the

announcement of 28 September. The Tribunal is satisfied that the respondent treated the claimant's absences in a way that was consistent with their treatment of other cases both on previous occasions and as part of the consultation process that involved the proposal and in line with the redundancy policy. The contents of these were agreed with the union who explained matters to representatives.

10.4 The five occasions brought into account in relation to the claimant are set out at page 155 in the bundle. That document sets out in typescript various details and helpfully abstracts relevant information in manuscript as follows:

"*SICK 15/10-26/2 25/5L*

AUTH L 9/5

12/5 PO

27/5 PO/X

24/8 PO/X".

At this point it is appropriate to note that the respondent relied on five separate absences. An explanation is called for as follows:

10.4.1 Although one period of sickness absence is shown as 15/10-26/2 the respondent told the Tribunal and the Tribunal accepts and finds that that period was effectively treated as continuing until March. The reason is that after the claimant was able to return to work he attended on a phased return basis. It is of some significance for there were two other absences in March which the respondent treated as part and parcel of the single absence from 15 October to the end of March.

10.4.2 Two pass outs were to be disregarded automatically. Crosses appear against the latest two dates. In fact no significance is attached to the fact of those crosses against those dates. The information was provided by the Accounts/Payroll Department and that department simply discounted two pass outs without regard to the dates of them.

10.5 The first period of absence as stated began on 15 October and was treated as continuing until March 2016 because following the claimant's ability to return to work he attended on a phased return basis. There were however two pass outs within that period and copies appear at pages 238 and 239 respectively. That at page 238 relates to 8 March 2016 and to a hospital appointment and that at page 239 is dated 18 March and again relates to a hospital appointment. It appears to the Tribunal given that the sickness absence proper ended on 26 February that account could reasonably have been taken of the two pass outs in March. In fact they were not but were included in a single period of absence 15 October 2016 to March 2017. The absence related to an impairment described by the claimant as Plantar fasciitis. The claimant alleges that that impairment constitutes a disability and absence for it should be disregarded under the

redundancy policy, page 60. The Tribunal is not satisfied that the impairment is to be treated as a disability for the Equality Act 2010 and deals with this matter later.

10.6 The second absence which was brought into reckoning is described as "*AUTH L 9/5*". Whether this absence should be included in the calculation became the subject of evidence and argument during the course of this hearing. It is to this Tribunal quite remarkable that it should for there is nothing to suggest that during the consultation periods it was said to be disability related or that it was in any way relevant. The claimant's case is that it should nonetheless be discounted. He says that on 8 May his wife became ill and on the morning of 9 May she was still unwell and he was unable to attend work. The claimant's case is that he phoned Mr Dacre to explain his absence but was unable to make contact with him. Nonetheless he says he left a message. In giving his evidence he said that his wife suffers from depression and has or had anxiety attacks. She had "*a bad turn*" on Sunday night and on Monday morning was still feeling ill. He says that he phoned William Dacre but did not speak to him. He tried two or three times and left a message. The message was to the effect that his "*wife had taken bad*" and he would not be able to attend for work. He did attend work at 7:30 on Tuesday, 10 May and completed a form for a lieu day for absence. He said that he handed the form to Mr Dacre who said that he could not sign it because "*people were coming in and claiming lieu days.*" It is obvious that there was no argument for Mr Meikle said "*I accepted – folded up the paper and put in a bin.*" The claimant says that he saw Mr Dacre in the afternoon and that he Mr Dacre said to him that he knew the rules. Mr Meikle agreed that he said "*OK I'll put in a sick day to cover the absence.*" It is obvious that that did not materialise for Mr Meikle said that later in the week Mr Dacre called him in and (according to the claimant) said that he would make an authorised absence so that the absence "*wouldn't count against any marks so I understood I was authorised to have that day off.*" Mr Dacre said that he did not use the word authorised but the words "*absent without pay*". The use of the word authorised was by the respondent's Payroll Department.

It is right to record that the Tribunal has a certain disquiet over the evidence. It seems that nothing was agreed in advance or on the day of the claimant's absence and that the claimant was prepared to seek some arrangement to cover his absence including sickness on his part.

When the claimant was cross-examined and in particular about what was meant that the absence would not count against him, he said that Mr Dacre later in the week called him into his office and said "*We will have to sort out this sick day/lieu day. I'll put it down as authorised absence.*" When challenged about the suggestion that the absence would not be taken against him he understood that to mean in respect of attendance and discipline but not in respect of redundancy.

The Tribunal is satisfied that there is nothing to suggest that the arrangement reached in respect of the claimant's absence on 9 May had anything to do with excluded absences within the meaning of the redundancy procedure. The Tribunal is satisfied that that absence was

properly taken into account. At the material time in May the respondent was active in attempting to rectify a situation not of its making in a way that would not lead to disciplinary action against the claimant.

10.7 The third absence taken into account was 24 August 2016. The Tribunal must again mention its disquiet over the treatment by the claimant of this absence:

10.7.1 He was recalled after all other evidence had been given to deal with the absence. In seeking leave to recall the claimant his counsel said that the claimant was in a position to give evidence in relation to the procedure and what he could say may be relevant as to whether this should be excluded under the policy. The claimant's representative acknowledged that he did not adduce this in dealing with the claimant's evidence in chief but now thought that the matter may have gained some significance. He said that the absence related to a doctor's appointment on 24 August. The respondent's representative whilst not opposing the application for the claimant to be recalled observed that had the existence of an appointment with the claimant's GP been raised it would have been considered.

10.7.2 The Tribunal records these exchanges in relation to the recalling of the claimant for it is satisfied that it is reasonable to suppose in light of all that was said by the claimant's representative that the claimant would have precise details at his fingertips and be able to give unequivocal evidence.

10.7.3 In fact the claimant told the Tribunal that he went to his GP on 24 August 2016 for blood tests in connection with a kidney impairment. He described the procedure which patients at that practice follow – they have to phone the doctor to ask for blood tests if necessary. He was, he said, asked to attend for extra blood tests because in a sample of blood protein and potassium had been traced. He phoned the surgery and was told he had to see a practitioner nurse who takes the bloods. That, he said, can only be done during the daytime. The patient is simply given an appointment. The patient cannot ask for an after hours appointment but is simply told what is available and must attend. He said that his GP's practice is only open Monday to Friday 8:00am to 4:00pm and that those times were impossible for him because he then worked dayshift Monday to Friday, 7:30am to 4:00pm.

10.7.4 Under cross-examination he said that he simply could not ask to make an appointment. His practice tells him when he must attend. He agreed however that although working full time his finish time on Thursday and Monday was 3:30pm and on Friday 1:30pm. He said that he agreed to attend for an appointment when he knew he was due to be at work and would need time off. He did not ask for any alternative arrangement. He did agree that the appointment was not an emergency.

10.7.5 The Tribunal asked for details of the blood test which had led to the concern over the protein potassium levels and when that test had

been taken. The claimant was simply unable to answer. Regard was then had to page 311 in the bundle which is an extract from the records held by the claimant's GP. The following entries are relevant:

"*22-Aug-2016 GP surgery … due bloods and BP this week.*"

10.7.6 It is significant that there is nothing to suggest that the claimant needed time off work to attend that appointment:

10.7.7 The records then show the attendance on 24 August and that blood tests were requested.

10.7.8 The records then show an entry against 25 August showing some abnormality and the need to contact the patient.

10.7.9 The Tribunal is satisfied therefore that the first test which occasioned the need for a second was prompted on 22 August and took place on 24 August leading to the prompt on 25 August. The Tribunal is entirely satisfied that the absence on 24 August was not to meet an emergency nor in any way related to any disability. For completeness the Tribunal notes that when cross-examined following his evidence in chief it was put to the claimant that disability related absences were discounted, that he knew that when he attended individual consultation with his union representative James Grant and he replied:

"*Correct. I attended three consultations each with union rep. I did not talk to him about disability related absences. I challenged scores but at no stage in those meetings or consultation period – never asserted disability nor that the respondent had taken into account disability related absences when scoring for attendance. I was provided with pass out forms because my solicitors provided them to the respondent's solicitors for the purposes of these proceedings.*"

10.8 It is right that the timing of the supply to the claimant of the pass out forms was disputed and that his case is that he did not receive them until after his letter of dismissal. The Tribunal attaches no weight to that suggestion being satisfied that the claimant and his representative knew the procedure and that the claimant certainly knew what absences he had had in connection with what he alleges were/are disabilities.

11 **Disabilities**

It is appropriate to set out those provisions of law which the Tribunal is satisfied are relevant and to interleave the findings of fact relating to the claimant and his contention as to disability:

11.1 First of all it is common ground and the Tribunal finds as a fact that the allegations in these proceedings relate to dismissal and/or selection for redundancy. Whether the claimant was disabled at the relevant time has to be tested against 23 November 2016 – the date of his selection for dismissal – or his last day at work which he described variously as about 23 December or two weeks before shut down for Christmas or 31 December 2016.

11.2 The statutory test is set out in section 6 of the Equality Act 2010 (EA). That section provides in its material part:

> "*(1) A person (P) has a disability if –*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities …*".

11.3 What is long-term is defined in paragraph 2(1) of Schedule 1 to EA which in its material part provides:

> "*(1) The effect of an impairment is long-term if –*
>
> *(a) it has lasted for at least 12 months,*
>
> *(b) it is likely to last for at least 12 months,*
>
> *(c) it is likely to last for the rest of the life of the person affected …*".

11.4 For the purposes of paragraph 2 of Schedule 1 "*likely to last*" is to be interpreted as "*may well happen*" as held in **SCA Packaging v Boyle [2009] UKHL 37**. On the same topic regard is to be had to paragraph C4 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011). That paragraph provides:

> "*C4 In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual (for example, general state of health or age).*"

11.5 Substantial is defined in section 212(12) EA and is said to mean more than minor or trivial.

11.6 Day to day activities must be considered in light of paragraph D3 of the aforementioned guidance – that paragraph provides that in general day to day activities are things people do on a regular or daily basis.

11.7 Paragraph 5 of Schedule 1 to EA deals with the treatment of measures which are being taken when assessing the effect of an impairment. That paragraph provides as follows:

> "***5 Effect of medical treatment***
>
> *(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*
>
> *(a) measures are being taken to treat or correct it, and*
>
> *(b) but for that, it would be likely to have that effect.*

> *(2) Measures includes, in particular, medical treatment and the use of a prosthesis or other aid …*".

The provisions of paragraph 5 of Schedule 1 to EA are often spoken of as deduced effects. Deduced effects figured largely in these proceedings. The Tribunal had to consider the extent to which, if at all, it had to have regard to measures being used by the claimant in testing whether an impairment is to be treated as having a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The relevance of medical evidence cannot be overstated nor overlooked for two reasons. First of all on 14 August 2017 the Tribunal ordered the parties:

> "*On or before 11 September 2017, to disclose each to the other documents in their possession relevant to the matters in issue, including in the claimant's case, records held by his General Medical Practitioner insofar as they relate to the impairments on which he relies to support his contention that he is disabled within the meaning and for the purposes of the Equality Act 2010.*"

Secondly in a judgment of the Court of Appeal in **Dorette Woodrup v London Borough of Southwark [2002] EWCA Civ 1716** the Court of Appeal said:

> "*13 I would just add this. In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under paragraph 6 of the Schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary.*"

11.8 In this case the respondent concedes the question of disability in relation to the claimant's osteoarthritis and save for saying that this condition is only relevant to his claim of direct discrimination no further comment is called for.

11.9 In relation to the impairment of Plantar Fasciitis the Tribunal is satisfied that this was not a disability at the relevant time. Material findings of fact are as follows:

11.9.1 The claimant's evidence is that this condition first came on in or around July/August 2015 and worsened until September 2015. In October 2015 he began a period of sickness absence and provided sick notes to his employer confirming the diagnosis and was referred to occupational health.

11.9.2 By 31 March 2016 he was suffering no pain and could walk and stand as normal without discomfort.

11.9.3 There is no record whether from occupational health, any general medical practitioner or hospital relating to the period between 31 March 2016 and dismissal which makes any mention of pain in the foot.

11.9.4 The claimant's disability impact statement makes no mention of any problem between April 2016 and dismissal. In that statement he says:

> "*12 I returned to full time in April 2016.*
>
> *13 In January 2017 I was given a cortisone injection that did not work and I was given another one a few months later.*"

11.9.5 That statement is relevant and significant on this topic in another context. The claimant has had a hip operation. In paragraph 16 of his statement he says:

> "*I have been referred to North Tyneside Podiatry Clinic on 27 September 2017 for further treatment and for new insoles as my hip operation has changed the way I walk and caused the pain in my foot to return and so I will need to be reassessed and the soles I use to be replaced.*"

11.9.6 The Tribunal takes particular note of the reference to his hip operation and the claimant's comment "*caused … the pain in my foot to return.*"

11.9.7 The Tribunal is satisfied that the claimant has been wearing insoles but there was no medical evidence to support deduced effect.

11.9.8 In summary the Tribunal is satisfied that there was no evidence about long term effects. There was nothing to suggest that the impairment would last 12 months nor anything to suggest that it was likely to. The condition started July/August 2015 at the earliest. There is no evidence of any adverse effects following 31 March 2016.

11.10 In relation to IgA Nephropathy, again the Tribunal is not satisfied that this impairment amounts to a disability for the purposes of EA. Material findings of fact are as follows:

11.10.1 IgA Nephropathy is a kidney condition which affects the ability of the kidney to filter blood and according to the claimant was first diagnosed in his case 25 years ago.

11.10.2 No evidence of any adverse effect on the claimant's day-to-day activities has been adduced in these proceedings. The respondent's counsel submits and the Tribunal notes and accepts that the claimant does not put his case on the basis of adverse effects but speaks of being <u>at risk</u> of kidney failure.

11.10.3 Medical evidence that has been adduced is clear and consistent that the condition is quiescent and the claimant's renal function is normal. The Tribunal notes the terms of a letter dated 16 June 1993 by the Research Registrar in Nephrology and includes that compared with his son the claimant seemed to have a much more quiescent disease and his renal function was essentially normal. The same letter shows that on that date 16 June 1993 his blood pressure was 135/85 and his urine was clear (page 251).

11.10.4 Further relevant reports include that dated 26 September 2014 (page 287) which includes:

> "*His renal function has been entirely stable for the last few years and he has no proteinuria.*"

11.10.5 Another letter dated 23 September 2015 (page 288) includes:

> "*I am pleased to report that he has been well in himself but has noticed a reduction in his energy levels over the past 12-18 months. He had a full blood count in June of this year which was unremarkable.*"

11.10.6 Another letter is dated 9 February 2016 (page 290) and includes:

> "*I saw Mr Meikle in the Glomerulonephritis/Vasculitis clinic on 03.02.2016. He has been well but is off work due to Plantar fasciitis which I believe is getting better … I think given his stability and the fact that he has no proteinuria I have discharged him back to your care …*"

11.10.7 Another report dated 14 September 2016 (page 293) includes "*feeling fine*".

11.10.8 The only symptom which may be linked to IgA Nephropathy is high blood pressure though, as the respondent's counsel submits, it is wholly unclear whether high blood pressure is a symptom of the condition or it is more risky to have high blood pressure if you have the condition. Whatever, the claimant's blood pressure is controlled by medication though there was no medical evidence that blood pressure would be high without it. Nor is there any medical evidence of the deduced effect of medication. The Tribunal has not been shown that having high blood pressure would have a substantial adverse effect on day to day activities nor that without blood pressure medication the kidney condition would have substantial adverse effect on the claimant's ability to carry out day-to-day activities.

12 In all of the circumstances the Tribunal notes the concession as to disability by osteoarthritis but is not satisfied that the claimant has shown that either Plantar Fasciitis or IgA Nephropathy is a disability.

13 For completeness it is appropriate for the Tribunal having been referred to the question of the respondent's knowledge to deal with that topic as follows:

13.1 In relation to <u>discrimination arising from disability</u> section 15(2) EA provides that:

> "*(2) Subsection (1) does not apply if A shows that A did not know and could not reasonably be expected to know that B had the disability.*"

13.2 In relation to <u>failure to make reasonable adjustments</u> and by reference to Part III of Schedule 8 of EA actual or constructive knowledge of the claimant's disability and the substantial disadvantage to which the claimant is put by reason of the relevant provision, criterion or practice is required.

13.3 The Tribunal is satisfied that the respondent had neither actual nor constructive knowledge of either Plantar Fasciitis or IgA Nephropathy or of any effects but

13.3.1 Even if the respondent knew of the existence of the kidney condition there was no evidence that it was having a substantial adverse effect on the claimant's ability to carry out normal day to day activities;

13.3.2 Occupational health evidence given to the respondent was that Plantar Fasciitis was likely to resolve. The respondent was not cast upon opinion but relied on prognosis as to recovery in a report dated 12 January 2016 - page 220 refers and includes:

> "*Confirmation of disability is a legal test that is beyond the scope of this occupational health assessment. However, it is likely that Ron's condition will improve completely and he does not have long standing or substantial impairment of his ability to undertake normal activities of daily living. On this basis it is unlikely, in my opinion, that he would be considered a disabled person under the Equality Act 2010.*"

13.4 The claimant's counsel referred the Tribunal to a judgment of the Court of Appeal – **Nigel John Gallop v Newport City Council [2013] EWCA Civ 1583** and in particular to paragraph 36. That paragraph includes:

> "that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the *facts* constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1…
>
> Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2)."

In light of the Tribunal's findings as to disability and the treatment of the question of knowledge it is not satisfied that the decision in **Gallop** has any relevance in this case.

14 Conclusions

14.1 Direct discrimination

The only allegation in this claim is that the respondent wanted rid of the claimant as he was facing a significant period of time off work to undergo hip surgery. The Tribunal rejects any such suggestion and notes:

14.1.1 There is not a scrap of evidence to support the allegation which as the respondent's counsel submits requires the Tribunal to find that Mr Dacre acted in bad faith and contrived to depress redundancy scores to achieve the dismissal of the claimant. The Tribunal is satisfied that Mr Dacre undertook his responsibilities with diligence and that what he did was counter checked by Martin Cain and was then scrutinised by arbitration. Challenges were made by the claimant. Those challenges were checked and in two cases scores were adjusted in line with the claimant's proposals. The checking was then itself the subject of arbitration.

14.1.2 The suggestion that the respondent wanted rid of the claimant because of an expected lengthy absence does not square with the claimant's own experience of the respondent. He was twice supported by the respondent during periods of long term sickness absence.

14.1.3 At no time was deliberate underscoring to secure dismissal for fear of a lengthy absence raised during the consultation meetings even though the claimant did make other challenges and was supported throughout by his union representative.

14.2 **Discrimination arising from disability and failure to make reasonable adjustments**

It is appropriate to deal with these claims together as both relate to the method by which the respondent treated the claimant's absence and the calculation of his score for attendance:

14.2.1 There is no argument against the fact that three absences would result in 10 points for attendance in the selection procedure nor that disability related absences were not to be taken into account.

14.2.2 Three occasions of absence were taken into account by the respondent in relation to the claimant namely:

- October 2015 to February 2016/March 2016 for Planatar Fasciitis including two pass outs in March;
- 9 May 2016 for the claimant to care for his wife;
- 24 August 2016 for what the Tribunal is satisfied was a routine non emergency appointment with a practice nurse at the premises of his general medical practitioner for blood tests.

14.2.3 The Tribunal is not satisfied that any of those absences was related to a disability and that accordingly they were not excluded when the attendance score was made. The Tribunal's findings show that:

14.2.3.1 The claimant's Plantar Fasciitis is not a disability. Even if it was the respondent did not know and could not reasonably have been expected to have known that it was a disability and there was no medical evidence as to deduced effects;

14.2.3.2 The absence on 9 May 2016 was not in any way related to the claimant's disability and there is nothing to suggest that it should have been disregarded;

14.2.3.3 The claimant's IgA Nephropathy is not a disability. Even if it was the respondent did not know and could not reasonably be expected to have known that it was a disability.

14.3 **Unfair dismissal** (Section 98 of the Employment Rights Act 1986 [and in particular subsection (4)]

14.3.1 The Tribunal accepts that at September 2016 the business picture facing the respondent showed a significant downturn in available orders/work. More does not need to be said for the claimant conceded that there was a genuine redundancy situation.

14.3.2 Further the claimant does not take issue with the collective consultation procedure, the pool of fitters which included himself, the extent of the individual consultation process or offers of suitable alternative employment. The claimant's issues with relation to the fairness of the decision to dismiss him are or originally were limited to

4.3.2.1 his scores, in particular for attendance and attitude;

4.3.2.2 the late provision of pass outs to him;

4.3.2.3 the decision to refuse Alan Moorhead voluntary redundancy.

14.3.3 The Tribunal is satisfied that the respondent has shown that it established a good system of selection and that it was fairly administered. It is not for the Tribunal to attempt a reassessment exercise and – it is not open to the claimant now to criticise the subjective nature of certain criteria where those criteria and the method of assessment had been agreed with his representatives. Further the claimant's union was satisfied with the appointment of Mr Dacre and Mr Cain as assessors for the fitters.

14.3.4 There is nothing to suggest bad faith on the part of Mr Dacre. The claimant's scores were the product of two assessments, an arbitration process, a reconsideration and a further arbitration procedure.

14.3.5 As for the scores in relation to the claim of unfair dismissal the only relevant absences are 9 May and 24 August. The claimant takes no point on the October to February/March absence.

14.3.6 In relation to the absence on 9 May the claimant was content to have the absence recorded against him as holiday or sickness neither of which was accurate. Despite an entry showing authorised leave unpaid the Tribunal is satisfied that they are the words of the payroll department and not of Mr Dacre who was active in securing some record of the claimant's absence which would not result in disciplinary action against him. No form was filled out to authorise the absence even retrospectively and there is nothing to suggest that the arrangement to cover the claimant's absence on 9 May would be ignored in any redundancy situation.

14.3.7 The absence on 24 August. For this absence to be excluded it would have had to be for a personal hospital appointment. That is the deliberate intention of the exclusion policy at page 60 for the company recognises that it is far more difficult to rearrange a hospital appointment than a GP's appointment. As stated the Tribunal is satisfied that the appointment was not to cover an emergency, had not been called for as the claimant initially described, was not an appointment which he could not have rearranged and the claimant did have free time when he could have attended a GP's appointment in his own time. This despite contending that he worked full time every weekday from 7:30am to 4:00pm.

14.3.8 The claimant contends that he was prejudiced because copies of pass out forms were not made available to him in good time. That contention is not accepted by the Tribunal. The Tribunal is satisfied that at the first consultation meeting with him individually on 8 November 2016 the claimant was given copies of his absences and the documents which appear at pages 155-164 in the bundle. The respondent's counsel submits and the Tribunal accepts that Mr Dacre who gave evidence to that effect was not cross-examined and that the claimant says nothing different. Why the claimant should need pass outs as well as the information which he was given is unclear. Furthermore the evidence is that even when he had the pass outs he still failed to appeal.

15 In all of these circumstances the claims fail and are dismissed.

EMPLOYMENT JUDGE REED

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
7 December 2017