EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr A Kassem	**v**	BP Exploration Operating Company Limited

Heard at: Reading **On:** 4, 5, 6, 7 and 8 March 2019

Before: Employment Judge Gumbiti-Zimuto
Members: Mrs AE Brown and Mrs J Smith

Appearances
For the Claimant: In Person
For the Respondent: Mr T Cordrey (Counsel)

RESERVED JUDGMENT

1. The claimant's application for a postponement is refused.

2. The claimant's complaints are not well founded and are dismissed.

REASONS

Postponement application

1. The claimant made an application for a postponement. The claimant has not served a witness statement he asked for a postponement to allow him time to serve a witness statement. The respondent objected. It had been proposed that the exchange of witness statements take place on 20 December 2018. There have been previous applications to postpone the hearing.

2. Prior to 4 March 2019, the claimant made an application for a postponement of the hearing. He asked that the case be postponed for a period of 18 months. The claimant made two applications: both of them were considered by Employment Judge Vowles who refused the applications taking the view that it was not in the interests of justice for the case to be postponed for that period of time.

3. The case was due to start on Monday 4 March 2019. The claimant did not attend. The claimant sent an email to the Tribunal indicating that he had made previous applications to postponement the case for 18 months. Although the email did not expressly state that it was an application for a postponement, the Tribunal treated it as an application for postponement.

4. The claimant was dismissed in November 2016 and there was a preliminary hearing on 12 April 2017, at which the claimant was present, when the case was listed for hearing on 19-23 February2018. The claimant initially instructed solicitors who stopped acting for him on 21 December 2017. The claimant had difficulties in his relationship with his solicitor and he has made a complaint to the legal ombudsman.

5. The Tribunal refused the claimant's application. The Tribunal considered that having regard to the history of the case that it was appropriate to proceed rather that to adjourn. Whilst we had sympathy with the claimant we need to take into account the respondent's position and that of their witnesses. While we recognise that the claimant's difficulties with his solicitor. If the case was postponed today it was likely to be 2020 before the case was relisted for hearing. We asked ourselves whether the claimant was going to be in better position to proceed in one year 's time than he is now. If the claimant took the opportunity to prepare his case the claimant would be in a better portion. However, the claimant has had over a year since the case was originally listed for hearing. The claimant has had various problems that he has had to deal with and the claimant has chosen not to prioritise the preparation for the Tribunal hearing. We also take into account that the issues in dispute in this case have been clearly set out. We note the way that the claimant was able to present his argument on this application and while the claimant is a litigant in person, he is well able to present his own case. In these circumstances we considered that the application for postponement should be refused.

Ruling on the claimant's Statement

6. This case was first presented to the Employment Tribunal on 28 November 2016 and it relates to a redundancy exercise that resulted in the claimant's dismissal on 30 June 2016. The case came before the Employment Tribunal on 12 April 2017 when the case was listed for hearing on the 19-23 February 2018. On 12 April 2017, the matter was heard by Employment Judge Hill. Mr Cordray (counsel) represented the respondent. The claimant was represented Mr Pappin (solicitor) and Ms Leadbetter (counsel) with Mr Holmes (paralegal) also in attendance.

7. It is important to note that on 12 April 2017, the solicitor acting was the same solicitor who had been responsible for the preparation and presentation of the claimant's ET1 form and is recorded in section 11 of the ET1 as the claimant's legal representative.

8. Due to a postponement because of the personal circumstances of the claimant the hearing listed for 19-23 February 2018 did not take place.

9. Directions to assist the parties in the preparation of this case were given by Judge Hill. The claimant was to provide further information; Orders were made for the disclosure of documents, the provision of a schedule of loss, medical evidence, preparation of the trial bundle and production of witness statements. The order relating to witness statements was to exchange by 1 December 2017.

10. After the hearing listed for 19-23 February 2018 was vacated the case was re-listed to take place beginning on Monday 4 March 2019 with a time allocation of five days.

11. In the year between the listing on 19-23 February 2018 and 4 March 2019, a number of things happened that have affected the claimant's preparations for the hearing. The claimant and his solicitors parted company. In December 2017. The claimant made a complaint against his solicitors to the Legal Services Ombudsman. The Tribunal has been provided with a copy of a preliminary decision dated 14 February 2019 made by the Legal Services Ombudsman.

12. Having discussed the position with the respondent while considering the claimant's application to postpone we decided that the way to proceed was to continue with the hearing but to start the hearing with the parties on Tuesday 5 March 2019 at 10.00 am.

13. On 5 March 2019, the claimant attended. The orders made by Employment Judge Hill had not been completed. There had been an exchange of documents, there had been preparation of the trial bundle, but there had not been an exchange of witness statements.

14. Although the respondent had asked the claimant to exchange witness statements in December 2018, the claimant had not been able to do so or was unwilling to do so. This request to exchange witness statement appears to have provoked the first of the applications for a postponement of this hearing.

15. On Tuesday 5 March 2019, when we were discussing the way that we proposed to proceed, one of the things that the claimant said to the Tribunal was that his claims had been set out in his grievance letter and his appeal letter. His witness statement, if he had prepared one, would only be restating the matters that are set out there.

16. On afternoon of 6 March, we came to the point where the claimant was to give evidence. It had been made clear to the claimant that the way that the Tribunal intended to proceed was to restrict him to relying on his ET1 form and the further particulars which he had provided earlier on in the proceedings. The ET1 form is at page 12 of the trial bundle and the further particulars commence at page 39 of the bundle.

17. Surprisingly, the claimant stated that he had never seen the grounds of complaint which begin at page 12 and said that while he was aware of the further and better particulars he had not had an opportunity to review them. At that point, the Tribunal adjourned and, on adjourning the case, we told the claimant that what he was required to do was to read the grounds of complaint, the further particulars and return the next day in a position to confirm that they accorded with his case or, to the extent that they did not accord with his case, be in a position to explain the differences between those documents and the case that he wanted to present. We also told the claimant that he was required to consider the trial bundle and identify or be ready to deal with any documents that he identified as missing.

18. On the morning of 7 March 2019, when the claimant came to give his evidence, he indicated that having considered the grounds of complaint and the further particulars, that they contained 60% errors. The question has therefore arisen how we should proceed in those circumstances. It seems to the Tribunal that there are broadly two ways in which to proceed.

19. First is to treat the grounds of complaint and the further particulars as the basis of the claimant's case and allow the respondent to cross examine the claimant on the case as it is presented there. Then the claimant could answer as he wishes and, to the extent that there is a conflict between what the claimant says in his live evidence and what is contained in the grounds of complaint and the further particulars, we should acknowledge that as the claimant disagreeing with the contents of the grounds of complaint and the further particulars.

20. The alternative way would be to allow the claimant to go through the grounds of complaint and identify that which he disagrees with. That would leave open the possibility of the claimant advancing facts or positions which have not currently been presented and the possibility of widening the scope of the case.

21. In deciding how we should proceed, the Tribunal had in mind the overriding objective to the Employment Tribunals Rules of Procedure. They require us to ensure that the parties are on an equal footing to deal with cases in a way which is proportionate to the complexity and importance of the issues, to avoid unnecessary formality and to seek flexibility in the proceedings, to avoid delay insofar as is compatible with the proper consideration of the issues, and to have regard to the saving of expense.

22. We also bear in mind that the Employment Tribunals Rules of Procedure, at Rule 41, give us the power to regulate our own procedure and conduct the hearing in a manner which we consider fair having regard to the principles which are contained in the overriding objective. We observe that Rule 43 says that where a witness is called to give oral evidence any witness statement of that person ordered by the Tribunal shall stand as the witness's evidence in chief unless the Tribunal orders otherwise.

23. We would proceed on the basis of the grounds of complaint and the further particulars as the claimant's case. We considered that was likely to be the way we will achieve the overriding objective because first of all, as already stated, the claimant told us that the grievance and his appeal, set out what his case is about. We have read those documents, we have read the grounds of complaint, we have read the further particulars, and we are unable to observe any significant differences in terms of what is presented in those documents. They do not jar with each other; there is not a contradiction in them. It may be that they are not expressed in the same way and we note that the claimant's first language is not English, so we are not concerned that there is a tension between the way that the claimant would have wanted to present his case and the documents that were actually presented by the solicitor who acted for the claimant.

24. We have also had the opportunity of considering the preliminary decision of the Ombudsman and we make two observations about that. The first is that the matters in dispute between the claimant and his former solicitors as highlighted in the 11 headings contained in the preliminary decision largely do not assist us in determining the issue that we are concerned with.

25. However, there is a paragraph in section 3 under the heading 'The firm changed the claim without authorisation and pursued a claim for unfair dismissal'. In respect of that the Legal Ombudsman was satisfied that the firm were pursuing the claims which the claimant wanted pursuing against his former employers as shown on the particulars of claim. That is a finding which gives us some comfort that the claimant must have had some input or knowledge of what the claim contained.

26. We consider finally that when looking at the overriding objective, which talks about putting the parties on an equal footing, to allow the claimant to potentially advance new factual propositions or arguments which have not been previously set out would put the respondent at a disadvantage. The respondent is however represented by counsel who in our view is likely to be well able to deal with any shift in the way the case is put. Attempting to be pragmatic and practical by treating the grounds of complaint and the further particulars as the claimant's basis of evidence, even if not originally intended to stand as the witness statement, is a proportionate way of dealing with this case. It does justice to the complexity and importance of the case because, to our mind, it reflects what the claimant wants to argue as reflected in his grievance letter and grounds of appeal. We consider that an informal way of proceeding and a flexible way of proceeding which is helping the parties move the case on. It helps avoid delay, or more accurately, further delay, because this case as already stated has been running since 2016. Using this sitting of the Tribunal to deal with this case is a way of dealing with the case which is saving expense which would otherwise be incurred if for any reason the case was to be adjourned or postponed for this reason.

27. For all those reasons, we decided to allow the claimant to proceed to give evidence. The claimant may, if he wishes to do so, draw our attention to any documents that he considers we ought to consider that support his case. We will treat the case that he wants to present as being reflected in the further and better particulars and the originating claim form. To the extent that the claimant in his questioning by Mr Cordray contradicts anything that is contained in those documents we are going to treat that as an expression of the 60% of the errors that he identifies and when we are considering the evidence as a whole, we will seek to reflect the claimant's position that he does not necessarily agree with the contents of the ET1 claim form and the further particulars, but if there is a significant divergence from those documents depending on the nature of it may be a factor that we will take into account in determining the credibility and overall merits of the case.

28. We cannot be blind to the reality of this case which is that we are today on 7 March 2019 and that this case was originally presented to the Employment Tribunal on 28 November 2016 and today it is being said that that claim form and the points made there are not the case that the claimant wants to

present.

The issues

29. An agreed list of issues on liability was produced when the claimant was still represented by solicitor and counsel. That is the list of issues which we have followed. There is a claim of unfair dismissal.
    29.1 Was the claimant dismissed for a potentially fair reason in accordance with section 98(2) Employment Rights Act 1996: the respondent relies on redundancy.
    29.2 Was the dismissal fair within the meaning of section 98 (4) Employment Rights Act 1996. The claimant contends that the dismissal was unfair for a number of reasons; there should have been an upwards adjustment to the claimant's redundancy selection scores because of his disability; the claimant was only scored taking into account a 7 month period of performance and should have been scored taking into account a longer period of his performance; the claimant was not permitted to be accompanied by Balance at the first or second individual consultation meetings; and the appeal process ignored the claimant's record of reaching goals he had been set and saving the respondent money.

30. In respect of the disability discrimination claim, in issue is whether the respondent knew of the claimant's disability at the material time. The claimant alleges three acts of direct discrimination. Comments made about the claimant to the claimant by Richard Jolly; the claimant being passed over for promotion and the failure to put the claimant on a performance improvement plan. The claimant makes a claim of indirect discrimination arising out of the annual performance review process and the redundancy selection criterion, in particular the performance and potential criterion. The claimant also makes a complaint that there was a failure to make reasonable adjustment.

31. The claimant complains of indirect race discrimination arising from the allegation that the respondent took into account English language skills in the redundancy process.

32. It is in issue whether the claimant's complaints have been presented inside the time limit for the presentation of complaints

Facts

33. The claimant commenced employment with the respondent in November 2004. At the time of his dismissal in 2016 he was employed as a level H Geologist.

34. The claimant is Egyptian and was first employed by the respondent in Egypt coming to work in the United Kingdom in 2010. The claimant took English lessons and in 2013 when the claimant first worked with Richard Jolly as his team leader the question of the claimant continuing the English lesson arose.

35. The claimant's case appears to be that when he made the request to continue with English lessons it was refused. Richard Jolly denies that he refused the claimant permission to continue with the English lessons. We accept Richard Jolly's evidence on this point. Richard Jolly stated that in 2013 he was meeting the claimant for the first time. The claimant's spoken English was good and Richard jolly had no knowledge of the claimant's written English. In 2013 when the claimant requested to continue with his English lessons Richard Jolly's response was to ask the claimant if he felt he was benefitting from the lessons. If so, Richard Jolly was happy to support the claimant. This is supported by the documents.

36. The claimant complains that Richard Jolly had taken into account his English language skills in the redundancy process resulting in the claimant being given a lower score that he should have received. Although the claimant said that this was evident from the discussion at the third consultation meeting, a consideration of the notes of the third consultation meeting (as corrected by the claimant) does not show this.

37. In January 2014 the claimant commenced a period of long-term sickness absence. The claimant returned to work on 15 August 2014. On his return to work the claimant's line manager was Lesley MacDonald. A return to work plan was agreed with the claimant in line with the advice given by occupational health. The claimant's workload was managed by Lesley Macdonald in line with advice from occupational health which in October 2014 included the comment that "any increase in workload should be carefully managed to avoid any potential stress that may occur." In late 2014 and early 2015 Lesley Macdonald had some concern about the quality of the claimant work and she spoke to the claimant explaining her concerns to him. The claimant was to later complain about this period suggesting that he was not given challenging work, at the time however the claimant appeared, from the comments he made in his 2015 My Plan, to accept the rationale of giving him smaller projects as a way of managing his work load following his return to work: and he did not complain at the time.

38. In December 2014 the claimant asked Richard Jolly to act as his mentor. The claimant's account is that Richard Jolly refused. Richard Jolly's account is that he agreed. The contemporaneous documents in the bundle support Richard Jolly on this point.

39. In about July 2015 the claimant worked closely with Richard Jolly, his performance improved, and he was rated as "delivers expectations" in his 2015 My Plan. The claimant complains that during a catch up meeting Richard Jolly said to the claimant "I see you as lazy and other people see you as lazy." Richard Jolly denies this. Richard Jolly's version of events is that the claimant said to him "you're calling me lazy, aren't you?" Richard Jolly denied that he used the word lazy and said he would not speak like that to one of his reports because of the demotivating effect it would have. Bearing in mind this was in the context of discussion where Richard Jolly was trying to impress upon the claimant the need to do more we consider it more likely that the conversation went in the way that Richard Joly explained rather than as remembered by the claimant.

40. The claimant also accuses Richard Jolly of referring to him as manic. The claimant states that he was asked by Richard Jolly "are you getting manic?" Richard Jolly states that he was concerned for the claimant's welfare and went for a walk with the claimant and that the claimant reassured him that he was well. Richard Jolly states that if he did use the word "manic" he was not doing so in any sense to refer to a medical diagnosis relating to the claimant's bipolar condition but simply because of his concern for the wellbeing of the claimant given his condition. In his oral evidence Richard Jolly suggested the word may even have been used to refer not to the claimant's mental state or the claimant at all but the fact that it was a busy time at work.

41. The claimant is clear in his account of this incident. Richard Jolly is clear in his denial. It appears to us something was said. Richard Jolly's account is a credible explanation. The burden of proof in respect of this incident lies with the claimant. We do not consider he has been able to show that the account given by Richard Jolly about this incident should be rejected by us. The claimant has not shown that the comment was made in the way that he suggests.

42. In 2015 the respondent carried out a reorganisation which resulted in 45 redundancies in the Reservoir Development function.

43. In January 2016 a further reorganisation was commenced this resulted in about 300 employees below level E being placed at risk of redundancy this included the claimant. A collective consultation meeting took place on the 27 January 2016 and a second collective consultation meeting took place on the 3 February 2016.

44. All at risk employees were scored by their team leaders. The selection criteria and scoring framework included Knowledge, Skills and Experience (KSE) which was given 40% weighting, performance dan potential (P&P) also 40% weighting and Values and behaviour (V&B) which was given a 20% weighting. All employees were given a score out of 5 for each criterion which were combined to produce an average score. Richard Jolly was responsible for scoring the claimant and gave him scores of 4 for KSE, 3 for P&P and 3 for V&B resulting in average score of 3.4. After arriving at his scores for the claimant Richard Jolly discussed the claimant's scores with Lesley MacDonald and Claire Smith who agreed with the scores.

45. Richard Jolly in scoring the claimant placed greater emphasis on the periods when he knew that the claimant had been well, he did not take into account the period for early 2015 when there concerns about the claimant's performance. Aware that the claimant had been off sick for a significant period Richard Jolly considered 4 previous My Plans instead of 3.

46. An assurance process carried out HR and discipline directors was in place to maintain consistency and ensure that there was no bias. This consisted of checking the at risk employee's last three My Plan ratings to ensure there was no unexplained disparity between the redundancy score and the My Plan ratings.

47. A third consultation meeting took place on the 10 February 2016 and a final consultation meeting took place on the 17 February 2016.

48. The claimant was considered in the Geology selection pool and after the selection event on 25 February 2016 where the score received by employees determined whether they were placed in a role. All level H Geologists with an average score of 3.8 or above were place in a role. The claimant with an average score of 3.4 was not placed in a role in the new organisation.

49. On 14 March 2016 the claimant was informed by Richard Jolly that he was provisionally unplaced in the organisation. The claimant was invited to attend individual consultation meetings with Richard Jolly.

50. Between 14 March 2016 and 21 March 2016 there were sensitive high-level meetings relating to the Platina project on which the claimant had worked with Richard Jolly. The meeting was only attended by employees at a higher level that the claimant, other employees at the claimant's level did not attend. There was no connection between the claimant's provisional selection for redundancy and the claimant not being invited to the meetings.

51. The claimant had requested to be accompanied at the individual consultation meetings by some from Balance, an employment support service, this was refused after Melissa Creevey, HR Advisor. She explained that the respondent allowed attendance by a colleague or a trade union representative but not an external third party.

52. The claimant's first individual consultation meeting took place on the 24 March 2016 when the claimant met with Richard Jolly and Melissa Creevey. The claimant was advised to look for roles advertised on the respondent's online job portal and to inform the Richard Jolly if there were any roles that he was interested in.

53. A redeployment forum took place on the 24 March 2016 at which remaining vacancies and provisionally unplaced employees across all functions were considered and placed in suitable roles having regard to the scores given to the employees and the requirement of the role. There were no roles that matched the claimant's skillsets and so he was not considered for any of the remaining roles.

54. The second individual consultation meeting took place on the 5 April 2016. At this meeting the claimant's possible eligibility for enhanced redundancy terms was explained. There was a discussion about the claimant's scores. The claimant indicated that he wished to challenge his socres of 3 for P&P and V&B.

55. On 6 April 2016 the claimant emailed Melissa Creevey and Richard Jolly saying that the did not consider that the notes of the consultation meeting reflected what had been discussed and that he still had concerns about his scores. The claimant stated that he did not want to attend a third consultation meeting until these matters had been resolved. Richard Jolly

and Melissa Creevey met with Rahul Williams to discuss the queries raised by the claimant in the second consultation meeting

56. On 7 April 2016 the claimant met with Rahul Williams and as a result of the matters discussed it was agreed that the claimant would be referred to occupational health. Rahul Williams also informed the claimant that the third consultation meeting would not take place until after referral to occupational health confirmed that the claimant was fit to attend the third consultation meeting. On 20 April 2016 an occupational health report stated that the claimant was fit to work with adjustments. This was treated by the respondent as indicating that the claimant was fit to attend an individual consultation meeting. The claimant met with Richard Jolly on the 21 April 2016 to discuss the occupational health report, it was agreed to reduce the claimant's hours as recommended by occupational health and further that the claimant could work from home on Fridays.

57. In April 2016 the claimant applied for role as Geologist in Kuwait. The claimant was shortlisted for interview but was not successful. The claimant was given detailed feedback on the reasons why he was not successful in his application for this role commenting on his technical skills and previous performance ratings.

58. A representative of Balance had contacted Richard Jolly requesting to be allowed to attend the claimant's consultation meetings. She was informed that the consultation meetings had been paused and that the respondent would contact her arrange for her to join when they resumed.

59. The third individual consultation meeting was arranged to take place on the 28 April 2016 when a balance representative to accompany the claimant was not available. There was no contact with Balance until very late on and nobody was available to attend. The claimant was offered the opportunity to reschedule so as to allow a representative of Balance to attend but he refused the offer stating that he wished to proceed. Prior to the third consultation meeting the claimant had requested that the meeting be recorded. The claimant was told that a "formal record would be taken by HR".

60. Rahul Williams describes the third individual consultation meeting as a difficult meeting at which all the claimant's representations were carefully considered and responded to in as much details as possible. Richard Jolly describes the consultation meeting as adversarial. The claimant's referral to occupational health was discussed, the claimant's scores were discussed, and the claimant made allegations against Richard Jolly stating that he had called him lazy during a conversation in 2015

61. Despite consulting with the claimant and considering all his points there was no suitable alternative role found for the claimant. On 3 May 2016 Rahul Williams wrote to the claimant giving him notice of termination of his employment on the grounds of redundancy.

62. On 3 May 2016 the claimant submitted a grievance letter raising concerns about the redundancy process his previous My Plan ratings and

discrimination on health grounds. On 6 May 2016 the claimant appealed against his redundancy. The grievance and appeal were considered by Alan Martin.

63. The appeal hearing took place over two days on 11 and 12 May 2016. During the appeal hearing Alan Martin discussed the claimant grounds of appeal.

64. Following the appeal hearing Alan Martin carried out further investigation which involved Maria Nazarkewych Martinez, from HR, speaking to Richard Jolly, Lesley MacDonald Rahul Williams and Melissa Creevey. Alan Martin later met with Maria Nazarkewych Martinez to report on her meeting.

65. In reaching his decision on the appeal Alan Martin considered the claimant's five grounds of appeal.

66. The claimant's first ground of appeal was that scores he had been given by Richard Jolly during the redundancy process were unfair and biased, in particular the score of 3 for P&P. Alan Martin was satisfied that the claimant's scores were appropriate and the scoring criteria had been correctly applied Alan Martin found that Richard Jolly had applied the scoring correctly, taking into account a number of facts, including the claimant's previous performance reviews and his own experience of the claimant's work.

67. The claimant's second ground of appeal was that Richard Jolly had treated him unfairly on a number of occasions in 2013 and 2015 and during the redundancy process. The claimant alleged that Richard Jolly had breached his confidentiality by sending a calendar invitation to Lesley MacDonald without a privacy lock to discuss the individual consultations with the claimant. Alan Martin found that the invitation had not been made private but did not consider that Richard Jolly treated the claimant unfairly. He considered that the purpose of the invitation was to find a practical solution to enable the consultation to proceed without delay as Richard Jolly was going to be away on holiday. Alan Martin considered the claimant's allegations that Richard Jolly called him lazy and asked the claimant if was getting manic. The claimant and Richard Jolly's recollections were very different about these events, but Alan Martin found that Richard Jolly had gone out of his way to help the claimant and both those conversations were held with the intention of providing guidance and support to the claimant. The claimant also made a number of allegations that Richard Jolly treated him unfairly about which Alan Martin concluded that there was no evidence. Alan Martin noted that both the claimant and Richard Jolly had spoken of having a good relationship over the time they worked together and he was satisfied that Richard Jolly had not treated the claimant unfairly or demonstrated bias towards him.

68. The claimant's third ground of appeal was that he had been discriminated against on health grounds following his return to work after a period of long term sickness absence in 2014 and during the consultation process. For the year 2015 the claimant believed that she should have been managed under a formal performance improvement plan (PIP) as Lesley MacDonald had

concerns about his performance in the first half of the year before he moved to Richard Jolly's team. Richard Jolly had informal discussion with the claimant about the need for improvement and following this discussion in July 2015 the claimant's performance had improved to a satisfactory level. Alan Martin was satisfied that a PIP was unnecessary. The claimant also alleged that he had not been given challenging work in the first half of 2015 which was against advice given by occupational health in October 2014 that had stated that "*any increase in workload should be carefully managed to avoid any potential stress that may occur*." Alan Martin concluded that Lesley MacDonald had managed the claimant's workload appropriately following his return to work taking into account the business needs and the claimant's wellbeing. Alan Martin concluded that there was no evidence that the nature of the work that the claimant had given disadvantaged him in the redundancy process. He concluded that the claimant had not been discriminated against on health grounds.

69. The claimant's fourth ground of appeal was that he had been unfairly dismissed. The claimant complained about delays in the process. Alan Martin found that the six weeks process in the claimant's case was not very different from other timescales for a normal redundancy. Further, Alan Martin found that the claimant had been responsible for some of the delay.

70. The claimant expressed concern about the notes of the individual consultation meetings accurately reflecting was discussed. Alan Martin found that the notes were comprehensive, and he did not consider that there was any deliberate intent to change the meeting notes and further that the claimant's comments did not suggest that the amendments suggested substantively changed the meaning of the notes.

71. The claimant had requested that Balance attend the consultations meetings, but this was refused in the first two consultation meetings and then permitted in the third consultation. However, the claimant did not make the arrangements for the balance representative to attend and although the claimant was offered the opportunity to postpone the meeting to enable Balance to attend the claimant wished to proceed. Alan Martin found Richard Jolly and Rahul Williams had accommodated the claimant's request for Balance to attend the third consultation meeting.

72. The claimant had initially been provided with incorrect figures for his enhanced redundancy terms due to an error in his continuous employment date on the HR system. The pensions team was responsible for calculating the terms and this was not done directly by HR. The miscalculation was an administrative error and the slight delay of one week in providing the re-calculated figures was due to the fact that HR did not do the calculations themselves.

73. Alan Martin found that the claimant had mistakenly believed that Rahul Williams had agreed to make an audio recording of the meeting but had in fact meant that notes would be taken by HR as a written record and shared with claimant afterwards.

74. The claimant had been sent an email offering outplacement support before his redundancy was confirmed and considered that there was a breach of confidentiality and suggested that a decision had already been made about his employment This was explained by Rahul Williams as having been sent in error and retracted once the error was identified. Alan Martin did not consider that there had been a breach of confidentiality or that the administrative error suggested that a decision had already been taken.

75. The claimant complained that he had been excluded from key meetings. Alan Martin found that this was not the case and that the relevant meetings were not meetings to which employees at the claimant level would have been invited to attend, there was no connection to the claimant's provisional selection for redundancy. The claimant's fourth ground of appeal was rejected.

76. The claimant's final ground of appeal was that his 2015 My Plan contained an unfair rating and comments. Alan Martin noted that the claimant had not challenged his My Plan at the time it was given and he did not uphold that ground of appeal.

77. Alan Martin found that there had been genuine redundancy situation; that the scoring criteria and selection process which had been adopted was objective reasonable and fair in all the circumstances and the claimant's scores were appropriate; that Richard Jolly had carried out a meaningful and fair redundancy consultation process by meeting with the claimant for individual consultation meetings and considering carefully, and responding to the claimant's representations; that the claimant's allegation of unfair treatment and discrimination were unfounded and that there was no evidence of bias or any other unlawful motive. Alan Martin confirmed the decision to terminate the claimant's employment on the grounds of redundancy.

The claimant's submissions

78. The claimant's submission included the following points: The claimant argued that his performance in 2011 was such that he earned a spot bonus. The claimant went on to say that had he not suffered ill health he was expecting to receive a rating of "exceeds expectation" but he received a rating of "delivers expectation", which although a satisfactory rating was less that he was expecting to receive in his appraisal and he believes would have received if he had not become ill. The claimant stated that the respondent turned a blind eye to his good performance in the 2012 My Plan. The claimant stated that he was disadvantaged by the absence of a Balance representative at his consultation meetings but did not explain in what way. The claimant in his submission referred to Richard Jolly failing to give him support when he was ill. The claimant blamed the respondent for becoming ill asking rhetorically, "why has the respondent not given me a break when they saw I was not looking good?"

Conclusions

What was the reason for the claimant's dismissal?

79. The Tribunal is of the unanimous view that the reason for the claimant's dismissal was redundancy. Redundancy is a potentially fair reason for the claimant's dismissal. The claimant has not presented a case that there was any other reason for his dismissal. In dismissing the claimant for redundancy the claimant says that the respondent was unfair and or discriminated against him on the grounds of disability and because of his race.

Was the claimant unfairly dismissed?

80. Section 98(4) of the Employment Rights Act 1996 provides that where the employer has proved a potentially fair reason within the meaning of section 98(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. The burden is neutral at this stage: the Tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

81. We were referred to the case of British Aerospace plc v Green [1995] IRLR 433 in which it is stated that: "in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him." The Tribunal must not embark on a reassessment exercise.

82. The claimant contended that there was unfairness in the decision to dismiss him because there should have been an upward adjustment of his scores because of his disability.

83. The respondent stated that it applied in the claimant's case a selection process that had been collectively agreed. It was further stated that Richard Jolly discounted periods of sickness in assessing the claimant. Richard Jolly places greater emphasis on the periods the claimant was well. Richard Jolly did not take into account the period when there were concerns about the claimant's performance. Richard Jolly took into account the claimant's previous four performance reviews not just the three that the procedure required because for a significant period of time the claimant had been off sick.

84. The respondent pointed out that the process it had adopted included a moderation or assurance process which was carried out by HR and discipline leads who checked each at risk employee's previous three years of My Plan ratings to ensure that there was no large disparity between the redundancy score and the My Plans ratings. The claimant had received a delivers expectation rating in each of 2013, 2014 and 2015. The delivers expectation rating was consistent with the claimant's score in the redundancy process.

85. The respondent says that the evidence shows that the claimant's performance was not affected by his disability on his return to work. The respondent also noted that the claimant was unable to say which scores should be uprated or to what extent.

86. We have not been able to conclude that there is any unfairness demonstrated in the scoring process itself or in the way that it was applied in the claimant's case having regard to his disability.

87. The claimant contended that in scoring him the respondent only took into account a 7-month period of performance and should have scored the claimant taking into account a longer period of his performance. It is clear to the Tribunal that the evidence of Richard Jolly demonstrates that this is exactly what happened. Richard Jolly assessed the claimant having regard to not only the time that he was working with the claimant but he also consulted with Lesley Macdonald and Claire Smith (who had previously been the claimant's team leaders) to discuss the claimant scores.

88. The claimant states that it was not fair that he was not permitted to be accompanied by someone from Balance at the first and second individual consultation meetings. This situation came about because following the claimant 's request Richard Jolly was advised that the respondent allowed attendance by a colleague or a trade union representative but not an external third party. He followed this advice. In respect of the third consultation meeting the position was considered afresh by Rahul Williams and he was willing to allow the claimant to be accompanied at the third individual consultation. The respondent contends that in respect of the third consultation meeting it bent over backwards for the claimant to have a Balance person present at the third consultation meeting.

89. The Tribunal note that the claimant has not explained how the presence of a person from Balance would have made any difference to the outcome of the first two meetings. It was the claimant who wished to proceed without anyone from Balance at the third consultation meeting. The Tribunal has not been able to conclude that in the way the respondent dealt with the claimant's request for a person from balance to be present at the first two consultation meetings was unfair.

90. The claimant also contends that Alan Martin ignored the claimant's record of reaching goals he had been set and saving the respondent money.

91. The Tribunal rejects this. It is the view of the Tribunal that Alan Martin invested a lot of time in the appeal process and investigated the claimant concerns thoroughly. Alan Martin took into account the claimant's track record and performance history and noted that the claimant was good a performer who had provided a valuable input. Alan Martin made specific reference in his evidence to considering the claimant's work on "Platina Chumbo" a project on which the claimant worked and where the claimant contends his work resulted in saving the respondent billions.

92. The conclusion of the Tribunal is that the claimant's complaint of unfair dismissal is not well founded and is dismissed.

Did the respondent know of the claimant's disability at the material time?

93. The first indication that the claimant was unwell came in about January 2014. It was not and could not have been clear to the respondent at that time what the problem with the claimant was. The respondent was aware that it had a duty of care to support the claimant. Soon after, in February 2014, the claimant was off work on long-term sickness absence. From about this time the respondent was aware of the claimant's impairment.

94. An employer is answerable for disability discrimination against an employee where the employer has actual or constructive knowledge that the employee was a disabled person. The required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as defined in section 6 of the Equality Act 2010. Those facts have three elements to them, (i) a physical or mental impairment, which has (ii) a substantial and long-term adverse effect on (iii) his ability to carry out normal day-to-day duties. 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'.

95. It is our view clear that this position had arrived by the time the claimant returned to work from his long-term sickness absence.

96. An employer discriminates against an employee if because of his disability he treats the employee less favourably than he treats or would treat others. On a comparison of cases there must be no material difference between the circumstances relating to each case. In a case of disability discrimination, the circumstances relating to a case include a person's abilities.

97. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.

98. We have reminded ourselves of the guidance which is contained in the case of *Igen v Wong* [2005] IRLR 258 and *Madarassy v Nomura International* [2007] IRLR 246 on the evidence and standard of proof required in proving discrimination.

99. The claimant alleges three acts of direct discrimination. The first relates to comments made about the claimant to the claimant by Richard Jolly. The comments are referring to the claimant as "manic" and calling the claimant "lazy".

100. With reference to the use of the word manic we note that the circumstances in which Richard Jolly is said to have used the word manic was where Richard Jolly was concerned that the claimant was becoming ill and

concerned for the claimant's welfare. We also not that Richard Jolly in his witness statement was clear that he did not use the word intending any attempt at diagnosis or to be offensive or discriminatory he was concerned for the claimant's welfare. In his oral evidence Richard Jolly added to his witness statement the possibility of the use of the word to refer not to the claimant at all but to how busy things were. We note that the claimant comments on the third consultation meeting seem to support this being an explanation given by Richard Jolly when the matter was first raised by the claimant.

101. Having regard to all the evidence before us we have concluded that the use of the word manic by Richard Jolly was not, if used by him, used in a pejorative sense. We do not consider that it has been shown that in the use of this word Richard Jolly treated the claimant less favourably.

102. The second less favourable treatment complained of is the claimant being passed over for promotion to a level G post in Kuwait which he applied for during the redundancy process. The claimant's argument on this aspect of the case appeared to the Tribunal to be that his poor performance ratings were a factor in the claimant not being selected for promotion. The claimant has not shown that his disability was a factor in the decision not to appoint him there was a clear account of feedback given to the claimant. The claimant complained at various times about the conduct of Richard Jolly and at the time commented on being treated unfairly by Richard Jolly however the Tribunal have not been able to conclude that in his assessment of the claimant Richard Jolly discriminated against he claimant in preparing his My Plan performance rating. Thus, to the extent that the claimant may have been complaining that the performance rating was infected by discriminatory consideration the Tribunal have not been able to find that this is correct. We have not been able to conclude that there was less favourable treatment.

103. The claimant complains that the failure to put him on a PIP was an act of less favourable treatment.

104. The claimant believed that she should have been managed under a formal PIP in 2015. The claimant can point to Lesley MacDonald's concerns about his performance and Richard Jolly's informal discussion with him about the need for improvement. The respondent's position is that the claimant's performance improved to a satisfactory level and so it was not necessary to place the claimant on a PIP. When Alan Martin carried out his investigation, he was satisfied that a PIP was unnecessary. It is not clear what difference it would have made if the claimant had been placed on a PIP. The purpose of a PIP is to improve the employee's performance, without being placed on a PIP the claimant's performance did in improve. The claimant's scores in the redundancy were supported by the scores on the claimant's My Plan. The claimant had good scores and was considered a good Geologist. It is not clear to the Tribunal that the claimant not being placed on a PIP was a detriment. The Tribunal has not been able to conclude that failing to place the claimant on a PIP was less favourable treatment.

105. The claimant makes a claim of indirect discrimination arising out of the annual performance review process and the redundancy selection criterion, in particular the performance and potential criterion.

106. An employer discriminates against employee if the employer applies to the employee a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of employee's. In this case the relevant protected characteristic is disability. A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of the employee's if the employer applies, or would apply, it to persons with whom employee does not share the characteristic, it puts, or would put, persons with whom the employee shares the characteristic at a particular disadvantage when compared with persons with whom the employee does not share it. It puts, or would put, the employee at that disadvantage, and the employer cannot show it to be a proportionate means of achieving a legitimate aim.

107. The first provision, criterion or practice that the claimant relies on is the annual performance review. This applies to all BP employees.

108. The claimant's My Plan rating in 2015 was that he delivers expectations. The comments in the claimant's 2015 My Plan were consistent with a good performance. The claimant has not been able to show in the application of the annual performance review that he suffered a particular disadvantage. There was no evidence adduced before the Tribunal that the annual performance review puts, or would put, persons with whom the claimant shares the characteristic of disability at a particular disadvantage when compared with persons with whom the employee does not share it. There was no evidence of a group disadvantage. It is the Tribunal's view that the process followed by the Respondent is a proportionate means of achieving a legitimate aim of carrying out a performance appraisal of employees.

109. The second provision, criterion or practice that the claimant relies on is the redundancy selection criteria, in particular the performance and potential criterion.

110. The claimant was given a score of three for performance and potential. This is consistent with a delivers expectation rating. The Tribunal is satisfied that the score that the claimant received on this in the redundancy selection process was arrived at by Richard Jolly after giving fair consideration of the claimant's work and performance. The Tribunal has not been able to find that there was a particular disadvantage suffered by the claimant in the application of this criteria. The application of the criteria is in our view a proportionate way for the respondent to carry out the legitimate task of carrying a redundancy selection process.

111. The claimant also makes a complaint of indirect discrimination based on the protected characteristic of his race. The claimant relies on the provision criterion or practise of taking into account his English skills in the redundancy process. There is no evidence before the Tribunal to support the claimant's allegation. Richard Jolly denied that he took into account the claimant's English in the redundancy process. Richard Jolly on first meeting

the claimant thought that he had excellent spoken English. Richard Jolly was content to support the claimant in continuing with English lessons if the claimant considered that it was benefitting him.

112. The Tribunal has not been able to conclude that what the claimant alleges took place. This claim therefore fails.

113. The claimant also makes a complaint that there was a failure to make reasonable adjustment. The provision criterion or practice relied on by the claimant are the annual performance review and the redundancy selection criteria.

114. In considering whether the respondent was in breach of a duty to make reasonable adjustments we have to consider whether the provision, criterion or practice of the annual performance review puts the claimant at a substantial disadvantage. What was the substantial disadvantage to the claimant in the annual performance review?

115. The claimant's My Plan rating in 2015 was that he delivers expectations. The impact of the claimant's absence due to his disability and its impact on the claimant's return to work was accounted for by Ricard Jolly disregarding the claimant's performance in the period when he first returned to work and his performance was a concern. The claimant's grading as delivers expectations aligns with other periods when the claimant's performance was not said to be impacted on by considerations related to his disability. The claimant's My Plan for 2015 was consistent with good performance. It has not been shown in the application of the annual performance review the claimant suffered a particular disadvantage. As previously stated there is no evidence that the annual performance review puts, or would put, persons with whom the claimant shares the characteristic of disability at a particular disadvantage when compared with persons with whom the employee does not share it.

116. The claimant complains that there was a failure to make a reasonable adjustment in the redundancy selection criteria. The respondent's redundancy selection criteria involved all at risk employees being scored by their team leaders. The team leaders used a scoring framework that looked at Knowledge, Skills and Experience (KSE), Performance and Potential (P&P) and Values and Behaviour (V&B) scoring each employee under each heading out of 5. The claimant was scored 4 for KSE, 3 for P&P and 3 for V&B. These are described as good scores. In the context of the redundancy selection process they were not sufficient to avoid redundancy, but they were an indicator of a performance that 'delivered expectation'. In scoring the claimant greater emphasis was placed on the periods when the claimant had been well and the period when there had been concerns about the claimant's performance were not taken into account. The claimant's scores in the redundancy selection process were subject to an assurance process carried out by HR and discipline directors. In the claimant's case this gave rise to no concerns.

117. The claimant' score of three for performance and potential and rating of delivers expectation does not indicate that the claimant has suffered any

substantial disadvantage as a result of the application of the application of the redundancy selection criteria. There is no evidence that the redundancy selection criteria puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

118. The claimant's complaints are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 21 May 2019

Reasons sent to the parties on

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For the Tribunal office

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