EMPLOYMENT TRIBUNALS

Claimant: **Mr Hopper**

Respondent: **Bridgwater and Taunton College**

Heard at: **Bristol** **On: 21 October 2020**

Before: **Employment Judge Christensen**

Representation
Claimant: **In Person**
Respondent: **Mr Kemp, of Counsel**

JUDGMENT

1. The claimant has been unfairly dismissed.

2. A Telephone Case Management will now be listed to give directions to determine matters of remedy.

REASONS

The claims and background

1. The claimant presented a claim form on 23 April 2019 in which he brought claims of unfair dismissal and disability discrimination. The claim of disability discrimination has been disposed of at a hearing before EJ Reed on 31 January 2020. Judge Reed found that the claimant was, at the time relevant to his claims, a disabled person by reference to problems with his left knee.

2. He also found that the claimant's claims under the Equality Act were out of time by reference to any act occurring before 14 November 2018 being on

the face of it out of time and that it was not just and equitable to extend time. The claim under the Equality Act may therefore not proceed. The analysis by Judge Reed was such that it was found that the last potentially discriminatory act took place on 9 November 2018 being the date that the first consultation meeting took place and on which date the claimant volunteered to be made redundant. On that analysis the act of dismissal by reason of redundancy, which took place on 22 November 2018, was not to be considered under the Equality Act. It falls to be considered as a claim of unfair dismissal. The original hearing date in April was lost because of the Covid pandemic and the matter was relisted to be heard on 21 October 2020.

The Issues

3. The claim of unfair dismissal is before me today. The hearing was conducted face to face and with all parties, witnesses and representatives present in the court room.

4. As expressed in the Case Management Summary of Judge Reed dated 31 January 2020 the issues are stated to be*.*

> *"The claimant was dismissed by reason of redundancy. The respondent undertook a redundancy exercise in October 2018, as a consequence of which the claimant was told he was selected for redundancy but was not given notice of dismissal. Before the College gave notice, the claimant himself made an application for voluntary redundancy, which the College accepted.*
>
> *The claimant says that his dismissal was unfair because the College should have rejected his application. Specifically, he says College knew (or should have known) that he only made the application because he had been improperly selected. Specifically, he had received a very low mark for attendance because he had been absent due to a disability (problems with his knee). It follows that he should not have been so scored, should not have been selected and therefore his application should have been rejected and his employment continued"*

5. It was agreed at the start of the hearing that these issues remained broadly the correct ones and that in determining the claim I should consider the entirety of the process that led to the claimant's dismissal. This includes his scoring under the redundancy matrix (with particular focus on the criterion of attendance), the consultation process and then his dismissal following his offer to be selected for voluntary redundancy. I should also consider his appeal against the dismissal.

6. I confine myself to addressing matters of liability.

The Law

7. It is agreed that, in accordance with S98(4) this case is to be determined by reference to determining whether, in the circumstances of a dismissal for the potentially fair reason of redundancy, the dismissal was fair in all the

circumstances. Guidance is given on redundancy in the case of *Williams-v-Compair Maxam* referred to by the respondent in closing submissions. I must determine whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors that a reasonable employer might be expected to consider are

- Whether the selection criteria were objectively chosen and fairly applied
- Whether employees were warned and consulted about the redundancy
- Whether, if there was a union, the union's view was sought
- Whether any alternative work was available

8. The particular unfairness argued for by the claimant, and therefore the particular focus in this case, relates to whether the selection criteria were fairly applied to him by reference to the criterion of 'Attendance'.

9. The respondent's opening note refers to the case of *Hachette Filipacchi-v-Johnson UKEAT* regarding the well-established principle that the range of reasonable responses test applies to each of the substantive questions of fairness for a redundancy dismissal.

10. The note submits that it is relevant that the claimant chose to request voluntary redundancy, that that was an informed choice made with the benefit of union advice. It submits that it is not for an employer to second guess the reasons for a request for voluntary redundancy and instead a reasonable employer is entitled to take such a request at face value. It submits that in the round the respondent followed a fair procedure including collective consultation, individual consultation, objective selection criteria and searching for suitable alternative employment.

Witnesses

11. For the respondent I heard evidence from Mr Kilduff, Assistant Principal of the respondent and Mr Berry, the College Principal. Mr Kilduff gave evidence on the redundancy procedure that led to the claimant being given the lowest score in the redundancy matrix and then the consultation process that led to the claimant requesting and being granted voluntary redundancy. Mr Berry gave evidence on the process adopted to process the appeal that the claimant submitted. The claimant gave evidence and called one witness – Mr J Fones a lay officer of the University and College Union (UCU). Mr Fones gave evidence on the collective consultation that had taken place with the UCU. He also gave evidence in relation to his attendance at the first consultation meeting with the claimant after the claimant had been put into a pool of three people who were all at risk of redundancy.

Matters arising during the hearing

Evidence of Mr Kilduff

12. When the claimant was questioning Mr Kilduff, it became apparent that, as result of the contents of the claimant's witness statement, Mr Kilduff had consulted his HR department in the days leading up to the tribunal hearing

to seek clarification on the application of the selection criteria applied to the claimant and the other two people in his pool. When questioned by the claimant, he started to give oral evidence of emails that had been exchanged the night before the hearing between him and HR to clarify how one of the particular criteria in the selection matrix had been applied. The particular criterion was 'Cost of Redundancy'. His oral evidence indicated that he agreed with what the claimant had put in paragraph 47 of his witness statement; namely that the claimant's scoring on this criterion was wrongly recorded on his redundancy selection matrix. Further he indicated that the scoring of the other two people in the pool was also wrongly recorded such that it was possible that the claimant's overall score may not have been the lowest in his pool.

13. I was satisfied that, if so, this could be relevant to the question of fairness because the claimant had been told by letter on 24 October that he had scored the lowest in the pool and "*identified as the individual in your pool who is directly affected by the potential redundancy situation as you were the lowest scoring Course Leader".* However, Mr Kilduff indicated that he could not be certain on this point without referring to the information that had been sent to him by HR. There was nothing in Mr Kilduff's statement to cover this point, there had been no request for any supplemental questioning or the production of further documents at the start of the hearing to deal with this new evidence.

14. Recognising that the focus of my enquiry today should be on the criteria relating to absence due to the claimant's knee problems as anticipated in the order of Judge Reed, I nonetheless concluded that I should not be limited to that issue in the event that evidence emerged that tended to indicate that other unfairnesses may be evident. This is particularly so as the claimant is self-represented. After discussion with the respondent's representative and to ensure fairness to both sides, it was agreed that there would be an adjournment to enable the respondent to make enquiries in relation to any emails that had been sent by HR to Mr Kilduff in the days before the hearing and to disclose them if that assisted in addressing the issue raised by Mr Kilduff.

15. The adjournment lasted 1.5 hours. Documentation was disclosed and added to the bundle at pages 246-250. It was agreed that the documentation established that an error had been made on this criterion in the scoring of all three people in the pool in which the claimant had been placed but that ultimately after adjustments to the scores to reflect the correct scoring for all three members of staff by reference to the 'Cost of Redundancy' criterion, the claimant was still scored the lowest in the pool. Accordingly, it was agreed that no new issues of unfairness arose in relation to this point.

Respondent's opening note

16. The respondent produced an 'Opening Note' and asked that I read it at the outset of the hearing. In relation to this the claimant indicated that he took issue on a few points and so I record them.

17. In relation to paragraph 8(e) the claimant indicated that he did not accept that he did not know that he was the lowest scoring candidate when he applied for voluntary redundancy. He confirmed that his position was that he did know that as he had been told it in terms by the respondent in their letter of 24 October 2018 and so in advance of his request for voluntary redundancy on 9 November 2018.

18. In relation to paragraph 9 the respondent accepted that they had incorrectly referred to a 5 month delay in appealing. The correct period of time is 3 months.

Findings of Fact

19. The claimant was employed by the respondent as the Course Leader for furniture studies. He was dismissed for reason of redundancy after 22 years of service to the respondent. The claimant was a well respected member of staff and had good relationships with his work colleagues.

20. The respondent is an educational College employing about 1400 staff and has an on-site HR function. The Head of HR is Mr Parsons. I did not hear any evidence from anybody in HR.

The development of the knee problems

21. The claimant started to experience knee problems in November 2016. These problems continued between that date and the date of his dismissal.

First Accident

22. The problems started when the claimant suffered an injury to his knee on 9 November 2016 when he was in Denmark attending a conference for the respondent. He received some medical treatment in Denmark and returned home.

23. He was signed off work for a period of approximately 6 weeks on successive sick notes. He returned to work on crutches and received physiotherapy and wore a knee brace.

Second Accident

24. The claimant suffered a second injury to the same knee on 10 February 2017 whilst at work. He received first aid at work and went to his local A&E department. He was signed off work until 24 February. The claimant returned to work on crutches and underwent further physiotherapy. The claimant informed his managers in advance of every medical appointment that he attended.

First surgery

25. The claimant underwent an Arthroscopic Partial Meniscectomy on 5 September 2017 and was signed off work for 4 weeks. His surgeon advised him that he would require further surgery to stabilise his knee and he was referred to a different surgeon for that further surgery.

Referral to OH

26. The respondent's HR department referred the claimant to the Avon Partnership Occupational Health Service on 28 February 2018 and a report was prepared dated 12 March 2018. That informed the respondent that

- The claimant had suffered two injuries to his knee in the last 18 months; the latter causing tendon and ligament damage resulting in surgery September 2017
- The claimant experienced constant discomfort and swelling of his knee which increased with level of physical activity
- The claimant is unable to kneel
- The claimant otherwise manages all activities with increased symptoms over the day
- The claimant uses pain killers and ice to ease the symptoms on his knee and in particular the swelling
- The claimant wears a knee support as required
- The claimant is undertaking regular physiotherapy

The report concludes

- The claimant is likely to require physiotherapy for some time yet
- Due to the continuing symptoms and feeling of instability two recommendations are made. Firstly, that the claimant does not undertake any activity with a ladder and secondly that he minimises the amount of manual handling undertaken particularly with heavy or awkward objects.
- The claimant should be offered a significant break to rest his knee and apply ice on the days that he works a long day given that his symptoms increase as the day progresses.
- The claimant should not be driving minibuses or students

Second surgery

27. The claimant underwent Anterior Cruciate Ligament 'ACL' reconstruction surgery on 8 August 2018. He was signed off work after the surgery and remained on a sick note until his dismissal in November 2018.

The redundancy process and selection criteria

28. The College experienced a significant decline in income as a result of a reduction of government, reducing the funding level per student. The number of students enrolling was also declining. The respondent was therefore experiencing financial pressure caused by less money and less students.

29. In light of this, the respondent undertook a redundancy exercise in Spring of 2018 and another one in the Autumn of 2018. The trade unions were consulted. The claimant was dismissed in the exercise that commenced in Autumn 2018. In relation to that exercise collective consultation with the affected staff and the trade unions started on 24 October 2018 for 30 days. The College Principal, Mr Berry, met with the trade unions on 23 October and shared the Consultation Document at page 127 in the bundle and explained the approach to redundancy including the proposed redundancy selection criteria and scoring method [pages 127-174]. The respondent was willing to entertain requests for voluntary redundancy. The respondent offered an enhanced contractual redundancy payment, in excess of the statutory scheme, but this was available to any member of staff dismissed by reason of redundancy irrespective of whether the dismissal was imposed or voluntary.

30. The College identified that due to less students in the area of furniture and carpentry there was a staffing surplus of 877 hours. A pool of 3 Course Leaders was identified as being at risk of redundancy in relation to this staffing surplus. The claimant was one of the Course Leaders in this pool.

31. Appendix 3 of the October 2018 Redundancy Consultation Document sets out the selection criteria guidance [pages 166-170]. It sets out 8 criteria namely

- Performance
- Knowledge
- Skills
- Experience
- Qualifications
- Attendance
- Disciplinary/Capability
- Cost of Redundancy

32. In fact the respondent combined Knowledge, Skills and Experience into one criterion in the matrix that was applied to the 3 Course Leaders. No explanation has been provided for this but I can discern no unfairness in the process arising from this.

33. The appendix advises in the section dealing with Attendance scoring that *'Care must be taken not to include time taken off for…disability related absences'* It also refers to maternity, adoption or paternity leave, maternity related sickness and parental/dependents leave. A formula is set out that requires the addition of scores for the number of occasions of absence to the score for the percentage of hours lost and then the conversion to a minus figure.

34. The claimant had no absences from work in the relevant period other than in relation to his knee problems. The application of the formula to the

amount and length of his absences from work related to his knee problems resulted in his score being awarded as -6. The other two staff members in the pool had respectively a '0' reflecting no absences and a -2.

35. The scores awarded in October 2018 were as follows

- Claimant 9
- Mr Partington 14
- Mr Dyke 12

36. Once the adjustments are made for the error accepted by Mr Kilduff in relation to the 'Cost of Redundancy' criterion the scores in the pool are agreed to be

- Claimant 14
- Mr Partington 17
- Mr Dyke 16

37. On that basis the claimant remains the lowest scoring in the pool.

38. To understand the claimant's case that he was improperly and unfairly scored by reference to the inclusion of his knee related knee absences, if the matrix were then hypothetically recalibrated to discount the claimant's knee related absences from work, the scores would become

- Claimant 20
- Mr Partington 17
- Mr Dyke 16

39. This analysis assists in identifying the impact of the knee related absences on the claimant's scoring in the redundancy scoring.

The pool and the scoring

40. In line with the agreed process the 3 Course Leaders were put into a pool. I am satisfied that the creation of this pool was reasonable in all the circumstances. Mr Kilduff then completed the redundancy scoring for the 3 Course Leaders. His scoring was then moderated and validated by a Senior HR Advisor, Ms Wills.

41. There was an error in the scoring attributed to the criterion of 'Cost of Redundancy' as referred to above. This error was made by Mr Kilduff and not identified by Ms Wills in her moderation and validation of Mr Kilduff's scoring. Her email to Mr Kilduff dated 20 October 2020 at page 250 confirms that she cannot explain how this error was made.

42. I find that neither Mr Kilduff nor his HR advisor, Ms Wills, gave any consideration to the possibility that the claimant's absences might be disability related. They therefore did not consider whether, in accordance

with their policy, the absences should be discounted in the redundancy scoring.

43. I find that Mr Kilduff did not consider this possibility when he did the initial scoring and did not consider or discuss this possibility in discussion with HR. I find that Mr Kilduff had a low level of understanding of what constituted a disability for the purposes of the Equality Act and the respondent's responsibilities under its redundancy scoring matrix – this possibility did not occur to him. I find that Ms Wills of HR also did not consider or raise this possibility with Mr Kilduff during her support of Mr Kilduff. I find that the possibility did not occur to her.

44. I make these findings based on the absence of any evidence to the contrary and because it is consistent with the way in which the claimant was scored on his attendance record. Given its relevance to the way in which the claimant brings his claim and given the respondent's own selection policy and guidance, it seems proper to conclude that if evidence had existed of the respondent giving consideration to the possibility that the claimant was disabled, the respondent would have disclosed notes of meetings to show perhaps that the possibility had been considered and rejected and why. They might have produced a witness from HR to give oral evidence to show that consideration had been given to the possibility of the claimant being disabled to ensure adherence to their redundancy selection policy. I am therefore satisfied that the possibility that the claimant may be disabled by reference to his knee problems, was never considered by the respondent at any point in the process leading to the claimant's dismissal.

The consultation with the claimant

45. On 24 October, Mr Kilduff met separately with Mr Dyke and Mr Partington and informed them that they were at risk of redundancy. He also told them that they were not the lowest scoring person at that point.

46. As the claimant was still away from work recovering from his ACL knee surgery, Mr Kilduff telephoned him at home. He was concerned to ensure that the claimant heard the news about being at risk of redundancy from him personally and before receiving his at-risk letter. Mr Kilduff telephoned the claimant and set out something of the background of the redundancy process, that there had been a scoring matrix and that the claimant had been placed in a pool of three Course Leaders who had all been placed at risk of redundancy,

47. There is a conflict of evidence between the claimant and Mr Kilduff regarding whether Mr Kilduff told the claimant in this call that, of the three people in the pool, he had the lowest score and therefore was at highest risk. I resolve this conflict in favour of Mr Kilduff. It seems inherently likely that he did tell the claimant this during the phone call as he confirmed it in writing in a letter to the claimant of the same date. I am satisfied that the claimant has simply forgotten this point of detail in the shock of being told that he was at risk of redundancy in the telephone call although nothing very particular hangs on this conflict.

48. Mr Kilduff wrote to the claimant on the same day, he told him what the 5 scoring criteria were and told him *"it is with regret that I must confirm that you have been identified as the individual in your pool who is directly affected by the potential redundancy situation as you were the lowest scoring Course Leader".* The claimant was sent his redundancy score which showed him with an overall total of 9. He did not know what the scoring was of the other two colleagues in the pool however he did understand that he had the lowest score on receipt of the letter of 24 October. He therefore attended the consultation meeting on 9 November in the knowledge that he was the lowest scoring Course Leader and therefore at highest risk redundancy.

49. The claimant had no understanding of how the scoring had been done nor indeed what guidance existed in the the respondent's Consultation Document (pages 127-174) in relation to how the various criteria should be scored. He was sent an edited version of the restructure consultation document which did not include any guidance on the scoring. That document explained that the consultation process would start on 25 November 2018 and that the proposed window for voluntary redundancy would close on 9 November 2018.

50. The claimant was told in the letter that he was at risk of redundancy and that no final decision would be made until the conclusion of the individual consultation process.

51. The claimant was shocked and dismayed to be told that he had been given the lowest score in the pool considering his lifelong skills experience and knowledge and his dedication to his role.

52. The claimant was written to again on 31 October and invited to his first consultation meeting. The original date suggested was 6 November but in fact the meeting took place on 9 November.

Meeting 9 November

53. The claimant attended the meeting accompanied by Mr Fones of the UCU. Mr Kilduff conducted the meeting and was supported by Ms Wills of HR who took notes. Mr Kilduff was fairly newly appointed to his role in the union and as a lay official had a low level of understanding of disability related issues. In advance of that meeting, Mr Fones did not consider or raise the issue with the claimant of whether his absences should have been discounted on the basis that they may have been caused by disability related absence.

54. The claimant found the waiting period at home leading up to the consultation meeting very stressful. By this stage he had been told that he had been marked as the lowest scoring in the pool and therefore was at the highest risk of redundancy and also that the window for considering voluntary redundancy would close on 9 November 2018. The claimant decided to attend the consultation meeting prepared to accept the possibility of voluntary redundancy, depending upon how the meeting went. He drafted a letter dated 9 November 2018 confirming that he was willing to be considered for voluntary redundancy.

55. At the meeting Mr Kilduff told the claimant that a carpentry lecturer had resigned and that in light of that the claimant could be granted a further week to consider whether he wished to volunteer for redundancy. The claimant was told that the carpentry lecturer post was at a lower grade and not close enough to the claimant's post to be a suitable alternative, but he nonetheless wanted the claimant to be aware of this vacancy. The claimant indicated that his skill set was in furniture rather than carpentry and that he did not wish to explore this possibility. Mr Fones confirmed that the meeting should continue as if this new information had not been introduced as it was a different post to Course Leader.

56. The claimant was told that if he wished to consider that role it was not suitable alternative employment within the redundancy process. It would therefore not avoid the claimant being made redundant however he would be given salary protection for 6 months and then join the top of the lecturer scale.

57. The claimant sought some reassurance that his low scoring in the redundancy matrix would not count against him in any reference that the respondent might provide him for new employment. Mr Kilduff confirmed that it would not form part of a reference and that the process was not about performance.

58. Mr Fones raised the issue that the claimant had not been provided with information on how the scoring had been done and what the maximum scores were. Ms Wills accepted that this this was an oversight on her part.

59. Mr Fones raised the issue that absences for an operation should be treated differently to other absences. Ms Wills confirmed that the scoring reflected all absences. There was no discussion about the respondent's policy that disability related absences should not be included in the scoring for attendance.

60. Mr Kilduff confirmed that he wished to meet the claimant again. The claimant indicated that the situation had been going round and round in his mind for the last few weeks and that he wanted to bring it to a conclusion as soon as possible.

61. On leaving the meeting the claimant considered that nothing had been said that indicated that the respondent would reconsider his scoring and that given that he had been scored lowest the best way of avoiding further stress and to optimise his recovery from his operation was to volunteer for redundancy. The claimant understood that he would gain nothing financially from volunteering (as opposed to waiting to be selected for redundancy) but was keen to avoid the stress of the continuance of the consultation process as he had lost confidence in the respondent. He didn't understand how the scoring had been done, considered that the respondent had a closed mind to any reconsideration and he was concerned that the redundancy scoring had been manipulated.

62. The claimant returned within minutes of the meeting ending and gave Mr Kilduff the letter that he had brought with him. It stated *"Due to the proposed Bridgwater and Taunton College restructure and considering that*

I'm currently recovering from major knee surgery, I confirm I am willing to be considered for voluntary redundancy"

Dismissal

63. Mr Berry, the College Principal, responded on 16 November *"I am writing to inform you of the outcome of the current restructure process. You indicated that your preferred option is to take redundancy and I can confirm that this has been agreed. Therefore your contract of employment as Course Leader will end for reasons of redundancy with effect from 22 November 2018"*

64. Mr Berry confirmed that the claimant could appeal the decision within five working days in accordance with the Appeals Policy which was sent to the claimant.

Appeal

65. The claimant's sister sent him some information in December 2018 regarding how physical impairments that lasted over 12 months might be classed as a disability under the Equality Act. The claimant had never considered this possibility as he had no understanding of how the Equality Act operated. He contacted the UCU to discuss matters. It took some time to get a substantive response. Once the response was received the claimant sent an appeal letter to Mr Berry on 12 February 2019.

66. The letter states

> *"it is clear that the BTC redundancy selection matrix was discriminatory as I was given a minus 6 score for attendance in the previous 12 months. The absences in question were directly related to the time I was signed as unfit for work by my GP whilst recovering from 2 operations. BTC were fully aware that the injury had a direct impact on my ability to carry out normal duties which had been the case for the preceding 2 years, this should not have been included in the redundancy selection process…."*

67. He raises a number of complaints about failures to make reasonable adjustments which are not relevant to this claim. He refers to his letter as an appeal and grievance.

68. I find that as a manager, Mr Berry had a limited understanding of issues around disability and would tend to seek advice from HR is such issues arose. He was aware that the redundancy selection policy indicated that disability related absences should not be counted when assessing attendances.

69. Mr Berry sought advice from the Head of HR when he received the claimant's letter. Mr Berry decided that, notwithstanding that it was significantly outside the 5 day period for appealing that he wished to investigate the matters raised by the claimant and respond outside the formal process. He took advice from HR. That advice took place in a

series of discussions between the claimant and Mr Parsons, the head of HR. There is no record of these discussions.

70. In these discussions, Mr Parsons advised Mr Berry that the claimant was not disabled and that in reaching that conclusion he relied heavily upon the OH report from March 2018 in reaching this conclusion. From this evidence I am satisfied that Mr Parsons reminded himself of the contents of that report when concluding that the claimant was not disabled but that no further investigation took place to address this issue. I reach this conclusion because there is no evidence of any investigation taking place.

71. The respondent had sought input from Occupational Health in March 2018 regarding how to manage the claimant's long standing knee related problems at work but did not use that opportunity to seek a view from OH regarding whether, in light of them, the claimant might be disabled under the Equality Act. The respondent did not seek and that report does not provide any view on whether the claimant was disabled under the Equality Act.

72. I am satisfied there was a low level of understanding amongst the claimant's managers regarding their responsibilities relating to issues relating to disability generally but specifically on the facts of this case, no thought given to whether his absences might need to be discounted as disability absences in the redundancy scoring, in accordance with their own policy being used. Despite factors well known to the respondent that could tend to indicate that he was a disabled person by reference to his knee problems, there was simply no index of interest in investigating and understanding this possibility and no advice given to managers by the respondent's HR advisors on this issue during the redundancy process. Given the significance of this issue to the selection criterion of 'Attendance' and given the size and administrative resource of this employer, this is a response that does not fall within a range of reasonableness.

73. Even once the issue was raised in terms by the claimant in his appeal, and notwithstanding the curiosity that Mr Berry properly then had in this possibility, the advice from HR to Mr Berry that the claimant was not disabled was based upon no further investigation and relied upon an OH report that

- Was written 5 months before the claimant had his ACL reconstruction surgery in August 2018 and 7 months before the redundancy selection exercise
- Gave no opinion on whether the claimant met the definition of disability with the Equality Act

74. The respondent's position is that the claimant's letter of appeal and grievance dated 12 February 2019 fell outwith their own appeals procedure and was therefore not processed within that policy.

75. Mr Berry responded to the claimant's appeal letter by letter dated 26 February 2019 following the receipt of oral advice from Mr Parsons in HR. His letter of response rejects the possibility raised by the claimant that the

selection matrix was not applied consistently and fairly. It rejects the claimant's contention that he was disabled – *"we contend that your injury does not meet the criteria to be considered a disability".* Mr Berry confirms that the claimant had not declared to the respondent that he was a disabled person.

76. The letter states that the appeal is considerably outside the timeframe of 5 days and the right of appeal has therefore lapsed.

Submissions

Respondent

77. I have considered the respondent's opening note and the oral submissions that were made at the conclusion of the evidence.

78. The oral submissions are as follows.

79. It would be an error of law to import a reasonable adjustment duty from S20 of the Equality Act into the consideration of a claim for unfair dismissal. In such a claim knowledge would be relevant which is not applicable to the claim being pursued under the Equality Act. The claimant should not be permitted to bring a reasonable adjustment claim through the back door. S98(4) does not import an obligation on employers to investigate whether an employee is disabled under the Equality Act. The respondent was entitled to hold a reasonable belief that the claimant was not a disabled person. It is relevant that the claimant did not at any time before his dismissal assert that he was disabled. The respondent acted in good faith.

80. In relation to the appeal the respondent accepts that disability is asserted but that it would be wrong to characterise this part of the process as falling within any formal appeal process. The response was instead simply an act of courtesy.

Claimant

81. The claimant submits that Appendix 3 at page 170 is key. That sets out the respondent's policy that care must be taken not to include disability related absences in the redundancy scoring matrix. The claimant submits that the College should at least have considered this possibility given his scoring of minus 6 which is what put him at greatest risk of redundancy in the pool of Course Leaders.

82. The claimant submits that it is relevant that the respondent had accepted that there are errors in parts of the scoring matrix, namely 'Cost of Redundancy'.

83. The same problems were repeated in the appeal – at that stage nobody noticed the errors in the scoring matrix.

84. The claimant submits that from his perspective it was clear that the scoring was set in stone at the consultation meeting and there was little point in any challenge.

85. The claimant submits that it was only in December, and once he had been sent some information from his sister, that he became aware that his scoring for attendance may not be valid because his attendance record may have related to disability related absences.

Determination of claim

Reason for dismissal

86. No issues arise between the parties on the reason for dismissal. It is accepted and I determine that the respondent has shown that the claimant was dismissed for the potentially fair reason of redundancy – S98(2).

Redundancy Dismissal – was the dismissal fair in all the circumstances? S98(4)

87. By reference to *Williams-v-Compare Maxam* the factors that a reasonable employer might be expected to consider are

- Whether the selection criteria were objectively chosen and fairly applied
- Whether employees were warned and consulted about the redundancy
- Whether, if there was a union, the union's view was sought
- Whether any alternative work was available

88. The particular unfairness argued for by the claimant, and therefore the particular focus in this case, relates to whether the selection criteria were fairly applied to him by reference to the criterion of 'Attendance'.

89. By reference to the issues identified by Judge Reed these refer to

- The possibility of unfairness because the College should have rejected his application for redundancy
- The possibility of unfairness because he had been improperly selected and identified as the person in the pool with the lowest mark for attendance because of his absence due to a disability and that he should not have been so scored.

90. The respondent has also submitted that it is relevant that a reasonable employer is entitled to take a request for voluntary redundancy at face value which is in essence the first issue identified by Judge Reed.

91. I address each of these.

Is there any unfairness by reference to the following *Williams-v-Compare Maxam* criteria: choice of redundancy criteria, warning and consultation with the union and the claimant and consideration of alternative jobs?

92. I am satisfied from my findings of fact that there was a genuine need to make redundancies in the Autumn 2018 redundancy process, that a pool for redundancy was properly and fairly identified by the respondent, that the claimant was properly put into that pool, that objective selection criteria were identified by the respondent and applied to the three people in the pool, that union's views were sought, that the claimant was fairly warned and consulted about the redundancy and that the respondent considered whether any alternative work was available.

Is there any unfairness because the respondent should have rejected the claimant's application for redundancy – is a reasonable employer entitled to take a request for voluntary redundancy at face value?

93. The claimant was dismissed for redundancy because he volunteered for redundancy and he did that because he had been told that he had received the lowest mark in the pool and was at highest risk of redundancy.

94. By reference to the respondent's submissions the volunteering for redundancy is enough to mean that a reasonable employer should take those at face value; that the acts of a reasonable employer do not include second guessing the reasons for a request.

95. It is my judgment that it would inconsistent with the breadth of S98(4) and the facts of this case, to draw such a fine line in considering whether the dismissal was fair in all the circumstances simply by considering the fact of the offer to be made redundant but without considering what led the claimant to make that offer. That offer existed within a continuum of events. It was significantly influenced by the claimant being told by the respondent that their redundancy scoring matrix had placed him bottom in the pool and that he was therefore at highest risk of redundancy within the pool.

96. By reference to the first issue identified by Judge Reed and on the facts of this case, I do not consider that the question of whether the respondent should have rejected the claimant's application for redundancy provides a complete answer to the question of whether the claimant had been unfairly dismissed. By that stage, the respondent had given no consideration to the possibility that the claimant might be disabled by reference to his knee.

97. It is therefore necessary to consider the issue of fairness more broadly and to consider the operation of the redundancy scoring matrix by the employer and the events that led the claimant to volunteer for redundancy. This requires consideration of the first *Williams-v-Compare* criterion and the second issue identified by Judge Reed.

A reasonable employer might be expected to consider whether the selection criteria had been fairly applied – were the selection criteria fairly applied to the claimant? Was the claimant improperly selected and identified as the person in the pool with the lowest mark for attendance because of his absence due to a disability and that he should not have been so scored?

98. The way in which the criteria were applied to him is identified as relevant in the issues identified by Judge Reed and further are cited as one of the

factors in *Williams-v-Compair Maxam.* A reasonable employer might be expected to consider; *"whether the selection criteria were……fairly applied"*

99. The claimant's submissions are that the respondent's own selection policy is a key factor in considering the fairness of his dismissal in that it sets out that disability related absences should not be included in the scoring and that the respondent should at least have considered the possibility that he was disabled before awarding him a score of -6.

100. I agree with the claimant's submissions in this regard. On the basis of my findings it seems proper to conclude that a reasonable employer would have given some consideration to the possibility that the claimant was disabled to ensure that it could fairly apply its redundancy selection criteria and thus whether to discount his absences which all related to his knee.

101. The respondent has submitted that it was entitled to hold a reasonable belief that the claimant was not a disabled person and that it is relevant that the claimant did not at any time before his dismissal assert that he was disabled.

102. I am satisfied that this employer was not reasonably in a position to hold a reasonable belief that the claimant was not a disabled person and in fact did not hold such a belief. Instead the respondent had no view on this as it had in no sense turned its mind to considering this possibility at any stage in the process leading to dismissal. An employer acting within a range of reasonableness, in terms of seeking to fairly apply its redundancy selection criteria, would given consideration to this possibility on the basis that (i) there were several factors known to them that tended to show that he could be disabled by reference to his knee problems (ii) knowing whether he was disabled was highly relevant to the selection criteria in the redundancy process that they were running (iii) the respondent was properly in a position to have been advised on and to have considered this issue as it was advised throughout the process by its HR Department and had access to an Occupational Health service.

103. My findings of fact confirm that the respondent is one of some magnitude, it employed 1400 members of staff and is supported by an on-site HR function. S98(4) confirms that the size and administrative resources is relevant in determining whether an employer acted reasonably or unreasonably in all the circumstances.

104. It is correct, as submitted by the respondent, that the claimant did not assert at any time before his dismissal that he believed he might be disabled. However, in my judgment that does not entirely address the question of whether this employer acted reasonably in all the circumstances in relation of the application of its attendance scoring matrix to the claimant. It is relevant that, at the relevant time, the claimant had no knowledge of the provision in the Equality Act relating to disability. His lay union representative also had very little understanding. The claimant also had no understanding of the guidance contained on Attendance scoring in the respondent's Redundancy Selection Criteria and Scoring Matrix. He did not know that the guidance provided that care should be taken not to include time taken off for disability related absence.

105. The circumstances were such that the respondent knew (i) the claimant had had mobility and physical problems arising from his knee and considerable absences from work arising from this for 2 years and otherwise had an excellent attendance record (ii) that he had suffered ongoing pain and mobility issues since 2016 and was at the time of the redundancy exercise in a post-operative recovery stage from his second operation (iii) that he was receiving ongoing medical treatment (iii) that he had two operations on his knee that had caused significant periods of absence to recuperate and had required post-operative use of crutches and that the most recent of these had happened a few months before the redundancy process had started (iv) that his ability to function fully at work in terms of physical activity had been impacted since 2016 (v) that the OH report in March 2018 confirmed that he had physical limitations arising from his knee problems and what adjustments should be made for him at work and (vi) no further OH or other medical report had been commissioned after the surgery in August 2018. On that basis, and even without the claimant raising it , a reasonable employer, with access to and advised by an HR department and conducting a redundancy selection exercise in which it was relevant to know if an employee's absences might be caused by disability, would have applied its mind in some way to considering this issue. A reasonable employer would have had an index of proper curiosity around well-known facts and have been interested in this to ensure that that it could fairly apply its own redundancy selection criteria. That policy required the respondent to ensure that redundancy absences were discounted. It is the complete failure of any manager or anyone from the HR department to have considered or advised on the possibility that the claimant might be disabled at any point and in any sense that creates the unfairness to the claimant. The actions of the respondent in the operation of its redundancy selection and scoring falls outwith the actions of a reasonable employer and satisfies me that the application of the selection criterion of 'Attendance' was not fairly applied to the claimant.

106. It is the scoring of this criterion by reference to 'Attendance' that left the claimant with the lowest score in the pool and therefore most at risk of redundancy. The claimant volunteered for redundancy knowing that and heavily influenced by the fact that he was the lowest scoring in the pool. It is directly causative of his dismissal. The respondent did not act reasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss the claimant.

107. The claimant's dismissal is unfair.

Appeal

108. The absence of any level of awareness of or interest in the possibility that the claimant was disabled by reference to his knee to ensure adherence to its Redundancy Selection policy, such that the respondent's actions fall within the range available to a reasonable employer, is not remedied on appeal.

109. Although Mr Berry became properly curious about this question, once it was brought to his attention by the claimant, the response from HR was cursory.

My findings indicate that Mr Parsons looked at the OH Report from March 2018 and from that concluded that, even though the issue is not addressed in the report, the claimant was not disabled and advised Mr Berry accordingly No further investigations were carried out to address the possibility that the claimant had been disabled.

110. I consider it relevant that the respondent had not asked OH to express a view on this possibility at that time of the report and the report does not therefore address this question. Instead, it sets out a number of pain and mobility problems experienced by the claimant in the preceding 18 months. It confirms that the claimant will require physiotherapy for some time yet and makes recommendations for adjustments in the workplace to accommodate this. It is written 5 months before the claimant has significant further knee surgery and for which there was no up to date medical information available regarding recovery.

Remedy

111. Issues arise for determination in addressing matters of remedy. How much compensation is the claimant entitled to? The respondent raises remedy issues, including those relating to what the outcome might have been in the absence of any unfairness in its ET3. A Case Management Preliminary Hearing by telephone will now be listed to EJ Christensen. AT that CMPH

- Issues relating to remedy will be identified
- A remedy hearing will be listed

The Equality Act

112. Given the respondent's submission on the importance of ensuring that this case is not determined through the prism of the Equality Act I address this issue. My analysis of this case is confined to the usual principles of fairness in accordance with S98(4) and is not influenced or assisted by the principles found in the Equality Act.

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Employment Judge Christensen

Date 10 November 2020