THE EMPLOYMENT TRIBUNALS

Claimant: **Mr B Pears**

Respondent: **Warmseal (Newcastle) Limited**

Heard at: Newcastle Hearing Centre (by CVP) **On: 11, 12 and 13 November 2020**

Before: **Employment Judge Morris**

Members: **Mr P Curtis**
Ms B Kirby

Representation:

Claimant: **Ms J Callan of counsel**
Respondent: **Mr A Sugarman of counsel**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint under section 111 of the Employment Rights Act 1996 that his dismissal by the respondent was unfair, being contrary to Section 94 of that Act by reference to Section 98 of that Act, is not well-founded and is dismissed.

2. The claimant's complaint that the respondent unlawfully directly discriminated against him by treating him less favourably than it treats or would treat others because of disability contrary to sections 13 and 39 of the Equality Act 2010 is not well-founded and is dismissed.

3. The claimant's complaint that the respondent unlawfully discriminated against him by treating him unfavourably because of something arising in consequence of his disability contrary to sections 15 and 39 of the Equality Act 2010 is not well-founded and is dismissed.

4. The claimant's complaint that he is entitled to receive a compensatory payment from the respondent in respect of his entitlement to paid holiday that had accrued but not been taken by him at the termination of his employment (whether brought by reference to section 13 of the Employment Rights Act 1996 or regulation 14 of

the Working Time Regulations 1998) is well-founded to the extent that the respondent conceded that the claimant was entitled to receive payment in respect of 12.5 days' holiday. The respondent is ordered to pay that sum to the claimant.

REASONS

Representation and evidence

1. The hearing was conducted by way of the Cloud Video Platform (CVP). The claimant was represented by Ms J Callan of counsel who called the claimant to give evidence. The respondent was represented by Mr A Sugarman of counsel, who called, Mr S Sadler, managing director of the respondent and Mr G Johnston non-executive director of UTS Engineering Ltd to give evidence on its behalf.

2. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. The Tribunal also had before it a bundle of agreed documents comprising some 243 pages, which was added to at the commencement of the hearing. The numbers shown in parenthesis below refer to page numbers (or the first page number of a large document) in that bundle.

The claimant's complaints

3. The claimant's complaints were as follows:

    3.1 Unfair dismissal contrary to Section 94 of the Employment Rights Act 1996 ("the 1996 Act") with reference to section 98 of that Act.

    3.2 Direct discrimination as described in section 13 of the Equality Act 2010 ("the 2010 Act") by dismissing him contrary to section 39(2)(c) of the 2010 Act.

    3.3 Discrimination arising from disability as described in section 15 of the 2010 Act, by dismissing him contrary to section 39(2)(c) of the 2010 Act.

    3.4 Entitlement to receive a compensatory payment from the respondent in respect of his entitlement to paid holiday that had accrued but not been taken by him at the termination of his employment, which Ms Callan clarified was brought primarily as a complaint that the respondent had made an unauthorised deduction from his wages in contravention of section 13 of the 1996 Act.

The issues

4. The parties had produced a comprehensive list of agreed issues, which, being a matter of record, do not need to be restated here. Suffice is to say that the issues arise from the four complaints of the claimant set out above and are addressed in our determination of the issues below.

Consideration and findings of fact

5. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

    5.1 The history of the respondent is relevant to these proceedings. From 1 June 2014 the claimant was employed as managing director of Warmseal Windows (Newcastle) Limited. That company went into administration and the claimant formed LTWF Limited ("LTWF") with a view to purchasing the assets of Warmseal Windows (Newcastle) Limited, which it did in 2016. That purchase constituted a transfer of an undertaking for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). As such, the claimant's service agreement (66) transferred to LTWF.

    5.2 That company in turn went into administration and Mr Sadler formed the respondent with a view to purchasing its assets, which it did on 29 May 2018. Once more pursuant to TUPE the claimant's service agreement transferred to the respondent along with the employment contracts of 17 other employees of LTWF. Thus, the claimant was employed by the respondent as managing director from 29 May 2018 until his dismissal on 13 February 2019 although he had continuity of employment pursuant to TUPE from 1 June 2014.

    5.3 Clause 5.1 of the claimant's service agreement provides that the remuneration of the claimant shall be a salary of "£100,000 per year", inclusive of directors' fees. During the course of the hearing much time was spent on the question of what was the actual amount of the claimant's annual salary. As that question is not directly one of the agreed issues for determination by this Tribunal we have not spent a great deal of time upon it in this section of our Reasons but will return to it in the determination section of our Reasons below. Suffice it to say at this stage, first, that the Tribunal has no hesitation in finding that the claimant's salary was, indeed, £100,000 per year and, secondly, that the claimant clinging to his assertion that his salary was, in fact, £150,000 per annum despite the overwhelming evidence to the contrary is a matter that we brought into account in relation to the claimant's credibility generally.

    5.4 Over the two years prior to the respondent acquisition of the assets of LTWF, as a result of financial difficulties, the claimant had chosen not to take his full contractual salary of £100,000 per annum, which had resulted in him being owed arrears of pay. The respondent was not prepared to take on LTWF if that would result in it being indebted to the claimant. As such, in order to facilitate the transaction the claimant agreed to waive all arrears of salary due to him in respect of which the parties entered into a formal Settlement Agreement (78).

5.5 Mr Sadler is the managing director of UTS Engineering Limited ("UTS"). Prior to the transfer of LTWF to the respondent it had been his intention that he would continue to focus on UTS and the claimant would continue as managing director of the respondent; this had been discussed many times with the claimant. The Tribunal accepts that this was Mr Sadler's genuine intention at the time notwithstanding that at the hearing the claimant challenged this suggesting that it had been Mr Sadler's intention all along to terminate his employment following his acquisition of LTWF. In addressing the conflict of evidence, we found persuasive Mr Sadler's explanation that if the claimant's suggestion was correct, an easier way for him to achieve that objective would have been to let LTWF go into liquidation and acquire its assets without any staff at all.

5.6 As mentioned above, the respondent's purchase of the assets of LTWF was completed on 29 May 2018. The claimant was absent from work that afternoon and for the whole of the following day. A member of the administrative staff of the respondent (JK) informed Mr Sadler about the claimant's absence and that he had Crohn's disease.

5.7 The claimant returned to work on 31 May 2018. His evidence in his witness statement is that he had a meeting with Mr Sadler that day when he specifically advised him that he had Crohn's disease and that this was regarded as a recognised disability. Mr Sadler denied that there was ever any such meeting or even a telephone call with the claimant and stated that his only source of information regarding the claimant was what he was told by JK. The Tribunal prefers the evidence of Mr Sadler for a number of reasons as follows:

5.7.1 First, when the claimant was answering questions at the hearing his evidence changed from that in his witness statement. In oral evidence he suggested that maybe there had not been a meeting but a telephone call as he could not bring Mr Sadler's face to mind in connection with their contact that day. That stands in contrast, however, to the evidence in his witness statement in which on two separate occasions he refers to their "meeting" and, on one of those occasions, fixing that meeting as having been "in the Boardroom at the Warmseal Throckley premises". Additionally, in oral evidence the claimant added to what he had recorded in his witness statement to the effect that he had also told Mr Sadler when they spoke that day that his condition had significantly worsened and that it would require him to have additional time off work. The Tribunal considers this additional evidence to be an embellishment on the part of the claimant not least because it comprises elements that an employer would need to know in order to establish knowledge of disability.

5.7.2 Secondly, the above evidence of the claimant is inconsistent with the Further Information that he provided in respect of his claim (37a), which was drafted by Ms Callan, in which it is stated that the claimant informed Mr Sadler that he suffered from Crohn's disease, "During his absence" …. rather than following his return to work on 31 May.

5.7.3 Thirdly, the claimant made no mention of this meeting (or telephone call) with Mr Sadler throughout the meetings that formed part of the redundancy process and particularly at the appeal meeting. By the time of the appeal meeting it is clear that the claimant considered his redundancy not to have been fair because he raised the suggestion that his dismissal was discriminatory because of his age. That being so, the Tribunal does not find it credible that he would not also have mentioned what occurred during this meeting (or telephone call) on 31 May if, indeed, he had had such contact with Mr Sadler.

5.7.4 Finally, the Tribunal has concerns about the credibility of the claimant's evidence in certain respects including the amount of his salary to which reference is made below, which we bring into account generally.

5.8 The Tribunal interjects at this stage that it accepts Mr Sadler's evidence that he had some knowledge of Crohn's disease and its effects as two of his long-serving employees at UTS had that condition as has his sister-in-law. Further. Mr Sadler made the point in evidence, which the Tribunal accepts, the he had no issues with employing people with that condition, that such adjustments as were necessary had been made to accommodate them including moving the workbench of one of them closer to the toilet and supporting the other financially through long-term sickness absence of approximately one year on a discretionary basis. Additionally, he has two other employees at UTS with diabetes who are permitted to take additional breaks.

5.9 Mr Sadler's decision to purchase the assets of LTWF was based in part on what he referred to as a "taster sheet" of financial information that had been provided to him by its administrators. They had provided financial data that suggested that on a turnover of £2 million the business could be profitable, which Mr Sadler considered could be achieved relatively easily with tighter control on costs. Following the acquisition, Mr Sadler's previous experience of acquiring companies in administration led him to ask the claimant and the respondent's financial controller to provide forward planning profit and loss estimates for the next two years. The figures provided showed that the respondent actually needed £4 million turnover to run at a profit, which turnover it had never reached during the previous three years.

5.10 As a result, Mr Sadler undertook a review of the workforce to see where cost savings could be made. He particularly looked at salaries and identified that the two most highly paid roles were the claimant on £100,000 and the financial controller on £50,000 per annum.

5.11 At this time, Mr Sadler was predominantly based at the respondent's premises. Additionally, he brought in SM, the operations manager at UTS but who also had experience in the double-glazing industry, to re-establish the respondent's supply chain with suppliers who had little confidence in the financial standing of the respondent given, in effect, its having gone into administration twice in the relatively recent past with the claimant as

its managing director. There was no cost to the respondent in engaging SM in this way because he was employed by and his salary is paid by UTS.

5.12 While working at the respondent's premises, Mr Sadler observed that on a day-to-day basis the business ran itself. WP led the sales staff and SB led the operational staff with no direction from the claimant who, additionally, appeared to have minimal interaction with them or other staff. The claimant's focus was on strategic planning which, while important, Mr Sadler considered not to be a full-time task. After a few weeks it became apparent to Mr Sadler that the respondent could function without a designated managing director. He would be able to absorb such of the claimant's functions that were required at managing director level while WP and SB could continue as before with minimal ad hoc guidance from him. Mr Sadler's objective was to find a way to keep the respondent going so as to avoid all its staff losing their jobs and livelihoods.

5.13 As a consequence of the above assessment, Mr Sadler placed the claimant at risk of redundancy and asked SM to undertake the consultation process assisted by AS who is Mr Sadler's wife. He explained to SM why he considered the claimant's role to be potentially redundant but that he should listen to the claimant's position and come to his own decision. He gave him full authority to make whatever decision he felt was appropriate. The Tribunal accepts that Mr Sadler then removed himself from the redundancy process and that his influence had been limited, as owner, to deciding that something needed to be done. The Tribunal accepts that assessment made by Mr Sadler and has not 'crossed the line' to examine the detail of that commercial decision, which it is for Mr Sadler to make as long as that decision is not shown to have been irrational or made in bad faith; the Tribunal being satisfied that there is no suggestion of that on the evidence before it.

5.14 Thus, the Tribunal accepts that SM was given the authority to conduct the redundancy process and make the ultimate decision. The Tribunal would need evidence if it were to find otherwise and although we acknowledge that Mr Sadler was senior to both the claimant and SM, had put the money into the respondent and had identified the claimant as being potentially redundant, evidence even by inference to the effect that he had controlled and manipulated the redundancy process is distinctly lacking. Such evidence might have included, for example, that during the redundancy consultation meetings the claimant had put up a strong argument to challenge either the redundancy situation within the respondent generally or his selection as an employee potentially to be made redundant, which SM ignored and acted somewhat puppet-like to 'rubber stamp' Mr Sadler's decision at the outset that the claimant's employment would be terminated by way of redundancy. There was no such evidence in this case.

5.15 At around this time the employment of the respondent's financial controller was terminated and he has never been replaced.

5.16 The first meeting that was conducted with the claimant as part of the redundancy consultation process was an informal meeting that took place on 27 June 2018. The note of that meeting (99a) records that its purpose was the "possible redundancy" of the claimant. At that meeting, SM identified the two principal drivers of the redundancy process as being, "Cost effectiveness" and "Managerial duties duplicated". On the basis of this written record alone, therefore, the Tribunal does not accept the claimant's contention that the reason for redundancy that was initially given to him was limited to the duplication of managerial duties and that the question of cost-effectiveness and finance did not arise until the following meeting. In light of the prospect of redundancy, AS advised the claimant that he should go home in order that his health would not be affected. Contrary to the claimant's evidence, the Tribunal does not accept that she referred to the claimant having Crohn's disease; indeed there is no evidence before the Tribunal that she knew of that and, ultimately, in cross examination the claimant shifted this position to be that AS "would have been aware" in that as he had told Mr Sadler he "assumed he told her" and she "knew I'd been away, which was highly unusual for me". As to AS having advised the claimant to go home, the Tribunal accepts the evidence of Mr Sadler that it is often in the interests of both an employee and the employer if, in circumstances of having been told that they are facing redundancy, the employee is not at work. Thus, the claimant commenced a period of 'garden leave' on 27 June 2018.

5.17 The discussion with the claimant at that informal meeting on 27 June 2018 was confirmed in a letter to him of that date from AS (100). In that letter it was confirmed that due to the need to make the respondent as cost-efficient as possible consideration had been given to whether there was a reduced need for employees to do work of a particular kind. As a result it was proposed to make the claimant's role redundant because it could be "absorbed and undertaken by another person within the organisation". As such, the claimant was informed that his role was at risk of redundancy. The letter confirmed that a search for alternative employment would be undertaken but, at present, there were no alternative vacancies within the respondent. The letter went on to outline a consultation timetable involving two formal meetings and 2 and 6 July 2018 at which the claimant had the right to be accompanied. The claimant was asked to bring questions, comments and suggestions to avoid redundancy to the next meeting. In the event, the first formal meeting took place on 1 August 2018 and not on the proposed date of 2 July 2018.

5.18 The claimant wrote to Mr Sadler, SM and AS by email of 27 July 2018 (103). That appears to be a reply to the above letter of 27 June. The claimant apologised for the delay and confirmed that he was now ready to continue with the discussions about his "potential redundancy". The Tribunal notes that in that email the claimant did not challenge his potential redundancy but asked that the respondent should honour his contract of employment and pay his "contracted salary of £100k".

5.19 The first formal consultation took place on 1 August 2018 (104). Having rehearsed the discussion at the informal 'at risk' meeting of 27 June SM asked the claimant whether he had bought any suggestions as to how redundancy could be avoided. The claimant responded, "No not really, nothing springs to mind, I was doing a very senior role and I don't think I would suited to driving the van". AS responded that the claimant was thinking of similar roles within the respondent but UTS was a global company and she asked the claimant to go away and think about his skill set and whether there were any suggestions he would like to put forward to try and avoid redundancy. She added that they were very serious in saying that they wanted to try and relocate him and avoid making him redundant. She informed the claimant that they were currently looking for a production manager at UTS if that was something in which he would be interested. The claimant did not respond in any way positively to the general topic of alternative employment or to the specific suggestion of the production manager role. Instead he raised what he referred to as being "a few questions" relating to practical matters: access to his computer; whether his salary had been paid; whether it was accepted that a gazebo stored on the premises belonged to him; whether they would be able to pull together the figures for his redundancy package; whether a cracked windscreen on his van and a valve could be attended to.

5.20 The discussion at the consultation meeting was confirmed to the claimant in a letter from AS dated 2 August 2018 (107). In evidence the claimant confirmed that this letter gave a fair reflection of the meeting. Towards the end of the letter the claimant was informed that the final consultation meeting would take place on 7 August 2018 and was advised that a potential outcome might be that he would be dismissed by reason of redundancy.

5.21 SM opened the meeting on 7 August by setting out the reasons why the potential redundancy had come about: the business needing to be as cost-effective as possible; having to consider areas where cost savings could be made; the duplication of people performing the claimant's managerial role (110). Based on the above, SM asked the claimant whether he agreed "that this is a genuine redundancy and that you have had to be put in a pool of one". The note records the claimant as having said "yes he agreed"; that response is borne out by the manuscript note that had been made on the short document produced in preparation for the meeting, "Yes Brian agrees" (112). This being so, the Tribunal rejects the claimant's evidence that he was only asked if he agreed SM's summary of the previous meeting and not whether he was in a pool of one. At the meeting the claimant was asked whether he had thought about his skill set and how he might be relocated within the UTS Group; specifically whether he had considered the role of production manager. The claimant responded that he had checked the website but the role had not been advertised there. He then informed SM that he had been checking over his contract and, "I have protective status, which honours contractual and level I am currently on."

5.22 The claimant then raised the issue of his personal guarantees about which he said he had had a meeting with Mr Sadler which he had left thinking that it was all sorted but nothing had happened and he had defaulted on the loan. He explained that because of that situation, "my relationship with Shaun has been damaged, his credibility and integrity, I would now have a trust issue working with him. …. The only way I would consider working with him would be as being employed as a contractor giving advice, rather than be employed directly. The other thing I could be of assistance would be as a non executive director – I would consider that role." (111). It is clear to the Tribunal that this exchange impacted upon the consideration of the claimant being an employee of the respondent or the UTS Group including the possibility raised by the claimant later that another employee could be made redundant so as to create a vacancy for him: i.e. 'bumping'. The claimant then asked to know the exact date on which Mr Sadler had decided that he would take over the running of the company. The respondent's representatives could not answer that question or respond to the possibility that the claimant could be engaged as a contractor for a non-executive director. That being so, although this was intended to be the final meeting it was adjourned to a future date.

5.23 At the end of the meeting the claimant was provided with a document relating to his "Redundancy calculation" (113), which detailed a payment in respect of his notice period of £50,000, accrued unused holiday entitlement of £5,576.99 and statutory redundancy pay of £3,048.00.

5.24 It is appropriate that the Tribunal should interject its consideration of the claimant's reference at the above meeting to the issue of his personal guarantees. Although the claimant did not explain his position with great clarity, it appears that this matter arose from the claimant's previous company, LTWF, having taken out three loans in the interests of its business in respect of which the lender had required the claimant to give personal guarantees. That being so, it is understandable that the claimant regarded the repayment of the loans to be important. For reasons that were never clear to the Tribunal the claimant wished Mr Sadler to agree that the respondent would make the repayments of the loans to the borrower on his behalf and would recover what it paid out by making equivalent deductions from the claimant's salary. The claimant referred to this arrangement as being "salary sacrifice" but that term is mainly applicable to arrangements in respect of a pension scheme and its use in these circumstances only adds to the confusion. The Tribunal accepts Mr Sadler's evidence that he was uncomfortable with this proposal not least because he did not want there to be any inference that responsibility for repaying the loans had transferred to the respondent. As such, he wished to consider his position and take legal advice and, to use his term, he put the claimant "in a holding pattern" while he did so. There is some indication of that in the email correspondence that Mr Sadler had with the claimant on 11 and 12 June 2018 that indicates that he was intending to resolve this matter (155 and 154), which he did not do. At the hearing Mr Sadler accepted, with hindsight, that it would have been more appropriate for him to be clear with the claimant that he would not agree to this

proposal. Nevertheless, Tribunal is satisfied that there was no agreement reached to the effect that the respondent would pay the loans on behalf of the claimant or that his salary would be reduced to reflect that. Following the transfer of the claimant's employment to the respondent his gross monthly salary should have been £8,333.33. In respect of the first two months following that transfer, however, the gross salary that was paid to the claimant was £6,000 (239). Mr Sadler's evidence was that this resulted from the claimant's instruction, without Mr Sadler's authorisation, to the respondent's payroll and represented his intended salary sacrifice. The claimant denied having given such instructions. Be that as it may, in each of those months of May and June 2018 he received £2,333.33 gross less than was due to him. When this came to Mr Sadler's intention he instructed payroll to pay the difference back to the claimant in a one-off payment of £4,666.66. When this was added to the monthly salary that the claimant should have received of £8,333.33 it produced a monthly payment of £13,000, which was paid to the claimant in July, the third month of his employment (240). Unfortunately, having made the one-off payment the respondent's payroll failed to readjust the claimant's salary to £8,333.33 and he continued to receive £13,000 gross throughout the remainder of his employment. This represented a total overpayment of £29,938.44, which the respondent sought to recover from the claimant in writing to him on 29 March 2019 (163). That overpayment has not been repaid.

5.25 The claimant had been provided with the notes of the meetings held on 27 June and 1 August 2018. On 11 August he wrote to AS to suggest some minor amendments but he did not challenge the accuracy of the notes in respect of the substantive issues of the potential redundancy or the process. The amendments suggested by the claimant were accepted and revised copies of the notes were issued.

5.26 The final consultation meeting took place on 13 August 2018 (115). SM advised the claimant that neither of the positions he had mentioned of being a contractor or a non-executive director were available and that although the position of production manager at UTS remained available the claimant had said that he would have trouble working with Mr Sadler due to trust issues so would not consider that position. The claimant was asked if he had any new suggestions for alternative employment to which he replied that he could not think of anything off the top of his head. As to the claimant's question of when Mr Sadler had decided he would take over running the business, SM explained that Mr Sadler's intention had been to run the respondent's business independently with the claimant being part of the setup but when he had fully reviewed the books he found that the numbers did not stack up and therefore the decision was made to look at if there was duplication of people doing the same role and make the business as cost-efficient as possible. The Tribunal accepts this explanation and that it was probably unrealistic to give a precise date when Mr Sadler made the decision to take over running the respondent's business.

5.27 The claimant was asked whether there was "anything else you would like to add Brian" to which he is recorded as having answered "no". In light of this and in the context of previous discussions the claimant was informed that as it had not been possible to identify any alternative employment for him his role was being made redundant and his employment was being terminated.

5.28 SM explained that it was the respondent's intention to put the claimant on garden leave for his six-month notice period. Alternatively, he could leave the company immediately and the respondent could pay the settlement in full. As this would be an exception to the norm the claimant would be required to sign a confidentiality agreement to say that he would not discuss that option with anyone. The claimant was given time to consider his answer but more or less immediately said that he would prefer to take garden leave. That was acceptable and AS confirmed that in that period the respondent would endeavour to find alternative employment for him. The claimant asked if he had a right to appeal and it was confirmed that he had.

5.29 Throughout this redundancy process, whether in any of the four meetings or in correspondence outside those meetings, the claimant had ample opportunity to raise matters upon which he relies in connection with his claim to this Tribunal: for example, the real reason for his dismissal was related to his disability; the respondent was motivated by him having Crohn's disease with the consequence that he would have to work more flexibly than in the past and even have time off work due to his illness; the decision was discriminatory by reference to his age, which he raised at his appeal against dismissal. The claimant did not, however, raised any of those matters generally or, specifically in answer to SM's question, recorded above, of whether there was anything else he wished to add.

5.30 Formal notice of the termination of the claimant's employment was given by letter of 15 August 2018 (118). In that letter SM summarised the discussions that had been held with the claimant and that as he had opted to be on garden leave throughout his period of notice his employment would be terminated by reason of redundancy of 13 February 2019 during which time the company would endeavour to find alternative employment for him. The letter concluded by summarising practical arrangements amongst which was the following,

> "You have accrued 14.5 days holiday to date. You will accrue a further 12.5 days holiday whilst you are garden leave, we will require you to take these holiday before 13th February 2019. If you could advise us by the end of September when you intend to take these holidays. If you fail to give us notice then we will serve you with notice of the days on which we require that holiday be taken."

5.31 The above letter of dismissal confirmed the claimant's right of appeal and how he should exercise that by writing to Mr Johnston at the UTS address. Instead, the claimant sent his letter of appeal, dated 22 August 2018, to

Mr Sadler, copied to AS and Mr Johnston (120). The Tribunal accepts Mr Sadler's evidence that he had originally intended to conduct the claimant's appeal himself, which was why he had asked SM to conduct the redundancy process, but thought it better to step aside in light of the claimant having raised at the consultation meeting on 7 August issues regarding his credibility and integrity, the trust he could place in him and that their relationship had been damaged.

5.32 In his letter of appeal the claimant set out three principal grounds as follows: his role had been passed to a UTS employee, SM, "who addresses himself with the title of Operational Manager of Warmseal Newcastle Ltd"; "The redundancy process has not been followed correctly"; redundancy was "not real and the intention was for myself to exit the business but avoid any claims in particular for my rights under TUPE. I do not believe that the settlement agreement I was forced to make in this regard is valid". The claimant provided further details of each of the above three grounds. In particular, with regard to the second ground he stated that he believed that he had "been subject to Age discrimination in that I am the oldest employee who was specifically identified as the only person sign away their TUPE rights prior to the sale of the business LTWF Ltd …." The claimant concluded his letter that he looked forward to meeting in due course "to try to achieve a resolution to this matter".

5.33 The appeal meeting took place on 8 October 2018 (124) and lasted some 1.25 hours. It was conducted by Mr Johnston with the Head of HR, Performance and Development Manager from UTS as note taker. The claimant confirmed that he was happy to continue the meeting without a companion. Each of the claimant's grounds of appeal and the associated further details were considered at some length. Towards the conclusion of the meeting the claimant confirmed that he accepted that he had been given a full opportunity to have his say and that the hearing had been carried out in a fair and reasonable way.

5.34 During the appeal meeting, Mr Johnson had struggled to identify how the claimant had filled his working days and what tangible contribution he was making to the business. As a result of this, following the appeal meeting and as had been agreed during the meeting, the claimant provided Mr Johnston with additional information in his letter of 16 October 2018 (139) to which there were numerous attachments including extracts from his day book and schedules of the payments he said were to be made on his behalf relating to his personal guarantees, which had not happened. Despite what was contained in this further information provided by the claimant, in Mr Johnston's opinion, the tasks that he identified did not add up to a role of managing director. Having received that information Mr Johnston spoke with Mr Sadler so as to be satisfied that he had the capacity to absorb the managing director aspects of the claimant's role; he was so satisfied. Mr Johnston also spoke to SM to gain an understanding of what he did on behalf of the respondent. In this connection, Mr Johnston made the point in evidence that although the respondent was a new company, it was not a 'start-up' company but had been fully

operational before it went into administration and, as such, there should not have been new tasks needing to be done by the claimant as managing director.

5.35 The Tribunal accepts Mr Johnston's evidence that he gave careful consideration to the claimant's appeal in light of the fairly lengthy discussion at their meeting and the additional information that the claimant had subsequently provided to him. Having done so he made his decision the key elements of which, principally drawn from his witness statement in relation to which he was not seriously challenged, are set out below. The Tribunal accepts that Mr Johnston's decision was well-founded on the basis of the information available to him.

5.35.1 There was no evidence that the claimant's role had been passed to SM whom Mr Johnson was satisfied was not encroaching on what the claimant was doing day-to-day. Mr Sadler, who undertook the strategic elements of his other businesses, would be able to absorb the strategic planning and marketing aspects of the claimant's role. In this connection, SM had since left the business and was not replaced, his role also being absorbed by Mr Sadler. The day-to-day running of the respondent's business was undertaken by junior management with any guidance required being provided by Mr Sadler.

5.35.2 An appropriate redundancy process had been followed including four meetings during which a genuine attempt had been made to establish whether there were any alternatives to redundancy including discussing alternative positions within the respondent and associated companies.

5.35.3 During the sale of the business in administration the claimant had not been asked to sign away his rights as a result of his age. At the appeal meeting the claimant had agreed that he was more likely to have been asked to sign a settlement agreement because he was the managing director of the company and it owed him money rather than anything to do with his age. It was also noted that Mr Sadler employed people of all ages including older than the claimant, who had been unable to provide any reason why his age would have been a factor.

5.36 In evidence Mr Johnston made the point that at no stage during the appeal or the redundancy process in general had the claimant ever raised an allegation that he had been selected for redundancy due to his disability. The only reference to his condition during the appeal process was in his appeal letter when he said it was exacerbated by stress.

5.37 In conclusion, Mr Johnson was satisfied that the claimant was made redundant due to a reduced need for people undertaking his role and for no other reason. In his letter dated 12 November 2018 (157) Mr Johnson informed the claimant of his decision, providing full reasons.

5.38 In cross examination Mr Johnston was questioned as to why he had not reverted to the claimant after obtaining the further information from him and from Mr Sadler and SM, which is referred to above. The Tribunal accepts that Mr Johnston could perhaps have done that but as he said in evidence he had given the claimant full opportunity to explain his position during the appeal meeting and get his point across. The Tribunal is satisfied that he had investigated these matters, knew the claimant's position in respect of them, and, therefore, it accepts that Mr Johnston proceeding directly to make his decision was reasonable in the circumstances.

5.39 As set out above, in the dismissal letter of 15 August 2018 the respondent had informed the claimant that he had accrued 14.5 days' holiday to date and he would accrue a further 12.5 days holiday while he was on garden leave all of which he was required to take before the termination of his employment failing which notice would be served upon him requiring him to take the holiday. In this regard Mr Sugarman conceded on behalf of the respondent that it would not seek to pursue the point that holiday entitlement arising from previous holiday years would be forfeit because, in accordance with clause 12.2 of his service agreement (71), the claimant was not entitled to carry forward holiday entitlement from one year to the next. The claimant did not elect to take any holiday. As such, the Tribunal accepts that the respondent wrote and posted to him the letter dated 3 December 2018 (162D). A problem in this regard, however, is that although the letter is broadly correctly addressed to the claimant the postcode is incorrect. In fact, the postcode on the letter is actually that of the postal address of UTS.

5.40 That letter refers only the 14.5 days' accrued holiday entitlement and not the 12.5 days' entitlement. That being so, Mr Sugarman conceded that the 12.5 days remained outstanding in relation to which payment was due to the claimant. In answer to a question from the Tribunal he also accepted that if the claimant did not receive the letter of 3 December 2018 he would also be due payment in respect of the 14.5 days.

Submissions

6. After the evidence had been concluded the parties' representatives made submissions (Mr Sugarman by reference to a written skeleton argument) which painstakingly addressed in some detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law some of which was cited by the representatives. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from our findings and conclusions below. Suffice it to say that we fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to our decision.

7. That said, the key points made by Mr Sugarman on behalf of the respondent, included as follows:

Unfair dismissal

7.1 The Tribunal cannot go behind the business decision of the respondent. The commercial decision of whether fewer employees are required is for the respondent to take.

7.2 This was a paradigm example of redundancy, the definition of which is satisfied as the respondent could and is carrying out work, even if the same amount of work, with fewer employees, the claimant and the financial controller having left.

7.3 The choice of the redundancy pool and whether other employees should have been 'bumped' is notoriously difficult for a claimant to challenge. It is sufficient if the respondent applied its mind to the questions and made a rational decision. In any event, the claimant could not be pooled with SM and SM could not have been 'bumped' as the claimant could not deal with the supply chain for the respondent and if SM were to be dismissed the claimant could not pick up his duties at UTS.

7.4 During the four consultation meetings the claimant did not seriously challenge redundancy as the reason for his dismissal. He did not raise pooling, bumping or disability discrimination and he accepted and did not challenge that the respondent was in financial difficulties or that there was duplication of his role of managing director. Those challenges only came after he was dismissed. Similarly, he was quiet in respect of making any alternative suggestions.

7.5 The dismissal was procedurally fair. The claimant suggests that the outcome was predetermined and dictated by Mr Sadler but that is an unevidenced assertion. Mr Sadler determined that the claimant should be put at risk of redundancy, which was a commercial decision for him to make, but then properly stepped back.

Disability discrimination

7.6 In respect of his complaint of direct discrimination, the claimant has not established any evidence of less favourable treatment.

7.7 The claimant's section 15 claim is based upon the amount of time that he would need to have off work and the reasonable adjustments that would be required to accommodate him, and he was dismissed because of the respondent's adverse view of these matters. That does not make any sense, however, as the claimant had only had 1½ days' off in six years, he had not needed to make any adjustments for himself prior to Mr Sadler's involvement and Mr Sadler had positive experiences of employing others with Crohn's disease from which his sister-in-law also suffers. In any event, that claim does not get off the ground if the respondent can show that it did not know and could not reasonably have known of the claimant's disability.

7.8 The claimant's disability discrimination claim was opportunistic. He had raised it way after the event to enhance artificially the value of his claim. The claimant had failed to establish a prima facie case and, therefore, the burden of proof is not transferred to the respondent; if it did transfer the respondent has established genuine redundancy as a reason

7.9 There is clear inconsistency between the claimant, first, asserting that Mr Sadler had misled him from the outset as he had always intended to run the respondent as managing director without the claimant yet, secondly, asserting a discrimination claim on the basis that he was dismissed after Mr Sadler had learned about his Crohn's disease. Those are inconsistent reasons and neither appears in the claimant's grounds of appeal, which are premised on age discrimination and the respondent seeking to avoid his TUPE rights; those two bases are no longer pursued.

7.10 When the Tribunal comes to assess whose evidence is to be believed, it cannot ignore the overbearing fact of the claimant giving false evidence as to the amount of his annual salary and disingenuously hanging on to £30,000 of the respondent's money that was paid to him in error. The claimant also continued to argue his protected salary status in order to justify his lack of interest in the production manager role whereas his contract said nothing of the sort.

Holiday pay

7.11 The respondent accepts the calculation of 27 days' holiday. The claimant had been told that he needed to take accrued holiday before his employment ended and if he did not he would be given notice to take the holiday. That notice was given but the respondent accepts only in respect of 14.5 days and, therefore, 12.5 days is still outstanding which it is liable to pay. The claimant has not suffered any loss, however, because he was paid some £30,000 more than he should have been which has subsumed the holiday pay; that is to say that 12.5 days of the approximately £30,000 should be allocated as holiday pay. It is further accepted that if the claimant did not receive the notice there is an additional 14.5 days to be added.

8. The key points made by Ms Callan on behalf of the claimant included as follows:

Unfair dismissal

8.1 If the true reason for the dismissal is in issue it must be investigated by the Tribunal to establish the real reason.

8.2 When consultation is perfunctory, unfair or insensitive it can amount to consultation not being reasonable and, therefore, the dismissal unfair. The claimant was a senior employee who was placed on garden leave at the very beginning. Consultation should be undertaken when proposals are still at a formative stage, the employee should be given time and the employer should give conscientious consideration to any points raised.

Disability

8.3 As to his section 15 claim, the claimant's primary focus is on Mr Sadler treating him unfairly, which is the unfavourable treatment. There may be more than one cause or reason and if the claimant's disability is in any way an operative cause that does not have to be the main reason; just that it is not trivial.

8.4 There is no dispute that the respondent knows of the claimant's disability. The question is how Mr Sadler came to know. He admitted in evidence that it might have been remiss not to enquire about the claimant's health but it is beyond remiss. Mr Sadler did not make any enquiries but turned a Nelsonian eye. From his own experiences (three employees and his sister-in-law) he knew that Crohn's disease is a disability under the Act. The respondent learned of the claimant's disability in the first week of his employment and within 23 working days he was placed on garden leave and was never in the workplace again.

8.5 The claimant was not given any information about costings etc or duplication that he could answer. It smells of unfairness to high heaven. There was no meaningful consultation because of the dispute regarding the personal guarantees and the claimant having disclosed his Crohn's disease. The consultation process that the respondent undertook was a fake ticky box exercise. It was therefore not meaningful and was therefore unfair. The appeal was no better. The claimant was not provided with the information that Mr Johnston obtained by speaking to Mr Sadler and SM. That exacerbates rather than cures the deficient process.

8.6 The claimant's salary was £150,000, which was negotiated on his behalf. His contract of employment mentioned £100,000 but that was out of date and was being updated. The claimant had incurred debts on behalf of his company of £50,000 and he was simply asking for payments to be made by the respondent on his behalf by way of salary sacrifice. It was not a dodge as it would be declared on the P11D. To suggest that it was dotchy is entirely without basis.

Holiday pay

8.7 The respondent does not contest that if the notice to take holiday was not received by the claimant (162D) there may well be an outstanding entitlement. If the wrong postcode is shown on the address it is not the case the letter would find its way to the correct address it is just as likely that it would be returned to sender as undelivered. The claimant did not receive the notice. If he was not told to take holiday it is ineffective and the holiday is outstanding. The respondent accepts 12.5 days but there is also the additional 14.5 days.

8.8 It is not right that the claimant asserts an annual salary of £156,000. During the period 31 May 2018 to 28 February 2019 he received £108,400, which is under the £150,000 contracted for.

The Law

9. The principal statutory provisions that are relevant to the issues in this case are as follows:

9.1 Unfair dismissal - Employment Rights Act 1996

"94 The right.
(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it -
……
(c) is that the employee was redundant,
.....
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

"139 Redundancy
(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to - …..
(b) the fact that the requirements of that business--
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

9.2 Direct discrimination - section 13 Equality Act 2010

"13 Direct discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

9.3 Discrimination arising from disability - section 15 Equality Act 2010

"15 Discrimination arising from disability
(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

9.4 Employees and applicants - Section 39 Equality Act 2010

(1) An employer (A) must not discriminate against an employee of A's (B)- …….
(a) by dismissing B;

9.5 Burden of proof - Section 136 Equality Act 2010

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

9.6 Right not to suffer unauthorised deductions - section 13 Employment Rights Act 1996

"*13(1) An employer shall not make a deduction from wages of a worker employed by him unless--*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

"27 Meaning of "wages" etc

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including--

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, …."

Application of the facts and the law to determine the issues

10. The above are the salient facts relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law. While not wishing to limit that general statement, the Tribunal records that in considering the claimant's complaints under the 2010 Act it paid particular attention to 'the reverse burden of proof'. The effect of that is that, initially, it is for the claimant to demonstrate evidence from which the Tribunal could reasonably conclude that he had been discriminated against in relation to his disabilities. If the claimant satisfies that initial burden of proof it then shifts to the respondent to show that, in no way whatsoever, was the reason for the particular treatment of the claimant to do with his disability.

11. The Tribunal addresses the agreed list of issues below but first returns to the question of the amount of the claimant's salary.

The claimant's salary and related matters

12. As indicated above, much time was spent on the question of what was the actual amount of the claimant's annual salary. In short, was it £100,000 or £150,000? The Tribunal's consideration of this question is as follows:

12.1 Clause 5.1 of the claimant's service agreement provides that the remuneration of the claimant shall be a salary of "£100,000 per year", inclusive of directors' fees (70). That notwithstanding, the claimant's evidence is that the salary in the service agreement was increased to a "full contractual salary of £150,000 per annum" on 23 October 2015, that being the date of a Facility Agreement (191) in which LTWF is described as the "Borrower". The claimant explained that his increased salary was determined by agreement with the main funder of LTWF, NEL Fund Managers, and was negotiated on his behalf by his corporate finance adviser. He explained further that while NEL invest in businesses they restrict salaries so as to limit cash withdrawals which could potentially expose their investment to risk until the loans are fully repaid.

12.2 In support of his contention that the Facility Agreement records an increase in his salary to £150,000 per annum, the claimant points to the definition of "Profits" in that agreement (198) as being the Profit of the Borrower subject to certain factors and assumptions one of which is "before charging directors emoluments in excess of £150,000". He argues that the agreement specifies his salary "by default" as he was the only director of LTWF and as only a pension contribution of 1% would reduce that £150,000, he is therefore entitled to an annual salary of £150,000. The Tribunal does not accept this contention or the construction that the claimant seeks to place upon a Facility Agreement, which regulates a

relationship between lender and borrower (and in respect of the definition of "Profits" simply explains how profit is to be calculated) and has no direct bearing whatsoever upon the terms of the claimant's employment.

12.3 In that regard the claimant also suggested that his employment relationship was no longer regulated by his service agreement (66) as that was in the process of being reviewed and updated by the Engineering Employers' Federation and, according to the claimant's evidence, the updated agreement "would say £150,000 perhaps less pension". The Tribunal does not consider that to be credible given that the claimant's service agreement was made between him and Warmseal Windows (Newcastle) Limited on 1 June 2014 and his employment then transferred to LTWF in 2016 and thence to the respondent in 2018 yet in all that time neither a new service agreement nor an addendum to it nor even a letter or email was produced recording such a significant increase of 50% to the claimant's annual salary; particularly, if the claimant were to be believed, after the date of the Facility Agreement on 23 October 2015.

12.4 With further reference to the dispute as to the amount of the claimant's annual salary, in his claim form (ET1), which he presented to the Employment Tribunal on 25 April 2019, he has stated that in each of the financial years 2016/2017 and 2017/2018 he was entitled to a "Contracted salary" of £100,000 (7). On this basis he claimed arrears of pay of £52,000 in 2016/2017, £28,000 in 2017/2018 and £7,000 for the first three months of the financial year 2017/2018.

12.5 The claimant's explanation for his having referred to a salary of £100,000 rather than £150,000 is that his salary was effectively reduced by way of salary sacrifice because Mr Sadler had agreed to address three loans that had been taken out by LTWF in respect of which the claimant had given personal guarantees to the lender; the amount of those loans being just under £50,000. That explanation does not bear scrutiny, however, because the figure of £100,000 twice quoted by the claimant in his claim form refers to financial years prior to the involvement of Mr Sadler. When this was put to the claimant and he was asked why he had referred only to £100,000 he answered, "That's very good question – I could in theory have increased that to £150,000". The Tribunal did not find that to be a satisfactory answer.

12.6 When the point was pursued with the claimant in cross examination that he had claimed arrears of pay notwithstanding having entered into a Settlement Agreement with the respondent dated 29 May 2018 he first suggested that he could do so because the arrears were in Mr Sadler's company and not LTWF. When it was pointed out to that that could not be so since he was claiming in respect of financial years 2016/2017 and 2017/2018 he was only able to answer, "I may have been confused at the time", which he clarified as being at the time that he completed his claim form and explained that the source of his confusion was that he had not been given independent advice with regard to the Settlement Agreement; that notwithstanding an Adviser's Certificate appended to that Agreement

in which a solicitor confirmed that the claimant had "received independent legal advice from me as to the terms and effect" of the agreement.

12.7 Just as the claimant had specified his salary of £100,000 in his claim form, in an email from him to Mr Sadler dated 24 May 2018 (95) he similarly referred to shortfalls in his salary, "against my contracted salary of £100k". Once more, the claimant could not provide an explanation for this that the Tribunal found to be satisfactory.

12.8 Likewise, in the claimant's email of 27 July 2018 (referred to above), this being after the redundancy consultation process commenced, the claimant asked that the respondent should honour his contract of employment and pay his "contracted salary of £100k" (103).

12.9 At the consultation meeting held on 7 August 2018 the claimant was provided with a document headed "Redundancy Calculation" (113). That is relevant to the true amount of the claimant's salary as it refers to any payment in respect of his six-month notice period being calculated by reference to a gross salary of £50,000: i.e £100,000 for the year. The claimant did not challenge that calculation at the time and the Tribunal does not find credible his explanation at the hearing that that was because he was frightened that it would be withdrawn.

12.10 Further confusion arises from the claimant's Schedule of Loss in which he refers to his net pay as £7,896.54 per month, that being based on gross pay of £13,000 per month, but that would produce a gross annual salary of £156,000 rather than £150,000. That figure of £13,000 is shown in certain of the claimant's payslips (240-243) but the Tribunal accepts the respondent's explanation that that figure of £13,000 arose from the claimant's true monthly gross pay of £8,333.33 to which was added reimbursement of £4,666.67, which had been wrongly deducted, producing £13,000. Further, that gross monthly pay was continued in error even after the reimbursement of the £4,666.67. When this error came to light, the respondent wrote to the claimant on 29 March 2019 to notify him that he had received a total overpayment of £29,938.44 and requesting repayment (163). The claimant responded to the effect that he assumed that the extra payments were in respect of his personal guarantee loans that Mr Sadler had very kindly agreed to pay as part of the acquisition process of his company (164). That is not credible, however, given that by this stage the claimant knew that Mr Sadler had not agreed to pay the loans through the respondent as it was that that the claimant explained at the consultation meeting some eight months earlier on 7 August 2018 had caused him to lose trust in Mr Sadler.

12.11 A matter that is related to the claimant's salary is his suggestion, when discussing the role of production manager at the consultation meeting on 7 August 2018, that having checked his contract, "I have protective status, which honours contractual and level I am currently on." At the hearing the claimant explained that the basis for that assertion is clause 20 of his service agreement (75). That clause is headed "Reconstruction or

Amalgamation". It is a standard 'boilerplate clause' typically found in most agreements of this nature. It simply provides as follows: "If the employment of the Director under this Agreement is terminated by reason of the liquidation of the Company for the purpose of reconstruction or amalgamation and the Director is offered employment with any concern or undertaking resulting from the reconstruction or amalgamation on terms and conditions not less favourable than the terms of his Agreement then the Director shall have no claim against the Company in respect of the termination of his employment under this Agreement." Quite clearly it has nothing to do with protecting the claimant's salary if he were to be redeployed to alternative employment in circumstances of potential redundancy. The claimant accepted at the hearing (albeit with considerable reluctance) that at the time when he was engaged in the consultations with the respondent there was no suggestion that his employment might be terminated because of the liquidation of the respondent or that it was contemplated that the respondent might undergo reconstruction or amalgamation.

12.12 A final matter related to the claimant salary is the issue of the so-called "salary sacrifice". The Tribunal is satisfied that while Mr Sadler might have been more direct with the claimant in this regard, he never agreed to the proposal that the respondent should repay the loans taken out by the claimant and recover those repayments by making appropriate adjustments to his salary. Moreover, the claimant blithely continuing to accept a gross salary at the incorrect amount of £13,000 per month and then refusing to cooperate when the respondent sought to recover the overpayment of £29,938.44 does him little credit and further impacts upon the credibility of his evidence.

12.13 In summary, as set out above, on the basis of this evidence the Tribunal has no hesitation in finding that the claimant's salary was, indeed, £100,000 per year. Further, that the claimant clinging to his assertion that his salary was, in fact, £150,000 per annum despite the overwhelming evidence to the contrary is a matter that we brought into account in relation to the claimant's credibility generally; as indeed is his retention of the £29,938.44 and his suggestion that the Reconstruction or Amalgamation clause in his service agreement gave him protective salary status in a redundancy situation.

13. Moving on, the Tribunal now turns to its consideration of the claimant's claims and the issues arising therefrom.

Unfair dismissal

14. The first questions for the Tribunal to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within section 98(1) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and

Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

15. As set out above, section 139 of the 1996 Act provides that a person shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to, amongst other things, the fact that the requirements of the business have ceased or diminished or are expected to do so. In this regard, in the context of Mr Sugarman's submission that the Tribunal could not go behind the commercial business decision of the respondent, Ms Callan referred the Tribunal to the decision in Manchester College of Arts and Technology (MANCAT) v. Smith [2007] UKEAT 0460 in relation to which she submitted that if the true reason for a dismissal is in issue it must be investigated by the Tribunal which must establish whether or not redundancy is the real reason. While the Tribunal accepts that it must identify the reason or, if more than one, the principal reason for the dismissal, the burden of proof in this respect being upon the respondent, in MANCAT it was observed that the decision in Murray v Foyle Meats [2000] 1 AC 51 does not require the soundness of the business case for redundancies to be considered before the employment tribunal decides what was the true reason for dismissal. In that case the House of Lords held, first, that whether the requirements of a business for employees to carry out work of a particular kind have diminished is a question of fact for the Tribunal, and secondly, whether the dismissal of an employee was wholly or mainly attributable to that state of affairs is a question of causation and fact for the Tribunal.

16. With that guidance in mind, on the evidence available to the Tribunal it is entirely satisfied that the dismissal of the claimant arose in the circumstances of what are sometimes described as being a genuine redundancy situation: namely, the dismissal of the claimant was wholly or mainly attributable to the fact that the requirements of the respondent's business for an employee to undertake the role and responsibilities of managing director had ceased or diminished. In particular, Mr Sadler could absorb the higher level responsibilities of that post at no cost to the respondent with any other responsibilities being picked up at a lower level.

17. In this connection, the Tribunal has noted a recent decision of the Employment Appeal Tribunal in Berkeley Catering Ltd v Jackson UKEAT/0074/20/LA (V). The facts in that case were similar to those in the case before this Tribunal. The director and owner of a company became its chief executive officer and took over the duties of the managing director in addition to his own duties. The managing director was then made redundant. Having referred to the decision in Safeway Stores plc v Burrell [1997] ICR 523 (in which it was emphasised that the question for a tribunal is not whether there has been a diminution in the work required to be done but whether there has been a diminution in the number of employees required to do the work) the EAT held "It is open to an employer to organise its affairs so that its requirement for employees to carry out particular work diminishes. If that occurs, the motive of the employer is irrelevant to the question of whether the redundancy situation exists"; that second sentence referring to the fact that the chief executive had undermined the managing director.

18. Addressing the agreed issue 1a, the Tribunal is satisfied that there was a reduction or cessation of the requirements of the respondent for work of a

particular kind to be carried out and, addressing issue 1b, the claimant's dismissal was wholly or mainly attributable to that reduction or cessation.

19. The second question in relation to the claim of unfair dismissal is that if, as the Tribunal has found, the reason for the claimant's dismissal was a potentially fair reason for dismissal, section 98(4) of the 1996 Act provides that the determination of whether the dismissal was fair or unfair depends upon whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating the reason of redundancy as a sufficient reason for the dismissal of the claimant; that question being determined in accordance with equity and the substantial merits of the case. In this regard the Tribunal reminded itself of the following important considerations:

    19.1 neither party now has a burden of proof in this respect;

    19.2 our focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter, and we must not substitute our own view for that of the respondent: see, Midland Bank v Madden [2000] IRLR 288;

    19.3 the decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness including as to the procedure an employer has followed regarding such matters as informing the employee of his potential redundancy, engaging in meaningful consultations with him in that respect during the course of which allowing him to bring forward any suggestions or proposals, considering alternatives to dismissal, making a reasoned decision and, if that is that the employee is to be dismissed, allowing him the opportunity to appeal;

    19.4 our consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision;

    19.5 the 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 and Post Office v Foley [2000] IRLR 827), which will apply to our decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see, J Sainsbury plc v Hitt [2003] ICR 111.

20. The Tribunal is very much alert to the possibility that in relation to any dismissal of an employee, whether related to redundancy or otherwise, an employer can fabricate an entirely false process the objective of which is to persuade an employment tribunal that the requirements of the relevant statutory and case law are satisfied; what Ms Callan referred to as being a "fake ticky box exercise". In this case, however, the Tribunal is satisfied that the respondent put in place and followed a procedure that was not false and, indeed, was more than reasonable.

Having acquired the assets of LTWF Mr Sadler found himself unexpectedly faced with a much worse financial position than he had expected on the basis of the information provided to him by its administrators. He therefore conducted a review of the workforce and identified that the claimant was paid the highest salary, precisely double that of the next most expensive employee, the financial controller. He also observed that the respondent's business was effectively conducted on a day-to-day basis by the sales and operations managers respectively while the claimant focused primarily on strategic planning. Thus Mr Sadler concluded that he could absorb the higher level responsibility of that post, and at no cost to the respondent, with any other responsibilities being delegated to a lower level. As a consequence, the claimant was at risk of redundancy. The claimant was placed in a 'unique pool' for selection purposes as he was the only employee undertaking the responsibilities of managing director and there were no other employees with interchangeable functions or doing similar work. The Tribunal is satisfied that this decision represented a sensible approach on the part of the respondent and fell within the range of reasonable responses available to it in the circumstances: Kvaerner Oil and Gas Ltd v Parker EAT 0444/02. It was not unreasonable for the respondent not to have 'pooled' together the claimant and SM not least because if it had been SM who had been dismissed the claimant's standing with the respondent's supply chain would have put supplies of materials in jeopardy; further, the claimant could not have moved over to undertake SM's role with UTS. For the same reason it would not have been appropriate for the respondent to have 'bumped' SM by dismissing him and redeploying the claimant into his role. Also relevant in this regard is that SM was employed by and paid by UTS and his salary was, therefore, not a drain on the limited resources of the respondent. A further factor in this respect is that the claimant never raised these issues of 'pooling' or 'bumping' during the course of the redundancy process; indeed, as found above, at the consultation meeting on 7 August he agreed that this was a genuine redundancy and that he had been put into a pool of one.

21. Mr Sadler having identified the claimant as being at risk of redundancy, the consultation process in respect of his possible dismissal for redundancy was then conducted by SM and AS to the exclusion of Mr Sadler. It involved what is sometimes termed an informal 'at risk' meeting followed by three formal meetings. In this respect the Tribunal notes that the original intention had been for there to be two formal meetings but that the respondent's representatives did not push ahead in making a decision at the second meeting and arranged a third when that became necessary in light of the claimant's proposals for a different working relationship with the respondent and his question as to when Mr Sadler had decided that he would take over the running of the business. The discussions at those consultation meetings are detailed above. Suffice it to say that the Tribunal is satisfied that those acting on behalf of the respondent explored with the claimant the matters that needed to be explored including the reasons for his potential redundancy and whether that could be avoided particularly by his being redeployed into alternative employment not only within the respondent but within UTS. As recorded above, however, the claimant did not bring forward any alternative proposals and did not respond positively to the prospect of alternative employment not least given the lack of trust that he said

he had in Mr Sadler in light of his perception of the personal guarantee issues between them.

22. In these circumstances, addressing agreed issue 2, the Tribunal is satisfied that the respondent did follow a fair process in selecting the claimant for redundancy including giving proper consideration to the selection 'pool' and whether SM should have been dismissed by 'bumping' him.

23. Ultimately, SM decided that the claimant's employment should be terminated by reason of redundancy and the final stage of the process was the appeal. Mr Johnston gave compelling evidence as to his conduct of that stage and the reasons why he came to his decision not to uphold the claimant's appeal all of which the Tribunal found reasonable.

24. As such, addressing agreed issue 3, the Tribunal is satisfied that the respondent did follow a fair process in dismissing the claimant by reason of redundancy including fair consultation.

25. In all the circumstances, as is required of it by section 98(4) of the 1996 Act, the Tribunal is satisfied that the respondent acted reasonably in treating the redundancy of the claimant as a sufficient reason for his dismissal.

26. In summary, with reference to the several elements contained section 98(4) of the 1996 Act, the Tribunal is satisfied that the claimant's complaint that his dismissal by the respondent was unfair is not well-founded and is dismissed.

Direct disability discrimination

27. There was a conflict of evidence between the parties as to when and how Mr Sadler became aware that the claimant suffered from Crohn's disease. Stepping back and considering all the evidence before the Tribunal we accept Mr Sadler's evidence that although he had some understanding of Crohn's disease he was not aware that it would necessarily amount to a disability as he understood that the symptoms can vary. Furthermore, that when he made his decision regarding the potential redundancy of the claimant, while he knew that he suffered from Crohn's disease he did not know and could not reasonably be expected to have known that on that basis the claimant was a disabled person as that term is defined in section 6 of the 2010 Act. We equally accept that neither SM nor AS nor Mr Johnston were aware of the claimant's Crohn's disease or that he was a disabled person.

28. It follows, therefore, that with reference to section 13 of the 2010 Act, the Tribunal is not satisfied that the respondent treated the claimant less favourably "because of" the protected characteristic of disability. This complaint must therefore fail.

29. Had our decision in relation to the respondent's knowledge of the claimant as a disabled person been to the contrary, for the same reasons as are set out above in relation to the complaint of unfair dismissal the Tribunal is satisfied that the claimant was selected for redundancy and ultimately dismissed on the basis of sound business reasons and not because of disability. As such, addressing

agreed issue 4a, the claimant was not selected for redundancy and ultimately dismissed because of his disability. Likewise, addressing issue 4b, none of the acts listed as being less favourable treatment were done because of disability.

Discrimination arising from disability

30. In relation to the claimant's complaint of direct discrimination the Tribunal has found above that the respondent, in the shape of Mr Sadler, SM, AS and Mr Johnston did not know and could not reasonably be expected to have known that the claimant was a disabled person. That applies equally, with regard to this complaint under section 15 of the 2010 Act. As such, the Tribunal is not satisfied that the respondent treated the claimant "unfavourably because of something arising in consequence" of his disability. This complaint must also therefore fail.

31. Once more, however, the Tribunal has considered other elements of this complaint lest its decision in relation to the respondent's knowledge of the claimant as a disabled person had been to the contrary.

32. In this context, in connection with this aspect of the claimant's claims the Tribunal adopted the approach as set out in Pnaiser v NHS England and another [2016] IRLR 170 which, so far as is relevant to this case, is as follows:

> "(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, …. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. …..
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. …..
>
> (f) This stage of causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
>
> (g) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the

> unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

33. In this regard the Tribunal also reminds itself that "unfavourable" does not equate to a detriment or less favourable treatment but to an objective sense of that which is adverse as compared to that which is a benefit: Trustees of Swansea University Pension and Assurance Scheme v Williams [2018] ICR 233. Thus, the 'test' is an objective one requiring the Tribunal to make its own assessment. In addition, the concept of "something arising in consequence of" disability entails a looser connection than strict causation and may involve more than one link in a chain of consequences: Sheikholeslami v University of Edinburgh [2018] UKEATS/014/17.

34. Further, that the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. It is for an employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases unfair dismissal: Hardys & Hansons plc v Lax [2005] IRLR 726.

35. Moving from the general to the specific, there is no dispute and the Tribunal finds that as recorded in the agreed list of issues, the claimant was selected for redundancy and ultimately dismissed both of which were unfavourable treatment in the objective sense described in Williams. The issue therefore becomes whether that unfavourable treatment was because of something arising in consequence of the claimant's disability. In this regard in issue agreed 5 the claimant relies upon two matters being that the respondent was concerned that either at the time or in the future, first, the claimant would have a need for sick leave and, secondly, it would have a responsibility to make reasonable adjustments.

36. Even had the respondent the necessary knowledge of the claimant's disability (which the Tribunal has not found) it is not satisfied on the evidence that there was a concern that the claimant would require sick leave or reasonable adjustments to be made in the future. That is inconsistent with such evidence as there is on this point that the claimant had rarely been absent from work during the years before the business was acquired by respondent and in the recent past had only had 1½ days' absence; when the claimant was in charge of his own business he had not needed to make any reasonable adjustments to accommodate any disability and appeared to work perfectly normally; Mr Sadler employed other employees at UTS with Crohn's disease and diabetes whom he had supported making such adjustments as were necessary. In summary, with reference to issue agreed 5, the Tribunal is not satisfied that the asserted concerns formed any part of the respondent's consideration of the claimant

redundancy; more particularly, there is no basis for the assertion that the respondent was concerned that the claimant might need sick leave or reasonable adjustments in the future.

37. Agreed issue 7 is whether the seven steps specified there in relation to the redundancy process constituted acts of unfavourable treatment because of something which arose in consequence of the claimant's disability. As above, it must be right that (with the possible exception of the appeal hearing itself which is arguably a potentially positive benefit) each of the steps did amount to unfavourable treatment again in the objective sense described in Williams. For the reasons explained in respect of the complaint of unfair dismissal, however, the Tribunal is not satisfied that such treatment was because of something which arose in consequence of the claimant's disability.

38. As such, (even accepting for these purposes the respondent had the requisite knowledge of the claimant's disability, which the Tribunal has not found) it is not satisfied that the respondent treated the claimant unfavourably because of something arising in consequence of his disability as particularised in issues 5a or 7. That being so, it is unnecessary to address the question of justification in issues 6 or 7.

39. Reverting to the approach in Pnaiser therefore and using the notation used in that approach above:

    (a) In the several ways referred to in the agreed issues 5 or 7, particularly in dismissing the claimant, there was unfavourable treatment of him by the respondent.

    (b) The cause of that impugned treatment, or the reason for it, was the redundancy of the claimant which did not arise in consequence of his disability.

    (d) As such, the reason/cause was not "something arising in consequence of B's disability".

Holiday pay

40. As set out above, at the point at which the claimant's employment was terminated he had accrued an entitlement to 27 days' paid holiday, 12.5 days of which had accrued during his notice period. In light of the internal email correspondence at the time and the relevant letters to the claimant there is no doubt that the respondent wished him to take those holidays before his employment ended and, if he did not opt to take leave on certain days he would be given notice under regulation 15(2) of the Working Time Regulations 1998 requiring him to take holiday.

41. Thus the respondent sought to give such notice to the claimant by letter of 3 December 2018 (162D). The essential question for the Tribunal in this regard, however, is whether the claimant received that letter. If he did not, as was conceded by Mr Sugarman, he is entitled to payment in respect of 27 days'

holiday whereas if he did, as was also conceded, he is entitled to payment in respect of 12.5 days' holiday.

42. As recorded above, the Tribunal is satisfied that the letter was posted to the claimant albeit bearing the wrong postcode. In those circumstances, it is reasonable to assume that the Post Office had a choice: either to ignore the obviously incorrect postcode and deliver the letter to the postal address of the claimant (all other elements of his address being correct) or to give precedence to the postcode and, therefore, deliver the letter to UTS. In the former case the claimant would receive the letter, in the latter it would be received by UTS, returned to the writer (the Head of HR) and would likely be reposted to the claimant at the correct address. The alternative proposed by Ms Callan was that if the wrong postcode is shown on the address it is not the case that the letter would find its way to the correct address, it is just as likely that it would be returned to sender as undelivered. Thus the outcome of her suggestion of the letter been returned to sender is the same as the Tribunal's second alternative of the letter being delivered to the UTS postcode.

43. On balance of probability, and bringing into account the significant findings that the Tribunal has made above regarding the credibility of the claimant's evidence including as to the amount of his salary and his protected salary status, the Tribunal is satisfied that the claimant received the letter of 3 December 2018. As such, as was conceded on behalf of the respondent, he is entitled to be paid in respect of 12.5 days' holiday, which the respondent is ordered to pay to him; that sum being calculated with reference to the claimant's annual salary of £100,000.

Conclusion

44. The unanimous judgment of the Employment Tribunal is as follows:

44.1 The claimant's complaint under section 111 of the 1996 Act that his dismissal by the respondent was unfair, being contrary to Section 94 of that Act by reference to Section 98 of that Act, is not well-founded and is dismissed.

44.2 The claimant's complaint that the respondent unlawfully directly discriminated against him by treating him less favourably than it treats or would treat others because of disability contrary to sections 13 and 39 of the 2010 Act is not well-founded and is dismissed

44.3 The claimant's complaint that the respondent unlawfully discriminated against him by treating him unfavourably because of something arising in consequence of his disability contrary to sections 15 and 39 of the 2010 Act is not well-founded and is dismissed.

44.4 The claimant's complaint that he is entitled to receive a compensatory payment from the respondent in respect of his entitlement to paid holiday that had accrued but not been taken by him at the termination of his employment (whether brought by reference to section 13 of the 1996 Act or regulation 14 of the Working Time Regulations 1998) is well-founded to

the extent that the respondent conceded that the claimant was entitled to receive payment in respect of 12.5 days' holiday. The respondent is ordered to pay that sum to the claimant.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 7 December 2020