EMPLOYMENT TRIBUNALS

Claimant: AB

Respondent: Centrica Storage Ltd

HELD AT: Leeds **ON:** 26 to 30 October 2020

BEFORE: Employment Judge Wade
Mr D Wilks
Mr D Pugh

REPRESENTATION:

Claimant: In person
Respondent: Mr Boyd (counsel)

This has been a remote hearing to which the parties consented. The form of remote hearing was CVP. A face to face hearing was not held because of the present Covid 19 circumstances.

JUDGMENT

1 The claimant's complaint of unfair dismissal is not well founded: he did not have the right not to be unfairly dismissed (he was an employee of the respondent for less than two years).
2 The claimant's Equality Act complaints relating to his selection for redundancy are also dismissed.

REASONS

Introduction

1. This case has posed difficult questions. The claimant has hypertension and associated anxiety. Any Tribunal, hearing of his circumstances, including the loss of his job with the respondent, would wish to express its sympathy for those.

2. Previous Tribunals in this case have decided: 1) at all material times the claimant was a disabled person; 2) that a victimisation complaint be dismissed on withdrawal; and 3) that time should be extended to enable the complaints to be decided.

3. The material events took place in 2018, with dismissal on 3 December 2018. The claims, drafted by solicitors then advising, were Unfair Dismissal and disability discrimination put as follows:
   3.1. I *believe the Respondent discriminated against me by selecting me for redundancy because of my disability (direct discrimination under Secton 13 (1) Equality Act 2010).*
   3.2. Further, or in the alternative, I believe the Respondent selected me for redundancy by reason of my absences which relate to my disability (discrimination arising from disability under section 15(1) Equality Act 2010).

4. The claimant, thereafter acting as a litigant in person, presented his case with great skill, concentration and attention to detail. There was a subject access request generating a raft of documentation prior to disclosure, then further disclosure by the parties, and then a few further additions to our file of relevant documents at the beginning of this hearing. The documents run to over 1300 pages. Mr Boyd conducted the hearing entirely consistently with due care for the claimant's conditions, and the overriding objective, including our obligation to put the parties on an equal footing.

5. The Tribunal heard from the claimant first, and then from Mr Colley his line manager, Mr Nolan the HR director, and Mr Scargill, who maintained the claimant's dismissal on appeal. The Tribunal considered both the protagonists, the claimant and Mr Colley, witnesses of truth; that is, they were reliable in the facts they were relating. The claimant's perceptions of the facts, were, in our judgment, reflective of his deep anxiety about his circumstances and health. These reasons will not persuade him that he is wrong in his belief that he has been treated very badly and unlawfully by the respondent, but we hope that he will understand that poor treatment or dismissal while a disabled person, does not amount to selecting for redundancy because of, or influenced by, disability, or illness, or absence.

6. There is within our documents a "duty of care" report commissioned by the respondent concerning one particular incident on 30 January 2018. There is a possibility of negligence proceedings. Our findings are therefore confined to those we need to make to determine the claimant's claims. We do not comment on whether the respondent exercised its duty of care to the claimant.

Findings of fact

7. The Claimant is a part qualified management accountant with more than twenty years' experience in large company finance teams. He was made redundant from his last major role with a steel business in 2016 and was then working in a temporary role. He was approached by an agency to work at the respondent.

8. The respondent is gas storage/production company and part of a large publicly owned group. It has in place all the systems and resources to be expected from a company within a group of this size. Some of its operations are off-shore and safety critical. It uses a third party supplier to manage the health risks at work including the potential for fatalities. Its systems include an automatic prompt to the third party to make contact with an employee if they declare sickness absence, and before they return to work, to ensure infection and health risks (particularly for those

working off shore) are monitored and controlled. Part of the respondent's mission is to have working environments free from discrimination.

9. In October 2016 the claimant accepted a 12 months' fixed term agency role as a Business and Project Reporting Analyst, the main requirement of which was to "provide assistance with cover for roles within the Hedon finance team" at the respondent. Behind this was the temporary departure of a respondent member of staff to cover maternity leave.

10. The respondent uses third party suppliers to fulfil temporary roles. The agency was clear with the claimant that the role was on a day rate of £200 a day, and the claimant was required to have time sheets authorised by Mr Colley, a finance manager.

11. In 2016 the finance team was between ten and fifteen people split between Hull and Staines. The claimant set up an umbrella company as a means to invoice and be paid by the agency. The respondent did not pay the claimant – it paid the third party supplier as it did for all its subcontracted labour. There was no performance review of the claimant in the period from the contract commencing on 31 October 2016 to June 2017, consistent with the respondent's approach to agency workers.

12. Directly employed staff, were, on the other hand subject to performance management and review throughout employment, with a final grading in December. Those gradings affected bonus and salary progression and potential career progression. Agency workers were not. The claimant accepted he was not a direct employee of the respondent between 31 October 2016 and 11 June 2017. He felt he had continuous service because he said his job was very similar throughout and he attended the same induction presentation as employees - he felt he was an employee during that time.

13. By June 2017 two "Financial Analyst" permanent positions had been created in Mr Colley's team, taking into account that the respondent's Staines office was due to close and some finance functions were moving to the Hull area. The claimant applied for and was successful in being appointed to one of those two roles.

14. The claimant signed his new contract of employment on 1 June, having taken part in psychometric testing and interview. The contract recorded the commencement of continuous employment as 12 June 2017 with no previous or subcontracted employment counting. The claimant provided all the usual information t on the commencement of his employment, including verifying his identity directly to the respondent. He did not disclose any health conditions at that time.

15. An external applicant, X, with different but equally long experience to the claimant, the formal "CIMA" qualification, gained the second post. Their line manager was Mr Colley and the head of finance was Ms Thomsen. The claimant had performance targets set, and he and his new colleague divided up the relevant work in Mr Colley's team between them with little management.

16. In early June 2017 the respondent announced the closure of one of its assets and the claimant sought reassurance from Mr Colley about the impact of that closure on finance. He was told not to worry because, in effect, a Hull finance team would be required for some time.

17. A team wide consultation about the closure of the Staines finance team took place that year. Its director of finance and other colleagues were due to leave the respondent by reason of redundancy between December 2017 and May 2018, and Ms Thomsen was taking over as Director. Those redundancies were included in the respondent's financial forecasting, which formed part of the claimant's tasks. He was therefore fully aware of those plans.

18. In July 2017 a third analyst started in Mr Colley's team: a qualified accountant whose role was to focus on the production of the statutory accounts and planning ("Y").

19. Mr Colley had a projects/planning team of three analysts (the "C" Team) and he had a counterpart who also ran a small risk and control team (the "F" Team). In December 2017 F sent the finance team an advertisement for a "Commercial Analyst" reporting to him. The claimant did not apply although he was doing some work to cover in F. The particular role involved working with the contract for the sale of gas to the group, including hedging risk in relation to that. There was an external application process and an appointment was made, with G starting around March 2018.

20. During 2016 and 2017 the finance team had operated a performance measure, asking staff how many "long days" they had worked in a month, and their feelings about that (happy, neutral or sad). The claimant was responsible for this report. Mr Colley and others frequently worked long days.

21. The claimant and X both received December 2017 performance reviews from Mr Colley; those reviews graded them both as "achieving expectations". They resulted in a pay rise of around £3000 for the claimant (to about £43,000) and a bonus of over £1000.

22. In the context of various stressful life events which had been impacting the claimant Mr Colley agreed informally in 2017 that he could work from home on Mondays to accommodate difficult family circumstances.

23. In early January 2018 the claimant worked from home on a Wednesday; Mr Colley then advised him that he was not prepared to authorise his Monday working from home on an informal basis any more – the claimant would have to apply through the flexible working policy if he wished to continue to do so.

24. On 30 January 2018 the claimant had his blood pressure measured at work as part of a health and wellbeing initiative provided by a third party supplier. At that time

the respondent directly employed a nurse as occupational health manager, whose office was very close to the claimant's work area. The claimant was not told of his readings, which were dangerously high, but was told to see his GP by the third party.

25. There is a dispute about whether the third party supplier approached Mr Colley and asked him to ensure the claimant saw his GP – it is not necessary to resolve that dispute to decide the issues in this case. Generally we found Mr Collley a very straightforward and honest witness – he may be mistaken about the day on which this happened. Either way there is no dispute that the precise readings were not communicated to the claimant before he travelled home by car on 30 January.

26. Early on Wednesday 31 January, after the claimant arrived at work, the claimant was seen by the occupational health manager, who had expertise in critical care. He liased with the claimant, Mr Colley and Ms Thomsen to ensure the claimant worked from home for the rest of the week because of his blood pressure levels.

27. The claimant was then subject to occupational health monitoring both directly and through an external provider. He was diagnosed with hypertension by his GP and prescribed medication, which started to lower his blood pressure. These assessments were provided to Mr Colley regularly. Mr Colley understood the claimant had a family history of cardiovascular disease, believing he had been told that in 2017. The claimant remained working from home while his condition stabilised.

28. The claimant's blood pressure situation was also known by the Managing Director Mr McKenna in around late February and he was reported to have enquired why an ambulance had not been called for the claimant on 30 January.

29. The claimant returned to working from the office on 5 March 2018 with an organised plan for those first few days. There was a recommendation that the respondent carry out a stress risk assessment. He had been called by external occupational health on Friday 2 March to discuss his latest readings, with the result that he was considered fit to return. Mr Colley then agreed in a return to work meeting that he was happy for the claimant to leave at 4pm (if he worked from 8am) to enable him to maintain his walking regime (which was helping his blood pressure reduction). Mr Colley's observation of the claimant was that he was like his old self, cheerful and happy on his return, although the claimant had felt the return to the office had been at short notice. Mr Colley did not complete a stress risk assessment at this time because he had not realised it was for him to do (there were several people involved in the management of the claimant's health condition at work - HR, internal occupational health, external health risk management, Mr Colley and Ms Thomsen.

30. January and February had been a typically busy period for the finance team – the company's year end was 31 December. One of the claimant's responsibilities at this time was to make sure Ms Thomsen had the report (dashboard) of the finance team's performance measures. By 2018 Ms Thomsen had as one of her own performance targets, the reduction of overtime worked in the team - overtime was unpaid and the issue was one of wellbeing/health risk rather than directly controlling costs.

31. Also by 2018 the style and type of overtime reporting was developing. There was a debate from January to March about whether it was desirable to ask everyone to capture their actual working hours and report them without an indicator of how happy or otherwise they were to work longer hours. The claimant has signed an opt out from the 48 hour working week limit, and presumably others had too. The reports at the time suggested that overtime hours in the team would equate to 1.5 further full time staff in finance.

32. In early March Ms Thomsen instructed the claimant to take out the overtime measure from the management report prior to her meeting with Mr McKenna saying, "we can't be showing all this red". (The report used red, amber, green analysis to indicate desirable (or not) performance in various areas. This put the claimant in a difficult position because he knew Mr Colley considered the measure should be included. He also considered that redundancies in December and January 2018 in the procurement team (another team within Ms Thomsen's ultimate responsibilities) had been carried out unfairly and he believed individuals who expressed unhappiness at their working hours might be singled out for redundancy. He had expressed unhappiness at working hours in December 2017.

33. After a team meeting towards the end of March Mr Colley said that the overtime measure was "staying in" after a meeting with Ms Thomsen in late March. Also at that time Ms Thomsen thanked the claimant for a good report. There was no indication of any ill will from her towards the claimant at all at this time but nonetheless he felt he was caught in the middle of a dispute between Mr Colley and Ms Thomsen about the team management report and whether overtime should be in it.

34. By later on in March the claimant seemed to be less happy than he had been and then had a poor performance review meeting with Mr Colley on 29 March. Mr Colley had prepared a number of questions because he and Ms Thomsen were unhappy that the claimant had not delivered on some tasks on time, and he wanted to explore the perceived drop in performance with the claimant.

35. The claimant found that meeting very distressing. The questions included relating to his mood, the effect of that on the team, his willingness to help them, and what had changed between his return on the 5 March and the end of March. It was a detailed performance discussion of tasks and work, and the claimant did not point to his health as the reason for his drop in performance. The conclusion was that at

that point in time his rating would be "underachieving", if things continued to the year end. The claimant came out of that meeting with increased anxiety.

36. The claimant then worked over the Easter weekend to provide Mr Colley with objectives for his performance for the coming year. He was suffering from headaches and had researched that these can be a symptom of stress at work. When discussing these events with Mr Colley during the hearing, the claimant suggested Mr Colley should not have allowed him to work that weekend (in effect – he should not have engaged in emails with him): Mr Colley's response was to the effect: "you are a grown man, you should be able to decide whether you are well enough to work or not". This was typical of the frankness with which Mr Colley gave his evidence.

37. Rather than be absent on 3 April, feeling unwell, the claimant came to work and sought occupational health confirmation of his blood pressure. Soon after arriving at work he saw an email from Ms Thomsen instructing him that overtime hours were to come out of the performance report. That was in the context that he had heard Ms Thomsen did not want Mr McKenna to see all those overtime hours.

38. The claimant understandably felt under further considerable stress – he was being instructed one thing by his boss, and another by Ms Thomsen directly. He also considered the concealment of the position from Mr McKenna to be wrong and that also caused him concern. Together with the poor performance review, these things were too much and he asked for a blood pressure check with the occupational health manager. His readings were again dangerously high and he was told initially to work from home and then to stop work altogether. After a visit to A and E on the advice of the GP Practice, confirmation of very high blood pressure, and increased medication, his GP certified him unfit for work by reason of hypertension. The claimant's absence was from 4 April to 15 May 2018.

39. Early in this first period of absence Mr Colley requested a copy of the claimant's contract, and noted that during sickness absence the claimant was entitled to one month at full pay and one month at half pay. In an email to Ms Thomsen he described as "good" the fact that service did not accrue during sickness absence. The context was that the respondent's company sick pay arrangements increased to six months full pay and six months half pay after a year's service. We accept Mr Colley's evidence when challenged about this comment, to the effect that there was no personal ill will towards the claimant. His remark reflected his frank view that having a member of staff absent, particularly for longer term absences on full pay, places a strain on cost and colleagues in any business. The respondent's performance measures by department included absence rates.

40. Mr Colley also undertook the recommended stress risk assessment, internal occupational health having confirmed how it should be carried out on 3 April. Rightly or wrongly (the causes of the claimant's hypertension are not an issue for this Tribunal) Mr Colley and Ms Thomsen held the view that it was not work which was the cause. The context for their view included that occupational health had expressed dismay about the claimant's blood pressure being risen on 3 April,

despite medication, in circumstances where work appeared to be the cause or a contributing factor.

41. As part of that stress risk assessment Mr Colley undertook a numerical analysis of the tasks and time spent by the claimant on work matters, concluding the tasks he had been completing represented only about 35% of the workload of a member of staff with full workload. He considered this supported he and Ms Thomsen's position that overwork was not the source of stress. Internal occupational health, clearly supportive of the claimant, also considered the stress risk assessment to be excellent work by Mr Colley.

42. During April the claimant kept in contact with external occupational health and he was advised to seek psychological therapy through his GP, as well as being referred for an assessment for that through the respondent's schemes. He was expecting to return to work in May. Mr Colley and Ms Thomsen were kept advised of these developments.

43. During May the claimant had the opportunity to discuss with HR, Mr Colley, and internal and external occupational health, his two concerns about a return to work: that his blood pressure would rise again; and that he would again be caught up in a dispute between Mr Colley and Ms Thomsen about overtime hours in the dashboard report. Measures agreed in his return to work meeting therefore included that Mr Colley would make the decisions about the dashboard and communicate them. The claimant returned to work in the week commencing 15 May and apart from Ms Thomsen not saying good morning to him on his first day back, there was nothing to indicate any ill will or the feared retaliation from her. There were no more requests from her to adjust the dashboard; Mr Colley agreed after discussion with her that overtime hours would not be included in the report.

44. Mr Colley did not carry out weekly one to ones with the claimant over the coming weeks (another measure envisaged by the return to work plan), but X had been asked to take on the dashboard and other work. Mr Colley also documented the claimant's March performance discussion, including the provisional "under achieve" rating, and uploaded it onto the respondent's system, where the claimant could view it and comment. The claimant did lodge any objections to it in May.

45. The respondents' 2018 forecasts included a planned reduction in people (direct or indirectly working for the respondent) from 339 to 295 (46 people) by December 2018, with 11 of those dismissals or other leavers to come from "Group" functions. This was to achieve 45 people by the end of 2018 from a starting point of 56. They included those within Ms Thomsen's control in finance. By the end of May there had been a reduction to 49 people for "Group" which included one finance person previously in Staines. The management report for the end of May showed that the business planned to make the great majority of redundancies at the end of June/July.

46. This plan was driven by the changing and declining long term nature of a business managing gas assets with finite life. That said, the respondent was profitable in 2017 (it had sold some assets) and again in 2018. It was not a business in a state of distress in the sense of making losses – it was a business seeking to maintain profitability and employment for the majority of staff for the future.

47. There was no detail available to the claimant in the forecasts about how the headcount reduction would be delivered within "Group", but he had known of planned redundancies in the Spring in the procurement team (which accounted for perhaps five of the eleven). The claimant considered there had been unfairness to two departing procurement colleagues in that exercise. He also knew of a reduction in personal assistant roles to the directors from three to two. One of those personal assistants joined the procurement team around May or June, without any apparent advertisement in that role, displaced by redundancy from her personal assistant role. By May of 2018 then, it required four people to be dismissed or to leave from "Group" to achieve the end of year plan. The claimant also knew that at least one HR person (also a group function) was leaving at around this time. She was not replaced.

48. Across the F and C finance teams (C being Mr Colley's team) there were six colleagues with "analyst" in their job titles, including the claimant. They all did different work; two with very specific roles (one in each team); and four with work that was doable by all four, given time to learn how the respondent wished it to be done, but with different core responsibilities.

49. At some point in May Ms Thomsen asked the managers of the three teams reporting to her to make further proposals for cost savings, which given the nature of the respondent's management reports, in context it was clear she meant headcount reductions/redundancies.

50. Using his April risk assessment of the time required to undertake various tasks in his team Mr Colley considered the analyst work, apart from the statutory accounts and other work done by Y, could be done by one person rather than two. X had been covering much of the work during the claimant's absence including the dashboard work. That proposal mean that X and Y were potentially at risk of redundancy.

51. Mr Colley, F and another finance manager were working with HR to develop their redundancy proposals for Ms Thomsen in May and June. HR tested whether Mr Colley's pool should have included Y, and for sound reasons accepted that Y's post should not be included (it was one of the specific roles above). That then required a selection exercise to be conducted between the claimant and X, who both held the post of financial analysts with the same job description in Mr Colley's team. The work broadly involved: month end accounting, supporting the York operation/business development, capital investment (applications for expenditure), and performance reporting. HR did not appear to have advised or considered a selection across both the F and C teams.

52. Mr Colley used the respondent's comprehensive selection matrix assessing technical competency, generic capability and past performance. Accordingly X and the claimant received the same scores for their 2017 performance (given Mr Colley's then rating of them then), but the claimant scored less well than X across a number of other measures including qualifications, focus, resilience, positive disruption and self awareness/personal development.

53. This was a good faith assessment by Mr Colley with comments displaying his characteristic frank approach. He did not make allowances for the claimant's health or its potential impact on him of late, but nor did the assessment include within it any score for attendance/absence. The claimant did not challenge Mr Colley on his scoring in this hearing. In all likelihood if Mr Colley had been required to carry out the assessment in December 2017, before the claimant's illness, X would then have, objectively, achieved a higher score. Although both X and the claimant had the same 2017 year end rating, the "achieved" rating had to cover the majority of staff (only a few are underachieving and a few are over achieving) – this is how the performance pay element can work. Within "achieving" there was a range of performance and attributes, and Mr Colley distinguished within that between X and the claimant.

54. On 12 June Ms Thomsen was pressing Mr Nolan for there to be an announcement concerning the redundancy proposals in finance, indicating that she did not want the matter to slip. She sent her email to Mr Nolan at around 4 am, perhaps indicative of a long hour culture, or a very busy time. Mr Colley appeared to be the only one of her direct reports ready to be making progress on time at that stage.

55. On Tuesday 19 June 2018 Mr Colley put a meeting for thirty minutes in each of the diaries of the claimant and X. He saw them separately and talked the claimant through a presentation. He told the claimant that he was at risk of redundancy by reason of the reduction in finance analyst roles in his team from two to one and his provisional assessment using the matrix. Mr Colley told X she was not at risk of redundancy. Mr Colley gave the claimant a letter confirming that discussion, indicating a wish to start consultation.

56. The claimant was then ill with raised blood pressure the following day, and shortly after that he departed on a week's holiday – he was contacted by external occupational health whilst on holiday (because of the automatic arrangements in cases of self reported absence) and he was upset by that - he was also sent a "have a good holiday" message by Mr Colley which he thought was malevolent or insensitive given the claimant had been told he was at risk of redundancy the day before.

57. There are no adverse inferences to be drawn from these events concerning the claimant's holiday although understandably he considered his holiday ruined and subsequently self certified that holiday period as being absent with work related stress. Following that, his GP fit notes confirmed he was unfit to return to with work with work related stress or hypertension until his dismissal on 3 December 2018.

58. Over July and August the claimant communicated his objections to the continuing of a redundancy consultation process. He made the point that he was both unfit for work and felt he was being retaliated against by Ms Thomsen. On 8 August Mr Colley asked for the removal of the claimant's access to finance team folders, but not all the other systems which enabled the claimant to make holiday requests, see information, and so on. This was said to be because of a duty of care to prevent the claimant working; the claimant did not challenge Mr Colley about this during his evidence.

59. The respondent meanwhile continued its involvement of HR, and internal and external occupational health to keep abreast of the claimant's ability to attend meetings or return to work. That included organising mediation by trained mediators to enable the claimant and Ms Thomsen to talk about his concerns that the overtime hours reporting was being covered up – that was discussed in a health review at the end of July. The claimant had identified his feeling that the redundancy proposal was retaliation and that that was a source of stress. He had also learned that there was a new "intern" in Y's team. The respondent took on two undergraduate sandwich year students into the finance department that summer, at a cost, Mr Scargill told us, of around £10,000 each, in partnership with Hull University. They were not deployed to Mr Colley's team.

60. Mr Nolan, the respondent's director of HR, had taken over the redundancy consultation process and was seeking to meet with the claimant. In late August the claimant was told to check his work email address for emails from HR because he had missed a potential appointment. He had asked for emails to his personal address because he was not supposed to be working. Nevertheless, he took part in a pre-mediation call and the respondent tried to put mediation back on track in September but both the claimant and Ms Thomsen considered the proposed time involved was too much (for ostensibly different reasons – the claimant was worried about the strain on his health and Ms Thomsen was worried about her workload).

61. On 26 August the claimant raised a "speak up" or whistleblowing complaint to "Ethics Point", a service set up by the respondent's group company for that purpose. He identified bullying by HR, Mr Nolan and Ms Thomsen. He raised a similar complaint to Mr McKenna on 30 August entitled "Please help"; he made the respondent aware that he was embarking on counselling to address his anxiety and that he would simply break down if redundancy meetings went ahead.

62. These events resulted in an informal face to face meeting on 5 September with Mr McKenna, and Mr Nolan. The claimant had the chance to relay his concerns and he understood in that meeting that reducing overtime in finance had indeed been part of Ms Thomsen's performance targets. He came away from the meeting feeling Ms Thomsen would be disciplined (for seeking to keep that information from Mr McKenna) and that the redundancy proposals in finance would not go ahead. The claimant's position was that headcount could not be safely reduced in finance when there were so many overtime hours being worked – he linked the two issues. Shortly after the meeting Mr Nolan confirmed the respondent would look at

commissioning an independent report about its response to the discovery of dangerously high blood pressure in January – that too had been discussed with Mr McKenna.

63. Unknown to the claimant, before the meeting Mr McKenna had proposed a draft response which encouraged the claimant to put his health first, and to identify the cause of stress. However, it also confirmed that there were two separate processes – 1) investigations of the claimant's allegations of bullying and retaliation for overtime reporting; and 2) the redundancy process – and that they would go ahead separately. That draft response was forwarded to Mr Nolan but it was not, in the end, sent to the claimant. It does inform the Tribunal about Mr McKenna's state of mind at the time: he either did not see the link between too many overtime hours justifying a cessation in redundancies, or he saw it as an option but did not wish to take that course. This draft email could also indicated that Mr McKenna had a settled view that the claimant's redundancy should proceed, whatever the outcome of this grievances and complaints.

64. After the meeting with the claimant on 5 September, Mr Nolan continued the redundancy consultation process in writing. He sent detailed and comprehensive Q and A style information and the vacancy list for the respondent as at 4 September. There were no vacancies in the Hull area.

65. Also in September there was an investigation of the "speak up" complaint by Group HR. That investigation reviewed the matter having spoken to the claimant by telephone. The "speak up" investigator understood that the claimant's concerns were being addressed through conversations with Mr Nolan and Mr McKenna, and closed the speak up complaint – which we understand to mean, no further action was to be taken on it.

66. A duty of care report was also commissioned by the respondent from an independent clinician to look at the events on 30 January and subsequently in relation to the claimant's health. That report concluded that there had been no breach of the duty. The claimant sought a copy of the report but only the conclusion, and later one further paragraph, were shared with the claimant. That restricted disclosure also led to him being concerned that other matters were being covered up and again was a source of stress. The full report was before the Tribunal. Without commenting on its accuracy or reliability, there was nothing about that report which informs the Tribunal about the workings of the mind of Mr Colley, Ms Thomsen, Mr Nolan or Mr McKenna.

67. On 5 October 2020 the claimant had a second redundancy consultation meeting with Mr Nolan and Mr Colley present, which lasted over three hours. Through the first meeting Mr Nolan had captured in some detail concerns the claimant had with his selection matrix, and his desire to see organisation charts (the "before" and "after" final structure). Mr Colley provided these and subsequently agreed to change some of the language he had used in comments justifying the scores – but not the scores themselves.

68. The claimant's position remained that there should be no redundancies when overtime hours were as they were in finance. He then had a further occupational health appointment on 11 October but the report came some days later while the claimant was on holiday for two weeks. The claimant gave permission for it to be released to the respondent on his return from holiday on 30 October. He was due to attend a third consultation meeting on 31 October.

69. Up until this point occupational health advice had identified the claimant as unlikely to be a disabled person within the Equality Act, but in the October report he was identified as likely to meet that definition.

70. On 30 October Mr Nolan forwarded to Mr McKenna an email from the claimant seeking to delay the third consultation meeting from 31 October to 7 November. Mr McKenna's reply was simply, "if he is fit to attend let's get him in and get this sorted". When the claimant emailed Mr McKenna directly again a few days later seeking a further meeting with him, and indicating he was at breaking point, Mr McKenna simply asked Mr Nolan, "should I reply?". There was no reply and no further meeting.

71. Mr Nolan decided to conduct the 31 October consultation meeting in the claimant's absence. Mr Nolan had provided written answers to the questions the claimant had been raising, including a detailed response to the claimant's questions about scoring.

72. Mr Nolan was of the view that having a consultation process hanging over the claimant was an avoidable source of stress which needed to be removed. Neither Mr McKenna nor Mr Nolan appeared to have considered that a way to remove that stress was to abort or interfere with Ms Thomsen's invitation for head count to be reduced in finance, or Mr Colley's proposals to achieve that objective. Or if they did consider it, they rejected it.

73. The claimant then raised a grievance about his treatment and this was discussed in a lengthy session with a different director. Each of the different means of looking at his concerns involved him talking by telephone or meeting people for hours at a time. His grievances were rejected (they were various and related right back to the removal of his Monday working from home for family reasons).

74. On 5 November Mr Nolan sent the claimant a letter and a number of attachments, giving notice to terminate his employment by reason of redundancy. The letter said his employment would end on 3 December and that he had a right of appeal.

75. The claimant presented an appeal and met with Mr Scargill to discuss it on 19 November 2020. He raised eleven points, including that the redundancy did not achieve its objective because headcount in finance had increased or remained the same (the interns); he also raised his illness, alleged unfairness in the selection scores and referred further points he had raised through the consultation.

76. Mr Scargill conducted interviews, examined documents, grouped the appeal points into four broad headings and rejected the appeal. By 19 December there had also been an appeal against the claimant's grievance outcome, and this too was rejected.

77. By the end of December 2018 the respondent's "headcount tracker" reported that from "Group" there had been a reduction from 49 direct employees at the end of May, with one person leaving at the end of June, six people leaving at the end of July and the remaining four, the claimant being the last, over the months August December[1]. That produced a reduction to 38 Group employees and three Group agency staff by December. From a planned reduction from 56 to 45 the respondent had dismissed or had resign more people from Group than required, to achieve its objective.

78. Overall during 2018 the respondent either dismissed, or had resign, 84 people, it hired 16 and took on one transfer from a group company. It had a small number of vacancies by the year end. In "Operations" where the great majority of its 277 people worked, it had also either dismissed or had resign more people than its operating plan required by the end of the year.

The Law

79. The claims in this case are of contraventions of the Equality Act 2010 ("the 2010 Act"). Section 39(2)(d) of the 2010 Act prohibits an employer discriminating against an employee by subjecting him to "any other detriment". Any other detriment means objectively viewed unfavourable treatment, rather than a subjective and unjustified sense of grievance – there is no question that selection for redundancy would fall within Section 39(2)(d).

80. Other sections of the 2010 Act set out six types of behaviour people can mean when they say: "disability discrimination": direct discrimination, indirect discrimination, harassment, a failure to make reasonable adjustments, victimisation and "Section 15" discrimination.

81. In this case only two types of discrimination are pursued: direct discrimination and discrimination because of something arising in consequence of disability ("Section 15" discrimination). The chain of events and allegation – selection for redundancy - in respect of which those complaints are made, is the same.

82. Section 13 (1) states: *"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".*

[1] The claimant referred in his evidence to page 511 (the management report to May 2018) and referred us to a similar document dated 14 December – this was 1036. The Tribunal said we would examine it carefully. Along with the other contextual evidence, 1036 is the basis for the conclusions in this paragraph.

83. Section 15 states:

"(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."

Establishing Discrimination

84. Section 136 of the Act states:-

(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.

85. The 2010 Act sets out a two stage process: it is for the claimant to prove facts from which the Tribunal could conclude an act of discrimination has occurred before the respondent is called to provide an explanation. In examining those primary facts, poor treatment is not enough. See in particular Madarassy v Numora International Plc [2007] IRLR 246 para 56, per Mummery LJ: "The bear facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination".

86. In claims of direct discrimination (and in relation to the "something arising in consequence of disability – in this case, absences), if the tribunal is satisfied that disability or absences were one of the reasons for the treatment in question, this is sufficient to establish discrimination. It need not be the sole or even the main reason for the treatment; it is sufficient that it had a significant influence on the outcome: Lord Nichols in Nagarajan v London Regional Transport [2000] 1AC501 House of Lords at 512H to 513B. Significant in this context means not trivial.

87. Direct evidence of discrimination is rare and frequently tribunals have to infer discrimination from all the material facts: Elias J (President) in Ladell: "Where the applicant has proved facts from which inferences could be drawn that the employer treated the applicant less favourably [on the prohibited ground], then the burden moves to the employer" … then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the

balance of probabilities that the treatment was not on a prohibited ground. If he fails to establish that the tribunal must find that there is discrimination".

88. Underhill J in the Martin v Devonshire Solicitors [2011] ICR 352, para 37 said: "Tribunals will generally not go far wrong if they ask the question suggested by Lord Nichols in Nagarajan, namely whether the prescribed ground or protected act had a significant influence on the outcome".

89. Paragraph 25 of the judgment of Mr Justice Underhill (President) in IPC Media Limited v Millar UKEAT/0395/12/SM is a reminder that our starting point is to indentify the putative discriminator (in this case there are several), and to examine their thought processes, conscious or unconscious.

90. In *Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305* at paragraphs 26 to 31 Langstaff P referred to the two-stage approach identified by the statutory provision: first, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be "because of" that "something". In *Charlesworth v Dransfield Engineering* Simler P has reasonably recently agreed this approach,

91. In this case, it was not in dispute that the claimant's absences, April to May 2018, and June to December 2018, arose in consequence of his disability.

Submissions

92. Mr Boyd provided a written closing argument document which set out the relevant law for the Tribunal, and his arguments as to how the issues should be determined. For the sake of brevity we do not repeat those submissions here. For many reasons, but including the length of time these proceedings having been affecting the claimant. we indicated to the parties they would have a written decision within five to ten days. Mr Boyd did not address the unfair dismissal complaint, given the claimant's concession that he was not an employee during his initial appointment. Similarly the claimant did not argue, beyond the position contained in his oral evidence, that he had the required continuity of service. We address below the points we understood from that evidence.

93. Mr Boyd had the opportunity to develop the relevant Equality Act points orally. He clarified that the respondent's case was a positive one on the facts in relation to the allegations of direction discrimination. He accepted that if the Tribunal found that the claimant's illness (hypertension) was a material influence on Mr Colley's restructuring proposal or selection, including subconsciously, then the claimant could establish direct discrimination, even if Mr Colley could not reasonably be expected to have known of every aspect of the Equality Act definition of disability in May 2018. However, he argued that when we bore in mind the reliability of Mr Colley's evidence and the lens through which he had examined things in May 2018, we could make a positive finding that there had been no less favourable treatment because of disability.

94. As to the Section 15 allegations, he reminded the Tribunal that it could only decide the claimant's pleaded case – the something arising in consequence of disability was the claimant's absences, and his allegation was that his selection for redundancy was because of those absences. The claimant had not alleged a failure to make reasonable adjustments; nor any other Equality Act or whistleblowing claim.

95. The claimant addressed the Tribunal orally and was clear that he maintained this was a sham redundancy which was because of, or connected with, his illness – it only happened after his hypertension was diagnosed and there was no headcount reduction. He was also clear that from the outset he had no chance of keeping his job; and he rejected the 35% time analysis that had led Mr Colley to the view that his team could cover its work with one, rather than two finance analysts.

Discussion and Conclusions

Did the claimant have the right to bring an unfair dismissal complaint?

96. The claimant's case was that while he accepted he was an agency worker or contract worker from 31 October 2016 until 12 June 2017, he was, in reality, working under a contract of employment with the respondent for that period and 31 October 2016 was the commencement of his continuous employment.

97. It is an established principle of law that courts and tribunals only look behind the written agreements of parties if there is evidence that these do not reflect the true intentions of the parties at the time they entered into them, whether because of duress or otherwise - that in reality there was some other contract between them, and that the written arrangements are a sham.

98. In this case, there is no basis to do so. This was not an employer using an agency or subcontracted arrangement to subvert or avoid employing people directly; it had plenty of directly employed permanent staff. It was using a temporary resource for a common reason – that of maternity leave cover – and there is nothing to suggest its intentions were otherwise. It could have offered a direct fixed term employment contract but it chose to use a third party supplier. There is nothing sinister or sham about that, particularly in a sector which uses a great deal of subcontracted resources.

99. Nor was there anything close to duress in the claimant's entering into the original arrangement, albeit the claimant said he felt forced to set up the umbrella company by the agency. For reasons which will become apparent the Tribunal considers his feelings and perception have developed with hindsight. The claimant disclosed no documentation indicating his protest or objections at the time. He had an alternative at the time: if he had wanted to wait for a directly employed position he could have rejected the agency offer and continued with his search while remaining in the temporary position he then occupied. The claimant did not document any objections at the time; and he later signed a contract with the respondent acknowledging and agreeing the start of his continuous employment in 2017.

100. Further the claimant told us that he had worked as an analyst in a Human Resources team. We consider he well understood the concept of a start date for accruing employment rights. At no stage until this claim did the claimant seek to suggest that his continuous employment had commenced earlier than 12 June 2017.

101. The claimant did not have the right not to be unfairly dismissed because he did not work under a contract of employment with the respondent for two years or more at the effective date of his termination, on 3 December 2018. This complaint must be dismissed.

Did the respondent treat the claimant less favourably by selecting him for redundancy than it treated or would have treated others because of his disability or because of his absences (these were the questions set out for the parties in a Case Management hearing on 6 July 2020)?

102. The first practical question for the Tribunal is whose thought processes ought we to examine to answer these questions as to discriminatory decision making? The claimant did not allege disability discrimination in his grievance/speak up complaints, but alleged bullying and other complaints related to the overtime concealment allegation. The alleged perpetrators of those matters were said to be an HR business partner with whom he had most dealings, Mr Nolan, and Ms Thomsen.

103. Towards the start of his evidence in this hearing, the claimant confirmed his belief that Mr Colley, Ms Thomsen and Mr Nolan had manipulated HR processes to dismiss him as redundant. His belief has endured, having reviewed a large volume of documentation in the case, much of which was carefully referenced in his witness statement.

104. On our findings it is clear that Mr McKenna was also aware of the claimant's health situation from as early as February and did not intervene, as he could have done, to prevent the dismissal after 5 September. As Managing Director he was the controlling mind of the respondent, and, unusually, had clear involvement in the claimant's treatment, including meeting him, from which the claimant believed the redundancy would be stopped. Whether his perception was reasonable is another matter. The claimant's understanding of his involvement has no doubt developed as a result of documents disclosed in these proceedings, which have also informed the Tribunal's findings. The claimant did not identify him as an alleged manipulator – he did however ensure that the Tribunal bundle contained his last exchange with him before dismissal on 3 November 2020. It was clear from the claimant's comprehensive written statement that Mr McKenna's involvement formed part of his case.

105. It seems to the Tribunal that should understand, as Mr Boyd did, "selecting me for redundancy" in its broadest sense to mean: both designating my post as one

which could be done by fewer people, **and** applying a selection criteria to select me, as opposed to my colleague.

106. On our findings, those two things were both done by Mr Colley. The involvement of others, later in the chain of events, may inform whether these were really Mr Colley's decisions, or may take us to a finding that they may have been commenced by Mr Colley innocently but informed by someone else's discriminatory thinking.

107. Unusually, in this case, once we have identified whose minds we need to consider, it is convenient to deal with both claims together. It was not in dispute that the claimant's absences arose[2] from his disability. The Tribunal must make findings as to whether illness/disability/absence played any part in the two decisions of Mr Colley, whether he was manipulated by Ms Thomsen, or Mr Nolan (either of whom could have had discriminatory motives, and then whether disability/illness/absence played any part when those were adopted by the many people who subsequently endorsed them.

Ms Thomsen

108. There is virtually no direct written evidence, despite a comprehensive disclosure exercise and subject access request, of animosity, discriminatory motive, retribution or unhappiness at absence or illness from Ms Thomsen. The only direct evidence which could be construed as unhappiness is a failure to say good morning to the claimant on his first day back from absence in May. This could be utterly innocuous. It also has to be balanced by her encouragement of the claimant to "tell his story" in an internal publication about how his hypertension was discovered - essentially an endorsement of the respondent's wellbeing programme, which does not demonstrate antipathy to illness or disability. Further Ms Thomsen had not long before thanked him for great work – again not indicative of antipathy.

109. There is, however, some indirect evidence. Firstly, we did not hear from Ms Thomsen, which was unhelpful - she could have informed the Tribunal about her oversight of the finance department restructuring and timings in detail – a level of detail that Mr Colley could address to some extent, but without the full vision one could have expected from Ms Thomsen.

110. Sometimes the absence of a witness can be basis to infer a discriminatory motive, but neither the Tribunal nor the claimant asked why she was not giving evidence: in the circumstances of this case we cannot fairly reach an adverse conclusion. We can make positive findings based on the claimant's evidence where matters concern her, however.

111. We also take into account that the respondent's approach, or at least the approach adopted by Ms Thomsen for group reductions, appears to be "team by team" with little forewarning of redundancy proposals. Some employers (as a

[2] Were "something arising in consequence of his disability"

matter of industrial experience), would have announced to the "Group" staff at the beginning of 2018, the need for eleven redundancies, sought volunteers, consulted across all affected departments in advance, perhaps undertaking a skills assessment to enable people to have the best chance of securing any vacant roles, and adopting wide pools (which in this case could have included at least four, rather than two, financial analysts). Neither the respondent nor Ms Thomsen did so.

112. That short notice team by team approach was endorsed by the HR Business Partner, Mr Nolan and his colleagues (given the oversight they had). Mr Nolan was clearly involved from the outset. Does this give rise to a finding that absence, illness or disability were part of the thinking of Ms Thomsen (or Mr Nolan or Mr Colley)? We take into account that the claimant had himself perceived "unfairness" in the redundancies of two supply chain/procurement colleagues, with the subsequent post in that team being filled without advertisement. It is also clear from our general findings that the team by team, short notice approach was applied to everyone in Group, with the exception being those in Staines where the office closed.

113. Consequently, there was potential unfairness to all those from Group who lost their jobs through redundancy. In those circumstances we cannot find that this is evidence of a discriminatory purpose or motive towards the claimant. The reverse is true – it suggests the approach taken by HR and Ms Thomsen, in asking for reductions on a team by team basis, without volunteers, and with less warning than could have been given, followed by an application of a company detailed selection process, was universal and not targeted at the claimant. The claimant's claims are about the reason why things happened - whether illness or absence played any part – they are not claims of indirect discrimination or failure to make reasonable adjustments. The latter are types of discrimination where something applied to everyone has adverse and unjustifiable impact on those with disability. Those are not the claims brought.

114. We should also note that the small pool approach to the financial analyst posts was on the basis that it would have been disruptive, where it would take several months to learn a different role, to undertake a skills based redundancy exercise amongst wider pools. This too was a universal approach. It may be one that poses greater challenges for those with disability than without, for the simple reason that they are at greater disadvantage in the jobs market if redundant through a small pool exercise, but the fact that the respondent adopted this approach is not sufficient to sustain a finding that Mr Nolan or Ms Thomsen or Mr Colley, were motivated consciously or subconsciously by the claimant's illness, disability or absences. The question for us was not whether the redundancy process was outside the band of reasonable redundancy processes, it was whether any founded criticisms of that process could sustain a finding of discriminatory motive. In these circumstances they could not.

115. Another matter which the claimant believed demonstrated potential discriminatory motive was the failure to disclose organisational charts or preparatory work related to the whole finance team, before his initial meeting with Mr Colley on 19 June and subsequently.

116. The C team charts were provided to him by Mr Nolan during the process of consultation. Taking into account the team by team approach, it was apparent from the contemporaneous emails that other redundancies were not ready to be progressed by the other managers, when Mr Colley embarked on his discussions on 19 June. The Tribunal cannot then find that the lack of a May or June finance organisation chart, evidence of discriminatory motive by Mr Colley, Mr Nolan or Ms Thomsen: the explanation was that the May/June 2018 versions were not kept and there was no disagreement that a December 2018 version (which was before the Tribunal), was concealing anything. The claimant agreed that if we added the extra post lost in his team, and took away the interns, it was accurate as at June 2018.

117. A further matter which troubled the Tribunal was the failure in Mr Colley's witness statement to identify the timing of Ms Thomsen's request for cost cutting proposals; in an internal investigation she had said things started in March 2018, whereas he identified in oral evidence that the meeting at which proposals were invited, was May. The apparent conflict was resolved by the disclosure documents which were entirely consistent with Mr Colley's evidence on this point, and indeed the claimant's observations of Mr Colley during May and June.

118. That Ms Thomsen remembered things commencing in March may indicate her recollection of the procurement/supply chain team restructuring which had commenced earlier than May, and indeed there were several departures from "Group" in the Spring. Whatever the reason for this answer in an internal investigation, this difference between her and Mr Colley cannot sustain the claimant's case that she was a discriminating co-conspirator or Iago.

119. Ms Thomsen's wish for the proposals to be announced in her team in June, and not to slip, similarly not give rise to any suggestion of discriminatory Iago style behaviour, when the business had planned anyway to make the majority of headcount reductions in June and July (revealed by 511/1036). A wish from her that things did not slip was consistent with both the plan and her role as finance director.

120. As a matter of fact the claimant has not established that the total headcount remained the same, or more than that indicated in the forecasts. The reverse was true: the respondent cut more staff than its plan required, even with the two undergraduate interns. Given the numbers involved, although it is possible that Ms Thomsen took the opportunity to "hide" a discriminatory dismissal of the claimant in a much bigger cost cutting exercise, this is unlikely from her methodology. She did not identify the positions to go herself, she asked for proposals from Mr Colley and others. It is possible to manipulate in this way, believing and hoping that Mr Colley would put forward the proposal he did, but again, it is unlikely.

121. Finally, there is Ms Thomsen's (and Mr Colley's) holding of a position that the claimant's illness was not caused by workload, after the claimant's blood pressure was dangerously high in early April. Holding a lay view about the cause of the claimant's illness, (however unwise given it is a complex medical question) could,

we accept, indicate an antipathy or intolerance to the claimant or his illness (from both Ms Thomsen and Mr Colley).

122. To summarise, in support of a case of discriminatory thinking by Ms Thomsen, we have the failure to say "good morning" in May, the view held about the cause of illness, and the possibility of Iago style manipulation of Mr Colley. Against those factors, we weigh the very compelling contextual evidence from Mr Colley about his thinking at the time, which we accepted. That included a feeling of conscience about needing to cut cost, if a job could be done by one person rather than two. Given his own long working hours it is also inherently unlikely that he would artificially shrink his team to please Ms Thomsen, if that would only stand to worsen his own position and workload.

123. Taking all these matters into account we cannot find on this evidence that Ms Thomsen instructed Mr Colley to design cost saving proposals to dismiss the claimant, because of, or influenced by, his illness or his absence. For the same reasons the evidence is wholly insufficient to sustain a finding of Iago style conduct by Ms Thomsen, in asking for cost cutting proposals in order to be rid of the claimant because of his absence and/or disability, achieving that through a dismissal by Mr Colley without himself having any discriminatory thoughts. It is also relevant to this conclusion that there is no evidence of Ms Thomsen perceiving disability, and the claimant's absence had only been five or so weeks at the time of her request.

Mr Colley

124. Mr Colley came to his understanding that he could operate with one finance analyst rather than two because of the need for the claimant's risk assessment, understanding then the time various tasks took, and because the claimant's tasks were able to be absorbed by his colleague X while he was absent.

125. Mr Boyd submitted that this was the context for the reason for the redundancy proposal, it was not the reason for it: the reason for it was Mr Colley's judgment that the work could be done by one person rather than two.

126. Sadly perhaps, it is a frequent occurrence that whenever staff are absent, whether through illness or maternity leave or for other reasons, similar understandings are reached by their employers. It is an utterly human reaction to respond with, "if I had not been absent I would not have been made redundant". However, that does not mean that the reason for a redundancy proposal is absence. To illustrate the point, if, while absent, a manager discovers an employee has taken part in misconduct, which would not have been discovered without the absence, and then dismisses for it, the reason for the dismissal is the misconduct, not the absence.

127. We accepted Mr Colley's evidence and judgment that the work could be done by one person rather than two, and that he needed, in the context of a need to cut headcount, to propose that solution, if he could see it and work with it. We repeat

our comments above about the unlikeliness of him proposing something which would worsen his own position unless he held that view in good faith. We find there was no conscious thought of the claimant's illness or absence from Mr Colley when he decided the work could be done by one rather than two.

128. As to his selection of the claimant, given our findings and conclusions above, we have to consider whether Mr Colley was subconsciously scoring the claimant unfavourably or wrongly, and selecting him for redundancy, subconsciously influenced by his illness or absences.

129. This is entirely possible on the facts of this case, particularly given the claimant's unhappiness about the effect of long hours and stress on his condition. Is it more likely than not? We consider that the whole tenor of Mr Colley's evidence is that he did not think deeply about these matters – he called it as he saw it – and he scored the claimant based on his genuine assessment of his skills and attributes. He saw him as a "grown man", not a person impaired with disability.

130. Mr Colley's scoring of the claimant was based on his performance and observations of him whilst working from home in January and February and then back at work in March 2018, and May and June; his comments were not so unfair as to suggest that he held subconscious bias towards illness or absence, and the claimant did not suggest that to him in any of his questions. In fact the claimant did not ask any questions of any of the witnesses about his scores during the selection process.

131. His questions were very much focussed on establishing he had been very poorly treated, that there was no reduction in headcount, and that the exercise had been a sham to punish him as a person who had indicated unhappiness with his hours. The difficulty with the latter proposition was that Mr Colley was also a person who had expressed unhappiness with his hours, and there were others, and their posts were not proposed to be redundant. Either way, treatment because of raising issues about hours in the department, does not equate to treatment influenced by illness, disability or absence. Again, it may be that a long hours requirement is something which could have given rise to claims of indirect discrimination, or failures to make reasonable adjustments, but those are not the claims before us.

132. We recognise it is difficult for a litigant in person, presenting different claims about the same issue, to argue or ask all the questions that are relevant to the different legal issues. That is particularly the case where the claimant's unfair dismissal argued: the redundancy was a sham driven by the claimant's complaint about Ms Thomsen and his health issues; the pool did not include all relevant analysts; warning of redundancy was not carried out as soon as possible; scoring comments were inconsistent and contradicted 2017 review; he was put under strain by a continuing process despite there being a "duty of care" investigation; and the final consultation meeting was not postponed.

133. In this case, the claimant had prepared an excellent witness statement detailing every document and point he wished to make in support of the points above, and had prepared his questions very thoughtfully and in a very targeted way by reference to the documents. We therefore consider that in not challenging Mr Colley's scoring, whether as discriminatory or simply unfair, he had ultimately accepted that if there were to be a selection exercise between him and X, he would come out objectively with a lower score.

134. By closing arguments the claimant was clear that his focus was on his illness or disability as the reason for dismissal. In the round the Tribunal has concluded on the balance of probabilities that Mr Colley's selection of the claimant, rather than X, for redundancy was free from thoughts, conscious or unconscious of the claimant's illness or his absence.

Mr Nolan and Mr McKenna

135. Mr Nolan's conducting of the final meeting in the claimant's absence, and giving notice of termination, despite the claimant wishing to postpone the final meeting, is a matter about which complaint is made. We ask whether it can give rise to any finding that Mr Colley, or Ms Thomsen acting as Iago, had thoughts of the claimant's illness or absence in selecting him for redundancy.

136. Mr Nolan's action was consistent with the direction from Mr McKenna "if he is fit to attend, let's get him in and get this sorted". He was faced with the claimant wanting more time to digest the occupational report having been on holiday, and seeking a postponement of seven days on the day of the meeting, instead of attending. When asked about that, the gist of Mr Nolan's evidence (and to a lesser extent that of Mr Scargill) was that as well as a duty of care to reduce the claimant's stress by bringing things to a conclusion, he also had a duty of care to others who had been taking the strain to resolve complaints, grievances, investigations and appeals, and a department that needed clarity. He referred to the fact that the claimant had enjoyed a holiday and then asked to postpone on the day, whereas he had not (had a holiday). We accept this evidence because it had the ring of truth about it, unsympathetic as it was. In short, he and others were weary.

137. We also asked whether the alternative way of removing the claimant's stress, namely by removing the redundancy proposal had been considered. It had not. There may have been many reasons why that was not considered but by this stage the year end was approaching and the plan involved achieving headcount reductions by the year end. Occupational health had finally advised the claimant was a disabled person and Mr Nolan and Mr McKenna knew that (or in the latter's case, ought to have known as he was sent the report). They had an opportunity to reverse the redundancy, as the claimant believed Mr McKenna would, but they did not.

138. Our findings about the reasons for the selection of the claimant for redundancy are that they were free from discriminatory thinking. By the time he came to be dismissed for that selection, the respondent knew he was a disabled person. That

may have caused some employers to pause for thought, bearing in mind the other provisions of the Equality Act that we have mentioned above. Certainly, in a context where the respondent's mission includes having an environment free from discrimination one might have hoped so. The respondent appears to have carried through reductions in staff when those in finance were working long hours, with a decision taken not to keep a record of those hours. That, too, is a decision or strategy which applies to everyone, but may have a worse impact on those with disability. The fact that Group was short of staff against its forecast by the year end may indicate the strategy was not popular.

139. No doubt oral evidence could have explored these matters had the claimant brought complaints of indirect discrimination or failures to make reasonable adjustments. The respondent would then have come prepared to address them. As it was, it did not, and the Tribunal cannot determine complaints which have not been brought.

140. In all these circumstances the Tribunal's unanimous conclusion is that the Equality Act complaints brought by the claimant must be dismissed.

Employment Judge Wade
10 November 2020