EMPLOYMENT TRIBUNALS

Claimant:	**Neil Ingram**		
Respondent:	**Morgan Sindall Construction & Infrastructure Limited**		
Heard at:	**Cardiff via CVP**	**On:**	**28, 29 and 30 June 2021**
Before:	**Employment Judge** **Members:**	**R Havard** **Mrs C Mangles** **Mr M Pearson**	

Representation:
Claimant: In person
Respondent: Ms H Gardiner, Counsel

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that the Claimant's claim of unfair dismissal is not well-founded and is dismissed;

2. The unanimous judgment of the Tribunal is that the Claimant's claims of direct and indirect discrimination are not well-founded and are dismissed;

3. The unanimous judgment of the Tribunal is that the Claimant's claim of discrimination arising from disability is not well-founded and is dismissed

4. The unanimous judgment of the Tribunal is that the Claimant's claim for failure to make reasonable adjustments is out of time and that it would not be just and equitable to extend time. Therefore, the Tribunal does not have jurisdiction to consider the claim.

REASONS

Introduction

1. By a claim form dated 7 October 2020, the Claimant indicated that he wished to pursue a claim of unfair dismissal.

2. On 20 November 2020, the Respondent lodged a response in which it disputed the claim pursued by the Claimant.

3. At a preliminary hearing conducted by telephone on 30 January 2021 before Employment Judge Moore, it was accepted by the Respondent that the claim form set out particulars of claim amounting to direct discrimination (section 13 Equality Act 2010

("EqA") and discrimination arising from disability (section 15 EqA). The Claimant also indicated he wished to bring a claim for the Respondent's failure to make reasonable adjustments (section 20 EqA).

4. Judge Moore allowed the amendment to include claims under sections 13, 15 and 19 EqA.

5. As for the application to amend the claim to include a claim under section 20 EqA, Judge Moore directed that, when lodging its amended response, the Respondent should indicate whether it objected to an amendment to include such a claim at this stage. If there was an objection, a further preliminary hearing would be required to decide the application.

6. On 11 February 2021, the Respondent lodged its amended grounds of resistance and also its objection to the Claimant's application to amend his claim to include a claim under section 20 EqA. It also maintained that such a claim was out of time and that the tribunal did not have jurisdiction to consider it.

7. On 12 May 2021, the Claimant's application to amend his claim to include a claim under section 20 EqA was heard before Employment Judge Frazer. It was opposed by the Respondent. However, Judge Frazer allowed the amendment and ordered that the issue with regard to jurisdiction should be considered at the substantive hearing.

8. At the commencement of this hearing, the Claimant applied to the Tribunal for an order that the documents at pages 503-514 of the Bundle should not be admitted as they had been served by the Respondent some considerable time after the prescribed date given in the directions of Judge Moore at the telephone preliminary hearing on 13 January 2021. This application had been foreshadowed by exchanges of correspondence between the parties and the Tribunal.

9. Ms Gardiner confirmed that, as knowledge of the Claimant's disability was no longer a contested issue, the document at pages 503-508 need not be included. Otherwise, the documents were disclosed as part of the ongoing duty of disclosure and the document at page 513-514 was provided due to the issue of the Respondent's reference for the Claimant being raised in the Claimant's statement.

10. The documents were indeed served late but still some ten days prior to the commencement of the hearing and the Tribunal was satisfied that it was in the interests of justice to allow the documents into evidence.

Issues

11. At the beginning of this hearing, it was confirmed by both the Claimant and Ms Gardiner that there was no requirement for those issues agreed at the preliminary hearing on 13 January 2021 to be amended in any way.

12. The agreed issues are:

1. **Unfair dismissal**

1.1 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy. The Claimant maintains the redundancy was a sham and his role continues to exist and be covered by an agency worker.

1.2 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

1.2.1. The Respondent adequately warned and consulted the Claimant;

1.2.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

1.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

1.2.4 Dismissal was within the range of reasonable responses.

2. **Remedy for unfair dismissal**

2.1 Does the Claimant wish to be reinstated to their previous employment?

2.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the Claimant?

2.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.6.3 If not, for what period of loss should the Claimant be compensated?

2.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.6.5 If so, should the Claimant's compensation be reduced? By how much?

2.7 What basic award is payable to the Claimant, if any?

3 **Disability**

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

3.1.1 Did he have a physical or mental impairment: Diabetes?

3.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

3.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

3.1.5.2 if not, were they likely to recur?

4 **Direct disability discrimination (Equality Act 2010 section 13)**

4.1 Did the Respondent do the following things:

4.1.1 Select the Claimant for redundancy

4.1.2 Dismiss the Claimant

4.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than

someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The Claimant says he was treated worse than the other site managers.

4.3 If so, was it because of disability?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the Respondent treat the Claimant unfavourably by:

5.1.1 Requiring / compelling the Claimant to remain at home under the Emergency People Policy thereby prevent him from working in his normal role (including latterly by furloughing the Claimant)?

5.1.2 Select the Claimant for redundancy?

5.2 Did the following things arise in consequence of the Claimant's disability:

5.2.1 A requirement to self-isolate under the Respondent's Policy?

5.3 Was the unfavourable treatment because of any of those things? Did the Respondent dismiss the Claimant because of the enforced absence?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent will set this out in their amended response.

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6. **Indirect discrimination (Equality Act 2010 section 19)**

6.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

6.1.1 "PCP 1" - A requirement for employees with certain health conditions to self-isolate (under the Emergency People Policy) and;

6.1.2 "PCP 2" - A requirement for Site Managers to physically work on site.

6.2 Did the Respondent apply the PCPs to the Claimant?

6.3 Did the Respondent apply the PCPs to persons with whom the Claimant does not share the characteristic, or would it have done so?

6.4 Did the PCP put persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic, in that

6.5 (PCP1) - It prevented the Claimant from attending work and being useful to the company and resulted in his selection from redundancy

6.6 (PCP2) - it prevented the Claimant from being useful to the Company and resulted in his selection for redundancy.

6.7 Did the PCP put the Claimant at that disadvantage?

6.8 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent will set this out in their amended response.

6.9 The Tribunal will decide in particular:

6.9.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

6.9.2 could something less discriminatory have been done instead;

6.9.3 how should-the needs of the Claimant and the Respondent be balanced?

7. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

7.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

7.2.1 "PCP 1" - A requirement for employees with certain health conditions to self-isolate (under the Emergency People Policy) and;

7.2.2 "PCP 2" - A requirement for Site Managers to physically work on site.

7.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that (PCP1) - It prevented the Claimant from attending work and being useful to the company and resulted in his selection from redundancy and (PCP2) - it prevented the Claimant from being useful to the Company and resulted in his selection for redundancy?

7.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

7.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

7.5.1 Worked from home

7.5.2 Been permitted to attend work by making his place of work Covid secure.

7.6 Was it reasonable for the Respondent to have to take those steps [and when?

7.7 Did the Respondent fail to take those steps?

8. **Remedy for discrimination**

8.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

8.2 What financial losses has the discrimination caused the Claimant?

8.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.4 If not, for what period of loss should the Claimant be compensated?

8.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

8.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

8.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.8 Should interest be awarded? How much?

Evidence

13. The Claimant gave evidence on his own behalf.

14. The Respondent called:

i. Mr Mark Thomas, Project Manager;

ii. Mr Sean Murray, Senior Contracts Manager;

iii. Mr Kenneth McGregor, Specialist Operations Director.

15. Those who gave oral evidence had provided written witness statements.

16. An agreed bundle had been prepared by the Respondent and submitted together with an index. To include the additional documents, it ran to 514 pages.

17. Unless otherwise stated, any page references in this judgment refer to pages in the bundle.

Submissions

18. Both the Claimant and Ms Gardiner provided written submissions which they supplemented with oral submissions at the conclusion of the evidence.

Findings of Fact

19. The Respondent is a large company involved in major construction and infrastructure projects. It is one of a number of companies which contract with Dwr Cymru Welsh Water ("DCWW"). The Respondent has contracted with DCWW for a number of years. Indeed, Mr Murray, for example, has worked on the DCWW contract since 2002.

20. DCWW allocates work through what are described as Asset Management Plans ("AMPs") which endeavour to forecast a programme of work for approximately every five years. The Respondent will submit a bid to be involved in AMPs. During the material time, the Respondent was involved in a programme of work known as AMP6 and, as AMP6 came to an end, negotiated with DCWW with regard to AMP7.

21. The level of work which would be generated by the Respondent through the AMPs was heavily dependent on the anticipated programme of work to be allocated by DCWW. The level of such work could fluctuate within the life of an AMP.

22. The Claimant commenced his employment with the Respondent on 4 December 2017. He was employed as a Site Manager at a Welsh Water contract at Nant Talwg. He was based in an office at Ty Awen which is one of DCWW's offices in Newport but his primary function was to oversee construction projects on site.

23. The Claimant's Line Manager was Mr Mark Thomas who is employed as one of the Project Managers for the Respondent. In turn, Mr Thomas would report to Mr Sean Murray who was a Senior Contracts Manager for the Respondent. Mr Murray would report to Mr Kenneth McGregor who is employed by the Respondent as the Specialist Operations Director for Water. Whilst based in Scotland, he covers the contracts with DCWW and also Yorkshire water.

24. The Tribunal listened carefully to the evidence from the Claimant and the witnesses for the Respondent. Whilst the Tribunal accepted that the Claimant may have genuinely believed the account that he gave in the course of his evidence, for the reasons outlined below, the Tribunal preferred the evidence of Mr Thomas, Mr Murray and Mr McGregor. The Tribunal found all three witnesses for the Respondent to be credible and reliable witnesses.

25. When AMP6 was awarded, it involved a much higher volume of work than previous AMPs. The Respondent recruited the Claimant as a result of the anticipated increase in work volumes.

26. In 2019, work reached a peak, including not only scheduled work such as routine maintenance but also emergency repairs due to damage caused by Storm Dennis. However, Mr Thomas indicated, and the Tribunal found, that this emergency repair work led to one off jobs and, as the end of AMP6 came closer, it was clear to the Respondent that there was insufficient planned work to sustain the number of Site Manager roles in the area.

27. This potential for fluctuation in work levels was readily understood by the Claimant who had considerable experience in working in this sector. In a review document which pre-dated the lockdown due to the pandemic in March 2020, there is a report of a review when the Claimant's awareness of the unpredictability of workflows was made apparent (page 290). In answer to question, *"7.0 What can I as your reviewer, do to help and support"*, the Claimant replied *"Not much more than now I guess but carry on training and if I need to diversify into another role let me know I have to."*

28. In answer to question *"8.0 What are your career aspirations"*, the Claimant replied, *"Looking to move / develop into new function".* In response to question *"8.2 Reason for choice of career aspiration and development required"*, the Claimant replied, *"Uncertainty of work stream is leading me to believe I may have to look at other roles and possibly move into one of them to maintain my employability here."*

29. Prior to the full impact of the Covid-19 pandemic becoming known, the Respondent knew that there was likely to be a downturn in work generated by projects from DCWW. The Claimant maintained that, in his experience, he would have expected to see an email from DCWW to the Respondent informing it of that downturn. He accepted that, at his level as Site Manager, he would not expect to be included in such a communication but he concluded it was relevant that such an email, which would have gone to senior management within the Respondent, had not been disclosed. Whilst the Tribunal noted that there was no such email, it was satisfied, based on the evidence of Mr Thomas, Mr Murray and Mr McGregor, who held a very senior position within the Respondent, that such a downturn did take place although the impact of such a downturn was not fully understood and appreciated at the time the Respondent was informed.

30. It was at this stage that the UK Government ordered the first lockdown which came into effect on 23 March 2020.

31. When the full extent of the potential impact of the pandemic became known, the Respondent drafted and circulated an HR Policy called "Emergency People Policy" (page 80).

32. The following are extracts from that policy:

"1.0 Emergency HR Policy

> "There will be occasions where the business will have to deal with unprecedented situations. This may be due to circumstances which are or are not in their control, but normal policies and procedures may not apply or be fit for purpose. The recent outbreak of "COVID-19" is one of those situations where in order to maintain essential business services and operations whilst providing for your health, safety and welfare, we have deemed it necessary to apply different processes and procedures as detailed in this document.
>
> This policy is intended as a guideline to assist in the consistent application of processes in unusual circumstances. The policy does not form part of your contract of employment and can be amended or withdrawn at any time."

"3.0 Alternative Work Arrangements

> We may ask you to work from home where your role allows. This will be discussed with you on a team or individual basis and an indication of length of time given. There are a number of supporting documents available on the Academy to

support homeworking, both for you and your line manager with some tips on how to use your time effectively."

"6.0 Payment Terms

6.3 Scenario 3: self-isolation due to having an underlying health condition.

"If you have an underlying health condition, as outlined by the World Health Organisation, and have informed us, we may either ask you to work from home or request that you leave work due to your personal health and wellbeing."

33. The policy then provides the basis on which payments would be applied to the relevant individual.

34. In January 2016, the Claimant was diagnosed with type 2 diabetes and started taking medication for this condition in May 2017. The Claimant also had high blood pressure and a high BMI.

35. On 20th March 2020, in an email to Mr Thomas, the Claimant made reference to the Emergency People Policy ("EPP") and confirmed that he had certain of the conditions listed. Mr Thomas responded straightaway and, whilst confirming that there was no obligation, he asked the Claimant of details of the underlying health conditions that he had so that the matter could be reviewed (page 105).

36. In his response, the Claimant confirmed that his health conditions were *"Weight, (BMI obviously), high BP and diabetic.*" A conversation ensued between the Claimant and Mr Thomas which was followed by an email from Mr Thomas to the Claimant on 20 March 2020 asking the Claimant to confirm that he would be self-isolating in accordance with section 6.3 of the EPP from Monday 23 March 2020 until further notice.

37. It was also confirmed that the option to work from home was not viable as his role meant that this would only take up one to two days per week. The Claimant was informed that James Morgan would be covering his role at the Nant Talwg Project site and he was asked to assist with a handover to Mr Morgan. The Claimant responded, confirming that, reluctantly, he would "adhere to the company policy as set out in the company emergency policy and as directed by HR after you spoke to them today" (page 103).

38. Mr Thomas then wrote to the Claimant on 22 March 2020 saying:

"Thanks Neil

Make sure you look after yourself at this difficult time. I will be in regular contact and don't be shy in contacting myself or any of the team at any time during your absence.

Regards and stay safe."

39. It was accepted by the Respondent, and the Tribunal found, that the Claimant was a disabled person within the meaning of section 6 of the EqA. It was also accepted by the Respondent that, whether or not it had knowledge of the Claimant's underlying condition prior to March 2020, it certainly had knowledge from 20th March 2020 and throughout the subsequent material time.

40. The Claimant confirmed that a substantial part of his role was liaising, and having contact with, other persons on site, particularly contractors.

41. At the time the EPP was implemented, it applied to all levels within the organisation. For example, Mr McGregor volunteered that he is also a diabetic and was required to self-isolate although, in his case, due to his role, he was able to work from home.

42. Due to the level of information and knowledge available with regard to the pandemic as at March 2020, and the direction and guidance given by the Government, the Respondent confirmed that they did not, at that stage, consider any alternative to the Claimant self-isolating at home as a result of his underlying health condition. He was one of a number of employees who were required to do so.

43. As stated, whilst the Claimant was self-isolating at home, James Morgan, an agency worker, took over the role of Site Agent at the Nant Talwg site.

44. In April 2020, the Respondent issued a revised EPP (pages 86 to 93). This followed the Governments' introduction of the furlough scheme. There was some dispute surrounding whether or not the Claimant should have been placed on furlough, and thereby receiving 80% of his salary, but there is reference to vulnerable people who are unable to work from home most likely to be designated as furlough (page 90). There is potentially a lack of clarity when paragraphs 6 of the revised EPP is taken into account (page 88) but it does not impact on the fact that, due to the Claimant's underlying health conditions, he was required to self-isolate.

45. Although it was not something that was raised at the time, the Claimant has maintained that it would have been reasonable for the Respondent to have arranged for a temporary portacabin to have been installed onsite for the sole use of the Claimant. He maintained that if this measure had been taken, he need not have self-isolated at home. The Tribunal found that the state of knowledge as at March 2020 was such that the Respondent simply followed the guidance of the Government and other organisations at the time which led to the Claimant and other employees having to self-isolate at home. It was on this basis, and to reflect the level of knowledge that existed at that time, that the EPP was implemented.

46. In May 2020, discussions took place between the Respondent and Mr Thomas with regard to his current situation and the workflows from DCWW. The project at Nant Talwg was nearing completion. Indeed, substantive completion of that project occurred on 10 June 2020. The Claimant was informed that he was required to continue in self-isolation in accordance with government guidance.

47. On 15 May 2020, Mr Thomas wrote to his Line Manager, Mr Murray, and the Regional Director, David Stacey, informing them of the conversation he had held with the Claimant and raised with them the fact that there were not many projects coming forward from DCWW on which the Claimant's role depended. Reference is made in that email to the possibility of redundancy.

48. Subsequently, due to the reduction in work, an announcement was made to the four site managers working on DCWW projects (page 115).

49. The announcement included the following:

"Business situation

As we exit AMP6 and enter AMP7 our client's budget and projected spend on the Capital Delivery Alliance is less than what we have experienced during the last two years.

Faced with these challenges, it is imperative that our business remains cost effective for both our business and our client, we have therefore undertaken a review of both forecasted workload and structure to ensure that we can maintain our efficiencies and profitability. There will be a significant reduction in supply chain delivered Civil schemes across our programmes."

Proposed changes

Due to the reduced AMP7 programmes our review has concluded that there is a need to downsize to meet our programme and client's needs.

As a result, we are proposing that our current community of four Site Managers are reduced to three as part of the downsizing measures. Historically several Site Managers have been flexible and have worked across all areas and as such all Site Managers will form part of the selection process.

Consultation and selection process

Before a final decision is made, however, we wish to hear any representations and observations that you wish to make. We will be consulting fully with you individually throughout this process on the proposal, timescales and examining any options for minimising or alleviating the need for redundancy dismissals or failing that compulsory dismissals.

We will be operating a proposed redundancy selection process (see attached) to determine which individuals will leave the business if redundancy dismissals are made. The proposed selection process will be the subject of individual consultation. If we decide to make these changes and you are affected, we will make every reasonable effort to look for suitable alternative employment for you elsewhere in the company."

50. Indeed, the Tribunal accepted the evidence of Mr Murray and found that there was a significant reduction in revenue from DCWW. It fell from £58 million to £42 million which was simply a reflection of what was included in the programme of work.

51. The four Site Managers in Wales were included in the pool, namely the two Site Managers in North Wales, one Site Manager in West Wales, and the Claimant in South Wales.

52. On 4th June 2020, the Respondent wrote to the Claimant confirming the reduction in DCWW's budget and projected spend and the need for rationalisation to include the prospect of the Claimant's position becoming redundant although no finalised proposals were being made. The Claimant was informed that there would be a consultation procedure. The author of the letter, Mr Stacey, indicated that selection criteria would be used and a copy of the proposed selection criteria was attached (pages 120 – 126).

53. The first consultation meeting was held with the Claimant on 8th June 2020. A note of that meeting was produced (pages 127 – 129). The Claimant also recorded the meeting. The Tribunal found that the Claimant was able to raise any issues or concerns with regard to the process. He also asked why he could not continue to be furloughed but Mr Thomas confirmed that the redundancy process was not linked to the pandemic.

54. The Claimant was able to put forward some suggestions with regard to the selection criteria. He also asked whether the fact that he had been absent due to having to self-isolate would have an impact on his scoring or selection for redundancy. Indeed, the Claimant maintained to the Tribunal that, as soon as the redundancy process was

announced, he believed that he would be the person who would be made redundant and that this was as a result of him having to absent himself from work. Mr Thomas confirmed that he would check the position with HR but his view was that it would be extremely harsh if that were so. It was subsequently confirmed to the Claimant that the fact that he had to self-isolate due to underlying health problems would not be taken into account in the scoring process.

55. The Claimant also raised the issue of agency workers who were currently on site and also other roles such as those of a general foreman. All these issues were taken into consideration in the course of the first consultation and Mr Thomas took advice from the Respondent's HR department. At the second consultation meeting, which took place on 15 June 2020, Mr Thomas responded to the Claimant's questions (pages 151 – 155). This meeting was also attended by Ms Corel Caulfield from HR who provided further information to the Claimant in relation to the operation of the furlough scheme.

56. It was reconfirmed to the Claimant that the reason for the redundancy process was unrelated to the pandemic and was directly caused by the downturn in work from DCWW. At the conclusion of the second consultation process, the Claimant was informed that the scoring process would now take place in accordance with the document "Redundancy, Selection Criteria and Scoring Matrix" (pages 120 – 126). This document set out the different sections which were to be scored, and the criteria to be applied to each section. The sections were: performance; knowledge; qualifications; attendance and disciplinary/conduct. Applying the criteria in respect of each section, scores would be applied ranging from 0 to 5, and again the definition of the score was outlined (page 121).

57. At the end of the process, the marks were included in a matrix (page 126).

58. Each of the Site Managers were scored by their immediate Line Manager and one other person. Mr Thomas carried out the scoring of the Claimant and one other Site Manager whom he managed. The second person to score the Claimant was Mr Sean Murray. It was suggested by the Claimant that this process was unfair in that it should have been the same persons who scored all of the Site Managers. Furthermore, it was submitted by the Claimant that Sean Murray was not sufficiently familiar with the Claimant's performance to be able to score him fairly.

59. However, Mr Murray stated, and the Tribunal found, that whilst he may only have had few direct interactions with the Claimant over the period in which the Claimant worked for the Respondent, there were three meetings directly between Mr Murray and the Claimant. Further, the Tribunal accepted Mr Murray's evidence and found that he would have discussions with Mr Thomas about progress on the sites being managed by the Claimant and he was also able to carry out a thorough review of the documentation relating to the Claimant's site, to include those the Claimant himself was required to complete, for example with regard to health and safety.

60. The Claimant also maintained that there was a level of collusion between not only Mr Thomas and Mr Murray but also with the other Project Managers and Senior Contract Managers who were undertaking the scoring of the other Site Managers to ensure that it was the Claimant who ended up with the lowest score. The Claimant was unable to produce any evidence to support such an assertion. The Tribunal has already confirmed that it found both Mr Thomas and Mr Murray to be credible witnesses and it was satisfied that both of them carried out the process of scoring the Claimant against the various sections independently and without reference to each other or those carrying out the scoring of other Site Managers.

61. Having listened to their evidence, the Tribunal was satisfied that Mr Thomas and Mr Murray reached their conclusions with regard to the Claimant's scores in an objective and impartial manner based on their knowledge of the Claimant and also, particularly in respect of Mr Murray, his assessment of the documentary evidence. Mr Thomas and Mr Murray stressed that the scores themselves were not in fact poor and that the Claimant's performance was satisfactory. The Tribunal found that with regard to the section relating to attendance, no account was taken of the Claimant's absence due to the pandemic and he received a score of 4 out of 5.

62. Initially, the Claimant was marked down as a result of an informal discussion with Mr Thomas regarding an improvement notice but when this was challenged by the Claimant, the scores were amended accordingly, having accepted the Claimant's representation.

63. The Tribunal accepted that the scoring in respect of each site manager was undertaken independently and then sent to Dave Stacey for correlation.

64. On 19th June 2020, the Respondent wrote to the Claimant informing him that he had been originally selected for redundancy and the selection score sheets were enclosed to enable the Claimant to carry out a review prior to a further consultation meeting.

65. The third consultation meeting took place on 22nd June 2020 (pages 235 – 237) at which the Claimant stated that he wished to object to the scoring. He maintained his objection to Mr Murray being part of the selection process and also challenged the scores. On 23rd June 2020, the Claimant sent a detailed email setting out his objections. Both Mr Thomas and Mr Murray reflected on the representations made by the Claimant and, where they considered it was justified, amended their scores (pages 271 – 286). Nevertheless, even though this led to an increase in the Claimant's overall score, he remained the Site Manager with the lowest score and therefore at risk of redundancy.

66. On 1st July 2020, a fourth, and final, consultation took place at which the Claimant, Mr Thomas, and Mr Murray attended (pages 287 – 291).

67. The Claimant was given an opportunity to make his representations with regard to the scoring process and both Mr Thomas and Mr Murray informed him that they believed that the scores were fair. Indeed, at no time was it suggested that the Claimant was not capable of conducting the role of Site Manager. It was simply the case that, in certain areas, the other Site Managers had achieved higher scores.

68. In advance of the fourth consultation, the Claimant had been advised to review any vacancies for employment on the Respondent's website. He has also been requested to provide his CV to HR which had been disseminated within the company. The Claimant stated that there were no vacancies which were of interest to him and also HR stated that no vacancies had been identified by the Respondent as suitable for the Claimant. As a result, the Claimant was informed that he would be made redundant but told that the Respondent would be happy to re-employ him if there was an increase in work.

69. The Claimant maintained in his evidence that work had continued on the Nant Talwg site and that the agency worker, James Morgan, was continuing to work there. The Claimant provided some text messages which he had exchanged with Mr Morgan some time after the date of his redundancy which the Claimant relied upon together with some photographs of the site at Nant Talwg taken in December 2020 to support his assertion. However, this was not inconsistent with the evidence of Mr Thomas relating to some reinstatement which had taken place but which did not require a full time Site Agent. Mr Thomas and Mr Murray stated, and the Tribunal found, that Mr Morgan was in fact

covering a site in Northumberland from 12 June 2020 in the role of Senior General Foreman and that he only attended for four days at the Nant Talwg site following 10 June 2020 to oversee some snagging works. There was reference to some lining work, which would have been a substantial piece of work, but this was initially deferred and, in January 2021, DCWW indicated that they no longer wished the Respondent to carry out such work.

70. Finally, the Tribunal was not able to place any real weight on the evidence of Mr Morgan. He had not provided a statement for the tribunal let alone attend in person to give evidence, and had not specified the location at which he had been working for the Respondent**.**

71. On 1 July 2020, the Respondent wrote to the Claimant informing him of the outcome of the redundancy process and that he would be made redundant with effect from 1 July 2020 setting out the payments that would be made on termination. In that letter (pages 304 – 305) the Claimant was informed of his right to appeal.

72. By an email of 3rd July 2020 (page 313) the Claimant appealed and included his reasons for doing so.

73. On 28 July 2020, the Claimant attended the appeal hearing which was conducted by Mr McGregor (page 317).

74. The Tribunal was satisfied that Mr McGregor conducted the appeal hearing in a fair and impartial manner. Mr McGregor had not met the Claimant before the appeal, had had no involvement in the selection process, and had not held any prior discussions with anyone who had been involved in that process.

75. Mr McGregor considered each of the points raised by the Claimant in his appeal and the challenges made by the Claimant in respect of the way in which he had been scored by Mr Thomas and Mr Murray, particularly the latter as the Claimant maintained that he did not know him very well.

76. Mr McGregor understood that Mr Murray had already revised certain of the scoring in the light of the Claimant's earlier representations and the issue relating to the disciplinary which had led to a reduced scoring under that section. At the appeal hearing, Claire Graham of HR also attended and assisted Mr McGregor and indeed the Claimant by providing further explanation in respect of the redundancy process and the selection criteria.

77. Following the appeal meeting, Mr McGregor reflected upon all that he had read and heard and reviewed the scores, adjusting the score in relation to the section disciplinary/conduct by removing the negative score as this was not justified and also took account of the point raised by the Claimant regarding asbestos training. Again his score was increased under this section but Mr McGregor concluded that his other grounds of appeal were not sustained. He wrote to the Claimant on 7 August 2020 (page 337) setting out in detail the basis on which he had concluded that the Claimant's appeal must be rejected.

78. The Claimant continued to maintain that the decision to select him for redundancy was linked to the requirement for him to self-isolate as a consequence of his underlying health conditions, and that it was a "sham redundancy". However, it transpired that the downturn in work from DCWW continued such that, in December 2020, a further Site Manager was made redundant, reducing the number of site managers in Wales to two.

79. The date of receipt by ACAS of the EC notification was 12 August 2020 and the date of issue by ACAS of the certificate is dated 26 September 2020.

80. On 7 October 2020, the Claimant lodged his claim with the Tribunal.

81. On 13 January 2021, at a preliminary hearing before Employment Judge Moore, the Claimant indicated for the first time that he wished to bring a claim for a failure on the part of the Respondent to make reasonable adjustments.

82. The reasonable adjustment the Claimant asserts the Respondent could have made was to install a portacabin on site to enable him to work on site.

83. At the time of the first consultation on 8 June 2020, the Claimant was receiving support from a solicitor although the Claimant then said in his evidence that he did not really talk to the solicitor in detail about his claim and had no advice.

84. The Claimant accepted that, at or about the time of the fourth consultation, he had called a union representative but did not find him to be of much assistance and stopped paying his contribution. Finally, the Claimant stated that a friend of his who is an Employment Judge had provided him with some guidance before he issued proceedings and that he had explained to her what was happening.

85. Mr Thomas and Mr Murray confirmed that, at the time of the imposed lockdown in March 2020, they followed the requirements of the company in the EPP which in turn was based on government guidance and instruction. They based their decisions on what was known at that time, namely that those with underlying health conditions should self-isolate at home. In any event, the scarcity of portacabins meant that there was a lead in time of some months which would have rendered the suggestion academic.

The Law

86. The legal principles applied were not in dispute. There are a number of concepts in the legislative framework that have been considered and applied by the Tribunal and also those to which we have been taken, primarily by Ms Gardiner, and which have been applied by the Tribunal.

87. **Unfair dismissal**

88. The law relating to unfair dismissal is set out in section 98 of ERA.

> "(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;"

89. The definition of redundancy is set out in s.139 Employment Rights Act 1996 ("ERA"):

(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.*

90. The leading case on establishing whether an employee has been dismissed by reason of redundancy is *Safeway Stores plc v Burrell* [1997] IRLR 200 (EAT) (approved by the House of Lords in *Murray and another v Foyle Meats Ltd (Northern Ireland)* [1999] IRLR 562). The EAT formulated a 3-stage test for applying s.139 ERA:

a. Was the employee dismissed? If so,

b. Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one of the other economic states of affairs in s.139(1) exist)? If so,

c. Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2?

91. If the answer at all 3 stages is “yes”, there will be a redundancy dismissal.

92. When considering a “diminished requirements” redundancy, the starting point is the requirements of the business. This is a commercial judgment on the part of those running the business about the priorities of the business and about which kind of work (or employee) has become surplus to requirements. The law does not interfere with an employer’s freedom to make such business decisions, and an employer is not required to justify its reason for making the redundancies. Provided that a tribunal is satisfied that redundancy is the genuine reason for a dismissal, it will not look behind the facts to see how the redundancy situation arose: *Moon v Homeworthy Furniture* [1976] IRLR 298.

93. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

“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) 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 shall be determined in accordance with equity and the substantial merits of the case.”

94. Procedural fairness is an integral part of the reasonableness test in section 98(4) of ERA. In redundancy dismissals “the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation” (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL).

95. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another reasonable employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "lay within the range of conduct which a reasonable employer could have adopted" (Williams v Compair Maxam Ltd [1982] ICR 156).

96. It is generally for the employer to decide on an appropriate pool for selection. If the employer genuinely applied its mind to the question of setting an appropriate pool, the tribunal should be slow to interfere with the employer's choice of the pool. However, the tribunal should still examine the question whether the choice of the pool was within the range of reasonable responses available to a reasonable employer in the circumstances. (Capita Hartshead v Byard [2012] IRLR 814)

97. A fair consultation would normally require the employer to give the employee "a fair and proper opportunity to understand fully the matters about which [he/she] is being consulted, and to express [his/her] views on those subjects, with the consultor thereafter considering those views properly and genuinely." (per Glidwell LJ in R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and others [1994] IRLR 72) cited with approval and as applicable to individual consultation by EAT in Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT "when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests". A fair consultation process must give the employee an opportunity to contest his selection for redundancy (John Brown Engineering Ltd v Brown and ors 1997 IRLR 90, EAT).

98. **Direct discrimination – s.13 EqA**

99. Disability is a protected characteristic for the purposes of the Equality Act 2010 ("EqA").

100. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

> "It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".

101. The provisions are designed to combat discrimination. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

102. Direct discrimination is defined by Section 13 EQA:

> **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.

103. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord

Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

104. Since exact comparators within the meaning of section 23 EQA are rare, it may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

105. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516.

106. Statutory provision is now made by Section 136 EQA:

> 136 Burden of proof
>
> (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.
>
> But subsection (2) does not apply if A shows that A did not contravene the provision.

107. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must established on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatsoever because of the protected characteristic.

108. It was also said by Mummery LJ in Madarassy:

> "The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case."

109. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: **Nagarajan v London Regional Transport** [1999] IRLR 572

110. The tribunal's focus "must at all times be the question whether or not they can properly and fairly infer... discrimination.": **Laing v Manchester City Council**, EAT at paragraph 75.

111. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must "see both the wood and the trees": **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.

112. **Indirect discrimination – s.19 EqA**

113. (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

114. What amounts to "*disadvantage*" is not purely objective. Regard should be had to what is reasonably seen as unfavourable by the person affected: *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65. An unjustified sense of grievance does not fit the definition.

115. In respect of group disadvantage, s.6(3) EqA clarifies that the "*particular disadvantage*" resulting from the PCP must be suffered by those who share C's particular disability.

116. The burden is on R to prove justification, and it is for the tribunal to undertake a "*fair and detailed analysis of the working practices and business considerations involved*" so as to reach its own decision as to whether the treatment was justified. Tribunals should not allow a Respondent a "*margin of discretion*" or apply a "*band of reasonable responses*" test similar to that found in unfair dismissal cases: *Hardys & Hansons plc v Lax* [2005] EWCA Civ 846. However, there is not a general duty on a Respondent to put forward evidence that it had considered less discriminatory or less onerous alternatives to the PCP, or a duty on the tribunal to consider any alternatives to the PCP even if the employer did not do so: *Magoulas v Queen Mary University of London* UKEAT/0244/15.

117. **Discrimination arising from disability – s.15 EqA**

118. (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.

119. Discrimination contrary to s.15 EqA occurs where the Respondent treats the Claimant unfavourably because of something arising in consequence of the Claimant's disability, and the Respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. In accordance with guidance from Langstaff J in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UEAT/0397/14, there are two distinct steps to the test:

    a. did the Claimant's disability cause, have the consequence of, or result in "something"?

    b. did the Respondent treat the Claimant unfavourably because of that "something"?

120. The principles in relation to unfavourable treatment and justification in claims under section 19 EqA apply to claims under section 15.

121. **Failure to make reasonable adjustments – ss.20 & 21 EqA**

122. Section 20 EqA imposes a duty on employers to make reasonable adjustments for employees (and others) in circumstances where a disabled person is placed at a substantial disadvantage by (amongst other things) a PCP.

123. Whether adjustments are reasonable is a fact-sensitive question. The test of reasonableness is objective and to be determined by the tribunal: *Smith v Churchill's Stairlifts plc* [2006] IRLR 41.

124. There is no objective justification defence available under this head of claim. The proposed adjustments were either reasonable or they were not. The EHRC Code states at para. 6.28 that the following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

    a. whether taking any particular steps would be effective in preventing the substantial disadvantage;

    b. the practicability of the step;

    c. the financial and other costs of making the adjustment and the extent of any disruption caused;

    d. the extent of the employer's financial or other resources;

    e. the availability to the employer of financial or other assistance to help make the adjustment; and

    f. the type and size of the employer.

125. The Code goes on at para. 6.29 to state that "*ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case*".

126. **Jurisdiction – s.123(1) EqA**

127. The time limit in which complaints of discrimination should be brought is set out in Section 123 of the EqA:

    "(1) ... proceedings on a complaint ... may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

Analysis and Conclusions

128. Addressing each issue in turn, the Tribunal has carried out an analysis of the facts and, applying the legal framework, has reached the following conclusions.

129. **Unfair dismissal**

1.1 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy. The Claimant maintains the redundancy was a sham and his role continues to exist and be covered by an agency worker.

1.2 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

1.2.1. The Respondent adequately warned and consulted the Claimant;

1.2.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

1.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

1.2.4 Dismissal was within the range of reasonable responses.

130. The Tribunal relied on its findings of fact and concludes that the Claimant has failed to establish that the redundancy was a sham and also that his role continued to exist and was covered by an agency worker.

131. It was not in dispute that the Claimant had been dismissed. Whilst the Claimant had maintained that he had been targeted for redundancy and that it was a sham, the Tribunal had accepted the evidence of Mr Thomas, Mr Murray and Mr McGregor that the flow of work from DCWW at the end of AMP6 and as forecast in AMP7 was substantially decreased. This is supported by the reduction in revenue from £58 million to £42 million.

132. The Claimant relied on a failure on the part of the Respondent to produce any written confirmation of the reduction in work from DCWW. Nevertheless, the Tribunal was entirely satisfied, having heard the evidence of Mr Thomas, Mr Murray and Mr McGregor (who in particular, occupied a very senior position with the organisation) that the programme of works from DCWW had decreased significantly. Further, the Tribunal had not found the Claimant's evidence of ongoing work to be at all persuasive, let alone that any such ongoing work rendered the redundancy a sham.

133. The Tribunal also took into consideration that it should not impose its judgment on the Respondent's entitlement to make business decisions that lead it to conclude that there is a requirement for making redundancies, however difficult that may be for those who are at risk of redundancy. The Tribunal was satisfied that the requirements of the Respondent for employees to carry out work of a particular kind, namely that of a site manager, had diminished and that the Claimant's dismissal was caused wholly by that state of affairs.

134. Having concluded that the Claimant's dismissal was by reason of redundancy, the Tribunal had gone on to consider whether the Respondent acted reasonably in treating that as a sufficient reason to dismiss the Claimant.

135. The Tribunal was satisfied that the Respondent acted reasonably in treating the redundancy as a sufficient reason for dismissing the Claimant.

136. The Respondent had warned the Site Managers about the proposed redundancy. It had consulted with the Claimant on four occasions. On the basis of the background circumstances, the pool being made up of the four site managers was reasonable.

137. Prior to the first consultation, the Respondent had written to the Claimant explaining the process that would be followed, the reasons for the consultation, and enclosed a document setting out the selection process.

138. At the first and second consultation, the Claimant was able to comment on the process to be followed, the selection criteria, and the basis on which those within the pool which had been identified, namely the Site Managers, would be scored.

139. Following the scoring process, the Claimant was sent the details of the scoring matrix and, following discussion, the scores were revised, having been challenged by the Claimant. Taking account of all the circumstances, the Tribunal was satisfied that the persons designated to score the site managers were appropriate and represented the fairest method of doing so.

140. There was a further and fourth consultation and thereafter an appeal process that the Tribunal considered to be fair, with the Claimant being given every opportunity to put his case.

141. The Respondent did what the Tribunal considered to be reasonable when assessing whether there were any alternative employment positions available which may have suited the Claimant. It directed the Claimant to its website for alternative vacancies and also distributed his CV within the organisation.

142. Finally, the Claimant was given every opportunity to address any other matters or concerns that he may have had. In particular, he was able to put to the Respondent his belief that he was being targeted for redundancy on the basis of his absence from work due to his self-isolation based on his underlying health conditions. However, the Tribunal was satisfied that this played no part in the Respondent's decision. The Tribunal had

also found that there was no "collusion" between those who carried out the scoring exercise with the aim of manipulating the process to ensure the selection of the Claimant.

143. The Tribunal also noted that, in December 2020, due to the decreased work flows from DCWW, a second site manager had been made redundant.

144. The Tribunal was satisfied that the selection process that was followed by the Respondent was a fair one and that their decision to dismiss the Claimant on the grounds of redundancy fell within the band of reasonable responses that a reasonable employer could have made.

145. Accordingly, the Claimant's claim of unfair dismissal is dismissed.

3 Disability

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

3.1.1 Did he have a physical or mental impairment: Diabetes?

3.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

3.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

3.1.5.2 if not, were they likely to recur?

146. The Respondent accepted that the Claimant had a disability as defined in section 6 of the EqA. The Claimant maintained that the Respondent was aware of the fact that he suffered from type 2 diabetes at some time before March 2020. However, and in any event, it was conceded by the Respondent that it was aware of his underlying health conditions namely type 2 diabetes, high BMI and high blood pressure, from March 2020 onwards.

4 Direct disability discrimination (Equality Act 2010 section 13)

4.1 Did the Respondent do the following things:

4.1.1 Select the Claimant for redundancy

4.1.2 Dismiss the Claimant

4.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The Claimant says he was treated worse than the other site managers.

4.3 If so, was it because of disability?

147. Whilst the Claimant had maintained that he had been targeted for redundancy, the Tribunal had found that the Respondent had selected the Claimant for redundancy and had then dismissed the Claimant for that reason. The Tribunal had found that the process followed by the Respondent had been a fair one.

148. The Tribunal concluded, that on the facts, there was no basis at all to infer that the Claimant had been treated less favourably than it treated the other Site Managers within the selection pool who were not in materially different circumstances, let alone that there had been any less favourable treatment because of the Claimant's disability.

149. The Tribunal repeated its findings in respect of the Claimant's claim for unfair dismissal. The Tribunal was satisfied that the Respondent's decision to reduce the number of Site Managers was based on proper commercial considerations and evidence. The process by which the Claimant was then selected for redundancy was fair. The fact that the Claimant had to self-isolate as a result of his disability played no part in the reasons for the Respondent treating the Claimant in this way. The Respondent's reason for treating the Claimant in this way was linked entirely and directly to the downturn in work and the selection process which was followed, leading to the decision that, of the four Site Managers, the correct decision was for the Claimant to be selected for redundancy.

150. The Tribunal concluded that the Respondent's decision was not discriminatory.

151. For these reasons, the Claimant's claim of direct disability discrimination is dismissed.

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1 Did the Respondent treat the Claimant unfavourably by:

5.1.1 Requiring / compelling the Claimant to remain at home under the Emergency People Policy thereby prevent him from working in his normal role (including latterly by furloughing the Claimant)?

5.1.2 Select the Claimant for redundancy?

5.2 Did the following things arise in consequence of the Claimant's disability:

5.2.1 A requirement to self-isolate under the Respondent's Policy?

5.3 Was the unfavourable treatment because of any of those things? Did the Respondent dismiss the Claimant because of the enforced absence?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent will set this out in their amended response.

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

152. It was not in dispute that the Respondent required the Claimant to self-isolate at home as a result of his disability. Indeed, the Claimant accepted this was the case, and, whilst reluctant for this to happen, he accepted that this was in accordance with company policy which, in turn, was based on guidance and requirements stipulated by the Government due the lockdown which took effect on 23 March 2020.

153. The Tribunal found that the Respondent's selection of the Claimant for redundancy and the self-isolation were separate and distinct issues. The Tribunal was entirely satisfied that the Respondent did not take into consideration the Claimant's enforced absence when reaching its decision to dismiss the Claimant on the grounds of redundancy.

154. Furthermore, the requirement for the Claimant to self-isolate under the Respondent's policy was justified in that it was in order to ensure that the Respondent met its responsibilities to ensure the health, safety and welfare of its employees. It was not only the Claimant who was required to self-isolate; there were a number of other employees who were required to do so, to include Mr McGregor, who was required to self-isolate for similar reasons to that of the Claimant.

155. For those reasons, the Claimant's claim under section 15 of the EqA is dismissed.

6. Indirect discrimination (Equality Act 2010 section 19)

6.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

6.1.1 "PCP 1" - A requirement for employees with certain health conditions to self-isolate (under the Emergency People Policy) and;

6.1.2 "PCP 2" - A requirement for Site Managers to physically work on site.

6.2 Did the Respondent apply the PCPs to the Claimant?

6.3 Did the Respondent apply the PCPs to persons with whom the Claimant does not share the characteristic, or would it have done so?

6.4 Did the PCP put persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic, in that

6.5 (PCP1) - It prevented the Claimant from attending work and being useful to the company and resulted in his selection from redundancy

6.6 (PCP2) - it prevented the Claimant from being useful to the Company and resulted in his selection for redundancy.

6.7 Did the PCP put the Claimant at that disadvantage?

6.8 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent will set this out in their amended response.

6.9 The Tribunal will decide in particular:

6.9.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

6.9.2 could something less discriminatory have been done instead;

6.9.3 how should-the needs of the Claimant and the Respondent be balanced?

156. It was not challenged, and the Tribunal had found, that PCP 1 was applied by the Respondent to the Claimant and to other employees, to include Mr McGregor.

157. The requirements of the EPP which, in turn, was based on guidance and instruction from the Government, did not place those with whom the Claimant shared the characteristic, namely his disability, at a particular disadvantage when compared with persons with whom the Claimant did not share the characteristic. It treated the Claimant in exactly the same way by preventing those people with underlying health conditions, to include diabetes, from attending work. This PCP was also applied to anyone who had an underlying health condition as specified by WHO. However, the Tribunal was entirely satisfied that this could not amount in any way to unfavourable treatment in that it was to ensure the health, safety and welfare of its workforce based on the information known at that time. In fairness to the Claimant, this was conceded when he gave his evidence.

158. The Tribunal accepted the submission of the Respondent that, had the Respondent insisted on the Claimant continuing to attend work, this would have put him at substantial risk, and therefore discriminatory. It would have placed him at more substantial risk of serious ill health or death compared to those who did not suffer from underlying health conditions such as diabetes.

159. With regard to PCP1, the Tribunal was satisfied that this was not discriminatory as the implementation of the EPP leading to the Claimant self-isolating at home had not resulted in his selection for redundancy.

160. For the same reason, in respect of PCP2, the fact that the Claimant accepted that there was a requirement for Site Managers to have to be on site in order to fulfil the role of Site Manager, and that he was unable to do so due to his disability, did not result in his selection for redundancy.

161. PCP1 was a proportionate means of achieving the legitimate aim of keeping members of the workforce, to include the Claimant, safe from harm.

162. PCP2, namely the requirement for the Claimant, as a Site Manager, to be physically on site in order to undertake his work, was also a proportionate means of achieving the legitimate aim of a Site Manager fulfilling the role.

163. The Tribunal was satisfied that the PCP's were appropriate and a reasonably necessary way to achieve those aims and that, with regard to PCP1, on the basis of the level of knowledge and awareness of the circumstances leading to the pandemic known at that time, there was nothing less discriminatory which could have been done instead.

164. For these reasons, the Claimant's claim of indirect discrimination under section 19 EqA is dismissed.

7. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

7.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

7.2.1 "PCP 1" - A requirement for employees with certain health conditions to self-isolate (under the Emergency People Policy) and;

7.2.2 "PCP 2" - A requirement for Site Managers to physically work on site.

7.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that (PCP1) - It prevented the Claimant from attending work and being useful to the company and resulted in his selection from redundancy and (PCP2) — it prevented the Claimant from being useful to the Company and resulted in his selection for redundancy?

7.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

7.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

7.5.1 Worked from home

7.5.2 Been permitted to attend work by making his place of work Covid secure.

7.6 Was it reasonable for the Respondent to have to take those steps [and when]?

7.7 Did the Respondent fail to take those steps?

165. Whilst not identified in the agreed list of issues, it was accepted that, first, the Tribunal had to consider whether the Claimant's claim had been brought in time, and, if not, whether it would be just and equitable to extend time.

166. It was conceded by the Claimant that this claim was brought out of time. Indeed, he did not dispute that, based on his claim that a portacabin could have been made available to enable him to work on site from 23 March 2020, the time for pursuing such a claim would have expired on 22 June 2020. However, it was only raised for the first time at the preliminary hearing almost seven months later on 13 January 2021.

167. The Tribunal took into consideration the fact that the Claimant had consulted with a solicitor prior to the first consultation meeting on 8 June 2020, discussed his claim with a trade union representative in or about early July 2020 and then spoke with a friend who is an Employment Judge before he issued his claim in October 2020.

168. Whilst the Tribunal at the preliminary hearing on 12 May 2021 had allowed the Claimant's application for an amendment to include such a claim, it was stated expressly that the issue of jurisdiction would be left to this Tribunal to determine.

169. In reaching its decision, the Tribunal took into consideration the guidance of Underhill LJ in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 and also the fact that the exercise of the Tribunal's discretion should be seen as the exception rather than the rule. Whilst the Claimant had originally only indicated a claim of unfair dismissal, the claims for direct and indirect discrimination could be drawn from the content of the Claimant's claim form and it was for this reason that the Respondent did not oppose the Claimant's application to amend his claim in that way.

170. However, the same could not be said for his claim for reasonable adjustments. There is no mention of what he considered to be a reasonable adjustment, namely the provision of a portacabin, in his complaint form issued in October 2020 and, as stated, the first mention of it was at the telephone preliminary hearing in January of 2021.

171. There appeared to be no reason why the Claimant had delayed for so long in raising this head of claim and there was no reason why this claim could not have been intimated to the Respondent at a much earlier stage. There was also no suggestion that the Claimant's failure to inform the Respondent of what he considered to be a reasonable adjustment was as a result of any lack of co-operation on the part of the Respondent. Further, if the Claimant believed that the provision of a portacabin amounted to a

reasonable adjustment, this could have occurred to him at a much earlier stage than January 2021 and there is no evidence to indicate when he thought of the portacabin for the first time.

172. For those reasons, the Tribunal has concluded that it would not be just and equitable to extend time and therefore the Tribunal has no jurisdiction to consider the Claimant's claim under section 20 EqA.

173. Even if it had concluded that it would be just and equitable to extend time, the Tribunal did not consider that the claim, on its merits, would have succeeded.

174. The PCPs were accepted by the Respondent, although the Respondent did not accept, and the Tribunal had found, that either PCP had resulted in the Claimant's selection for redundancy.

175. The Tribunal determined that it must be right to assess the reasonableness of the suggested adjustments as at the time of the country going into lockdown as a result of the pandemic on 23 March 2020. It was the clear directive and guidance of the Government that those with underlying health conditions had to self-isolate at home. The Respondent was entitled to conclude that, in the interests of safety, it must follow the guidance. The Tribunal was entirely satisfied that it was appropriate for the Respondent to introduce its policy for that to happen and this was not restricted to the Claimant. As has been stated, it applied to a number of other employees, including Mr McGregor.

176. It had been conceded by the Claimant that, for him to fulfil his role as a Site Manager satisfactorily, he needed to have been on site. He also accepted that an important part of his role was interacting with others. The Claimant had not challenged the Respondent's evidence that, if working from home, the role of Site Manager would only take up one to two days per week.

177. It was simply unreasonable, taking account of the state of knowledge of everyone at that time, for the Respondent to consider any measure other than those in the Claimant's situation having to self-isolate at home, rather than the suggestion of him sitting alone in a portacabin on site. It was also not consistent with the part of the Claimant's role that involved interaction with others, such as contractors, on site. Indeed, even had this been a proposition, the lead in time for the delivery of such an item was understood to be a number of months and therefore it was again neither reasonable nor realistic and the redundancy process would have been concluded by the time the Respondent would have been able to source a portacabin for that site.

Employment Judge M R Havard
Dated: 27 July 2021

JUDGMENT SENT TO THE PARTIES ON 28 July 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche