EMPLOYMENT TRIBUNALS

Claimant: Miss H Kinsey

Respondent: Scrivens Ltd

Heard at: Leeds (by CVP video) **On:** 9-10 November 2021

Before: Employment Judge Parkin
Mrs J Blesic
Mr D Bright

Representation
Claimant: Both in person
Respondent: Mrs P Whelan, Director of HR

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1) The claimant is a disabled person but she was not treated unfavourably because of something arising in consequence of her disability. Her disability discrimination claim is dismissed;

2) The claimant was fairly dismissed. Her unfair dismissal claim is dismissed; and

3) By consent, the respondent is ordered to pay the claimant the sum of £523.30 gross as compensation for accrued annual leave, pursuant to regulation 14 of the Working Time Regulations 1998.

REASONS

1. The claim and response

By her claim form presented on 6 October 2020, the claimant claimed unfair dismissal, age and disability discrimination, notice and holiday pay in respect of the termination of her employment as a Sales Advisor on 29 July 2020. Relying upon disability impairments of osteoporosis, fibromyalgia, hypertension, depression and anxiety, she contended she had been unfairly dismissed when made redundant by the respondent after she had recently returned from

lockdown, in circumstances where her role still existed and her branch manager had told her that she needed someone who could work longer than the part-time hours she worked.

2. The respondent admitted dismissing the claimant for redundancy, contending it had restructured its organisation in central Leeds following lockdown with the effect that employees at all three branches: Beeston, where the claimant worked; Hunslet and Headingley, which was to be closed, were at risk of redundancy. The claimant was unsuccessful in her applications for the Beeston manager and sales advisor roles because other applicants performed better during interview and were offered the roles; it had been prepared to offer roles part-time. The respondent admitted that the claimant was disabled by reason of fibromyalgia, but not any other impairments and it denied any discrimination, contending that her health and absences did not form any part of the decision to offer the roles to others; accordingly, she was not disadvantaged during the interview process.

3. The issues

At a case management hearing before Employment Judge Little on 15 December 2020, the claimant clarified her claims and withdrew her age discrimination claim. She then relied upon the disability impairments of fibromyalgia and depression and anxiety. Whilst acknowledging she was paid in lieu of notice, she claimed accrued holiday pay or compensation.

4. For her disability discrimination claim, while the respondent admitted the claimant's disability of fibromyalgia, it was still for her to prove that she was also disabled by her depression and anxiety. However, during the final hearing, the respondent conceded that the claimant was disabled by reason of the mental impairment of anxiety and stress also. EJ Little identified the disability discrimination claim as one of unfavourable treatment relating to her disability, contrary to section 15 of the Equality Act 2010 in that the respondent took into account her sickness absences resulting from disability and her inability to work full-time again linked to her disability in its selection of her for redundancy i.e. its non-selection of her for the continuing role at Beeston.

5. For the unfair dismissal claim, it was for the respondent to prove its potentially fair reason for dismissal relating to the claimant's redundancy; if it did so, having regard to section 98(4) Employment Rights Act 1996, did it act reasonably in treating that as a sufficient reason for dismissing her having regard to its size and administrative resources and in accordance with equity and the substantial merits of the case. That included consideration of the respondent's warning and consultation, selection criteria and process of determining upon redundancies and appeal process.

6. The claimant had not cashed the cheque the respondent sent her in resolution of her holiday pay (compensation for accrued leave) claim earlier in the year. However, the respondent was content for the Tribunal to declare the claimant's correct entitlement for the final holiday year, calendar year 2020, and confirmed it would then make payment to her. In the event, the Judge gave the parties a provisional determination of the annual leave days accrued by the claimant in the year up to termination of employment and they were then able to

agree the terms of an order for payment by the respondent by consent. Thus, only the disability discrimination and unfair dismissal claims remained to be determined.

7. The claimant had provided a Schedule of Loss in accordance with EJ Little's Order; she made no claim for a basic award (having received a redundancy payment) or for loss of earnings in circumstances where she had received additional benefits since her dismissal but did claim compensation for injury to feelings if the Tribunal found unlawful discrimination.

8. The final hearing

The hearing was by video. The respondent provided the bundle of documents (1-156) and an additional list of job vacancies for Hunslet and Beeston. Since initially there was still a live issue on the mental health impairment as a disability, it was necessary to require the claimant to provide photocopies of sick notes in her possession dating back to 2016 showing the extent of and reasons for various sickness absences during the period to 2020. She did so and the respondent took instructions and thereafter did not challenge the claimant's condition of anxiety and stress amounting to a disability. The claimant gave evidence on her own behalf and the respondent called its Regional Managers, Gareth Parry and Michael Savage. The progress of the hearing was interrupted by the additional disclosure of documents and numerous internet reception difficulties. In the event, the Tribunal reserved its judgment on liability following closing submissions on the second day, having provisionally listed a remedy hearing, and was able to conclude its deliberations that day.

9. The facts

From the oral and documentary evidence, the Tribunal made the following main findings of fact:

9.1 The respondent is a national chain of optical and hearing centres with nearly 1000 employees. Based in Birmingham, it has an HR resource of the Director at its head, with some 4 HR officers/advisors.

9.2 The claimant commenced employment as a sales advisor originally at the respondent's Hunslet branch in December 2015, moving to the Beeston branch after about a year.

9.3 She had significant absence for various sickness reasons in 2016 and 2017, much less in 2018 but again extensive absence in 2019. These included, in 2017, absence of three to four months with anxiety and depression and, in Spring 2019, absence for two weeks with anxiety and stress, together with investigation of rheumatological problems. From late July to early October 2019, she was continuously unfit for work variously with fatigue, muscular aches and fibromyalgia and also an ear infection.

9.4 The claimant had complained about bullying by colleagues and management in or about May 2017 to senior management and matters were resolved initially through intervention and mediation.

9.5 In May/June 2019 there was an agreed reduction and variation of working hours to 9 days per four week period following the claimant's flexible working application. Her application for reduced hours resulted from a combination of her health concerns and her domestic caring responsibilities for her two children.

9.6 From late January to mid-February 2020 the claimant was also away sick with fibromyalgia, returning briefly to work in February and March 2020 before lockdown, when she was placed on furlough.

9.7 Beeston was a smaller branch. Despite the fact that she worked mainly alongside only 2 others, the Branch Manager and another Sales Advisor (together with an Optometrist and an Audiologist in the branch), the respondent managed to deal with her absences and never sought to embark upon any capability or disciplinary procedure.

9.8 During lockdown the respondent effectively closed its branch operations for a few months and then reviewed them ahead of re-opening from late May onwards and identified branches for possible closure. These included Headingley, the third more central Leeds branch alongside Hunslet and Beeston.

9.9 Gareth Parry, the new Regional Manager, proposed the closure of Headingley and some restructure of the other two branches including covering Headingley customers. His proposals were approved by the Operations Director, Adrian Ellis, and determined upon at senior managerial level, above both the branches and the Area Manager, Natalie Eaton.

9.10 It was anticipated that the roles of Assistant Manager and Optical Dispenser at Hunslet, Senior Sales Advisor at Beeston and Sales Advisor at Headingley would all be lost, with the larger Hunslet branch and smaller Beeston branch operating more as a cluster of the 2 branches afterwards. All managers and sales advisers in the three branches were notified that they were "at risk" of redundancy and that they could apply for as many roles as they wish to be considered for and would be interviewed. The posts remaining would be, at Beeston: Branch Manager (no longer also covering Headingley) and Sales Advisor, with the Optometrist and Audiologist, and at Hunslet: Branch Manager, Hearing Aid Dispenser, Senior Sales Advisor, two Sales Advisors with an Optometrist.

9.11 Mr Parry was a highly experienced manager with experience of redundancy selection exercises. His decision, approved by Mr Ellis, was that this procedure whereby employees of all three branches applied for the ongoing positions was likely to be more effective than a traditional redundancy selection matrix, especially in circumstances where the sales advisor role was multi-faceted covering interaction with customers by phone and in person including sales, optical and hearing pre-screening and administration in particular NHS paperwork. Mr. Parry confirmed that the term "Sales Advisor" did not reflect the breadth of the role, which could be carried out differently in different branches.

9.12 On 15 July 2020, Natalie Eaton, the Area Manager held the first individual consultation meeting with the claimant (97-99) and others. The template for the meeting began: “Manager to make the announcement and then take the employee through each of the sections below, and record their answers” and the sections were: “Reasons for redundancy situation which has been announced”, “The consultation process... is expected to last for 10 working days and there are at least three scheduled meetings with the affected employees”, “Selection - everyone in the branch is affected as the proposal is to shut the branch”, “Redeployment opportunities” and “Assistance and support”.

9.13 By letter dated 16 July 2020, the redundancy situation and opportunity to apply for the Beeston and Hunslet positions were confirmed in writing, with applications to be made by 10am on 17 July (100-1). All employees received a copy of vacancy list, showing the posts they could apply for, by this short timescale.

9.14 The claimant chose to apply both for the Branch Manager on the sales advisor posts at Beeston, but not for any roles at Hunslet because she foresaw personality difficulties with employees she expected to be based at Hunslet.

9.15 On 22 July 2020, Natalie Eaton held the second consultation meeting with the claimant, again working to the same template (102-7). The claimant confirmed that she had looked at the wider redeployment opportunities but that other vacancies (such as at Rotherham and Sheffield) were too far for her to travel to. she asked about the questions to be put and scoring at the interview and Ms Eaton replied that set questions would be asked; she confirmed that the notice period to be given to the claimant would be the standard four weeks.

9.16 The set questions for each applicant covered how they saw their role changing as the business recovered from lockdown and what obstacles they might face, whether they needed any direction or future support in particular areas, how they would encourage apprehensive customers to attend, how to support the manager to deliver the branch budget, what obstacles there would be supporting the manager, whether they preferred dealing with people or administration, the most important part of a service advisor’s role with an example of them diffusing a situation with a forceful customer, their flexibility to support the business, challenges over the next six months and three key things the service advisor could do to ensure a customer’s experience was positive. A further standard question was: “The roles… are based on the future needs of the business but with the benefit of access to your previous work history I can see that you have had some absence issues over the last 12 months. How do you plan to deal with this moving forwards?”.

9.17 There were additional questions for applicants for the Manager positions relating to business growth and obstacles to it, their personal qualities for management, ways of influencing a team to deliver a shared goal and ensuring the team did things the way they needed with examples

of skills they had used to get the results needed and their three key areas to support the branch to develop the business.

9.18 On 23 July Natalie Eaton interviewed the claimant (104-7) and others, noting each of their answers on her laptop as the interview progressed. She then provided her contemporaneous notes to Mr Parry. He had reviewed briefly individual employees' records in terms of absence, productivity and customer interaction, mainly to ensure that all service advisors were performing a full dispensing service and interacting with customers. Whilst the ultimate decision on which employees to appoint to the ongoing posts was that of Mr Parry, he discussed the interviews and outcomes and agreed them with Ms Eaton.

9.19 At about the time of her interview, the claimant was contacted by her manager KD who told her that the branch was looking for someone working longer hours than she was. Similarly, the current Senior Sales Advisor CC told her the same thing.

9.20 For the Beeston Branch Manager role, four had applied including the claimant and KD, the existing manager, who both applied only for Beeston. As between ND and the claimant, Mr Parry felt KD gave stronger replies especially about key areas for developing the business: optics, contact lenses and hearing, and would be able to hit the ground running upon branch re-opening without the need for the level of training and support the claimant spoke about.

9.21 For the Beeston Sales Advisor role, five applied including the claimant and CC, then the Senior Sales Advisor at Beeston; both of these applied only for Beeston. From their records, Mr Parry saw both were experienced at the full role of service advisor including dispensing and face-to face interaction with customers. He considered CC demonstrated enthusiasm and a drive to improve in her role and make the branch successful (111-3) more so than the claimant who did show that she was currently fully capable of fulfilling the role.

9.22 He shared his personal views about the best applicants for the two Beeston roles and the Hunslet roles with Ms Eaton, who agreed with him. No account was taken of sickness absence records nor of whether the applicant wished to work part-time. Mr Parry took the view that the cluster of Hunslet and Beeston after restructure meant that absences and shortage of working hours could be resolved across the two branches. KD was the successful candidate for the Beeston branch manager post and CC for the Beeston for the Sales Advisor post.

9.23 KD (and still more so CC) had no part in organising the redundancy or appointment process and no input in the decision-making as to which employees were selected for the ongoing jobs. Mr Parry was new to his role and had only met KD once; the Tribunal accepted his evidence that he would not have consulted or permitted input from a branch manager herself involved in applying for appointment. Whilst Natalie Eaton had been Area Manager for two to three years visiting branches on about a fortnightly basis, she also had regard only to the interview replies; hers

was the subordinate role, following Mr Parry's lead and agreeing in each case.

9.24 On 24 July, Ms Eaton wrote notifying a third consultation meeting following the interview, to be held on 29 July with Mr parry present (129).

9.25 On 29 July 2020, the respondent held the third consultation meeting with the claimant. On this occasion, Mr Parry chaired the meeting and was not working to a template, with Ms Eaton also in attendance and taking notes (130-132). He explained that the claimant had been unsuccessful in her application for the two posts and was to be made redundant. The claimant questioned why, if Headingley was closed, those employees were not made redundant. She accepted she had seen the wider vacancies on the company website and did not want to apply for any of them. Mr. Perry concluded the meeting by giving notice of dismissal on grounds of redundancy, with effect from that day with the claimant to be paid in lieu of notice. He confirmed her right of appeal and the claimant made clear that she wished to appeal and had had a grievance in the past with her Branch Manager KD.

9.26 Mr Parry did not dispute the accuracy of the claimant's transcript of her own recording of the meeting (150-155), made without the knowledge of the respondent. In particular, when she asked why she was unsuccessful in her applications, he replied: "Well we've looked at primarily the interview that's the main factor we've used and we've taken a sort of cursory look at previous employment as well... Well we've looked at performance well performance primarily, both in sort of sales terms and in terms of interaction... interaction with customers and performance…". The claimant asked: "Right and what's wrong with my interaction with customers?" Mr Parry was not prepared to discuss any deficit in her interaction with customers with her: "We we I'm not, I'm not going to talk to you today about that today because erm we've made a decision about who's got the roles so we're not going to get into detail about that today we've made a decision about roles and staff." The Tribunal did not find this reply inconsistent with his evidence that the almost exclusive basis for decision-making was the individuals' responses in interview, with employee records considered only to check that sales advisors were fulfilling the full role with customers.

9.27 The claimant expressly asked whether she had not been successful because of her reduced hours which worked well for her because of her disabilities, saying she had been told by her manager KD and also CC that the branch wanted somebody who could do more hours. Mr Parry replied that this was not part of the decision-making process and specifically that KD and CC were not part of the decision-making; he said the respondent has accepted applications from people wanting to work part-time and full-time hours.

9.28 The claimant's dismissal was confirmed in writing by letter dated 31 July 2020 (133). Despite its dismissal with immediate effect, the respondent purported both to notify her she would be paid 4 weeks' pay in

lieu of notice and that she was required to use her accrued paid annual leave during her notice period.
9.29 Amongst others, the Headingley sales advisor was also made redundant after not succeeding at interview in being appointed at the remaining branches.

9.30 On 4 August 2020, the claimant sent her written appeal (134-5):

> "I am now appealing against the decision of the outcome of our meeting with myself common Natalie Eaton and Gary Perry at the Leeds Beeston branch on 29 July 2020 that I am dismissed on the grounds of redundancy on my performance and my interaction with the customers.
>
> I find this very disrespectful and upsetting as I have done this role for 4 1/2 years I feel the outcome of this procedure has not only been unfair, I also feel that I have been discriminated against regarding my ability to work and the hours I can not do on a weekly basis…
>
> I will also like to bring to your attention the attitude of Gary Perry who I have only met for the first time during my dismissal interview, I found him to be very rude, abrupt and when asked to go into more depth about a certain point in my meeting, I got the reply of I'm not going back to that question, I'm not repeating myself. I'm shocked to think that I'm no longer employed because my branch manager and sales adviser at the time I was furloughed both said on two separate phone calls out of work that they needed someone who could do more hours.

The claimant maintained she had been unfairly dismissed and discriminated against as disability and sex discrimination because she could not work the hours the respondent was asking for.

9.31 The claimant's appeal was held on 13 August 2020 by video call (143-5). The appeal manager was Mike Savage, Regional Manager, with Lisa Spencer taking notes. Mr Savage had previously been the Regional Manager before Mr Parry and knew the region and its branches and Ms Eaton well. He too was experienced in redundancy selection exercises and had conducted both traditional redundancy selection matrix scoring exercises and one exercise similar to this in Sheffield whereby employees from both the closing store and the remaining store applied for the ongoing posts. Mr Savage preferred the latter process including an interview and would have chosen the same method as Mr Parry in Leeds. However, he was not involved in the redundancy or appointment process until asked to hear the appeal against the claimant's redundancy.

9.32 The claimant contended it was unfair to put everyone at risk just because Headingley was closing and that it was being used as an opportunity to get her out because of her sickness absence. She had not applied for Hunslet posts due to friction with staff there and also referred to an incident with KD. She felt her time off must have counted against her

and raised her concern at CC being made Senior Sales Advisor in her absence. She said KD and CC had both told her they needed people who could do more hours. KD had telephoned and said the branch needed someone who could do more hours and cover holidays. She had a disability and her redundancy was unfair because she should not be included in the process; moreover sex discrimination because she had kids and could not work more hours because of her children.

9.33 After the appeal hearing, Mr Savage discussed the appeal and background with Mr Parry before concluding the appeal.

9.34 On 18 August 2020, Mr Savage wrote to the claimant rejecting her appeal (147-9). He stated that the decisions were primarily on the basis of the interviews rather than previous performance and customer interactions and that phone calls from KD and CC to the claimant were not part of the company's consultation process or decision and not relevant. He did not accept the claimant was correct in saying her previous role still existed, explaining that staff across all three stores had been at risk of redundancy and that those successful in interview were filling "new" roles. He therefore strongly maintained that she was not selected for redundancy, including the somewhat inconsistent statements:

> "... you were not selected for redundancy. The way the process worked meant that all jobs were placed at risk of redundancy pending the outcome of an interview process but you were confirmed as redundant because you were unsuccessful following the interview process."

Mr Savage wrote that the claimant's medical history, medical conditions and absence record played no part of any decisions during the interview process and she had not been discriminated against on grounds of disability. He said he felt the decision to place all employees across the three branches at risk of redundancy was reasonable and stated that whether the claimant could work full or part-time hours had been irrelevant to the interview process and decision.

10. The parties' submissions

The respondent made extensive submissions, comparing the responses the claimant gave in interview to those of CC. Mr Parry made the ultimate decision in conjunction with Natalie Eaton; KD, who was herself affected by the process, had no influence in the outcome. In the past the respondent had "absorbed" the claimant's absence and that of others with lengthy absence issues and absence was ignored for everyone in the process. There was no unfavourable treatment of the claimant in the interview process or the decision to dismiss her. As to unfair dismissal, Mr. Perry made a deliberate decision to seek applications for the ongoing jobs considering that a traditional redundancy selection process would be unfair because of the complexity of the sales advisor role. This ensured all were on an equal footing. There were three consultation meetings over a 14-day period. The cluster meant applications could be on a full-time or part-time basis and it was reasonable to ring-fence the openings to the three Leeds branches affected by restructure, still drawing attention to other vacancies further afield. It was the claimant's choice not to apply for Hunslet. Selection through interview

was a reasonable process and, although the respondent saw the claimant as a good performer in her role, she was unsuccessful; her dismissal was fair.

11. The claimant contended that she was treated very unfairly. She pointed to the question relating to absence in the last 12 months in the interview, querying why it was there if Mr Parry knew nothing about and ignored sickness absence. She suspected KD and CC did have input with Natalie Eaton over her interview, since KD told her they needed someone with more hours and each referred to the other as a team in their interviews. She pointed to the transcript of her recording of the third consultation meeting with Mr Parry, showing he had indeed spoken about her performance and interaction with customers. She felt it was clear her absences and part-time hours were taken into account.

12. The Law

Disability Discrimination: The statutory provisions relating to the unlawful disability discrimination claim are in the Equality Act, 2010, particularly at Sections 6, 15, 39 and 136.

On discrimination arising from disability, Section 15 sets out:-

"(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…"

Section 39 protects against acts of discrimination within the employment field, as follows:-

"…(2) An employer (A) must not discriminate against an employee of A's (B) -

> …(c) by dismissing B;
>
> (d) by subjecting B to any other detriment…".

In deciding a section 15 claim, the Tribunal must first decide whether the claimant has proved facts from which it could conclude or draw an adverse inference that the claimant was treated unfavourably because of "something arising in consequence of the claimant's disability". If so, the burden of proof shifts to the respondent. To defend the claim successfully, the respondent will then have to prove on the balance of probabilities that they did not act unlawfully, whether by showing that any unfavourable treatment was not because of something arising in consequence of the disability or by establishing the justification defence under s.15(1)(b). If the respondent fails to do so, the Tribunal must find that the act was unlawful. The respondent here did not seek to rely upon the justification defence.

13. Unfair Dismissal – redundancy.

By Section 98, Employment Rights Act 1996:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and
(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
…(c) is that the employee was redundant...

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

By Section 139:
(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-

(a)the fact that his employer has ceased or intends to cease—
(i)to carry on the business for the purposes of which the employee was employed by him, or
(ii)to carry on that business in the place where the employee was so employed, or
(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…

Accordingly, it is for the respondent to prove the claimant's redundancy was the reason or the principal reason for dismissal. As to section 98(4) there is no burden of proof either way on reasonableness and there will often be a range of reasonable responses which it is open to a reasonable employer to pursue. In particular, the Tribunal will consider the process of how the employee was selected, what the warning and consultation process was and what alternatives to redundancy or suitable alternative employment were considered. The Tribunal must bear in mind that it must not substitute its own decision for that of the respondent and the respondent was entitled to make its own business decisions which may not necessarily be wise or the best commercial decisions.

14. Conclusions

Applying the law to the facts, the Tribunal concluded that the claimant's disability impairments of fibromyalgia, anxiety and stress (as now conceded by the respondent) and the previous sickness absence resulting from them did not play

any part in her redundancy dismissal based upon her lack of success in being appointed to the ongoing positions of Branch Manager and Sales Advisor at Beeston. In Mr Parry's mind, supported by Natalie Eaton, there were better applicants: KD for the Branch Manager position and CC for the Sales Advisor position. He made that comparison substantially from his analysis of the responses given by each applicant to the standard questions put at interview. The Tribunal accepted that a standard question about sickness absences was put to all employees (whether or not they had a significant sickness absence record) in circumstances where many employees applying for the Hunslet and Beeston posts, and not only the claimant, had experienced such significant absence. However, the absence records were not taken into account in her case or in the case of other employees. Nor was the claimant's part-time working held against her, since employees were entitled to apply to work part-time or full-time and the respondent would have managed the hours across the two branches in the cluster. Accordingly, the claimant was not put at any disadvantage by the respondent by reason of or relating to her disability impairments and past inability to attend work regularly and consistently. In relation to the appointment and interview process, she was not unfavourably treated. Therefore, although of course she was dismissed by the respondent for redundancy, which was clearly unfavourable treatment, this did not amount to the respondent unlawfully discriminating against her contrary to section 15 of the 2010 Act.

15. Whilst there was a significant overlap between the disability discrimination and unfair dismissal claims, they did not stand or fall together. In the first place, the respondent readily proved that the reason for dismissal was the potentially fair reason of the claimant's redundancy. Applying the definition at Section 139 ERA, there was plainly a diminution in the respondent's need for sales advisors as a result of the closure of Headingley and restructure of three branches into two, even though there remained one such post at Beeston.

16. Turning to reasonableness within the very wide framework of section 98(4), the Tribunal considered all stages of the procedure adopted by the respondent, giving particular attention to the respondent's choice to carry out an exercise whereby employees effectively applied for their own jobs rather than implementing a traditional redundancy selection matrix with comparative scoring of individuals against obviously objective criteria such as qualifications, length of service, disciplinary record etc. The procedure of requiring employees to apply for positions without a clearly defined person specification or any scoring matrix runs the risk of wholly subjective decisions or the influence of personality or personal feelings when comparisons are being made. However, having regard to the nature of the sales advisor role as described by both Mr Parry and Mr Savage which the Tribunal accepted, in circumstances where Mr Parry was new and distanced from the individual applicants and the secondary role of Natalie Eaton brought in some further objectivity, the Tribunal was satisfied this was a reasonable approach by the respondent.

17. This was by no means a perfect or model redundancy exercise despite the respondent being a substantial employer with a sufficient HR resource supporting line management. The Tribunal was critical of some aspects of the procedure such as the respondent's consultation stages, finding no evidence of collective consultation and very little scope for the individual employee to influence the formulaic approach devised by Mr Parry and the decision to "ring-fence"

applications for the ongoing posts to the three branches' employees. The plan to close Headingley and expect employees at all three branches to apply for the ongoing positions (rather than, for instance, making Headingley employees redundant or declaring them "at risk") appeared finalised before the first consultation meeting. The time from announcement of the restructure to the claimant's dismissal with pay in lieu of notice was very short, a bare fortnight. Furthermore, little thought had been given to what would happen if an employee succeeded in appealing the decision to dismiss them as redundant; Mr Savage's answer to that was no more than that the respondent's business would need to retain that employee (and thus lose part of the financial saving in making the restructure). This approach would however be consistent with the respondent's non-interventionist management approach to dealing with staff sickness absence in the past.

18. The Tribunal stood back and viewed matters holistically, taking care not to substitute its own decision and approach for that of the respondent. Having done so, the Tribunal did not conclude that any of these matters individually or taken together made this dismissal unfair. It could not be concluded that the respondent acted outside the range of reasonable responses open to a reasonable employer in treating redundancy as a sufficient reason for dismissing the claimant. When a redundancy situation occurs, many employees who were performing perfectly satisfactorily (and without any capability or disciplinary procedure ever having been applied to them) find to their misfortune that their employer decides it has to lose their services.

19. The claimant's disability discrimination and unfair dismissal claims are thereby dismissed. The remedy hearing provisionally listed on 24 January 2022 is vacated.

Employment Judge Parkin
Date: 12 November 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
17 November 2021