EMPLOYMENT TRIBUNALS

Claimant: Mr M Bashir

Respondent: Fothergill Engineered Fabrics Limited

HELD AT: Manchester (by CVP) **ON:** 11 and 12 October 2021 and chambers discussion on 16 November 2021

BEFORE: Employment Judge Johnson

MEMBERS: Mr Q Colborn
Mrs J E Williams

REPRESENTATION:

Claimant: Ms A Bashir (daughter)
Respondent: Mr R Powell (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1) The claimant was fairly dismissed by reason of redundancy.

2) The claimant was disabled within the meaning of section 6 of the Equality Act 2010 by reason of Inclusive Body Myopathy.

3) That the claimant was not directly discriminated by reason of his disability contrary to section 13 of the Equality Act 2010.

4) That the claimant was not discriminated against by reason of something arising from his disability contrary to section 15 of the Equality Act 2010.

5) This means that all of the complaints are unsuccessful, and the claimant's claim is dismissed.

Introduction

1. This claim arises from the claimant's employment with the respondent from 2 March 1987 until his employment was terminated on 23 September 2020 following a redundancy process.

2. He presented a claim form to the Tribunal on 10 October 2020 following a period of early conciliation from 25 September to 25 September 2020 and he brought complaints of unfair dismissal and disability discrimination.

3. The respondent presented a response resisting the claim and asserting that the claimant was fairly dismissed by reason of redundancy and/or some other substantial reason. It was not accepted that the claimant was disabled and if he was disabled, it was disputed that the decision to dismiss and/or select the claimant's role for redundancy was connected with his disability.

4. The case was subject to case management at a preliminary hearing before Employment Judge Benson on 15 March 2021. She listed the case for a final hearing, identified a list of issues and made appropriate case management orders. In accordance with these orders, the claimant provided an impact statement and medical records relating to his condition which he identified as inclusive body myopathy.

Issues

5. The issues identified by Employment Judge Benson remained in place at the beginning of the final hearing, although at the beginning of hearing, Mr Powell confirmed that he had been instructed that the respondent accepted that the claimant was disabled by reason of inclusive body myopathy and that it was aware of the disability at the material time.

6. In all other respects, the list of issues remained as follows:

   Unfair dismissal

   Reason

   a) Has the respondent shown the reason or principal reason for dismissal? The respondent says the reason was redundancy and/or some other substantial reason, being reorganisation.

   b) Was it a potentially fair reason under section 98 Employment Rights Act 1996 ('ERA')

Fairness

c) If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

d) If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

   i) The respondent adequately warned and consulted the claimant; ii) The respondent adopted a reasonably selection decision, including its approach to a selection pool and any scoring within the pool;
   iii) The respondent took reasonable steps to find the claimant suitable alternative employment;
   iv) Dismissal was within the range of reasonable responses.

e) The claimant says:

   i) That the respondent didn't continue to use the furlough scheme to keep him in employment when it could have done so;
   ii) That because of his weakened muscles he was at an increased risk of having accidents within the workplace, and it as such the respondent used the reduced work during Covid as an opportunity to dismiss him;
   iii) That it has already decided to dismiss him prior to the capability meting (he relies upon the removal of his disabled parking space sign); and,
   iv) That it didn't give consideration to other roles he could have carried out within the business.

Disability

f) The respondent now accepts that the claimant was disabled in accordance with section 6 Equality Act 2010 ('EQA') at the time of the events that the claim is about. This is by reason of the condition of inclusive body myopathy

Direct disability discrimination (section 13 EQA)

g) It is accepted that the claimant was chosen for redundancy/dismissed.

h) If so, has the claimant proven facts from which the Tribunal could conclude that in by being chosen for redundancy/dismissed, he was treated less favourably that someone without a disability was or would have been treated? The claimant relies on a hypothetical comparator.

i) If so, has the respondent shown that there was no less favourable treatment because of disability?

Discrimination arising from disability (section 15 EQA)

j) Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

k) If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

    i) By dismissing the claimant/choosing him for redundancy?

l) Did the following things arise in consequence of the claimant's disability:

    i) Because of his weakened muscles he was at increased risk of having accidents within the workplace?

m) Has the claimant proven facts from which the Tribunal could concluded that the unfavourable treatment was because of any of those things? Did the respondent dismiss the claimant because it was concerned he might have an increased risk of accidents within the workplace?

n) If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

o) If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says its aims were:

    i) [the respondent was asked to confirm by Employment Judge Benson at the preliminary hearing]

p) The Tribunal will decide in particular:

    i) Was the treatment an appropriate and reasonably necessary way to achieve those aims;
    ii) Could something less discriminatory have been done instead; iii) How should the needs of the claimant and the respondent be balanced.

Remedy

q) What compensation should be awarded to the claimant?

Evidence used

7. Both Mr Bashir and his daughter Ms A Bashir gave oral evidence in support of his case.

8. Mr Stephen Oldham, the Production Manager and Mr Nader Midani, the Chief Operating Officer gave evidence on behalf of the respondent. Mr Oldham dealt

with redundancy process and the decision to dismiss, and Mr Midani dealt with the appeal against dismissal.

9. The respondent's representatives had prepared a bundle which was available to both parties, and which involved 158 pages. This bundle included information concerning the management of the claimant's condition within the workplace by managers and also the documentation used in the redundancy process. The respondent was also allowed to introduce an additional document on day 2 of the hearing, which was a copy of the company redundancy policy.

Findings of fact

10. The respondent, ('Fothergill'), is part of the Fothergill Group of companies, which employs some 110 employees. It produces specialist woven and coated high performance technical textiles aerospace, composites and thermal protection. The group operates at five manufacturing locations.

11. The claimant, ('Mr Bashir') worked at the respondent's site in Littleborough and commenced employment with them on 21 March 1987. Latterly, his career was as a Loom Technician, and he had a team leader role. However, with the progression of his disability, he began to experience changes in his physical health, which caused him difficulties in his ability to carry out his job.

12. Fothergill confirmed at the beginning of the hearing that Mr Bashir was disabled within the meaning of section 6 EQA. This was in respect of the condition of 'inclusive body myopathy' and the Tribunal understands that this is an autosomal receptive muscle condition clinically characterised by slowly progressive muscle weakness and wasting. It typically affects muscles in legs, causing an increased likelihood of trips and falls. This makes negotiating stairs and climbing hills more difficult. For Mr Bashir the condition had become increasingly symptomatic, and this progressed during the previous 10 years.

13. Mr Bashir continued to work as a Loom Technician and although Fothergill provided assistance by making adjustment, for example by providing railings to stairs and in the toilets, it became clear that it was becoming increasingly difficult for him to do this job. The role of store manager became available in 2017 when the post holder passed away and Fothergill offered the post to him. The Tribunal understood that this role was primarily a desk-based job but it could involve some carrying. However, it was less physical than the previous jobs he had carried out at Fothergill. He also retained his team leader designation which ostensibly appeared to ensure that his considerable experience could continue to be utilised as part of the production processes, although it also enabled Mr Bashir to retain his level of pay as the store manager role alone would have given rise to a reduction of pay of almost £5,800. However, the Tribunal felt that on balance of probabilities, Mr Bashir primarily worked in the store manager role from 2017 and the team leader part of his job was in practice, only worked on occasions.

14. Mr Bashir's new position was largely uneventful from 2017 until the beginning of 2020. He did refer to a meeting with a new Health & Safety ('H&S') Officer Steven Rowland, but the Tribunal finds that this occurred around 2016 in and before he moved into the store manager role. Mr Bashir referred to Mr Rowland meeting with disabled employees at Fothergill and describing him as being a *'liability'* and said felt really upset by comment. The Tribunal was taken to an email which Mr Rowland sent Ms Lamb and which copied in Messrs Oldham and Midani on 19 January 2019. He said *'…I believe he could present a risk to himself and others in the future as this muscle wasting condition (he tells me) is making his everyday activities difficult.'* The Tribunal does find that comments of this nature are inappropriate as they treat the disabled employee as the *problem* rather than a colleague *in need of support*. However, in his evidence to the Tribunal, Mr Oldham disagreed that Mr Bashir was a liability and noted that Mr Rowlands did not remain with Fothergill for very long. Moreover, this incident preceded the 2017 transfer to the Store Manager role, Mr Rowlands was not present towards the end of Mr Bashir's employment and the Tribunal accepts that Mr Rowland's unfortunate comments did not reflect the view of the Fothergill generally towards the claimant.

15. There was documentary evidence of review meetings taking place between Ms Lamb, Mr Oldham and Mr Bashir where they would discuss his health issues and adjustments that might be needed in the workplace. On 29 October 2019, there was a review meeting with Ms Lamb Mr Oldham and it appeared to have been prompted by Mr Bashir having recently been awarded a blue badge for use with his car. The meeting note described that the purpose of the meeting was *'a review meeting and a meeting to explore suggestions you have made for adjustments to the workplace'.* Mr Bashir said stairs remained a problem for him. Mr Oldham said that a designated parking space was in the process of being configured *'…around the corner in engineering'.* The Tribunal understood the factory to be an old building with limited floorplan and environs. A problem envisaged by management concerning the provision of a dedicated parking space was how the space might restrict access for goods vehicles. However, Mr Oldham was clear that a designated space would be provided for Mr Bashir, with an anti-slip surface and handrails being included. He explained the difficulties to Mr Bashir but said by way of reassurance that *'…we want to make it as easy as we can for you'.* It was also explained that the stores could not be moved to the ground floor due to space and expense, but that handrails had been put in place to ameliorate the difficulties experienced by Mr Bashir. Mr Bashir appeared to accept that it would be too expensive for such a move to take place.

16. The parking space was eventually located in late 2019 and a white line marking machine purchased to mark out the parking bay. However, due to building work taking place to replace a roof, scaffolding had been erected and this remained in place until May 2020 and no disabled sign or painted markings were provided. However, the Tribunal understands that during this time, Mr Bashir when attending work was permitted to park close to the proposed parking space close to the scaffolding, (although no actual signage or marking was in place).

But for the roof repairs, the Tribunal finds that a marked and signed bay would have been provided before the end of 2019.

17. On 10 January 2020, Ms Bashir phoned Ms Lamb to say that she had overheard a conversation between her father and his care worker about the difficulty he was experiencing with stairs, and she asked whether a lift could be made available. Understandably, Ms Lamb said that she could not discuss these issues without Mr Bashir's permission, but she sent an email to his managers, including Mr Oldham, suggesting a meeting with Mr Bashir to review his current level of impairment. The Tribunal finds that this was a sensible and appropriate response by Ms Lamb and a meeting took place on 16 January 2020 between Mr Bashir, Mr Oldham, Mr Fletcher (another manager) and Ms Lamb. Mr Bashir said to his managers that his difficulties were *'no more than usual'* and he acknowledged that some adjustments had been put in place including rails on stairs, but that it would cost too much to move the storeroom location. He was reminded to that management would continue to review but they said that if he felt worse, he should let managers know. The Tribunal does not find that this meeting was in any way inappropriate, and it was a sensible to review his condition following Ms Bashir's call, given that there may have been a concern that he was not telling managers that he was struggling.

18. In late March 2020, the Covid 19 pandemic started to make an impact in the UK and a lockdown was imposed across the country. Although Fothergill decided initially that it did not need to furlough their staff, sales began to decline sharply and it became clear in May 2020 that it would be necessary to furlough approximately members of staff, including Mr Bashir, who was furloughed on 5 May 2020. Mr Oldham explained how the roles which were furloughed were carefully selected in order that production could continue with some production staff remaining in work. At this stage, furlough was ordered on a 3-weekly basis, with a review taking place before it was decided whether furlough should continue.

19. By end of May 2020, Fothergill's sales continued to diminish against projections and Mr Oldham explained that it was decided that it was necessary to review staffing levels as Mr Midani explained, staffing was the largest cost in the business and consideration was given as to those posts which could be made redundant. Mr Oldham explained that 6 jobs were at risk, and these were Mr Bashir's role, 3 employees working in finance, 1 person working in the laboratory and 1 employee who was an inspector. The Tribunal understood that these roles were not directly involved in production of Fothergill's products. In relation to Mr Bashir's store manager role, it was felt that his duties *'could be distributed amongst the remaining workforce'*.

20. On 18 June 2020, Mr Oldham sent a letter to Mr Bashir warning him that he was being considered for redundancy and the reason given was 'a downturn in sales due to the Coronavirus Pandemic'. The Tribunal accepted that there was no reason to disagree that the pandemic would have profoundly affected Fothergill's business, and it is not surprising that they were experiencing a significant drop in orders. Additionally, by late May 2020, it was becoming

increasingly clear to everyone across the UK that the impact of the pandemic in the UK was likely to be much longer lasting than had originally been envisaged. It was understandable that businesses would need to consider the staffing of their businesses for the months to come. We also acknowledged Mr Oldham's evidence that the particular skills involved in the production process were held by very few people and the company was therefore conscious of the need to retain as many production staff as possible, who were experienced and would be required to make the products when business conditions improved, and orders began to increase in the future.

21. The Tribunal noted that the letter described *'that it will be necessary to make two employees redundant at Fothergill'* and felt that this was an inappropriate way of describing the situation as it was the job roles rather than the employees occupying those roles that were being considered for redundancy. However, the letter did state that this was a provisional decision, and that consultation would take place to see whether redundancies could be avoided.

22. Mr Bashir was invited to a meeting with Ms Lamb and Mr Oldham on 22 June 2020 to discuss the potential redundancy situation. The meeting took place as arranged. Mr Bashir was recorded as asking about the criteria used in selecting the potential redundancies and it was explained that sales activity was down 50% of budgeted levels, with this downturn being forecast to continue for the next 3 months and the redundancies were based upon these circumstances not improving for remainder of 2020. Redundancies were also referred to elsewhere in the group among office-based staff. When asked whether furlough could be used as an alternative, Mr Bashir was told that the forecast into 2021 was not considered good and it was not possible to continue with furlough. The Tribunal notes that at this time, there was no certainty as to the duration of furlough being provided by the government and that there was a need to reduce costs because of the significant drop in orders.

23. On 24 June 2020, a summary of the meeting was described in a letter which Mr Oldham sent to Mr Bashir. The letter confirmed that the consultation period had ended, and it had not been possible to find an alternative to redundancy. A further final meeting was therefore arranged to take place on 25 June 2020. A final schedule of redundancy payments was included with the letter. This meeting was adjourned on 25 June 2020 because Mr Bashir raised several points. He referred to his considerable experience and the possibility of finding alternative work for him and that he felt that his disability played a part in Fothergill deciding to dismiss. He referred to his daughter's call in January 2020 and that it *'may have played on someone's mind'.* He did, however, acknowledge that *'I have no complaints about my treatment, I have been really well looked after.'*

24. The reconvened meeting took place on 1 July 2020. Mr Oldham said he did not dispute that Mr Bashir had 'done a fantastic job' while working for the company and that they employ people with all sorts of impairments and disputed that his disability played a part in the decision to make his role redundancy. Indeed, Ms

Lamb was recorded as saying '*May I add that it is the role that is redundant'* and Mr Oldham added that *'it is purely down to the job role, with the pandemic, the loss and reduction in orders and the lack of activity'.* It was also explained that with the redundancies taking place across the business, it was not possible to find suitable alternative vacancies. The note suggested that Mr Bashir had become acquiescent by this stage and the decision was confirmed.

25. Following the meeting on 1 July 2020, a letter was sent on 3 July 2020 confirming that Mr Bashir's employment would be terminated by reason of redundancy. It summarised the process of consultation and that Fothergill managers had been unable to find any suitable alternative roles within the business. Notice of termination was therefore given with 23 September 2020 being the date of termination. He was advised that he had a right of appeal.

26. Mr Bashir gave notice of his intention to appeal, and this was acknowledged by Ms Lamb on 6 July 2020. She asked that he provide details of his grounds of appeal and that the matter would then be considered by another manager. He asserted in his email of 6 July 2020 that the decision was 'unfair and due to my disability'. He referred to his daughter's phone call in January 2020 as influencing the decision to dismiss, that it was unreasonable not to offer alternatives to redundancy given his experience, that he could have been furloughed for a longer period and that with the easing of lockdown in July 2020, it would be likely that production would recover quickly thereby removing the need for redundancies.

27. The appeal was heard by Mr Midani on 16 July 2020. Mr Bashir accompanied by Peter Aspden. During the appeal hearing he mentioned that he had noticed attending the appeal meeting that '*it took months to put the sign up for the parking, it didn't take long for it to come off! I came in for this meeting and it has gone'.* The implication appeared to be that this was indicative that the redundancy process was a sham and that Fothergill had decided to dismiss Mr Bashir before the process commenced.

28. Mr Midani explained in detail why the downturn in business arising from the pandemic and he referred to a '*domino effect'* where the company's customers had been hit first of all by the situation and carried out significant redundancies and now as a supplier Fothergill was experiencing a reduction in orders from customers which necessitated redundancies. He said the recovery would not happen overnight and as aerospace involved a third of the company's business, it was not possible to predict an early recovery to healthy sales. He also asserted that HMRC had told businesses that furlough could not be used were redundancies inevitable. He provided details of the savings made across the business and it was necessary to reduce staffing levels. Part time employment was raised as an alternative to redundancy for first time, but Mr Midani said it was *'not feasible, since the roles under threat due to reduced output and activity levels'.* The Tribunal found this to be a confusing argument against part time working, however, it accepts Mr Oldham's explanation that the store manager role was redundant because its duties would be given to a number of other staff members was the real reason why part time work would not be possible. While

Mr Aspden said that he was busy, Mr Midani explained that this was not connected with a healthy order book, but due to fewer people being work due to furlough.

29. Mr Bashir mentioned he had *'been through four of five rounds of redundancies and have always come through, the only difference with this is my disability'.* However, Mr Midani said that the most recent previous redundancy was 9 or 10 years ago, and he could not see the relevance in that suggestion. Mr Midani's conclusion was that redundancies are solely because of the pandemic and its impact upon global business and that the decision to make the store manager role redundant was as part of an overall review of the business and that reduction in orders, meant that a dedicated store manger was no longer required. Mr Bashir asked if he could be used as
a technician when one was off sick, but Mr Midani responded that this would not amount to an actual saving. Mr Bashir maintained his argument that he had been targeted for redundancy because of his disability, but Mr Midani responded that the decision was not connected with his disability.

30. Mr Midani confirmed his decision to uphold the decision to make Mr Bashir redundancy in his letter dated 21 July 2020 disputing the argument that the dismissal related to Mr Bashir's disability. Mr Midani confirmed that the position was redundant, and it was not appropriate to use furlough when the business situation not likely to change in near future. The Tribunal noted that he did not mention the query raised by Mr Bashir during the appeal hearing concerning the parking space. However, the bundle included an email from Mr Fletcher to Mr Midani which was sent on 17 July 2020 which was the day following the appeal hearing. He said he was not aware of a sign being erected and that *'[w]e were going to put it onto the wall near to Engineering but due to concerns regarding engineers working in and around the area it was decided to put the dedicated parking spot more towards the loading bay area.* Due to the scaffolding (for the roof work), the painting of the bay and erection of the sign was delayed. Staff were then furlough and during this period the scaffold was then removed. The sign is still in the Engineering Workshop and was stored with the paint sprayer.' The Tribunal accepts that while a parking space was identified in October 2019, it was not possible to complete the necessary work because of the scaffolding in place and that due to delays arising from Covid 19, it had still not been completed when the redundancy process began. However, there was no evidence to suggest that these delays arose from any early intention by the respondent to dismiss Mr Bashir before the redundancy process took place. the reason for the respondent's dismissal.

The Law

Discrimination

Disability

31. Section 6 of the Equality Act 2010 ('EQA') provides that a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Section 212 provides that substantial means more than minor or trivial. Schedule 1 of the Act provides that the effect of an impairment is longterm if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

32. When considering whether a Claimant is disabled within the meaning of the EQA, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant.

Discrimination complaints

33. Section 39(2) of the EQA provides, amongst other things, that an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment.

34. Section 13 of the EQA provides that 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.

35. Section 23 of the EQA provides in relation to comparators requires that *there must be no material difference between the circumstances relating to each case.*

36. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

37. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

38. Thus, the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the Respondent's explanation, before deciding whether the requirements at the first

stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

39. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

40. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At this stage, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. The Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an explanation for the treatment.

41. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246.

42. If the Claimant does not prove such facts, his or her claim will fail.

43. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic (disability in this case), then the Claimant will succeed.

Unfair dismissal

44. Under section 98(1) of the Employment Rights Act 1996 ('ERA') it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee holding the position she held. Redundancy is a potentially fair reason falling within section 98(2).

45. An employee can bring a complaint of unfair dismissal to the Tribunal if they have completed at least two years continuous employment at the date of termination in accordance with section 108 ERA. Section 111 ERA further

provides that when bringing a complaint, the claim form must be presented to the Tribunal within 3 months of the effective date of termination, (or such further time as the Tribunal believes to be appropriate if it accepts that it was not reasonably practicable to present the claim within the 3 month period).

46. Section 139(1)(b)(i) of the ERA provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

47. In Murray v Foyle Meats Ltd [1999] ICR 827, Lord Irvine approved of the ruling in Safeway Stores plc v Burrell [1997] ICR 523 and held that section 139 of the Employment Rights Act 1996 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

48. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation. See McCrea v Cullen and Davison Ltd [1988] IRLR 30. Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

49. There is no requirement for an employer to show an economic justification for the decision to make redundancies; see Polyflor Ltd v Old EAT 0482/02.

50. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and the substantial merits of the case.

51. In Williams v Compair Maxam Ltd [1982] ICR 156 the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals:

    a. Whether the selection criteria were objectively chosen and fairly applied;
    b. Whether the employees were given as much warning as possible and consulted about the redundancy;
    c. Whether, if there was a union, the union's view was sought;
    d. Whether any alternative work was available.

52. However, in determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it has to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out in Williams v Compair Maxam will not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

53. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255 it was held that Employers need only show that they have applied their minds to the problem and acted from genuine motives. As was said in Capita Hartshead Ltd v Byard [2012] IRLR 814, provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

54. In R v British Coal Corporation [1994] IRLR 72, the Divisional Court endorsed the test proposed by Hodgson J in Gwent County Council ex parte Bryant [1988] Crown Office Digest 19 HC, namely that fair consultation means (a) consultation when the proposals are still at a formative stage (b) adequate information on which to respond (c) adequate time in which to respond (d) conscientious consideration by an authority of the response to consultation. Also see Rowell v Hubbard Group Services Ltd [1995] IRLR 195; and King v Eaton Ltd [1996] IRLR 199.

55. The Tribunal must judge the question of redundancy selection objectively by asking whether the system and its application fell within the range of fairness and reason (regardless of the whether the Tribunal would have chosen such a system or apply it in that way themselves; see British Aerospace v Green [1995] IRLR 433. The Tribunal should only investigate marks in a selection exercise in exceptional circumstances such as bias or obvious mistake; see Dabson v David Cover & Sons Ltd UKEAT/0374/10; and Nicholls v Rockwell Automation Ltd UKEAT/0540/11.

56. If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: Virgin Media Ltd v Seddington and Eland UKEAT/0539/08/DM

57. The procedures to be applied and the criteria to be applied when selecting an employee for redundancy cannot be transposed to the process for deciding whether a redundant employee should be offered an alternative position. The principal test when examining the fairness of the process of selection for a new role is that set out in section 98(4) of the Employment Rights Act 1996. The criteria set out in Williams v Compair Maxam do not apply. See Morgan v Welsh Rugby Union [2011] IRLR 376.

58. The Polkey principle established in the House of Lords is that if a dismissal is found to have been unfair by reason of procedural defects, then the fact that the employer might or would have dismissed the employee in any event had a fair procedure been followed goes to the question of remedy and compensation reduced to reflect that fact.

Discussion

Unfair dismissal

59. Mr Bashir was an employee of Fothergill and at the time of his dismissal had worked for the company for more than 33 years. He therefore clearly had sufficient continuous employment in accordance with section 108 ERA in which to bring a claim of unfair dismissal. His effective date of termination was 23 September 2020 and as he notified ACAS of a potential claim on 25 September 2020 and presented his claim form on 10 October 2020, he had brought his claim within the time limits provided by section 111 ERA.

60. There was no dispute that Mr Bashir had been dismissed and the respondent asserted that this was because of the potentially fair reasons of redundancy and/or some other substantial reason.

61. The Tribunal was provided with a copy of the respondent's redundancy process on the second day of the hearing. The Tribunal accepted its late introduction into the hearing bundle. However, it did not appear to take matters much further because neither of the respondent's witnesses were able to provide much evidence concerning its contents and operation. In any event, the Tribunal noted that it was a somewhat generic document, and it broadly followed the general principles which an employer is expected to follow in a redundancy exercise. Consequently, the Tribunal felt that it was more appropriate to focus upon the witness evidence and the documentation already available within the bundle which revealed how the redundancy exercise which involved Mr Bashir was carried out.

62. The Tribunal accepted that this was a case where a genuine redundancy situation existed. Both Mr Oldham and Mr Midani gave detailed information regarding the downturn in business which took place when their customers in industries such as aviation began to suffer from the impact of the Covid pandemic and significantly reduced their orders with Fothergill and its related businesses. The downturn was significant and was considered unlikely to improve until 2021 at the earliest and as a consequence, they found it necessary to make savings to ensure that the business could continue to operate. Inevitably with labour costs being a significant part of the business' overheads, consideration was given to redundancies. Additionally, because Fothergill wished to preserve their production capacity, they wanted to avoid making any production staff redundancy at this stage, especially as they had

skills which were difficult to replace. This of course meant that consideration was initially given to potential redundancies involving those roles which were not directly involved in production, such as finance and stores positions.

63. Mr Bashir was the only employee working in the stores and therefore this was not a case where a pool of comparable job roles had to be identified. As stores manager, it was 'a pool of one'. it was identified by management that with the downturn in orders, it would be possible to make redundant this role and to split the duties up and to allocate them among other members of staff.

64. Mr Bashir was given warning that he was at risk of redundancy and was invited to a meeting to discuss the matter further. The letter inviting him to the meeting confirmed that no final decision had been made to make his position redundant and the Tribunal that the meeting which he was incited to was a consultation meeting concerning the need to make the job redundant. The notes of the meeting indicated that Mr Bashir was able to discuss openly his thoughts concerning redundancy and other possible options such as keeping him on furlough for a longer period to see if business improved. It appeared to be a meaningful consultation with Mr Bashir being able to present his thoughts and views to management.

65. Once the decision was confirmed by Fothergill, Mr Bashir was invited to a further meeting on 25 June 2020, and which was adjourned to 1 July 2020. This meeting did explore alternatives to redundancy, but perhaps inevitably as it was concerned with a staffing reduction exercise rather than a restructure, it was not possible to offer alternative jobs.

66. The decision was then made to confirm the dismissal and Mr Bashir was afforded the right of appeal, which he accepted and following a lengthy and detailed discussion before Mr Midani, a decision was made to uphold the dismissal. Accordingly, the Tribunal accepts that there was a genuine redundancy situation and that it was reasonable to include Mr Bashir's role in that that process. It accepts that a fair and open process took place with a warning of redundancy, a meaningful consultation, a consideration of alternative vacancies and the right of appeal. The Tribunal did feel that the process was a little rushed and the consultation exercise was concluded within a few days. It is fair to say that Fothergill were experiencing a significant reduction in orders and the Covid pandemic was an exceptional situation. However, Fothergill were to some extent protected by furlough and while they should not have used it to mask the need to make redundancies, once it was clear that a redundancy exercise was necessary, it would not have been unreasonable to continue with furlough until the redundancy process was completed.

67. The Tribunal did feel that they would have preferred to see a longer consultation process take place. But while this might be the case, the Tribunal also reminded itself that it could not substitute its own opinion as to what it would have done. Accordingly, it has not applied these thoughts to its determination of whether or not the dismissal was fair. While Mr Bashir would have no doubt entered the

redundancy process in a state of shock and it would have been a very difficult process for him to go through, the Tribunal accepts that he was afforded the necessary procedural steps to ensure that the decision to make his position redundant was conducted fairly. Under these circumstances the decision to dismiss was procedurally fair and Mr Bashir was fairly dismissed.

Disability discrimination

68. As was discussed at the beginning of the judgment, the respondent helpfully accepted Mr Bashir was disabled in accordance with section 6 EQA by reason of inclusive body myopopathy and that it was aware of his disability at the material time, namely during the redundancy process and up the effective date of termination.

69. Additionally, as was described in the section above dealing with unfair dismissal, the claim was presented within 3 months of the effective date of termination and in principle, the claim was presented in time in accordance with section 123 EQA. While the claim dealt with events stretching back to January 2020 where Ms Bashir made a call to Ms Lamb, the case is about a dismissal arising from redundancy process which began in late May 2020 and continued until effective date of termination. The Tribunal did not believe that Ms Bashir's phone call had any impact on the decision to dismiss Mr Bashir.
In these circumstances, these amount to a series of continuing acts ending on 23 September 2020 and the complaint was therefore presented to the Tribunal in time.

70. It was clear to the Tribunal that Mr Bashir was a disabled person when he was considered for redundancy and that his employer was aware of his impairment. However, that is an insufficient argument to support an allegation of direct discrimination by itself. The Tribunal accepts that a genuine redundancy situation arose at Fothergill and that there was a need to reduce the workforce by a certain number. Moreover, those roles not directly involved in production were more likely to be considered as part of the redundancy exercise than those roles involved in production. The store manager role was clearly one of those.

71. The evidence available to the Tribunal was that the decision was focused upon Mr Bashir's role rather than Mr Bashir and his impairment. While his managers were aware of his daughter's concerns, there was evidence that they held regular review meetings and the emphasis was very much about reasonable adjustments rather than questioning his capability to work. There was no evidence that Fothergill were seeking to dismiss or looking for reasons to dismiss Mr Bashir prior to the downturn in orders arising from the Covid pandemic. The issue connected with the parking space was not considered relevant as the Tribunal accepted that a space had remained available from October 2019 until after the decision was made to dismiss Mr Bashir. It had not been possible to formally mark and sign the space because of the scaffolding

being used to repair the engineering building roof. This was not indicative of a decision being made to terminate Mr Bashir's employment because of his ongoing health issues.

72. Accordingly, the Tribunal finds that the decision to dismiss related to the job role and not the impairment of Mr Bashir and that any person occupying this role in May 2020, would have been considered for redundancy. As such, there was no less favourable treatment because of Mr Bashir's disability.

Discrimination arising from disability

73. In relation to this complaint, Fothergill did treat Mr Bashir unfavourably by selecting him for redundancy and then dismissing him.

74. It is also correct that Mr Bashir faced an increased risk of accidents in the workplace because of his weakened muscles and that this arose from his disability.

75. The Tribunal has already discussed its findings concerning the reason for Mr Bashir's dismissal by reason of redundancy in the section above relating to direct discrimination and it is unnecessary to repeat that discussion in this section. However, taking into account these findings, the Tribunal is unable to accept that the unfavourable treatment arose from Fothergill's concerns that Mr Bashir was at a greater risk of accidents or because of his disability more generally.

76. This is not a case where a legitimate aim was not advanced by the respondent and it was not included in the list of issues, although Employment Judge Benson had left it open for the respondent to confirm its position in her Note of Preliminary Hearing. When questioned during final submissions, Mr Powell confirmed that a legitimate aim would be that the respondent needed to ensure that its business remained economically stable. However, it is not necessary to consider this defence further because although it is a legitimate aim, the decision to dismiss was wholly connected with the redundancy of the store manager position and not connected with Mr Bashir's disability.

Conclusion

77. The Tribunal has therefore made the following decisions in this hearing:

a) The claimant was fairly dismissed by reason of redundancy.
b) The claimant was disabled within the meaning of section 6 of the Equality Act 2010 by reason of Inclusive Body Myopathy.
c) That the claimant was not directly discriminated by reason of his disability contrary to section 13 of the Equality Act 2010.
d) That the claimant was not discriminated against by reason of something arising from his disability contrary to section 15 of the Equality Act 2010.

78. This means that all of the complaints are unsuccessful, and the claimant's claim is dismissed.

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Employment Judge Johnson

Date: 16 December 2021

JUDGMENT SENT TO THE PARTIES ON

20 December 2021

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.