EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Davies**
Respondent:	**Marlin Industries (Wrexham) Limited**
Heard at:	**Mold & CVP** **On: 11th &12th November 2021.**
Before:	**Employment Judge R F Powell**
Members:	**Mrs M Walters** **Mr B Roberts**

Representation:
Claimant: **In person**
Respondent: **Mr J Dolan, solicitor**

REASONS

1. By a claim form presented to the employment tribunal on the 24th of August 2020 Mr S Davies, the claimant, claimed that he had been unfairly dismissed. In his pleading he made substantial reference to his physical impairments.

2. A case management hearing took place on the 6th of May 2020, the Employment Judge allowed an amendment of the claim to include breaches of section 15 and 20 to 21 of the Equality Act 2010 and the respondent was allowed to amend its response.

3. The response admitted the dismissal of the claimant for the potentially fair reason of redundancy. In respect of the reasonableness of its decision to dismiss, the respondent's set out elements of its procedure, selection method and its consultation with affected employees. It averred that its conduct was, in all the circumstances of the case, reasonable.

4. It did not admit that the claimant was disabled and it denied knowledge of the claimant's disability. It also denied that it had subjected the claimant to unfavourable treatment or that it had failed to make reasonable adjustments.

5. It went on to asset a positive case with respect to justification for the purposes of section 15 of the Equality Act 2010.

6. The issues in this case were set out by Employment Judge Moore. It appears that those issues had been discussed with care between the parties at the hearing on 6th May 2021. In the course of this hearing, we have had no cause to consider that any of the issues set out within that order fails to reflect the claimant's, or the respondent's, case and so we have used that list of issues as a template to guide us through the conduct of the hearing and an aid in the structure of our decision making. We also asked the parties to make their submissions in accordance with the structured approach of EJ Moore.

7. With respect to the claim of unfair dismissal, the dismissal is admitted and the averred reason for dismissal; redundancy, was not challenged in evidence or submissions. The claimant's case before us focused on Section 98(4) of the Employment Rights Act 1996:

a. Whether the respondent adequately warned and consulted with the claimant prior to the decision to dismiss him by reason of redundancy.
b. Whether the respondent adopted a reasonable method of selection.
c. Whether the respondent took reasonable steps to find the claimant a suitable alternative employment, and more generally;
d. Whether the dismissal was within the range of reasonable responses open to a reasonable employer in all the circumstances of this case.

8. The issue of disability, again the issues were set out in detail which we will not recite it at this juncture. In short, the claimant asserts that he was subject to discrimination arising from disability and that he had been treated unfavorably in the following ways:

a. By marking him down on the selection criteria in respect of "attendance" and "skill set."
b. By dismissing the claimant.

9. Here we note that, on the respondent's case, it was only the claimant's "skill set "score which led to his selection for redundancy. Here the factual matrices for unfair dismissal and discrimination claims are intertwined. The respondent asserts that the claimant was not subject to unfavourable treatment in respect of the "attendance" and, in any event, the accurate recording of attendance was justified. The Respondent asserts the claimant's "skill set" mark did not arise from his disability at all.

10. The claim for reasonable adjustments under section 20 and 21 of the Equality Act 2010 asserts that the "provision criterion or practice" is requirement to meet the standards set out in the redundancy selection matrix applied during the redundancy process. The claimant contends that he was put at a substantial disadvantage compared to a person without the claimant's disability because he was unable to achieve a higher score in respect of "absence" and "skill set" due to his disability.

11. The proposed reasonable adjustments were the provision of a training programme or adjusted duties.

12. The respondent avers that the "attendance" mark had no material influence on the decision to select the claimant for redundancy and that the "skill set" mark did not put the claimant at a substantial disadvantage and the respondent could not have been aware of the averred substantial disadvantage.

13. To determine these issues, we have had the benefit of hearing evidence from four witnesses:

a. The claimant, who gave evidence in accordance with his witness statement and was cross examined.

b. Mr Droog, the Managing Director of Marlin Industries limited also gave evidence in accordance with his witness statement and was cross examined

c. Ms Whitley, Human Resource Manager of the three companies within the Marlin Industries Group.

d. Mr Mark Davies, production manager for Marlin Industries (Wrexham) who was the line of manager of claimant.

14. We also add took into account, with the respondent's consent, the claimant's impact statement which he had prepared in accordance with one of the case management orders of the 6th May 2021 and which is included in the bundle of documents.

15. We considered the majority of the initial bundle of 488 pages. We record that in the course of the hearing further documents, adduced at partly at our request, were entered into the bundle.

Findings of Fact

16. The following findings of fact are the unanimous decision of the employment tribunal and they have been reached applying the civil burden of proof; on the balance of probabilities.

17. In respect of the discrimination claims, where we make our findings of fact regarding the respondent's reason for its conduct, we have reminded ourselves that, should section 136 of the Equality Act 2010, come into play, the burden will rest upon the

respondent to establish that its actions were wholly untainted by conscious or unconscious consideration of the claimant's protected characteristic.

18. At all material times the respondent's business comprised of three companies with a cumulative workforce of around 175 staff who were principally engaged by the two companies known as Marlin industries Wrexham and Marlin industries Scotland .

19. The claimant at all times worked at the Wrexham site. The respondent's principal business was associated with electrical fibre-optic cables and the processes of winding cable drums, delivery and receipt of cable and drums, packaging, repair, maintenance and making of packaging, the loading and unloading of vehicles and product for dispatch to clients.

20. The business, as can be seen from the respondent's spreadsheet when it carried out the redundancy exercise, has a number of departments, they include; Administration, Drums (large wooden drums about which the industrial cables were wound), Plywood (an aspect of production), Yard (largely to do with loading and moving), Winding and Wood waste; the group of employees within which the claimant worked.

21. The claimant commenced his employment in February 1996 as a yard operative. In his witness statement the claimant describes his main role as scrapping drums by dismantling them and saving parts for further use. That work included a variety of skills. He undertook a range of training courses, or in-house training, as set out in pages 375 to 379 of the bundle.

22. One significant operation within the respondent's business was the unloading and loading of vehicles. This was a task for which the claimant was not fully trained.

23. It is the respondent's case that the claimant was reluctant to engage in aspects loading and offloading of materials and, in particular, he was reluctant to become involved with the record keeping and the associated use of the respondent's computer system.

24. We heard from Mr Mark Davies that the task of loading and unloading became increasingly important to the respondent as the years passed and, by the time of the 2020 redundancy consultation, the volume of HGV vehicles attending the site had more than doubled.

25. The claimant's failure to complete the above training meant that he was not fully able to help with the loading and offloading. Mr Mark Davies' evidence, which we accept, stated that on occasions he, was called in to help with the physical loading and offloading rather than the claimant.

26. In January 2019 the claimant fell from a forklift truck. We make no findings of fact about the cause of that fall because we understand that is subject to separate litigation. The claimant describes a door handle, by which he was holding on to a vehicle, snapped and he fell on his back, striking his head against the concrete surface of the yard. He attended hospital and he was thereafter certified unfit to attend work in any capacity until mid-June of 2019.

27. On the 7th of June 2019 the claimant had a discussion with Miss Whitley which she recounted in an email to Mr Droog on same day, (page 507 of the bundle):

" *Steve and I met with Steve Mark Davies earlier, after the niceties, I advised him that if there was no prospect of return to work the company would have to consider terminating his employment which is standard procedure, Steve obviously doesn't want to lose his job and as such we've agreed to a trial period of phase return commencing on ….. 15th of June half shift starting at 9:00 AM and gives him time to reduce his tablets which are currently making him drowsy…… I said we would ask Mark Ray to look at possible light duties but can't guarantee anything. His back is slightly less painful but he's still getting sporadic headaches which can stop him in his tracks. He's waiting for injections in his neck which will supposedly stop the headaches. Suggested he talks to his GP about the prospect losing his job which might move him along the waiting list."*

28. The claimant, when he returned to work, provided further medical certificates, one of which, dated 7th of August 2019 (at page 182 of the bundle) advised the respondent that the claimant was fit for work subject to the following advice; amended duties, workplace adaptions and, because his ongoing neck and back pains were worse after the claimant's work shift, the need for an occupational health assessment by the employer and any consequent workplace adaptions.

29. That advice was re-stated in subsequent MED 3 certificates for a total of three months following 7th August 2019.

30. We find that a patient health assessment, of the sort described by the doctor, did not take place. However, the respondent did undertake a general assessment of his health in February 2020.

31. The claimant was absent a number of times in the months that followed his return to work. On each occasion some relevant detail of the reason for his absence, and his symptoms, was recorded in a pro forma document used at the return-to-work interview. One example, amongst several in the bundle, is at page 158 of the bundle (the record for an absence from the 11th of December 2019}.

32. The reason for the absence is recorded as headaches and the question: "Was your absence a result of an accident at work ?": was answered; "yes". The claimant was asked for details of any ongoing problems his response was; " neck pain, pain ".

33. Each return-to-work interview record has discrete entries concerning the claimant's absence but there is nevertheless a substantial continuity of the types of entry noted above.

34. The record has a section titled "Points" with two options available for selection. The word "no" has been circled. This reference to "points" is a reference to the respondent's sickness absent management process which employs the Bradford System for the evaluating the impact of sickness (page 314 of the bundle). Within the respondent's staff handbook, it states that absences due to industrial injury will be discounted. In the claimant's case his absence was, for the above purpose, discounted.

35. On 19th of February 2020 the claimant attended an annual health assessment conducted by an external body. The respondent, on Ms Whitley's evidence, was not privy to the detail of that written assessment which is now within the employment tribunal bundle.

36. In the course of cross examination, the claimant was taken to page 194 of the bundle; part of a basic health questionnaire completed by the claimant for the external assessment. Under the title "musculoskeletal" the claimant was asked; "Do you have or have you ever had;" and amongst a list of conditions he ticked "yes" for neck and/or upper body problems and "yes" for lower limb problems. A handwritten annotation recorded that he was waiting for hospital appointments but he was also managing to control the situation.

37. In cross examination it was put to the claimant that, he had ticked; "no" in response to a question; " Are you currently suffering from the illness injury or disability not mentioned above which may require reasonable adjustments to the role or working environment ?"

38. The Tribunal took the above answer into account, noting that the question enquired about issues which were in addition to those prescribed in the printed form; that particular question was not asking the claimant about the musculoskeletal conditions he had been asked to identify.

39. It is self-evident from these documents that the claimant had identified two physical causes of pain which were affecting him in the period preceding the commencement of the redundancy process.

40. We then consider one contentious issue which is the foundation for much of the claimant's case on unfair dismissal and is significant in his disability discrimination claims.

41. At the heart of the respondent's rationale for claimant's redundancy is the scoring matrix used to select employees for potential redundancy and the mark it awarded the claimant for his breadth of skills. The respondent awarded the claimant 1 point, out of a possible 10, because he was judged not to be competent in all of the tasks for his current role.

42. It is this mark which the claimant considered to be unfair. He asserts that he was involved in loading and offloading lorries. He accepts that he was not fully competent in that task but, argues that his lack of competence was because respondent failed to train him or, the alternative, when training was offered it was so disrupted by the respondent directing the claimant to undertake other tasks that it was ineffective. Thirdly, the claimant argues that the respondent had never put him on notice of its dissatisfaction with his lack achievement and competence nor threatening him with a disciplinary hearing on any occasion.

43. Mr Davies' evidence stated that the respondent had given every opportunity to the claimant to achieve competence in loading and offloading but the claimant had expressed a consistent desire not to be expected to undertake the relevant training or achieve competence in the loading and offloading tasks.

44. To determine this dispute, we have three sources of evidence; first is the evidence of claimant, the second is direct evidence of Mr Mark Mark Davies; the claimant's line manager and thirdly, documents within the bundle; typically records of appraisals for the claimant in previous years.

45. We did not consider that Miss Whitley or Mr Droog could give any direct evidence on these points; their positions in the firm meant they were remote from the day-to-day activities in the yard.

46. We start with the points set out in the appraisals, as brought to our attention through cross examination of the claimant.

47. For example, at page 391 was a copy of a six-month period appraisal for the year of 2010 . The claimant's flexibility and adaptability is described as; ".. seems to be a constant battle to get Steve on board with things but when he does he works well and in the needs for training and improvement and development needs computer development and loading and offloading…"

48. In a subsequent year (page 398) a similar comment is made upon the claimant's willingness to adapt. On page 399 is another expression of the claimant's need to get to know the respondent's computer systems and increase his knowledge of working in the yard. Both of which were to be achieved and within 12 months of the date of that appraisal. He was again given a target that year of learning loading and offloading and computer systems.

49. Pages 413 to 14 record the respondent's expectations for further development of the claimant's skills. The same matters are mentioned and set out as targets on page 414. These documents are not supported by witness evidence from their authors but Mr Davies' evidence, which we found to be very reliable, described his experience of managing the

claimant , and the claimant's response to direction to undertake training; it was consistent with the records in earlier appraisals; he had asked the claimant to expand his knowledge and undertake the training and the claimant had expressed in strong, but courteous terms, his desire to be relieved from that burden.

50. When questioned by the claimant why Mr MarkDavies had not warned or threatened a disciplinary process for the claimant's refusal, he stated that he considered the claimant to be a very well-liked member of staff and a long serving employee so, as long as it was possible, he had allowed the claimant to avoid filling his whole role because it was practical t for others to shoulder that work.

51. However, by reason of the increasing level of loading and unloading work, that degree of tolerance had become less possible and, by 2019, Mr Mark Mark Davies had expressly asked the claimant to undertake the training and he had expressly told the claimant that the training would be arranged in circumstances where he would not be disrupted (and therefore his training would be effective).

52. We accept that evidence because firstly, in our judgment, it was demonstrable that Mr Mark Davies held the claimant in high regard as a person and that Mr Mark Davies was candid in accepting his failing of indulging claimant when he might otherwise have been firmer. Taking in to account the claimant's prior appraisal documents and Mr Mark Davies' evidence, we consider there is no doubt that the claimant was aware of the need to undertake the loading and offloading training.

53. We also find that following the claimant's return to work in June 2019, Mr Mark Davies had given the claimant one consistent task to do which was drum cleaning, which the claimant described as the somewhat simple task of removing labels and cords. That was not a task which involved significant physical labour and he was not being asked to undertake any other role. It was a perfect opportunity for the claimant to use the months between late June of 2019 to early 2020 to fulfill the direction from Mr Mark Davies; learning the computer systems that were part of the claimant's job.

54. The claimant, along with other employees, was furloughed in March 2020. We accept the evidence of Mr Droog that during the furloughed period from late March through to June 2020 the respondent suffered a very substantial downturn in its business; its monthly profits, and its forecast for future profits, dropped by the equivalent of the monthly wage bill for the three Marlin Industries companies. As with many other businesses the degree of uncertainty about the duration and focus of the UK governments' Covid restrictions left the business cautious about how it should try and reduce its costs in order to maintain, to quote the respondent, it's; "survivability".

55. The respondent issued a number of written updates to staff which set out the initial difficulties caused by the 2020 Lockdown and the uncertainties that the management faced.

By late May the respondent was indicating the possibility of a redundancy process as the only practical method to reduce the respondent's ongoing costs.

56. Before going any further, it is important to describe the respondent's redundancy process as set out in the staff handbook (at page 359 of the bundle). The policy has three introductory paragraphs the third of which states; that *in order to minimize the impact of redundancy the following procedure will be adopted wherever possible. It must however be recognized that when the needs of the business so dictate the procedure will be adapted to the particular circumstances which prevail*.

57. Step one of the procedure states that when the possibility of a reduction in the size of the workforce arises the board will enter into consultations with a view to; *establishing whether the proposed job losses can be achieved by means other than compulsory redundancy and consideration will be given specifically to the following alternative options subject to the companies immediate business aspirations; imposing a ban on further recruitment, considering redeployment, restricting the use of subcontract labour, temporary and casual labor, reducing the amount of overtime, implementation of temporary layoff or short time and invitations for early retirement and or voluntary redundancy*

58. Point Two states: *Where after due consideration of these other alternatives, the directors consider the need for redundancy still remains, provisional selection for redundancy will be made by the directors, subject always to the companies need to retain specific knowledge and skills and a balanced workforce*.

59. In particular the next sentence is of importance as it is in the crux of the respondent's case:

"Where there is a need to reduce the number of staff carrying out a specific activity, selection will be made on the grounds of capability".

It goes on to set out the procedural steps; the process which in this case we do not need to repeat.

60. It is evident from the redundancy schedule, which sets out the scores for each person who was part of the Wrexham redundancy process, that the respondent divided its workforce into teams by the task they employed to undertake, as referenced earlier in this judgment; Administration, Drums, Plywood and Winding are examples and relevant to the claimant; Wood Waste a team of five employees.

61. The phrase "staff carrying out a specific activity" is, in the parlance of industrial relations, a reference to a "pool" of employees; defined by their shared specific activity. In the claimant's case, his pool was "Wood Waste".

62. It is the respondent's case that the staff were selected for redundancy within their "pool" In the claimant's case Wood Waste. was the group for which he worked for many years of his employment,

63. The matrix had the following criteria:

a. length of service

b. attendance

c. time keeping

d. discipline

e. health and safety

f. Overall skill level

g. attitude and flexibility

64. The maximum mark in each category was 10.

65. In the claimant's case, for length of service, time keeping, discipline and attitude & flexibility he received the maximum mark . With regard to health and safety he received 6 marks which was the award for any employee who demonstrated full competence in their health and safety compliance he does not complain about that.

66. With regard to attendance, the respondent discounted from consideration the claimant's extended period of absence between 15th of January and 15th of June 2019 but took into account each of the short-term absences between July 2019 and January 2020. Because his level of intermittent absence exceeded 7% of the total working year, according to the respondent's marking scheme, he was awarded 1 mark out of a possible 10.

67. With regard to the overall skill level, an employee was awarded 10 marks if the employee was highly skilled in most jobs, six marks if the employee was adequate skilled for several jobs, 3 marks if the employee was fully skilled for their current job only and 1 mark if their skill level was inadequate for the employee's current job.

68. It is these two points which form the core of the complaint and the dispute between the parties.

69. Following the notice in the newsletters, the claimant was informed of his provisional selection for redundancy in a letter from Ms Whitley dated the 15th of June 2020 (at pages 209-210).

70. It is clear from some of the text messages in the bundle which passed between the claimant and Ms Whitley that he engaged with her to ask for explanations for some of his scores, that he made one suggestion for suitable alternative employment which respondent said did not exist as a discrete role.

71. By the 1st of July 2020 the claimant received his confirmation in writing of the termination of his employment with the effective date of termination being the 23rd of September 2020; which reflected the period of his statutory notice. The claimant did not appeal the decision to dismiss him. He told us that when he was furloughed, he believed; "that the writing was on the wall" and that he saw no hope of altering the respondent's decision through the appeal process.

72. The claimant was one of eight colleagues who were made redundant in this process. Each of them was not required to attend work during their respective notice periods. In July 2020 Ms Whitley messaged all eight employees, inviting them to return to work to assist with an unexpected increase of work in the Winding department. Perhaps unsurprisingly, they all declined to do so as there was no financial advantage to them whilst they were serving their notice on garden leave.

73. Consequently, the respondent took the step of recruiting two temporary employees. The initial period of that employment was expected to end on the 31st of August 2020. Those two employees were told they would be informed if there was an extension of that employment.

74. The respondent sent out letters dated 1st October 2020 inviting those two employees to accept an offer of permanent employment.

75. In questions from the tribunal Ms Whitley indicated that she had been informed of the respondent's decision to offer employment to those two persons "a few days" before she typed the letter on 1st of October 2020. She was not party to the decision to employ new permanent staff but it was her role to action that decision. The tribunal finds, as a fact, that the said decision must have been made, at the very least, a few working days before the 1st of October.

76. Any person making such a decision must have been mindful of the need to potentially employ permanent staff in the Winding department, at the very least, a week before the letter was typed up; sometime around the 23rd or 24th September 2020.

77. We now turn then to our findings of fact specific to the issues of disability.

78. The claimant's impact statement sets out a description of the physical and mental circumstances which he states adversely affected him. The content of that statement is at page 68 to 70 of the bundle.

79. We address our conclusions about the content of the impact statement by reference to the submissions made on behalf of the respondent.

80. The first submission made is that elements of the impact statement refer to events which are either unambiguously matters which occurred after the claimant had been dismissed or can only reasonably be viewed as doing so; because where the statement provided in response to an order of the 6th of May 2021, refers to; *" I am now …."* it is not referring to circumstances which existed at the time of the alleged acts of discrimination.

81. We accept that submission and we have, for instance, therefore discounted the section of the impact statement relating to mental health after his dismissal.

82. The second submission goes to the claimant's credibility and therefore the reliability of the balance of the impact statement.

83. The respondent's witnesses, Ms Whitley and Mr Mark Davies, recounted a statement from another employee; Mr Ray, who is not a witness. They recall Mr Ray telling them that he had spoken to the claimant casually following his dismissal and the claimant had said he was spending some of his time going fishing and walking. In cross examination the claimant accepted that indeed he had continued to go fishing and that he could sit for an hour to an hour and a half in a chair with a rod before the pain was no longer bearable. He also accepted that he went for walks, which were short, to a particular bench where he and his partner would sit. The respondent contends that such evidence contradicts an element of the impact statement; "… before the accident I enjoyed fishing and watching football this has stopped due to not being able to sit for long periods on hard surfaces…."

84. We do find that there must be a degree of exaggeration in the claimant's impact statement .We balance that with aspects of the contemporary medical records from the doctor, the contemporary description the claimant gave through his sickness absence return to work records and the account that he had given to Mr Mark Davies (which led Mr Mark Davies had to restrict the claimant's work to the lightest possible of the manual labour tasks).

85. We also took into account that the activities of walking and fishing were ones undertaken whilst the claimant had the benefit of medication to reduce his pain.

86. We looked at, and took into account, for instance pages 200 to 272, wherein we found entries from the 1st April 2019 to February 2020 which described, ongoing pain and the efforts to mitigate the pain with medication which hadn't provided enough relief. We note the consistent references to pain and medication through to March 2021.

87. We find those records, Mr Mark Davies' account and the claimant's account sufficient to persuade us that, on the balance of probabilities, the claimant did suffer the continuous conditions, if intermittent in severity, of headaches and back/neck pain from the 16th of January 2019 through to 2021. We are persuaded that the claimant suffered physical impairments; such as the inability to bend so as to be able to dress without assistance, or to be able to drive more than a short distance without assistance, which lasted more than 12 months and had lasted more than 12 months by the date of the alleged discriminatory acts which took place, as alleged, in June to 1st of July 2020.

88. The next issue is whether those impairments had an adverse impact which was more than minor or trivial and we remind ourselves on this point of the relevant factors in the guidance within Schedule 1, part 1 of the Equality Act 2010.

89. We should look at the adverse effect of the proven impairments cumulatively. We should focus on what the claimant cannot do rather than what he can do; Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19. So far as it is practicable, given that the tribunal has no specialist knowledge, or relevant medical opinion, we must try and assess the impact of any such impairment absent of any medicinal relief which is temporary in nature.

90. We have taken into account the statutory guidance as required by Schedule 1, paragraph 12 of the Equality Act 2010.

91. Taking those matters into account. On the whole, and subject to rejecting the degree of exaggeration, we accept the claimant's description of the adverse impact of his headaches, neck and back pain at the relevant time. We are satisfied that the claimant had the above physical impairments and we are satisfied those impairments substantially, and adversely, affected his day-to-day activities in the ways which we have accepted from the description in the impact statement.

92. Further we are satisfied that the adverse impact was long term before the date of the first act of alleged disability discrimination. The claimant has established, on the balance of probabilities, that at the material time he was a person with the protected characteristic of disability for the purposes of section 6 of the Equality Act 2010.

93. The next issue is the respondent's knowledge of the claimant's disability at the relevant time.

94. It is accepted that the respondent did not have actual knowledge of the claimant's disability; the evidence of Ms Whitley and Mr Droog on this point was not challenged.

95. The statutory Code of Practice states that an employer must do all it can reasonably be expected to do to find out whether the employee has a disability and, in the case of reasonable adjustments, is likely to be placed at a substantial disadvantage (Employment Code para 5.15 and 6.19). The case of A v Z [2019] UKEAT/0273/18 confirms that the same approach is applicable to claims under section 15 of the Equality Act 2010.

96. The Code states; "What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

97. Mrs. Justice Eady, in A v Z stated the employers responsibility; "must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

98. We remind ourselves that we found the following:

a. The respondent was aware of the claimant's six months absence and its cause.

b. The respondent was aware of the Doctors' opinions on the Med 3 fitness certificates which, over a period of nine months referenced the claimant's head injury, headaches, neck pain and back pain in various statements.

c. The respondent received a certificate in August 2019 which indicated that adjustments were likely to be needed for three months; to the 6th of November 2019.

d. The respondent was aware of the content of the claimant's return to work interviews; each of which indicated that his absences were related to the industrial injury which, at that time, to the respondent's knowledge could have been nothing other than the January 2019 incident. Those Interviews occurred from June 2019 up to January 2020.

e. The respondent had knowledge of the claimant's day to day physical limitations via the production manager Mr Mark Davies who had made

adjustments to the claimant's job role because of the information he received from the claimant.

f. The claimant had been required to produce a list of his medications so the respondent could assess what work he should do.

g. The respondent was advised by a doctor to obtain a specific report with respect to potential reasonable adjustments and did not do so.

99. Each of the return-to-work interviews identified that the claimant's injuries related to an industrial accident in January 2019. The date on which the claimant's symptom were caused was understood by the respondent when it acknowledged that the long-term absence was caused by an industrial injury.

100. These combined sources of information and advice, along with the respondent's own enquires and actions, as set out above, are sufficient to prove that the respondent's had knowledge of the claimant's physical conditions and that, on the information available at that time, the respondent had evidence which demonstrated the claimant's physical impairments had lasted a year by the time of the last return to work interview in January 2020.

101. The respondent had knowledge of the degree to which the claimant's impairments were limiting the claimant's physical capabilities and its managers had knowledge that they were adjusting what they expected of the claimant because of his limited physical abilities. This was in addition to the respondent's knowledge from medical certificates and their own records.

102. Had the respondent, as advised, sought to obtain a medical opinion it would have clearly been on notice of the claimant's disability, at the latest, by the time of the February 2020 annual health appraisal, but it had still not followed up the GP's prior recommendation for an assessment of the claimant.

103. In any event It would have become clearly aware of the claimant's disability just on a review of its own documents to which we have referred above.

104. In all those circumstances, and on balance probabilities, we are satisfied that the claimant has established that the respondent had constructive knowledge of this disability by January 2020.

The Claim of Unfair Dismissal

105. We have directed ourselves in law by reference to the following cases at which we have provided or highlighted to the parties. The first is the authority of Moon v Homeworthy Furniture Northern Limited 1976 IRLR 298. We accept the proposition that when considering business decisions, the employer is the sole judge of the requirements of its business.

106. Secondly, we have taken into account the guidance in Safeway Stores PLC v Burrell IRLR 200 in which HHJ Peter Clarke set out the correct approach when identifying the principal reason for a dismissal for the purposes of section 98(1)&(2) of the Employment Rights Act 1996.

107. We are satisfied that the respondent has discharged the burden upon it to establish a potentially fair reason for dismissal. The principal reason, in fact the only reason, for the dismissal was redundancy. The claimant did not challenge the evidence from Mr Droog about the financial circumstances of the business during the first Covid Lockdown and his evidence was corroborated by the contemporary documentation before us.

108. Turning then to the issue of reasonableness and section 98 (4) of the Employment Rights Act

109. We considered the case of Williams & Others v Compair Maxam limited 1982 IRLR 83 which reminds us that the standard by which the respondent is judged is the range of reasonable responses open to an employer in all the circumstances of the case and, that the tribunal is not entitled to substitute its view for that of the reasonable employer. It also gives guidance, albeit that guidance does not amount to a statement of the law, on the potential scope of reasonable consultation.

110. We were also referred to Polkey v A.E Dayton Services limited 1987 IRLR 503 by the respondent and have taken this case into account.

Our analysis

111. The first element of the respondents' redundancy procedure, as we find, is a procedural requirement to consult with its employees.

112. We have set out the respondent's redundancy procedure earlier in these reasons. The first step states: "Where the possibility of a reduction in the size of the workforce arises the board will enter into consultation with the view to establishing whether the proposed job losses can be achieved by means other than compulsory redundancies" specific examples are then provided.

113. In submissions on behalf of the respondent, it was argued that consultation in this context was consultation between the members of the decision-making body of the respondent; the board directors.

114. We found no evidence that such an approach was taken at the time. We also looked at the examples of the subjects upon which such consultation might be held. In our judgment, that argument is not supported by the evidence or consistent with the natural reading of the respondent's redundancy policy. Nor would it be consistent with good industrial practice.

115. The respondent pointed out that this consultation occurred in June of 2020 when there were restrictions on the degree to which people could be contacted in person and when some people were furloughed. We acknowledge and recognise that as a relevant circumstance. However, it was perfectly practicable for the respondent to communicate with all of its staff in newsletters and it was perfectly practical to have used the same format to communicate with staff for ideas, or ways, to avoid the need for redundancies , or mitigating the number of redundancies. Written communication, in electronic format or otherwise, would also have been a practical means of informing employees that the respondent was willing to consider suitable applications for voluntary redundancy.

116. In these circumstances, the coronavirus epidemic was not sufficient to explain the respondent's failure to comply with this aspect of its procedure in light of the evidence of its ability and willingness to communicate with the same persons electronically in the same period.

117. We reject the respondent's argument's. Any reasonable employer, in the circumstances of this case, would have consulted with the workforce on ways of avoiding, or minimising, redundancies and avoiding compulsory redundancies. This aspect of the respondent's conduct was not reasonable in all the circumstances of this case.

118. The second element of the claimant's case is the marking of his absence and overall skill levels.

119. We find that the evaluation of the claimant's skill set was conscientious and consistent with the evidence before the respondent. The claimant does not dispute that he was not fully trained for his role. The award of 1 mark was therefore within the reasonable band of reasonable responses.

120. The claimant, in effect, argues that despite the accuracy of the mark, a reasonable employer would have increased the score to reflect the claimant's difficulties in successfully completing his training.

121. The claimant asserts that the respondent had acted unreasonably in the years prior to 2019 by failing to sufficiently cajole, or even threaten him with disciplinary proceedings, for his failure to complete the HGV loading, administrative work and computer training.

122. It is probably apparent from our preference for the evidence of Mr Mark Davies and the evidence from contemporary appraisal documents to which we have referred, that, the tribunal might think it would have been better for the respondent to have brought the claimant, as it were, to book; rather than to tolerate his lack of willingness to learn the full ambit of his role.

123. However, the test in law is not; "what could the employer have done better", we must focus on whether the employer's actual response was reasonable in all the circumstances. Those circumstances include the claimant's knowledge that he had, despite a number of years of written instructions and reminders, consciously avoided learning some elements so the work undertaken in the Wood Waste area.

124. We consider the respondent's actions to be within the band of reasonable responses; the claimant was a mature and long serving employee. Whilst his intransigence had been tolerated by Mr Davies, the claimant's inaction was his own choice and to award the claimant a mark which gave a false indication of his abilities, when compared with other "at risk" employees in his pool, would to very many reasonable employers, have been unfair to the claimant's colleagues and it would be a poor managerial decision to prefer the less capable and less co-operative employee.

125. We therefore find that the respondent's marking was within the band of reasonable responses.

126. As to the question of the claimant's absence, in our assessment the respondent's marking was an accurate reflection of the claimant's absence.

127. The tribunal accepts that, in a case such as this, where the claimant was allocated to a "pool" that the only criteria that actually determined whether the claimant was selected for redundancy was "capability" and, on the respondent's witness evidence, which we accept, capability was determined by "overall skill level "; the respondent wanted to retain the employees with the broadest range of skills; those who had the capability to undertake more than their own work.

128. In this case, the award of one point for the claimant's attendance had no material influence on the respondent's decision to select the claimant for redundancy because the mark for his attendance was not a matter taken into account.

129. The other factor raised before us was the opportunity to apply for suitable alternative work during the claimant's notice period.

130. We have reached a judgment that, as the respondent was in a position to make an offer of permanent employment to two persons who had not been employees of the respondent prior to July 2020 and during the period of the claimant's notice, were fixed term employees, it was an unreasonable response by the respondent to not allow the claimant (and others serving their notice period) the opportunity to apply for the new permanent roles.

131. The offers of permanent employment were typed on 1st of October 2020; seven days after the expiry of the claimant's notice period. We have found that the decision to afford two new permanent roles would have been taken, on the balance of probabilities before the claimant's effective date of termination and was logically under consideration prior that.

132. We consider that no reasonable employer, (which has been colloquially described as from paternalistic to the harsh but fair) in all the circumstances of this case, would fail to inform and at least invite a redundant employee, of 26 years' service, serving their notice, to apply for a role as a Winder. That is particularly so as in this case; the claimant been asked whether he wanted to undertake that role on a temporary basis less than three months earlier.

133. In our judgment, taking into account all the circumstances of this case, the respondent's inaction was outside the band of reasonable responses open to any employer in these circumstances.

134. For the two reasons set out above, we have reached the conclusion that the respondent's decision to dismiss the claimant was out with the broad band of responses open to a reasonable employer and we therefore declare that the dismissal of the claimant was unfair.

<u>The disability discrimination claims</u>

135. It is convenient to refer to the list of issues prepared by Employment Judge Moore.

136. Dealing first with the claims under section 15 of the Equality Act 2010. We remind ourselves that section 15 states that a person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of the disability and that the respondent cannot show the treatment is a proportionate means achieving a legitimate aim

137. We have taken into account it's the guidance in Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305. Which states that there can be a series of steps between the disability and the "something" arising from it, although there must be some causal link.

138. The tribunal should focus on the words "because of" something and identify the causal connection between the two. We considered Pnaiser v NHS England 2016 IRLR 170 which endorsed the following approach:

139. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues:

a. Did the respondent treat the claimant unfavourably because of his "something"; his intermittent absences and;
b. Did that "something" arise in consequence of B's disability.

We also considered Hall v The Chief Constable of West Yorkshire Police 2015, UKEAT/0057/15/LA on the correct approach to identifying the cause of the unfavourable treatment.

140. In Bank Mellat v HM Treasury (No 2) [2013] UKSC 38, the Supreme Court (see Lord Reed at para 74 and Lord Sumption, para 20) reviewed the domestic and European case law and formulated the justification test as follows:

a. Whether the objective of the PCP (the alleged legitimate aim) is sufficiently important to justify the limitation of a protected right,
b. Whether the PCP is rationally connected to the objective,
c. Whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
d. Whether the impact of the right's infringement is disproportionate to the likely benefit of the PCP.

141. The particulars of the claimant's section 15 claims were recorded by Employment Judge Moore of follows;

"Did the respondent treat the claimant less favourably by marking him down on the selection matrix in respect of attendance and skill set ?

142. We deal with the skill set first. We are satisfied on the evidence from the respondent that the sole cause for the limitation of the claimant's skill set was his own response to the instructions, directions and setting of goals by the respondent.

143. It is evident on the documents, and from the evidence of Mr Mark Davies, that the claimant's unwillingness to learn the full range of tasks associated with his role had existed for years before he had the protected characteristic of disability in 2019. At that time the claimant's unwillingness to learn was in no sense whatsoever associated with his future protected characteristic.

144. The Claimant's attitude to learning, on the evidence of Mr Mark Davies, which we accept, did not alter when he returned to work in June 2019 even though he was presented with the opportunity to undertake the training without any interference from other tasks and, due to his disability, a reduced range of simpler tasks; providing a greater opportunity to learn. He still did not take any active step with regard to learning the computer or paperwork side of his role.

145. We are therefore satisfied, on the balanced probabilities, that the respondent has proven that there was no causal connection between the claimant's incomplete skill set and his disability. The cause of the claimant's incomplete skill set was his pre-existent reticence to learn.

146. With regard to marking of the claimant's attendance in the redundancy selection matrix our first reaction on this case was that it was perfectly practical for the respondent to have discounted absences related to disability but in the course of the case it became apparent, and as we have accepted as a finding of fact, that the alleged unfavorable treatment of a low mark for attendance had no material part to play in the decision to dismiss the claimant; only his overall skill set marking determined his selection for redundancy.

147. The definition of unfavorable treatment has been considered in the recent case of Williams v The Trustees of Swansea University Pension and Assurance Scheme 2018, UK SC 65. At paragraph 27, Lord Carnforth stated:

"I agree with her that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.

148. In paragraph 5.7 of the Equality and Human Rights Commission's Code of Practice (2011) on what is meant by unfavourable treatment it states as follows:

"For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."

149. The unfavourable conduct alleged is the provision of 1 mark for the claimant in respect of his attendance. The claimant does not dispute the marking criteria nor the weighting of the marks.

150. On our findings of fact, the respondent's decision to dismiss the claimant' was not in any sense influenced by his attendance record; it was not a relevant criterion. In that respect the mark was not a disadvantage to the claimant. Logically, a higher mark would also have had no influence because the respondent did not take attendance into account.

151. We considered the alternative; that the low mark was, of itself, unfavourable to the claimant.

152. Having taken into account the Code of Practice and the dicta in Williams, as cited above, we do not consider that, on the claimant's evidence he perceived the mark itself as disadvantageous; it was the effect, as he understood it, which caused him the disadvantage; it's perceived contribution to his selection for redundancy. A perception which, with hindsight, was erroneous. The relatively low threshold of disadvantage which is sufficient to trigger the requirement of justification, is in our judgment, not met by the accurate assessment of the claimant's intermittent absence, in the context of the respondent's decision to discount the claimant's five month absence, when such an assessment did not have any unfavourable effect upon the decision to select the claimant for redundancy.

153. If we were wrong in that, we would find that the respondent has made out the defense of justification in that it has persuaded us, on the balance of probabilities , that the adoption of objective criteria was for a legitimate purpose; to enable a lawful and objective selection process for employees at risk of redundancy in circumstances where the respondent had the need to reduce its costs in order to sustain the survival of the business.

154. The accurate recording of the claimant's level of attendance, and classification of attendance generally by reference to a mark, was a proportionate means of ensuring a consistent and objective form of assessment for all employees. That is particularly so given the respondent did not take into account the period of five months absence which occurred in 2019 and the fact that his absence was discounted altogether in the respondent's final analysis.

155. In light of the above, we do not consider there was a less intrusive method by which the respondent could have achieved its legitimate aim and find that the respondent has established the statutory defence.

156. We then turn the to third aspect of the alleged unfavorable treatment; dismissing the claimant.

157. Without repetition of our findings of fact, we have concluded that the sole reason for the claimant's dismissal was his score on the "skills" matrix. We have found as a fact that the score on the skills matrix arose from the claimant's attitude towards the managerial directions that he should undertake training; an attitude which the claimant adopted for a number of years before he was disabled and there is no evidence to sustain a conclusion that his disability exacerbated or materially altered his pre-existing attitude.

158. We therefore found that the respondent has proven that, in no sense whatsoever, was the claimant's disability causally connected to the reason for his dismissal.

159. For the above reasons, we find that the claims of discrimination of arising from the claimant's disability must fail.

Reasonable Adjustments

160. Section 20 of the Equality Act 2010, states:

Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

161. The duty applies as between employer and employee by virtue of s.39(5) Equality Act 2010 and Schedule 8 contains further provisions applicable to that duty (see paragraphs 1, 2, 5 and 20). In particular, there is no duty on an employer to make reasonable adjustments if he does not know or could not reasonably be expected to know that the employee has a disability and is likely to be placed at the relevant substantial disadvantage.

162. The relevant steps in determining a claim of failure to make reasonable adjustments are set out in Environment Agency v Rowan [2008] ICR 218 (at paragraph 27).

163. The first step is to identify the relevant 'provision, criterion or practice"; (PCP), which places the employee at a substantial disadvantage.

164. The second step is to identify the 'substantial disadvantage' to which the employee was subject in comparison with persons who are not disabled. Substantial is defined in s.212(1) Equality Act 2010 as meaning "more than minor or trivial".

165. In Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, the Court of Appeal made clear the importance of identifying the relevant PCP and the precise nature of the disadvantage it creates in relation to a disabled individual by comparison with its effect on non-disabled people.

166. Where the disadvantage is the risk of dismissal for lack of capability, the comparator is likely to be an able-bodied person not at risk of dismissal because s/he is capable of performing the job.

167. The third step is to consider the reasonableness of the proposed adjustment. This is an objective test. It is not necessary for there to be a 'real prospect' of an adjustment removing a disadvantage to be reasonable. It is sufficient that there would have been; 'a prospect' of it being alleviated: Noor v Foreign and Commonwealth Office [2011] ICR 695 #

168. In this case the alleged criteria which are said to have put the claimant at a substantial disadvantage are the aforementioned redundancy selection criteria. The character of the selection criteria is not in dispute.

169. There is no doubt that the redundancy scoring matrix appears to impose the criteria of attendance and skill set. There is no dispute that the criteria of "skill set" was applied to the claimant.

170. It is also evident from the respondent's redundancy policy that when an employee, such as the claimant, is within a "pool", a fact which is not being disputed in this case, the only criteria the respondent applied was "capability"; which in practice meant the skill set of each employee.

171. For the reasons set out earlier in this judgment we find that the criteria of "attendance" was not applied to the claimant as part of the redundancy selection process. Similarly, the claimant was not at a substantial disadvantage by reason of his attendance record because the respondent did not take the attendance marks into account during the selection process.

172. We find the criteria of "skill set" was applied to the claimant in the redundancy selection process.

173. The next question is whether that PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability; in that he would be more likely to have more absences from work which would inhibit the claimant from gaining a skill set which made him capable of fulfilling all aspects of his job role ?

174. On our analysis, the claimant's skill set had, on the documentary evidence, been incomplete in the years from at least 2008 up to the commencement of his long-term sickness absences in early 2019. That was so despite the repeated directions to complete training.

175. In the period of June 2019 to March of 2020 we find that, the claimant could have engaged in learning the recording and information entry systems on the respondent's computer system. The claimant's instances of sickness absence did not inhibit him from doing so in the context of the light duties he was required to undertake and the encouragement of Mr Mark Davies.

176. In those circumstances, and the fact that on Mr Mark Davies' evidence the claimant had been requested and declined to undertake the training there is nothing in the evidence before us that we have accepted which indicates that in this particular case the claimant's disability had any influence on his skill level in respect of one load or offload or the associated and recording and inputting information.

177. in those circumstances, we do find that, for the purposes of the assessment of a claimant for redundancy, that he was not at a substantial disadvantage by reason of his disability.

178. Nor, given the evidence of Mark Davies, could the respondent reasonably have understood the claimant was at a substantial disadvantage in meeting the skill set criteria when the apparent reason for the claimant's limited ability to fulfil all aspects of his job role was a deep seated, and long-standing unwillingness to do so.

179. For these reasons, we have found that reasonable adjustments clam is not well founded.

180. We conclude this judgment with two points. In relation to the claim of unfair dismissal, in the course of the evidence, and in submissions, the claimant did not challenge the respondent's approach to the "pool" of employees in which he was placed. There was no apparent unreasonableness in the respondent's decision identified by the tribunal.

181. The claimant has acted in person, albeit ably assisted by his partner. The tribunal at times actively engaged with all of the matters that were necessary for our determination of the pleaded claims, whether those elements were pleaded or not and to a considerable

extent in the course of this case, particularly through myself and partly through my colleagues, we made some effort of pressing the respondent's witnesses on matters that the claimant had not touched upon. In this way we are satisfied that every aspect of the claimant's case has been thoroughly tested before we reached our decisions.

Remedy for unfair dismissal

182. An employee who has been unfairly dismissed may, depending upon the circumstances, be entitled to a basic award under section 119 and a compensatory award under section 123 of the Employment Rights Act 1996.

183. The claimant's schedule of loss, at page 20 of the bundle, does not seek a basic award. This accurately reflects the effect of section 122(4) in a case, such as this, where a person has been dismissed by reason of redundancy and received a redundancy payment calculated in accordance with the statutory scheme. Accordingly, we make no order for a basic award.

184. Section 123 of the Employment Rights Act 1996 states:

Compensatory award.

(1)Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2)The loss referred to in subsection (1) shall be taken to include—

(a)any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b)subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

185. The starting point in assessing compensation for loss of earnings for unfair dismissal is:

a. Whether the loss claimed flows from or was occasioned or caused by the dismissal: would the employee have been dismissed (either at or around the same time or at some later point) anyway? In short, did the unfairness make a difference?
b. Whether the loss was attributable to the conduct of the employer?
c. If so, was it just and equitable to award compensation?

186. The claim for compensation is for the financial loss the claimant has suffered subsequent to his effective date of termination on the 23rd of September 2020; his salary and pension contributions.

187. At paragraph nine of the claimant's witness statement, he set out what, in his very difficult personal circumstances, he has done to mitigate his loss. We accept that it is very difficult for him to obtain employment following his dismissal because of the continuing adverse effects of his impaired physical, and now mental, health.

188. The tribunal found that the dismissal was unfair in two respects and we will look at each of those in turn in our assessment of the claim for compensation under section 123 of the Employment Rights Act 1996.

189. The first element was the failure of the respondent to consult with the employees before commencing the redundancy selection process for potential redundancy.

190. The purpose of the initial stage of consultation was to explore possible ways of avoiding redundancies or mitigating the number of people who might be dismissed by reason of redundancy. In the circumstances of this case, only one specific criticism has been forthcoming; the reduction of compulsory redundancies through voluntary redundancy.

191. We noted the evidence of Mr Droog that, with regard to voluntary redundancies, three people had resigned in the course of the redundancy process and received a redundancy payment. We accept Mr Droog 's evidence that those resignations were part of the redundancy process and those who resigned were included in scoring matrix of employees who were at risk of redundancy.

192. The Claimant was not a person who wished to resign on a voluntary basis, and there was no evidence that the failure to consult made any material difference to the selection of the claimant for redundancy from within the Waste Wood pool of employees.

193. In our judgment, had the respondent acted reasonably in holding an initial consultation, it would have had no material effect upon the selection of the claimant from within his pool. Neither would the duration of the claimant's redundancy process have been protracted because the consideration of voluntary redundancies occurred in tandem with the compulsory selection process.

194. The more difficult point to determine is the respondent's failure to invite employees who had been given notice of their redundancy to apply for the two new permanent positions of Winder.

195. We took into account the fact that three members of the Winding team were selected for redundancy. In the redundancy Scoring matrix one of those three had scored 52 points, one had scored 50 and the third 46. The claimant's mark was 48.

196. The tribunal considered that it was relevant to take into account that, where there are two vacant positions for Winders there is some likelihood that those who had very recently been engaged as Winders would be likely to apply for a continuation of the job from which they had been made redundant. Further, a reasonable employer might prefer such an applicant because they had immediate experience in the job. And so, if the opportunity had been made available to the redundant employees during their notice period, it is far from certain that the claimant would have been a candidate with a reasonable prospect of success.

197. The other point of significance is this; when asked by the employment judge, the claimant was reticent about whether he would have applied for the post.

198. The potential effect of such reticence upon the possible quantum of any award of compensation was explained to the claimant and the tribunal allowed the claimant a break to give him an opportunity to think about his position.

199. His position did not change significantly but the employment judge and Mr. Roberts also enquired about the claimant's attitude to towards the potential alternative employment had reasonable adjustments been made for the claimant; it would have been incumbent upon the respondent to consider reasonable adjustments for an applicant for the Winder posts.

200. The claimant explained which tasks in the Winding process were undertaken by people rather than machines. These included the final adjustments of the large wooden drums (both those which were wound with wire and those waiting to be wound) into two pistons and the removal of those drums onto a forklift truck. Those were repetitive manual handling operations requiring a degree of strength and endurance. Such work would have a substantial risk of further damage to his physical health. After further enquiry from the employment judge and Mr Roberts, the claimant could not conceive of any reasonable adjustment which would enable him to undertake that type of activity.

201. The balance of the work is the operation of a forklift truck which delivers or returns drums, whether empty or full, to their destinations. Again, on the tribunal's enquiry on the practicality of the claimant being able to undertake the driving role in a forklift truck, with reasonable adjustments, he explained that in his former role, on occasions when he was working alone, he would sometimes drive a forklift truck across the yard to retrieve empty drums and take them back to his place of work for cleaning. This was a round trip of about 50 metres. He also indicated that the yard was uneven, so driving a forklift truck could cause him significant pain if he was jolted when driving over a pothole. He referred to 19th January 2020; just such an occurrence was recorded in his doctor's notes.

202. By the conclusion of the claimant's submissions, it can be reasonably said it would be very unlikely that he could, even with adjustments, have taken up any aspect of the winding role. It is still less likely that, for the above reasons, he would have applied for it.

203. The respondent's position is that, on the correct application of section 123, we must award compensation which flows from the respondent's unlawful actions. The respondent argued that, on the evidence and submissions of the claimant, he has sustained no loss which was consequent to the unlawful actions of the respondent.

204. We have also directed ourselves in accordance with the dicta Polkey v A.E Dayton Services limited 1987 IRLR 503 and paragraphs 54 to 57 of the Employment Appeal Tribunal decision in Software 2000 ltd v Andrews & Others [2007 IRLR 569 which gives precise guidance to the tribunal on the degree to which it is appropriate to speculate on the possibility that an employee might have retained their employment or had their employment terminated lawfully and how that should be expressed, typically in percentage terms.

Analysis

205. With regard to the first unreasonable act of the respondent, we cannot detect any loss which flows from that decision. The claimant would not have applied for voluntary redundancy. Had the respondent undertaken the initial consultation the selection process would have started and proceeded at the pace it did.

206. The claimant was candid in his acceptance that he did not believe, even with reasonable adjustments, that he would have applied for the Winder post. It is a virtual certainty that, had the respondent made the claimant aware of the Winder job, he would not have applied. Further, and hypothetically, had the claimant made an application, it is less than likely that he would have been the only person amongst his relevant colleagues to do so. Those colleagues who had been made redundant from their Winder post would have been significantly stronger candidates.

207. We have expressed two reasons above. They are discrete; absent the second reason we concluded that the claimant would not have continued in the respondent's employment because it is virtually certain he would not have applied for the winder post.

208. Our conclusion is that the unreasonable conduct of the respondent did not lead to any financial loss to the claimant; he would in any event have been selected for redundancy and his dismissal would have been effective on the same date; 23rd September 2020.

209. In those circumstances the tribunal is driven to a conclusion that it is just and equitable to make no award for compensation following from the unfair dismissal.

Employment Judge R F Powell

Dated: 25th January 2022

JUDGMENT SENT TO THE PARTIES ON 27 January 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche