EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105221/2018

Held in Glasgow on 18, 19, 20 March, 10 and 11 April and 21 May 2019 - Members meeting in Chambers

Employment Judge: F Jane Garvie

Mr C	**Claimant** **In Person**
Novograf Limited	**Respondent** **Represented by:** **Mr W Templeton - Employment Relations Representative**

JUDGMENT

The Judgment of the Tribunal is that:-

(1) the claimant is disabled in terms of section 6(1)(a) the Equality Act 2010 and he was disabled as at the date of his dismissal by the respondent;

(2) the claimant was dismissed by reason of redundancy in terms of section 105 of the Employment Rights Act 1996 which is a potentially fair reason for dismissal in terms of section 98(2)(c) but

(3) his dismissal was not connected to or associated with his disability. The respondent's decision to dismiss the claim on the ground of redundancy was fair and the claim is therefore dismissed.

REASONS

Background

1. In his claim, (the ET1) presented on 3 June 2018, the claimant alleged that he had been unfairly dismissed. He also alleged that he was discriminated against on the grounds of disability. He ticked the box marked, 'other payments' at section 8 of the ET1.

2. The respondent lodged a response, (the ET3) on 15 June 2018 in which they admit that the claimant was dismissed on the ground of redundancy but deny he was disabled as alleged. They further deny that he had been discriminated against on the grounds of an alleged disability.

3. Arrangements were made for a Preliminary Hearing by way of case management to be held on 17 August 2018. That Preliminary Hearing took place before Employment Judge Lucy Wiseman who issued a Note dated 20 August 2018 in which she made various directions, in particular, that the claimant was to set out on what basis his claim in relation to discrimination was and to do so by 31 August. He was also directed to provide a letter confirming the diagnosis of depression, when it was made, what medication was prescribed and what impact this condition has on the claimant. The claimant also agreed to provide a Disability Impact Statement setting out what impact his depression has on his ability to carry out normal day to day activities and to do so by 31 August. Thereafter, the respondent was given 14 days to clarify their position regarding the allegations of discrimination.

4. The claimant provided a Statement under cover of an email of 30 August 2018 copied to Mr Templeton for information. By email of 2 September 2018, he provided a report from his GP and indicated that he had requested his full medical records.

5. By email of 4 September 2018, the respondent indicated that the claimant had not set out his position in relation to his claim and the claimant responded on 5 September 2018.

6. Meanwhile, Mr Templeton by email of 6 September 2018 set out the respondent's position regarding the claimant's Disability Impact Statement.

7. The claimant's wife replied on 14 September 2018, explaining that her husband was not in a position to respond further as of that date and a reply was received from Mr Templeton on 18 September 2018.

8. There was then further correspondence from Mr Templeton followed by an Additional Information Order being granted on 12 October 2018.

9. The claimant replied to this by email of 5 November 2018, attaching Answers to the Questions posed by the respondent. Mr Templeton then responded by email of 14 November 2018, setting out that the respondent's position which remained that they were unaware of the claimant's disability coming within the compass of the Equality Act 2010, (the 2010 Act).

10. On the direction of Judge Shona Maclean, arrangements were to be made for a final hearing with the issue of disability being addressed at that final hearing and the parties were to be provide their availability for that final hearing.

11. By Notices dated 19 January 2019, the parties were advised that the final hearing would take place on 18, 19, 20 and 21 March 2019 and the issue of whether or not the claimant was disabled would be addressed at that final hearing.

12. Thereafter, an application was made for witness orders by the claimant and he was directed to provide an explanation as to why these individuals were required to attend on the claimant's behalf. Subsequently, Witness Orders were issued for the attendance of Messrs Hogarth, Robertson, Rough and MacDonald.

13. The respondent objected to the relevance of these witnesses and was informed that Employment Judge Wiseman had already directed that these witnesses should be in attendance on the basis that the claimant had already confirmed the relevance of their evidence after which the Witness Orders were issued.

The final hearing

14. It became apparent at an early stage in the final hearing that it would be appropriate to issue an Anonymisation Order in relation to the claimant and accordingly this was issued. There was no objection from either party to the Tribunal doing so. It was issued in terms of rule 50 (3) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

15. It later became apparent on 20 March 2019 that it was not appropriate to continue with the final hearing as the claimant was too upset to be able to proceed. Accordingly, fresh dates were agreed with the parties the hearing to continue on 10, 11, 12, 15 and 16 April 2019. The evidence was completed on 11 April and so the remaining days were not required.

16. When the evidence concluded it was agreed with the parties that rather than proceed with closing submissions by way of an oral addressed to the Tribunal that week, it would be appropriate for this to be done by way of written submissions. Mr Templeton agreed to send his written submissions to the claimant by no later than 18 April 2019 and the claimant was then given until 30 April 2019 to provide his written submission. The Tribunal arranged to meet in private to consider the evidence, the issues and the parties' submissions on 21 May 2019.

17. Both parties duly provided written submissions which were available to the Tribunal for consideration at the Tribunal's meeting on 21 May 2019.

18. It is also appropriate to record that it was agreed that the issue of remedy would be reserved to a later date in the event that the claim was successful either in relation to unfair dismissal and/or disability discrimination.

19. It was also agreed that the respondent would give their evidence first since the claimant was unrepresented and there was no objection from either party to proceeding on this basis.

20. Evidence was given on behalf of the respondent by Mrs Jennifer Riddell-Dillet, their Managing Director, Mr Alan Marshall, their Operations Director and Mr Robert McKee who is a Product Designer with the respondent.

21. The claimant gave evidence on his own behalf. Evidence was also given on his behalf by Mr Craig Robertson who is a Graphic Designer with the respondent, Mr Robert McKee who is a Product Designer with the respondent and Mr David Rough who is a Design Manager with the respondent.

22. A joint bundle of productions was provided.

Findings of Fact

23. The Tribunal made the following essential findings of fact.

24. The claimant commenced employment with the respondent on 18 April 1988. His employment ended on 31 March 2018. In his ET1 at page 4, he gave as his job the title, 'Graphic Designer', (Production 1.3). This is the same job title as was shown in his terms and conditions under the heading, 'Job Title', (Production 9).

25. Ownership of the respondent's business changed from a privately owned company to an employee owned company in December 2016 with a number of trustees on the Board of Directors. By early 2018 there was a downturn in business as a result of which the board concluded that operating costs must be reduced and potentially there was a requirement to consider making a number of positions redundant.

26. Mrs Riddell-Dillet prepared a document entitled, '2018 Managing the Business for the Future – Cost Control', (Production 12). This document is dated "Mar 2018".

27. On 13 March 2018, all staff were informed that measures were being put in place to take account of this business downturn and that as a result, cost saving measures would be required, including possible redundancies.

28. The staff were informed that employees who were potentially at risk of redundancy would be scored against a selection criteria matrix. Pools of staff

who were potentially at risk were placed into various pools using job descriptions.

29. On 20 March 2018, (Production 19) Mrs Riddell-Dillet had emailed "All users" informing them as follows:

"Dear all,

To confirm the consultation processes underway for those staff potentially impacted. All other employees are not required to attend the consultation. If you have any questions, please do not hesitate to ask."

30. The claimant was one of four staff in his selection pool. Following a scoring exercise carried out by Mr Marshall, his scores were the lowest overall, (Production 13). The respondent had decided that consultation should only take place with those staff from each of the pools who were identified as being most at risk of redundancy, based on their scores in the selection matrix.

31. The claimant was invited by letter dated 19 March 2018 to attend a first consultation meeting later that day, (Production 15). He chose to be accompanied by his colleague, Mr McKee.

32. Mr Marshall had previous experience of preparing a selection matrix and scoring system for an earlier redundancy situation which occurred in 2011.

33. Mr Marshall attended for the respondent. He read from what is described as a "Script" and explained why redundancies were required. He also explained that the possibility of job sharing\salary cut\shorter hours\etc had been considered but the respondent decided these options would not be suitable and so, the only alternative would be making the claimant's post redundant. The claimant was asked if he could think of any other option to let Mr Marshall know, (Production 16).

34. Mr McKee was concerned that in his handwritten note of that meeting, (Production 26) he referred to this further meeting on 26 March as the "Finalization Meeting" and this may have caused the claimant to think there was only to be one more meeting whereas there were actually two further

meetings, the second one being held on 26 March followed by the third and final hearing the day after that on 27 March 2018.

35. Against this, it was explained that there would be a further meeting to be held a week later on 26 March 2018.

36. At this first meeting Mr Marshall informed the claimant that he had carried out the selection scoring for those in the claimant's pool. He explained the scoring matrix and went through the claimant's scores. He also explained that the claimant's lowest score was under the heading of "Professional, performance" but the claimant's absences and time keeping were not included since they were regarded by Mr Marshall as being a "personal matter". Therefore, his performance attracted a lower score as his performance was not "exemplary". The notes from that meeting, (Production 16.1) also refer to "a lot of errors made".

37. The reason Mr Marshall did not take account of the claimant's absences and time keeping was that the claimant had informed him at some point around 2010 that he had depression. The claimant asked Mr Marshall not to disclose this condition to other staff. Mr Marshall agreed to keep the information to himself. He did not arrange for the information to be noted in the claimant's personnel file nor did he tell any of his management colleagues about the claimant's depression. He was, however, aware that over the years there were occasions when the claimant would arrive late at work to start a shift while on other occasions he might not attend work. No disciplinary steps were ever taken by the respondent as a result of late time keeping or occasional absences when he did not attend work.

38. In relation to the selection criteria used by the respondent these are set out under four separate headings, (Productions 13 and 14). The first was "Product, market and operations knowledge, its specialist value, and ability to deploy effectively".

39. The second was "Uniqueness of skills set, and potential competitive future value of specialist skills". The third was "Relationship with customers and

potential direct impact on revenues or future business growth if no longer in relationship".

40. The fourth was "Professional standards re sickness, absence, timekeeping, task completion".

41. The scores attributed to the claimant were set out at Production 13. The claimant's total score was 29, comprising a mark of 8 for the first three categories and a mark of 5 for the fourth category.

42. The scoring was marked under the values of 0, 1, 2, 4, 8 and 16 for the first three categories whereas the fourth category (Professional Standards re sickness, absence, timekeeping, task completion) had three scores, 0 where "Issues have been raised with one or more matters relating to this area", 5 where it was found to be "Acceptable track record, with no abnormal pattern of issues" and 10 for "Exemplary track record with no issues". As indicated above, the claimant scored 5 as Mr Marshall discounted the claimant's timekeeping and attendance. Had he not done so, then the score he would have had to give would have been 0. The claimant could not have been awarded 10 as that is where someone had an "Exemplary track record with no issues".

43. Under the heading, "Basis of Criteria" in Production 13) it reads:

> "1 To ensure the business retains those employees able to act and respond most flexibly to market, technical and operational demands.
>
> 2 To ensure the company retains those employees with the maximum detailed intrinsic knowledge of novograf.
>
> 3 To ensure the company protects any unique or hard to find specialisms within its employee base.
>
> 4 To recognise the difficulty and time scale of recovering appropriate human resources.

5 To address the issue of the degree of commercial and client relationship risk relating to the departure of an individual.

6 To ensure we recognise the highest professional standards, eg discipline etc."

44. In relation to the scoring, Mr Marshall had also prepared a separate note setting out the information contained at Production 13 but with further information alongside this at Production 14. The claimant was not shown Production 14.

45. In relation to the first category, the claimant had the same scores as his three colleagues in the pool. In Production 14 Mr Marshall's comments were that all four members of the graphic design team which was the pool he scored which included the claimant, had "a high level of knowledge and understanding and were able to deploy effectively."

46. Under the second category, "Uniqueness of skill sets etc", his comments were that all four in graphic design had "various skills which were stronger than others but all equally valid and appropriate". Robert (in design), photoshop (Craig) likewise plus Icut, the claimant with nesting & template. He also specified that "none are specialist to the business, others in design can do all tasks".

47. In relation to the third category, he noted that all four members of the pool had "various interactions with customers and relationships were of a strategic benefit to the business though none were likely to make a client remove their business."

48. In relation to the fourth category, his comments were as follows -

"This is the segment where there is a recorded difference between C and the others. He continued in his note that:

"There was an exclusion made throughout the 3 stages of the redundancy process relating to C's timekeeping and absence, these were not taken into account. The scoring of 5 reflected an acceptable

track record excluding timekeeping/absence where no abnormal patterns were included.

C was never penalised for lateness and absence as can be seen from his satisfactory performance."

49. This note also recorded that where the claimant had "scored lower", it was "down to the general service delivered to the business."

50. There were also comments that "digital staff and converting staff would often complain "off-record" about the time taken to release files, the quality of the file and its integrity (revision control)."

51. One issue was specifically noted in relation to a customer, Iceland where it was noted that "Files selected and released were incorrect and not those that were specifically created by the designer. This caused batch control issues and down time on the press for colour matching. Revision control of files was hap-hazard."

52. There was also comment, "manufacturing installed a FS standard for how a department should look, X failed to meet these standards and failed to recognise what they were trying to achieve even after being told on several occasions."

53. There was also reference to "emails chasing progress and department complaints that had been passed through from converting."

54. At this meeting, Mr Marshall explained the scoring matrix and went through how he had scored the claimant and why he had the lowest score in relation to professional performance. He explained specifically to the claimant that the claimant's absence and timekeeping were not being included as part of that scoring exercise and that this was due to a personal matter.

55. It was also made clear to him that the scoring was down to his performance and that this was not "exemplary with a lot of errors made".

56. The claimant's response was that he did not consider the scoring to be fair for professionalism but he did acknowledge that his performance had not been exemplary.

57. At this meeting, the claimant was supplied with a copy of his scoring card (Production 13).

58. The meeting on 19 March 2018 was relatively short. The claimant was (understandably) very upset to be told of his potential redundancy. Mr Marshall decided that the claimant should to home as he was in shock particularly given his length of service with the respondent.

59. Mr Marshall did not accept that the said to the claimant not to mention his illness. Mr McKee did not recollect this being said whereas the claimant was adamant it was said to him and that was why he did not mention it to Mr Marshall. What was mentioned was the claimant's timekeeping and attendance under explanation by Mr Marshall that these were discounted by him when scoring the claimant under the fourth category and hence why the claimant was scored for this category as a 5 rather than 0, there being only 3 scores available to be used, namely 0, 5 or 10.

60. By letter dated 22 March 2018, (Production 20) confirmation was given of the further meeting to be held on 26 March 2018. The claimant attended this, again with Mr Rough present as his representative. Mr Marshall attended for the respondent, (Production 17). This further meeting had been mentioned on 19 March 2018.

61. At the second consultation meeting held on 26 March 2018, the claimant questioned how many were in his group. He also wanted an explanation of "the grouping". Mr Marshall explained that the pool used had been the four staff who held the same job title, namely that of Graphic Designer.

62. The claimant did not make any suggestions about alternatives to redundancy Although he did make it clear that he felt that he had been "shabbily treated after 30 years of service".

63. The claimant was again visibly upset. Mr Marshall advised him that he should go home as it would have been unfair to expect him to return to his work station. The claimant did not return to work thereafter.

64. There was then a third meeting on 27 March 2018, again with Mr McKee and Mr Marshall present. At that meeting the claimant was informed that the consultation process was coming to an end and, as there were no suitable alternatives available, the claimant was to be made redundant.

65. He was advised that he had an entitlement to three months' notice but would not be asked to honour this due to his long service and so, in effect, he did not require to return to work to serve his notice period. The appeal process was also outlined to him.

66. By letter dated 27 March 2018, (Production 21) Mr Marshall confirmed the respondent's decision to dismiss the claimant on the ground of redundancy, arising as a result of diminished work load in the business. The letter set out the claimant's entitlement to statutory redundancy entitlement payment was attached. The letter advised the claimant of his right to appeal against the decision and to do so within 7 days to the Managing Director, Mrs Riddell-Dillet.

67. One of the issues which the claimant repeatedly referred to during his evidence to the Tribunal was to focus on what he saw as his unique skillset in relation to being able to carry out off site surveys. He believed that this unique skillset was not held by others in the selection pool.

68. Mr Marshall, Mr McKee, Mr Robertson and Mr Rough disagreed that this was a unique skillset but even if others had not been trained in such work it was a skill that was quickly and easily acquired and this had proved to the case going forward.

69. By letter dated 28 March 2018, (Production 22), the claimant submitted an appeal to Mrs Riddell-Dillet.

70. In his letter, he asked her to consider his appeal and that the reasons for challenging the decision was as follows:

"

- *You failed to enter meaningful consultation with me and all affected employees in my department*
- *You failed to adopt a fair selection process and I believe I was unfairly scored in the selection criteria.*
- *You have failed to act reasonably or adopted a fair basis on which to select for redundancy or taken any steps which may be reasonable to avoid or minimise redundancy by redeployment within the Company.*

I believe that these actions demonstrate that the whole process is a sham, and that you had predetermined the outcome. For these reasons, I assert that I have been unfairly dismissed on the grounds of my disability. I look forward to your response with details of an appeal hearing where we can hopefully resolve this situation internally, avoiding the need for any legal action."

71. By letter dated 27 March 2018, Mrs Riddell-Dillet acknowledged the claimant's appeal letter, (Production 23). She confirmed that this would be held on 5 April and that the claimant had the right to be represented by a colleague, if he wished to do so.

72. The appeal hearing took place with Mrs Riddell-Dillet. The claimant declined to be accompanied. Mrs Riddell-Dillet made notes during this meeting, (Production 24 - 24.3). These set out the grounds given by the claimant in his appeal letter which were discussed.

73. Mrs Riddell-Dillet explained that the company did not need to consult with any staff other than those who were specified to be at risk so far as the company was concerned.

74. The claimant responded that, as no other staff were consulted, in his view the process had been predetermined and he felt there had been no consideration given to alternative options.

75. In relation to unfairness, the claimant highlighted the reference to "Uniqueness of skillset and potential competitive future of value of specialist skills", he pointed out that he had scored 8, whereas he felt he should have been scored 16 as he was the only member of staff in the pool who could conduct off-site surveys and he had done these within the last two months. He also believed that he was the only person who had these skills and should therefore have been scored higher than the score given.

76. In relation to "Professional standards", his position was that he should have scored 10 but was scored 5 and a higher score should have been attributed because he had carried out the same job for 30 years working with a company throughout that time.

77. He also pointed out that there was no "on-file record" of poor performance by him.

78. He also then explained that he felt that his disability had been the reason he had been selected although he did note that at the consultation meeting, Mr Marshall had said that this had not been considered.

79. Mrs Riddell-Dillet asked the claimant to provide information on any health issues as the company had no formal record or any written documentation or information of any medical condition. The claimant advised that he had told Mr Marshall of health issues in the past but this had been done verbally.

80. He also explained that he had been clinically depressed for eight years and was on medication for his illness and that he had been diagnosed with sleep apnea in the previous November 2017 and had received a device which was assisting him from January 2018 onwards.

81. The claimant accepted that he had not provided any written documentation about his health to the respondent but he believed that it was because of his "disabilities" that he had been selected.

82. He also indicated that he was "disgusted" that after 30 years, "the company would do this" and he was "shocked by this".

83. His view was that the company had not met its own Code of Conduct. He was asked if he had any other points that he wished to make.

84. The claimant is recorded as having said that he believed that "at a tribunal Novograf would have to show why he was targeted".

85. By letter dated 9 April 2018, (Production 25-25.2) Mrs Riddell-Dillet wrote to the claimant, advising of the outcome of the appeal against redundancy.

86. She explained that the company did not consider it was necessary to consult anyone other than those who were immediately at risk and, following a detailed selection criteria review and scoring, those employees potentially impacted had been scored by Mr Marshall. His scoring was then verified by the Line Manager for each of the impacted employees.

87. The process was then also considered by the elected trustees for the company by way of a final overview. Once this process had been completed those employees who were potentially impacted, including the claimant, were consulted.

88. She explained that:

"No final decision was reached as the outcome of the process until all avenues arising out of the consultation process had been explored. The process was therefore not pre-determined and had significant oversight to ensure no bias was included in selection scoring."

89. It was her conclusion that there was consultation with the claimant. In relation to the claimant's allegation that the selection criteria used was not fair and that he was unfairly scored, she noted that the claimant had a skill of conducting off site surveys in the past. She noted he maintained that no other staff had done this type of work. Her conclusion was that this was work that the claimant had undertaken but it was not a unique skill and was not a critical skill in the Graphic Design role.

90. While the claimant was not entitled to see the scores of the rest of his pool, the company considered that the scoring was fair.

91. Mrs Riddell-Dillet also noted the comment made that the score for "Professional standards at 5 should have been higher" but this did not factor in length of service. The claimant scored 5 as he had an "acceptable track record, with no abnormal pattern of issues". In her view, this was fair and reasonable and had not been negatively impacted by the claimant's health issues.

92. She then reiterated that, as explained at their meeting, steps had been taken to reduce costs with a view to reducing the need for redundancies which had included looking at restrictions on overtime, recruitment, use of temporary staff and cost control for all expenditures. "Regrettably, even having implemented these measures a number of redundancies had been found to be necessary."

93. Finally, she noted the claimant's comments that he had been unfairly dismissed on the grounds of disability. Her letter continued as follows:

> *"Novograf was aware that you had certain health issues, though we have no written records of what these might be. They do not appear to have impacted adversely upon your employment. Certainly, we are not aware, and had no reason to suppose, that you are in any way disabled, nor did you suggest such a thing at the consultation meetings. Being, thus, aware and in the interests of fairness, we ensured that there were no selection criteria which has been impacted by these potential health issues."*

94. Her letter concluded that the claimant's selection was neither predetermined nor based on any health issues.

95. As explained above, Mr McKee who had attended all three consultation meetings with the claimant had made some handwritten notes, (Production 26) at the first meeting. He thought that he had perhaps inaccurately recorded this as indicating that 26 March was to be "finalisation meeting" which may have caused the claimant to think that the decision had already been taken, whereas there was a second meeting on 26 March 2018 when the claimant's job was still at risk there was further discussion. The final

meeting was then held on 27 March 2018 when the claimant was informed that he was being made redundant. Mr McKee's note also refers to the meeting on 26 March 2018 as being the "2nd meeting".

96. The claimant provided a report from his GP, (Production 27-27.1) which is addressed, "TO WHOM IT MAY CONCERN".

97. In this report, there is reference to the claimant having a long history of depression for a number of years. It continued as follows:

> *"On discussing with his wife and reviewing old notes, it would appear that he can have dips in his mood which last a few days every couple of months. During these times, he struggles to get out of his bed, he does not communicate, is very low in mood and tearful. I understand that during such times, he has often had to phone into his work to take holidays rather than admit that he was suffering from depression at that time. I understand that he can also have two or three bouts of much more severe depression when he is physically unable to get out of bed for a number of days. This can happen up to three times a year according to (his wife). I understand that C has been very embarrassed and reluctant to discuss symptoms of depression and has often phoned work to say that any time towards any time taken off work is due to poor sleep rather than admitting it is due to a depressive episode."*

98. There is also reference to the claimant's depression having had an impact on his work and his relationship and that he had been involved in several treatments including "CBT (cognitive behavioural therapy) and counselling over the years which have helped at the time." The doctor noted that "however it would appear that after some time his mood deteriorates again."

99. The report then refers to the GP's first meeting having been with the claimant on 10 March 2017 when the claimant was a new patient (as the claimant had moved house).

100. The report refers to various medications prescribed to the claimant and then a review when he saw the claimant on 4 April 2018shortly after his employment with the respondent had ended.

101. The report continues:

> *"At that stage, he was bewildered and his mood was lower. He was having poor sleep. We had a long chat and C was considering his options. At that stage we decided to continue (his medication) at the same dose and I was to see him again in a few weeks.*
>
> *I reviewed him on 13 June 2018, at this stage he was struggling and complaining of poor motivation and concentration, poverty of thought."*

102. There was then further information about the medication being prescribed followed by further consultations with the claimant on 2 July and 31 July and then on 20 August 2018.

103. The report concluded as follows:

> *"In my opinion, it would appear that the claimant's mood has suffered a very significant deterioration in relation to losing his job. It is also apparent that C has often struggled through his working life trying to manage his depression. He states that there are times when he has attended work despite difficulties with his cognition due to his depression. This led to him obviously working a bit slower than others. He and his wife state that there were no provisions made for this."*

104. As already explained above, In relation to depression, the claimant had had a discussion with Mr Marshall around later 2010 or 2011 when he had explained to Mr Marshall that he was affected by mental health issues but he made it clear that he did not want this discussed with anyone else in the respondent's workforce. This appeared to include any discussion with the management team. Mr Marshall, for his part, accepted that the claimant did not wish this discussed and he took steps to ensure that more leeway was given to the claimant on occasions when he would arrive later than usual, not

attend work at all or on other occasions when the claimant would leave his workstation and go for a walk elsewhere in the respondent's factory.

105. Mr Rough was aware that the claimant would, from time to time, appear to fall asleep for what the claimant described as "microsleeps" where he would close his eyes momentarily but then would refocus immediately and return to work as normal. There was never any discussion with the claimant by the respondent's management, including Mr Marshall about these occasional lapses of concentration nor the fact that the claimant would from time to time leave his work bench and go elsewhere within the factory premises.

106. In relation to the redundancies, 10 employees were made redundant at the same time as the claimant's role was made redundant. The claimant's job title had changed from Senior Graphic Designer some months before the redundancy process took effect in late 2017. At that time there were no redundancies in contemplation. The claimant accepted the change in his job title in late 2017. It did not impact on his salary and he did not appeal against the decision to relabel his job title as Graphic Designer rather than Senior Graphic Designer.

107. As at the start of the redundancy process, as indicated above, the claimant was one of four Graphic Designers

108. At the first consultation meeting the claimant was adamant that Mr Marshall had told him something to the effect of "This is not about your illness, so don't raise/mention it."

109. Neither Mr Marshall nor Mr McKee could recollect this having been said to the claimant, albeit the claimant was adamant it had been mentioned. It was not in dispute that the claimant became upset at the consultation meetings which is entirely understandable given his employment was potentially at risk.

110. Both Mr Marshall and Mr McKee were clear in their evidence that the claimant was told that his illness and attendance record were discounted when the selection process was being undertaken and the scoring/marking carried out.

111. The Tribunal was satisfied from the evidence before it that the claimant was indeed told that his timekeeping and attendance record were not considered relevant when the scoring process was being undertaken by Mr Marshall. The respondent was faced with a position where there was an unexpected downturn in their business and they therefore had to take immediate action to reduce their costs. As indicated, the company had become employee owned some time earlier and there was a reluctance to make people redundant but the conclusion reached was that it was an option that they had to follow. Previous redundancies had occurred in 2011 but not since then.

112. Redundancies were looked at across the whole of the respondent company and the pools used were based on job titles.

113. The claimant was known to be late in arriving at work for a shift on some occasions and on others failing to come to work. The respondent did not make any enquiries about these incidents which fitted with Mr Marshall having accepted that the claimant's depression was known to him and had been for many years.

114. There were occasions when the claimant felt he had to leave his work station and go for a walk around the factory and no-one questioned him about doing so at any time. The claimant explained that there were some times when he realised that while at his work station he would lose concentration and have what he described as "microsleeps", lasting only seconds but he would then be able to concentrate again on the work task which he had been undertaking. Mr Rough knew that this would happen from time to time.

115. At the conclusion of the final hearing, (see above), it was agreed that the parties would each provide written submissions as this was going to be more helpful from the claimant's perspective to see what the respondent's position was and then to provide his reply to that written submission. Neither the claimant nor Mr Templeton sought to be given the opportunity to address the Tribunal orally on their written submissions.

116. The Tribunal was grateful to both parties for providing such clear written submissions.

117. The issues for determination by the Tribunal are as follows:

1, Was the claimant disabled in terms of the 2010 Act which the respondent disputes at least in relation to the time when the claimant was employed by them and

2. Whether the claimant's dismissal for redundancy in terms of section 98 (2) (c) of the Employment Rights Act 1996 (the 1996 Act) was fair or unfair, section 98(4) of the 1996 Act.

Submissions

Respondent's submissions

118. The Claimant makes a number of claims summarised by Employment Judge Wiseman in her note to the preliminary hearing on 17th August 1918, document 3 in the bundle. The Claimant confirms these to be correct in document 4.

119. In short, the Claimant claims the dismissal was unfair; there was no true redundancy; the procedures surrounding the selection and the consultation process were unfair and that he was discriminated against on the grounds of a disability contrary to sections 13, 15 and 20 of the Equality Act 2010.

120. I will address the issue of discrimination first.

121. It is the Respondents' position that, as at the point of redundancy, 27th March 2018, the Claimant's illness did not meet the criteria for it to be classified as a disability in terms of the Equality Act section 6.

122. In other words, at that time he was not, in this case, suffering from a mental impairment having a substantial and long term adverse effect on his ability to carry out normal day to day activities.

123. The medical evidence before the Tribunal would appear to bear out the long-term nature of the Claimant's condition. It is, however, my respectful submission that the Tribunal has no evidence to suggest that the Claimant's

condition had a substantial adverse effect on his ability to perform his normal day to day abilities.

124. The onus is on the Claimant in the first instance to establish a prima facie case and in my submission he has failed to do so. See *Royal Mail Group v Efobi 2019 EWCA Civ 18*.

125. It is for the tribunal to decide based on the evidence before it, and as a matter of law, whether the Claimant's condition should be classed as a disability. That determination has to be made as at the date of dismissal and not at the date of the hearing or some other later date.

126. It is my respectful submission that there is no evidence upon which the Tribunal could reach that conclusion. Medical evidence before the Tribunal either pre- dates the date of dismissal by many years or postdates it. The content of documents 27 and 28 must necessarily be taken cautiously due to their clearly post-dating the redundancy.

127. The Equality Act 2010 Guidance includes two non- exhaustive lists which might be taken into account to either suggest a substantial effect or the opposite.

128. I would at this point draw attention to documents 5, 6, 7and 8 of the bundle. Document 5 is the Claimant's Disability Impact Statement. In his evidence the Claimant indicated that this was completed based on his condition at the time of completion rather than on 27th March 2018. We heard evidence from Mr Marshall, Mr McKee and Mr Robertson. All of these witnesses know the Claimant well and in Mr Marshall and Mr McKee's case had done for in excess of 20 years. Neither Mr Marshall nor Mr McKee recognised any of the problems referred to by the Claimant. All three witnesses, and the Claimant himself, made reference to what the Claimant described as "micro sleeps". It appears that these were a very frequent occurrence, lasting 2 to 3 seconds, perhaps on average 3 or 4 times a day although on occasion more frequently. The Claimant believes these to be caused by his medication. There is no suggestion that he is in any way confused or disoriented by these events, it has not impacted on his ability to drive a motorcar and in my submission,

these should be discounted as not having a substantial effect. In fact, that "loss of consciousness" is the only symptom, upon which the Tribunal have evidence, which appears in the Guidance lists. It is apparent that their impact is not as severe as the Guidance list anticipates.

129. It is worthy of note that the micro sleeps are not referred to in any of the medical evidence.

130. Document 6 can only be described as evasive and gave rise to the Case Management Order, document 7. The replies in document 8, again, from the Claimant's evidence, describe his condition at the point of answering and not at 27th March 2018. When I put some of the same questions to him in cross examination, emphasising the need to cast his mind back to that date, it is apparent from his responses that, where his condition had an impact at all, he did not perceive it as substantial, using expressions such as "not greatly", "no major impact" or even "not at all". He confirmed that the episodes of low mood to which he referred were infrequent and lasted generally only for a relatively short time, a day or less.

131. The tribunal is obliged to focus on what the Claimant cannot do or can only do with difficulty discounting the effect of any medication. See *Mutombo-Mpania v Angard Staffing Solutions UKEATS/0021/18/JW*.

132. It is for the Claimant to lead evidence demonstrating what particular day to day activities are affected by his condition and that the effect is substantial, more than minor. In my respectful submission he has entirely failed to do so. The Claimant has failed to provide any evidence which would allow the Tribunal to reach a conclusion on his disability or otherwise as at 27th March 2018. I would invite the Tribunal to find that the Claimant was not disabled within the meaning of the Act.

133. If the Tribunal is not with me on that, given that Mr Marshall was clearly aware of the illness, I would have to concede that the Respondents were aware of the illness. I would point out, however, that, in his evidence, the Claimant made it very clear that he "did not want it to become gossip around the factory" and "did not want it going further than one person in the company".

134. It is clear that Mr Marshall took great care to respect that wish. This was, without doubt, the honourable thing for him to do, though in hindsight, perhaps not the wisest. It would seem that he took steps to support and protect the Claimant for around 11 years after the condition was originally disclosed to him. The Claimant acknowledged this, in response to a question from the tribunal, albeit insisting that it was the company who protected him not just Mr Marshall.

135. The Company may have known of the Claimant's condition but, with the exception of Mr Marshall, none of these involved in the redundancy process knew of it. The Claimant did not raise the issue until the appeal stage and, in his letter of appeal, in my submission, the suggestion appears almost to be an afterthought. The Claimant in his evidence stated that the letter was drafted by his daughter, an HR professional, and that he would not have worded the letter in that way. It is clear that the Claimant did not even perceive himself as potentially disabled prior to his redundancy impacting upon him. See Document 8.1 at paragraph 8.

136. For the Claimant to succeed in his claim of disability discrimination, he must not only convince the Tribunal that he was disabled, but also that he was discriminated against because of that disability, in this case, that his dismissal was directly related to his alleged disability. The Claimant has failed to make reference to any actual or notional comparator. At this stage I would draw your attention to the Claimant's statement, in response to questions from the tribunal, that, in his view, his condition was "not something which they (the Respondents) saw as being an issue." It is my respectful submission, that the Claimant has entirely failed to demonstrate any discrimination whatsoever. The Claimant seeks to argue that he was selected for redundancy because he was disabled. In my submission there is not a shred of evidence to support that view.

137. I will now turn to the fairness of the dismissal.

138. At this stage, I would comment on the credibility of the witnesses. I would invite the Tribunal to find that, where there is a conflict in the evidence, the

evidence of the Respondents' witnesses, and of those called by the Claimant, is to be preferred to that of the Claimant himself. It is clear that at the time of the consultation meetings, the Claimant was upset. His recollection differs from that of Mr Marshall and Mr McKee, in particular, in relation to the discounting of his illness and attendance record in the selection process. Mr Marshall and Mr McKee are in agreement that this was made clear to the Claimant. He disputes this. He says he was told when entering the first consultation, by Mr Marshall, that he should not mention his illness which "had nothing to do with this". It may be significant that the exact timing of that alleged comment varied from being at the meeting, see document 8.1 paragraph 4, to before the meeting started, see the Claimant's witness statement page 2. The Claimant did not, despite cross examining both Mr Marshall and Mr McKee suggesting that the remark was as he recalled it, at any time challenge their evidence that the remark was passed in the course of the meeting. The idea that it came only as the parties were entering the room was first suggested only when the Claimant was giving evidence in person from his written statement. Without doubt, the Claimant was told that his illness and attendance record were not relevant considerations in relation to his redundancy.

139. The Claimant now appears, albeit with apparent reluctance, to accept that there was a genuine redundancy. Certainly, he made no suggestion to the Respondents' witnesses that it was anything else and led no evidence to that effect himself. His position appears to be that the person being made redundant should have been - anyone other than him. As I suggested in cross examination, and he accepted, he believes the company made a mistake in selecting him for redundancy rather than one of his colleagues.

140. Redundancy is potentially fair dismissal in terms of Section 98(2)(c) of the Employment Rights Act 1996.

141. Redundancy arises where the requirements of the employer for the employee to do work of a particular type in a particular place has ceased or diminished or is expected to do so. I paraphrase section 139(b) of the Act.

142. The Claimants dismissal was caused by the urgent need of the Respondents to reduce costs. His was one of 10 jobs lost at the time, and we have heard that the overall head count has reduced still further in the intervening period. He was the only person made redundant to challenge any part of the process.

143. I would ask the Tribunal to accept the evidence of the Respondents' witnesses and find that the reason for the dismissal was redundancy and nothing else.

144. Faced with an unexpected downturn in business, the Respondents took immediate action to cut costs. Redundancies in an employee owned company were perceived to be the last resort. When it was determined that they had to consider that option, they elected to follow the process followed by the company on the last occasion, 2011, they had the need to make employees redundant.

145. They determined that redundancies should be across the whole company and that the pool should be based on job title. See *Fulcrum Pharma v Bonassera and another UKEAT/0198/10DM*, referring to Harvey and to the earlier case of *Taymech v Ryan* in 1994.

146. How the pool should be defined is primarily a matter for the employer to determine.

147. The Claimant in his evidence suggested that his change in job title, some few months prior to his redundancy, was intended to set him up for redundancy. I would ask the Tribunal to accept the Respondents' witness evidence and that of Mr Rough, called as a witness for the Claimant, that such an idea is nonsense. At the time of the reorganisation giving rise to the change in job title, redundancy was not even in contemplation. It is frankly inconceivable that a process involving the loss of 10 staff would be cobbled together for no reason other than the removal of a single employee, the Claimant. Had that been the Respondents' wish, given the Claimant's evidence about the impact of his health on his work, they could surely have managed his dismissal on the grounds of capability without too much difficulty. The Claimant acknowledged, in cross examination, that had his job title not changed, he might have ended up in a more vulnerable pool of one. I would ask that the

Tribunal find that the change in job title did not impact adversely at all in regard to redundancy.

148. It will only rarely be appropriate for a tribunal to embark on a detailed scrutiny of the pool selection or the scoring system. See *Charles Scott and Partners v Hamilton UKEATS/0072/10/BI.*

149. In that case, Lady Smith summarises the position by reference to a number of cases. In short, it is not for the Tribunal to substitute their view for that of the Respondents, to take a view that in their opinion the Respondents erred in the construction of the pool, the design or the scoring of the matrix, unless there is evidence to suggest that their was manifest unfairness therein.

150. In this case the scoring matrix was virtually the same as that used in 2011. And I would ask that the Tribunal accept the evidence of Mrs Riddell Dillet and Mr Marshall that the Claimant's health issues and attendance levels were deliberately discounted when scoring. The detailed complaints about the scoring made by the Claimant on appeal, do not suggest that the scores were adversely affected by his illness, and in his evidence, and in cross examination of other witnesses he concentrated upon what he perceived to be his unique skill set, not his illness. I would ask the Tribunal to accept the evidence of Mr Marshall, Mr McKee and Mr Robertson and Mr Rough that the skill set was not, in fact unique, but in any case, there is no suggestion that the Claimant was the only member of his pool with unique skills. On the contrary.

151. The Claimant complains that the consultation process was flawed. There was consultation and the Claimant used that to make enquires and to challenge the makeup of his pool. I would ask that you accept the evidence of Mr Marshall and Mr McKee as to what happened during the consultation meetings. The pool was explained to the Claimant; he was provided with a copy of his selection scores, and these were explained to him.

152. In my submission, even if the Tribunal accept the Claimant's evidence that the consultation was not fair, that would not of itself render his dismissal

unfair. Consultation or its lack does not of and by itself render a redundancy process unfair. See *Williams and others v Compare Maxam 1982 ICR 156*.

153. The procedure followed by the Respondents was fair. It was subject to review at multiple levels including by Trustee Directors. The Claimant was unhappy with the result. That is unsurprising.

154. After termination the Claimant sat down with his family to discuss it and concluded, for the first time, that he was disabled and that this must have had a bearing on the selection process. Document 8.1 paragraph 9. In reaching that conclusion, from his evidence, it seems he formed the view because he could not understand why he had been selected and not one of his colleagues. This may have been because of his misperception of the importance of, and the uniqueness of, his skill set or a fundamental misunderstanding as to the meaning of a need to reduce business costs.

155. Again, I would ask the Tribunal to accept the evidence of the other two persons present at the consultation meetings that it was made clear to the Claimant that his illness and attendance were being discounted and that his scores were explained to him. He was not told not to mention his condition.

156. The Claimant suggests that all staff should have been asked to agree their scores before selection was complete. That would have been impossible and potentially damaging. He says that all of those in his pool should have been consulted with. The Respondents made a conscious decision, based on feedback from employee directors and trustees involved in the last round of redundancies, not to do this because of the effect on morale. Had the consultation concluded that the Claimant should not be made redundant, I would ask the Tribunal to accept Mr Marshall's evidence that the process would have been recommenced, if need be, with another employee.

157. The Claimant's view is anyone other than me.

158. Turning to the appeal process the Claimant also challenges its fairness. From his cross examination of Mrs Riddell Dillet he appears to think that, to be fair, she ought to have conducted a forensic examination of all prior stages of the

redundancy process. That goes somewhat further than the letter of appeal, document 22, might suggest. While there might be occasions when an appeal takes the form of a complete re-hearing, there is in my submission, no legal requirement that it does so.

159. I would ask the Tribunal to accept Mrs Riddell Dillet's evidence. She carried out her own investigation, listened carefully to the Claimant's argument and reached a reasoned decision to reject the appeal – document 25. I would also ask the Tribunal to find that the Claimant's contention, when cross examined on the final sentence of the third last paragraph of document 25.2, that he did not understand it's meaning, is incredible but, perhaps, suggests an unwillingness on his part to accept anything with which he does not agree. Mrs Riddell Dillet could have done no more.

160. In my respectful submission the dismissal was due to redundancy and was both substantively and procedurally fair.

161. If the Tribunal are not with me then, relying on Polkey, I would ask the Tribunal to find that any procedural failings would have made absolutely no difference to the final outcome. Ultimately the Respondents did their best. It is my respectful submission that they are entitled, even obliged, to select to keep the staff which in their opinion are best for the future wellbeing of the business. That is what they did.

162. I can now deal with the allegation of failure to make reasonable adjustments contrary to Section 20 of the Equality Act.

163. The Claimant has led no evidence whatsoever as to the nature of any adjustment which he thinks should have been made but which was not. He identifies the provision criteria or practice as being the selection process. I would ask the Tribunal to find that the Respondents discounted his health issues when scoring, they could have done no more. It is inconceivable that having ignored health issues and attendance problems for 11 years, and through an earlier round of redundancies, Mr Marshall, when scoring the redundancy matrix on this occasion, should suddenly decide to base his decision on these issues now and then choose to lie about it. That is

particularly the case when it would appear from the medical report, document 27 that the Claimant's health in the 13 months prior to redundancy had been improving. On cross examination the Claimant acknowledged this to be the case.

164. The Claimant alleges discrimination arising from a disability contrary to section 15 of the Equality Act. To succeed he must convince the tribunal that the disability was the cause of the Respondents' action and not merely a background circumstance. See *Charlesworth v Dransfields Engineering UKEAT/0197/16/JOJ.*

165. Which found that there must be something arising in consequence of the disability and that the unfavourable treatment must be because of that.

166. It is a twostep process and in my submission the instant case falls at both hurdles. There is no evidence to suggest that the lower score on the selection matrix was related to the illness never mind consequential upon it. The dismissal, which was the only "unfavourable treatment" suffered by the Claimant, was simply due to the need for redundancy. There is absolutely no causal connection between the Claimant's illness and his redundancy. Indeed, the Claimant stated, in response to a question from the Tribunal, that had Mr Marshall explained his scoring to him in greater detail, "it would have helped"; the implication being, surely, that it was confusion as to why he was selected, rather than his colleagues, in particular those with shorter service, and not any perception of discrimination, which gave rise to his tribunal claim.

167. In conclusion, therefore, I would ask the Tribunal to dismiss this case in its entirety. The dismissal was substantively and procedurally fair. There was no breach of any of the provisions of the Equality Act. If the Claimant suffered from a disability at the point of dismissal he was not discriminated against because of that or at all.

Claimant's submissions

168. As I am unaware as to how such a document should be supplied, I hope that the layout, as presented, is acceptable to the tribunal. I have endeavoured to

answer Mr. Templeton's arguments, and have marked the relevant page and line from his submissions for each one.

Page 2. Line 5

169. The Respondents say that there is 'no evidence to suggest my condition had a substantial adverse effect on my ability to perform my normal day to day abilities'. I would direct them to look at the record of timekeeping and you can clearly see a pattern of lateness to work, on average each year between a third and half of the days I was due to be working I was late. Mr. Marshall, Mr. McKee Mr. Rough and Mr. Robertson all acknowledged this pattern in my timekeeping. Mr Marshall also acknowledges he was aware of my condition as he states I came to him and explained that I had been diagnosed with depression, and as well as needing to take medication every day, I was getting counselling and I would require time off work to do this (in fact I had two lots of counselling over a period of 15 months - each for ten sessions, as well as attending a two day WRAP course in February 2014 (all as noted in document 35 22/2/16, an excerpt from my medical records)). I disclosed this information to Mr, Marshall as he was my line manager at that time, and I assumed this would be shared with the appropriate people in the company, by being put in my personnel file. I have since found this information was not put in my personnel file. Mr Marshall had a duty of care as my line manager to ensure this information was entered into my personnel file. Mr. McKee stated in his evidence that he assumed I must have supplied some medical note to the company as I was never pulled up/spoken to with regards to lateness or sleeping at my desk.

170. As explained at the tribunal, mornings are particularly difficult for me as my condition makes getting up, dressed and motivated at that time, a challenge and on some days (a third to a half of them) that challenge is harder and I get to work but can be up to four hours late and on some other days I lose the battle and don`t get into work and need to ask if I can take an unscheduled holiday. Late starts to work or unscheduled holidays were more often than not a regular occurrence. I would often micro-sleep at my desk at the times I was there, and I often had to leave my desk as I felt overcome by emotion or brain

fog. My condition had a serious impact on my ability to perform my job to the best of my ability. I firmly believe my illness was perceived as having a detrimental impact to the business and was the reason I was selected for redundancy.

171. Had the company kept proper records for employees the tribunal would see that these issues dated back to my diagnosis in 2010

Page 2. Line 10

172. I would submit that my medical records as supplied (bundle 33, 34, 35, 27, 28) along with the respondent's own log of my timekeeping (bundle 32) establishes a prima facie case – There being clear evidence of issues with my ability to get up to attend work in a normal manner (and sometimes not to attend at all), with my employers making reasonable allowance (which they did do) but without it allegedly ever being written down anywhere. A situation that went on without ever being mentioned by anyone for approximately eight years.

Page 2. Line 31

173. Mr. Templeton does not contest that all the mentioned parties were aware of my microsleeping. In regard to any other outward visible signs, I would refer back to my testimony that I would leave my work station to go to the toilet or a quiet area within the factory to collect myself for ten or so minutes before going back to work. I had no wish to draw attention to myself and tried to hide my condition as much as possible.

Page 3. Line 10

174. The Respondents say that the microsleeping is not mentioned on any of the medical evidence, this is because it occurs as a side effect of the medication that I take daily (citalopram) to help with my depression (can cause drowsiness).

Page 3. Line 15

175. Mr. Templeton describes the answers to document 6 as evasive and gave rise to the case management order document 7. But if you look at the whole of document 6 as supplied in the bundle, you can see the second list of questions that Mr. Templeton attempted to have answered by my GP, which in no way relate to someone with depression or a mental health issue, and that entire section was excised from the case management order. On being so confronted initially by such an intrusive and arbitrary set of questions, does the tribunal understand why the answers initially supplied in relation to document 6 would be guarded. However, if you look at the answers supplied in document 8, you can see that I am referencing my mental health as it was ongoing during my time of employment, and only at specific points do I comment in regard to how I have been affected post redundancy. Although I have daily medication that helps combat these feelings of depression and helps, it doesn`t take it away. My mood fluctuates, hence the sporadic nature of days I would be late in or fully absent. And as I have always stated I worked hard at overcoming my depression. At present I am on 40mg Citalopram daily (I was mostly on 20mg, but did have it down to 10mg, at the point that I tried to stop my medication. Something I was unable to accomplish), along with 4mg Reboxetine (which is prescribed for major depression).

176. Although the Respondents are trying to say that my depression was not affecting my life at the time of the redundancy this is not true as depression is not something that you can switch off and on, it is always there and it has impacted on me every day of my life whether good or bad things are happening. It is there. It can be amplified by external factors, but I have found that it never goes completely away. The Respondents misunderstand depression if they think that someone who is on daily medication (at that time 10mg-20mg) and who is monitored closely by their doctor can be unaffected by depression every day.

177. I would draw your attention to the point that the original tribunal judge made the final decision on the questions/statements and GP`s letter and sought only clarification in regard to my answers only.

Page 3 Line 21

178. “The tribunal is obliged to focus on what the claimant cannot do or can only do with difficulty discounting the effect of medication”. I must admit to not completely understanding this reference, as the difficulties I have experienced regarding my job, have all occurred while I have been taking medication. I have not been able to do without medication at some level or other in the last ten years. Clinical Depression is not something that maintains a constant level. The depth of it varies through time, and as everyone’s emotions vary in regard to existential experience (life), that is another inconstant that can also weigh against me (it was specifically for that reason that I undertook the CBT course -Cognitive Behavioural Therapy, as noted in bundle 35 22/2/2016). Everything that I have went through regarding timekeeping/days off happened with the aid of medication. If I had no medication the results would have been unimaginably worse. I assert that the medical documentation as supplied (specifically bundle 35 15/2/16 – 18/3/16 when taken along with my timekeeping records (bundle 32) show that I suffered from an ongoing illness that affected me substantially on a day to day basis and was in disabling me in real terms from carry out a normal life.

Page 4. Line 5

179. The Respondents say and Mr Marshall claimed, that no one else knew about my condition as he felt that he had to keep that information to himself. This is patently untrue, as I have said the original directors of the business (In charge for eight plus years from the start of my depression till the employee buyout) would regularly (on an a daily basis) walk through the factory and would certainly have been aware of my microsleeping as well as my timekeeping and days off. And never once in eight years was anything mentioned to me. Even after Mr. Marshall moved on from being my direct line manager and other people were in that position, none of these people ever queried my timekeeping or taking unscheduled days off. In both instances, the only reasonable explanation, is that they were aware of my medical condition. I believed that the Company was aware of my condition. I had informed Mr. Marshall originally that I didn’t want to become a talking point on the factory

floor, but I did believe that I was informing the company by notifying my, at that time line manager. That information I firmly believed had been added to my Personnel file, which would be viewable only by those individuals within the company structure senior enough to warrant access and so unlikely to partake in factory floor gossip. I find it extremely difficult to believe that there were no personnel records kept at any point. Novograf has been a successful company for thirty plus years, achieving British Standard accreditations several times during that time. For a company to achieve and retain accreditation requires a large input to record keeping and system adherence. For them to claim that Personnel records were this lax, that something as important as an employee's medical information was not recorded, beggar's belief.

180. Mr. Marshall said to me as we went into the room for the meeting 'this has nothing to do with your illness so don`t mention it' and I didn`t, with hindsight I wish I had but I didn`t, I allowed him to silence me. There was no other mention of it as the Respondents would have you believe that I was told everything around my timekeeping had been discounted etc. the proof of that is in Mr. McKee`s notes (bundle 26) where he has written timekeeping not bad (the not scored through). In fact, Mr. Marshall even in his own notes (bundle 16.1), does not explicitly express the reason for my absences and timekeeping not being counted. It is only referred to as "support we were giving him with regards to a personal matter". if Mr. Marshall had covered my time-keeping and absences in regards to my depression as explicitly as he claims he did at the meeting, then he surely he would have made sure to detail it as explicitly in his notes (I have to assume that I was the only person made redundant that had depression, and for that reason alone, the respondents would want to take extra care in regard to that fact when it came to the process used – as Mr. Marshall claimed to have taken such care with me in respect of my condition for the last ten years). Mr McKee's notes from the meeting fail to make any reference to this information being discussed at the meeting (it being mentioned at all or to say that my timekeeping had been discounted due my illness). in Mr. McKee's notes, Mr. Marshall did mention timekeeping, telling me mine was bad.

181. The Respondents want us now to believe they did not take into account my timekeeping as it was discounted due to my condition. However, it is clearly marked as relevant on the matrix (bundle 13, 14), and nowhere on Mr. McKees notes does it say timekeeping, absences or sickness were discounted from the procedure Professional Standards: re- sickness, absence, timekeeping, task completion.

182. I had never been spoken to with regards to any matters either sickness, absence, timekeeping or task completion, and nothing noted in my personnel file nor is there anything noted on my Appraisal (6 weeks before I was made redundant).

183. Professional standards (bundle 13) - Score 5 (which is what I received) - Acceptable track record. With no abnormal pattern or issues, I had never been spoken to with regards any issues re- professional Standards or my attendance, or timekeeping (the respondents have supplied no evidence to state otherwise- even when requested (document 38.1), there was no evidence to supply (doc 38). At the time of the redundancy I fully believed the reason I had received this score was due to my lateness's and days off affecting my score, as I had not been informed otherwise. It was only, as I argued in my evidence on receipt of the document bundle was I made aware of what the respondents claim had affected that particular score (doc 14) (which again there was no evidence supplied by the respondents to confirm any of the supposed issues that I was being held responsible for).

184. In relation to the collective emails (bundle 29): Mr. Robertson in his evidence did confirm that the software as used by Novograf was now operating as reading only 11 characters of any file name (a state of affairs that I contested not been the norm in o/s software since about 1999/2000 (the date on further checking I have confirmed is actually earlier). He claimed not to remember when that had started, but as I reminded him it had been at the time of the tables software upgrade in early September (As I argued, it is a well known fact that a computer will simply overwrite one file with the other when asked to save a file with a pre-existing name. These files all had similar names that the system was from early September 2017 onwards unable to read exactly,

hence the apparent appearance of multiple files (the barcodes can themselves have up to 43 characters within them-the scanner was only able to read the first 11). This was (as I argued) the actual background to these errors occurring. The only physical evidence brought against me, which was not an issue I had created, only one I had to react to.

Page 4. Line 11

185. Mr. Templeton makes the claim that "the company may have known of the claimant's condition but, with the exception of Mr. Marshall, none of those involved in the redundancy process knew of it". Why then when she was cross examined and directly questioned on whether she knew of my condition prior to the Appeal letter Mrs Riddell-Dillet chose to answer, "No Comment". This casts severe doubt on what Mr Templeton claims. In fact, it would appear that the managing director and Mr. Marshall were both aware of my illness (which again brings us back to Mr. Marshalls statement that he told no one of my depression – If Mrs. Riddell-Dillet was aware of my illness prior to my Appeal letter then she could only have known about it if Mr. Marshall informed her.

Page 4. Line 12

186. "The claimant did not raise the issue until the appeal stage and, in his letter of appeal, in my submission, the suggestion appears almost to be an afterthought". This statement is true in as much as I have already stated, the only mention made to my depression at any time during the redundancy process was Mr. Marshall saying, "This has nothing to do with your illness so don't mention it". My main concern when writing the appeal letter was to raise the issue of my skillset which I felt had not been properly marked. I also believed at that time that the score of 5 re. professionalism etc. had been marked down due to my time keeping. As my depression had not been discussed with me (directly or indirectly) at any point in the proceedings, I was only starting to realise that it (my depression) could be driving the whole process in relation to my redundancy.

Page 4. Line 15

187. It is true that I did not perceive myself as being disabled, but when my daughter pointed out the description covered in the Disability Discrimination Act, it was how my illness impacted on me. I had an illness that forced me to call in sick at times with no forewarning. That for half of the time made getting up in the morning something I had to contend with, not just do as a normal thing. That I would several times daily nod off at my desk. Mr Templeton draws your attention to my statement that my condition was "not something which they (the respondents) saw as being an issue." I made this remark in relation to the original owners/directors for whom I had worked amicably for 29 years. They are not the respondents. Mrs Riddell-Dillet stated that she joined the company full time in April 2017. My job title changed in October 2017 (document 37 uncontested during the tribunal), and I was made redundant in March 2018. That is a timeframe of 11 months. She as the Managing Director is the Respondent. I would not have thought to use the word disabled, no one wants to think of themselves as disabled, but depression is disabling and has disabled me over the years.

Page 4. Line 32

188. Mr. Templeton now turns to the credibility of the witnesses. It is true that our recollections differ. Mr. Marshall stated in his notes and under examination that he explained that absence and timekeeping wasn't being included to the support I was given in regard to a personal matter. He also vehemently contested several times during cross examination that I was supplied with a copy of the scoring card at the time of the meeting because his notes said so. Mr. Marshall while being re-examined by Mr Templeton then changed his story to agree with what I had stated re the matrix, that I had in fact only viewed the matrix on his tablet and did not receive a copy until the next day. Mr McKee stated under oath that he had given me a copy of his notes after the meeting at which time I had a copy of the matrix. I informed him, as had already been confirmed by Mr. Marshall that I had not received the matrix until the following day. A point which Mr. McKee then conceded as he couldn't remember otherwise. So, in regard to the respondent's witnesses, we have

one case of poor memory, and one that could be construed as not being 100% truthful in their written submissions and testimony under oath. In any event Mr. Marshall has drawn his testimony into question by his eleventh-hour admission which casts a shadow over his credibility as a witness.

Page 5. Line 6

189. Mr. Templeton seems to think there is disparity in my statements regarding what Mr. Marshall said to me “This has nothing to do with your illness so don’t mention it”. The fact is it was said as we were entering the room for the first redundancy meeting. My answer in document 8.1 4 was written in answer to the schedule information order bundle 7.2 question 4 – “Why does the claimant not refer to his disability at either of the consultation meetings prior to his redundancy?”. I answered the question as it was asked, and it was only at the point of giving my own evidence was I able to give a fuller answer. The pertinent fact is unaltered. The only mention made to me during the whole redundancy process in relation to my illness was “This has nothing to do with your illness so don’t mention it”

Page 5. Line 16

190. I do accept that the company made a mistake in selecting me for redundancy rather than one of my colleagues, in as much as if the process had been carried out in an impartial manner that I would not have been the person chosen for redundancy.

Page 5. Line 31

191. Mr. Templeton talks about the company’s urgent requirement to reduce costs at that time. And as has been confirmed at that point in time, two of the pool had been employed by the company for less than two years (which would have resulted in a minimal outlay to divest the company of either of these employees). Due to my length of service and notice period required my redundancy cost the company £19,000. And from start to finish that process allegedly as initially took fourteen days (that is from the realisation of a business downturn, which required all possible alternatives to be discussed

by the board before the decision being made that redundancies were the only option, forty odd matrices being completed, being verified by line managers and then passing to employee trustees for oversite). Mrs Riddell-Dillet later admitted during questioning that her speech to the employees of 13th March (bundle 12) that at that point that the "potential redundancies" as she spoke of had already been decided as being actual. Her timeline for all these actions therefore does not hold up to scrutiny. This leads me to believe that the outcome was premeditated on the part of the respondents.

Page 6. Line 5

192. The Respondents say that they followed the same process as the last time there were redundancies (2011). This is in fact not true: they may have used the same document (i.e. matrix), but only spoke to who they perceived as the lowest scoring employee in each pool, not to every person involved as they had in 2011. I believe they also went from having two members of management hold the meetings, to one. These facts prove that the process was radically different from that of 2011. It should also be noted that after this point in time the company did go through a period of financial difficulties which resulted in the factory being placed on a shortened working week (which lasted for a period of about a month). Pursuant of that fact, bundle 9.4 the terms and conditions of employment state (17) the company reserves the right to place you on short term working for such length of time as the Employer may from time to time decide if it is deemed in their best interest to do so (there is no notification of how long such actions would be perceived as being allowable for in law, so I cannot attest to what that time period could be. But as written, and as I understood it, there was no reason that they could not have followed that same course of action in this instance and achieved the same result without the need for redundancies).

Page 6. Line 11

193. "The pool should be based on job title". "How the pool should be defined is primarily a matter for the employer to determine". I do not disagree with either of these statements. What I do take issue with is how closely the respondents

then followed their own guideline in relation to who I was being measured against. They have claimed that I was only being measured amongst those employees as designated Graphic Designer, a pool of four people in total. (see answer to Page 6 Line 32 for further clarification).

Page 6. Line 19

194. I do not claim that the whole Redundancy process of ten individuals was cobbled together in order to remove me. I believe it suited the company to use the downturn as a means of removing someone they (the newly appointed MD) perceived (through a short timeframe view, and allegedly without the knowledge of my illness which Mr. Marshall claims was withheld from everyone) as being an employee with perpetual lateness who was unreliable as he often took days off without prior notification. This is quite conceivable, and I would add quite possible.

Page 6. Line 27

195. I agree I could have been in a pool of one (and had indeed been so up until 5 months before the redundancy). But if I had been made redundant under those conditions, that would only have highlighted the fact that a senior employee with unique skills, with the longest service history in the department and therefore the largest redundancy payment was made redundant when there were other less experienced employees below him requiring little or no redundancy pay who had been overlooked. Not to mention the fact of my illness which would still have to be addressed and would have still been questionable in regard to unfair dismissal.

Page 6. Line 32

196. Mr. Templeton states that it is rarely appropriate for a tribunal to scrutinise pool selection or scoring methods, unless there is evidence to suggest manifest unfairness therein. I believe that is the case here. I had to request clarification at the second redundancy meeting as to who comprised the pool (as recorded in Mr. Marshalls notes). It was only from that point on that I was clear as to who I was being measured against, and that was what I discussed

with Mrs Riddell-Dillet at the appeal meeting (that there were two points of variation to the other members of the pool where I had skills that they did not (at that time) have – surveying and production of finished cutter shapes (both of which I had had occasion to use at that time, and both of which all witnesses have agreed (however acrimoniously) was the case). It was on receipt of the Appeal rejection that I was informed that I was actually being measured against someone outside of the pool (Mr. McKee - bundle 25.1 last paragraph "this is not a unique skill in the business"). (bundle 13) My score of 8 for uniqueness of skills, when measured against the other people in the pool should have been 16. It was only by including someone I should not be compared with, that the respondents got the score they wanted (a lower score for me). Their actions had not followed their own basis of criteria (bundle 13) in relation to: 1 (to ensure the business retains those employees able to act and respond most flexibly to market, technical and operational demands. And; 2 (to ensure the company retains those employees with the maximum detailed knowledge of Novograf). By choosing to make redundant an employee of thirty years' experience over two with less than two years, they did not follow those criteria. By choosing an employee with unique immediately deployable skills (survey and templating) within the pool (graphic designer) they did not follow those criteria. Mr. McKee in his evidence even admitted that he had been called on to train Mr. Robertson in exactly those skills after I had been made redundant. I believe this shows manifest unfairness was applied by the respondents in how they approached the scoring in relation at least one of the matrix headings, and predetermination in relation to making me the person to be made redundant.

Page 7. Line 7

197. Mr. Templeton contends that I was mainly interested in the matrix scoring in regard to my skillset. This is completely inaccurate, as my evidence in relation to the score for professionalism etc, centres on the fact that I was not told that my timekeeping etc had been eliminated as a measure (as validated by Mr. McKees notes (bundle 26)). I did also contest the score in regard to skillset (as previously covered), which I believe shows that the respondents

improperly marked me in not one, but two areas). If either or both of these scores were shown to be incorrect then the final result would have been vastly different, and I believe I would not have been the person made redundant.

Page 7. Line 14

198. I would ask the Tribunal to accept that Mr. Marshall, Mr. McKee, Mr. Rough and Mr. Robertson all accepted that no one else in the pool had the skills as previously stated. Mr. McKee adding that he had trained Mr. Robertson after my departure (which Mr. Robertson confirmed). I at no point stated that the other candidates did not have unique skills, only that as an employee with thirty years' experience, I was the only employee in that pool with those skills (survey and templating) which were very relevant to the position I held, and the company and its functioning, and which I had been using even on the day I was made redundant.

Page 7. Line 19

199. If, as has been asserted, the process had been rigorously explained at the first meeting, then why would I have had to query Mr. Marshall at the second meeting (as he and Mr. McKee both recorded in their notes) on something as simple as who I was in the pool with? There was no clarity of explanation in the first consultation meeting, that is why I had to ask that question at the second.

200. The pool was only clearly explained at the second meeting (which I believed was the final meeting). I only viewed my matrix at the first meeting on Mr. Marshalls tablet, which was emailed to me the following day. The only thing said to me regarding depression was "this has nothing to do with your illness so don't mention it". The scores therefore were not adequately explained.

201. For these reasons I contend that the consultation was unfair.

Page 8. Line 18

202. Mr. Templeton asks you to accept that the process would have recommenced "if need be" with another employee, had I been removed from the proceedings

mid process. This flies in the face of Mrs. Riddell-Dillet's email of the 20th March (only the day after the first consultation meeting) which assured everyone their job was safe if they 'haven't been spoken to'. She asserts that this email was sent to buoy company morale. What would the effect have been on company morale had it become known that someone who had been informed that they were safe, was within a matter of days told that they were in fact up for redundancy? How would the management then be perceived? (I also believe that Mrs. Riddell-Dillet in her evidence professed that if I had shown that I shouldn't be the person to be made redundant, then no one in that area would. How does that fit with the assertion that was made that a redundancy was required in the pre-press production area). In regard to the email, this action only helps in my assertion of the predetermined nature of the redundancy.

Page 8. Line 25

203. In regard to the appeal, my understanding was that all information should have been checked and confirmed that was supplied at the appeal meeting. Mrs. Riddell-Dillet confirmed while giving evidence that she spoke to Mr. Marshall. And that would appear to be all she did. She states in her appeal rejection letter (bundle 25.1) "No final decision was reached as to the outcome of the process until all avenues arising out of the consultation process had been explored". This is patently wrong, (bundle 36) as she had already removed everyone else from the process who wasn't being spoken to prior to any avenues being explored – which was supposedly what the second meeting was to be about (giving me the perception of predetermining the outcome).

204. At the first meeting I was informed of all the alternatives that had been removed from the table (bundle 16 "shorter hours/job share/salary cut etc" (sic)) before being asked to supply any others(?) (giving me the perception that I was being given information and not consulted with, and of predetermining the outcome). Mrs Riddell-Dillets Response (25.1) equates this to - as I had been told that these solutions were unavailable and I should supply some others, I was therefore consulted. As I testified Mr. Marshall read

the script (first meeting script and notes bundle 16) verbatim. On seeing the use of “etc” included in the list of alternatives, I don’t know that there would have been any option that I could have given that would not have been rejected out of hand.

205. In her notes and the appeal rejection letter, in regard to answering the question of my skillset, she pointedly does not mention templating, but rather answers only in relation to surveying (the two going hand in hand re art production). As no one else in the pool had these critical skills her answer is disingenuous “not a critical skill in the graphic designer roll” (as confirmed by the need for Mr. McKee to train another employee within the graphic designer pool after my dismissal).

Page 8. Line 34

206. In relation to the third last paragraph of document 25.2 which covers the respondents’ attitude to my depression they write “Novograf was aware that you had certain health issues” (Mr. Templeton has argued that the company had no knowledge of my illness. The above line completely refutes that.

207. “They do not appear to have impacted adversely on your employment”. I put it to you that this is due to the then (original) management of the company accepting that I had an Illness that affected me to some extent almost every other day (re lateness) and accepted that I would at short notice take days off without explanation. But that also valued the work I did carry out when I was able. I believe that attitude changed with the change of management.

208. Mr. Templeton took great pains to point out that there were in fact three meetings. However, the Respondent’s own script/notes (bundle16.1) paint a different picture:

“A SECOND MEETING WILL BE HELD W/C 26TH MARCH 2018 WITH YOU.

THE SAME STAFF WILL BE PRESENT, AT THIS WE WILL ADVISE THE EMPLOYEE OF THE DECISION AND PROVIDE THEM WITH FINAL DETAILS” (sic).

Or as Mr. McKee put it in his notes “26th March Finalization meeting”.

209. As far as the respondents and I were concerned at the time of the first meeting, the second meeting, even as I was being asked to supply alternatives to redundancy, was actually to let me know their final decision. I can only assume the respondents were informed of the need for a third meeting to take place in order to fulfil their legal requirement, after the first meeting had occurred.

210. I submit that the redundancy as carried out in both substance and procedure was unfair.

211. In relation to reasonable adjustments, the evidence I gave was that the respondents made no adjustment for my illness regarding the matrix. (16.1) Mr. Marshalls notes say timekeeping and absence wasn’t included due to a personal matter. I contend that was never said at the time and is borne out in Mr. McKees notes (26), where there is a notation:

TIME/ABSENCE NOT BAD

212. This in no way reflects what Mr. Marshall has said, and I reiterate that the only reference made to my depression during this whole procedure was Mr. Marshall saying as we entered the room at the first meeting “This has nothing to do with your illness so don’t mention it”. And the first time I was aware of any alleged adjustment being made in the matrix scoring mechanism was on receipt of the appeal rejection letter (bundle 25.2).

213. I agree with Mr. Templeton wholeheartedly that the company that I worked for up until the management change gave me great support in relation to my illness, and yes, I had been actively trying (and ultimately unable) to come off my medication. But with the change in management came a change in position. If we are to believe Mrs. Riddell-Dillets’ testimony she knew nothing of my illness prior to receiving my appeal letter, and then the information at the appeal meeting. On hearing for the first time that an employee that had just been made redundant suffered from depression, and was appealing the redundancy, it behove her to fully confirm the information she had been

supplied, due to the seriousness of the allegations. That certainly does not appear to have been the case. In fact, Mrs Riddell-Dillet was found to be very elusive in her testimony stating “No Comment” several times for fear of incriminating herself or validating my case.

214. I also agree with Mr. Templeton that had Mr. Marshall explained the scoring in more detail “it would have helped”. It would have helped to know that my lateness wasn’t counting against me – I did not. It would have helped to know the errors that I was being accused of to assess their validity – I was not. From the start of the redundancy process I was mis-directed and mis-informed in order to keep me from the fact, that I was made redundant due to my illness – depression.

215. If we look at the matrix, initially, at the skillset question in isolation, and find reason to question the score at all (the fact that I was the only person in that pool that had a relevant unique skillset, which the respondents had to compare me to someone outside of the pool to reduce my score. And then have that same person then train someone within that pool to carry out those tasks after I had been made redundant), then that fact alone would confirm that the redundancy had indeed been unfair.

216. When we consider the professional standard question scoring, the contention is whether or not I was aware of my timekeeping being removed. Mr. Marshall says one thing. I say another. The notes as taken by Mr. McKee at the time do not in any way reflect what Mr. Marshall in evidence vocally contested (He even changed his story on re-examination regarding how the matrix was presented and disseminated without Mr. Templeton troubling to ask why he had changed his story so).

217. Given these facts, when we start to include the other evidence, or lack thereof (any personnel records detailing having been spoken to in relation to: any issues with my work, any issues with my conduct, any issues with lateness, any issues with my professionalism, or any recorded information that they held with regard to my medical history) on the side of the respondents. If there is no evidence to support their assertion that I should have been the person

to be made redundant, then what reasons can we come to as for why that was the case?

218. In conclusion I submit that the dismissal was unfair in both substance and procedure, the reason being disability discrimination.

Observations on the witnesses

219. There was only limited conflict of evidence between the witnesses, principally in relation to what was or was not said by Mr Marshall about the claimant's illness. The Tribunal concluded that it preferred the evidence of Mr Marshall and Mr McKee as to what was said during the consultation meetings. There was no doubt that the claimant was very upset at these meetings which is hardly surprising given his employment was potentially under threat. However, the Tribunal concluded that it preferred the evidence of Mr Marshall and Mr McKee that it was made clear to the claimant that the issue of his time keeping and attendance record had been discounted from the selection process. Specific reference was made by Mr Templeton to Production 8.1 at point 4 where the claimant asserts:

> *"4 At the very first meeting, Alan Marshall said "this is nothing to do with your illness so don't mention it".*

220. The Tribunal concluded that the claimant had been told that his time keeping and attendance record were not taken into consideration in the selection and scoring process.

221. The Tribunal was not satisfied that the claimant was told something to the effect that "this has nothing to do with your illness so don't mention it." The Tribunal was not persuaded that Mr Marshall would have said something to this effect to the claimant given he had for many years kept the claimant's confidence about his depression and therefore he had not told other staff. Mr Marshall's recollection was supported by Mr McKee.

Deliberation and Determination

222. It is not in dispute that the claimant was dismissed as his post was redundant although the claimant asserts that his disability was the reason why he was selected for redundancy.

223. The respondent's position is that redundancy is a potentially fair reason for dismissal in terms of section 98 (2)(c) of the Employment Rights Act 1996.

224. The Tribunal gave careful consideration to the points set out by Mr Templeton in his submission that the respondent had concluded that redundancies should be across the whole company and the selection pools would be based on job titles.

225. It was his submission that how a pool is defined is primarily a matter for the respondent employer to determine and, in relation to a change in the claimant's job title from Senior Graphic Designer to Graphic Designer, this decision was made some months before redundancies were in contemplation.

226. The claimant's suggestion that the change in title was intended to "set up the claimant for redundancy" did not fit with the evidence of the respondent and Mr Rough. At the time of the reorganisation in late 2017 which gave rise to a change in job title for the claimant there were no redundancies in contemplation.

227. The Tribunal concluded that Mr Templeton's submission on this point was correct. The Tribunal concluded that the change in the claimant's job title did not impact adversely in relation to his being selected for redundancy in March 2018.

228. In relation to whether a tribunal can undertake a detailed scrutiny of the pool for selection, Mr Templeton referred to the judgment in ***Charles Scott & Partners v Hamilton***, (see above).

229. That judgment refers to a number of cases and the point is made that it is not for a tribunal to substitute its view for that of the employer or to take a view that, in its opinion, the respondent employer erred in the construction of the

pool, the design or the scoring of the matrix, ***unless*** (this Tribunal's emphasis) there is evidence to suggest that there was manifest unfairness.

230. The Tribunal was not persuaded that there was such evidence before it.

231. The scoring matrix used here was almost the same as that used in 2011 which was the last occasion when there were redundancies within the respondent's business.

232. The Tribunal concluded that the evidence of Mrs Riddell-Dillet and Mr Marshall that the claimant's health issues and attendance levels were deliberately discounted, was an adequate explanation as to how the scoring process had been undertaken.

233. The detailed complaints made by the claimant on appeal do not suggest that his scores were adversely affected by his illness: rather he seems to have concentrated at the appeal hearing on what he saw as his "unique skillset".

234. Against this, the evidence of Mr Marshall, Mr McKee, Mr Robertson and Mr Rough was that this skillset was not, in fact, unique to the claimant. Even if the claimant was the only person who had recently carried out of site surveys, this was a skill which could quickly be taught to other staff in the graphic design team.

235. Next, dealing with the complaint that the consultation process was flawed, the claimant was given the opportunity to make enquiries and challenge the makeup of the pool.

236. The Tribunal was satisfied that the pool was explained to the claimant. He was given a copy of his selection scores although he was not given a copy of Production 14 which set out in more detail the reasoning applied by Mr Marshall as to how he reached the scoring for the claimant and his colleagues in the pool.

237. The Tribunal concluded that it could not say that the consultation was inadequate but even if it had done that in itself would not render the dismissal

unfair since consultation or lack thereof does not by itself render a redundancy unfair, (see ***Williams & Others v Compair Maxam Ltd***).

238. The Tribunal accepted Mr Templeton's submission that a fair procedure was followed since it was reviewed at several levels by the respondent's management and Board Trustees. The Tribunal concluded that it could not find that the process itself was flawed.

239. While the claimant indicated that he should have had the opportunity to see all the scores so as to be able to compare his with the three other members of the selection pool, Mr Templeton's submission was well made that a respondent employer is not required to provide such information to individual employees.

240. In relation to the appeal process, the Tribunal was satisfied that this was carried out by Mrs Riddell-Dillet carefully and she took into account the points set out by the claimant and then reached a reasoned decision as to why she had rejected his appeal.

241. The Tribunal concluded that the dismissal was for redundancy and that the process was both substantively and procedurally fair.

242. Since the Tribunal has reached that conclusion, it did not then need to consider a ***Polkey*** reduction.

243. Turning to the issue of disability, the Tribunal noted all that was said in relation to the issue of discrimination and the point made by Mr Templeton that, as at redundancy on 27 March 2018, the claimant's illness did not meet the criteria for it to be classified as a disability in terms of the Equality Act.

244. On the other hand, the respondent accepted that it had known or at least Mr Marshall had known, for many years, that the claimant had a mental health issue but, it was submitted that the respondent did not know that this had a substantial and long term adverse effect on the claimant's ability to carry out normal day to day activities.

245. Against this, Mr Marshall was well aware that there were occasions when the claimant would arrive late for a shift or did not attend work at all. These occasions did not result in the respondent carrying out any investigation or enquiry as to the reason(s) why the claimant either failed to attend work or attended later than his normal starting time for a shift.

246. It was pointed out by Mr Templeton that the medical evidence before the Tribunal appears to bear out the long-term nature of the condition but there is no evidence that the condition had a substantial, adverse effect on the claimant's ability to perform normal day to day activities.

247. It was pointed out the onus is on the claimant to establish this and that guidance is provided in the 2010 Act as to substantial effects or the opposite.

248. The claimant had provided the Disability Impact Statement and while Mr Marshall, Mr McKee and Mr Robertson had all known the claimant for many years, and in the case of Mr Marshall and Mr McKee for more than 20 years, none of them recognised any of the issues referred to by the claimant although there was reference to "microsleeps".

249. There was no suggestion that the claimant became confused or disorientated by events and, in Mr Templeton's submission, there was no substantial adverse effect. He also noted that the "microsleeps" are not referred to in the medical evidence.

250. The Tribunal noted all that is submitted in relation to what the claimant cannot do or can only do with difficulty, discounting the effect of any medication and that it is for the claimant to lead evidence demonstrating what particular day to day activities are affected or impacted by his condition and that the effect is substantial rather than minor.

251. The Tribunal gave very careful consideration as to whether the claimant was disabled whilst he was in the respondent's employment. It concluded that the claimant was most certainly disabled as at early April 2018 given the terms of the GP report. It also appears from reading that report that the medical

issues which have affected the claimant have been there for many years. His depression varies in severity from time to time.

252. Mr Templeton accepted that, as Mr Marshall was aware of the claimant's illness, he would have to concede that the respondent must be aware of that illness. It is therefore not in dispute that the respondent had knowledge of the claimant's illness. What is disputed is its effect on normal day to day activities and so forth.

253. The Tribunal had some difficulty on this issue since it was very clear that Mr Marshall was careful to respect the claimant's wish that he would not want it to be talked about around the factory amongst his colleagues. Mr Marshall respected the claimant's desire to keep this information about depression confidential. As Mr Templeton pointed out, that was an honourable but perhaps not the wisest thing to have done.

254. It seems that Mr Marshall took steps to support and protect the claimant for approximately 8 years after the claimant's condition was first disclosed to him. The claimant seemed to think that Mr Marshall would have had this information recorded on the claimant's personnel file. Mr Marshall did not do so nor did he inform any of his senior manager colleagues of his discussion with the claimant when he was advised the claimant had been diagnosed with depression.

255. It was submitted by Mr Templeton that no one, except Mr Marshall knew of this condition and that the claimant did not raise the issue until the appeal stage.

256. The Tribunal reached the conclusion that the claimant was disabled in terms of the 2010 Act and that this was known to the respondent (by Mr Marshall) ed prior to his dismissal.

257. It did so as there was no evidence before it that things only became much worse after his dismissal. The GP's report indicates that the claimant became much more severely affected by his depression after his dismissal in late March 2018. However, the claimant's depression had been

clinically/medically diagnosed many years before and the impact on his was variable. When it was worse the claimant was unable to function in the sense of carrying out normal day to day activities. There were days when he could not get out of bed and prepare for the day. On some occasions, he would arrive late at work for a shift and on others he was unable to attend work at all.

258. The Tribunal noted that no comparator had been provided. It also noted that, in any event, it was submitted that the claimant had failed to demonstrate that there was any form of discrimination against him in relation to the selection for redundancy as a result of his depression.

259. The Tribunal concluded that the claimant's depression/disability was not a factor that was taken into account by Mr Marshall when the claimant was selected for redundancy. It had no hesitation is accepting Mr Templeton's submission that there was no evidence to support any suggestion that the claimant's depression had any impact on the decision reached to terminate the claimant's employment.

260. In these circumstances, the Tribunal has therefore concluded that while the claimant was disabled and that this was known to the respondent prior to his dismissal, his disability had no bearing on the respondent's decision to select him for redundancy.

261. The Tribunal also concluded that the claimant was selected for redundancy as he had the lowest score in his pool, there was a consultation process which was carried out and the process adopted by the respondent was fair in all the circumstances. The fact that the claimant was disappointed with the result is not an issue for the Tribunal although it does have sympathy for how the claimant must have felt when informed that he was being made redundant after very many years of service with the respondent.

262. However, the issue is whether the decision to dismiss the claimant on the grounds of redundancy was fair both substantively and procedurally. The Tribunal concluded that the respondent's decision to dismiss the claimant on the ground of redundancy was a fair one to have reached. It could not say,

on the evidence before it, that the decision to select the claimant or the process used was unreasonable.

263. In relation to adjustments which could have been made to make allowance for the claimant's illness, the Tribunal concluded that no evidence had been led before as to any adjustments that should have been made but were not made by the employer. Mr Marshall discounted the claimant's illness when giving a score for the fourth category. Had he not done so then the claimant's score would not have been 5 but 0 which would have had the result of lowering the claimant's score even more against the rest of his pool.

264. As indicated by Mr Templeton, the claimant identified the Provision, Criteria or Practice as being the selection process. The Tribunal was not persuaded that this was correct. Mr Marshall took the claimant's illness into account and discounted it, as explained above.

265. The Tribunal was satisfied that the claimant's dismissal was on the ground of redundancy and the process adopted was substantially and procedurally fair. It therefore follows that the complaint of unfair dismissal cannot succeed.

266. In relation to the alleged failure to make adjustments, the Tribunal concluded that there was no evidence before it of any adjustment which the claimant thought should have been made but was not made during the course of his employment with the respondent and, given the respondent had discounted the claimant's time keeping and attendance, when carrying out the scoring process, the Tribunal concluded that Mr Templeton was correct that no more could have been done. Mr Marshall had ignored the health issues that had been brought to his attention and the various attendance problems over a long period of time.

267. The claimant's view that his disability was in some way connected to his being selected for redundancy did not fit with what Mr Marshall said about having discounted the claimant's attendance and time keeping issues when carrying out the scoring process.

268. Mr Templeton pointed out from the medical report that it seems the claimant's health in the 13 months prior to his redundancy appeared to have been improving.

269. Mr Templeton's submission was well made that, in order to succeed, where an allegation of discrimination arising from a disability, contrary to section 15 of the 2010 Act, is made, a claimant must convince or satisfy a tribunal that the disability was the cause of the respondent's action and not merely a background circumstance.

270. The Tribunal noted the reference by Mr Templeton to **Charlesworth** (see above) which requires that there must be something arising in consequence of the disability and the unfavourable treatment must be because of that.

271. The Tribunal noted that, in Mr Templeton's submission, this failed since there was no evidence to suggest that the lower score in the matrix was related to illness, never mind consequential upon it.

272. The dismissal which was the only "unfavourable treatment" suffered by the claimant was the need for redundancy.

273. The Tribunal concluded that Mr Templeton was correct as there was no causal connection made out between the claimant's illness and his being selected for redundancy.

274. In all the circumstances, the Tribunal therefore concluded that the claim in relation to discrimination on the grounds of disability cannot succeed and, having concluded that the dismissal was substantively and procedurally fair, the complaint of unfair dismissal also cannot succeed.

275. Accordingly, it therefore follows applying the law to the above findings of fact that this claim does not succeed and it is therefore dismissed.

Employment Judge: **J Garvie**
Date of Judgment: **14 June 2019**
Entered in register: **17 June 2019**
and copied to parties