EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs H Gardner	AND	J.S.Bloor (Services) Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 4 to 7 April 2022

EMPLOYMENT JUDGE J Bax
MEMBERS Mr E Beese
Mrs D England

Representation

For the Claimant: Ms A Chute (Counsel)
For the Respondent: Mr S Wyeth (Counsel)

JUDGMENT

The judgment of the tribunal is that

1. The Respondent contravened section 39(2)(d) of the Equality Act 2010 and the Claimant succeeded in her claims of discrimination arising from disability and failure to make reasonable adjustments.

2. The claims of direct discrimination are dismissed.

3. The Respondent unfairly dismissed the Claimant, however there was a 50% chance that the Claimant would have been fairly dismissed if a fair procedure had been followed.

4. Directions for a remedy hearing are given by way of separate order.

REASONS

1. In this case the Claimant, Mrs Gardner, claimed that she was unfairly dismissed and was discriminated against on the grounds of disability. The Respondent contended that the reason for the dismissal was redundancy, and that the dismissal was fair.

Background and issues

2. The Claimant notified ACAS of the dispute on 8 October 2020 and the certificate was issued on 18 November 2020. The claim was presented on 18 November 2020.

3. At a telephone case management preliminary hearing on 25 August 2021, before Employment Judge Self, the Respondent accepted that the Claimant was disabled by reason of Polymyositis at all times material to her claim, but did not admit that it had knowledge of the same. The issues to be determined were agreed. The Respondent asserted that the reason for the Claimant's dismissal was redundancy, which the Claimant challenged and also challenged the fairness of the decision. The Equality Act 2010 ("EqA") claims were identified as three allegations of direct discrimination, an allegation of discrimination arising from disability, namely the redundancy process leading to dismissal and a failure to make reasonable adjustments. For the reasonable adjustments claim the Claimant alleged that the Redundancy selection criteria was a provision, criterion or practice, namely the attendance, flexibility and ability to work alone components. A second PCP of requiring sales advisors to conform to a standard of appearance was also relied upon.

4. At the start of the hearing the issues were further discussed. The Claimant did not dispute that there was a redundancy situation. The Respondent did not dispute that the Claimant was disabled or that it had knowledge of the disability at the material times. The Respondent clarified that the business aim or need with regards its defence of justification was 'client and operational need and the health, safety and welfare of the workforce'.

The evidence

5. We heard from the Claimant, and from Mrs Parker and Mr Fletcher on behalf of the Respondent. The Claimant also relied upon a witness statement from Ms Freeman, who the Respondent did not require to cross-examine, and we accepted her evidence. We were also provided with a bundle of 316 pages and any reference in square brackets within these reasons is a reference to a page in the bundle.

The facts

6. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

7. The Respondent is a private construction developer and has been building houses for approximately 50 years.

8. A 5 day site is one which is open 5 days a week and for some or all of that time is manned by one sales adviser. A 7 day site was open 7 days a week and generally had 2 sales advisers. In both scenarios there was an element of lone working. A stock plot is a home which has finished being built and therefore PPE was not required to visit it. A 'home demo', was a demonstration of aspects and equipment of the home.

9. The Respondent's redundancy policy provided, as part of its principles, that the Respondent will seek to avoid compulsory redundancy as far as a possible and provided examples of such means, including "The implementation of temporary lay-off, short time working or job sharing where appropriate. Where fewer than 20 redundancies are proposed each employee will be consulted and have full opportunity at a meeting to express their objections and views and to make representations."

10. The disciplinary policy provided, under the heading informal process, that the purpose of an informal meeting is to establish whether the incident occurred, identify areas of concern and to develop an agreed action plan. It states that "The manager will keep a record of the meeting. Under no circumstances will such a meeting be viewed as a formal disciplinary, even when the content of the meeting is summarised in a letter." Under the formal procedure where poor performance was suspected, the process reverted to the Company's Capability Policy to improve performance.

11. On 17 April 2014, the Claimant commenced employment with the Respondent as a sales advisor. This involved her selling new homes, either ones already built, or off plan. Her duties included dealing with customer enquiries, at the site or by telephone, finding the right property for the customer, negotiating the sale and seeing the sale through to completion. She would liaise with conveyancing solicitors, financial advisors and the build team.

12. When there is a new site, sales advisors are present on site before the first foundations are dug. When construction starts, they need to be aware of negative points and be able to show potential customers around. If a customer decides to buy, they provide regular updates and photographs of

the construction. When the build is finished, they do a home tour, usually with the site manager. On the day of occupation, gifts are left with the NHBC certificate and demo pack.

13. At all relevant times the Claimant worked on the Thornbury site, a 7 day site, with another sales advisor, Ms Burgess. Her line manager was Ms Turner, Sales Manager,

14. The Claimant's appraisals in August 2018 and August 2019 were good and positive comments were made by her line manager about her performance. In the 2018 appraisal reference was made to the Claimant needing to remember her audience and adapt her manner to suit it. It said that she "had another great year supporting the region with exceeding her target and gaining a 100% for her IFA and solicitor referrals … she is a great asset to the team." In the 2019 appraisal it was commented that her passion for the job can lead her to becoming quite outspoken in her thoughts and that she needed to remember the environment she was in and remain professional. We accepted that these comments related to situations with colleagues and senior management. We also noted that in July 2018 the Claimant had the highest private completions in the region for that quarter.

15. The Claimant was, at all material times, disabled by reason of Polymyositis. In 2015, the Claimant became ill with symptoms of fatigue, painful muscles, muscle weakness and difficulty breathing. She took 8 months off work. She was unable to walk short distances and was using a wheelchair. The Respondent arranged for her to a see a specialist and was diagnosed with Polymyositis, an inflammatory condition, which is managed by medication. She sometimes requires a transfusion of Rituximab, whenever necessary, and has blood tests every two weeks. The main symptoms are tiredness, severe muscles weakness and shortness of breath. She has periods of remission and relapses and does some things at a slower pace. The condition made the Claimant prone to depression. The Claimant was able to climb stairs and lived in a house with stairs, although sometimes she had to pace herself when doing so.

16. In 2017 the Respondent carried out a risk review, in which it was identified that the Claimant could only walk on made up roads and paths and there was a limitation with walking upstairs due to shortness of breath.

17. The Claimant and Ms Burgess agreed that the Claimant would show customers around the homes near the office and do the bulk of the paperwork and Ms Burgess would show customers around the further away plots. If the Claimant was on her own, the Site Manager, Mr Morris, whose responsibilities lay with construction, liked to show people around unbuilt plots and do home demonstrations. The Claimant was able to drive to stock plots on site and customers would follow her. We accepted the Claimant's

oral evidence that she was able to climb stairs. We found that if customers were happy to do so, they would look at the upstairs of properties leaving the Claimant downstairs. We also accepted the Claimant's evidence that the steel toe capped boots were heavy and difficult to put on when her feet were swollen and that there were lighter steel toe capped trainers available on the market. The Claimant could go on unfinished plots, if she had the right footwear. At the weekly site meeting the site manager informed the sales staff which plots were safe with no trip hazards and this was relevant to both staff and customers. About 80% of the Claimant's sales were 'off plan'.

18. The Claimant, due to her mobility, had to wear safe flat shoes. The uniform included trousers, which the Claimant wore because it meant people could not see the swelling in her legs. The Claimant was always smartly presented. Some of the other female colleagues wore the uniform skirt and high heels when in the office. The Claimant was conscious that she was not as young or glamourous as some of her colleagues. There was no evidence that the Respondent expected female staff to wear skirts or high heels. The only expectation the Respondent had, in terms of dress, was that the uniform was worn and employees were smart in appearance.

19. In March 2019, Mrs Parker, Sales Director, started working for the Respondent.

20. In March/April 2019, a customer complained about the Claimant. The customer said that she overheard the Claimant dealing with another customer saying that she would say a different customer had referred them and gave them his details so that they could fill in the refer a friend form and get £250 off. The customer was concerned about a GDPR breach and potential fraud against the Respondent. The complaint was referred to the Claimant's line manager and the Sales Director. Ms Turner met the Claimant and said that the use of recommend a friend vouchers cannot be given unless the correct procedure is followed and when taking a reservation to be mindful of customers in the office and sharing sensitive information was a breach of GDPR. No formal action was taken, and the Claimant and Ms Burgess went on a GDPR course afterwards. In the e-mail confirming what had occurred, Ms Turner said it had previously been allowed to happen if required on a discretionary basis [p78]. The Claimant was not disciplined for what happened, although the customer was told that she had been reprimanded.

21. In July 2019, a recent purchaser made a complaint that one of the sales team in the Thornbury office had given out personal information contrary to GDPR in relation to there being a lottery winner on site and how the property had been purchased. The owner had wanted not to make their win public. The Claimant and another were on site and it could not be ascertained who

had said it. The Claimant and her colleague were not subjected to disciplinary proceedings.

22. The Claimant had historically, for personal reasons, gone abroad each Christmas. She booked flights and accommodation on the return from each holiday. The Claimant would do this without seeking authorisation from the Respondent to take leave. We accepted that other colleagues would also do this, and they managed this amongst themselves. In 2019 a Christmas holiday request by the Claimant was declined by Mrs Parker. It became apparent to Mrs Parker, that the Claimant had not sought prior authorisation, contrary to the holiday policy. The Claimant had already paid for the holiday and explained the situation to Mrs Parker. The Claimant was permitted to take the holiday and told not to book any holidays without prior consent in the future because they would not be authorised and she was asked to resubmit her declined holiday request.

23. In November 2019, the Respondent referred the Claimant to occupational health. The claimant accepted that this was out of genuine concern and due to her ability to perform her role. Ms Turner and Mrs Parker were concerned that the Claimant's symptoms had worsened after her latest infusion. At about this time, Ms Turner asked the Claimant if she could cope with a 5 day site.

24. The subsequent report dated 1 December 2019, considered that she was likely to be disabled. It set out that the Claimant presented with breathlessness, pain, difficulty walking and fatigue. She paced her activities and avoided situations she felt could be difficult and rested to balance the fatigue. It was considered that the Claimant would have great difficulty in getting in and out of the site PPE and walking on a potentially uneven site. It was detailed that the Claimant and her colleague had agreed she would do viewings nearest the office and the bulk of the paperwork and her colleague walked the rest of the site. It was recommended that her contract was amended to reflect the tasks she was able to do and remove those she was not participating in. It was recommended she continued wearing the uniform she used, i.e. trousers and appropriate supportive footwear. A telephone headset was sourced to promote a more comfortable posture. It was recommended that she was supported when her hospital appointments fell on a workday and she should be provided an increased absence percentage should she need to take time off. On the balance of probabilities, the report was not saying that the Claimant could not do the tasks, but that she had difficulty with some of them. We accepted the Claimant's evidence that she could do the tasks, but with difficulty.

25. The Respondent did not seek to discuss the implications of the report with the Claimant, on the basis that adjustments had been locally arranged. The Claimant did not seek to discuss the report with the Respondent because

she was happy with the local arrangements. Ms Turner spoke to the Claimant about a headset, which was provided but did not work.

26. In January 2020, Mr Fletcher became the Regional Managing Director, we accepted his evidence that his responsibilities related to construction and not sales or company policy, which were dealt with by Mr Powell, Regional Head of Sales.

27. When the covid-19 pandemic struck in March 2020, the Respondent asked its employees to disclose any pre-existing health conditions which could make them vulnerable. The Claimant confirmed that she suffered from Polymyositis and recently had 2 infusions of Rituximab. The Claimant was considered by the NHS as someone who might be a high risk of severe illness if she caught covid-19.

28. The Claimant and other colleagues were furloughed on 27 March 2020.

29. On 22 May 2020, Mr Fletcher, sent a newsletter to the staff in the region. He made reference to many of their competitors having shut down and that they had been able to complete sales in March and April and were forecasting 17 in May and 49 in June and the income meant they had been able to pay salaries and sub-contractors. There was reference to a strong order book and land bank and that they were well positioned. We accepted Mr Fletcher's evidence that this was a newsletter to encourage the workforce and that the actual position was that they were 160 units short from the previous year, which they had been able to carry forward into that year which meant it appeared they were in a favourable financial position in comparison to the previous year. They were using the sales that they already had. At that time the Respondent was closing sites and reducing them from 17 to 10. It was very unclear when any planning consent would be given on sites in the land bank. There were difficulties in obtaining materials for constructing new homes. We did not accept that Respondent was in a strong position or that it was expecting any significant growth in its business.

30. In about mid-June Mrs Parker, became aware of proposed redundancies/restructuring, due to the drop in output caused by the pandemic. Developments were finishing, sites were closing and there had been a drop in sales.

31. About a week later, Mrs Parker was asked by Mr Powell if she would lead the redundancy process in the region. At this time, Mrs Parker was not particularly aware of the nature of the Claimant's medical condition. She had never conducted a redundancy exercise before and was given briefing notes [p296-307] and was able to ask HR questions. The HR officer assigned to the region was Mr Kinsella. The proposal was that 7 day sites

would have a maximum of 2 sales advisors and 5 day sites a maximum of 1 person. The Thornbury site had originally been a 7 day site, but due to the number of plots sold it was proposed to change it to a 5 day site and would be closing. The Respondent was looking for one member of staff to perform all tasks and it was not feasible for 2 sales advisors to work at it going forward.

32. On 29 June 2020 the Claimant's furlough ended and she worked from home due to shielding concerns. The Claimant was provided with a computer.

33. On 6 July 2020, Ms Turner informed the Claimant that it was possible the Respondent would be making people redundant. The Claimant did not think it would affect her because she had an extremely good sales record.

34. On 6 July 2020, Mrs Parker held a meeting with all sales advisors at risk of redundancy and explained that there would be consultation due to the proposed organisational changes which could lead to a reduction in roles.

35. A letter dated 6 July 2020 was sent to the Claimant informing her that she was at risk of redundancy and if suitable employment could not be found, notice of redundancy would be given on 17 July 2020. She was informed that there would be a selection process and her director would provide details setting out the selection criteria which was proposed to be used. The Claimant was informed that the Respondent wanted her views on the proposed criteria prior to agreeing the final form. She was informed there would be 3 consultation meetings with the option for additional consultation should she request it. The letter did not enclose the selection matrix.

36. The same day, the Claimant was invited to attend a consultation meeting on 7 July 2020. She was informed of her right to be accompanied. The letter did not enclose the selection matrix.

37. On 7 July 2020, the Claimant attended the consultation meeting by Zoom, which was chaired by Mrs Parker. There was no sound on the video and therefore Mrs Parker telephoned the Claimant on her mobile telephone and they used Zoom for the video and telephone for the sound. The Claimant did not want to be accompanied. Mrs Parker commented that they had 9 sites requiring 17 full time members of staff, but currently had 24 sales advisors in the region.

38. The Claimant suggested that everyone could take a £4,000 pay cut which would save a job. The Claimant also raised a question about job sharing and was told that it could be brought forward as a suggestion, but it was up to the individual to come up with a plan and propose it. The Claimant did not put forward such a proposal and we accepted her oral evidence that she did not think she would be made redundant due to her sales record.

However she also gave evidence that she did not want a part time role and was just trying to save a job.

39. In the meeting the selection matrix was held up to the screen by Mrs Parker, but it was difficult to see what it contained. Mrs Parker accepted that it was only held up so that the format could be seen rather than the detail. There were not any job vacancies at that time.

40. In cross-examination Mrs Parker accepted that she did not seek the Claimant's views on the matrix before agreeing its final form. Mrs Parker considered the suggestion of a pay decrease, but did not think it was viable because sales advisors received commission and other benefits and the decrease would have needed to be much higher. Mrs Parker considered it was up to the Claimant to make a proposal for any job share and that she should have spoken to others about it and that other employees had made such proposals.

41. On 8 July 2020 The Claimant was sent the meeting notes and the selection matrix which included the following criteria:

1. Has not been subject to a performance improvement plan at any time during the assessment period. A reduction of 5 marks for a short term (less than 4 weeks) plan. A reduction of 10 marks for a longer term performance plan.
2. Has had a clean disciplinary record during the period. A verbal warning constitutes a deduction of 5 marks. A written warning a reduction of 10 marks.
3. Attendance during the period is scored as follows 100% 10 marks, 95% or better 5 marks, 95% or less 0 Marks
7. Achieves targets and KPIs set by the region on Sales and Cancellation Rates.
8. Ability to run the sales function on the development, whilst working alone and in line with 5 day requirement.
11. Customer feedback. To include NHBC and Trustpilot direct feedback. Communication and feedback from internal customers

42. During the process the Claimant asked Mrs Parker, Sales Director, whether the same criteria was used for everyone and she said it was. We were satisfied that Mrs Parker used the selection criteria in the Matrix for the employees in her region. The final score on each employee's assessment was a percentage of the marks scored against the total of 110 possible marks. Some employees had not been subject to a mystery shop and therefore they were not scored on that criterion and their percentage was based on a total of 100 possible marks.

43. The Claimant attended a further meeting on 9 July 2020 by Zoom. The Claimant had been told that the meeting would be at 1200 and then received an e-mail saying it was at 1400. The Claimant was telephoned at about 1215 and was asked why she was not in the meeting and she immediately joined but was flustered.

44. At the meeting the Claimant was told that there would not be sales adviser vacancies or other roles available in the South West region. The Claimant raised job sharing again. Ms Parker said that any job share would need to be on the basis of a 2/3 or 3/2 split, that the Claimant would need to make a proposal and that any job share would be permanent. The Claimant said she could not manage on 2 days wages.

45. Discussion took place about how the matrix would be scored and applied. The Claimant raised concerns about how customer feedback would be scored when there was more than one person on site. It was confirmed that the Respondent would look at team feedback, however if there was something about a specific person, either positive or negative, they would look at it. The Claimant queried how the KPIs would be judged and wanted to be judged herself rather than in relation to others on site and that it was unfair to be scored on cancellations. Mrs Parker explained that it was hard to measure how she or Ms Turner felt about a person and the emotional element had to be taken out of the process and it needed to remain factual. The measure applied was judged on a team effort and was the same for all employees. The Claimant raised concern about criterion 8 and her lack of mobility impacted her ability to go out on site. The Claimant said that she felt it did not stop her selling and she can sell off plan and stressed that she had worked on 5 day sites in the past. The Claimant was told that the scoring would be done the following week and final position would be confirmed on 17 July 2020.

46. Ms Turner conducted the scoring exercise first and then it was checked and rescored by Mrs Parker by moderating each score against the others to ensure consistency conducted the scoring exercise. Advice was taken from HR in relation to some dates in relation to the Claimant's employment.

47. The Claimant was scored against the criteria on 14 July 2020 and was at the bottom of the matrix. The Claimant scored 79 out of 110, which was a score 72%. The next scores up were 72% [p262], 76% [p263] and 76% [p267]. The claimant was scored as follows in respect of the following criteria:

    (a) Criterion 1 (not subject to performance improvement plan): The Claimant was scored 8 out of 10. The notes recorded "repeated use of recommend a friend voucher inappropriately". Mrs Parker also marked down two other individuals by two points on the basis that their sites had

been on an improvement plan. The Claimant had not been subject to an improvement plan, however Mrs Parker considered that it should have been a disciplinary matter and deducted 2 points. A similar approach was applied to the two other employees. The Claimant had not been subject to formal disciplinary action regarding this incident. Mrs Parker's witness statement confirmed that the refer a friend incident had occurred outside of the assessment period and she sought to rely on the lottery incident as justification for the score although that had not been taken into account at the time. The Claimant accepted in evidence that this score was not disability related.

(b) Criterion 2 (clean disciplinary record): The Claimant was scored 5 out of 10, with the comment that she had unauthorised holiday booked in October 2019. This related to the booking of the Claimant's 2019 Christmas holiday. The Claimant accepted that this score was not disability related. Mrs Parker took the view that it was a formal disciplinary matter and it was something on the Claimant's record and she considered it was a disciplinary matter.

(c) Criterion 3 (attendance): The claimant scored 5 out of 10. In the notes it was recorded that there were 5 days absence in August 2019. 9 days of shielding were not included. Mrs Parker highlighted this to show that they and disability related absences were not included. The Claimant in cross examination said that the 5 days absence were not related to her disability. Her witness statement at paragraph 64 appeared to suggest that she considered they were; however, this was not referred to in her letter of appeal. The Claimant was clear in her oral evidence that she did not consider them to be disability related and we accepted that evidence.

(d) Criterion 7 (achieves targets and KPIs on sales and cancellation rates): The Claimant was scored 5. Mrs Parker considered that the Claimant had met her sales targets . The KPIs were in relation to the performance of the site and were a recognised measure of performance by the majority of housebuilders nationwide. Since the KPI was a measurement of the site the same KPI score was applied to the Claimant and Ms Burgess and the same approach was adopted across the region. Staff were measured throughout the year on timings and when solicitors and IFAs completed work. We accepted that this measure was used because it was an industry standard. The Claimant accepted that this was unrelated to disability.

(e) Criterion 8 (ability to run the sales function, while working alone in line with a 5 day development):

(1) The Claimant scored 5 out 10, with the note unable to home demo, demonstrate product, visit site office, visit stock plots. Other employees were also scored down on the basis of working part time and various other reasons, although none related to physical difficulties. Mrs Parker considered it was an essential part of the business model for the sales function to be run alone and it was necessary for sales advisors to work in the office, show customers plots and take them round houses. She considered that the Claimant struggled to move around the site and was unable to show the upstairs of homes, however when giving oral evidence she accepted the Claimant could use stairs. When a sale was completed the sales advisor would show the customer how to work the heating etc, which Mrs Parker believed the Claimant was unable to do.

(2) The Claimant, when giving evidence, accepted that she did not like going to the site office, which was two portacabins stacked on top of each other with staircase made out of scaffolding which frightened her. The site meetings were held in the sales office as a result.

(3) Mrs Parker referred to an incident when she had attended the site because the Respondent was having difficulty in selling some of the houses. Mrs Parker said she had asked the Claimant what the feedback was and was told that she had not been to the homes and was not aware of what the issues were. This was not put to the Claimant in cross-examination and did not appear in the witness statement and we placed limited weight upon it. In cross-examination Mrs Parker accepted that the Claimant could walk on made up roads and that she was never provided with light protective footwear, but it could have been if requested. It was accepted that when the Claimant was at work, she managed her condition well. It was denied that the occupational health report was a significant part of the decision making process.

(4) Mrs Parker accepted that she did not discuss with the Claimant how she managed on the site. When it was suggested the decision was made without recourse to medical evidence, Mrs Parker said they had the report. We rejected Mrs Parker's evidence that she did not make assumptions. She concluded that the Claimant could not do the activities without speaking to her and made an assumption based on one occasion and the Occupational Health report which had not been discussed with the Claimant.

(f) Criterion 11 (customer feedback): The Claimant scored 8 out of 10. The Claimant had no Trust Pilot reviews and had one negative review in an NHBC survey. One point was deducted for each of these aspects and

the same approach was taken with Ms Burgess. It was considered to be an appropriate measurement.

48. Mrs Parker did not consider temporary layoff because it was not based on the facts at the time, on the basis that they did not know what the market was going to do. She also did not consider furloughing the Claimant and we accepted that at that stage no staff were on furlough.

49. There were two compulsory redundancies and three voluntary redundancies.

50. Shortly before the Claimant was informed of the decision to dismiss her, she discovered that Ms Freeman had been asked if she wanted to work part time. Ms Freeman's unchallenged evidence was that the Respondent was aware that that she had future plans to study and a few days before the process ended she was offered a part time job in place of her full time role, which she accepted. We accepted that Ms Freeman offered to reduce her hours because she was going to university and would be reducing them in any event.

51. On 16 July 2020, the Claimant was invited to attend a final consultation meeting the following day. She was informed of her right to be accompanied. The meeting should have been by Zoom at 11am, but the Claimant was telephoned at 0858 by Ms Parker. She was informed that she was being made redundant and informed of the amount she would be paid. There was no discussion about the scores the Claimant had been given on the matrix.

52. A letter confirming redundancy was sent the same day. It said that the Claimant had been provisionally selected for redundancy, suitable alternative employment had not been found and she was dismissed with effect from 17 July 2020 and would be paid in lieu of notice. The Claimant was informed of her right to appeal within 5 days.

53. On 19 and 20 July 2020, the Claimant requested her and her colleagues' matrix scores and her consultation notes, not having seen them before she was dismissed. The Claimant received them on 20 July 2020.

54. On 21 July 2020, the Claimant informed the Respondent that she wanted to appeal, but did not send grounds of appeal. At the Claimant's request the meeting was held in person and it was arranged to take place in her garden.

55. On 30 July 2020, the Claimant sent her grounds of appeal in which she said she had been discriminated against and disadvantaged due to her disability. She made specific reference to a lack of reasonable adjustment to criteria 8. She was deducted 5 marks for being unable to home demo, demonstrate

product, visit site office and visit stock plots, which were the tasks for which the occupational health report had recommended adjustments were made. She said despite her disability she still had offered to complete home demos, she demonstrated products in the show home and took customers to stock plots. She had been deducted marks because the Respondent believed she could not physically complete the tasks, whereas others had marks deducted for reasons of experience, competence or part time working [p199-203].

56. In relation to the scoring of the criteria she said:

(a) Criterion 1: She had never been subject to a performance plan. She accepted she had been spoken to about the refer a friend voucher scheme, but she was not subject to formal written advice or formal performance plan. The other candidates with marks deducted were on sites with formal improvement plans

(b) Criterion 2: She had a clean disciplinary record and not received a verbal or written warning during the period. She disputed she had taken unauthorised holiday.

(c) Criterion 3: She accepted she had 5 days sickness in August 2019. She was pleased to see her enforced absence due to the covid-19 pandemic related to her disability and had been properly excluded. No recognition had been made that she took holiday to attend some hospital appointments.

(d) Criterion 7: She had raised concerns about KPIs being used and how they were used on an individual basis when two members of staff worked on the same site. She said she had an almost perfect referral rate. It was questioned whether it was fair to use KPIs as a measure when they are influenced by external factors.

(e) Criterion 8: The Claimant repeated what she said about discrimination.

(f) Criterion 11: The Claimant wanted to see the adverse name check mentioned because she was not aware of negative feedback

She also raised that in the first meeting the audio remained connected longer than the video and she heard the notetaker comment, ‘she asked a lot of questions.’ The changing of the time of her second consultation meeting caught her off guard. She had received a leaving gift from colleagues before the end of the appeal period.

57. The Claimant’s appeal was heard by Mr Fletcher on 4 August 2020 and she was accompanied by Ms Freeman. Mr Fletcher had met the Claimant on one previous occasion, for 10 minutes, when he attended the Thornbury

site. He had met all the staff on site and then they had walked to the stock plots and the Claimant had not joined them. He said the Claimant said that Ms Burgess did the majority of the site visits and he did not discuss home demos, product demos or visiting stock plots with her. He accepted he did not discuss these elements with the Claimant, and it was a failing of the Respondent.

58. The notes incorrectly recorded the meeting being at the offices, whereas it was at the Claimant's home. We accepted Mr Fletcher's evidence that he was not satisfied with the quality of the notes taken by the notetaker. The meeting took about an hour and a half. At the meeting they discussed the Claimant's concerns about cancellations and other concerns she had about the scoring. In relation to criterion 1 the Claimant said her performance review had never been called into question. Her holiday had been authorised. In relation to criterion 3 she was concerned that if shielding was not included in the figures why was it included in the report. In relation to criterion 7, the Claimant referred to cancellations and one client had cancelled and re-bought and cancellations were unfair. In relation to criterion 8, the Claimant referred to the occupational health report and that Ms Turner had said in the past that she could not do a 5 day site, which the Claimant disagreed with. She did not go to the site office because the report said she should not. She felt the question was put in against her and her disability. In relation to criterion 11, she could not see anything in the HNBC survey which said anything bad about her. The Claimant referred to Ms Burgess not getting on with one customer and suggested Mr Fletcher telephoned him.

59. On 6 August 2020, Mr Fletcher contacted Ms Turner in relation to the holiday and cancellations and scoring. He spoke to Ms Turner about criteria 1 and 8 and obtained a copy of the NHBC report.

60. The conclusions reached by Mr Fletcher were:

    (a) Criterion 1: he considered the correct conclusion had been reached and had been told by Ms Turner that the Claimant had received a verbal warning. In cross-examination Mr Fletcher accepted that the Claimant had not been subject to an improvement plan, but considered she had misused the refer a friend voucher. He accepted that it was not fair to use a different standard on the criteria.

    (b) Criterion 2 : In oral evidence Mr Fletcher accepted that the Claimant had not been subjected to formal disciplinary proceedings, but that there had been a breach of company policy and he did not understand the criteria to mean only formal disciplinary proceedings. He considered it correct to deduct 5 marks.

(c) Criterion 3: Mr Fletcher considered that the Claimant was happy shielding had not been included and was referenced only to highlight it.

(d) Criterion 7: Mr Fletcher concluded everyone was scored on the same basis and the other individual on the Thornbury site had the same score with the same comments.

(e) Criterion 8: In his witness statement Mr Fletcher said, on the basis of his one visit, that the Claimant could not demonstrate products out of the office, visit stock plots or undertake home demonstrations. It was necessary to show customers around show homes, visit different plots and climb stairs. It was not possible to conduct the work purely from the office. The model meant that only one person would be on site at a time. However in oral evidence he accepted that he should have discussed how the matters with the Claimant at the time and it was a failing. We were not satisfied that what the Claimant could actually do was discussed during the appeal or the extent to which she was assisted by her colleagues and what the effect would be if she did not have that assistance.

(f) Criterion 11: The site had been criticised in one of the surveys and the Claimant and Ms Burgess were treated the same. He did not consider it was appropriate or professional to telephone a customer and ask about the survey.

61. On 17 August 2020, the Claimant sought to withdraw her appeal. We accepted that the Claimant sought to do this after receiving legal advice.

62. On 18 August 2020, the Claimant was sent the outcome of her redundancy appeal and the decision to dismiss was upheld. The letter did not set out reasons as to why the criteria had been appropriately scored.

63. In January 2021 the Respondent advertised the availability of a sales advisor position in Somerton, which was close to the Claimant's home. We accepted Mrs Parker's evidence that the vacancy arose because an employee left the business. There were advertisements for three further sales advisor positions in April, May and December 2021.

The Law

Redundancy

64. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").

65. We considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

66. In Williams v Compair Maxam Ltd [1982] IRLR 83, the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows: '... there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

    1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

    2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

    3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

    4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

    5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

67. It has been stressed that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. However, if they are to be departed from one would expect a good

reason for doing so. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.

68. In Langston v Cranfield University [1998] IRLR 172, the EAT held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case. Accordingly, even if not raised specifically by the claimant, the employment tribunal will be expected to consider them. Moreover, the employer will be expected to lead evidence on each of these issues.

69. Selection: It is now well established that tribunals cannot substitute their own principles of selection for those of the employer. They can interfere only if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did. However, as the EAT made clear in Williams v Compair Maxam, it is important that the criteria chosen for determining the selection should not depend solely upon the subjective opinion of a particular manager but should be capable of at least some objective assessment.

70. A tribunal will not usually review the marks employees received through a scoring process. It will generally be sufficient for an employer to show that a reasonable system for selection was established and fairly administered. The tribunal may assess the fairness of the system, the criteria and the method of marketing, but it should not embark upon a detailed analysis of the individual scores unless there has been a glaring inconsistency or bad faith is alleged.

71. Consultation: Consultation is one of the basic tenets of good industrial relations practice. Where unions are recognised, consultation will generally be with the trade unions, although this does not normally eliminate the obligation to consult in addition with individual employees. Usually the former will be over ways of avoiding redundancy and (if the union is willing to discuss the issue) over redundancy selection criteria. Consultation with individuals will generally arise once they have been at least provisionally selected, and will be for the purpose of explaining their own personal situations, or to give them an opportunity to comment on their assessments.

72. The EAT in Mugford v Midland Bank [1997] IRLR 208 summarised the state of the law as follows:

(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be

unfair, unless the [employment] tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

73. It has to be remembered that warning and consultation are two different things. Consultation generally requires an employee being given a fair and proper opportunity to discuss the reasons behind the employer's decision and to express his views on them with the employer, thereafter, properly and genuinely considering them. An employee clearly needs to be given sufficient information so that they can understand the reasons behind the decision which is threatened by the employer (Davies-v-Farnborough College [2008] IRLR 14).

74. Search for alternative employment: In order to act fairly in a redundancy situation an employer is obliged to look for alternative work and satisfy itself that it is not available before dismissing for redundancy (with the same employer or elsewhere in a group of associated employers, if appropriate). It has been emphasised by the case law that the duty on the employer is only to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment.

75. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole (Taylor v OCS Group Ltd [2006] ICR 1602). What matters is whether the overall process was fair, notwithstanding any deficiencies at an early stage. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, (e.g. see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors [2015] IRLR 704].

76. We were also referred to John Brown Engineering Ltd v Brown [1997] IRLR 90, in which the individual employees had not been told their scores in the assessment process. We were referred to paragraph 8 where after referring to the meaning of fair consultation as stated in R v British Coal Corporation and Secretary of State for Trade and Industry *ex parte* Price [1994] IRLR 72 said, "What is important to recognise at once is that that passage does

not suggest that individual consultation is an essential, and confirms to our mind that in each case what is required is a fair process, where an opportunity to contest the selection of each individual is available to the individual employee, who can nevertheless achieve that opportunity through his trade union. Lack of consultation implies a loss of opportunity, not that the opportunity if given would have made necessarily any difference. Obviously individual consultation is the easiest way to assert even-handedness on the part of the employer, but we would not wish to suggest that it is necessarily required in every case. On the other hand, a policy decision to withhold all markings in a particular selection process may result in individual unfairness if no opportunity is thereafter given to the individual to know how he has been assessed. We recognise it may be invidious to publish the whole identified 'league tables', but in choosing not to do so the employer must run the risk that he is not acting fairly in respect of individual employees. It also has to be reasserted that it is no part of the industrial tribunal's role, in the context of redundancy, to examine the marking process as a matter of criteria under a microscope; nor to determine whether, intrinsically, it was properly operated. At the end of the day, the only issue is whether or not the employers treated their employees in a fair and even-handed manner."

77. In certain circumstances a tribunal may properly find that even though the dismissal would have taken place, adherence to fair procedures would have delayed its implementation or that there is a percentage chance that the same outcome would have occurred. This is the approach sanctioned by the House of Lords in Polkey v A E Dayton Services Ltd [1987] IRLR 503, [1988] ICR 142, HL. In these circumstances compensation should be awarded for the additional period of time for which the employee would have been employed had the dismissal been fair (see Mining Supplies (Longwall) Ltd v Baker [1988] IRLR 417, [1988] ICR 676, where a dismissal was held to be unfair for lack of consultation and the EAT held that had a reasonable period for consultation occurred the dismissal would have been delayed by a week). It is for the Respondent to adduce evidence on this issue

78. In some cases it is difficult to be certain whether the dismissal would have occurred had the employer acted fairly.

79. In Software 2000 Ltd v Andrews [2007] IRLR 568 the EAT reviewed the authorities and gave the following guidance regarding the correct approach to 'Polkey' and in particular the difficulties inherent in what is a predictive exercise:

'(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role".

Discrimination claims

80. The claim alleged discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complained that the Respondent had contravened a provision of part 5 (work) of the EqA. The Claimant alleged there had been direct discrimination, discrimination arising from disability, harassment and a failure by the respondent to comply with its duty to make reasonable adjustments.

81. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

82. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A

treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

83. The provisions relating to the duty to make reasonable adjustments are found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

Direct Discrimination

84. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably, on the ground of her disability, than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

85. We approached the case by applying the test in Igen v Wong [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):
"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

86. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a

difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, we had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

87. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

88. In Denman v Commission for Equality and Human Rights and Ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

89. The function of the Tribunal is to find the primary facts and then look at the totality of those facts to see if it is legitimate to infer that the acts or decisions were done/made on prohibited grounds (Qureshi v Victoria University of Manchester [2001] ICR 863). In terms of drawing inferences, in Efobi v Royal Mail Group Ltd [2021] ICR 1263 in which after referring to Wisniewski v Central Manchester Health Authority [1998] PIQR 324 it was commented that, "Tribunals should, as far as possible be free to draw, or decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books before doing so."

90. The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful

discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

91. "Could conclude" means that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

92. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072).

93. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

94. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

95. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn

(Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Discrimination arising from disability

96. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170, EAT, at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment, but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

97. When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of his disability*". There needed to have been, first, '*something'* which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that '*something*' (Basildon and Thurrock NHS-v-Weerasinghe UKEAT/0397/14). Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might be several links in the causative chain (Hall-v-Chief Constable of West Yorkshire Police UKEAT/0057/15 and iForce Ltd-v-Wood UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (Pnaiser-v-NHS England [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (Sheikholeslami-v-University of Edinburgh UKEATS/0014/17).

98. In IPC Media-v-Millar [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

99. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (Williams-v-Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230, SC).

Justification

100. In assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc [2008] IRLR 846).

101. In Hensman v Ministry of Defence UKEAT 0067/14/DM, Singh J held that when assessing proportionality, while and an Employment Tribunal must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3) (see also Hampson v Department of Education and Science [1989] ICR 179). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax [2005] IRLR 726 CA).

102. The test of proportionality is an objective one.

103. A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 in which Lady Hale, at paragraph 20, quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213

> *20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 para 151:*
> *"the objective of the measure in question must correspond*

to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

He went on, at para 165, to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 , 80:
"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31, 32, it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

104. Lady Hale, at paragraph 19, also made reference to the decision of the ECJ in Bilka-Kaufhaus GmbH v Weber von Hartz in which the ECJ held that a discriminatory practice might be regarded as objectively justified on economic grounds if a national court finds that the measures chosen by [the employer] respond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued, and are necessary to that end.

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from articles 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz (Case 170/84) [1987] ICR 110 ."

105. At paragraph 24 Lady Hale said

"24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."

106. Pill LJ's comments in Hardy & Hansons plc v Lax [2005] IRLR 726 in relation to the Sex Discrimination Act 1975 at paragraph 32 also provide assistance in that the statute:

"Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary…"

And further at paragraph 33

"The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action."

107. If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the defence in the section (*Buchanan-v-Commissioner of Police for the Metropolis* UKEAT/0112/16).

108. A tribunal will err if it fails to take into account the business considerations of the employer (see Hensman v Ministry of Defence), but the tribunal must make its own assessment on the basis of the evidence then before it.

Reasonable adjustments

109. In relation to the claim under ss. 20 and 21 of the Act, we took into account the guidance in the case of Environment Agency v. Rowan [2008] IRLR 20 in relation to the correct manner that we should approach those sections. The Tribunal must identify

(i) the provision, criterion or practice applied by or on behalf of the employer; or
(ii) the physical feature of the premises occupied by the employer,
(iii) the identity of the non-disabled comparators (where appropriate); and
(iv) the nature and extent of the substantial disadvantage suffered by the claimant;

before considering whether any proposed adjustment is reasonable.

110. It is necessary to consider whether the Respondent has failed to make a reasonable adjustment in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP (Secretary of State for Justice v Prospere UKEAT/0412/14/DA).

111. In Ishola v Transport for London [2020] EWCA Civ 112 the Court of Appeal held.

"*35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. …*

36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. …

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again…."

112. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he or she is caused a substantial disadvantage when compared with those not disabled. It is not

sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled, and that test is an objective one (Copal Castings-v-Hinton [2005] UKEAT 0903/04).

113. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have been a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham UKEAT/0067/07 and Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075).

114. Counsel for the Respondent referred to Lancaster v TBWA Manchester UKEAT/0560/10/DA in which the Employment Tribunal held that removing three of the essential selection criteria would not be a reasonable adjustment would not have prevented the Claimant's dismissal and therefore could not be a reasonable adjustment. The decision was upheld and the EAT said at para 46, "…The material question for the an ET in considering its effect, which is one of the factors to which regard is to be paid in assessing reasonableness, is the extent to which making the adjustment would prevent the PCP having the effect placing the Claimant at a substantial disadvantage. That enquiry is fact sensitive."

Conclusions

Direct Discrimination

Was the Claimant treated less favourably by the Respondent by:

Scoring the Claimant as it did in the redundancy exercise and selecting her for redundancy on the basis of those scores

115. The appropriate comparator was a person with the same skills, experience and achievements as the Claimant, but had mobility and breathing difficulties and was not disabled. The Claimant relied on the Respondent being aware that she was prone to infections, that the Respondent assumed that she could not do the work on a 5 day site and that updated medical evidence had not been obtained before scoring the Claimant in relation to criterion 8, which was the only criterion the Claimant considered was related to her disability. It was submitted that assumptions had been made about the particular disability and it was thought that she could not do her job and it was wrong to proceed without medical evidence. The Claimant's submission was effectively that because of the effects or perceived effects of her disability that the Respondent made assumptions. That was different to whether it treated her less favourably because she

was disabled It was significant that the Respondent, if it had wanted to remove the Claimant, had three potential disciplinary matters it could have used, but on each occasion an informal approach was adopted. The Claimant was scored on the understanding of the situation by Ms Turner and Mrs Parker. No evidence was adduced that tended to show that an appropriate comparator would have been treated any differently. There was not any evidence that any inappropriate remarks or comments were made about the Claimant or her disability and her colleagues were understanding and assisted her. We were not satisfied that the Claimant discharged the initial burden of proof to adduce primary facts tending to show that she had been less favourably treated because she was disabled, and this claim was dismissed.

Assuming that the Claimant was unable to undertake home demonstrations or demonstrate products, visit site offices or stock plots and by reducing her redundancy score accordingly.

116. It was submitted that this was direct discrimination because medical evidence had not been obtained. Mrs Parker relied on her observations and what had been said to her and what had been set out in the occupational health report. Counsel for the Respondent made the same submission about making assumptions. For the same reasons as set out above we were not satisfied that the Claimant discharged the initial burden of proof and this claim was dismissed.

Failing to offer her employment such as part time work or a job share arrangement as an alternative to dismissal.

117. The Claimant relied upon the same submission as to what tended to show that there had been less favourable treatment and that she had raised job shares in the first and second consultation meetings, but the Respondent did not raise it in the final meeting. The Claimant had told Mrs Parker that she could not live on 2 days wages a week and was told that she would need to bring proposals to the Respondent. Other employees were also told the same thing, and some made proposals. Ms Freeman was offered part time hours on the basis that she was going to university and would have wanted to decrease them in any event. There was no evidence to suggest that the Claimant was treated any differently to her colleagues or that an appropriate comparator would have been treated more favourably. For the reasons set out above the Claimant failed to discharge the initial burden of proof and this part of the claim was dismissed.

<u>Failure to make reasonable adjustments.</u>

Whether the Respondent had the following provisions, criteria or practices:

The requirement for sales advisors to conform to a standard of appearance

118. The Claimant asserted that the Respondent was looking for glamourous women to work for it and that she did not fit that model. This was explained by the Claimant on the basis that other women wore skirts and high heels, which was something she could not do, due to needing to wear flat shoes. The only requirement the Respondent had was for employees to wear the company uniform and look smart. The uniform included skirts and trousers and there was no requirement as to which should be worn. We did not accept that the Respondent had a standard of appearance to be glamourous. The Claimant was always smartly turned out at work. We rejected that the Respondent had the provision, criterion or practice contended for by the Claimant. In any event she was not disadvantaged by the need to wear the uniform, because she wore it and always appeared smart.

In the application of the redundancy selection criteria, namely attendance, flexibility and ability to work alone and whether the Claimant was placed at a substantial disadvantage to persons who are not disabled

119. All three of the criteria were part of the selection matrix and the employees were measured against them. Whether they were a PCP was not contested and we concluded that they were.

120. Claimant did not make submissions about flexibility; it was recognised that in relation to that part of the selection criteria the Claimant was awarded full marks. Accordingly, the Claimant was not put to any disadvantage in relation to this criterion.

121. In relation to attendance the Respondent did not include any days that the Claimant was unable to work by reason of needing to shield or were disability related. The Claimant's evidence was that the 5 days absence which were taken into account were not disability related. Days sickness for employees who were not disabled were taken into account when they were scored against the matrix. Counsel for the Claimant argued that account should be taken of what the Claimant said in paragraph 64 of her witness about being more prone to infection and that the Respondent had not included additional discounting in assessing her attendance percentage following the occupational health report. However for the purposes of the redundancy exercise the Respondent did not count shielding and disability related absence. Although the Claimant theoretically could have been disadvantaged, she was not disadvantaged by the way in which the Respondent approached the criteria. The only matters taken into account were absences unrelated to disability and the Claimant was not substantially disadvantaged by the criteria in comparison to non-disabled people.

122. In relation to the ability to work alone, it was accepted by the Respondent that there was a disadvantage related to the Claimant's disability in relation to this part of the criteria. It was common ground that the Claimant had difficult with some aspects of working on the development sites, in particular on rough ground and on occasions when having to climb stairs. Those difficulties were sufficient for her colleagues to assist her. We concluded that the disadvantage was more than minor or trivial and was substantial in comparison to employees who were not disabled.

123. The Respondent accepted that it had the requisite knowledge at the material time.

124. An adjustment not only has to be reasonable, but it must operate so to avoid the disadvantage of the PCP. When assessing this part of the criteria Ms Turner, Mrs Parker and Mr Fletcher made assumptions as to the Claimant's ability to work on the site. They erroneously concluded that she was unable to home-demo, demonstrate products, attend the site office and visit stock plots, when that was not the case. If Mrs Parker, before scoring her, had a meeting with the Claimant at an early stage in the process and discussed with her: (1) what she could and could not do, (2) the reason why her colleagues were assisting and (3) whether it was entirely necessary for Ms Burgess to visit all further away plots or for Mr Morris to undertake demonstrations on the basis that the Claimant could have driven to the plots; it was highly unlikely that the conclusion would have been reached that she could not do those activities. In the circumstances it would have been reasonable for Mrs Parker to have such a meeting and it would have enabled the Respondent to have a true view of the situation and would have ameliorated the effects of the PCP. Such a meeting would have been a reasonable adjustment, which the Respondent failed to make.

125. The Claimant suggested that the Respondent should have sought medical advice. We considered that the Respondent could have made enquiries and sought an emergency occupational health report in order to assist it to decide upon the capability of the Claimant and the effect of the local adjustments in the past. The Respondent's position was that they had the report from December 2019, however it identified difficulties and not that the Claimant could not do certain activities. There was no mention of driving to stock plots or lighter PPE trainers. The Respondent was aware of how it was proposing to restructure, and that the Claimant was disabled. It was obvious that the Claimant's disability was going to be relevant when considering criterion 8. In the circumstances it would have been reasonable for an urgent report to be sought from occupational health so that an accurate picture of the Claimant's ability could be sought when she was not provided with assistance. Such a step would have ameliorated the effects of the PCP and would have been a reasonable adjustment.

126. It was also contended that a removal of the criterion would have been a reasonable adjustment. We rejected that suggestion. 5 day sites were going to be staffed by one person and therefore it was an important consideration when deciding who should be made redundant. To remove it would effectively remove the reason for the restructure proposal and the effect of it and would have created a situation of unreality. In the circumstances of this case it would not have been a reasonable adjustment to remove it.

127. Accordingly we concluded that the Respondent failed to make reasonable adjustments.

Discrimination arising from disability

128. The unfavourable treatment alleged was detrimentally treating the Claimant by the redundancy process, leading to her being made redundant. The only relevant criteria in the matrix was criterion 8. Being scored down in relation to a criterion is something which is to an employee's disadvantage, as is being dismissed. It is more to the employee's disadvantage if the reason for the reduction in score is based on an assumption without properly checking the actual position. We accepted that this was unfavourable treatment.

129. The reason why the Claimant was scored down was because Mrs Parker and Mr Fletcher did not consider that the Claimant could do home demos, demonstrate products, visit the site office or visit stock plots. They thought this because of the Claimant's difficulty with mobility and because tasks were undertaken by her colleagues. Mrs Parker and Mr Fletcher had incorrectly concluded that the Claimant was unable to do the tasks, whereas the actual position was she could visit stock plots further away from the office if she drove and could undertake demonstrations. However we accepted that she might have difficulty with undertaking some of her functions and it was not clear to what extent she would not be able to fully comply.

130. It was the Claimant's difficulty with walking and breathlessness that caused her to make local arrangements with her colleagues so that she could attend the plots nearest the office and mainly do paperwork. Mrs Parker and Mr Fletcher were aware of the Claimant's disability and that it caused such limitations and those matters were in their mind when considering the scoring for criterion 8 and was something which was more than minor or trivial. This was accordingly unfavourable treatment arising from an effect of the Claimant's disability.

131. The restructure involved the proposal of a single member of staff working at 5 day sites. This was an important aspect of the decision making

process when deciding who to make redundant. The redundancy scores for all employees were relatively close. We took into account that there can be more than one causal link. Criterion 8 was more than a minor or trivial part of the criteria and we were satisfied that the Claimant's difficulties with walking and breathing were a more than minor or trivial cause of her redundancy.

132. The Respondent relied upon the defence of justification. The business aim or need was client and operational need and the health, safety and welfare of the workforce. The Claimant did not dispute that it was a legitimate aim.

133. The Respondent was restructuring, and 5 day sites were to be staffed by a single sales advisor. We accepted that the Respondent needed to consider whether employees were capable of undertaking all aspects of the role. It was therefore reasonable for the Respondent to consider whether an employee could work on their own.

134. In the Claimant's case, the Respondent made an incorrect assumption about the extent of her restrictions and concluded that she was unable to do various tasks. The actual situation was that the Claimant was able to undertake the tasks but had difficulty with some aspects, due to her mobility issues. It was relevant that the Claimant could drive to stock plots and was able to do home demos and product demonstrations. We accepted that she had some difficulty with the tasks, but that they were not impossible. An agreement had been reached locally as to how tasks were split, but that did not mean the Claimant was unable to the parts done by her colleagues, it was a way of making it easier for the Claimant. If the Respondent had discussed with the Claimant, the extent of her difficulties and what she could do without assistance, prior to scoring her, it would have gained the true picture. Further the Respondent could have sought an urgent occupational health report to assist with what the Claimant could and could not do. These were less discriminatory measures that the Respondent could have reasonably taken within the redundancy process. Instead the Respondent proceeded to dismiss the Claimant with consulting her on the scoring or speaking to her about the extent of her difficulties. There was no evidence that such discussion took place at the appeal stage and Mr Fletcher had concluded that the Claimant also could not do parts of her role. The burden of proof is on the Respondent to establish the defence of justification. There were less discriminatory measures which could have been reasonably taken. In the circumstances the discriminatory effect of criterion 8 and its application was not outweighed by the business need of the Respondent and it was not availed of the defence.

135. The Claimant therefore succeeded in this claim.

Unfair dismissal

136. It was not in dispute that there was a genuine redundancy situation. The Respondent's reason for dismissal was redundancy which is a potentially fair reason. The Claimant disputed that redundancy was the true reason and that she was dismissed because she was disabled. The Claimant submitted that we should take into account that there was an increase in business in 2021 and that the Respondent engaged new sales advisors. We took into account that the country was in restrictive measures due to the covid-19 pandemic, that there were social distancing measures in place, a restricted amount of building materials available and a high degree of uncertainty. The Respondent needed to reduce headcount and in the Claimant's case made an incorrect assumption about the extent of ability to perform her role. We did not accept that the Claimant was dismissed because she was disabled. The principal reason for the dismissal was redundancy.

137. The pool of those at risk of redundancy was not challenged and it consisted of the sales advisors in the region. We were satisfied that the Respondent genuinely applied its mind to considering who was at risk and including all sales advisors was something a reasonable employer could do.

138. The Claimant challenged the inclusion of criteria 7 and 11 as part of the matrix. Criterion 7 was challenged on the basis that KPIs were based on the site and that it was unfair because it did not take into account the Claimant personally and that it was unfair to take into account average days to exchange, because the Claimant did not have control over it and different solicitors might have different workloads. She also said that it was unfair that it included cancellations because cancellations also included where a customer cancelled one plot and bought another. We accepted that using KPIs was an industry standard and that it was an objective means of assessing performance. We accepted that sales targets were also set per site. The Respondent considered that it was a reasonable way in which performance could be measured and where two employees were at the same site, they were scored the same on the basis of the KPIs. We were satisfied that a reasonable employer could have used such a criteria. Similarly in relation to criterion 11, the Claimant said that it was unfair to include it because it was unclear whether the adverse feedback was about her. The Respondent applied the same standard across the redundancy exercise and the feedback related to sites and would not be applied in the same way to each employee at the site if the feedback identified that individual. We were satisfied that the Respondent properly applied its mind as to the inclusion of this element as a means of scoring the employees and that a reasonable employer could have included it in a scoring matrix.

139. The Claimant challenged the scoring of criteria 1, 2, 3, 7, 8 and 11. We took into account that we should not embark on a detailed analysis of the scores unless there had been a glaring inconsistency or bad faith. Both counsel impressed upon us not to conduct a re-scoring exercise due to the risk of the Tribunal substituting its own view for the employer.

140. In relation criterion 1, the Claimant was marked down 2 points for the repeated use of the refer a friend voucher. Mrs Parker identified that it fell outside of the assessment period. The only matters which were to be taken into account were those in the assessment period. Accordingly the Claimant should not have been deduced 2 marks in this respect. Mrs Parker in her witness sought to rely on the lottery winner issue, however it was not taken into account at the time. Further the criterion related to a performance improvement plan for deductions and there was no evidence that the Claimant was ever subject to such a plan. We were satisfied that a reasonable employer would not have deducted 2 points for the refer a friend voucher issue and the Claimant should have been scored 10 points.

141. In relation to criterion 2, the Claimant argued that she had not been subject to formal disciplinary proceedings in relation to the holiday issue, which we accepted. The criterion related to a clean disciplinary record and it did not distinguish between formal and informal action, both of which formed part of the disciplinary policy. Mrs Parker considered that it was a breach of the holiday policy. A reasonable employer could consider that the Claimant had received an informal warning and that it was backed up with a letter. In the circumstances a reasonable employer could have concluded that the Claimant did not have a clean disciplinary record, had received a verbal warning and deducted 5 marks.

142. In relation to criterion 3, we accepted the Claimant's oral evidence that the 5 days taken into account were not disability related. Counsel for the Claimant invited us to go behind the oral evidence and consider the implication in paragraph 64 of the witness statement, which we declined to do. There was no suggestion during the redundancy process that the Claimant said those matters were disability related and we concluded a reasonable employer could have reached the same conclusion as the Respondent.

143. In relation to criterion 7, the Claimant submitted that it could not be ascertained whether scoring was fair across the board and there was no rationale for a 5 mark deduction. We accepted the Respondent's evidence that the use of KPIs was an industry standard and that targets and the KPI measures were specific to a site and not a person. The Claimant and Ms Burgess were scored the same for this. The same process was adopted across the region. In the circumstances, a reasonable employer could have given such a score.

144. In relation criterion 8, for the reasons set out above the Respondent made an incorrect assumption about the effect on the Claimant's disability to perform her role. We accepted that she was able to do stock plot visits and undertake the various demonstrations, but that she might experience difficulty. Some of those difficulties could be overcome by the use of a car or PPE trainers. The Respondent did not seek clarification from the Claimant in relation to the extent of her difficulties and if her colleagues had not been assisting her how much of the duties she was able to perform. The Respondent was wrong in its conclusion that she was unable to perform the tasks and we concluded that there had been a failure to make reasonable adjustments and that this conclusion was discrimination arising from disability. We considered that due to the proven discrimination that this was a criterion that could be scrutinised more carefully. We were satisfied that because of the incorrect premise, that the score of 5 was wrong and it should have been higher. However the Claimant still had difficulties, which would have impacted on her ability to perform the role and there could be considered areas where her performance would be lacking as a result. We concluded that the score should have been higher than 5, but we could not conclude that it should have been scored 10, which would have been a score when there were no concerns.

145. In relation to criterion 11, the Claimant challenged the score on the basis that it could not be ascertained to whom the poor feedback related. We accepted that a reasonable employer might not make an enquiry of a customer in anonymous feedback, on the basis of a suspicion by an employee. The Claimant was scored the same as her colleague and we were satisfied that a similar approach was adopted across the region. A reasonable employer could have reached the same conclusion.

146. In terms of consultation, the Respondent provided the Claimant with the scoring matrix the day before the second meeting. We accepted that the Claimant had the opportunity to discuss the matrix at that meeting and put forward her views on the criteria. However, the Respondent did not confirm what the final criteria would be, despite indicating that it would in the at risk letter, and instead scored the Claimant. The Claimant was dismissed without knowing how she had been scored. The ability of an employee to know how they have been scored and to be able to comment on or challenge it, is important as it means that mistakes can be identified. This opportunity was not afforded to the Claimant. In the Claimant's case the significance was magnified on the basis that incorrect assumptions had been made about the extent of the difficulty she faced with undertaking some aspects of her role. The Respondent knew that the Claimant was disabled, but it did not seek to discuss with her the extent of her difficulties before scoring her. It also did not seek any guidance from occupational health on an urgent basis. A reasonable employer would have engaged in

additional consultation with the Claimant before scoring her so that it understood what the true position was in relation to criterion 8. A further aspect was that the second and third meeting times were changed without the Claimant's knowledge and left her underprepared and flustered, thereby making it more difficult for her to participate. A reasonable employer would not have changed the times without reasonable notice.

147. The Respondent relied on the appeal as a cure of the defects, we rejected that submission. There was no evidence that Mr Fletcher ascertained the actual extent of the Claimant's difficulties, he concluded that she was unable to do the tasks, which we found was an incorrect finding. For a failing to be cured on appeal, the appeal needs to be sufficiently thorough and we did not accept that the true extent of the Claimant's difficulties and the impact they had was ascertained by Mr Fletcher. We also considered that the purpose of an appeal is to allow an employee to challenge a decision. In the present case the Claimant was not given an opportunity to address the scoring or the effects of her disability on her role before a decision was taken. In effect a key part of the consultation was not conducted until the appeal stage and the Claimant had no right of redress from the decision. In the circumstances we were not satisfied that the appeal cured the procedural defect or the errors in scoring.

148. The Claimant also submitted that the Respondent should have considered temporary layoff, we rejected that submission. All staff had returned to work and the Respondent was faced with a reduction of sites and the need to restructure the way it operated them. There was no indication as to when the number of sites would increase. This was not a situation in which the Respondent could foresee when there would be an increase in business and although it was not considered, it was not a feasible option. The Claimant also submitted that furlough should have been considered. The Respondent had a need to reduce head count due to a reduction in sites and the need to restructure. All employees had returned to work from furlough. The purpose of the furlough scheme was to enable employers to keep on employees whilst they were unable to trade. The Respondent was trading at the relevant time. We accepted the Respondent's submission that furloughing the Claimant and paying her to stay at home without working, whilst other employees were at work was something likely to cause significant disharmony in the workforce and would be an inappropriate use of the scheme. The Respondent was trading with a new structure. In the circumstances it was not suitable to consider furloughing the Claimant.

149. In the circumstances a reasonable employer would have consulted with the Claimant about the extent of her difficulties and sought guidance as to what she could do before scoring her against criterion 8. A reasonable employer would not have scored the Claimant as the Respondent did in

relation to criteria 1 and 8. Taking into account the size and administrative resources of the respondent the decision to dismiss fell outside of the range of reasonable responses. Accordingly the Claimant was unfairly dismissed.

150. The Respondent submitted that even if a fair procedure had been followed the Claimant would have been dismissed in any event. The Respondent accepted that this issue would be influenced on the findings of fact. It was submitted that if criterion 1 was wrong only, that there would be no difference in the decision, with which we agreed. If the two points were added to the Claimant's score, she would have had 81 points which would equate to a percentage of 73.6% and she would still have been in the bottom two under the process. The Respondent also submitted that criterion 8 should be taken out of matrix, however this was at odds with the rationale of the restructure and would have removed the Respondent's analysis of its employees' suitability for that new structure. In order for the Claimant to be taken out of the bottom 2 employees she needed to score more than 76%. If she scored 76%, she would be tied with 2 other employees with the second lowest score. For the Claimant to score 77% she needed a total points score of 84.7 points out of 110, which were awarded on a whole basis and therefore she needed to score 9 points in relation to criterion 8. Therefore 8 points would have left her in a tie. The Claimant submitted that to undertake such an exercise was too speculative, however we were satisfied that the Claimant should have been scored higher than 5 and considered it unlikely that she would have scored 10 for criterion 8, on the basis that she did have some difficulty with aspects of her role. The scores between the bottom employees in the matrix were close together. In the circumstances, taking into account that the claimant could have been scored between 6 and 9 points and might have been in a tie situation, we considered that there was a 50% chance that the Claimant would have been fairly dismissed in any event.

151. Accordingly the Claimant was unfairly dismissed, although there was a 50% chance that she would have been fairly dismissed if a fair procedure had been followed. The Claimant succeeded in her claims of discrimination arising from disability and for a failure to make reasonable adjustments as set out above.

Employment Judge J Bax
Date: 29 April 2022

Reasons sent to Parties: 19 May 2022

FOR THE TRIBUNAL OFFICE