EMPLOYMENT TRIBUNALS

Claimant: **Mr A Thompson**

Respondent: **Hanson Quarry Products (Europe) Ltd**

Heard at: **Bristol (by VHS)** **On:** **27, 28. 29 and 30 June 2022 and in chambers on 7 July 2022**

Before: Employment Judge Street
Mrs D England
Mrs P Ray

Representation
Claimant: Mr J Duffy, counsel
Respondent: Mr M Humphreys, counsel

JUDGMENT

In the Judgment of the Tribunal,

i) the Claimant succeeds in the claim in respect of unfair dismissal. The Claimant was unfairly dismissed.

ii) The Claimant succeeds in the claim of disability discrimination. The Respondent discriminated against the Claimant by treating him unfavourably because of something arising from his disability.

iii) The Respondent discriminated against the Claimant by failing to comply with the duty to make reasonable adjustments.

iv) The Claimant fails in his claim that the reason or principal reason for his dismissal was that he was a member of Unite the Union or that he had taken part in the activities of an independent trade union. The Claimant fails in his claim that the reason or principal reason for his selection for redundancy was that he was a member of an independent trade union or had taken part in the activities of an independent trade union at an appropriate time. Those claims are dismissed.

The Remedy Hearing is listed for 30 September 2022, starting at 10.00 am.

REASONS

1. Background

1.1. This is a claim for unfair dismissal, detriment and disability discrimination arising out of the dismissal of Mr Thompson after many years of employment by Hanson Quarry Products (Europe) Ltd, ("Hanson"). The dismissal took place on 7 September 2020 with immediate effect and the claim was brought on 7 January 2021. The Respondent says that the dismissal was by reason of redundancy and fair and that there was no detriment or discrimination.

2. Evidence

2.1. The claimant gave evidence on his own behalf and called Mr Tony Hulbert, Regional Officer for Unite, to give evidence on his behalf

2.2. The respondent called three witnesses, Mr Gary Langton, currently Marine Managing Director and formerly Area Operations Manager for Aggregates based at the Whatley Quarry, Mr Justin Collis, Project and Engineering Manager, formerly Quarry Manager at the Whatley Quarry, and Mr Joseph Bagnall, Regional Director, and the appeals officer in this case

2.3. The witnesses gave evidence from written witness statements.

2.4. The parties presented an agreed bundle of documents of 314 pages of which we read those pages to which we were directed. Two additional documents were added by consent, a job description for a rail foreman and a job description for a quarry operative.

2.5. Numbers in brackets in these Reasons are references to the page numbers in the agreed bundle, the paper number first and the digital number second.

3. Issues

3.1. The Claimant claims unfair dismissal, dismissal under s.152(1) (a) and (b) TULRCA 1992, detriment under s.153 of the Trade Union and Labour Relations (Consolidation) Act ("TULRCA") 1992, discrimination arising from disability under section 15 of the Equality Act 2010 ("EqA") and a failure to make reasonable adjustments (EqA, ss 20 and 21).

3.2. The issues before the Tribunal to decide, using the numbering in the original list, are as follows. This is the original agreed list but incorporating the points which Mr Humphreys confirmed at the close of the hearing that the Respondent was not challenging.

Unfair dismissal

1. It is agreed that the Claimant was dismissed.
2. What was the reason for dismissal? The respondent asserts that it was a reason related redundancy, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996 ("ERA").
3. Did the requirements of the respondent for employees to carry out work in the place where the Claimant was employed by the respondent cease or diminish, or were they expected to cease or diminish?
4. The Claimant denies that there was a genuine redundancy situation on the following basis:
    i. Vince Pitt, a Unit Manager of the Respondent stated in a communication to the workforce on 18 August 2021 that the company was "in a great place at present and the future looks to be just as promising as we have found this year. The pandemic has not been as damaging to our business as we had feared and as you have all witnessed we are very busy";
    ii. There was no diminution in the number of employees required to carry out work of a particular kind, namely Rail Operatives;
    iii. The Respondent engaged contractors to backfill the roles that were made redundant and then subsequently re-advertised the vacated roles and therefore there was no reduction in the headcount;
5. If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide whether:
    i. The respondent adequately warned and consulted the claimant;
    ii. The respondent adopted a reasonable selection decision, including its approach to a selection pool;
    iii. The respondent took reasonable steps to find the Claimant suitable alternative employment;
6. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
7. Did the respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects;
    i. The individual redundancy consultation was not satisfactory or meaningful in that the Respondent failed to take the Claimant's concerns about the selection criteria into account. He had three consultation meetings. The Claimant understands that he was the only employee on the 1st round of consultations who had a member of the HR department present. The Claimant also was advised by Darren Underhill, union representative (who accompanied him to the first and third meetings), that he was the only member with whom the Respondent would not discuss the skills matrix (although it was discussed with the Claimant later at the second and third consultation meetings).
    ii. The Respondent failed to engage in satisfactory or meaningful consultation with the Claimant's Union;
    iii. The Respondent failed to agree the selection criteria with the Union or the Claimant;

iv. The Claimant should not have been placed into the General Operative selection pool as he had been employed for the last 33 years as a Rail Operative. There was a misapplication of the selection criteria for General Operative role when the Claimant was a Rail Operative;
v. The Respondent ring-fenced three roles in the General Operative pool and the employees in those roles were excluded from the redundancy process however those subjected to the redundancy exercise were still scored against these three ring-fenced roles as part of the 24 jobs included in the selection criteria;
vi. The selection criteria utilised by the Respondent was subjective in that it took into account the opinion of individual managers. The Claimant submits that the selection criteria was designed in such a way to target specific employees including himself. The selection criteria did not take into account previous skills and experience.
vii. The Respondent made no effort to explore voluntary redundancy despite the Claimant raising it during the consultation process.
viii. The Respondent failed to consider suitable alternative employment other than to offer him vacancies which were physically impossible for him (due to his disability) or were hundreds of miles away.

8. If it did not use a fair procedure, what is the percentage chance that the Claimant would have been fairly dismissed in any event and, if so, when would that have occurred?

Dismissal under s.152(1) (a) and (b) TULRCA 1992:

9. Was the principal reason for the Claimant's dismissal because
(a) he was a member of Unite, the Union, or
(b) had taken part in the activities of an independent trade union at an appropriate time

10. The Claimant relies on the following reasons:
    i. The Claimant was an active member of Unite the Union;
    ii. The Claimant was a trade union convenor with responsibility for:
        a) To act as a link between trade union members and management and vice versa;
        b) Put forward issues to management on behalf of members;
        c) Attendance at work council meetings;
        d) Representing members at national pay talks.
        e) The Claimant spent approximately 10-12 hours per month on union matters.
    iii. The Claimant was involved on behalf of the Union in the redundancy consultation process;
    iv. The Claimant had previously held a role as a union appointed health and safety representative until approximately 2010.

<u>The Respondent accepts that the Claimant did all these things</u>

Detriment under s.153 TULRCA 1992:

11. It is admitted that the Respondent selected the Claimant for dismissal during the redundancy process

12. Did the circumstances constituting the redundancy apply equally to one or other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed?

13. Was the reason or principal reason for that action because that he was a member of an independent trade union or had taken part in the activities of an independent trade union at an appropriate time?

14. That is, was the dismissal because he was a Senior Shop Steward and that he was selected for redundancy as a consequence of the following:
    i. The Claimant was an active member of Unite the Union;
    ii. The Claimant was a trade union convenor with responsibility for:
        a) To act as a link between trade union members and management and vice versa;
        b) Put forward issues to management on behalf of members;
        c) Attendance at work council meetings;
        d) Representing members at national pay talks.
        e) The Claimant spent approximately 10-12 hours per month on union matters.
    iii. The Claimant was involved on behalf of the Union in the redundancy consultation process;
    iv. The Claimant had previously held a role as a union appointed health and safety representative until approximately 2010.

<u>The Respondent accepts that the Claimant did all these things – the issue is causation</u>

Discrimination arising from disability (EqA 2010, s.15):

15. Did the Respondent treat the Claimant unfavourably by:
    i. Selecting him for redundancy;
    ii. Dismissing the Claimant.
16. Did the following things arise in consequence of the Claimant's disability (para 48, EJ Midgley's judgment, page 81i):
    i. The Claimant was limited in the time that he can undertake physical activities before he becomes so short of breath that he has to stop and take remedial steps.
    ii. The Claimant has shortness of breath when he undertakes any digging or manual labour.
    iii. The Claimant has a very limited ability to walk 200 or 300 metres.
    iv. The Claimant's ability to climb stairs is very limited.

<u>The Respondent says Yes, because the tribunal has told us that</u>

17. Was the unfavourable treatment because of the "things" outlined above?

18. Was the treatment a proportionate means of achieving a legitimate aim. The Respondent alleges:

    The need to retain a multi-skilled workforce at the site. This would ensure that employees could be more easily moved between areas of the Quarry as and when the business required it.

19. The Tribunal will decide in particular:
    i. Was the treatment an appropriate and reasonably necessary way to achieve those aims?
    ii. Could something less discriminatory have been done instead?
    iii. How should the needs of the Claimant and the respondent be balanced?

20. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

The Respondent does not argue that the respondent did not know or could not be expected to know.

Reasonable adjustments (EqA 2010, ss 20 and 21)

21. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

The Respondent does not argue that the Respondent did not know or could not be expected to know.

22. A "PCP" is a provision, criterion, or practice. Did the have the following PCPs:

    Applying selection criteria equally to all employees.

23. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

    The Claimant had been unable to perform physical roles and was therefore scored down.

24. Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

The Respondent does contend that it did not know or could not reasonably be expected to know that the Claimant was likely to be placed at the disadvantage.

25. What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:
    i. Adjustment of the selection criteria to take into account his disability;
    ii. Adjustment of the selection criteria to allow for previously acquired skills to be taken into account in the scoring matrix;
    iii. Adjustment of the selection criteria to allow for the extra weighting applied to particular skills to be removed. The Primary and Arrival/Departure Rail Operative skills were heavily weighted at x5. There was no consultation on this. The Claimant submits the rail loft skills should have been weighted due to the responsibility, communication and the management of plant and resources involved;
    iv. Ring-fencing all Rail Operative roles including the Claimants.

26. Was it reasonable for the Respondent to have to take those steps and when?
27. Did the Respondent fail to take those steps?

Remedy

Unfair dismissal

28. Does the Claimant wish to be reinstated and/or re- engaged?
29. What basic award is payable to the claimant, if any?
30. If there is a compensatory award, how much should it be? The Tribunal will decide:
    i. What financial losses has the dismissal caused the claimant?
    ii. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    iii. If not, for what period of loss should the Claimant be compensated?
    iv. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    v. If so, should the claimant's compensation be reduced? By how much?
    vi. Does the statutory cap of fifty-two weeks' pay or £88,519 thereafter apply?

Automatically unfair dismissal s.152 and 153 TULRCA 1992

31. The Tribunal must order the minimum basic award prescribed in s.156 TULRCA 1992 (before deductions are made).

Discrimination

32. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
33. What financial losses has the discrimination caused the claimant?
34. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
35. If not, for what period of loss should the Claimant be compensated for?
36. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
37. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
38. Should interest be awarded? How much?

4. Findings of Fact

References to witness statements are given as "ws" References to the page numbers are given with physical page numbers first, digital page numbers second.

4.1. Whatley Quarry is a large quarrying site, producing around six million tons of aggregate material per year. As Mr Collis describes it,

> "Material is loaded onto large dumper trucks and transported across the quarry where it is processed and then screened and sorted by size. Once sorted, the materials is loaded onto either lorries or trains ready for delivery to customers. Around two million tons of the material is delivered by lorries from the site annually, the rest being delivered by rail."

4.2. Mr Thompson's employment began on 16 March 1987.

4.3. On 10 July 2009, he became a Rail Foreman (90/104). That role was at grade and skill level E1.

4.4. The role involved Mr Thompson driving locomotives and shunting but with a range of duties relating to Sidings and Loading Management (job description 10/10/09). Those included hand-over, organising shunting requirements or notify the availability of shunting manpower for other duties elsewhere, completing daily shift reports, organising daily shunting requirements for repairs and reporting faults or safety issues, arranging holiday and sickness cover and meal breaks, taking responsibility for safe practice and spillage, preventing overloading, signing trains off for dispatch and forging good working relationships.

4.5. Mr Thompson had an NVQ Rail Operations level 2 shunting from November 2003, and had been working on the basis that he was qualified to do so until 2014.

4.6. As a Rail Foreman he had personal development reviews (oral evidence).

Mr Thompson's health

4.7. In 2003, Mr Thompson was diagnosed with supraventricular tachycardia.

4.8. Employment Judge Midgley recorded the day-to-day effects of that condition as follows:

> "When he suffers an attack, he has a sudden missed breath and then has a very rapid shallow pulse. If he remains standing, he begins to feel faint and needs to sit down, although he prefers to lie on his back and raise his legs. He will remain in that position until his pulse returns to normal. The attacks can last from a few minutes to up to an hour. When he suffers an attack, he cannot walk, work, or drive until his pulse has stabilised. He has found drinking ice-cold water or eating an ice lolly can help his pulse return to normal quicker."

4.9. In June 2014, Mr Thompson was diagnosed with ischaemic heart disease.

4.10. On 30 June 2014, an Occupational Health report recorded episodes of central chest pain on exertion, and the diagnosis. The pain was provoked by more physical work activities. He was medically fit to undertake his

full-time working hours but should work a pattern of restricted duties, office or light physical work. He should not be required to walk more than 200 to 300 yards at a time. It was likely that the Equality Act 2010 applied and that Act required that reasonable adjustments should be made to facilitate working needs (106/122).

4.11. On 21 October 2014, he underwent coronary artery bypass surgery.

4.12. He had discussions with his manager both before and after that surgery. His manager was concerned about his safety getting about the site in particular and about the avoidance of heavier duties, associated with locomotive and shunting work. Mr Thompson transferred to the rail loft as a Rail Loadout Operator initially on a temporary basis.

4.13. The loft is accessed by a double flight of stairs but once in the office, there was no physical exertion required and Mr Thompson needed to go in and out relatively little.

4.14. An Occupational Health report was obtained in March 2015 which referred to his temporary position at that point as a Rail Loadout Operator, work of a light physical nature. He was to have a phased return, with no heavy manual work and adjustments made (109/123).

4.15. In 2016, the Occupational Health report described him to be doing Loader Admin and confirmed him to be medically fit to carry out the Rail Outloader role (114/128). That report again refers to the probability that Mr Thompson was covered by the Equality Act with regard to disability (128).

4.16. There were routine annual health assessments carried out confirming his fitness for what he was doing in 2017, 2018 and 2019.

4.17. His health did not preclude him from driving.

4.18. Employment Judge Midgley noted the medication Mr Thompson took and the self-management of his palpitations. Even with that, he suffered significant limitations in respect of physical activity at the material times,

> "The description the claimant gives is one of difficulties in undertaking what may be described as relatively low-level physical activities which would from part of day-to-day activities, namely gardening and climbing stairs. Furthermore, that he is very limited in the time that he can undertake the activities for before he becomes so short of breath that has to stop and take remedial steps. Similarly, his ability to walk even 200 or 300 metres or to climb stairs is very limited."

4.19. Employment Judge Midgley held that Mr Thompson met the criteria to be regarded as disabled under the Equality Act 2010.

Rail Loft Role

4.20. After his surgery, Mr Thompson had had a phased return to work and was transferred to the Rail Loft, eventually on a permanent basis. It

meant a reduction in his grade and pay, but his manager was concerned for his health and safety moving about the site and doing the work of a Rail Foreman.

4.21. The manager expressed concern about him crossing the yard,

> "The yard is several tracks wide and the surface is uneven, moving vehicles around, slippery sleepers, the manager at the time did not think it was a health and safety risk worth taking." (Mr Thompson, oral evidence)

4.22. Locomotive drivers face a certain amount of heavier activity, pulling points, coupling wagons.

4.23. At the time he was offered other possibilities, including weighbridge work or dispatch, mobile plant, dumper and front-end loader roles (oral evidence). He was a skilled and experienced man and recognised as able to handle different roles. The Loft was a role that was less physically challenging, apart from using the stairs a couple of times a day (185/201)

4.24. The contract in place from 2015 was that dated 14 September 2015 taking effect from 3 August 2015 (101/115). That describes him as a Rail Operative. He was at grade and skill level C2. Mr Collis explained the grading,

> "Quarry roles within the Company are divided into different grades, based on skill set, to ensure consistent payment for equal work across the country."(para 6)

4.25. That change meant a demotion and lower pay but work within his capacities and avoiding risk (102/116).

4.26. Allocated to the Rail loft, there were six workers, three covering the 24 hour shifts as Rail Loadout Operators and three handling Rail Trippers.

4.27. Mr Thompson worked as a Rail Loadout Operator. His role was primarily computer based (ws para 7). It involved checking materials available, inputting what was to be loaded and in what order, from instructions. If materials were not available to meet the orders in the bins he would arrange for additional supplies. He worked in an elevated office, with two flights of stairs up to it, with a gantry from which he could view vehicles arriving and departing and record wagon numbers. There were CCTV cameras that he monitored.

4.28. There were three workers covering 24 hours between them. Mr Thompson was busy, often having to work during meal breaks or to eat while supervising someone who was not able to carry out the role independently (oral evidence). He had difficulty in getting cover for his breaks.

4.29. Mr Collis tells us that it took some 3 - 4 minutes to fill a wagon, there would be perhaps 20 wagons per train and an average of 12 trains over the 24 hour period.

4.30. Rail Trippers managed the wagon filling. Quarried material was loaded onto wagons by rail trippers or occasionally by front-end loaders. The tripper travelled along the track and the role of the rail tripper was to ensure it was accurately located so as to load each wagon. The operator sat in the cab of the rail tripper and operated it by computer. There would be some housekeeping duties associated with it, as with other roles.

4.31. While the Rail Loadout Operators worked from the Rail Loft, Rail Tripper operators had to walk up to get to the rail tripper, so walking several hundred yards and climbing up – there were stairs and a ramp.

The Union

4.32. The site is substantially unionised. Mr Thompson had been the Union Health and Safety representative and in 2018 was elected Convenor for Unite the Union, a role he held until his dismissal.

4.33. As Convenor, he was responsible for the following activities:

- Acting as a link between trade union members and management and vice versa;
- Putting forward issues to managers on behalf of members;
- Attending work council meetings;
- Representing members at national pay talks.

4.34. He spent around ten to twelve hours per month on union activities. He also attended meetings with onsite union representatives and visiting outside union officials and represented employees at disciplinary or grievance meetings (Mr Thompson, ws paras 5 and 6).

4.35. Working relationships between the Company and the staff were traditionally amicable and co-operative, with regular negotiation and consultation on shifts, terms and conditions. There had been consultation in advance of any redundancy process.

4.36. In January 2020, Mr Langton joined the company as Area Operations Manager for Aggregates based at the Whatley Quarry. He has 30 years of management experience and has worked in a rail loft himself, amongst other roles. His was a new role for the quarry.

4.37. Contractors had traditionally been used at the Quarry to cover sickness and holidays. Within the last couple of years before these redundancies, some 15 contractors had been taken on as permanent employees, which had had required union negotiation over the unexpected effect on bonuses.

4.38. Neither Mr Hulbert nor Mr Thompson felt that Mr Langton was sympathetic to the Union.

4.39. Mr Thompson refers to an incident in March 2020, when he accompanied two union members when they were called to Mr Langton's office. They had shut the exit weighbridge because of the lack of Covid prevention measures in place. Mr Langton agrees that he told Mr Thompson to leave

on the basis that it was not a union matter: there had been no grievance or formal complaint, he expected not to require union representation at an informal discussion with staff and he says that is what they successfully achieved without Mr Thompson's attendance. Mr Thompson saw it very differently. This was a health and safety matter and the workers were clearly in breach of management directions: this was in his eyes very much part of his role as a union representative.

4.40. Mr Hulbert referred to the first time he met Mr Langton who had made a comment on the lines of "I don't much care for unions" to which Mr Hulbert replied, "I do", and that at that point he foresaw some difficulties ahead for the union on the site.

4.41. The working relationship between the Union and the Company had hitherto been good. Mr Hulbert's evidence is that "the relationship changed dramatically when (Mr Langton) joined the business and it has dramatically changed since he moved on." He says the relationship has got back on track, improving dramatically (Mr Hulbert, ws paras 19 and 20).

The redundancy exercise

4.42. In early 2020, the company were looking for efficiencies and to overcome wasted time, and were considering a restructuring exercise to run the site with fewer staff.

4.43. Covid-19 had been a factor well before lockdown and, once furlough became available during the early stages of the pandemic, some 56% of staff, including Mr Thompson, were furloughed. By July 2020, furlough had been extended, with the flexible furlough scheme in place until October.

4.44. Three men continued to cover the Rail Loft Loadout function, with someone covering for Mr Thompson while he was on furlough.

4.45. The site continued to function effectively.

4.46. There were major uncertainties facing the company and a substantial loss of business was feared.

4.47. The success of operating with fewer staff led Mr Langton to resume the plan for redundancies, in May 2020, with the goal of losing 19 members of staff. Two resigned, leaving 17 roles to be shed.

4.48. The Company's intention was to operate with a multi-skilled workforce, providing maximum flexibility with a reduced head count.

Additional skills attracted additional pay. There were a lot of individuals across the Quarry with multiple skills at a competent level. There were also a significant number of individuals working in settled roles. Those included at least three individuals with adjustments for disabilities, two of whom worked in the rail loft. One of those was Mr Thompson, one was a Rail Tripper. They each had settled roles within their capabilities and that was an arrangement that had been acceptable to them and the company.

The 2004 Redundancy Selection Procedure

4.49. There had been a Redundancy Selection Procedure in 2004 that addressed selection for redundancy in the 2004/05 operational review *(88b/100).* Volunteers for redundancy would be invited before compulsory redundancies, without guaranteeing acceptance if it might cause an imbalance of remaining skills and experience and impact on efficiency. Objective criteria would be used so far as possible in redundancy selection. Prime examples of objective criteria were competence assessments then used across the operations in terms of NVQ and EPIC license attainment and the assessed ability of multi-skilling.

4.50. Guidance was given on assessing qualifications and experience, workforce involvement, multi-skilling, time-keeping, length of service, live disciplinary issues and attendance (unauthorised absence, assessed over 12 months).

4.51. In respect of qualifications, the procedure recognised four levels, those with an NVQ with competence and capacity to recognise and rectify minor problems, those with competence to carry out the role and always reporting problems to a superior, those requiring some supervision or those requiring considerable supervision in carrying out the role.

4.52. In relation to workforce involvement, employees were encouraged to be involved in Works Council meetings, Health and Safety Committees and to become Safety Representatives and that was reflected in the scores.

4.53. In respect of multi-skilling, points were awarded where a worker was paid for and competent at a number of skilled activities (4), was qualified and competent at least one other skilled activity in addition to their main job (3), was willing and competent to assist in additional unskilled jobs in addition to the core job (2) or can and does only competently perform the core job (1).

4.54. The 2004 redundancy document suggested that nationally multi-skilling was approved and encouraged.

4.55. Time-keeping and attendance were assessed over a 12 month period, disciplinary issues over six months to two years where there were warnings.

4.56. That document was not looked at by Mr Langton nor was he referred to it by his senior managers when they settled the criteria for redundancy selection on this occasion. It was referred to by Mr Hulbert in the meeting of 10 August 2020. It was not considered.

The First Matrix

4.57. Mr Langton explained that having decided on a headcount reduction and efficiencies, he was looking for “objective criteria that would take into account the four areas of competencies backed by certificates and other measure of competence. That was his view in March 2020. Progress on

that came to an end initially during the pandemic but was resumed after a period with lockdown and falling sales.

4.58. Having settled on that, he tells us,

> "I instructed my three senior managers of the site to go away and based on their experience to come back with their personnel, experience and skills for us to be able to put scores against."
>
> "How did you ensure consistency in the scoring?"
>
> "They each manage different departments but they also cover each other's. So they had to do their own and then put it together and then we ran through it. And then with knowing the scope and the full written criteria, verbally over a coffee, we had a lot of data to put in a format, so a collective effort from all, and each of us had the ability to speak openly candidly and in a safe environment and then we had to evidence that with competency with certificates and training records."

4.59. There are no records of those conversations or of the way the scores were applied in each case.

4.60. There were two different selection procedures being applied, one in Aggregates and one to Asphalt. The Area Operations Manager for Asphalt was seeking initially to select on "soft" factors - effort, commitment, overtime. A different matrix was used for Aggregates, where Mr Thompson worked. That was skills based.

4.61. The approach to skill levels was to take a snapshot of active skills held at that point in time. It favoured those with more than one current, active skill over those who had worked in a single settled post without maintaining skills elsewhere

4.62. The majority of the roles in the Quarry require formal qualifications. Most required NVQs at level 2. Those and QCF (Qualifications and Credit Framework) did not lapse with time.

4.63. In addition, roles requiring accreditation needed refresher training and fresh certification. That re-accreditation training varied from skill area to skill area but would take between half a day and two days.

4.64. The rail functions at the quarry were managed by an independent rail operator, Mendip Rail Ltd, who were responsible for the rail sidings. Hanson employees were seconded to them to operate the sidings. Sidings operatives had to be competent at shunting wagons and driving trains.

4.65. Mendip conducted the assessments for those roles and provided training. They were due every two to three years.

4.66. Mr Thompson for example had NVQs, but not having worked in shunting or locos since 2014, had not had recent refresher training or re-accreditation. He had not been put forward for or requested training.

4.67. There was no consideration of whether lapsed skills could very readily be the subject of refresher training and certification: Mr Langton told us,

> "There is a huge amount of flexibility and multi-skilling in the workforce but given the time-line for what we were trying to achieve, upskilling was not considered."

4.68. For Aggregates, the skill matrix was developed over time. The version applied at the start of the August consultations is here referred to as the First Matrix, though it was the outcome of a number – perhaps nine – iterations.

4.69. Six pools were identified in the First Matrix. The Rail Loft staff, all six workers including the Rail Trippers and the Rail Output Loaders, were pooled together as "Rail". The other pools were Maintenance, Front-End Loader ("FEL"), Dumper, Weighbridges, Fitting and Admin. In the admin pool there was only one person, a unit clerk (201c/220).

4.70. These did not reflect actual departments, simply a collection of skill areas.

4.71. 23 skills were to be assessed, such as front-end loader, rigid dump truck, locos, admin, rail loft, rail tripper, in and out weighbridge, primary, wash plant, spillage, admin and housekeeping.

4.72. The pools identified did not cover all working areas. Not included in that First Matrix were the workers in Sidings, Primary, Explosives, Electrical or Spillage (201c/2020).

4.73. If they were not in the matrix, workers were not put at risk of redundancy.

4.74. Nobody included in the First Matrix had the skills to handle locomotives ("locos"), shunting or spillage, for example and those workers that did were not put at risk of redundancy at any stage, as Mr Langton confirmed (*oral evidence)*.

4.75. Each skill area was allocated one point. Additional weighting – scores of 5, 10 or 15 – were added to "Primary" and to those with full or limited responsibilities in certain areas.

4.76. In that version, a score was also allocated, maximum 2 points, for flexibility *(201c/220).*

4.77. Of those assigned to Rail, two workers scored 1 point each for Rail Loft skills, two scored 1 each for Rail Tripper skills and two scored a point for both. Mr Thompson scored 1, for Rail Loft skills. Others had points in addition for skills in handling mobile plant, offering flexibility and/or first aid.

4.78. Mr Thompson would have scored points for locomotive driving, shunting and possibly other mobile plant handling had it not been for his disability and being transferred to the Rail Loft in 2015, so that his skills were seen by the company and accepted by him as being out of date.

4.79. Mr Thompson was sent that version of the matrix with the scores after a meeting with the union over the process in August while he was on furlough, by a shop steward.

The consultation process

4.80. There was no prior consultation with the Union over the proposal to make redundancies, contrary to previous practice. The numbers involved did not make union consultation obligatory.

4.81. Mr Langton said this,

> "I am aware that there was union involvement on site with the senior managers driving this process. When and to what level I don't know. I did not."

4.82. The scoring was carried out before any consultation on the criteria took place and initially without consultation on scoring with individual employees.

4.83. Although the redundancy consideration has been described by the Respondent as involving all employees, a number were not sent at risk letters. The at-risk letters were issued on the basis of the First Matrix *(201c/220).* Forty-nine workers were issued with at-risk letters *(202/223).*

4.84. Two individuals, including the maintenance manager, were dismissed immediately, not having the two years required for employment protection. *(Mr Collis, oral evidence, page 201/217)*

4.85. Mr Thompson was notified that he was at risk of redundancy on 3 August 2020. His first consultation meeting took place on 4 August 2020 *(126/142).* He had union representation.

4.86. Others had the same letter on 3 August and first consultation meetings on the same day or shortly afterwards.

4.87. Twenty-eight, including general operatives, were told immediately that they were not at risk, on 4 August. That was based on their scores, applied before any consultation. Eight others including Mr Thompson were told that they were at risk and there would be further consultation *(213/233).* The same process the next day led to five more general operatives being told they were not at risk and seven being told that they were.

4.88. Mr Langton explained that the skills matrix gave them the scores to come to that conclusion at that early stage. Mr Langton confirmed that the individuals kept at risk at that first consultation were the same individuals as made redundant in the final outcome. He explained,

> "The selection of those identified from the skills risk were those that were made redundant. The skills matrix scores did not change, so the outcomes were the same."

4.89. Page 203/223 is an annotated spreadsheet headed "At Risk – 4th Timetable". It shows those identified by 4 August as not at risk. Against those identified as being at risk is an entry showing the pool. Mr

Thompson is shown as being in a pool of 6, 3 at risk. The unit clerk is at risk, in a pool of 1. The weighbridge team were in a pool of 8 and 2 were identified as being at risk.

4.90. The roles themselves were not redundant. In particular, there were 6 in the rail loft and there remain 6 whose primary role is in the rail loft or on rail trippers. It is the individuals working that have changed, those with limited skills replaced by multi-skilled workers. Mr Langton agreed it was not the roles that were redundant but the individuals, because others with more skills could carry out their roles. (Mr Langton, oral evidence)

Union Consultation

4.91. Mr Thompson asked for union consultation over the process at the meeting on 4 August 2020.

4.92. Mr Hulbert learned of proposals at that point, when Mr Thompson telephoned him and informed him that the Respondent had already held first consultation meetings and had informed some employees that they were at risk of redundancy and other employees that their roles were safe.

4.93. The process of consultations was suspended while meetings took place with the Union.

4.94. Mr Hulbert wrote on behalf of the five union representatives on 6 August 2020, notifying a "failure to agree".

4.95. That pointed out that the redundancy procedures used in 2004 and 2009 had not been followed, "The Aggregates side has not even given the agreement any consideration at all."

4.96. The criteria being used were criticised as fundamentally subjective and designed to dispatch Unite representatives and long-serving staff.

4.97. He warned of the potential for discrimination under the Equality Act arising from the approach being taken.

4.98. He complained of the failure to consult in a meaningful way, and that some employees had been told that they were no longer at risk, implying that decisions had been taken before the consultation even began *(130/146).*

4.99. Union consultation took place at meetings on 10 August, 11 August and by zoom on 27 August, a meeting which Mr Thompson attended *(133-137, 138 – 141, 150 – 152).* Mr Wilcock, Regional Director Aggregates, attended the first two, Mr Langton the third, Mr Wilcock being on leave.

4.100. There are minutes of those meetings. They are not verbatim. Even so, the quality is very poor. Mr Hulbert was forthright,

> With all due respect, these minutes of 11 August are written on the back of a cigarette paper. They are the worse minutes I've ever seen.

4.101. He had had no part in writing or amending the minutes and they were not "particularly meaningful".

4.102. Mr Hulbert attended the meeting of 10 August. He had not seen the scored version of the first matrix. He saw headings only.

4.103. He challenged that people had already been taken "off risk" after the first meeting with them, although the process was just beginning,

> "It implies a decision has been made" *(133/149).*
> "You have already made your decision *(134150)*"

4.104. He questioned the fairness of looking for a multi-skilled workforce, not having planned on that basis,

> "The concern is that for many years the business has been happy with individuals doing 1 job. Now you are looking for flexibility. I don't disagree with the flexibility, but you haven't multiskilled them or provided any sort of flexibility programme."

4.105. Mr Wilcock's answer to that was,

> "We have never been in a place where anyone has come to us. We would never have said no, we would cry out for it. We have already got a lot of highly skilled and highly flexible people within Whatley. There are 2 parts to the flexibility. The skills but also things like willingness to learn and do things differently, hours, overtime etc."

4.106. He said Whatley Quarry was seen as less flexible and agile than other sites, to which Mr Hulbert said,

> "You can't blame them if you haven't multi-skilled them."

4.107. Mr Hulbert also expressed concerns about the criteria. Absence records had not been used. Mr Wilcock said that they had made the decision not to use absence records, but to use skills as the decider.

4.108. Mr Hulbert didn't understand why that was,

> "What you normally have, you would always use absence as a guide. No point in having a good skill base if they don't turn up for work. It is a fundamental in any, any situation. Here, where the multiskilling was, down on the quarry itself, mobile drivers, those would have been the people with poor absence records. No doubt about it, Mr Thompson would have retained his job, and some of the newer employees had very poor records, they do not turn up for work and we know that because our reps represent them and

> so we know that, so why would you not use a medium that eliminates those that do not turn up for work? *(Oral evidence)*

4.109. The HR representative at that meeting suggested that they had to consider the relevance of things like absence and length of service, and,

> "We would need to be careful in terms of potential discriminatory criteria, e.g. under the DDA."

4.110. It was pointed out too that they had not taken into account NVQs and that they had been used in the 2004 redundancy selection procedure. Mr Wilcock said,

> "We have to draw a line somewhere. If we thought someone wasn't capable just because they didn't have the NVQ that would be an issue. It is good they have the qualifications, but they weren't judged on that. It is about competence in the role."

4.111. That is not the view that Mr Langton takes. He said that competence was based on qualifications, NVQ, in-date certificates,

> "NVQs are very much part of our sector. Very few parts of mobile plant would you be permitted to operate without one."

4.112. He told the tribunal that no guidance was required as to how managers satisfied themselves as to staff having the skill level, either they did or they didn't – it was binary. He confirmed that there were no written criteria on marking workers against the criteria *(oral evidence).*

4.113. How that difference in approach affected the scoring is not known, save that Mr Langton did not take part in the scoring process.

4.114. Mr Hulbert wanted them to scrap the whole process and start again. In his view, the criteria were not designed to retain a multi-skilled workforce but to target older members and Trade Union representatives.

4.115. The Union also pointed out, and it was agreed, that if a pool was reduced by, say, three workers, it was not then appropriate to move 3 new workers in to cover those roles. That would apply to Mr Thompson's situation. He had been identified as a member of a pool of six, three of whom were at risk but there was never a question of dispensing with three of the roles *(137/153).*

4.116. This was put to Mr Langton,

> "If you are reducing a pool of 6 by 3 you should not be putting other people in there to cover the job, the job is not redundant. You still needed 6 people in the rail loft. So how is the job redundant?"

> "Because there are people that have the same skills as Mr Thompson."
> "The job, the functionality of the process was not redundant. It is the people that are redundant and the redundancy criteria was picked up from the matrix, there were several other multi-skilled people who could complete that work." *(oral evidence).*

4.117. At the meeting on 11 August, the Company put forward a different approach to pools. The general operatives were to be pooled. The other new pools were Sidings, Weighbridge, Primary, Engineering, Support.

4.118. Flexibility had been removed as one of the criteria, leaving the selection entirely based on current skills for roles. That followed a discussion by telephone initiated by Mr Hulbert. Flexibility was seen as highly subjective.

4.119. Over the two discussions there were references to other criteria, including absences, length of service, qualifications, contractual roles, the impact of the Equality Act, but the criteria remained solely skill based, using the roles and weighting identified by the company. The matrices did not consider experience save as regards current ability to perform roles. They did not include performance, discipline or any other factors.

4.120. Absence, timekeeping and flexibility, with guidance on scoring were included in the revised Asphalt matrix *(140/156).*

4.121. During the 27 August meeting, the circumstances of one worker, not Mr Thompson, on light duties was discussed in relation to potential discrimination and the management response was that,

> "We have reviewed this person and are confident the disability does not affect the matrix scores." *(166)*

4.122. The outcome of the consultation with the union is that the union saw the matrices as improved but not agreed. Mr Hulbert put it this way,

> "No. there was no agreement. I think it looked a lot better. There was no formal agreement with the business that the criteria were acceptable and I don't think they were looking for our agreement."
>
> We had no say in the criteria. We challenged them. We vigorously challenged it. There were some amendments made, in particular on the asphalt, asphalt was changed dramatically because it was very subjective. We never agreed the aggregates, because we always felt that there were certain jobs in rail that should have been ring fenced. In his rail loft, if you still need 6 operatives there should not be a redundancy in that department. We agreed nothing, elements in it that were not right. Maybe better than when we first started…..

> They had already made the decision effectively. I asked them to retract all the criteria and start afresh, with fair criteria, but they refused, that is minuted. They had decided who was going and who was staying."

4.123. No change had been made in response to the Union representations other than the removal of flexibility. Mr Hulbert drew out the contrast with earlier negotiations he had been involved with the Company. There had been a good and effective relationship at which difficult issues had been discussed and resolved.

4.124. In previous redundancy consultations, voluntary redundancies had been accepted, reducing the need for compulsory redundancies. Throughout this exercise, voluntary redundancies were not accepted. Mr Thompson thought some six people would have gone willingly, as he explained at his second consultation meeting on 1 September but the response was that the Respondent was not considering voluntary redundancies at this time (159/175),and they did not at any stage.

4.125. Voluntary redundancies might have reduced the number of compulsory redundancies without removing the required skill base, since there need be no commitment to accepting volunteers.

4.126. Mr Collis did tell us that while voluntary redundancy was not an offer on the table, he had had some applications but that the skills sets of those individuals were not skills that the company could afford to lose (oral evidence)

The final matrix: the pools

4.127. The final version of the skills matrix that had been an evolving document is shown at page 201/ 217. The skills matrix identifies roles across the business against which individuals scored. The matrix did not reflect any commonly used criteria, such as performance, conduct, workforce involvement, length of service, time-keeping, unauthorised absence or attendance.

4.128. The pools were now Managers, General Operatives, Sidings, Weighbridge, Primary, Engineering and Support. The latter now incorporated two roles, unit clerk and stores.

4.129. A pool had been created of General Operatives. That pool consisted of 38 employees who carried out a variety of different roles at the Site. That was a much bigger group than in the original pools. The goal was to reduce the number of General Operatives from 38 to 29.

4.130. Not all General Operatives were in that pool. Some were also placed in Weighbridge and Primary.

4.131. Although the Claimant's contract identified him as a Rail Operative, he was classified for these purposes as a General Operative along with all the Rail Operatives in the Rail Loft.

4.132. in the Respondent's view, that "most appropriately matched his skill set." Mr Collis explained that,

> "In reality, he was not carrying out the role of a Rail Operative. Rail Operatives at the Site had a variety of skills including shunting wagons and driving trains."

He added,

> "The Claimant let his skills in these areas lapse and therefore did not possess the skills required to carry out the role of a Rail Operative."

4.133. The remaining Rail Operatives were pooled together in Sidings, in a discrete group. They all scored for locos and shunting and they were the only workers with those scores - the managers did not have them. These workers had not been sent at-risk letters and were never part of the redundancy consideration.

The final matrix – the criteria

4.134. There were 24 skill areas assessed *(201/217).*

4.135. Most attracted 1 point per skill area. Two involved regulatory body roles that required substantial experience and training. Those had scores of 5, 10 or 15 and were awarded to managers and scores of 5 were given to a couple of foremen.

4.136. Primary was a weighted area, everyone with that skill scoring 5 points. 8 people achieved those 5 points, including the 4 in the Primary pool, one manager, one spillage worker, one weighbridge operator and one general operative. That is said by the Respondent's Regional Director to be a critical role and one which it takes at least six months to learn (139/155, 11 August consultation with union). It is a desk-based role using computers and CCTV cameras.

4.137. Mr Langton justified the extra points for primary - most skills were allocated 1 point, primary 5 – by comparison with the rail loft,

> "Having done the rail loading role for many years myself I understand how it works. This is busier, but I have extensive rail loading experience. I have seen how it works there. I understood it far better than the primary role. But it is more than just the primary crusher, you are dictating the frequency of material entering the crusher, then through the processes including screening and then out into the next stage and so very much more complex. I take my hat off to those that do it."

4.138. A number of scoring areas identified those with discrete skills:

- The only people scored for Spillage were the four spillage workers; they were all multi-skilled. One did not have two years service and was dismissed, the others were retained.
- The only people scored for Engineering were the engineering team and a couple of managers; eight out of eleven of them scored only 2 points, the other point being for housekeeping. Redundancies were made.
- The only people scored for Electrical were the three electricians and one manager; two of those scored only 2 points, the other point being for housekeeping. There were no redundancies.
- Two people scored in respect of explosive handling, both managers.

4.139. The Respondent was retaining skills in areas of need, without requiring multi-skilling save for the housekeeping point.

The approach to scoring

4.140. The Respondent says that all employees were scored against the Skills Matrix using objective competency criteria, including all Rail and General Operatives. They were scored as competent in particular skills if they met a specific level skill in that skill, including whether or not they had a relevant and current license or qualification or whether they had maintained the minimum number of hours in that skill to remain competent. There were also task authorisations to confirm competence in that role *(Collis page 6 day 4)*

4.141. It was described by Mr Langton as a binary process: employees were either competent in a skill or they were not. They were not considered competent if they had allowed their training to expire or might be able to undertake training in future. That was not necessary from a business objective. *(Collis para 16*).

4.142. The Respondent has not however produced documentation to show what the competence requirements were for any skill. Mr Collis says,

> "All our management team know what a competent person is. It is required by Quarries Act 1999, it is a regulatory requirement, we have to have a competent person in place, authorisations, qualifications, training….
>
> We don't write the definition down, are they competent, they would all say the same
> The question for the management was are they competent, yes for competent, no for no. that takes out subjectivity.
> You relied on the managers as to what competence is?
> They know – they are appointed under the Quarry Act reg 8.1.d."

4.143. There remains some uncertainty since the scoring was carried out using the First Matrix and Mr Wilcock took a slightly different view as discussed above. The Union objected to the fact that when the First Matrix was scored, NVQs were not expressly taken into account. The 2004 redundancy selection had recognised four grades of competence including competence without qualifications.

4.144. Nobody has specifically identified the scoring basis for the rail loft.

4.145. Mr Bagnall describes the company's general approach to skill management, referring to a system accessible to managers,

> "It was called LMS ("learning management system")and it is now called Pathways and it is like a library of people's skills, it is down to the manager to see if he logs on to see if there are any skills needing to be renewed, and to arrange training to update, it is down to the manager to update that.
>
> Hanson's practice is, every operator doing the role should have an NVQ2, so there should be a skills matrix that shows vocational qualification and any other skill, each job role should have that." *(oral evidence).*

4.146. Every worker's file should therefore have a job description and a skills matrix confirming competence for the job role. We haven't seen a job description for rail loft, or Mr Thompson's skill matrix, nor had there been any refresher training offered to him.

4.147. Mr Collis describes a process of verification to establish skill levels where there were gaps in the information available, by ringing up certifying authorities. At least once, he said an unrecorded NVQ led to someone no longer being at risk of redundancy although Mr Langton believed the scores had not changed.

4.148. Where the result of the skills matrix did not produce a final selection for redundancy, because people had equal points, length of service or other factors were used including whether training could readily updated – in weighbridge for example where a submatrix was used *(Mr Langton, oral evidence).*

4.149. Across the thirty-eight general operatives, one scored 15, one scored 10, twelve scored 6 or over up to 9, five scored 3. Nine, including Mr Thompson, scored 2 or less. The target was to make nine redundant. All save three scored 1 point for housekeeping. Each of those three was made redundant. Housekeeping is recognised as physically demanding.

The approach to disability

4.150. The skills matrix did not reflect any disability or adjustment for disability. In particular, those who were in settled roles because of disability, which

restricted them from undertaking other activities, were likely to be disadvantaged by an approach that required up to date multi-skilling.

4.151. Mr Langton confirmed that the decisions taken were based solely on the skills matrix. Asked about this, in relation to Mr Thompson,

> "Would it not have been reasonable to take into account his disability in marking his scores?
> "I consider we did the best job we could do and I would not change it."

4.152. He was asked,

> "Would it not be reasonable to pool him within the rail loft and kept him in that role ringfenced since that was the only job he had been doing for five years."
> "I can only reiterate, we used the skills matrix to base our decisions."

4.153. He was asked whether he had considered addressing disability and the circumstances of those with disability adjustments specifically,

> "Not within the skills matrix that we set up. I was aware there were employees with medical issues and with reasonable adjustments. Like someone having a plug in for the car close to the changing rooms to reduce the distance to walk. I did not see those issues as preventing people doing their jobs."
> "Did you consider not moving people"
> "Not in this instance, but it would have been a possibility."

4.154. Mr Collis was carrying out the scoring assessments in collaboration with other senior managers. He was not initially aware of Mr Thompson's health or disability,

> "At the time I hadn't been aware. It was brought to my attention and then through consultation I knew from the medical perspective, he had some ailments but it had not been put to me that he was under the EA. But it did seem a reasonable adjustment was in place due to his heart bypass and other medical conditions *(oral evidence)*.

4.155. He was asked how disability was taken into account,

> "Did you look for OH reports or adjustments in relation to employees?
> "Why would we look at medical reports to see what functions were required and what skill sets were required?

How would that help me?"
"You are dismissing them. You are judging them on skills and criteria, some of which an element of physicality. It would be in your mind if they may be disabled or not."
"I was looking at whether they could carry out a function and the binary process was yes they can, no they can't" *(oral evidence).*

"Did you consider if they were disabled or not?
"In the broad sense, I looked at what skills they could carry out.… I don't recall looking at disability per se."

4.156. No adjustments were made to the skills matrix in respect of disability.

4.157. Mr Hulbert's view was that those in the jobs the rail loft could have been left either on the same basis that the roles in the sidings or electrical were protected or on the basis that there were two people in there with disabilities who were doing a job within their abilities and they should have been left there *(oral evidence).*

Mr Thompson's scores

4.158. Mr Thompson's second consultation meeting took place on 1 September 2020, a meeting conducted by Mr Collis with an HR representative. *(155-161)*. He had by then seen the first matrix, which was sent to him by a shop steward attending the first union consultation meeting on 10 August.

4.159. At this September meeting, matrix scores were discussed, using the headings from the final matrix and Mr Thompson was shown his scores. He did not disagree.

4.160. There are notes of that meeting *(159/171)*. They are poor quality. A lot of the discussion is about the overall approach to the redundancy selection.

4.161. He was scored 1 point for "Rail Loft". That was where he had been working since 2015.

4.162. Mr Thompson agreed he did not have recent skills, qualifications or experience to do a wider range of work, but that was because he had been in the Rail Loft for health reasons since 2015. He mentioned his heart condition.

4.163. He asked about voluntary redundancies but was told they were not being considered at this stage. They might be considered at "consult 2" although not to the detriment of the company's skill base.

4.164. He was shown a vacancies list. None of the jobs were jobs that he could do, either because where they were or the seniority or physicality of the roles. The document included in the bundle does not include any suitable roles *(162/178).*

4.165. He was mistrustful of the process. He saw the matrix as contrived, "This is a hit list".

4.166. In the Rail Loft team, one scored 8, two scored 3, two scored 2 and Mr Thompson scored 1. He only scored for "Rail Loft". Each of the others in the Rail Loft/Rail Tripper teams scored an additional point for housekeeping.

4.167. Mr Thompson was dismissed at the final meeting on 7 September *(164-180).* The dismissal was confirmed by letter on 8 September 2020 *(170/186)*.

4.168. Two of the redundancies, including Mr Thompson, came from the Rail Loft team and one from the Rail Tripper team.

The appeal

4.169. Mr Thompson appealed on 10 September *(174/190).*

4.170. The appeal grounds were that he should have been pooled as a Rail Operative in accordance with his contract and that his role as a Rail Operative (referring to the six in the rail loft) was not redundant; and that he had been on judged on criteria that he could not comply with by reason of his disability, and had been placed at a fundamental disadvantage. He pointed out that his disability was well known to management *(172/190).*

4.171. The appeal hearing took place on 5 October 2020. It was conducted by Mr J Bagnall, Regional Director. Mr Hulbert represented Mr Thompson and commended the fairness of the hearing.

4.172. The minutes, recorded by the HR representative present are poor. Comments are misattributed and as recorded make little sense. The following for example is attributed to Mr Bagnall,

> "If you go the specific skills for Ril, rial loft, rail tripper. Loco and shaunting. Difference between GO and sidings, Can't belief that it was not weighted. 6 years ago, due to ill health they told me to do that. I was trained up in shaunting." *(183/199)*

4.173. Half of that presumably comes from Mr Thompson, and the reference to weighting suggests that a comparison is being made between the rail loft and Primary. There was clearly a wider conversation which can only be guessed at.

4.174. Mr Bagnall relied throughout on the skills assessment in the matrix as being correct. He didn't check them. He was satisfied that the managers would be able to assess skills. With regard to the skills areas Mr Thompson put himself forward for, he checked the requirements for the role and his competence with the site managers.

4.175. The discussion covered the role Mr Thompson had done, the comparison with primary, his challenge to the numbers given the rail loft skill, his health condition and the reason for his move to the rail loft, his previous experience with locos and shunting, in which he agreed he no longer had up to date validation. He referred to work he had done with

loading shovel, dumper and skidsteer, and to being a rail foreman. They discussed why the rail loft had been chosen when he had surgery – Mr Thompson said he had been offered weighbridge or dispatch, but the rail loft only involved negotiating the stairs a couple of times a day. He was asked if other opportunities had been offered, but they had not. There was some discussion of what roles Mr Thompson was fit to carry out (and here the notes are particularly unhelpful)

4.176. At Mr Bagnall's request, Mr Thompson sent details of the roles he thought he could do, together with some medical evidence including his last Occupational Health assessment.

4.177. He identified, as roles he could carry out, front-end loader, rigid dump truck, locos, weighbridge in and out and primary *(190/206)*. He added that,

> "In the case of the loco skill it is generally accepted that there is also a degree of shunting and physical work involved with that role but I used to and certainly could drive locos."

4.178. The appeal was dismissed.

4.179. Mr Bagnall gave his decision by letter on 16 October 2020. The appeal was dismissed.

4.180. In relation to the first appeal ground, that Mr Thompson should have been dealt with as a rail operative and that his role had not been redundant, Mr Bagnalll explained that with the creation of a pool of General Operatives, the Company had sought a high level of multi-skilling in the retained group. The General Operative pool consisted of 38 people and over a quarter had the rail loft skill. The plan was to have 6 multi-skilled operatives operating across 3 shifts and not 6 rail operatives with only one particular skill and no mobile or fixed plant skills. He identified that to be classed as competent in locos and shunting he needed to have met the independent rail operator standards:

> MRL–Q&D–F–609 Assessment of Shunting Duties and MRL-Q&D-P-601 MRL Local Instructions for Whatley Rail Sidings.

4.181. Mr Thompson did not have those.

4.182. Mr Bagnall equally dismissed front-end loader, rigid dump truck, in-bridge, out-bridge and primary on the basis that Mr Thompson did not have those skills either from a training perspective or in experience relative to other general operatives.

4.183. In relation to the claim of breach of the Equality Act 2010, Mr Bagnall changed the decision under appeal. He awarded scores on two skills in the matrix in which there was an increase in physical work demand compared to the work Mr Thompson had been doing, to ensure a fair comparison. Those areas were Wash plant and Housekeeping. Those were areas he could not do.

4.184. That brought Mr Thompson to 3 points.

4.185. Mr Bagnall had also considered spillage, which he concluded Mr Thompson's disability prevented him from doing. He did not award a point for that.

4.186. At the hearing, shunting had not been discussed but it came up in Mr Thompson's brief note the next day, as being physically challenging. Mr Bagnall accepted that was the case but did not award a point. He accepted that there was a physical difficulty but thought the real obstacle was the lack of up-to-date skills, that is the training side.

4.187. He acknowledged that the judgment had been very difficult. He had based his final judgment on the fact that Hanson needed people with mobile plant skills, and to add more points to Mr Thompson would have prioritised him over those with badly needed skills. The passage of time was also a factor:

> "When I awarded the points to raise him to 3, that caused me a lot of frustration, he is now back at peer level with people with 3 points. I did think about going through the selection process again. But I was mindful of the passage of time. This process started in August, now October. There are people who have been put at risk, taken off, doing the job and others redundant. So not fair to disrupt people's lives. So I made the decision to look at what was in the interests of Hanson."

4.188. Mr Bagnall concluded by saying that his change of scores did not change the decision. The score was still too low to avoid redundancy *(197/213).*

4.189. Two individuals in the rail loft had retained their posts with only 3 points. They had been taken off risk at the first consultation meeting, before Mr Thompson's redundancy dismissal.

4.190. Mr Bagnall did not consider it appropriate to go through the selection process again, or to determine the matter by reference to length of service or on interview. He was asked about this,

> "So what is the point of having an appeal, you have weighted certain things as more important?"
> "I think that is a fair point but I thought it was the right decision because of the passage of time. What was the best way forward, in that small subgroup of people. Mobile plant is a massive issue, now it is a calamity. We would not want to let anyone go. Very few people had rail tripper. I weighted it to them and I didn't uphold his appeal."
> "Other objective factors, length of service, absence record?"
> "No" *(oral evidence)*.

4.191. In November 2020, the Company advertised for a general operative. Mr Collis explains that recruitment in the months after the redundancies

were to replace two individuals who had retired, not to replace those made redundant *(oral evidence, 213/233),* Mr Thompson says someone else had already been taken on; this advertisement is only for one.

4.192. Mr Collis considers the redundancy exercise to have been worthwhile and successful,

> "There was a genuine redundancy situation as is still the case and the business having streamlined and worked out the efficiencies have now produced the biggest tonnage ever with the reduced number of persons, so that shows that the process worked." (oral evidence)

4.193. It was however damaging to morale.

4.194. In August 2021, a morale survey was carried out. The Unit Manager wrote to the staff

> "It has become clear to me from the feedback that the redundancies made last year has had a lasting negative impact on the team at Whatley. Having had such an arduous and demanding year I know it will feel that the process was particularly wasteful.
> However, I was not party to the action but have been assured it was necessary for the outlook of the business at that time with so many variable unknowns. I am asking if you could all look to the future now, leaving past grievances behind." *(217/237)*

4.195. He confirms the pandemic had not been as damaging as feared, they were very busy, and that contractors would be vital and would be utilised heavily until further changes (referred to as "Westdown"). That conflicts somewhat with the statement that use of contractors had not increased.

5. **Law**

Unfair Dismissal

5.1. Section 98(1) of the Employment Rights Act 1996 ("ERA") sets out:

> "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

5.2. It is for the employer to satisfy the Tribunal as to the reason for the dismissal.

5.3. The reasons that are potentially fair under section 98(2) are capability, misconduct, redundancy or some other substantial reason.

5.4. If the employer fails to establish that the reason for the dismissal was an acceptable one, the tribunal must find the dismissal unfair.

5.5. Where the employer establishes that the reason for the dismissal was within section 98(2), then the next question is whether it was fair and equitable including as to the procedure adopted.

5.6. By section 98(4),

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

5.7. First, therefore the employer must establish the reason or principal reason for the dismissal and that it is a potentially fair reason.

5.8. Then the Tribunal must be satisfied that the employer has acted reasonably in treating the ground as a sufficient reason for dismissal.

5.9. By section 139(1),

> "For the purposes of this Act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to - ….
>
> (b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.

Reason in the mind of the employer

5.10. Applying *Abernethy v Mott Hay & Anderson (1974 IRLR 213),*

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

5.11. That is expanded in *Beatt v Croydon Health Services NHS Trust 2017 EWCA Civ 401 2017 IRLR 748*

> "The essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what "motivates" them to do what they do."

Fair Redundancy

5.12. Where the allegation is of dismissal for redundancy, the employer must show that the facts supporting that ground in fact exist (*Elliott v University Computing Co (Great Britain) Ltd 1977 ICR 147).*

5.13. In *Williams v Compair Maxam Ltd [1982] IRLR 83,* the Employment Appeal Tribunal set out the standard which should guide tribunals in determining whether a dismissal for redundancy is fair under section 98(4).

5.14. Browne-Wilkinson J set out the following guidance:

> "…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 such 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.

5.15. The position was summarised by Lord Bridge in *Polkey v A E Dayton Services Ltd [1988] ICR 142 at 162 – 163*

> "in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organisation. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with."

5.16. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant. If an employer simply dismisses an employee without first considering the question of a pool, the dismissal is likely to be unfair *(Taymech Ltd v Ryan EAT 663/94).* If the employer genuinely considers the problem of selecting the pool of those from which selection for redundancy is to be made, it is difficult but not impossible to challenge.

5.17. The Employment Tribunal has a duty to scrutinise the way in which the employer selected the pool. The use of fair selection criteria to the wrong pool is likely to result in unfair dismissal.

5.18. The question for the Tribunal is not what the Tribunal thinks is the right pool. It is whether the employer's choice of pool is within the range of reasonable responses available to the employer.

> "Different people can quite legitimately have different views about what is or is not a fair response to a particular situation… in most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band."

5.19. Where there is a customary arrangement or agreed procedure, that specifies a particular selection pool, the employer will normally be expected to adhere to it, unless it was reasonable to depart from it.

Otherwise, it needs to be a reasonable and considered choice based on genuine motives.

5.20. Relevant factors in determining whether the employer has acted reasonably in identifying the pool will include,

- Whether other groups of employees are doing similar work to the group from which selections are made
- Whether employee's jobs or skills are interchangeable
- Whether the employee's inclusion in the unit is consistent with his or her previous position
- Whether the selection unit was agreed with any union.

5.21. Usually the pool is composed of employees doing the same or similar work. There is no principle of law that the selection should be limited to similarly placed employees *(Thomas and Betts Manufacturing Co Ltd v Harding CA [1980] IRLR 255).*

5.22. The question of how the pool should be defined is primarily a matter for the employer to determine *(Taymech v Ryan EAT/663/94).*

5.23. In *Capital Hartshead Ltd v Byard [2012] IRLR 814*, the following guidance is given.

a) It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted
b) The range of reasonable responses test applies to the selection of the pool from which the redundancies were to be drawn
c) There is no legal requirement that the pool should be limited to employees doing the same or similar work.
d) The question of how the pool should be defined is primarily a matter for the employer to determine.
e) The Tribunal should consider with care the reasoning in deciding if the employer has genuinely applied its mind
f) It is difficult to challenge if the employer has genuinely applied its mind to the problem.

5.24. Selection from the pool is again a matter for the employer, to be interfered with by the Tribunal 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. The question is whether the employer sets up a system of selection which can be reasonably described as fair and applies it without any overt signs of conduct that mars its fairness *(British Aerospace plc v Green CA [1995] IRLR 437, Bascetta v Santander [2010] EWCA Civ 351))*

5.25. When selecting for redundancy, the criteria applied must be objective and applied with transparency and must not be unduly vague of

ambiguous. There should be reference to data such as records of attendance, efficiency and length of service that would support or explain the scorings given, although an element of judgment is necessarily part of the assessment. The Tribunal again must not substitute its own judgment but be satisfied that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion. Has the employer acted fairly overall in its assessment of skills and requirements.

5.26. It is reasonable for an employer to try to retain a workforce that is balanced in terms of skills and abilities. So it is reasonable to assess skill and knowledge, but there should be some objective assessment. An organisation that appraises and keeps records will be better placed than the employer that relies only on a subjective opinion.

5.27. It is important that the criteria for selection are not subjective or dependent on the subjective opinion of an individual manager, but capable of at least some objective assessment. However, objectivity is not an absolute requirement; ultimately this is a question of balance:

> "The concept of a criterion only being valid if it can be "scored or assessed" causes us a little concern, as it could be invoked to limit selection procedures to box ticking exercises" *Master of the Rolls, Mitchells of Lancaster (Brewers) Ltd v Tattershall UKEAT/0605/11*

5.28. In *Biluan v Mental Health Care (UK) Ltd UKEAT/0248/12/[2013] All ER (D) 265 (Mar),* an elaborate and seemingly objective selection meant that individuals were scored without the input of their managers. That was held to be unfair – the Respondents had lost touch with common sense and fairness.

5.29. Job losses confined to one team can result in the dismissal of skilled and experienced staff who are of greater long-term value to the organisation than other individuals whose posts are not directly affected. Selection criteria for redundancy are sometimes applied to a class of employees wider than the class to which the redundancy situation relates. The leading case is *W Gimber and Sons Ltd v Spurrett 1967 ITR 308,*

> "If there is a reduction in the requirements for employees in one section of an employer's business and an employee who becomes surplus or redundant is transferred to another section of that business, an employee who is displaced by the transfer of the first employee and is dismissed by reason of that displacement is dismissed by reason of redundancy."

5.30. It can therefore be unfair not to consider offering alternative employment to a potentially redundant employee, even in the absence of a vacancy *(Lionel Leventhal Ltd v North EAT 0265/04).* Whether such a failure is

unfair is a question of fact for the Tribunal which should consider factors such as,

- Whether there is a vacancy
- How different the two jobs are
- The difference in remuneration between them
- The relative length of service of the two employees
- The qualifications of the employee at risk of redundancy.

5.31. Again, it is a matter of the Tribunal considering the range of reasonable responses in assessing whether failure to consider or the reasons for rejecting bumping is fair.

5.32. However including a range of different job functions in the pool can be unfair. In *Contract Bottling Ltd v Cave and anor EAT 0525/12,* a single pool of all administrative staff, encompassing functions as diverse as accounts, sales and quality control, and applying a general scoring matrix to identify the staff who scored the lowest was unreasonable. It meant that employees who were kept on might be retrained to do work of a completely different kind – so a warehouse manager, retraining to do accounting work.

5.33. We are referred to guidance derived from *R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72 at 24,*

> "Fair consultation means:
> (a) Consultation when the proposals are still at a formative stage
> (b) Adequate information on which to respond
> (c) Adequate time on which to respond
> (d) Conscientious consideration by an authority of the response to consultation
>
> Another way of putting the point is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely."

5.34. Where lack of consultation or other procedural failure renders the dismissal unfair, the Polkey principle applies, derived from *Polkey v AE Dayton Services Ltd [1988] ICR 142.* When assessing the compensatory award payable in respect of the unfair dismissal, a reduction may be made where the lack of a fair procedure made no practical difference to the decision to dismiss, other than perhaps through extending the period of employment for a period. That may have the effect of reducing the compensatory award to nil. In the alternative, where the evidence is that the employment would have continued, the Tribunal may conclude that

it is not just and equitable to reduce the award at all *(Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT).*

Dismissal (s.152(1)(a) and (b) TULR(C)A 1992

5.35. By section 152(1)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A"), dismissal where the reason or principal reason is that –

(a) he was a member of Unite, the Union, or
(b) "had taken part in the activities of an independent trade union at an appropriate time"

the dismissal is unfair.

Detriment (s.153 TULR(C)A 1992

5.36. By section 153 of TULR(C)A. where the reason or principal reason for the dismissal of an employee was that he was redundant but it is shown,

(a) that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer, and
(b) that the reason (or if more than one, the principal reason) why he was selected for dismissal was one of those specified in section 152(1)

the dismissal is unfair.

Discrimination arising from disability – section 15

5.37. By section 15(1) of the EqA,

"A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

5.38. The Code of Practice sets out at paragraph 5.7 that this means placing someone at a disadvantage. Even if an employer thinks they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

5.39. By section 15(2) of the EqA, the above 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.

5.40. The focus of section 15 is about the extent to which the employer is required to make allowances for disability *(General Dynamics Information Technology v Carranza [2015] EAT 0107).* The consequences of a disability include anything that is the result, effect or outcome of a disabled person's disability.

5.41. There are four elements for a claimant to succeed in a section 15 claim.

- There must be unfavourable treatment
- There must be something that arises in consequence of the claimant's disability
- The unfavourable treatment must be because of (ie, caused by) the something that arises in consequence of the disability, and
- The respondent cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

5.42. There is no requirement for a comparator.

5.43. The analysis required is explained in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2015] UKEAT 0397, [2016] ICR 305 ("Weerasinghe").* There are two causative steps to be established. The first is that the disability has the consequence of "something". It causes "something" or leads to "something". That might be, for example, a need for frequent visits to the toilet, or a difficulty in speaking to strangers on the telephone. The second is that the claimant is treated unfavorably because of that "something"; the treatment arises in consequence of it.

5.44. It does not matter in which order that is addressed. Either way, the reason for the treatment and what it is that arises from the disability have to be addressed.

5.45. Weerasinghe also establishes that the consequence of disability may involve more than one step, (para 41). At paragraph 29, Mr Justice Langstaff explains how the facts of the case of *Malcolm v London Borough of Lewisham [2008] IRLR 700* might be interpreted under section 15. The disability led to the Claimant wrongfully subletting his property; it was because of the effects of his mental condition (something arising in consequence of his disability) that he had sublet the property, and it was because of that that he was subject to eviction proceedings. Had section 15 applied, the Claimant would have succeeded in his claim that his eviction constituted unlawful discrimination against him.

5.46. Simler P in *Pnaiser v NHS England [2016] IRLR 170, EAT*, gave the following guidance as to the correct approach to a claim, adopting and developing the guidance in Weerasinghe.

'(a) 'A tribunal must identify the unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant:

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. This involves an objective question and does not depend on the thought processes of the alleged discriminator.

5.47. We are referred to *Sheikholeslami v University of Edinburgh [2018] IRLR 1090*, where Simler P develops that approach,

> "…this provision requires an investigation of two distinct causative issues:
>
> (i) did A treat B unfavourably because of an (identified) something? and
> (ii) (ii) did that something arise in consequence of B's disability?
>
> The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence. (See *City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746)*."

5.48. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified".*(para 5.21 Code of Practice).*

5.49. In terms of burden of proof, in a section 15 claim, in order to prove a prima facie case of discrimination, the claimant will need to show:

- That he has been subjected to unfavourable treatment

- That he is disabled and that the employer had actual or constructive knowledge of this
- A link between the disability and the "something" that is said to be the ground for the unfavourable treatment
- Some evidence from which it could be inferred that the "something" was the reason for the treatment.

5.50. In *Cummins Ltd v Mohammed*, *(UKEAT/0039/20/00),* the Tribunal is reminded that it is essential to consider why the decision-maker acted as he or she did: what is the reason for the impugned treatment?

5.51. If unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know and could not reasonably have been expected to know that the person was disabled. If the employer can show that the reasons for the unfavourable treatment arose from another cause, and not the "something" arising in consequence of the disability, that is a further basis for defeating the claim.

5.52. Justification requires that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This is an objective test on which the Tribunal must make its own assessment. The measures must "correspond to a real need, are appropriate with a view to achieving the objectives pursued and are necessary to that end" *Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317.*

5.53. The onus is on the employer to establish justification, including proving that the unfavourable treatment pursues a real need on the part of its undertaking.

5.54. The legitimate aim relied on may well be the needs of the business. We are referred to *Hensman v Ministry of Defence UKEAT/0067/14* which emphasises that the Tribunal must pay full regard to those needs, in the assessment of proportionality.

5.55. The conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim, and requires consideration of whether a lesser measure might have served that aim (*Birtenshaw v Oldfield [2019] IRLR 946).* It is for the assessment of the Tribunal whether that lesser measure was appropriate – not whether it would have been acceptable to the decision maker. That is because this is an objective assessment for the Tribunal.

5.56. The same point is made by the EAT in *Stott v Ralli Ltd 2022 IRLR 148.* The Tribunal must engage in "critical scrutiny" by weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end. The Tribunal must consider whether a lesser measure could have achieved the employer's legitimate aim.

5.57. In *O'Brien v Bolton St Catherine's Academy 2017 ICR 737,* the Court of Appeal indicated that the judgment of the decision-maker should be accommodate a substantial degree of respect, provided he has acted rationally and responsibly. It was accepted that it had been legitimate for the tribunal to conclude that, on the facts of that case, relating to dismissal for sickness absence, having found the dismissal to be disproportionate for the purposes of the section 15 claim, it should logically follow that the dismissal was also unfair for the purposes of the 'reasonableness' test in section 98(4). Lord Justice Underhill explained that although the language of the two tests was different, "I very much doubt whether the two tests should lead to different results."

5.58. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification *(Hardys & Hansons plc v Lax [2005] IRLR 726, CA)* The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and make its own assessment as to whether the former outweigh the latter.

Failure to make reasonable adjustments - section 20

5.59. The EqA, by section 39(5), imposes a duty on employers to make reasonable adjustments.

5.60. The duty is set out at section 20 of the EqA.

5.61. The duty comprises three requirements. Here the first is relevant and that applies where a provision, criterion or practice of A's (the employer) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

5.62. A failure to comply with those requirements is a failure to make reasonable adjustments. By section 21(1) and (2), "A discriminates against a disabled person if A fails to comply with that duty in relation to that person".

5.63. The duty does not arise where A did not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the disadvantage referred to – that is the effect of schedule 8, paragraph 20, as amended, to the EqA However, the employer must do all they can reasonably be expected to do to find out whether a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. So, knowing of a condition such as dyslexia, the employer has a duty to do what it reasonably can to establish the effects of that and so avoid the risk of a substantial disadvantage arising.

5.64. Guidance is given in the ACAS Code of Practice in Employment (2011), at paragraph 6.19,

> What is reasonable to do will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

5.65. The following example is then given,

> "A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

5.66. In *Wilcox v Birmingham CAB Services Ltd [2011] Eq:R.S810*, the EAT took the view that unless the employer had actual or constructive knowledge of the disability, the question of substantial disadvantage did not arise. An employer will be taken to have the requisite knowledge provided that they are aware of the impairment and its consequences. There is no need for them to be aware of the specific diagnosis *(Jennings v Barts and the London NHS Trust [2013] Eq:R 326 EAT*). If an agent or employee knows in that capacity of a worker's disability, the employer will not usually be able to claim that they do not know, see para 6.21 of the Code.

5.67. Where a disabled person keeps a disability confidential, no duty arises for the employer "unless the employer could reasonably be expected to know about it anyway." (Code para 6.20)

5.68. And,

> "If a disabled person expects an employer to make a reasonable adjudgment, they will need to provide the employer … with sufficient information to carry out that adjustment."

5.69. No like for like comparator is required – the comparison may be between those who could do the job and the disabled person. As explained in *Royal Bank of Scotland v Ashton ([2011] ICR 632)*, the tribunal must identify the non-disabled comparator or comparators. That may be a straightforward exercise,

> "In many cases, the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play." (*Fareham College Corporation v Walters ([2009] IRLR 991)*

5.70. There is no onus on the disabled worker to suggest what adjustments ought to be made. It is good practice for employers to ask. If the disabled person does make suggestions, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. *(Code of Practice para 6.24)*

5.71. It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. … It is advisable to agree any proposed adjustments with the disabled worker in question before they are made. *(Code of Practice para 6.32.)*

5.72. In considering whether there has been a failure to make reasonable adjustments, the tribunal must identify the nature and extent of the substantial disadvantage relied on by the claimant; make positive findings as to the state of the respondent's knowledge of the nature and extent of that disadvantage and assess the reasonableness of the adjustment that it is said could and should have been taken in that context.

5.73. The process for the Tribunal therefore is to identify:

(a) the employer's provision, criterion or practice which causes the claimant 's disadvantage

(b) the identity of the persons who are not disabled with whom comparison is made

(c) the nature and extent of the substantial disadvantage suffered by the employee

(d) what step or steps it is reasonable for the employer to have to take to avoid the disadvantage *(General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43).*

5.74. The Tribunal must identify all of those to judge whether the proposed adjustment is reasonable. There is no need to find that the adjustment would have prevented the adverse effects. The Tribunal is entitled to find that the adjustment proposed was a reasonable option with a not unreasonable chance of success *(The Environment Agency v Rowan [2008] IRLR 20).*

5.75. Assessing the reasonableness of any particular step, relevant factors will be how effective it will be in preventing the substantial disadvantage, how practicable it is, how much it will cost and how disruptive it may be, the size and resources of the employer and the nature of the business. It may also be relevant that external resources are available to help provide adjustments *(Code para 6.28).*

5.76. Failure to make a reasonable adjustment cannot be justified, but only reasonable steps fall within the duty. Whether or not adjustments were reasonable in the circumstances is to be determined by the employment tribunal objectively, *(HM Land Registry v Wakefield [2009] All E R 205 (EAT).*

Burden of proof

5.77. By section 136(2) and (3) of the EqA, the test in respect of the burden of proof is set out:

> "(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.'

5.78. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

5.79. For the burden of proof to shift, the claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case *(Igen v Wong, 2005 IRLR 258 CA),* remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld *(Peter Gibson LJ, para 17, Igen)*

5.80. The Tribunal is required to make an assumption at the first stage which may be contrary to reality.

5.81. In *Hewage v Grampian Health Board [2012] UKSC 37,* the application of the Barton/Igen guidelines to cases under the EQA is approved at the highest level. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence…"

5.82. In *Laing and Manchester City Council and others, 2006 IRLR 748,* the correct approach in relation to the two-stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (*or other)* discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"'.

5.83. The nub of the question remains why the claimant was treated as he or she was:

> "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 unlawful act of discrimination." *(Madarassy v Nomura International plc) 2007 IRLR 246).*

5.84. In that case, in a judgment later approved by the Supreme Court in Hewage, above, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show "that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant."

5.85. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest explanations *(see Base Childrenswear Ltd v Otshudi 2019 EWCA Civ 1648 CA; Veolia Environmental Services UK v Gumbs EAT 0487/12.*

5.86. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

5.87. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in *Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25)* it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

5.88. In *Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT,* His Honour Judge Shanks — having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

- it is very unusual to find direct evidence of discrimination
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
- it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities

- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations

- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment

- if it is necessary to resort to the burden of proof in this context, s.136 EqA provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

5.89. Unreasonable conduct or poor management does not of itself point to discrimination. There must be indications from the evidence that point to the unreasonable conduct relating to the prohibited ground *(Laing v Manchester City Council and anor 2006 ICR 1519, EAT).*

5.90. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson considered that 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' His Lordship also approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.

5.91. Equally, it cannot be simply inferred that the fact that an employer has acted unreasonably towards one employee means it would have acted the same way towards others. A failure to explain unreasonable conduct by the employer can support an inference of discrimination. If an employer acts in a wholly unreasonable way, it may be inferred that the explanation offered is not the true or full explanation *(Rice v McEvoy 2011 NICA 9 NICA).* In all cases, the drawing of inferences involves careful consideration of the surrounding facts:.

> "Facts will frequently explain, at least in part, why someone has acted as they have" (Elias P in Laing (above).

5.92. However,

> 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.' *Simler P*, *Chief Constable of Kent Constabulary v Bowler EAT 0214/16*

5.93. As stated by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, an unjustified sense of grievance does not point to less favourable treatment.

5.94. Where a case consists of several allegations, the Tribunal must consider each separately to determine whether less favourable treatment occurred by comparison with others, so as to shift the burden of proof, rather than taking a broad-brush approach in respect of all the allegations *(Essex County Council v Jarrett EAT 0045/15).*

6. Submissions

6.1. Mr Duffy and Mr Humphreys both made written submissions which we have considered fully and with equal care in making our findings of fact and in determining the issues. We are grateful for their assistance.

7. Reasons

Redundancy

7.1. We accept that there was a genuine redundancy situation within the meaning of section 139 ERA.

7.2. Redundancies were considered early in 2020. Covid-19 was a consideration at the Quarry well before lockdown was announced in March 2020, with awareness of the risk of infection leading to the incident when the weighbridge workers closed the weighbridge because of concern about inadequate safety precautions.

7.3. The first furlough scheme came into effect from 26 March 2020 and staff were put on furlough, including Mr Thompson.

7.4. Fuller consideration of redundancies was put to one side as the pandemic developed, but review of the effect on operations of having around half the staff on furlough demonstrated that the Quarry could operate effectively with reduced staff numbers.

7.5. This was a time of maximum uncertainty. Aside from the impact on sales, there was uncertainty about staff absences amongst those still at work and about supplies.

7.6. The company had to act against that background of uncertainty, having already identified that a reduction in staffing was probably necessary.

7.7. It is the case that the Unit Manager at the Quarry wrote in August 2021 that the company was “in a great place at present and the future looks to be just as promising as we have found this year. The pandemic has not been as damaging to our business as we had feared and as you have all witnessed we are very busy” *(217/237).*

7.8. That was written a year later and was not the basis on which the redundancy exercise was carried out, nor could the success of the business over that year have been predicted.

7.9. It is contended for the Claimant that the Respondent engaged contractors to fill the roles that were made redundant. That is denied by the Respondent’s witnesses and there is no contemporary evidence for it. Mr Thompson believes it to be true on the basis of what he heard from the Quarry after he had been made redundant but was able to give no factual detail and conceded the point when the company’s denial as put to him. We do not have evidence that contractors were used to take the place of the employees made redundant, although clearly they were relied on to a significant extent a year later.

7.10. Equally, we do not have evidence that their roles were advertised shortly after the dismissals so that there was no reduction in the headcount. One advertisement has been presented for a multi-skilled general operative with Quarry experience, with the closing date of 16 December 2021, and it is established that followed a retirement, perhaps two. That does not show that those dismissed were replaced.

7.11. As Mr Collis said,

> *“*There was a genuine redundancy situation as is still the case and the business having streamlined and worked out the efficiencies have now produced the biggest tonnage ever with the reduced number of persons, so that shows that the process worked.”

7.12. We are satisfied that the requirements of the business for employees to carry out work of a particular kind, or of a particular kind in the place where the employee was employed had diminished. This was a genuine redundancy situation.

The pool

7.13. The point is well made on behalf of the Claimant that the initial proposal was to pool his role with others in the Rail Loft, including the three Rail Tripper operators. Those 6 employees had the same or similar roles. None of those roles ceased to be necessary; there are still 6 employees doing that work. In that sense, there was no redundancy situation in the Rail Loft.

7.14. However, the respondent later revised the pool to include all the Rail Loft operatives amongst the General Operatives, creating a wider pool.

7.15. All the Rail Loft workers were put into that pool.

7.16. Mr Thompson's contract, issued to him in 2015 when he went into the Rail Loft, referred to him as a Rail Operative. He therefore resists being regarded as a General Operative. However, he no longer had the qualifications to drive locos or carry out shunting duties, which were now regarded as the key elements of a Rail Operative role. It was not unreasonable to pool his skills here with those of other staff who did not have those active skills, and so were not included in Sidings.

7.17. The employer clearly applied its mind to the selection of the pool, having changed it between the first and second matrix following union consultation, albeit not agreeing the pool with the union

7.18. The effect of the pools chosen was to protect certain key skill areas – primary, sidings, for example - and then to pool a group of individuals in different jobs with different skills. Many had more than one or two skills or functions. The effect of doing that was that they retained sufficient numbers able to operate each role, while dismissing those with the fewest active skills.

7.19. The choice of pool was one open to the Respondent to make and within the range of reasonable options.

Union Consultation

7.20. This was a workplace in which a substantial proportion of the staff were union members. That had been a fruitful relationship for both sides. The union promoted multi-skilling, to the company's benefit. Mr Hulbert told us that difficult issues had been successfully addressed by negotiation.

7.21. There had been redundancy exercises in 2004 and 2009. We know nothing of the 2009 exercise, but the 2004 exercise was carried out on the basis of criteria agreed with the Union nationally. Those criteria were clear, objective and sophisticated.

7.22. In the 2020 exercise, there was no advance warning to the Union. The Union was only consulted after the at-risk letters had been issued, in August. By then, on Mr Langton's evidence, managers had been working on the criteria for selection over a number of months. Mr Hulbert learned of the proposed redundancies not from the Company but from Union representatives.

7.23. Mr Thompson raised the question of union consultation at his first individual consultation meeting on 4 August 2020. Individuals had already been scored using the selection matrix, and only those with lower scores continued to be at risk.

7.24. There had therefore been no consultation on the selection criteria or the approach to scoring. Mr Hulbert was blunt in the "failure to agree" letter of 6 August. He challenged the failure to use the previous agreement in relation to redundancies. He challenged the criteria as subjective and apparently designed to target union representatives and long-serving workers. He challenged the individual consultation process in that the selection of those for

redundancy dismissal appeared pre-determined, since the others had been told they were not at risk,

7.25. In spite of the discussions with the Union, there was still no agreement over the selection criteria. In respect of the selection criteria proposed for Aggregates, Mr Hulbert suggested that the whole matrix was withdrawn and that they start again. He suggested that it would be appropriate to look, for example, at absences, rather than simply at a skill-based matrix. He raised the question of the Equality Act 2010. He suggested that the flexibility criterion was too subjective.

7.26. Save for the removal of flexibility, his proposals were rejected. There was no change to the selection criteria between the first matrix we have seen and the final one.

7.27. The pool was changed, following the first Union consultation on 10 August, at which a Union representative pointed out that it was not appropriate to consider redundancies in the Rail Loft pool since it was intended that the numbers in the Rail Loft would stay the same.

7.28. The Union did not agree the new pool.

7.29. The Union consultation ended on 27 August.

7.30. As established in *Williams v Compare Maxam Ltd*, in cases where the employees are represented by an independent union recognised by the employer, there are steps a reasonable employer will take. Those include seeking to give as much warning as possible; consulting as to the best means by which the desired result can be achieved fairly with as little hardship to the employees as possible and in particular seeking to agree the criteria to be applied in selection.

7.31. This was a company with a good history of working with the union and a sound precedent for agreeing redundancy selection criteria. The management had ample time while developing the redundancy selection criteria before August to warn and consult the Union.

7.32. The Respondent only moved to consult on being prompted to do so and after the selection matrix had been completed with the scoring and the first individual consultations had begun.

7.33. This was a management setting in which no weight was attached to working co-operatively with the Union. There was no serious attempt to agree matters with the Union.

7.34. The loss of trust and goodwill is clear from the letter of 18 August 2021.

Individual consultation

7.35. In relation to individuals affected, consultation was little more effective.

7.36. Mr Thompson had his first individual consultation on 4 August.

7.37. The procedure outlined required a blank matrix to be provided and discussed. This was a meeting conducted remotely. The matrix would have had to be sent. There is no record of it produced of it being sent. It is not referred to in the letter of 3 August inviting Mr Thompson to the consultation. Mr Thompson says he did not see it and Mr Collis could not confirm he had

sent it. The contemporary note says that the matrix would be scored later. There is no record of any discussion of the matrix in the brief notes.

7.38. We are satisfied that Mr Thompson was not given the matrix, not even the headings.

7.39. What he knew of it before the second consultation came from a Union colleague.

7.40. The scoring had already been carried out, as confirmed by the earlier version of the matrix. Mr Thompson was told the scoring would be done later. *(127/143).*

7.41. The second consultation meeting was on 1 September. Mr Collis told Mr Thompson at that meeting that, "I have now completed your scores". That was untrue. The scores were those on the earlier version, and had already been used to tell the majority of workers that they were no longer at risk. Mr Thompson had, since before 4 August 2020, been identified as due for redundancy on the basis of those scores.

7.42. Those selected by the initial scoring of the earlier matrix were those eventually dismissed, as Mr Langton confirmed. The pools changed between the two matrices, but the scoring, save for the removal of flexibility, and, according to Mr Collis, in one or two cases where qualifications had been overlooked, did not.

7.43. As Mr Collis explained,

> "Once we had ascertained the functions and tasks required for the business and the skills matrix in order to fill those functions, we knew how many people we would need in order to fill those roles. Those with the higher score were not at risk and those lower down would still remain at risk and in consultation."

7.44. The identification of those to be made redundant had indeed been predetermined, and that was not disclosed to Mr Thompson.

7.45. That did not necessarily render the consultation fruitless of itself. This was an opportunity for the Company to consider whether the selection was fair and sound.

7.46. On 1 September, the first and only effective meeting with Mr Thompson to consult about the redundancy selection, much of the discussion was about the process as applied to the workforce generally. This is the entirety of the note about Mr Thompson's position (JC is Mr Collis, AT is Mr Thompson):

> JC "At the first consultation meeting we discussed a skills matrix, I have now completed your scores and would like to discuss this with you? Down as rail loft – anything missed?
> AT "used to have…"
> JC "the current…"
> AT "heart operation and was put up there. Heart condition"
> JC "Do you have any questions or comments?"
> AT "no"

JC “do you agree with the scores?”
AT “Yes current score can do”
JC “Agree with the areas you have been marked for?”
AT “Yes. Don’t know how you weight it”
JC “Challenged and agreed with the Union”.
AT “no one had received it. Didn’t agree the matrix. Should have been consulted. Same as furlough, should have been involved in the first place”

7.47. He was then given the redundancy calculation.

7.48. The basis of the scoring was not explained. In the earlier matrix, admin had been a category for the unit clerk only. Mr Thompson assumed that still applied. In fact, a number of managers and three electrical foremen were scored in admin in this version.

7.49. The weighting was not explained.

7.50. It was not the case that the matrix had been agreed with the Union. Mr Collis explained to us that that was what he had been told.

7.51. In this brief consultation, Mr Thompson endeavoured to explain that he was disabled, and that he had been moved into the rail loft as being a safe environment in which he could work following his surgery. It was an adjustment for his disability. That discussion was closed down by Mr Collis. He refused to consider it.

Consultation assessed

7.52. We refer to the guidance derived from *R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price [1994] above:*

> “Fair consultation means
> (e) Consultation when the proposals are still at a formative stage
> (f) Adequate information on which to respond
> (g) Adequate time on which to respond
> (h) Conscientious consideration by an authority of the response to consultation.”

7.53. Neither the consultation with Mr Thompson nor the consultation with the Union met that standard. What is clear, from the timeline and from the inflexibility, that this was not a consultation at which the proposals were at a formative stage and there was no conscientious consideration of the response to consultation. Those selected before the consultation began – save for one or two whose qualifications were unrecorded – were those dismissed and that was the intention, confirmed by the comments of Mr Langton and Mr Collis.

7.54. In particular, both Mr Hulbert and HR referred to the Equality Act and the need to avoid discrimination. These selection criteria operated adversely for those who had taken a settled role and whose other skills had lapsed. That would include anyone with adjustments for disability where those adjustments

had led to them taking a settled role within their capabilities, where their wider skills had lapsed. There was a plain risk of these criteria having a discriminatory consequence.

7.55. Housekeeping is a physically demanding role. Only three general operatives were not scored for housekeeping. All were made redundant. Mr Thompson was amongst them. He did not score (until the appeal) for housekeeping because of his disability. That points to selection criteria that were discriminatory on the grounds of disability.

7.56. The consultation did not address that.

7.57. The consultation did not meet the required standard and in our judgment was no more than going through the motions; box ticking to confirm decisions already made.

Mr Thompson and the pool

7.58. Mr Thompson contends that he should have been pooled as a rail operative. His contract identified him as a rail operative.

7.59. We attach no weight to the job description presented for a quarry operative, not knowing if or when it was issued to him. It bears no relation to his role in the Rail Loft.

7.60. However, the rail skills the Respondent was looking for were locos and shunting. In those areas, he did not have the refresher training required to be counted as having those as active skill areas. That was not the work he was doing.

7.61. If the Respondent acted fairly in only assessing active skills, it was reasonable to put him in with the general operatives.

7.62. None of those with active skills in locos or shunting were made redundant, or even put at risk.

Selection from the General Operatives pool

7.63. The only criteria for scoring was having, or not having, active skills, with current authorisation and up to date certification where necessary.

7.64. No other criteria were applied.

7.65. The Union sought to have absence considered – they may well have raised other criteria, but the notes of the meetings are very poor and Mr Hulbert very fairly said he couldn't remember the detail of meetings two years ago. It is at least clear that absence was raised. That was rejected.

7.66. All Mr Langton said about that was

> "We did not use that as part of the criteria and I genuinely don't recall absence and sickness as something that came on my radar beyond what I have experienced as normal in life."

7.67. That is an interesting comment for a senior manager. Most companies have absence management policies and that is because they are needed.

7.68. Mr Hulbert told us that was wrong, that there were issues over absence because the Union representatives were active in representing people who were facing action over absences.

7.69. It is improbable that there was no-one in the work force with a poor record over attendance or unauthorised absences, and we have no reason to doubt the validity of Mr Hulbert's evidence, general though it is.

7.70. The effect of limiting the selection to skills and excluding all other criteria is far-reaching.

7.71. Had there been, for example, a number of employees with skills at handling more than one kind of mobile plant, but with poor attendance, a long-serving and utterly reliable worker in a settled role would have been dismissed in preference to those individuals. As Mr Hulbert pointed out, skills aren't any good to the Company, if you are not at work to use them.

7.72. The Respondent proposes that the criteria used were objective – it was a binary system, either you have the skills or you do not.

7.73. Hanson maintains individual files which include details of training, job authorisations and re-certification. They weren't wholly accurate. We know that Mr Collis had to put in some work to check the positions, including ringing up the certificating bodies to check exactly what qualifications individuals had.

7.74. Furthermore, while in some instances there was regular re-certification required, it is not clear what job authorisations in other areas were based on. We found it hard to ascertain what was the benchmark in the Rail Loft, for example, where twenty-two individuals were scored as having active skills, but it was acknowledged that not all worked regularly or recently in that role. Mr Thompson was not aware of that number of people covering breaks, absences or shifts, and he would have a reasonable knowledge given that he would be seeing people at daily handovers – he must have known who he took over from and who he handed over to - and trying himself to get cover.

7.75. There are clearly different levels of authorisation in admin, and it seems that the scoring depended on having a current login for the computer system, although the work done varied between roles. We don't know why the electrical foremen were given a score in that area but not other foremen.

7.76. Almost everyone was scored for housekeeping, and again that is unexplained. We don't know what competence was being measured. Mr Bagnall awarded Mr Thompson that point on appeal because he physically could not do that work, but at the point when the scoring was done, Mr Collis told us he was unaware of Mr Thompson's disability or that he was in his current role as a reasonable adjustment for disability. What ability was being measured that almost everyone else had, that he did not?

7.77. In our judgment, while the requirement for skills and necessary certificates and authorisations worked in some areas, it is not so clearcut in others.

7.78. There is the ambiguity referred to above, in respect of how competence was scored: the Union sought to have NVQs taken into account, Mr Willcock

emphasised competence over qualifications but Mr Langton and Mr Collis put the emphasis on qualifications. In the Asphalt exercise and the 2004 exercise, competence without formal qualifications was recognised. No written scoring guidance has been produced or referred to for Aggregates – there was such guidance for Asphalt. Which view prevailed in the actual scoring? (*141/157)*

7.79. What is clear is that the whole redundancy selection could be conducted by consulting the records of skills and certification, and not seeing any other documentation.

7.80. It seems that that is what happened. Mr Collis says he was unaware of the Mr Thompson's disability until Mr Thompson referred to his health condition in the second consultation meeting on 1 September. It is not clear if and when Mr Collis realised that disability adjustments had been made to Mr Thompson's role – he does not mention disability, health or adjustments in his witness statement, or the change from being Rail Foreman to the Rail Loft. Mr Langton distanced himself from the individual assessments and so would have no reason to know.

7.81. The relevant history would have come from the personnel file, or from the consultation. As already seen, the consultation discussion was closed down as soon as it went outside the immediate skills.

7.82. On the basis of this approach to selection, the managers concerned would be unaware of anything else on the personnel file of which the employer would be expected to have knowledge: absences, health, performance issues, personal circumstances, disciplinary history, grievances or other complaints against or by them, for example.

7.83. We find it very hard to confirm as fair and reasonable a system that does not require even that much knowledge of the individual, leaving aside the way that it excluded consideration of disability.

The application of the skills assessment

7.84. What is also puzzling and concerning is the requirement imposed that the skills must be current, in an environment where re-certification takes no more than two days.

7.85. Mr Thompson had been a Rail Foreman. He undoubtedly had the skills and formal qualifications required for the Sidings group. What he didn't have was the re-certification. That was required every two to three years and would have taken something between half a day and two days to acquire: that is the Respondent's evidence.

7.86. There has been no suggestion that he could not go through the re-certification process, whether because of his disability or otherwise.

7.87. The Respondent's decision was simply to only assess on current skills, not those requiring updating or recertification.

7.88. The comment was made that it was his failure to obtain additional skills that put him at risk of redundancy.

7.89. This is not someone who had limited skills. Assessed in 2014, before his surgery, he would have had locos, shunting, skidsteer and the administrative

skills and experience of a foreman. He was a senior shop steward and convenor, he had skills and experience as a union representative; he had encouraged union members to increase their range of skills, and he had been a health and safety representative.

7.90. If the priority is to establish a multi-skilled workforce, it is far from clear why the Respondent did not consider existing skills that required quick re-certification, where that was necessary. It is not surprising that the word wasteful was used in the 2021 letter.

7.91. What particularly concerns us is that it was the Company that moved Mr Thompson to the rail loft, and they did so on the basis of health and safety. The manager was concerned about the risks to Mr Thompson from moving about the site, with uneven ground, slippery sleepers, and the need for him to avoid undue physical exertion. He hadn't wanted Mr Thompson out on the busy sidings or moving wagons.

7.92. Mr Thompson pointed out that he had not had a personal development review for eight years. It was suggested that general operatives did not routinely have such reviews. Whether that is the case or not, Mr Bagnall told us that it was down to the manager to see if there are any skills needing to be renewed, and to arrange training to update. Mr Thompson had not been invited to refresh his skills.

7.93. The Company chose to allow Mr Thompson's wider skills to lapse.

7.94. It has been said it was his fault that happened, for not putting himself forward for training.

7.95. It is not reasonable to say that of someone who is already multi-skilled, where the company does nothing to support his retention of those skills. It is not reasonable, given that he had been encouraged to move to a less active role for his own safety, and in doing so had taken a pay cut to a lower grade role. Until this round of redundancies, there was no reason to think that he was not in a secure role and where the company thought he was appropriately placed.

7.96. The Respondent further asserts that his disability did not prevent him from undertaking many of the roles being looked at; again, suggesting that he was at fault for not developing more skills. Mr Thompson himself agreed that he was fit for some of the roles at which he was not currently skilled or trained - weighbridge roles, primary, administration and probably rail tripper. He is clear that he could drive locos, but could not do the heavy aspects of that role, coupling wagons and handling points.

7.97. What Respondent overlooks in emphasising Mr Thompson's fitness for a range of roles is that any role in the quarry would have required to be assessed for its suitability and for adjustments to be considered. Even in putting forward that Mr Thompson was fit for other roles, it is conceded that he would have needed help in getting where he was to work.

7.98. It is not uncharacteristic of the way he gave his evidence that he accepted points put to him without challenge, but the difficulties caused by his health are well documented. Many of the roles required movement about the site, a certain amount of physical effort, for example, dealing with

housekeeping or waste, functions ancillary to many roles, and/or physical competence in accessing work stations. There were aspects of each role that involved physical fitness.

7.99. Mr Thompson could have managed many roles, with training and adjustments. He could not manage those roles without those things and had no encouragement to step outside the role in which he had been placed for his own health and safety.

7.100. We again bear in mind that this was a period of maximum uncertainty for the company and they had to assess what was needed for the business.

7.101. Against that, they were making 9 out of 32 general operatives redundant, in a context of 17 compulsory redundancies. There was a role that Mr Thompson could do, that was being retained. The reason why his other skills had lapsed was not considered. That he could be retained to do his own job, while also retaining a team that was multi-skilled, was not considered.

Multi-skilling

7.102. A multi-skilled workforce is clearly a legitimate aim.

7.103. What is surprising about the approach taken is the decision to limit consideration to currently active skills.

7.104. It is likely that nationally, flexibility and multi-skilling were the goals and that there were structures in place to support that – that is a reasonable inference from the 2004 document which has a careful assessment that grades skills, rating multiple skills and competencies highly. The company pays a higher rate to those with additional skills.

7.105. What we do not have is evidence of that policy being supported by management policies locally.

7.106. Mr Hulbert was clear from the first Union consultation that in this Quarry, the Company had not aimed at multi-skilled workforce: they had been satisfied with the “one man, one job” approach, instead of aiming at flexibility.

7.107. Asked how the Company supported multi-skilling it appeared to be no more than an expectation at the local supervisor level that they would be running their team efficiently. Mr Thompson’s old Rail Foreman’s job description guided the supervisor to make use of spare manpower during slack times by offering them elsewhere. It does not stipulate a duty to ensure their skills did not lapse.

7.108. There were invitations during the hearing to explain how the Company helped maintain skills beyond the main job, which might for example have been by ensuring regular shifts or periods in each such role, but no such policy was put forward. There were anecdotal references to someone coming in on a Saturday to keep up driving skills, or individuals with different skill sets covering in the rail loft, but no system to support and maintain those skills was described. It appeared to be left to individuals. There was no account of reviews that would identify training needs or skill reviews, save Mr Bagnall’s comment that it was down to the manager to check that skills did not lapse. If that was the policy, that had not been applied in Mr Thompson’s case. From

Mr Hulbert's comment about this being a "one man one job" business, with the Company content for individuals to stay in settled roles, it seems it was not applied elsewhere in the Quarry either.

7.109. Mr Collis was expressly asked what kind of training plan or job rotation was put in place to support the multi-skilling approach. This was his answer,

> ""Staff, supervisors, there is a shift supervisor and it is part of their duty to make sure right bums are in the right seats at the right time and that is down to them to manage, so as breaks happen, people move around, it might be the case that we direct, can you take a later date break or an earlier time, because we know we have a particular task to do and it is very much up to them."

7.110. That is not a description of a system to support and maintain a multi-skilled workforce.

7.111. Where some individuals scored 5, 6 or 7, without doing any weighted roles, reflecting competence in 5, 6 or 7 different skill areas, it would take sound management to maintain skills across all of those fields. The evidence did not explain how that was achieved.

7.112. In the absence of a structured approach to supporting multi-skilling, the emphasis on multi-skilling as the key aim is less persuasive.

7.113. Again, it was the Respondent's repeated evidence that where skills needed formal refresher training and renewed certification, it would take no more than two days.

7.114. That being the case, we are puzzled that no distinction was made between those who had never had certain skills, who would have required to be trained up, and those whose skills needed simply refresher training and renewed certification. Excluding from the skills assessment skills that could readily be renewed is wasteful.

7.115. A genuine commitment to multi-skilling could have been applied to support those with disabilities. Mr Thompson was a good candidate having already achieved competence across a number of skill areas. With support by way of reasonable adjustments, he could have renewed his certifications. That he did not is not a reflection of his lack of interest, but of the Company's lack of a management strategy to develop and support multi-skilling. They failed even to adhere to the modest expectation that skills would be kept under review by managers.

7.116. Mr Langton referred to the tight time-line for these redundancies, without elaboration. In our judgment, the Respondent has not shown that the legitimate aim of creating a multi-skilled workforce required the very tight timeline that allowed for no refresher training to be considered. We do not understand the failure to distinguish between existing skills that required brief refreshment or recertification, and new skills that required training from the start.

7.117. The Respondent has contended that there were other roles that Mr Thompson was fit to perform. It is not their contention that he was only fit for

the Rail Loft role. Mr Thompson identified in oral evidence that he had previously been able to do locos, shunting, skidsteer and housekeeping. He did not propose himself for admin, understanding that to be relevant only to the unit clerk, as on the first matrix, and his experience was never assessed in relation to the range of roles that involved admin as a skill.

7.118. If skills that could be readily refreshed had been counted, Mr Thompson would have scored better and the Respondent would have had a wider pool of candidates to consider for retention. Other relevant factors could have been considered as part of the selection criteria.

7.119. It would have been reasonable at least to assess what the time and cost involved in renewing existing skills would be rather than making the dividing line active skills only.

7.120. We do not question the pools that the respondent chose, but it cannot be clear that Mr Thompson was in the right pool without there being that assessment. He might have secured four points, for rail loft, locos, shunting and skidsteer and would not then have been pooled with the General Operatives.

7.121. It would not be reasonable to exclude roles for which Mr Thompson had the skill set simply on the basis that there might need to be reasonable adjustments. They must, of their very nature, be reasonable. At the least, those would require to be considered and they were not.

7.122. It is not appropriate for us to make the assessments that the Respondent could have made. It is enough to say that the Respondent has not shown fair selection criteria or their fair application, at this stage.

The appeal

7.123. We were impressed by Mr Bagnall. He presented as fair-minded, humane and frank. Mr Hulbert was clear that he had conducted a full and fair hearing, and that he and Mr Thompson had had the opportunity to raise their concerns fully.

7.124. We do not accept that Mr Bagnall had been coached in the required outcome. It was very clear that the outcome was his own independent decision, and one that was finely balanced.

7.125. He did not step outside the matters raised in the appeal. He did not enquire into the basis for Mr Thompson's scoring, or the other scores. He was entitled to do that.

7.126. He was well aware that a score of one point for someone who had been with the company for 33 years was surprising, and concerned to check it was right. He heard the reference to a "hit list" and was also concerned to ensure that the appeal hearing was transparent, full and fair.

7.127. He recognised that Mr Thompson was disabled, and that there were roles that he could not perform on the site. He attempted to address that by awarding two extra points, housekeeping and wash plant, those being roles that demand physical fitness.

7.128. There are difficulties with that approach. It meant that Mr Thompson achieved three points, albeit with two points for skills he could not exercise. It is inconsistent – other roles also demand physical fitness, or would require adjustments to enable Mr Thompson to perform them. Spillage is a physically demanding role. So are aspects of the loco and shunting roles.

7.129. Leaving aside that difficulty, Mr Bagnall was aware that others who had three points had not been dismissed. The 9 dismissals from the general operatives had come from those with 2 points or less. Once Mr Thompson had 3 points, the fairness of his dismissal was up for question.

7.130. There were several options. What Mr Bagnall chose to do was to attach more weight to the skills of those who could handle mobile plant over the points he had given Mr Thompson to compensate for a lack of physical fitness.

7.131. Having accepted that an adjustment for disability was necessary, Mr Bagnall did not take that approach to its logical conclusion, either that Mr Thompson might have scored more points on the same basis, or that the redundancy selection might need to be re-opened. Mr Bagnall's approach again raises the question why refreshing existing skills could not be an option, given how quickly it could be achieved.

7.132. His main reason for not wishing to re-open the redundancy selection was that it would involve disrupting the position of those who had been retained. He did not feel he could go back and unsettle them, placing them again at risk of redundancy. Sadly, that is to undermine the whole appeal process.

7.133. There were other options open to him. He could have referred the case back to management to look at again, on the basis of the points he awarded.

7.134. He could have questioned the restriction to current skills.

7.135. He could have borne in mind the normal business turnover. As it happens, we know that there had been two retirements, during the period since the redundancy assessment; that is why there was an advertisement in November for a general operative post, with a closing date in December. The Company would have known that retirements were coming up.

7.136. Mr Bagnall could have kept to his two additional scores and reinstated Mr Thompson on the basis that natural wastage would have lead to the right outcome in terms of numbers shortly – in fact, very shortly. Even if he had not known of the actual vacancy that was advertised, such a vacancy was likely to arise within a foreseeably short period.

7.137. It is true that the company would not have been able to use the vacancy to recruit a multi-skilled individual at that point; but this is a balancing exercise; the job that Mr Thompson was doing had been retained, and was being covered by someone who had other skills. The company had retained 66 employees, with all the general operatives having at least three different skill sets. They would still have had a multi-skilled work force if they had retained Mr Thompson.

7.138. The company is under a clear duty to consider alternative employment. In a case where his own job is retained, that duty extends to considering his own job.

7.139. None of these possibilities were considered and in our judgment that makes the outcome unfair.

Union activity

7.140. Mr Thompson relies on the principal reason for his dismissal being his union membership or activities. There are a number of factors to consider.

7.141. A substantial number of the workers at the Quarry were in the Union. Mr Collis thought 89%. That may not be accurate but it gives an indication.

7.142. There had been previously sound co-operation with the Union – that emerges both from the 2004 agreed redundancy policy document and from Mr Hulbert's evidence, from his personal experience.

7.143. The failure by the Respondent to engage in planned consultation with the Union in good time was in our judgment a break with the traditionally good working relationship with the Union. It speaks of a hostile environment for Union activity. That is what Mr Hulbert observed in his first encounters with Mr Langton.

7.144. Mr Langton had to deal with the weighbridge men who had closed the weighbridge in concern at the lack of safety measures to protect them from Covid – 19. Closing a weighbridge is a serious measure involving a deliberate refusal to follow orders. It is not something that workers would normally do lightly. Mr Thompson saw the meeting that followed between the men and Mr Langton as an area of legitimate Union involvement. It concerned health and safety and Mr Thompson had been a health and safety representative.

7.145. Whatever he thought about that, asking Mr Thompson to leave the room, as Mr Langton agrees he did, was in itself a challenge to the Union. It was not calculated to promote harmonious working relationships with the Union.

7.146. It is not surprising that Mr Thompson and Mr Hulbert saw antipathy towards Union activity, where the relationship had previously been good.

7.147. We cannot see that Mr Thompson was being treated differently and unreasonably when HR was represented at his first consultation. That, we are told, also happened at some other consultations, and given that this involved a senior Union official, it is not unreasonable that there be an HR presence to make sure things were done properly. In our judgment that does not point to him being targeted.

7.148. Nor do we have evidence of the other such consultations being conducted differently from his with regard to the scoring and the matrix.

7.149. There is what appears to be direct evidence of union membership or activity being part of the redundancy selection in the document at page 201/217. This is headed "Matrix (later version) and it is presented as the basis of the redundancy exercise that was carried out. It is what we have called the Final Matrix.

7.150. Across the top are the skills that were under assessment – front-end loader, rigid dump truck, locos, shunting and so on. In the middle, between Reg

8.1.c and Reg 8.1.d, is a heading not present in the earlier version of the matrix that we have seen. The heading is Union.

7.151. There is no score shown in that column for anyone.

7.152. It does not obviously form part of the skills assessment.

7.153. Mr Collis told us that he had included it in response to a request from HR about union membership.

7.154. He explained it in this way,

> "I had been asked by Bindi in HR to provide information on another employee. Where she wanted to understand the magnitude of how many employees were in the union as there was a question over it. I should have deleted that comment back out. ….. my error. To understand the unionised workforce."

7.155. He later explained that this had been after the appeals against redundancy had been dealt with. It was for another case. It was convenient to use this matrix because it included the names of everyone on site,

> "Why would I retype every name and grade and send it?"

7.156. Finally, he was asked when this was and he ventured October 2021.

7.157. The Claimant's appeal had been heard in October 2020, Mr Bagnall had been dealing with other appeals at that time, so Mr Collis is suggesting that a year later he was dealing with a request from HR about Union membership and for which he needed a list of names of those employed in August 2020.

7.158. That is baffling. If there is a simple explanation, we have not had it.

7.159. The column is inserted in the middle. It is hardly a convenient location to make some quick entries.

7.160. It does not demand sophisticated skills to copy the list of names on their own, or to make a copy of the matrix and delete the skills assessment, leaving only a column for union membership.

7.161. Altogether, it is not an explanation that we find to be credible.

7.162. Mr Collis, we know, presented the whole scoring exercise to Mr Thompson on the basis that it was carried out after the union consultation on the selection criteria, when in fact it was clearly carried out before that and before the at-risk letters were sent out. It had been the basis on which most employees were immediately taken off the at-risk list at their first consultation. He was evasive when asked about simple points in relation to the formal procedure as to what documents Mr Thompson had been given and what explanations he had had. With that context, we are reluctant to gloss over an inadequate explanation.

7.163. Mr Duffy reasonably enough suggests that it points to union membership or activity being a factor in the redundancy selection, exactly the point that Mr Thompson and Mr Hulbert believe to be the case.

7.164. Does it, with the other evidence of antipathy towards the Union, point clearly enough to active Union members and Mr Thompson in particular being targeted for redundancy? Does it reflect an internal discussion about whether the criteria had the desired effect of reducing the ranks of experienced union representatives?

7.165. In our judgment, that is not an inference we can draw. The very numbers involved in the Union go against that. Mr Collis tells us that from recollection two union representatives were dismissed and five remained and that 89% of workers were union members.

7.166. There is only one incident when Mr Thompson's union activity was seen as a nuisance, that with the weighbridge workers.

7.167. We cannot find on the evidence that his union activity was the basis for his selection nor can we find on the evidence that the skills matrix was deliberately shaped to get rid of him.

7.168. We are not happy with Mr Collis' explanation for the use of the column headed Union. The dates don't work, and the explanation does not work. But it is a large step from that to determine that some sort of negative score was applied based on union membership or activity.

7.169. Taken altogether, the evidence does not establish that the principal reason for dismissal was union membership or activity.

7.170. There is a sufficient explanation for Mr Thompson's selection in the low scoring on the chosen matrix,

7.171. The ignorance about disability discrimination contributes to that explanation. Management knew, formally, of his disability and the adjustments made for him by changing his job role. In the redundancy selection, they did not check his file or reflect when he pointed to his health condition as a reason for the limited skills he now had – as against the wider range of skills he had exercised previously There was no understanding of the obligations on the employer in relation to disability. The only explanation for his low level of active skills that was advanced was his failure to be more ambitious. On that basis, his low score was his fault and a sufficient reason to dismiss him.

7.172. The evidence does not point to union activity being a factor in his selection.

Conclusions in respect of unfair dismissal

7.173. In our judgment, the dismissal was by reason of redundancy. The requirement for employees to carry out work in the place where the claimant was employed by the respondent diminished, or were expected to diminish.

7.174. The principal reason for the dismissal was not union membership or activity.

7.175. The Respondent did not act reasonably in all the circumstances in treating the redundancy as a sufficient reason to dismiss the Claimant.

7.176. The consultation was flawed. The outcome was all but predetermined before it began.

7.177. The selection criteria were too narrow, not fair in principle and not fair in their application. They cannot be seen to have been consistently applied.

7.178. There is obvious unfairness in excluding all personal factors or working history from consideration and it would be surprising to assess as fair and reasonable criteria that ignored disability and disability adjustments or that could directly select for redundancy on the grounds of disability.

7.179. The goal of creating a multi-skilled workforce is legitimate, but not well supported by requiring assessment only on the basis of current active skills, when refresher training and recertification will take one to two days. That is wasteful and arbitrary. It is unfair where the Company itself has allowed skills to lapse. It is not established that the time-scale required that.

7.180. We find the dismissal for redundancy to be unfair on the basis that there was a failure of consultation and unfair selection for redundancy. In our judgment, no reasonable employer would have approached consultation in this way or applied such unnecessarily narrow selection criteria.

7.181. We have to be mindful that it is for the employer to determine the selection pool and criteria and the Tribunal must not substitute its view for the reasonable decisions made.

7.182. We question reasonableness of the process on the basis discussed fully above. If we stray from our role in so doing, the point that is determinative is the handling of the appeal. Mr Thompson was given additional points on appeal, which brought him level with those retained. Mr Bagnall recognised that adjustments were required because of his disability.

7.183. In our judgment, it was not then reasonable to dismiss Mr Thompson without fuller consideration. He had then scored the same as those workers who had been retained.

7.184. That did not necessarily require that the selection was re-run or that an additional assessment was carried out, although those were options. It might require only that he was retained, on the basis that normal turnover of staff would reduce the numbers quickly to the level originally identified as necessary if it had not already done so.

7.185. That in our judgment would have achieved a fair balance between the needs of the company for a multi-skilled workforce and a properly informed assessment of Mr Thompson's ability to contribute to that. It would incidentally have afforded the opportunity to consider updating his skills.

7.186. We are invited to consider whether the Polkey principle applies and do so in the light of our finding that there was a significant failure in consultation and procedure. In our judgment, given a man with a sound and long record, who has been multi-skilled, where he agrees he can carry out a range of roles, with brief updated training and where the Respondent also agrees he can carry out a range of roles, the evidence that his employment would have been fairly terminated had the process been fair is scanty.

7.187. The Respondent contends that had Mr Thompson been retained, there would have been 7 in the Rail Loft, and he, as the lowest scoring, would have been made redundant anyway. That is not the right approach, in our judgment. Someone had been transferred in temporarily to cover the role while Mr Thompson was furloughed. That worker could simply have been returned to his usual role or roles, their other skills being in demand.

7.188. We find no basis for a Polkey reduction.

Detriment under s.153 TULRCA 1992:

7.189. The same reasons apply in our judgment to the claim brought of detriment as to the question of the reason for the dismissal above.
7.190. There were employees in the Company who held positions similar to that held by Mr Thompson and who were not dismissed.
7.191. Taking the Claimant's case at its highest, we do not find the evidence to point to the reason or principal reason for his selection was that he was a member of an independent trade union or had taken part in the activities of an independent trade union at an appropriate time.

Discrimination arising from disability (EqA 2010, s.15):

7.192. The Respondent treat the Claimant unfavourably by:

i. Selecting him for redundancy;
ii. Dismissing the Claimant.

7.193. The "somethings arising" in consequence of the Claimant's disability are identified as the following, based on the findings of EJ Midgley (para 48, EJ Midgley's judgment, page 81i, 90):

i. The Claimant was limited in the time that he can undertake physical activities before he becomes so short of breath that he has to stop and take remedial steps.
ii. The Claimant has shortness of breath when he undertakes any digging or manual labour.
iii. The Claimant has a very limited ability to walk 200 or 300 metres.
iv. The Claimant's ability to climb stairs is very limited.

7.194. The Respondent does not argue that the respondent did not know or could not be expected to know that the Claimant had the disability.
7.195. Was the unfavourable treatment because of the "things" outlined above?
7.196. The Respondent contends that those things were not the reason for the unfavourable treatment. The reason was Mr Thompson's lack of active skills.
7.197. We do not accept that contention.
7.198. Mr Thompson had been given a reasonable adjustment. His former manager had accepted that after his heart surgery, he was not safe moving about the site and was limited in how much he could exert himself. He had invited Mr Thompson to accept a lower grade and lower paid role, but one he could do. Mr Thompson agreed to that move to the Rail Loft. Over time, his certification for his established skills lapsed.

7.199. The reason those skills lapsed was because he had been moved from the job where he could exercise them. That was in response to the "something arising" from his disability. Both he and the Company accepted that as a reasonable solution to his disability. He was in a job he could do, on a part of the site he could access, with stairs he needed to climb only a couple of times a day.

7.200. In our judgment, it is clear that the effective cause of selection for redundancy was that Mr Thompson's skills had lapsed. His physical limitations led the Company to move him to a job where those skills were not exercised and that is why they lapsed. He was then dismissed because those skills had lapsed.

7.201. That establishes a sufficient link between the disability, the things arising from the disability and the lack of skills that led to the redundancy selection and dismissal. Weerasinghe (above) establishes that the consequence of disability may involve more than one step.

7.202. The case that was advanced throughout was based on those physical consequences of the Claimant's heart condition, more specifically spelled out in that judgment. That is the approach taken in Weerasinghe*,* where the examples were from the effects of the condition on the Claimant. An alternative formulation is to consider the consequence of those effects. In Sheikholeslami, for example, the "something arising" was pursued as the Claimant's absence from work and inability to return to it.

7.203. Here, in the alternative formulation, the "something arising" would be that Mr Thompson was transferred from his Rail Foreman job which involved driving locos and shunting, and moved to the Rail Loft, where those skills were not needed and not recertificated. It is then the more clear that the effective cause for selection for redundancy was the "something arising", the transfer to a job where those skills were not needed.

7.204. In our view, it makes no difference to the merits of the case whichever way it is formulated. The unfavourable treatment, the redundancy selection and dismissal, was because of the "somethings arising".

7.205. The Respondent's claim of justification is based on the need to retain a multi-skilled workforce at the site. This would ensure that employees could be more easily moved between areas of the Quarry as and when the business required it.

7.206. In our judgment, the unfavourable treatment cannot be objectively justified. The employer has failed to establish that it was reasonable or necessary to have regard only to active skills without considering skills held but where certification had lapsed. Excluding those skills, not even considering the scope for refresher training and renewal of certificates, was not proportionate. The Respondent has not shown that there was a reasonable necessity for these dismissals to be carried out so quickly that such certification could not be considered, or even that that possibility was explored. Redundancy had been under consideration for a number of months, many of the workers were still on furlough and at the time the decision was

made, furlough had been extended until October, albeit with some costs falling on the employer.

7.207. This is not the same as requiring training for those without such skills: Mr Thompson had 33 years of service and well-established skills. What he lacked was the recent certification together with consideration of whether reasonable adjustments would enable him to resume those roles. Given that part of the Respondent's case has been that he could undertake a range of roles had he only been up to date with his skills, it must have been reasonable to consider the scope and timing of refresher training along with any adjustments necessary.

7.208. Dismissing someone with sound skills for lack of brief refresher training is wasteful not proportionate.

7.209. While the Respondent emphasises the need for multi-skilling, we bear in mind that the evidence for it being used systematically in the Rail Loft is weak. There are three people still carrying out the roles that Mr Thompson carried out with two others. They are simply different people. It is proposed that when work is slack, someone could be moved to another role temporarily but we do not have evidence to show that that has actually happened. There is some evidence of people covering from different roles but nothing obviously systematic or regular. Mr Thompson's evidence was that he was busy and Mr Collis' account of numbers of trains and duration of loading and related duties did not contradict that. If this job did not require three individuals carrying it out over the 24 hour shift on a dedicated basis, we would expect to see evidence of that.

7.210. The Rail Loft was well run, so this is a job Mr Thompson was acknowledged to do well and that was within his capabilities.

7.211. That is not to say that it is not an advantage to have a highly skilled and flexible workforce. The issue is whether that requirement justifies this selection and this dismissal.

7.212. We accept the submissions made by Mr Duffy on this point. The Respondent has 66 employees remaining after the redundancy, with all of the general operatives remaining having at least 3 different skillsets. Mr Langton considered the Rail Loft to be well run. Mr Thompson had worked there for five years, had found himself to be busy, had no complaints about his capability and was not required or encouraged to be involved in other skill areas.

7.213. Even without considering the scope for re-accreditation of his other skills, a less discriminatory outcome would have been to leave Mr Thompson in the job he had been doing, a job that was still needed, given that the remaining workforce had the flexibility arising from having multiple skills that the Respondent needed.

7.214. That could have been done by ring-fencing the 6 in the rail loft or the 3 rail loft positions, excluding the rail tripper positions, or by building into the selection criteria a recognition of the employer's duty towards those who are disabled, as Mr Bagnall sought to do.

7.215. Dismissal was not a proportionate means of achieving a legitimate aim. It was not appropriate and necessary in all the circumstances.

Reasonable adjustments (EqA 2010, ss 20 and 21)

7.216. The Respondent does not argue that the respondent did not know or could not be expected to know that the Claimant had the disability at all material times.

7.217. The first issue here is,

> "Did the respondent have the following PCP:
>
> > Applying the selection criteria equally to all employees."

7.218. The Respondent agrees. That follows from the evidence.

7.219. Next,

> "Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:
>
> > The claimant had been unable to perform physical roles and was therefore scored down.

7.220. The Respondent points out that Mr Thompson was not scored down. No marks were deducted. He failed to score points for skills he did not have.

7.221. That is a very literal interpretation of what is being proposed and we do not accept it. The disadvantage identified is that he was not scored for skills that required physical exertion. That is what happened – he was not scored for those he had never learned and he was not scored for those he had exercised in his earlier career but where his certification was out of date.

7.222. This is of course an assessment of his ability to perform physical roles without adjustment or assistance.

7.223. Mr Thompson had been moved from the roles of loco driver and shunter, losing his rail foreman role in so doing. That was because of his physical limitations. As a result, his skills had lapsed. The Company was content that his skills lapse and that he performed solely within his new role. There was no complaint about that and no proposal to support him in either refreshing his skills or acquiring new ones.

7.224. When the selection criteria were applied, Mr Thompson was not scored on his wide skill base but only on his current skills.

7.225. Being scored only on his recent skills was a substantial disadvantage.

7.226. The Respondent further challenges this on the basis that Mr Thompson admitted that in addition to the Rail Loft, there were a range of other skills he was not prevented from performing because of his disability.

7.227. Again, we have Mr Thompson regarded as someone who did not pursue other skills, rather than as a highly skilled and experienced man who worked where he did because of his disability.

7.228. For him to undertake other roles would have required assessment of adjustments even to access them and as to elements that required exertion. While he agreed that there were other roles he could fulfil, it is plain that that safety assessment and adjustments would have been necessary before he did so.

7.229. It is one thing to say that he should have acquired other skills. It is quite another, from a position of disability, for him to put himself forward to undertake other roles, which would have required that assessment, in particular when placed by the Company in a job he could do and was doing well. That is the more true given that he had other much valued skills that the Company was content to allow to lapse, not even reviewing with him whether he should seek to retain that certification. In our judgment, that is unrealistic.

7.230. The argument put forward is only an application of the argument that everyone should be treated equally. In addressing discrimination, and in particular disability discrimination, it is a commonplace that to treat everyone equally, or the same, can be discriminatory.

7.231. In our judgment, having recognised his disability, it was not open to the Respondent to discount it and treat him the same as everyone else.

7.232. As Mr Duffy points out in his submission, there were skill areas that Mr Thompson could not undertake. By comparison with his able-bodied peers, they had more scope to achieve points than he had. To that, we add that in other areas where he had the skills already would have needed safety assessment and adjustments, even if he had had the certification, placing him at an added disadvantage.

7.233. It meant that under the selection criteria that were applied, he was made redundant from a role in which he performed well, in which the Company had placed him because of his disability, which he could manage within the limitations of his physical condition and a role which the Company still needed someone to do.

7.234. The next issue is,

> "Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?"

7.235. The Respondent does contend that it did not know or could not reasonably be expected to know that the Claimant was likely to be placed at the disadvantage.

7.236. That is not accepted. The Respondent knew of the disability and the limitations it imposed. It was, in our judgment, obvious that Mr Thompson would suffer a substantial disadvantage in not having his wider skills taken into account or not having the disability - the underlying reason why they had not been maintained or others acquired - acknowledged.

7.237. What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

i. Adjustment of the selection criteria to take into account his disability;
ii. Adjustment of the selection criteria to allow for previously acquired skills to be taken into account in the scoring matrix;
iii. Adjustment of the selection criteria to allow for the extra weighting applied to particular skills to be removed. The Primary and Arrival/Departure Rail Operative skills were heavily weighted at x5. There was no consultation on this. The Claimant submits the rail loft skills should have been weighted due to the responsibility, communication and the management of plant and resources involved;
iv. Ring-fencing all Rail Operative roles including the Claimants.

7.238. Was it reasonable for the respondent to have to take those steps and when?

7.239. The focus here has to be on what the Respondent could reasonably have done to mitigate the disadvantage that Mr Thompson suffered. He challenged the weighting for primary, but the Respondent defended that weighting on the basis of the complexity of the role and it is an assessment they are entitled to make. They were equally entitled to consider that the Rail Loft roles did not merit such weighting.

7.240. There were options for adjustments. The Rail Loft roles could have been ring-fenced as a way of ensuring that Mr Thompson was not disadvantaged. That might have had more impact though on the aim of a multi-skilled workforce than an individual adjustment to the scores.

7.241. Mr Bagnall recognised the unfairness in this situation and adjusted the selection criteria to take account of Mr Thompson's disability. Having done so, the appeal should have been allowed, but Mr Bagnall introduced a fresh factor, by giving more weight to mobile plant skills. He was reluctant to allow the appeal and to reinstate Mr Thompson because he recognised the Company's need for mobile plant skills and did not want to disturb the staff who had been retained.

7.242. That demonstrates the scope for adjusting the selection criteria for an individual as a reasonable adjustment.

7.243. The result was an inconsistency in the way the criteria were applied. The outcome is uncomfortable: This was not the assessment that applied to others. Nor were there only two areas scored because they were areas where Mr Thompson was unable to perform. Mr Thompson could have been scored substantially more by adding points for other skills he could not perform.

7.244. We have to go back to the stated purpose of the legislation. The purpose is to avoid the disadvantage and the means are by making adjustments that are reasonable.

7.245. So the inconsistency does not matter, if the adjustment is reasonable.

7.246. Had Mr Thompson been scored in 2014, he would not have been selected for redundancy. The disadvantage arises because of his disability and being placed in a single safe role, to the loss of his skills. He was selected for redundancy. The disadvantage is overcome by not selecting him for redundancy. That could be by committing to retain his role for him. It could

have been by committing to some different process for those with disability adjustments; adding some additional assessment criteria. It could have been by adjusting the criteria to add points in respect of disability, as against adding points for skills only. It could have been as Mr Bagnall did, adding points for things that the individual concerned could not do. It could have been by adding points for skills that have lapsed because of the adjustment made for disability, particularly where those could be readily restored.

7.247. The only conditions are that the disadvantage is to be avoided, if possible and that the adjustment(s) be reasonable.

7.248. This is a similar assessment to the one carried out in respect of justification. What would be the consequence to the Respondent of retaining Mr Thompson?

7.249. There has been no suggestion that he was not competent or reliable. The evidence is that the Rail Loft was well run, he has a wide range of skills and experience and it is reasonable to infer he was a good worker. He was in a job that the Respondent retained, still needed.

7.250. The disadvantage of retaining him in that role is simply the loss of the additional active skills another worker could bring. It has not been demonstrated that those skills were urgently needed in this role and as Mr Duffy points out, the rest of the work force was multi-skilled.

7.251. In our judgment, there were adjustments that could have been made, by adjusting the selection criteria, that would have overcome the disadvantage here, by enabling Mr Thompson to keep his job, and those adjustments were reasonable, when balanced against any disadvantage to the Respondent.

7.252. Did the respondent fail to take those steps?

7.253. The steps the Respondent took did not avoid the disadvantage. No other steps were explored or taken. There was a failure by this large employer to consider reasonable adjustments on a structured basis as part of this redundancy selection exercise.

7.254. Accordingly, the judgment of the Tribunal is that the Respondent did discriminate against the Claimant on the grounds of disability by failing to make reasonable adjustments.

8. ***Disability: a comment***

8.1. It is perhaps important to add a note about the Respondent's understanding of disability discrimination.

8.2. There obviously has been recognition of the duty to make reasonable adjustments in the past. Mr Thompson's situation was addressed appropriately in 2014. We know of three workers altogether with disabilities, and have heard that adjustments had been made for them.

8.3. In this process, however, there appeared to be no awareness of any duty towards those with disabilities. The Equality Act and the need to avoid discriminatory selection criteria was mentioned during the Union consultation meetings by Mr Hulbert and the HR representative but apparently the reference was not understood. The selection criteria did not require that the

Respondent identified that anyone had a disability or an adjustment. In consultation, Mr Thompson raised his heart condition and the reason that he was in his present job, but it was dismissed. Neither Mr Langton nor Mr Collis displayed any knowledge of any obligations under the Equality Act. Disability was simply not a relevant consideration.

8.4. That is dispiriting in a significant employer. Training, and not simply online training, is clearly needed.

9. Determination

9.1. In respect of the issues to be determined at this hearing, not including remedy, we find as set out below, based on the analysis above.

Unfair dismissal

9.2. It is agreed that the claimant was dismissed. The reason we find was redundancy. It was a genuine redundancy situation. The requirement for employees to carry out work in the place where the claimant was employed diminished.

9.3. The respondent did not act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The choice of selection pools was reasonable but the decision to exclude skills that could have been quickly re-certificated was not. The use of current skills criteria only to the exclusion of all other personal or professional factors was not reasonable. It was in particular not reasonable to exclude any knowledge or consideration of disability and disability adjustments or to use potentially discriminatory criteria. And finally, the adjustment to the selection criteria that was made in respect of disability did not avoid the disadvantage of dismissal and rendered the appeal process nugatory.

9.4. It was a factor to be considered that Mr Thompson was able to perform competently in the role he had, and that was a role that was being retained.

9.5. The consultation was poor, the approach taken with the Union and in individual consultations was inflexible and the outcome was pre-determined before the consultation started. That was in a setting where a sound selection procedure for a significant redundancy operation had previously been agreed with the Union. There was no genuine engagement in consultation. The unfairness of the procedure is illustrated by the fact that the scores were established before any consultation, although that was consciously concealed until a later stage.

9.6. This was an unfair redundancy dismissal and, in our judgment, with a fair procedure, the Claimant would not have been dismissed.

Dismissal under s.152(1) (a) and (b) TULRCA 1992:

9.7. It is agreed that,

i. The Claimant was an active member of Unite the Union;

ii. The Claimant was a trade union convenor with responsibility for:

a) To act as a link between trade union members and management and vice versa;
b) Put forward issues to management on behalf of members;
c) Attendance at work council meetings;
d) Representing members at national pay talks.
e) The Claimant spent approximately 10-12 hours per month on union matters.

iii. The Claimant was involved on behalf of the Union in the redundancy consultation process;
iv. The Claimant had previously held a role as a union appointed health and safety representative until approximately 2010.

9.8. It is not established that the principal reason for dismissal was the union membership or activities.

Detriment under s.153 TULRCA 1992:

9.9. Equally, the reason or principal reason for his selection for redundancy is not established to be that he was a member of an independent trade union or had taken part in the activities of an independent trade union.

Discrimination arising from disability (EqA 2010, s.15):

9.10. The Respondent treated the Claimant unfavourably by:
iii. Selecting him for redundancy;
iv. Dismissing the Claimant.

9.11. It is agreed that the following things arose in consequence of the Claimant's disability (para 48, EJ Midgley's judgment, page 81i):
v. The Claimant was limited in the time that he can undertake physical activities before he becomes so short of breath that he has to stop and take remedial steps.
vi. The Claimant has shortness of breath when he undertakes any digging or manual labour.
vii. The Claimant has a very limited ability to walk 200 or 300 metres.
viii. The Claimant's ability to climb stairs is very limited.

9.12. The unfavourable treatment was because of the "things" outlined above.

9.13. The Respondent says that the need to retain a multi-skilled workforce at the site was a legitimate aim. This would ensure that employees could be more easily moved between areas of the Quarry as and when the business required it. We agree that that is a legitimate aim.

9.14. The Tribunal does not find that selecting the Claimant for redundancy and dismissing him was an appropriate and reasonably necessary way to achieve those aims. It was neither appropriate nor necessary to rely solely on criteria that discounted his disability and the adjustment previously made for it.

9.15. Instead, his services could have been retained, in the role he had shown himself able to perform, with little impact on the overall level of skills at the Quarry.

9.16. This was discrimination arising from disability.

Reasonable adjustments (EqA 2010, ss 20 and 21)

9.17. It is agreed that the respondent had the following provision criterion or practice: applying selection criteria equally to all employees.

9.18. That provision, criterion or practice put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant had been unable to perform physical roles and was therefore scored down. In our judgment that wording addresses the failure to score.

9.19. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? This is denied but in our judgment it is very plain that the Respondent knew and could reasonably be expected to know that Mr Thompson was going to be placed at that disadvantage.

9.20. The following adjustments are amongst a number that could have been made and would have been reasonable to make:

v. Adjustment of the selection criteria to take into account his disability;

vi. Adjustment of the selection criteria to allow for previously acquired skills to be taken into account in the scoring matrix;

9.21. Those were reasonable in that the disadvantage to the Respondent is substantially outweighed by the disadvantage to the Claimant in failing to make those adjustments. Other reasonable adjustments should have been explored.

9.22. The steps the Respondent took did not avoid the disadvantage.

9.23. Accordingly the Tribunal finds that the Respondent did discriminate against the Claimant on the grounds of disability, having failed to make reasonable adjustments in relation to him.

Employment Judge Street

Date: 25 July 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
1 August 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE