EMPLOYMENT TRIBUNALS

Claimant: Mr Robert James Auton

Respondent: Benlowe Group Limited

Heard at: Leicester

On: 4, 5 & 6 July 2022

Before: Employment Judge Ahmed

Members: Mr K Rose
Mr M Alibhai

Representation

Claimant: Mr David Gray-Jones of Counsel
Respondent: Mr Kieran Wilson of Counsel

JUDGMENT

The unanimous decision of the tribunal is as follows:

1. The claimant was a disabled person by reason of arthritis in both of his hands but not a disabled person by reason of any back condition or prolapsed disc.

2. The complaints of discrimination arising from disability and a failure to comply with the duty to make reasonable adjustments are both dismissed.

3. The Claimant was unfairly dismissed by reason of the Respondent applying an unfair selection criterion process but if the process had been applied fairly the Claimant would have been dismissed fairly in any event. The tribunal therefore makes no compensatory award. The basic award is extinguished by the redundancy payment made.

4. The Respondent is ordered to pay compensation for failure by the Respondent to provide a statement of terms and conditions of employment as required by section1 of the Employment Rights Act 1996 and pursuant to section 38 Employment Act

2002. The Respondent is ordered to pay to the Claimant compensation of £1,280.76 net.

5. The Recoupment Regulations do not apply.

REASONS

1. In these proceedings the Claimant brings complaints of unfair dismissal and disability discrimination. The complaints of disability discrimination are of discrimination arising from disability and a failure to make reasonable adjustments.

2. In arriving at our decision we have taken into consideration the oral evidence of the witnesses, the documents in the agreed bundle, the contents of their witness statement and oral submissions made by Counsel on both sides, to whom we are grateful. This decision represents the views of all three members of the Tribunal.

3. Oral evidence for the Claimant at the hearing was given by the Claimant and his daughter, Miss Kelly Auton and a former colleague, Mr Aaron Barret. The evidence of the witnesses other than the Claimant was solely in relation to issue of the Respondent's knowledge of the disability.

4. The witnesses for the Respondent were: Mr Clive Ross (employed by the Respondent as the Logistics Manager and dismissing officer) and Mr Nigel James, Joint Director of the business who dealt with the appeal against dismissal.

THE FACTS

5. The facts of the matter are not, unless otherwise indicated, in dispute. The Claimant was employed by the Respondent from 1 October 2015 to 18 September 2020 as a Glazier. He began ACAS early conciliation on 22 October 2020 and received his early conciliation certificate on 22 November 2020. He presented his claim to the Tribunal on 15 January 2021.

6. The Respondent is a manufacturer and installer of timber windows and doors supplying the majority of its products to the UK housing developer market. There are two Directors of the business, Mr Nigel James and Mr Harris. Mr Harris has not been involved in this case. The majority of the Respondent's work (accounting for around 90% of sales) is in connection with the refurbishment of hotels and public buildings.

7. The Claimant was based at the Respondent's factory in Ratby, Leicestershire. The Glazing department works on a number of different glazed products which range from small single bar windows to larger multi-bar windows, bi-fold doors and Fire Windows. The Claimant was one of 9 Glaziers employed by the business at the relevant time.

8. Glaziers employed by the Respondent have different skills. The Claimant's role consisted of making single bar windows only which is deemed to involve the lowest

level of skill in production terms. The Claimant was not involved in making multi- bar windows, bifold doors or Fire Windows.

9. The Respondent's business was until recent years relatively successful. Unfortunately, the steady decline in timber windows with the rise in popularity of uPVC plastic windows has led to successive downturns in business and corresponding reductions in headcount. The business has gone from employing around 259 employees in 2007 to around 87 in recent years. Part of the reduction was a result of the closure of the Respondent's Birmingham factory in 2017. Mr Clive Ross, the Logistics and Customer Administrator, and the person responsible for internal HR matters in the company, had been charged with dealing with the redundancy selection exercise in Birmingham. He devised a selection matrix during that process which he decided to use for the purposes of this present exercise.

10. The business was then hit hard by the impact of the Covid-19 pandemic and the consequent lockdown in March 2020. The Leicestershire factory was forced to close for two months. The Claimant and his colleagues were furloughed. When furlough came to an end it was clear to Mr James that the losses sustained during lockdown and the likely reduction in work going forward meant that there was and would be a reduced need for employees. Mr Ross was tasked with deciding how many should be made redundant and to mark the criteria in conjunction with views from supervisors.

11. On 20 July 2020 the Respondent announced that there would be a number of redundancies in the business. Two Glaziers were to be made redundant. As there were no volunteers, Mr Ross wrote to all Glaziers setting out the selection criteria that the business intended to apply based on the past 15 months of performance and service. All Glaziers were placed in a pool for selection. The relevant period for consideration of the selection criteria was 1 January 2019 – 31 March 2020.

12. There were seven selection criteria as follows:

<u>Time and attendance</u>

13. This was marked on points of 0 - 5 with 5 points for those who had not taken any days off and zero for those who had taken more than 21 days in the relevant period. As a second limb of this criterion the Respondent considered employees who were late on arrival for work or those who left early. This was done by reference to documentary records. The highest mark was 5 for those who were never late or absent with a sliding scale down to zero for those with 21 or more of such instances.

14. In relation to the Claimant on the attendance criterion Mr Auton was involved in an accident at work from 17 – 23 March 2020. This period was discounted by the Respondent from consideration.

15. In 2019 the Claimant was also absent for 5 days in total being 27 – 29 March, 1 May and 11 July. In his evidence the Claimant said that a couple of those days may have been for his back but he could not be sure which of them were for that reason. When asked in cross-examination if any of the absences were to do with his

hands he said they “might not have been” but he could not be sure. He also said that if his hands seized up he would go and see the doctor who would give him more pain killing tablets. However there is no evidence that any of the absences were to do with any issue relating to his hands. It seems likely from the notes supplied that such discussions with the doctor were either after work or on the telephone. There is no independent evidence to confirm the absences were in relation to his hands. The Claimant was therefore deemed to have had 5 – 9 absences which gave him a score of 3.

16. In relation to days late/leaving early the Claimant accepts that this happened twice and he thus scored 4 points. He does not take any issue in relation to that particular score.

Discipline

17. This criterion looked at past disciplinary warnings. None of the employees in the pool had been subjected to any disciplinary action so the score for everyone was the same, namely 3 points.

Production

18. This looked at the average daily number of units produced by the Glazier, excluding overtime. For those that produced an average of 19 or more units per day the maximum score awarded was 5 points. The Claimant was assessed as having a produced an average of 17 – 18 units and scored 4 points.

Glazing skills

19. There were several Glaziers in the pool who could undertake more skilled work such as multi-bar or bi-fold windows as well as manufacturing Fire Windows. The Claimant admits he had not undertaken work on bi-fold or Fire Windows. He says that whilst he could have made multi-bar windows he was not given the opportunity to do so or perhaps more accurately not given the opportunity to learn the necessary skills. We are satisfied the Claimant did not undertake work on anything other than single bar windows.

Consideration of other skills

20. A point was awarded for further additional skills such as Q & A skills, frame assembly etc. The Claimant accepts he did not have any quality and assessment skills or any others which could gain him anything other than the single point he received.

Glazing Quality

21. This was a subjective assessment of glazing quality performance. It was marked from ‘average’ (one point) to ‘excellent’ (4 points).

Performance

22. This was also marked from ‘average’ (one point) to ‘excellent’ (4 points).

23. All of the marking and award of scores was undertaken by Mr Ross (largely by reference to company records) save for the final two criteria which were marked by the Factory Supervisor, Mr Nigel Gibson. Mr Gibson did not give evidence to the Tribunal. The Claimant final scores (with the points in brackets) were as follows:

Time and attendance (3)

Late/left early (4)

Discipline (3)

Units per day (4)

Glazing skills (1)

Other skills (1)

Glazing quality (2)

Glazing performance (1).

24. The Claimant's total score was therefore 19. The scores of the others in the pool were: 29, 24, 27,27,22,21,19 and 21. The Claimant was therefore the joint lowest.

25. On 10 August, the Claimant attended a meeting with Mr Ross to discuss his scores. Mr Ross confirmed that no decision had been made at that stage as to who was to be made redundant. Mr Auton agreed his marks on the first two criteria. On criterion 3 he questioned the number of average daily units produced saying that as he always got a bonus he felt that the mark was unfairly low. Following those representations Mr Ross increased the score by one point. On criterion 4 Mr Auton said that he could do multi-bar windows if he had been asked. In relation to criterion 5 Mr Auton complained that he would have been able to undertake other roles but he was never been moved around and so could not acquire other skills. The Claimant was critical of the scores on criteria 6 and 7 as he felt that the quality of his mark should have been marked as above good (that is either 'very good' or 'excellent') and that his performance noted as 'average' was unfair.

26. Towards the end of the meeting Mr Auton pointed out that he was disabled by reason of his hands. There was no further discussion on the subject. Mr Ross moved to discussing alternative employment. He pointed out that there were 2 possible vacancies, one in quality assurance and the other in door hanging. He asked if Mr Auton was interested to which Mr Auton replied that he thought they were "taking the piss". He said he was unable to do either job as he was disabled.

27. On 17 August 2020 the Claimant was informed that he was being selected for redundancy. On 21 September he received his redundancy payment of £2,040.48. There is no issue that it has been correctly calculated.

28. Mr Auton appealed against the redundancy decision. The appeal was considered by Mr James. There are notes of the appeal meeting in the bundle which we accept are an accurate record. At the appeal meeting Mr Auton explained that he

could not do the alternative jobs he had been offered because of his disabilities being his hands and a prolapsed disc. He felt that the Respondent was being disingenuous in offering him jobs that he could not do. Following the meeting Mr James wrote to the Claimant dealing with the points he had raised. He dismissed the appeal and confirmed the decision to make the Claimant redundant.

29. As part of the process of disclosure the Respondent has disclosed a note which Mr James says records his thought at the time regarding the Claimant's appeal (paragraph 23 of his witness statement). The note is as follows:

"Draft brief reply note to Rob Auton.

Clive Ross has reviewed the scores and increased an area for him, but his score still come out as the most vulnerable of them. There are a number of categories to rate, rate not just volume, six categories. Quite separately from the scores the general view of supervision and workers in his area is that he [the Claimant] has a disruptive element that jeopardises total volume of the department. It is also their view that his focus is on the simplest items so that his volume appears higher."

30. On 15 January 2021 following ACAS early conciliation the Claimant presented his complaint to the Tribunal.

THE ISSUES

31. The issues are agreed as follows: -

Unfair Dismissal

31.1 What was the reason for the dismissal? Was it for redundancy or for some other substantial reason of a kind to justify the dismissal of an employee?

31.2 If the Respondent has established a potentially fair reason for dismissal was the decision to dismiss the Claimant reasonable, falling within the band of reasonable responses?

Disability Discrimination

31.3 Was the Claimant a disabled person within the meaning of section 6 Equality Act 2010 ("EA 2010")? The relevant period for determining disability is 20 July 2020 - 18 September 2020. The Claimant relies upon a prolapsed disc and chronic arthritis of both hands as the alleged disabilities.

Knowledge of Disability

31.4 Did the Respondent have knowledge of the disabilities for the purposes of both his disability discrimination complaints?

Discrimination Arising from Disability

31.5 Whether the Claimant has been treated unfavourably because of something arising in consequence of the Claimant's disability contrary to section 15 EA 2010?

The alleged unfavourable treatment complained of is dismissal only. The "somethings" relied on by the Claimant are the Claimant attaining lower scores in a redundancy selection exercise.

31.6 Whether the Respondent has shown that the unfavourable treatment if any was a proportionate means of achieving a legitimate aim? The legitimate aim relied on is the retention of the most experienced and skilled employees.

Disability Discrimination – failure to comply with the duty to make reasonable adjustments

31.7 Whether the Respondent applied a provision, criterion or practice ("PCP") and if so whether the PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The PCP relied on by the Claimant is the application of the Respondent's redundancy selection criteria.

31.8 The reasonable steps the Claimant alleges to have taken or ought to have been taken are: allowances for the Claimant's disability by changing the criteria or removal or Criteria 1, 5 and 6.

THE LAW

Relevant statutory provisions

32. Section 6 of EA 2010 sets out the definition of disability as follows:

"(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out day to day activities."

33. Section 15 of EA 2010 deals with discrimination arising from disability and states:

"(1) 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.

(2) Subsection (1) 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."

34. Sections 20 EA 2010 deals with the duty to make adjustments and states (so far as is relevant):

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

(2) The duty comprises the following three requirements.

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

35. Paragraph 20 of Schedule 8 of EA 2010 deals with knowledge of disability in relation to failure to make reasonable adjustments and states:

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) **…**that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

36. Section 1 of the Employment Rights Act 1996 ("ERA 1996") states:

"Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

(a) the particulars required by subsections (3) and (4) must be included in a single document; and

(b) the statement must be given not later than the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and worker

(b) the date when the employment began, and

(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work including any terms and conditions relating to—

(I) normal working hours,

(ii) the days of the week the worker is required to work, and

(iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.

(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay,

(iia) any other paid leave, and

(iii) pensions and pension schemes,

(e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,

(f) the title of the job which the worker is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(ga) any probationary period, including any conditions and its duration,

(h) either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,

(j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made…"

37. Section 38 of the Employment Act 2002 states:

"(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or section 4 (1) of the Employment Rights Act 1996, the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."

38. Section 139(1) of ERA 1996 sets out the definition of redundancy and states:

"(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, or

(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."

39. Section 98 of ERA 1996 deals with the relevant law on unfair dismissal and states:

"(1) 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.

(2) A reason falls within this subsection if it relates to:

[(a- b) not relevant]

(c) is that the employee was redundant

(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."

40. The leading authority on the law concerning discrimination arising from disability under section 15 EA 2010 is **Pnaiser v NHS England** [2016] IRLR 170**.** In that case Mrs Justice Simler P (as she then was) set out the relevant steps for the tribunal in determining such complaints. The relevant passages are as follows:

"(a) A Tribunal must first identify whether there was 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. An examination of the conscious or unconscious thought processes of A is likely to be required.... 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...

(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". That expression 'arising in consequence of' could describe a range of causal links... the causal link between the something that causes unfavourable treatment, and the disability may include more than one link...

(e) However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) .. the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear……that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

(i) ... it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to 'something' that caused the unfavourable treatment."

41. In the EAT case of **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090, it was explained that that there are "two distinct causative issues" which must be considered when determining whether the "somethings" alleged arose in consequence of the Claimant's disability. These are (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?

42. In relation to the complaints of a failure to make reasonable adjustments, the classic guidance was set out in the case of **Environment Agency v Rowan** [2008] IRLR 20 where the EAT said this:

"… an employment tribunal … must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the Claimant."

43. The relevant comparative exercise referred to in **Rowan** must be conducted by reference to the disadvantage caused by the PCP, that is with the non-disabled person who is subject to the PCP but not disadvantaged by the PCP (see: **Smith v Churchills Stairlifts Plc** [2006] IRLR 41).

44. The leading case on when a redundancy situation arises is **Murray v Foyle Meats** [1999] ICR 827. In that case the House of Lords explained that in determining whether someone is dismissed for redundancy, as opposed to some other reason, the tribunal must ask itself two questions: Does one of the state of affairs that is set out in section 139 ERA 1996 exist and if so, was the Claimant's dismissal wholly or mainly attributable to that state of affairs?

45. In relation to the fairness or reasonableness of the dismissal and in applying section 98(4) ERA 1996 we have borne in mind the guidance in **HSBC Bank plc v Madden** [2000] ICR 1283. In that case the Court of Appeal re-affirmed the guidance originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439, namely that: -

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right course to adopt.

(4) In many cases there is a Band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the Band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the Band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

46. The Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 reminded tribunals of the importance of not substituting their views for that of the employer. We have been conscious of the importance of not doing so.

47. In **Williams v Compair Maxam Ltd** [1982] 83, the EAT gave important guidance in redundancy selection cases. The guidance was as follows:

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

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

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

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

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

48. In **British Aerospace plc v Green** [1995] IRLR 433 the Court of Appeal reviewed the relevant authorities on selection for redundancy and said that in general an employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.

49. In **Eaton Ltd v King** (1995) IRLR 75, the EAT made it clear that it is sufficient that the employer shows that it had set up a good system of selection and that it was fairly administered. Ordinarily there is no need for the employer to justify the assessments on which the selection of redundancy was based.

CONCLUSIONS

The disability issue

50. We are satisfied that the Claimant has established that at the relevant time he suffered from an impairment to both of his hands which might be described as arthritis (though no label is necessary) and that the impairment satisfied the test of disability under section 6 EA 2010. There is no real issue as to impairment or its long-term nature. The disagreement on disability is purely on the issue of the relevant impact on the Claimant's ability to undertake normal day-to-day activities.

51. Whilst we accept that the Claimant has appeared to exaggerate some of the things he cannot do or only do with difficulty (such as how long he can hold up a cup

of tea) that should not detract from the overall seriousness of the effect of arthritis in his hands on his ability to carry out normal day to day activities. We accept that the Claimant found it difficult to undertake normal day-to-day activities such as getting dressed, not being able to cook for himself without assistance and the ability to hold and grip everyday items. The Guidance on matters to be taken into consideration in determining disability refers to peeling vegetables and opening jars as matters which would be relevant. The Claimant's inability to cook unaided is an implicit reference to these difficulties. We are therefore satisfied that the impairment in relation to the Claimant's hands would have had a substantial adverse effect on his ability to carry out normal day to day activities and he was thus a disabled person by reason of the impairment to his hands at the material times.

52. In relation to the prolapsed disc in his back (or back problems generally) the situation is less clear. The Claimant has indeed been prescribed pain killers but it is by no means certain they are specifically for his back. The Claimant has other conditions such as sciatica and problems with his legs for which he may well have been taking pain killers. The Claimant has not disclosed his full GP records and so the position is unclear. His back condition, unlike his hands, do not appear to have been the subject of any referral to a Consultant by his GP . There is some reference to back problems in his application for benefits from the Department of Work and Pensions but the documentation provided by the Claimant is incomplete and there is insufficient evidence to establish both an impairment and also that it was 'substantial', that is more than minor or trivial. The Claimant's impact statement says very little about his back condition and very little on how it affects his ability to carry out normal day to day activities. We therefore find that the Claimant has not discharged the legal burden on him to show that he was a disabled person by reason of his back condition.

Knowledge of disability

53. The test as to knowledge of disability is different depending on whether it relates to a section 15 EA 2010 complaint (discrimination arising from disability) or a section 20/21 EA 2010 (failure to comply with the duty to make reasonable adjustments) complaint. In relation to discrimination arising from disability, the requisite knowledge is what the employer actually knew or could reasonably be expected to know. In relation to knowledge for failure to make reasonable adjustments, the knowledge must be of the substantial disadvantage.

54. We are satisfied that the Respondent had knowledge of the claims of disability for the purposes of the discrimination arising from disability complaint for the following reasons:

54.1 In March 2020, the Claimant wrote a letter to the Respondent referring to himself as a disabled person. The Respondent merely filed the letter away rather than making any further enquiries. Somewhat dismissively, Mr James said he paid little attention to this letter as it just one amongst so many others he received at a time when the Respondent was under extraordinary pressures because of the pandemic. Even though the specific disability was not mentioned the Respondent was on notice that the Claimant regarded himself as disabled.

54.2 It is agreed that the Claimant told Mr Ross at the consultation meeting that he was disabled because of his hand. This was before any decision was made to make him redundant had been made. Mr Ross therefore had actual knowledge that the Claimant was disabled because that is what he was told by the Claimant.

54.3 Mr James said that he routinely visited the factory as part of his observations. He noticed that the Claimant wore a wrist support. He made no further enquiry as to why it was being worn despite the fact that the Claimant was undertaking manual work. Mr James did not ask the Claimant nor did he ask for any risk assessment to be performed despite the fact that the Company routinely undertakes risk assessments as is clear from the documents in the bundle. In conjunction with the all the other factors we are satisfied that Mr James had constructive knowledge of the disability of the Claimant's hands.

55. We do not however find that the Respondent had relevant knowledge for the purposes of the failure to make reasonable adjustments complaint. At no point was any substantial disadvantage identified by the Claimant.

Conclusions on the section 15 EA 2010 complaint

56. The only relevant criteria that can potentially apply to the section 15 complaint are the two elements of criteria one. The Claimant relies upon his sickness absence as the causative link.

57. We have been taken through the attendance records for the Claimant which were relevant from January 2019 to March 2020. Apart from a 5-day absence which was discounted, the Claimant was absent for another 5 days in 2019 on 27 - 29 March, 1 May and 11 July.

58. The Claimant is not sure why he was absent in March 2019. It is to his credit that he has been honest but the fact is that the Claimant cannot give any reliable evidence that it was to do with his disability. He said that if his hands ceased up he would go and see the Doctor who would give him more tablets thus he is unlikely to have taken time off work for an appointment. The Claimant has produced some patient records but they do not provide any evidence that the absences were to do with the Claimant's disability. In short there is no evidence of the Claimant being absent for disability-related reasons in the relevant period.

59. Furthermore, given that the Claimant was someone who did not normally take time off for absences in connection with his hands it is likely that he would have worked through any pain or difficulty because his hands were, on his evidence, a constant problem and he is likely to have done his best to simply cope. The Claimant has not therefore been penalised in the criteria scoring for anything to do with his disability. We therefore find that there is no causative link between the 'somethings' and the unfavourable treatment of dismissal. In those circumstances the complaint of discrimination arising from disability must be dismissed. It is unnecessary to consider any issue of 'justification', that whether dismissal was a a proportionate means of achieving a legitimate aim

Conclusions on the section 20/21 EA complaint

60. In the absence of relevant knowledge this complaint must of course be dismissed. In the event that we would have been required to consider the issue on the merits our findings are these. It is agreed that the Respondent's redundancy selection criteria was factually capable of amounting to a PCP and that the PCP was actually applied to the Claimant. The crucial issue is whether the PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

61. It cannot be said that the selection criteria placed those who were disabled in relation to a relevant matter at any particular disadvantage. We do not know the reasons why the Claimant was off sick or late for work on the occasions in question. Again, the Claimant has given his evidence honestly and accepted that he may have been late in arriving for work or leaving early. He does not dispute the fact that the statistical records and evidence are accurate in that respect. In our judgment there is no substantial disadvantage caused by the PCP because anyone else who was not disabled, but was late or absent, would have been similarly disadvantaged. This complaint would therefore have been dismissed on the merits in any event.

Conclusions on unfair dismissal

62. We are satisfied that the Respondent has established that redundancy was the reason for dismissal was for the purposes of section 98 ERA 1996. On the evidence before us there was a clear diminution in the work requirement caused by the Covid-19 pandemic which led to a reduction in demand for building and in turn for the Respondent's products. We accept the Respondent's evidence that this led to significant shortfall in work including the need for Glaziers. There was therefore a genuine redundancy situation within the meaning of section 139(1)(b) ERA 1996 in that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished or was expected to cease or diminish. Applying the guidance given in **Murray v Foyle Meats**, we are satisfied that the state of affairs identified in section 139 ERA 1996 existed and the Claimant's dismissal was wholly or mainly attributable to that state of affairs. The Respondent has discharged its obligation to show a potentially fair reason under section 98(1) ERA 1996. There is no need therefore to consider whether dismissal was for some other substantial reason.

63. We have gone on to consider whether the decision to dismiss the Claimant was fair having regard to provision of section 98(4) ERA 1996. In coming to our decision we have been careful not to substitute our views for that of the Respondent and have borne in mind the guidance in **Madden.** In that respect we make no criticism of the Respondent for not calling Mr Gibson to give evidence. Had he done so there was a risk of us substituting our views for that of one of the assessors. What is important in unfair dismissal cases is for the Tribunal to view the matter through the eyes of the dismissing officer and that we have been able to do.

64. We also bear in mind the guidance given in **British Aerospace v Green** and **King v Eaton**. What is needed is to take a broad view of the fairness of the criteria and not to require the Respondent to justify the scoring.

65. Whilst selection criteria should ideally generally focus on objective factors, the economic and commercial reality is that there is bound to be some subjective element involved. There is nothing inherently unreasonable as to the inclusion of some subjective criteria provided, as **Compair Maxam** makes clear, the decision is not wholly subjective or largely dependant on one person's personal views.

66. There is no issue as to warning the Claimant of impending redundancies. The details of the criteria were sent out in advance and no comments were received. There was consultation after the initial scoring. Upon representations being made the score as to one criterion was adjusted. The scoring was not dependant solely on the opinion of one person alone. The majority of the scores were cross-referenced to objective evidence. It is quite clear that the time and attendance factor was calculated by reference to independent evidence as was the days late/left early category. The discipline criterion did not detrimentally affect the Claimant as he received maximum points. In relation to units per day these were based upon empirical evidence. In relation to glazing skills whilst the Claimant could have undertaken multi-bar windows and perhaps other work the fact is he did not and so he was correctly scored. The Claimant was offered alternative employment which was not accepted.

67. It is of course important that selection criteria must not be used as a pretext to get rid of unwanted employees who are not liked for one reason or another and where their selection has nothing to do with their performance, capacity, skills or any other legitimate reason.

68. In that respect that we have considered carefully the note that the Respondent has disclosed. The views set out in that note are highly unfavourable and prejudicial to the Claimant. They have nothing to do with his abilities, skills or performance. The reason as to why the Claimant was considered a disruptive element was never investigated and it is not clear why such a view was held. We accept the evidence of Miss Auton that Mr Ross regarded the Claimant as 'a bit of a problem'. We accept the Claimant's evidence that he was regularly asking about manual handling training and complaining about the lack of suitable toilets on the premises. These views must have been known and shared across management including Mr Gibson and Mr Ross. It is not credible that managers and supervisors would not have discussed such matters. Both Mr Ross and Mr James believed that the Claimant hogged the low-level single bar work on which it was easier to attain bonuses. At times it was felt by management that this was to the detriment of others. But that is all the work he was given so it is difficult to see why it was a problem. In relation to the subjective elements of the criteria the Claimant was therefore more likely than not to have been marked unfairly because of such views. No reasonable employer would have taken such remarks at face value without further investigation or relied on them. Those who held such views should not have been involved in the process whether such views belonged to Mr James, Mr Ross or Mr Gibson. As such the decision to dismiss, based on the subjective elements of the criteria, was therefore unreasonable. To that extent the decision fell outside the range of reasonable responses. The decision to dismiss was procedurally unfair under section 98(4) ERA 1996.

Polkey

69. We have gone on to consider the 'Polkey' factor. A 'Polkey reduction' is the phrase used in unfair dismissal cases to describe the reduction in any award for loss to reflect the chance that the individual would or might have been dismissed fairly in any event (see: **Polkey v AE Dayton Services Ltd** [1987] IRLR 503). It only applies to the compensatory award element of a claim. The Claimant has already received a redundancy payment which extinguishes the basic award and thus it is only the compensatory award that is in issue.

70. The subjective element of the marking only applies to criteria 6 and 7. If one excludes those offending criteria completely the Claimant would still have been amongst the lowest two candidates. The subjective criteria, on which the Claimant may have been marked unfairly, did not therefore ultimately make any difference. It may be arguable that the Claimant should have received higher marks and if one adopts that approach it is possible he may not have been the lowest scorer and thus avoided redundancy. However to view the matter any other way would involve a re-scoring exercise which in our view would involve substituting views for the Respondent. We therefore prefer to exclude or excise the offending criteria and consider what the position was. Because the Claimant would have been selected anyway he has not suffered any loss. There shall therefore be no compensatory award by reason of the **Polkey** factor.

Section 1 ERA 1996 and section 38 Employment Act 2002

71. Section 1 ERA 1996 provides that where a worker begins employment with an employer the employer shall give to the worker a written statement of particulars of employment. What is required is set out in the remainder of the section which is set out above

72. Upon or shortly after commencement of employment the Claimant was given a letter by the Respondent. This letter set out some of his terms of employment but did not comply fully with the provisions of section 1 ERA 1996.

73. We are satisfied that the Company Handbook (which may have fulfilled the requirement) referred to at this hearing was not given to him either. He *has* signed for a health and safety book but in our view that is a different document. There is no signature for receipt of any Company Handbook nor is there any record or evidence that it was ever given to him.

74. The requirements of section 1 ERA 1996 have not therefore in our view been complied with. We are also satisfied that it is appropriate to make an award under section 38 Employment Act 2002 which states that an award *mus*t be made where upon a successful claim under any of the jurisdictions listed in schedule 5 of the Act it becomes evident that the employer was in breach of its duty to provide full and accurate particulars under section 1 ERA 1996. Unfair dismissal is one of those jurisdictions. There is no need for such a claim to be formally made or pleaded. It can and must be considered by the Tribunal of its own motion even if not set out in a schedule of loss.

75. The Respondent might be, as Mr James contends, a small to medium-sized business but it has been operating for some years and had some 80 employees at the relevant time. There were more employees in years gone by. There is no reasonable excuse for the failure to have proper procedures and documentation in place and no exceptional circumstances as to why an order under section 38 should not be made.

76. Accordingly, we consider that an award of 4 weeks pay as compensation is appropriate. The Claimant worked 39 hours a week at £8.21 an hour. His gross weekly pay was therefore £321.19. The award of 4 weeks' pay comes to £1280.76.

Employment Judge Ahmed

Date: 8 August 2022

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