EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Morgan**		
Respondent:	**Bergstrom Europe Limited**		
Heard at:	**Cardiff**	**On:**	**9, 10 and 11 August 2022**
Before:	**Employment Judge**	**R Havard**	
	Members:	**Mrs C Izzard**	
		Mr R Mead	

Representation:
Claimant: In person
Respondent: Mr M Huggett, Carbon Law, Solicitors

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that the Claimant's claim of unfair dismissal is not well-founded and is dismissed;

2. The unanimous judgment of the Tribunal is that the Claimant's claim of direct discrimination is not well-founded and is dismissed;

3. The unanimous judgment of the Tribunal is that the Claimant's claim of discrimination arising from disability is not well-founded and is dismissed

4. The unanimous judgment of the Tribunal is that the Claimant's claim for failure to make reasonable adjustments is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form dated 13 January 2021, the Claimant indicated that he wished to pursue claims of unfair dismissal and discrimination on the grounds of disability. The Respondent lodged a response in which it disputed the claims pursued by the Claimant.

2. At a preliminary hearing conducted by video on 16 July 2021 before Employment Judge Moore, in the course of the preliminary hearing, the Claimant's claims were clarified and included: a claim for unfair dismissal; a claim of direct discrimination (section 13 Equality Act 2010 ("EqA") discrimination arising from disability

(section 15 EqA), and a claim that the Respondent failed to make reasonable adjustments in respect of his disability (section 20 EqA). It was directed that, in relation to the draft list of issues which had been prepared, the Claimant had to provide further particulars of all of the "unfavourable treatment" on which he relied in pursuit of his section 15 claim and the Respondent would then have leave to file an amended response addressing the complaints as clarified.

3. The Claimant provided the additional information and the Respondent duly filed and served an amended response in accordance with Judge Moore's direction.

4. In advance of this hearing, there was correspondence to suggest that the Claimant intended to be represented by Ms Guscott of Watkin and Gunn, Solicitors. However, the Claimant stated that, due to an administrative error and also issues with regard to funding by an insurer, the Claimant was unrepresented. It was understood that representation may become available to the Claimant on the second day. The Tribunal stated that, in accordance with the overriding objective, it would consider adjourning the hearing to commence on the following day, stating that the case involved areas of law which could be complex and that it would not wish the Claimant to be prejudiced if the issue of representation was capable of being resolved. The Tribunal intended to take some time to read the documents on the first morning and the time in the afternoon that was lost could be made up in part by starting earlier on the remaining days. Despite this proposal, the Claimant maintained that he wished to represent himself. He had prepared the Bundle and was ready to proceed.

Issues

5. In the course of the hearing, a discussion was held with the parties regarding the issues set out at pages 9–13 of the decision of 16 July 2021 (pages 45–49) there was a very substantial element of agreement between the Claimant and Mr Huggett but that paragraphs 5.1.1 and 5.3 needed completion. Mr Huggett confirmed that he would discuss the matter with the Claimant.

6. Subsequently, and following further discussion, the issues set out below were agreed.

7. The agreed issues are:

1. **Unfair dismissal**

1.1 It is accepted that the Claimant was dismissed?

1.2 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy. The Claimant disputes there was a genuine redundancy situation and says it was a sham.

1.3 If the reason was redundancy, 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, in particular, whether:

1.3.1 The Respondent adequately warned and consulted the Claimant;

1.3.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

1.3.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

1.3.4 Dismissal was within the range of reasonable responses.

2. **Remedy for unfair dismissal**

2.1 Does the Claimant wish to be reinstated to their previous employment?

2.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the Claimant?

2.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.6.3 If not, for what period of loss should the Claimant be compensated?

2.6.4 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?

2.6.5 If so, should the Claimant's compensation be reduced? By how much?

2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it ?

2.6.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%? 2.6.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

2.6.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

2.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

2.7 What basic award is payable to the Claimant, if any?

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

3. **Disability**

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

3.1.1 Did he have a physical or mental impairment: Ankylosing Spondylitis.

3.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

3.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

3.1.5.2 if not, were they likely to recur?

4. **Direct disability discrimination (Equality Act 2010 section 13)**

4.1 Did the Respondent do the following things:

4.1.1 Dismiss the Claimant

4.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

4.3 If so, was it because of disability?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the Respondent treat the Claimant unfavourably by:

5.1.1 isolating the Claimant form his team, allocating his tasks to other staff, dismissing the Claimant.

5.2 Did the following things arise in consequence of the Claimant's disability:

5.2.1 The Claimant's absence from work as a result of him being required to shield due to his disability?

5.3 Was the unfavourable treatment because of any of those things? / Did the Respondent dismiss the Claimant because of him having to shield?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

5.4.1 Respondent to set out

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the Claimant and the Respondent be balanced?

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

6. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

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

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

6.2.1 Requiring someone who was shielding to stay furloughed;

6.2.2 Requiring employees to physically attend work

6.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was not permitted to attend work and undertake his duties which led to his selection for redundancy?

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

6.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

6.5.1 Permitting the Claimant to come off his medication;

6.5.2 Permit the Claimant to work remotely.

6.6 Was it reasonable for the Respondent to have to take those steps and when?

6.7 Did the Respondent fail to take those steps?

7. **Remedy for discrimination**

7.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the Claimant?

7.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the Claimant be compensated?

7.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

7.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?

Evidence

8. The Claimant gave evidence on his own behalf. Mr Steven Estebanez, a Quality Engineer employed by the Respondent, also gave evidence on behalf of the Claimant.

9. The Respondent called:

i. Mr Robert Thrupp, Quality and Operations Director;

ii. Ms Hannah Thomas, Human Resources Manager;

iii. Mr Nicholas Wilkinson, Managing Director.

10. Those who gave oral evidence had provided written witness statements.

11. The statement of Mr Estebanez is included within the bundle (page 214).

12. An agreed bundle had been prepared and submitted together with an index. It ran to 274 pages. The only additional document to be submitted in the course of the hearing was a Training Certificate in respect of the Claimant relating to a course attended by the Claimant on 7 and 8 July 2020. This was numbered page 275.

13. Unless otherwise stated, any page references in this judgment refer to pages in the bundle.

Submissions

14. Both the Claimant and Mr Huggett provided written submissions which they supplemented with oral submissions at the conclusion of the evidence.

Findings of Fact

15. The Respondent is a supplier of climate control systems to other manufacturers for installation in their vehicles. It is owned by Bergstrom Incorporated which is based in Rockford, Illinois in the United States. The Company has been established at its site in Ystrad Mynach in its current form since 2003.

16. In January 2020, there were 147 direct and indirect employees working at the site. There were also two people employed in a small Business Unit based in Gloucester.

17. The Respondent is divided into various departments such as: Sales; Production; Purchasing; Fabrication and, most relevant for the purposes of this claim, Quality.

18. In April 2010, Mr Robert Thrupp commenced his employment with the Respondent. Initially, he joined the Company as Quality Manager which was a position he held until November 2014 when he became Quality and Operations Director, a position he continues to hold.

19. From November 2014, Mr Thrupp managed the Quality team as well as being responsible for operations at Ystrad Mynach.

20. In or about 2016, Mr Thrupp's role developed further in that he became responsible for providing operational support to Bergstrom's facility in Spain. The name of the Spanish facility is Dirna Bergstrom.

21. As a result of his involvement at Dirna Bergstrom, it was concluded that it would be appropriate to appoint a Quality Manager at Ystrad Mynach as Mr Thrupp was unable to continue with his previous role as well as his involvement at Dirna Bergstrom. The role was advertised and an individual was appointed as Quality Manager on 3 April 2017. However, that person did not prove to be successful in the role and he left the Respondent on 23 November 2017.

22. The post was re-advertised and it was at this stage that the Claimant was successful in an application for the job; he commenced his employment with the Respondent on 30

April 2018. In his ET1, the Claimant had indicated that his employment had commenced on 4 May 2018 but he accepted that was an error.

23. The Claimant entered a contract of employment (pages 95-105) and agreed to work in accordance with a "Job Role Definition" for the Quality Manager dated February 2018 (pages 92-93). He was directly responsible for five individuals to include: a Senior Quality Engineer; a Quality Engineer, and three Quality Technicians.

24. In an organisational structure issued in January 2020 (page 107), it shows the Claimant as Quality Manager and the members of his team are: Tim Whitehead, Senior Quality Engineer; Stephen Estebanez, Quality Engineer; Steve Priest, Quality and Metrology Engineer; Jeff Evans, Quality Technician; Dewi Price, Quality Technician and Leon Richards, Quality Trainee.

25. The Job Role Definition stated that the general purpose of the role was:

"*To lead and direct the strategic development and operational management of the quality function within the Company.*"

26. The Claimant's main responsibilities are set out under a series of headings, namely: Strategy; Cultural Change; Business Management System; Customer Relationships; Warranties; Supplier Development; Measurement, and Development of People.

27. When the Claimant was interviewed for the role, he informed Ms Helen Thomas and Mr Thrupp of an arthritic condition for which he took medication. Indeed, the Respondent accepted that the Claimant's condition of "Ankylosing Spondylitis" was a disability within the meaning of the Equality Act and that they knew of that disability throughout the material time. The condition is such that the medication prescribed is immunosuppressant and therefore made, and makes, the Claimant more vulnerable to infection.

28. Both Mr Thrupp and Mr Wilkinson confirmed that there had never been any concerns with regard to the Claimant's performance in the role which was always acceptable, as was his attendance record.

29. The Claimant confirmed that the Respondent reacted positively to the adjustments that were required to accommodate his disability. For example, he informed the Respondent that he could not sit for long periods and he would have to make sure that he was able to stand and walk around at regular intervals. The Respondent also carried out a Display Screen Equipment ("DSE") risk assessment and provided the Claimant with an appropriate chair and computer screen set-up.

30. Based on the evidence, which was largely non-contentious, the Tribunal found that the Respondent took the necessary steps to ensure that the Claimant was able to fulfil his role. Further, as stated, the Tribunal found that the Claimant was a competent Quality Manager, his attendance record was good, and he was well-regarded not only by his Line Managers, to include Mr Thrupp and Mr Wilkinson, but also by his team members. The Tribunal also found that the Claimant provided support to his team members and facilitated the development of the skills they required to undertake their roles. The Claimant enjoyed his role and his relationships with Mr Thrupp and Mr Wilkinson were positive and professional.

31. Indeed, Mr Estebanez, who the Tribunal found to be a credible witness, stated that, prior to the pandemic in 2020, he considered that the department was well-run, there was a

good spirit in the team, and everybody got on well. Mr Estebanez confirmed that when the Claimant was in work prior to the pandemic, he presented a focal point for the team.

32. Mr Estebanez described his role as Quality Engineer. He indicated that, initially, he was responsible for supplier quality concerns and he would request corrective actions when necessary. He would produce supplier quality monthly reports. From March 2021, he acquired a "goods inwards" responsibility which meant that a team member would report to him. He then acquired customer accounts for which he was responsible which meant that, if there were any production issues, the customers would come to him for such issues to be resolved. He was the only one responsible on the supplier's side. The Senior Quality Engineer would be responsible for a number of customer accounts.

33. At the beginning of 2019, as a result of a further reorganisation, Mr Thrupp was appointed as Joint Managing Director of the site at Ystrad Mynach with Mr Nicholas Wilkinson. This meant that Mr Thrupp would continue with his responsibilities for quality and operations but also have reporting duties to the US.

34. In the course of 2019, Mr Thrupp's involvement in providing operational support and oversight of the activities at Dirna Bergstrom diminished until it came to an end at the end of 2019. The Claimant suggested that the level of engagement of Mr Thrupp in the Spanish operation was overstated and exaggerated. However, even though Mr Thrupp was initially reluctant to provide an estimation of the percentage of his time which was taken up at Dirna Bergstrom, he believed that it would have amounted to 15-20% of his time. Having listened to his evidence, the Tribunal found Mr Thrupp to be a credible witness. He remained consistent in his account and did not seek to embellish or exaggerate his outline of events. The Tribunal concluded that Mr Thrupp was in the best position to assess how much time he would have had to have committed to Dirna Bergstrom and therefore accepted his estimation. Therefore, the fact that, from the end of 2019, he no longer had an involvement with Dirna Bergstrom meant that this increased his capacity to undertake his role at Ystrad Mynach.

35. In February and March 2020, there was a growing realisation of the seriousness of COVID-19 and the fact that it was defined as a pandemic. Prior to the announcement of the lockdown which took effect on 23 March 2020, the Claimant stated, and the Tribunal found, that arrangements were being made for an unofficial rota to be set up for people to be working on site.

36. Following the announcement on 20 March 2020 of the lockdown to take effect from 23 March 2020, an official rota was set up. However, the Tribunal found that this was a period of great uncertainty and the position with regard to the Respondent's business was dynamic, with the management having to react quickly to daily guidance and instruction from HM Government.

37. Inevitably, due to the impact of the lockdown, the effect was to lead to a dramatic decline in business activity. The Respondent experienced a dramatic and significant reduction in its order book with many of its main customers temporarily suspending their operations. Furthermore, and inevitably, the lockdown led to a similar impact on the Respondent's suppliers.

38. The only customer of the Respondent to continue to operate was an American customer who required an ongoing supply of products for installation in buses, such products being produced in Ystrad Mynach. The customer was considered by the US Government to provide an essential service and would be continuing to operate through the pandemic.

39. The Government then announced the introduction of the Coronavirus Job Retention Scheme i.e. the furlough scheme. As at the end of March 2020, the Respondent employed 146 at Ystrad Mynach. Of that number, 98 were put on furlough immediately, leaving 48 employees to support the ongoing needs of the business.

40. All but one of the Quality Department, to include the Claimant, were put on immediate furlough leave. The one person who was in the Quality team who remained was Dewi Price, the Goods Inwards Inspector.

41. Prior to the furlough scheme being announced, there were exchanges between Mr Thrupp and the Claimant with regard to members of the Quality Department remaining at home as the levels of work did not justify their attendance.

42. Furlough agreements were sent out to employees setting out the basis on which the employees on furlough would continue to be paid. The Claimant signed his furlough agreement on 2 April 2020 (pages 125 – 129).

43. All employees who were not placed on furlough agreed to work a four-day week with pay reduced to 80% of their normal levels, the same basis of payment being made to those on furlough without a cap on the salary at the Government prescribed level of £2,500.

44. On 3 April 2020, the Claimant called Mr Thrupp to inform him that he had been advised by his consultant that he was at increased risk of infection and needed to isolate, or "shield", for 12 weeks and that a letter to confirm the position had been sent to him.

45. That letter was sent by the Claimant to the Respondent by email on 6 April 2020 although in a form which was very difficult for Hannah Thomas to read. Nevertheless, on 6 April 2020, Ms Thomas sent an email to the Claimant informing him that he would remain on furlough until 31 May 2020 which was when the initial Job Retention Scheme was planned to come to an end and that, if the Claimant was required for medical reasons to refrain from attending work following that date, it would have to be recorded as sickness absence.

46. The Claimant stated, and the Tribunal found, that he was required to shield for a period of 12 weeks which would run to 16 August 2020.

47. Consequently, the Tribunal found that the Respondent had placed the Claimant on furlough before either the Claimant or the Respondent were aware of his need to shield due to his medical condition.

48. From in or about May 2020 onwards, the Respondent monitored the activity levels within the business together with Government advice and instruction. The Tribunal accepted the time line provided by Hannah Thomas of steps that were taken to reintroduce employees back to the workplace from the end of May 2020 onwards. This chronology was not challenged by the Claimant who, very fairly, accepted that it was appropriate for employees, to include members of the Quality Department, to return to work on a gradual basis.

49. For example, by the end of May 2020, the Respondent had returned 57 employees from furlough, predominantly in production, cleaning and maintenance staff. Only seven were from support functions, to include Quality.

50. It was also in May 2020 that Corporate Headquarters in the US announced a global company restructure, the revised structure at Ystrad Mynach being set out in a memo from the Chief Executive dated 21 May 2020 (pages 134-135).

51. It had been decided that Mr Nicholas Wilkinson would assume the role of sole Managing Director of the Respondent, reporting to the Chief Executive in the US and that he would have responsibility for all aspects of the business in Wales. Reporting to Mr Wilkinson would be, amongst others, Rob Thrupp in his role as Quality and Operations Director. In other words, Mr Thrupp was no longer joint Managing Director.

52. As a consequence of this reorganisation, and due to Mr Thrupp no longer having responsibility for Dirna Bergstrom, it meant that the situation reverted to the same that existed in 2016 when, amongst operational responsibilities, Mr Thrupp also had responsibility for managing the Quality Department and there was no separate role of Quality Manager.

53. From May 2020 onwards, Ms Thomas would discuss with Mr Thrupp and other managers the requirements for staffing levels in their respective departments taking account of the increased level of activity.

54. Following such discussions, on 26 May 2020, Ms Thomas sent an email to the Senior Quality Engineer, Tim Whitehead, and also Jeff Evans of the Quality Department informing them that they were required to return to work, and thereby come off the furlough scheme, with effect from 1 June 2020 due to increasing customer demand (page 141).

55. During June 2020, the same discussions were taking place between Hannah Thomas and the management of the Respondent which led to Leon Richards returning full-time to the Quality Department on 6 July 2020.

56. Steve Priest, the Quality and Metrology Engineer, was required to return to work following the normal and planned summer shutdown period in August 2020 (pages 144 – 150) but on a flexible furlough arrangement as he was not required to return on a full-time basis.

57. Finally, Stephen Estebanez was requested to return on a full-time basis in September 2020.

58. Whilst this was disputed by the Claimant, the Tribunal was satisfied that, following the reorganisation in May 2020 when Mr Thrupp's role as joint Managing Director came to an end and he reverted solely to the role of Quality and Operations Director, it led to him having additional capacity.

59. The Tribunal also found that certain of the tasks originally undertaken by the Claimant had been reallocated to members of the Quality Department as and when they returned from furlough and that such tasks had been absorbed into their day-to-day roles. For example, in relation to the business management system which formed part of the Claimant's job role definition, the Claimant suggested that this formed very much part of his role. However, the Tribunal accepted the evidence of Mr Thrupp and found that, whether or not that formed part of the Quality Manager's job role definition, it had been absorbed by the Senior Quality Engineer, Tim Whitehead, who had a previous involvement with the development of that system.

60. Furthermore, certain customers for which the Claimant had responsibility had been reallocated to other team members.

61. The Tribunal found that the Claimant continued to communicate with members of the Quality Department. The Tribunal had been shown exchanges of messages between them. The Tribunal found that the members of the team were clearly busy and there was an expectation that the Claimant would return. Indeed, Mr Estebanez confirmed that this was so and there was an assumption that the reason that the Claimant had not returned to work was as a consequence of him having to shield.

62. As stated, the requirement for the Claimant to shield continued until 16 August 2020. However, when the Claimant was in communication with the Respondent about a return to work pattern after that date, Mr Thrupp concluded that there was no requirement for the Claimant to return as there was no work for him to undertake and he therefore remained on furlough.

63. The Tribunal found that the decision made by Mr Thrupp that the Claimant should not return to work had nothing to do with the Claimant having to shield. It was due to Mr Thrupp's decision that there was no business requirement for the Claimant to return to work.

64. The Claimant maintained that he felt isolated having to stay at home and remain on furlough. However, in an email to the Claimant on 26 May 2020 (page 139) it was confirmed by Mr Thrupp that the Respondent was able to slowly bring people back into the business but stated as follows:

> "*Yes we are at a point where selective, indirect roles are becoming more necessary, and I have requested that Jeff and Tim return to work to support these requirements, I presume that Tim has advised you so.*
>
> *I have to remind you that you are on furlough leave, and accordingly you should not actively conduct yourself in any work related matters. Therefore I will not consult or liaise with you regarding any return to work for members of your department, as the business requires.*
>
> *Of course you can liaise with colleagues on a social basis, but you must not be coordinating any work related matters with them. This would be a breach of the furlough arrangement and would jeopardise our application to the Government support programme. Simply forwarding emails on, as you have done, is permissible.*
>
> *I would add, that if you are being asked questions by your team relating to work arrangements, that they contact Hannah or myself directly.*"

65. The Claimant understandably felt a sense of isolation from his role as Quality Manager but the Tribunal found that this was a requirement of the furlough scheme, namely that those individuals on furlough should not participate in work-related matters. However, Mr Thrupp made it clear that the Claimant was able to communicate with his colleagues in the Quality Department on a social basis. It is evident that he did so and the Tribunal found, on the balance of probabilities, that the assumptions made by members of the Quality Department, to include Mr Estebanez, regarding the reason for the Claimant not returning work, namely having to shield, were based on information provided to them by the Claimant.

66. As stated, the Tribunal found that the decision made by the Respondent that the Claimant should not return to work, and that he should remain on furlough, was based on a conclusion reached by Mr Thrupp that there was no role for the Claimant to fulfil if he were to return. Therefore, the Tribunal found that the Respondent's decision did not

relate to the Claimant's requirement to shield. This must be so in that the Claimant was placed on furlough before he, and thereby the Respondent, became aware that he was required to shield and, having reached the end of the period during which he was required to shield, the Claimant continued to be furloughed.

67. The Tribunal found that, due to the reorganisation and Mr Thrupp reverting to the role that he held in 2016 as Quality and Operational Director, he had greater capacity to manage and oversee the day-to-day functions of the Quality Department.

68. Furthermore, and no doubt with the support of the Claimant, members of the Quality Department had developed additional skills in their roles enabling them to take on more tasks, such as customer facing roles, which meant that they required less management and supervision.

69. Mr Estebanez stated that the Claimant provided a focal point for the Quality Department. Mr Thrupp confirmed that he would visit the Quality Department; he would return to the Department perhaps once a day to make sure that everything was being managed properly. He accepted that on occasion he would not be able to visit on a particular day but his office was only metres away from the Department and he was also contactable by phone and that periodically he would be contacted by members of the team. He confirmed, and the Tribunal found, that, whilst everyone was busy, the team was capable of carrying out the work, to include the additional tasks allocated to them, to the extent that there was no need for anyone to work overtime and all was achieved within their core hours.

70. At no stage had Mr Thrupp received any complaints about the way that the team was conducting its activities and ordinarily, it was only if an issue was particularly serious that it would be escalated to him.

71. Importantly, Mr Estebanez confirmed that the Quality Department was functioning. Since 2020, it had not proved necessary to appoint a person to fulfil the role solely as Quality Manager.

72. As a result of ongoing discussions, Ms Thomas was informed by Mr Thrupp that he had spoken with the Claimant by telephone on 5 October 2020 to inform him that his position had been identified as being at risk of redundancy.

73. By a letter dated 7 October 2020, the Claimant was invited to his first consultation meeting (page 156 – 157).

74. The letter explains the reason why the position of Quality Manager was at risk and the potential outcomes together with alternative positions of employment.

75. At the first consultation meeting on 13 October 2020, the Claimant was accompanied by Mr Estebanez and Mr Thrupp ran the meeting with Ms Thomas taking a note of what was said (pages 160-163).

76. The process was explained to him and the Claimant continued to profess his lack of understanding why his position was at risk of redundancy and that he considered himself to be a key asset to the Company. The explanation provided by Mr Thrupp was that, over the past six months, it had been identified that the role of Quality Manager was no longer essential. The Claimant was given every opportunity to explain why he considered the role was still necessary and it was clear that he was extremely aggrieved about the whole situation.

77. He dismissed the prospect of alternative employment offered to him as being far too junior.

78. On the same day as the second consultation, namely 21 October 2020, Mr Wilkinson sent a memorandum to all employees thanking everyone for their continued support and vigilance whilst working through the uncertain and difficult time and also warning of the ensuing two week 'firebreak' imposed by the Welsh Government from 23 October 2020 representing effectively a further lockdown (pages 168-169).

79. On 21 October 2020, the second consultation meeting took place and the same people attended (pages 170-174).

80. At that consultation, the Claimant was aggressive in his tone. Indeed, in the course of this hearing, he apologised to Ms Thomas for his conduct. The purpose of the second consultation was to discuss further the view that the role of Quality Manager may be redundant and to give everyone an opportunity to discuss whether this was so and to consider the representations being made. It was confirmed that no final decision had been taken. However, the Claimant responded by stating that there was no real point in the process as the decision had already been made.

81. Mr Thrupp summarised once again the basis on which it was concluded that the role of Quality Manager was at risk of redundancy and the Claimant was given every opportunity to put his case for the continuance of the role and the Claimant was also able to challenge Mr Thrupp and his ongoing role as Manager of the Quality Department. The Claimant maintained that it needed day-to-day support and that due to the site being back to full production, there had been a need for the team to be supported and managed. The Claimant was able to question Mr Thrupp about various projects and tasks being undertaken by the Quality Department in his absence. Again, the Claimant became aggressive towards Mr Thrupp saying that he should not have to justify himself to Mr Thrupp and he felt he was being unfairly treated. Mr Thrupp continued to ask the Claimant if there were any other considerations or representations that he would wish to make and the Claimant said that he had nothing to add.

82. A third consultation took place on 30 October 2020 (pages 177-179). Again, the discussions that had taken place at the previous two consultations were summarised and the Claimant was asked whether he wished to contribute. However, the decision had been taken that the role of Quality Manager was now redundant and that the management of the Quality team would fall within the role of the Quality and Operations Director.

83. Further, it was confirmed that, as it had not been possible to identify any suitable alternative roles, the Claimant's employment was terminated on the basis of redundancy.

84. On 30 October 2020, the Claimant was sent a letter by Mr Thrupp (pages 180-181) confirming the decision that had been reached and that the role of Quality Manager had become redundant and that certain duties of such a position could be effectively distributed amongst the Quality team with Mr Thrupp managing the team going forward.

85. On 4 November 2020, the Claimant sent a letter of appeal to Mr Wilkinson (pages 186 - 187). Whilst in that letter the Claimant challenged the correctness of the legal process followed by the Respondent, in his evidence to the Tribunal, he accepted that the process had been fair.

86. He maintained that the decision to make him redundant was discriminatory. He contended that he was the only employee who was shielding who had been made redundant and that he was kept on furlough, after the shielding period ended, for no good reason.

87. The appeal was heard by Mr Nicholas Wilkinson. He was transparent in his written statement that Mr Thrupp had advised him, before the consultation process began, that he was considering placing the role of Quality Manager at risk and Mr Wilkinson confirmed that he played no part in the decision but understood the rationale for that process being followed. The Tribunal listened carefully to Mr Wilkinson when he gave his evidence. He provided that evidence, and answered questions put to him quite properly by the Claimant, in a balanced and professional manner.

88. The Tribunal noted that Mr Wilkinson was aware that Mr Thrupp was reviewing not only the Quality Department but also all operations. Mr Wilkinson had read all the notes of the consultation before the appeal hearing and the Tribunal accepted his evidence and found that he was "happy to be convinced that there was a role" and that he was "completely open to things, I did not predetermine my decision, and was quite happy to reverse the decision if I was persuaded that the role continued to exist".

89. However, the meeting illustrated to Mr Wilkinson that the Claimant was not interested in trying to persuade him. Indeed, in the notes of the meeting (pages 196-199), it stated that the Claimant indicated he was not willing to work for the Respondent in the future, but was going through the appeal process so that he could pursue a claim.

90. In the course of his evidence, the Claimant accepted that the process followed by the Respondent was a fair one. However, he considered that the consultation was effectively a formality and that the decision to make him redundant had been made before the first consultation meeting.

91. It was also suggested by the Claimant that he was the only person in the Respondent who had been made redundant but Ms Thomas confirmed, and the Tribunal found, that the two persons working at the Business Unit in Gloucester had also been made redundant when the office was closed.

The Law

92. The legal principles applied were not disputed. There are a number of concepts in the legislative framework that have been considered and applied by the Tribunal and also those to which we have been taken, primarily by Mr Huggett, and which have been applied by the Tribunal.

Unfair dismissal

93. The law relating to unfair dismissal is set out in section 98 of ERA.

> "(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 –

…….
(c) is that the employee was redundant;"

94. The definition of redundancy is set out in s.139 Employment Rights Act 1996 ("ERA"):

(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.*

95. The leading case on establishing whether an employee has been dismissed by reason of redundancy is *Safeway Stores plc v Burrell* [1997] IRLR 200 (EAT) (approved by the House of Lords in *Murray and another v Foyle Meats Ltd (Northern Ireland)* [1999] IRLR 562). The EAT formulated a 3-stage test for applying s.139 ERA:

a. Was the employee dismissed? If so,

b. Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one of the other economic states of affairs in s.139(1) exist)? If so,

c. Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2?

96. If the answer at all 3 stages is "yes", there will be a redundancy dismissal.

97. When considering a "diminished requirements" redundancy, the starting point is the requirements of the business. This is a commercial judgment on the part of those running the business about the priorities of the business and about which kind of work (or employee) has become surplus to requirements. The law does not interfere with an employer's freedom to make such business decisions, and an employer is not required to justify its reason for making the redundancies. Provided that a tribunal is satisfied that redundancy is the genuine reason for a dismissal, it will not look behind the facts to see how the redundancy situation arose: *Moon v Homeworthy Furniture* [1976] IRLR 298.

98. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

"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) 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 shall be determined in accordance with equity and the substantial merits of the case."

99. Procedural fairness is an integral part of the reasonableness test in section 98(4) of ERA. In redundancy dismissals "the employer will not normally 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 minimise redundancy by deployment within his own organisation" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL).

100. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another reasonable employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "lay within the range of conduct which a reasonable employer could have adopted" (Williams v Compair Maxam Ltd [1982] ICR 156).

101. It is generally for the employer to decide on an appropriate pool for selection. If the employer genuinely applied its mind to the question of setting an appropriate pool, the tribunal should be slow to interfere with the employer's choice of the pool. However, the tribunal should still examine the question whether the choice of the pool was within the range of reasonable responses available to a reasonable employer in the circumstances. (Capita Hartshead v Byard [2012] IRLR 814)

102. A fair consultation would normally require the employer to give the employee "a fair and proper opportunity to understand fully the matters about which [he/she] is being consulted, and to express [his/her] views on those subjects, with the consultor thereafter considering those views properly and genuinely." (per Glidwell LJ in R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and others [1994] IRLR 72) cited with approval and as applicable to individual consultation by EAT in Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT "when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests". A fair consultation process must give the employee an opportunity to contest his selection for redundancy (John Brown Engineering Ltd v Brown and ors 1997 IRLR 90, EAT).

Direct discrimination – s.13 EqA

103. Disability is a protected characteristic for the purposes of the Equality Act 2010 ("EqA").

104. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:

> "It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".

105. The provisions are designed to combat discrimination. It is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer's procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.

106. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

107. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

108. Since exact comparators within the meaning of section 23 EQA are rare, it may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).

109. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516.

110. Statutory provision is now made by Section 136 EQA:

> 136 Burden of proof
>
> (1)This section applies to any proceedings relating to a contravention of this Act.
>
> (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.
>
> But subsection (2) does not apply if A shows that A did not contravene the provision.

111. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must established on the totality of the evidence, on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that there must be a 'prima facie case' of discrimination including less favourable treatment than a comparator (actual or hypothetical) with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was because of the protected characteristic; (b) if this is established, the Respondent must prove that the less favourable treatment was in no sense whatsoever because of the protected characteristic.

112. It was also said by Mummery LJ in Madarassy:

> "The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case."

113. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing

cause in the sense of a significant influence: **Nagarajan v London Regional Transport** [1999] IRLR 572

114. The tribunal's focus "must at all times be the question whether or not they can properly and fairly infer... discrimination.": **Laing v Manchester City Council**, EAT at paragraph 75.

115. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. We must "see both the wood and the trees": **Fraser v University of Leicester** UKEAT/0155/13 at paragraph 79.

Discrimination arising from disability – s.15 EqA

116. (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.

117. Discrimination contrary to s.15 EqA occurs where the Respondent treats the Claimant unfavourably because of something arising in consequence of the Claimant's disability, and the Respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. In accordance with guidance from Langstaff J in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UEAT/0397/14, there are two distinct steps to the test:

a. did the Claimant's disability cause, have the consequence of, or result in "something"?

b. did the Respondent treat the Claimant unfavourably because of that "something"?

118. The principles in relation to unfavourable treatment and justification in claims under section 19 EqA apply to claims under section 15.

Failure to make reasonable adjustments – ss.20 & 21 EqA

119. Section 20 EqA imposes a duty on employers to make reasonable adjustments for employees (and others) in circumstances where a disabled person is placed at a substantial disadvantage by (amongst other things) a PCP.

120. Whether adjustments are reasonable is a fact-sensitive question. The test of reasonableness is objective and to be determined by the tribunal: *Smith v Churchill's Stairlifts plc* [2006] IRLR 41.

121. There is no objective justification defence available under this head of claim. The proposed adjustments were either reasonable or they were not. The EHRC Code states at para. 6.28 that the following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;

b. the practicability of the step;

c. the financial and other costs of making the adjustment and the extent of any disruption caused;

d. the extent of the employer's financial or other resources;

e. the availability to the employer of financial or other assistance to help make the adjustment; and

f. the type and size of the employer.

122. The Code goes on at para. 6.29 to state that "*ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case*".

Analysis and Conclusions

123. Addressing each issue in turn, the Tribunal had carried out an analysis of the facts and, applying the legal framework, had reached the following conclusions.

Unfair dismissal

124. The Tribunal relied on its findings of fact and concluded that the Respondent had established, on the balance of probabilities that the principal reason for its decision to dismiss the Claimant from his role as Quality Manager was on the basis that the role had become redundant.

125. It was not in dispute that the Claimant had been dismissed.

126. The Tribunal was satisfied that the circumstances leading to the Respondent's decision were linked with the decisions taken with regard to the management structure within the Respondent and the chronology of events that took place.

127. Prior to Mr Thrupp's involvement at Dirna Bergstrom from 2016, there had not been an employee at the Respondent with the role of Quality Manager. The management of the Quality team was absorbed within Mr Thrupp's overall role as Quality and Operations Director.

128. It only became necessary to appoint a Quality Manager when his involvement with Dirna Bergstrom meant that he was unable to fulfil the entirety of his role at the site at Ystrad Mynach.

129. Whilst Mr Thrupp's involvement at Dirna Bergstrom decreased throughout 2019, he had also been appointed in January 2019 as Joint Managing Director with Mr Wilkinson of the site at Ystrad Mynach with reporting duties to the US. As a consequence, there continued to be a need for a Quality Manager as Mr Thrupp did not have the capacity to manage the Quality team along with all his other responsibilities.

130. When the pandemic struck, and following the introduction of the Job Retention Scheme, 98 members of the workforce, to include the Claimant, were placed on furlough. All

members of the Quality team bar one were placed on furlough with effect from 27 March 2020. On 2 April 2020, the Claimant signed and returned a furlough agreement.

131. The decision to place staff on furlough was as a result of the drastic reduction in activity at Ystrad Mynach.

132. Subsequent to the Claimant being placed on furlough, at the beginning of April 2020, he was advised by his Consultant to shield due to the effect of his medication. He notified Mr Thrupp by telephone on 3 April 2020 and then sent an email to Ms Thomas on 6 April 2020 confirming the position. The requirement to shield extended for 12 weeks to 16 August 2020.

133. Subsequently, and as activity levels started to increase, discussions were taking place between Ms Hannah Thomas, the HR Manager, and Mr Thrupp with regard to the need for members of the workforce, to include those in the Quality team, to return to work. The Claimant very fairly accepted that this was a logical and sensible approach to take. The Tribunal accepted Mr Thrupp's evidence that certain of the tasks undertaken by the Claimant were re-allocated to the members of the Quality team who were able to carry out those tasks. The Claimant suggested that this amounted to "scope creep" i.e. a gradual process of distributing to members of the team the tasks that he would ordinarily carry out. The Tribunal did not accept the inference to be drawn from such a description and found that this was an appropriate course for the Respondent to take in the circumstances that existed at the time.

134. The Tribunal had also accepted that, as a result of the changes to Mr Thrupp's role, he had additional capacity. He no longer had an involvement at Dirna Bergstrom and, from May 2020, he was no longer joint Managing Director.

135. Indeed, the Tribunal had found that, in effect, and due to the changes in Mr Thrupp's role, the circumstances had reverted to those which existed prior to the creation of the role of Quality Manager in 2017. Prior to the appointment of the first Quality Manager, the Quality team had been managed by Mr Thrupp.

136. The Tribunal considered that it was relevant that there was no suggestion of the Claimant and Messrs Thrupp and Wilkinson having a difficult working relationship. Both Mr Thrupp and Mr Wilkinson readily accepted that the Claimant was competent and that his attendance record was good.

137. Whilst Mr Estebanez was supportive of the Claimant, he did accept that the Quality team, after the Claimant's departure, was functioning. Furthermore, a Quality Manager had not been appointed since the Claimant's redundancy. The tasks expected of the Quality team have continued to be fulfilled within core hours and without the need for any overtime.

138. Whilst Mr Estebanez found the Claimant supportive in his role as Manager, the Tribunal found that it was ultimately a decision for the Respondent to determine how the Quality team was to be managed and the Tribunal had noted that, whilst perhaps different in approach, Mr Thrupp managed the Team in the manner that he described. Indeed, the Tribunal fully recognised that the Claimant disagreed with the decision reached by the Respondent, and that he felt strongly that there was an ongoing role for him as Quality Manager. However, ultimately, it was not up to the Claimant to dictate how the team was to be managed. That was a commercial decision for the Respondent to make.

139. As for the procedure adopted by the Respondent, the Claimant himself had described the process as fair even though he believed that the process was a formality and that

the decision had already been made. Nevertheless, the procedure, which included three consultations and an appeal, was, in the judgment of the Tribunal, one which lay within the range of conduct which a reasonable employer could have adopted.

140. It is appropriate for a selection pool to comprise of one person. The circumstances giving rise to the decision to make the Claimant redundant related specifically to the Quality team and the involvement of Mr Thrupp in his role as Quality and Operations Director.

141. The Claimant was put on notice that his position was at risk and the reasons for the Respondent reaching this conclusion. The Claimant was invited to a consultation and was informed that it was his opportunity to make representations to Mr Thrupp why his role was not redundant.

142. The Tribunal did not accept the Claimant's assertion that the process was "rubbish" or pointless and he was also given the opportunity to be accompanied by Mr Estebanez.

143. In conclusion, the Tribunal was satisfied that the Respondent had established, on the balance of probabilities, that the reason for the Claimant's dismissal was redundancy.

144. The Tribunal was satisfied that the requirements of the Respondent for an employee to carry out work specifically as Quality Manager had ceased or diminished and that this was a commercial judgment on the part of the Respondent.

145. The Tribunal was satisfied that the Claimant was adequately warned of the fact that his role was at risk of redundancy and the Respondent went through a fair consultation process with him and also took reasonable steps to attempt to find the Claimant suitable alternative employment. In all the circumstances, the dismissal fell within the range of reasonable responses.

146. On this basis, the Claimant's claim of unfair dismissal is dismissed.

Direct disability discrimination (Equality Act 2010 section 13)

147. The Tribunal had found that the Respondent had selected the Claimant for redundancy and had then dismissed the Claimant for that reason. The Tribunal had found that the process followed by the Respondent had fallen within the range of conduct which a reasonable employer could have adopted and the Claimant himself had accepted that the procedure was fair.

148. Whilst the Claimant had not relied on any actual comparators nor had put forward arguments with regard to how he would have been treated had he not been disabled i.e. a hypothetical comparator, the Tribunal concluded that on the facts, there was no basis at all to infer that the Claimant had been treated less favourably than the Respondent would have treated someone that was not in materially different circumstances, let alone that there had been any less favourable treatment because of the Claimant's disability.

149. The Tribunal repeated its findings in respect of the Claimant's claim for unfair dismissal. The Tribunal was satisfied that the Respondent's decision to make the role of Quality Manager was based on proper commercial considerations and evidence. The process by which the Claimant was then selected for redundancy fell within the band of reasonable conduct a reasonable employer would have followed.

150. The Tribunal concluded that, on the facts, the Claimant had failed to establish, on the balance of probabilities, facts which amount to a prima facie case on the basis of which

the Tribunal can infer that discrimination had taken place. There was no basis at all to infer that the Claimant had been treated less favourably than the Respondent would have treated others in not materially different circumstances, let alone that there had been any less favourable treatment because of the Claimant's disability.

151. The Respondent's reason for treating the Claimant in this way was linked entirely and directly to the Respondent's decision that there was no longer a need for a Quality Manager.

152. As stated, the decision taken on 27 March 2020 to place the Claimant on furlough was taken prior to the Claimant, and thereby the Respondent, being informed of the need to shield. It was only on 3 April 2020 that the Respondent became aware of the Claimant's need to shield. Once the shielding period ended on 16 August 2020, the Claimant remained on furlough as the Respondent had concluded that there was not a business need for him to return to his employment. Consequently, the Tribunal concluded that the Respondent's decision was not discriminatory as it was not linked to the Claimant's disability.

153. For these reasons, the Claimant's claim of direct disability discrimination is dismissed.

Discrimination arising from disability (Equality Act 2010 section 15)

154. It was alleged by the Claimant that the Respondent had treated him unfavourably by isolating him from his team, allocating his tasks to other staff, and dismissing the Claimant.

155. The Tribunal had found that the Respondent had not taken any steps to isolate the Claimant from his team. In the email from Mr Thrupp to the Claimant of 28 May 2020, it is stated explicitly that the Claimant could liaise with his colleagues on a social basis. It was clear from the exchanges of messages that the Claimant did so. However, he was precluded from doing so for work-related purposes as this was a requirement of the furlough scheme.

156. With regard to allocating the tasks of the Quality Manager to other staff, the Tribunal relies on its findings of fact. It had found that certain of the tasks ordinarily undertaken by the Quality Manager were allocated to other members of the team as and when they returned to work in 2020. In addition, due to Mr Thrupp having capacity to do so following the conclusion of his work at Dirna Bergstrom and then the restructure in May 2020 which meant he was no longer Joint Managing Director, he resumed his role as managing the Quality team.

157. As for the dismissal of the Claimant, the Tribunal relies on its findings as set out above in reaching the conclusion that this was as a consequence of the Respondent reaching the commercial decision that the Claimant's role was redundant.

158. Consequently, the Tribunal was satisfied that the ways in which the Claimant alleged he was treated unfavourably by the Respondent did not arise in consequence of the Claimant's disability.

159. The Tribunal was also entirely satisfied that the Claimant's absence from work was not as a result of him being required to shield due to his disability.

160. The Tribunal repeated its findings in respect of this issue. The Claimant was one of 98 employees who had been placed on furlough in March 2020 following the introduction of the Job Retention Scheme. This decision had nothing to do with the Claimant's

disability. It was only after this decision was taken that, in April 2020, the Claimant informed the Respondent that he had been advised by his consultant that it was necessary for him to shield due to the effects of the medication that he was taking as a result of his disability.

161. The period of shielding ran for 12 weeks to 17 August 2020. At that time, the Claimant was not required to return to work as Mr Thrupp had assessed that there was no work for the Claimant to do. Whilst that is disputed by the Claimant, that was the commercial decision reached by Mr Thrupp. The Claimant therefore continued on the furlough scheme.

162. As a result of this chronology, there is no basis on which the Tribunal can conclude that the Claimant's absence from work was as a result of him being required to shield due to his disability.

163. The Tribunal was satisfied that the Respondent's decision to dismiss the Claimant was not as a result of him having to shield. There was no evidence to support such a conclusion.

164. The Respondent required the Claimant to refrain from returning to work for reasons relating to redundancy which were unrelated to his disability.

165. In other words, the Tribunal found that the Respondents selection of the Claimant for redundancy and his disability were separate and distinct issues. The Tribunal was entirely satisfied that the Respondent did not take into consideration the Claimant's disability when reaching its decision to dismiss the Claimant on the grounds of redundancy

166. Consequently, the Tribunal found that the Claimant was not the subject of any discrimination arising from his disability and therefore his claim under section 15 of the EqA is dismissed.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

167. The Tribunal considered that it was relevant that the Respondent accepted that the Claimant was disabled within the meaning of the EqA throughout the material time. The Claimant accepted that, when he took on the role, and when he requested adjustments to be made in the light of his disability, to include adjustments to his method of working and steps taken to accommodate his DSE assessment, the Respondent reacted positively and provided him with the necessary flexibility and equipment.

168. As stated, the Claimant had been placed on furlough on 27 March 2020. When the Claimant sent an email to Ms Thomas on 6 April 2020 attaching the advice from his Consultant that he should shield, Ms Thomas responded on the same day. In her email, Ms Thomas stated that the Claimant would remain on furlough until 31 May 2020, which was the date originally set for the Job Retention Scheme to come to an end. If the scheme did come to an end and the Claimant had to remain at home in order to shield, Ms Thomas informed him that this would be recorded as sickness absence and would be managed under the normal absence management policy and sick pay guidelines.

169. If there was a requirement for the Claimant to fulfil his duties within his role then there was a preparedness to consider working from home for the remainder of the shielding period. However, this did not arise.

170. It was suggested by the Claimant that he was prepared to come off his medications, which were immunosuppressant, to enable him to come back to work. However, the Respondent considered that this was inappropriate as it would put the Claimant at risk and the Respondent was not prepared to entertain this suggestion. In any event, this did not arise because the Respondent did not require the Claimant to return to work because it had concluded that there was no work for him to do.

171. In the circumstances, the whole issue of making reasonable adjustments did not arise as there was no requirement for the Claimant to return to work due to the Respondent's conclusion that there was no business need for him to do so.

172. For this reason, the Tribunal found that the Respondent had not failed to make any reasonable adjustments and that the Claimant's claim under sections 20 and 21 of the EqA is dismissed.

Employment Judge R Havard
Dated: 8 September 2022

JUDGMENT SENT TO THE PARTIES ON 9 September 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche