EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr David Tonks	v	Sterling Thermal Technology Limited

Heard at: Watford On: 26 to 28 September 2022
(In chambers on 19 October and 21 November 2022)

Before: Employment Judge Bedeau
Members: Mr C Surrey
Mr N Boustred

Appearances
For the Claimant: Ms D Tonks, Niece
For the Respondent: Mr M Sutton, Employment Consultant

RESERVED JUDGMENT

1. The claim of unfair dismissal is not well-founded and is dismissed.

2. The claim of discrimination arising in consequence of disability is not wellfounded and is dismissed.

3. The claim of failure to make reasonable adjustments is not well-founded and is dismissed.

4. The provisional remedy hearing listed on 6 March 2023, is hereby vacated.

REASONS

1. In a claim presented to the tribunal on 2 April 2021, the claimant made claims of unfair dismissal, discrimination arising in consequence of disability, and failure to make reasonable adjustments. He worked for the respondent as a Fabrication Welder from 18 June 2012 to, effectively, 4 January 2021, when he was made redundant.

2. In the response, presented to the tribunal on 18 May 2021, it is averred that the claimant was dismissed by reason of redundancy and that a fair procedure had been followed. The discrimination claims are denied.

The issues

3. At a preliminary hearing held on 19 January 2022, before Employment Judge McNeill KC, the claims and issues were clarified:-

> "(4) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:
>
> Time limits / limitation issues
>
> (i) Were all of the Claimant's complaints of disability discrimination presented within the time limits set out in sections 123(1)(a) & (b) of the EqA?
>
> (ii) If any acts complained of amounted to conduct extending over a period, when did that period come to an end?
>
> (iii) If any claims are out of time, is it just and equitable to extend time so as to permit the Claimant to pursue those claims?
>
> Unfair dismissal
>
> (iv) What was the principal reason for dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)? The Respondent contends that the reason was that the Claimant was redundant. The Claimant disputes this.
>
> (v) If the reason for dismissal was that the Claimant was redundant, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the socalled 'band of reasonable responses'? The Claimant relies on the following matters in alleging that the dismissal was unfair:
>
> a. He was advised to shield during the early stages of the pandemic and placed on furlough so that he was unable to undertake training or renew his qualifications in the same way as those who were at work. This left him disadvantaged in the redundancy selection process.
> b. He was marked down on his skill set in the selection process.
> c. He was scored by someone who had very little knowledge of his work.
> d. His scores unfairly took into account some altercations with colleagues at work in relation to a matter concerning shutter doors, where the Claimant was acting in the best interests of the Respondent.

e. His scores for attendance took into account absences that were related to his disabilities and the medication taken to treat his disabilities.

f. The consultation process was unfair and included calling the Claimant in for consultation meetings during Covid when he had been advised to shield and was furloughed.
g. The pool for redundancy selection was small and excluded individuals with skills similar to or lesser than the Claimant's skills.
h. The Claimant was not considered for alternative duties.
i. The Claimant's selection was materially influenced by his disability.
j. He was dismissed following the application of a selection process that was unfair.

Remedy for unfair dismissal

(vi) If the Claimant was unfairly dismissed, he seeks compensation.

(vii) What is he entitled to by way of a basic award and what financial losses has he sustained in consequence of his dismissal?

(viii) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed?

Disability

(ix) Was the Claimant at all relevant times a disabled person within the meaning of section 6 of the EqA because of the following conditions: COPD; alpha 1 anti-trypsin deficiency; atrial fibrillation; stroke?

EqA, section 15: discrimination arising from disability

(x) Did the following things arise in consequence of the Claimant's disability:

a. Reduced ability to concentrate;
b. Impaired agility;
c. Sickness related absences;
d. Being at higher risk and being advised to shield during the coronavirus pandemic?

(xi) Did the Respondent treat the Claimant unfavourably by acting in the manner complained of at paragraph 4(v)a-j above, selecting him for redundancy and/or terminating his employment?

(xii) Did the Respondent treat the Claimant unfavourably in any of those ways and dismiss him because of all or any of the matters arising in consequence of his disability?

(xiii) The Respondent contends that the dismissal was for redundancy and does not seek to rely on any defence of justification.

(xiv) Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant was disabled at the relevant times?

Reasonable adjustments: EqA, sections 20 & 21

(xv) Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?

(xvi) Did the Respondent have the following provision, criterion or practice (PCP): requiring the Claimant to carry out his normal job without any adjustment or to be on furlough during the pandemic.

(xvii) Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at the relevant time, in that he could not safely return to work without adjustments?

(xviii) If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

(xix) If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage, such as finding alternative duties for him during the furlough period; finding a means of consulting with him in relation to redundancy that did not require him to attend the workplace; finding a way of enabling him to return to work from 2 August 2020 when those who were shielding were advised that they could return to work.

(xx) If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

Remedy

(xxi) If the Claimant succeeds in any of his disability discrimination claims, what is he entitled to in respect of any financial losses caused by the discrimination and what is he entitled to in respect of injury to feelings?"

The evidence

4. The tribunal heard evidence from the claimant. On behalf of the respondent evidence was given by Mr David Bailey, Production Manager; Ms Sarah Smith, Human Resources Advisor; and Ruth Warner, Head of Human Resources.

5. In addition to the oral evidence the parties adduced a joint bundle of document comprising of 357 pages. References will be made to the documents as numbered in the joint bundle.

6. The tribunal was not referred to audio recordings of the claimant's meetings with the respondent's managers.

Findings of fact

7. The respondent is a well-established heat exchanger manufacturer which designs and produces equipment based on customer's requirements.

8. The claimant commenced employment with the respondent as a Welder on 18 June 2012. He was contracted to work 37.5 hours each week and at the time of his dismissal, was paid £506.25 per week, gross.

9. On 9 November 2016, he suffered a stroke causing the onset of his atrial fibrillation which was diagnosed in November 2016, and endogenous depression, diagnosed in January 2017. On 14 February 2020, he was diagnosed as suffering from Chronic Obstructive Pulmonary Disorder causing him to feel short of breath. He also suffers from alpha-1 antitrypsin deficiency, paroxysmal atrial fibrillation, a heart condition.

10. In his submissions, Mr Sutton, on behalf of the respondent conceded that the claimant's medical conditions are disabilities. In relation to stroke, the respondent genuinely believed that he had recovered and did not display any long-term adverse effects. In relation to the other conditions, the issue is one of knowledge.

11. At all material times the claimant worked for the respondent as a Fabrication Welder at the respondent's Water Orton site, Lakeside Industrial Park, Marsh Lane, Birmingham.

12. Mr David Bailey, Production Manager for the site, had three Team Leaders, one of which was Mr Lee Hopkins, Team Leader for the Welding Team to which the claimant belonged. Mr Bailey joined the respondent on 21 January 2020 and was made redundant on 31 May 2022. He features to a large extent on this case.

13. The claimant was diagnosed as suffering from a stroke on 9 November 2016 and was off work until 30 October 2017. Mr Paddy Weir visited him at his home on 21 February 2017 and entered a note in his personnel file. He wrote:

> "David appeared in good spirits. He reports that the doctor at the Stroke Centre has informed him at last weeks appointment that he doesn't have any underlying condition. What remains is the effect of the stroke and they are hopeful of a full recover[y]. This had made Dave more positive. He is having physio one-to-one per week and has other exercises which he is doing…"
>
> (page 291)

14. Mr Weir then wrote to the claimant stating:

> "Dear David,
>
> It was good to meet with you on 21 February. I was pleased to hear your news that your doctor anticipates a full recovery, which I am sure will offer you some reassurance going forward.
>
> As explained to you at our meeting, I now write to request your consent to approach the GP or a specialist who treated you for a conditional medical report on your progress.
>
> We need to take this step so that we can properly assess your fitness for and likely return to work, together with the impact of your absence on our organisation and resources. The report should also help me to understand the effect of your condition on your day-to-day activities and whether there are any reasonable adjustments we may be able to make that will assist you in any plans to return to work…" (page 292)

15. There was a further welfare visit on 3 April 2017.

16. The respondent requested the claimant give his medical consent to an Occupational Health report in order to determine whether to make reasonable adjustments and what those adjustments should be. On 21 February and 3 April 2017, the claimant did not give his express consent. Following his return to work, the respondent reasonably believed that he had recovered from his stroke.

17. The claimant was absent on 26 February 2018 for one week suffering from flu; 26 March 2018 for 20.5 hours with diarrhoea; 25 May 2018, 179.30 hours with back injury as he had fallen down the stairs; 13 August 2018, 6.25 hours, with sickness; 28 August 2018, 29.25 hours sickness. On 3 January 2019, 12.75 hours with a chest infection; 18 February 2019, 8.25 hours with an upset stomach; 1 April 2019, 16.5 hours, also with an upset stomach; 29 April 2019, 6 hours, he went home due to fumes in the factory; 20 May 2019, 7.25 hours, with a stomach bug; 2 July 2019, 28.5 hours with a bad back; 27 August 2019, 7.82 hours, sickness and a bad stomach and 4 September 2019, 8.25 hours, an eye infection.

18. A disciplinary hearing was held as there were concerns about the claimant's persistent absenteeism, on 31October 2019, with Mr Alan Crook, Production Manager (102).

19. From the notes of that meeting the claimant was advised that the level of his absence was untenable. He stated that the medication he was taking for his stroke which he suffered in 2017 was affecting his stomach. He was booked to see his doctor in hope of reviewing his medication. He informed Mr Crook that his absence was due to a bad back and this was an ongoing condition following him falling down the stairs in 2018. He was advised that if he needed physiotherapy or a chiropractor he could use Westfield Health Treatment. Mr Crook informed him that his sickness absences needed to be improved and that the loss of 89 hours in 2019 was considerable and had a significant impact on the business workloads. The claimant apologised and confirmed that his absences were genuine and he would do his best to improve. (103-104)

20. In Mr Crook's letter dated 4 November 2019 sent to the claimant regarding the meeting and outcome, he repeated that he expected the claimant's levels of sickness absence to improve to a maximum of 2 occasions over the next three months. Should he need to have time off work due to sickness, he was required to provide evidence that he had sought his doctor's advice on each occasion. Mr Crook stated that should there be a repeat during the period in question the claimant would be liable to further disciplinary action. He was informed of his right of appeal (105).

21. The spirometry test checks the capacity/efficiency of the lungs. In February 2020 the claimant's spirometry test recommended that he refer himself to his doctor as results were below the normal limits as defined by the British Thoracic society. (295-296)

22. The claimant was one of four whose lung function was below normal and who had to see their doctor.

23. On 24 February 2020, Ms Sarah Smith, Human Resources Advisor, asked Mr David Bailey, Production Manager, to investigate the concerns in relation to the spirometry test conducted on the claimant by way of a welfare meeting with him. Mr Bailey was to have regard to the standard guidance notes which states that the symptoms may be associated with Occupational Asthma and so needed to be investigated further by the claimant's doctor. She asked Mr Bailey to encourage the claimant to visit his doctor and then to meet with him in order to determine whether an Occupational Health Assessment was required. Mr Bailey responded that a plan would be put in place over the following two weeks to see all individuals identified including he claimant. The claimant went on sick leave from 17 March suffering from covid related symptoms. No such meeting took place.

24. The claimant's Bucklands End Lane Surgery sent a letter dated 24 March 2021 setting out a list of the claimant's medication and problems. The letter confirmed that on 14 February 2020, the claimant was diagnosed as suffering from moderate chronic obstructive pulmonary disease (297-298).

25. In relation to the Covid pandemic, the claimant was identified as a vulnerable person. The letter was sent to him on 19 March 2020 by Ms Warner who had signed it on behalf of Ms Smith. It states the following:

> "Dear David,
>
> Re: Support for employees with vulnerabilities
>
> I am writing to you as your records indicate that you may fall within the category of being vulnerable to the risks of covid 19. We are naturally concerned for your wellbeing and if you haven't already done so, we now need you to seek guidance from your GP about the precautions that you need to take to protect yourself. If you can then speak with your line manager about any impact that this guidance will have on your working arrangements, they will do all they can to support you." (108)

26. The following day he went on sick leave. Ms Smith completed a Vulnerable Employee Questionnaire by phone. The claimant confirmed that he had not received the government's letter to isolate. He was surprised not to have one. (109)

27. On 24 March 2020, Mr Bailey spoke to the claimant who said that on 17 March 2020 he was suffering with a persistent dry cough. The medical advice was to self-isolate and that he was still coughing. He was not going to return to work as the reason for his absence was covid 19 related. He had not fully recovered. The decision was taken by Mr Bailey that the claimant would be on Covid related sickness full pay. The claimant was sent home on 24 March 2020 to continue to self-isolate (110-111).

28. The claimant was put on furlough leave from 7 April 2020. This followed the claimant's request on 3 April 2020 to be considered for the CJRS Furlough Scheme. Ms Warner gave an account of events leading up to and including the redundancy exercise. She had been instrumental in that process from a strategic point of view and came across to us as a credible witness. She stated, and we do find as fact, that her contract with the respondent was extended beyond February 2020, and she continued to provide Human Resources support. By March 2020 she was attending management meetings where the discussion initially was about the Covid 19 pandemic. She instigated a communication briefing process and announcements about how the respondent could respond to support the people and the business and they were sent out on 13, 18 and 24 March 2020 giving detailed changes to enhance company sick arrangements to avoid employees being financially disadvantaged while self-isolating.

29. On 6 April 2020, as a result of insufficient orders, the respondent announced that it needed to furlough 26 employees and the claimant was one of those affected. Letters were issued on 6 April 2020 to all those affected. It stated that the minimum furlough period would be three weeks and acceptance of the furlough arrangements would result in a variation to their contracts of

employment terms and conditions. The claimant agreed to the variation on 15 April 2020. (113-114)

30. The claimant was one of four in the Welding Team who were on furlough.

31. In September 2020 it was reported in the board meeting that the respondent had exceeded the maximum lending facility. Although its revenue had improved, the financial performance had not achieved any profit. For the first six months of 2020 financial year, that is April to September, the business reported £5.272 million in revenue while making a profit, after tax, of only £18,000. This figure included significant support under the furlough scheme grants, without which, the respondent would have declared significant losses and the viability of the future of the business would have been under threat. It was also experiencing significant price pressure on some core products from larger market players and the cost structure was denying it the option to compete successfully.

32. Ms Warner worked with the Finance Director and the Chief Executive Officer from August to October 2020, to analyse the feasibility of a potential restructuring proposal and, in conjunction with her legal advisers support she outlined a process plan which would as a minimum, satisfy all legal obligations.

33. In October, the Executive Team sought the approval of the board to propose a restructuring programme with the aim of realigning the costs structure as the respondent faced the end of the furlough grant scheme in the same month. The proposal was approved. On 26 October 2020, the restructuring proposal was announced and the consultation process commenced.

34. On 26 October 2020, Ms Warner supported the Sales and Marketing Director and attended the Water Orton site to deliver the briefing of the announcement to the whole employee base. The proposal placed potentially 13 employees at risk of redundancy at the site and 8 employees at the respondent's other site in Aylesbury.

35. Every employee received a personal letter outlining the proposal and the potential impact on them.

36. The claimant's letter dated 26 October 2020, sent by Mr Mark Jabri, Operations Director, states the following:

> "Dear Dave,
>
> Restructuring announcement – at risk of redundancy notice.
>
> Further to the company announcement issued today, where proposals to restructure Sterling Thermal Technology were outlined, I advised that regrettably we anticipate having to make redundancies in the near future.
>
> With regard to the impact that this may have on you personally, I can confirm that your role is in a category where the number of roles are

> proposed to be reducing in the revised organisation structure and as such, you are therefore at risk of redundancy. You should regard the receipt of this letter as warning notice of that potential redundancy.
>
> As part of the consultation process, I will made arrangements to meet with you individually to discuss the company proposals, the details of what happens next, and if there are any alternatives whereby your employment could be protected. Given that you are in a category which is proposed to be reducing, you will be subject to a selection assessment, the details of which will be outlined in our first consultation meeting. I would also ask you to consider and put forward alternatives proposals and suggestions at the consultation meeting which you feel are relevant to the aim of avoiding redundancy.
>
> You may if you wish, be accompanied by a fellow employee at this meeting. If you wish to exercise this right to be accompanied at our meeting, please make these arrangements yourself and let us know so that we can make the appropriate social distancing arrangements. (138)

37. It was stated by the government that the CJRS scheme would not end before 31 October but would be extended beyond that date. The respondent having written to all employees affected to say that they would remain on paid leave for the remaining period of consultation, it then had to write again to update them that they would be placed back on furlough.

    They were advised that the respondent would continue to honour their pay at 100% of their wage despite only being obligated to pay 80%. (152)

38. In August the government lifted the restriction on self-isolation. We find that it was not until 15 October 2020 when the claimant contacted Mr Bailey as he wanted to return to work. There was nothing available for him at the time. The claimant said that Mr Bailey had said that Welders were doing welding certificates and tests and that Andy Peak was taken on. The claimant alleged that he had a conversation with Mr Lee Hopkins, Team Leader, who said to him that there was plenty of work. Mr Bailey said that Mr Peak was taken on to do welding work. That work was not enough for two Welders to carry out. Although the claimant said that Mr Hopkins said to him that there was a lot of work, Mr Hopkins was not called as a witness to be questioned.

39. During the respondent's consultation process, they secured the assistance of Ms Saragh Reid and Mr Paul Baker from Peninsula to provide the necessary legal advice and to observe the process.

40. Ms Warner issued to the managers a detailed timing plan of consolation meetings which covered the following two weeks. Each at risk employee would be offered three consultation meetings. The first consultation meeting would be held either on a one-to-one basis with the at risk individuals or as a small group of individuals in an at risk pool. They would ask questions and be given feedback on the business rationale for reorganisation. At the meeting they would be given blank copies of the selection assessment form relevant to their pool. They would be invited to rate themselves in

preparation for the second consultation where the manager would compare the two assessments and discus evidence to reach an outcome.

41. The second and third meetings would be on a one to one basis. In advance of the third consultation meeting, the employee would be given the final selection assessment rating results and the likely personal impact on them. That meeting would be an opportunity to discuss their final rating and raise any outstanding questions

42. The claimant attended the welder's at risk consultation meeting held in the Engineer's Office on site at 3.30pm, 26 October 2020. It was also attended by the Welders as well as the team leader. Ms Warner facilitated the meeting and was supported by Mr Bailey, Mr Mike Allman, Sales and Marketing Director, and Mr Baker who joined remotely. The meeting discussion centred on what to expect from the consultation process and the selection process. Questions were asked by those in attendance and notes were taken. (126-137)

43. Mr Bailey had been working within various manufacturing departments in facilities over the previous 20 years. We find that he has extensive experience of managing teams of Welders and fabricators on a range of processes using many different materials. He is a Graduate Engineer who has continued to learn and develop continuously throughout his career. He

has a CSWIP Visual Welding Inspection Qualification to enable him to fully understand and discuss production challenges and works closely with Welders to develop robust processes. He has knowledge and experience of machining to include turning, milling, cutting and also welding processes. DSWIP is the certification scheme for welding inspection personnel.

44. Mr Bailey was the claimant's line manager from 21 January 2020 and only effectively managed the claimant for three months prior to him being furloughed. There was only one period of sickness absence during that time, a persistent dry cough attributed to Covid 19. (106)

45. Although Mr Bailey was aware that the claimant had experienced a stroke several years earlier, he was led to believe that the claimant had made a full recovery. He was not made aware of any adjustments in respect of the stroke.

46. Mr Bailey understood the rationale for the restructuring and was present on the day of the announcement to the employees. The consultation process was outlined to them. (123-124)

47. He attended the at risk redundancy meetings with the individuals or groups impacted. He was required to make a selection assessment for each employee within his area of responsibility using standardised criteria. On skill breakdown assessment, it covered: TIG welding; flux core; fabrication ability; pipe welding; coding level; draw welding symbols and setting managing distortion. In relation to, approach to work assessment, this

covered: seeks opportunity to make improvement; responds positively to reasonable request outside of role; willing to go extra mile to help others; and is positive and constructive when involved in changes. The criteria also took into account disciplinary and attendance records. Also taken into account were: ability to continue, learn and develop in role; adapt speedily to changes in role requirements; and knowledge that forms basis to acquire knowledge of other jobs.

48. In relation to the claimant, Mr Bailey carried out his assessment and invited the claimant to attend a meeting on 2 November 2020. In relation to the skill description, out of a maximum of 35, the claimant scored 19. In relation to potential, out of a maximum of 6, he scored 3.5. With regards to approach to work, out of a maximum of 8 points, the claimant scored 5. In relation to disciplinary records, he scored the maximum 10. For attendance he scored 5 as Mr Bailey was of the view that there were up to three absences in the previous 12 months. For length of service he scored 6 as he had been employed between 5 to 15 years. He scored the 48.5 out of a total of 79. (142-145)

49. In relation to the comments section of the form for the employee, the claimant stated,

> "Score regarding positional pipe weld further following consultation. Although previously competent in the positional coding there has not been opportunity to do any during furlough. This means that although competent and able to score 3 and 2 respectively – all qualifications are currently expired. Ability wise is capable on a range of projects, however not normally involved in some of the more complex jobs. Skill/Competency score reflect the level of x-ray defects in EDF coils and timings booked in relation tom this." (145)

50. In selecting the pool for the purpose of redundancy the question was raised whether the Team Leader should be included. The decision was taken that the roles were different and that the Team Leader would be required in the proposed reduced structure. Accordingly, they should not be included in the at risk pool. Mr Bailey thought to include Mr Lee Hopkins, Team Leader, as part of the assessment process but Ms Warner advised him that it would not be appropriate given that Mr Hopkins' son was also in the pool and that might compromise his position and role. Accordingly, Mr Lee Hopkins was not involved in carrying out the assessments. There were only Welders within the claimant's redundancy pool. We find that they had similar skill sets although some had wider ranges of competence than others. This meant that they could do more intricate jobs and work with more challenging materials.

51. The claimant was made fully aware of his own assessment score and was advised that others within his pool had achieved higher scores. His score, 48.5, was the lowest in the pool.

52. In carrying out his assessments, we find that Mr Bailey had numerous discussions with Mr Lee Hopkins and observed those in the Welding Team carrying out their work. He also observed those engaged in TIG welding. He had no personal relationships with the other Welders, and had to decide what work the others could do. Mr Crook's handover note made it clear that they were good at certain things, and within a couple of weeks, Mr Bailey said that he was able to form a view about who could do what tasks. Mr Bailey felt that he had sufficient time to assess the claimant's skills and competencies. When there was sufficient work in the welding bay, he understood that the claimant would be drafted in to help out and that the tasks given to him were based on his skills. One issue was the claimant wanting the shutter doors to the welding section closed as, in his view, this would assist him in his welding with his fan. The other Welders wanted the doors open and each had a fan on their desks. Mr Bailey's evidence was that the claimant became argumentative and disruptive when he, Mr Bailey, explained to him why the fan being on was more disruptive to the process. Another issue of concern to the claimant was paint fumes, but the painters worked a safe distance to avoid the paint fumes being inhaled.

53. From the scores within the team, in relation to skill, the claimant scored 19. Mr Andy Peak scored 21.5, Mr K Campbell scored 35, Mr Sam Hopkins scored 32.5, Mr C Kelly scored 23, Mr S Pethick also scored 23, and Mr Barry Tonks scored 35.

54. In relation to potential, the claimant scored 3.5, Mr Peak 5.5, Mr Campbell 6, Mr Hopkins 6, Mr Kelly 6, Mr Pethick 6, and Mr Barry Tonks 6.

55. As regards approach, the claimant scored 5, Mr Peak 7, Mr Campbell 8, Mr Hopkins 5.5, Mr Kelly 8, Me Pethick 8, Mr Tonks, 8.

56. In relation to disciplinary record all within the team scored the maximum 10.

57. As regards attendance records the claimant scored 5, Mr Peak 10, Mr Campbell 5, Mr Hopkins 5, Mr Kelly 10, Mr Pethick 10, Mr Tonks 5.

58. The sub total was 42.5 for the claimant, 54 for Mr Peake 64 for Mr Campbell, 59 for Mr Hopkins, 57 for Mr Kelly, 57 for Mr Pethick, and 64 for Mr Tonks.

59. In relation to length of service the claimant scored 6, Mr Peak 6, Mr Campbell 10, Mr Hopkins 6, Mr Kelly 3, Mr Pethick 3, Mr Tonks 6.

60. The overall score for those within that pool were as follows: The claimant 48.5; Mr Peake 60; Mr Campbell 74; Mr Hopkins 65; Mr Kelly 60; Mr Pethick 60; and Mr Tonks 70. This was out of a maximum of 79 points. From the scores it was clear that both Mr Peak and the claimant scored the lowest. (349)

61. Mr Bailey was questioned at length by Ms Tonks on behalf of the claimant. He stated that Mr Kelly's potential was 6. He demonstrated that with the

work he had done. He was not classed as a trainee, as the claimant contended, but was a fully qualified Welder, who took coding and passed. The claimant and Mr Campbell were on EDF coils but the claimant had more failures. They were both on consistent projects with different results. Mr Bailey had observed this. The claimant was on the Joy Mining project and Mr Kelly carried out that task while the claimant was on furlough. There was no need for the claimant, in addition to Mr Kelly, to carry out that work. The claimant had the greater x-ray failures in relation to the EDF coils work. He observed that over time and was of the view that the claimant did fewer jobs when compared with Mr Campbell. With regard to the claimant working overseas, Mr Bailey understood that the claimant would offer to work overseas as the other Welders were reluctant to do so. He had not worked overseas after he suffered a stroke in 2017. He did not observe the claimant displaying shortness of breath, wheezing, fatigue, dizziness or persistent coughing. During the cross-examination, Mr Bailey was able to justify the scores given to those within the team. His evidence was clear, informative, and convincing.

62. As regards the notes of the meeting that Mr Bailey had with the claimant in the company of Saragh Reid on 2 November 2020,at the conclusion of that meeting he agreed to look into the fabrication welding work done by the claimant. He stated that he would probably need to speak to Mr Lee Hopkins as Team Leader to give some other examples of projects the claimant had been describing at that first consultation meeting. (146-148)

63. A further meeting was held later in the day with the same individuals. The claimant stated that he got on with everyone within the department. Mr Bailey stated that there were examples where he had minor altercations with other co-workers within the unit, such as, the opening and shutting of the roller shutter doors. Only sometimes would the claimant respond well to requests outside his normal duties. The claimant said in respect of the shutter doors that when he was welding he worked close to the door where the draft came through and when he was TIG welding it blew the gas away. This would cause holes in the weld which he had to grind off. Sometimes the other Welders would not allow him to shut the door. He stated that he had done jobs in the fitting area. Mr Bailey agreed to confer with Mr Hopkins again. (148-150).

64. The furlough scheme was extended by the Government and the respondent agreed to pay the claimant 100% of his salary. (152)

65. On 6 November 2020, Ms Smith signed a letter on behalf of Mr Mark Jabri, Operations Director, inviting the claimant to a further consultation meeting on 9 November 2020, with Mr Bailey. (153)

The claimant's dismissal

66. The claimant was sent the outcome of the meeting by letter dated 10 November 2020, which was to terminate his employment. Ms Smith signed it on behalf of Mr Jabri, who wrote:

> "Dear Dave,
>
> Further to our meetings on 26th October, 2nd November, 9th November and my letter of 26th October I am writing to advise you that the redundancy consultation has now been concluded. As explained to you at the start, and throughout the consultations, the reason for proposing the redundancies has been to realign the cost structure of the business to address the future competitiveness and work towards making the company profitable.
>
> All ways of avoiding the redundancies and all alternatives have now been considered and explored. Unfortunately, it has not proved possible to find a solution to the current problem other than to make compulsory redundancies.
>
> Consequently, it is with regret that your employment will therefore terminate by reason of redundancy.
>
> Your length of service entitles you to 8 weeks' notice which will commence on 10th November 2020. You will remain employed throughout your notice and therefore your last day of employment with the company will be 4th January 2021.
>
> I advise that you remain furloughed for the duration of your notice period and you are therefore not expected to attend work
>
> As your continuous service with us is more than two years necessary to attract a Statutory Redundancy Payment, you will be entitled to a redundancy payment on termination of your employment.
>
> Attached to this letter is a schedule breaking down your final entitlement including any holiday pay which is remaining at the end of your notice period.
>
> In accordance with the holiday details in the attached financial statement, I provide the necessary notice of five weeks, that 12 days holiday will be allocated to the period 14th - 29th December 2020. Your notice payments will be made in the normal way through payroll and on your normal pay date, with your severance and any remaining holiday pay being included in the month's pay in which your notice period ends.
>
> You will also receive your P 45 in due course following this final payment.
>
> I would like to remind you that at your earliest convenience, you must return any company property in your possession, including any credit cards, charge cards, keys, equipment, documents, papers and correspondence. If you have any personal belongings on site please

> contact us so that arrangements can be made to assist you to retrieve them.
>
> You have the right to appeal against this decision and should you wish to do so you should write to Sarah Smith, HR adviser within seven days stating your grounds for appeal against a redundancy dismissal… ." (175-176)

The appeal

67. The claimant appealed on 13 November 2020. His grounds were: the selection criteria, Mr Bailey only knew him for two months and the selection process was based on inaccurate information and subjective views; during his period of furlough he was treated unfairly as he was shielding which ended on 2 August 2020 and furlough should have come to an end. Others were offered overtime. The respondent was obliged to provide alternative duties in order to be able to work from home. He received little correspondence throughout furlough and the lack of willingness to keep him integrated in the business. It gave no consideration to his needs to self-isolate throughout the redundancy consultation process. That the respondent discriminated against him because of disability. (184)

68. The appeal went ahead on 26 November 2020, attended by Mr Jabri, Ms Ruth Warner, Head of Human resources, and the claimant who joined by telephone as he had problems connecting via Teams. Notes were taken. Mr Jabri and Ms Warner were the decision makers. It was a long meeting with the claimant going through his grounds of appeal.

69. An outcome letter was sent on 7 December 2020, from Ms Warner setting out the grounds and reasons for the appeal panel coming to its conclusions, rejecting his grounds except for absences which was increased to a score of 5 but this did not alter the outcome. With regard to the claimant's belief that the selection assessment of his skills, approach to work, and attendance, were based on inaccurate and subjective information, and that the credibility of Mr Bailey, as the selection manager, given the length of time he worked with the claimant, was in issue, Ms Warner wrote:

> "The panel found that the selecting manager David Bailey, whilst managing you for a period of eight weeks between 21st January to 23rd March, made appropriate reasonable steps to gather information about the skill levels of you and the other members of the pool prior to making the rating judgements. The panel have been presented and written hand-over notes in the note book, between David Bailey and Alan Crook, the previous manager of 40 years+, who left on 20 February 2020 and whose assessment was that you could do most jobs, but with support. It is not possible to meaningfully share this evidence because of the references to all other team members, and this would breach GDPR.
>
> The panel found this assessment to be consistent with David Bailey's assessment of two elements where you were rated partially competent in the selection form, but less than David in five elements where he has

> credited you with being fully competent. David Bailey also referred to historic data of jobs allocated to you from production records which date back several years. Additionally, it was found that the manager did make appropriate changes to your ratings after you have presented further evidence to him during the consultation meetings which reflects his willingness to be fair and reasonable. He did not make any final changes after your final consultation meeting because he did not assess that this information made any material difference to the skill ratings awarded. We find David Bailey's assessment to be consistent and fair across the pool and we do not find that there is limited time working with you to have placed you at any disadvantage in your selection assessment of scale. We also find that your treatment is consistent with that of all other members within the pool. The panel therefore finds that this ground of appeal is not upheld."

70. As regards the alleged failure to consider examples of the claimant responding well to requests outside of normal duties, Ms Warner's response was:

> "The panel accept your explanation that there are examples, where you have responded positively to requests outside of your normal duties. It finds that despite these good examples, the selecting manager has also identified occasions where resistance has been noted and the panel therefore finds that the "sometimes responds positively" instead of "always responds positively" to [be] a fair rating. Examples provided where requests would sometimes but not always be met with readiness, were support on fitting with paint touch up, driving the company van, moving goods to support stores using the pallet truck and when being in timings for jobs. It is noted that you disputed any resistance to these examples, but we find there to be no evidence to support that your manager has falsified his assessment of you and we therefore do not uphold this ground of appeal."

71. In relation to lack of opportunity to obtain his welding qualifications, the response was that:

> "The panel found on investigation that this matter the lack of welding qualifications had initially impacted on your rating for the pipe welding skill element, but that during consultation manager accepted that this was unfair and adjusted this element from a rating of 1 to 3 to ensure that you were not disadvantage because you had been furloughed. The panel therefore does not uphold this ground of appeal."

72. In relation to the inclusion of a complaint about the roller shutter doors, Ms Warner stated that in Mr Bailey's view, the incident was a relevant example of how the claimant was not being positive and constructive when involved in changes to working practices. His rating of "sometimes" and not "always" responds positively and constructively. The conclusion was that the panel found no evidence that Mr Bailey had falsified this assessment of the claimant, therefore, this ground of appeal was not upheld.

73. As regards the claimant's sickness absence record which, allegedly, wrongly included his underlying medical issue, the response of the appeal panel was the following:

> "The panel found that the period between 1 April 2019 and 31 March 2020 was considered in accordance with the selection assessment rules. This was to account for the 12-month period prior to your fellow leave commencement and any Covid related sickness was to be discounted.
>
> The panel has found that you[r] first date of furlough leave was 6 April 2020 and so the 12 month period should be altered to 6 April 2019 to 5 April 2020. It therefore has discounted the period of absence which was recorded on 1st to 2 April 2019 for upset stomach, leaving five periods of absence remaining.
>
> Furthermore, the panel gave consideration to your claim that you have an underlying COPD medical condition and that absences which relate to this condition and also the medication which you took to help you to deal with this, should be discounted from this assessment rating. Whilst there has been no medical opinion sought to confirm or disprove this claim, the panel have agreed to give you the benefit of the doubt with this matter. It is therefore agreed that the relevant absences be removed from the attendance assessment rating. These include the absence for fumes on your chest on 29th of April, and stomach related issues on 19th May and 27 August 2019 leaving two periods of absence remaining.
>
> Finally, the panel considered your claim that the absence on 4 September 2019, for an eye infection was a work related incident and again whilst there are no records to substantiate this claim, it was agreed to also discount this absence, leaving one period of absence remaining.
>
> Considering these adjustments, your attendance record for the period of 12 months prior to your further leave commencement, is now one absence and this provides you with a rating of five points. This adjustment has not affected a change to the overall rating for your attendance rating and therefore does not affect your overall selection assessment score or your ranking.
>
> The panel finds that having made the appropriate adjustments to your attendance ratings, based on your claims about your underlying medical condition and work-related incident that this ground for appeal is not upheld."

74. The claimant claimed that overtime worked by his team members while he was on prolonged furlough leave due to his disability, suggested that selection for redundancy, was predetermined. The response from the panel was that it had established there was an average of 30 hours overtime each week over an 11-week period. The hours were required from six different members of the team and allocated according to their skills and the jobs they were doing at the time. It would have been impractical to have collated the hours, bring the claimant back to take over the various jobs from each

member, and having regard to furlough, the respondent wanted to establish a safer workspace in the welding bay area.

There was no evidence that any of the decisions were based on the claimant's furlough status, either directly or indirectly. This ground of appeal was not upheld. Ms Warner, however, took responsibility, as human resources manager, for not guiding the respondent's line managers to be in regular contact with those on furlough during their lengthy periods of absence. She personally apologised for not being more considerate. She stated the events were unprecedented and that everyone had a lot to learn from them. The lack of communication did not support evidence of predetermination and unfair selection.

75. With regards to the claimant's belief that the respondent gave no consideration to his welfare and the need to self-isolate during the consultation process which he found discriminatory on grounds of disability, the panel responded stating:

> "The panel find that there were reasonable steps taken to encourage employees feeling concerned for their welfare during the consultation process to come forward was stated in the last paragraph of the announcement from the CEO on 26 October 2020. Additionally, a reference was also made in your personal "at risk" the letter of the same date that should you wish to be accompanied by a fellow employee at this meeting for you to let your line manager nerve so that arrangements can be made to ensure appropriate social distancing. It therefore concludes that this ground for appeal is not upheld."

76. The claimant was informed that he had exercised his right of appeal and that the panel's decision was final. There was then reference to outstanding financial matters. (237-241)

77. We find that the clamant did not ask for any adjustments to be made during his employment with the respondent.

78. He was dismissed on 8 weeks' notice and was informed that he would remain employed until 4 January 2021 but on furlough. We find that the effective date of termination was 4 January 2021. Mr Peak who scored 60, was also made redundant. All at risk staff were sent a list of current vacancies and encouraged to apply, but the claimant did not apply.

Submissions

79. The tribunal heard submissions from Ms Tonks, on behalf of the claimant, and from Mr Sutton, Employment Consultant, on behalf of the respondent. They produced their written submissions and spoke to those when they addressed us. In addition, Mr Sutton referred to authorities which we have taken into account.

The law

80. In relation to discrimination arising in consequence of disability, section 15 provides,

> "(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."

81. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

82. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

83. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that 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 amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

84. A similar approach was taken in the earlier case of Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893 it was held that:

> "It is sufficient for disability to be "a significant influence or cause which is not the main or sole cause, but is nonetheless and effective cause of the unfavourable treatment."

85. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

86. In the case of Seldon v Clarkson Wright & Jakes [2012] ICR 716, a judgment of the Supreme Court, Lady Hale held that,

> "The measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so…, paragraph 50 (5).
>
> The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen…, paragraph 50 (6)
>
> 55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) they are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it."

87. Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1) Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; 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 of practice of A's put 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 is reasonable to have taken to avoid disadvantage."

88. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20, a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1) the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2) the physical feature of premises occupied by the employer;
>
> (3) the identity of a non-disabled comparator (where appropriate), and
>
> (4) the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.
>
> A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

89. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

90. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

91. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

92. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

93. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

94. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future "the consideration point" be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

95. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant's appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

96. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

97. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the ablebodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

98. There is no reason artificially to narrow the concept of what constitutes a “step” within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.

99. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is

structured and organised so as to accommodate those who cannot fit into existing arrangements.

100. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

101. In the case of Lamb v The Business Academy Bexley UKAEAT/0226/15/JOJ, the EAT held that a one off decision is unlikely to be capable of being a PCP where there is the absence of repetition or potential for repetition.

102. Sections 15(2) EqA states that discrimination arising in consequence of disability does not apply if the respondent shows that it did not know, or could not have been reasonably expected to know that the claimant had a disability. A similar provision applies in the case of failure to make reasonable adjustments, Schedule 8, paragraph 20.

103. Section 136 EqA is the burden of proof provision. It provides:

> "(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 provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

104. Under section 123(1) Equality Act 2010, a complaint must be presented within three months,

> "starting with the date of the act to which the complaint relates" (a), "or such other period as the employment tribunal thinks just and equitable," (b) and "conduct extending over a period is to be treated as done at the end of the period," (3)(a).

105. The time limit is extended if there is an ACAS certificate, section 140B Equality Act 2010.

106. Time limits are to be applied strictly. The Court of Appeal held that the exercise of the discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the Tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the Claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule and the matter remains one of fact.

107. In the case of Abertawebro Morgannwg University Health Board v Morgan EWCA/Civ/EAT/640, it was held by the Court of Appeal, that the Tribunal has a broad discretion to consider factors, such as the length of and reasons for the delay; whether the delay has prejudiced the respondent; and the prejudice to the claimant.

108. Section 139 Employment Rights Act 1996, "ERA 1996", states that a redundancy can occur where:

> "(b) the fact that the requirements of 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."

109. In relation to unfair dismissal, redundancy is a potentially fair reason to dismiss an employment, section 98(2)(c) ERA 1996.

110. A fair procedure must be followed in line with the guidance given in the case of Williams and Others v Compair Maxam Ltd [1982] ICR 156, a judgment of the Employment Appeal Tribunal, in which it was held that factors which a reasonable employer may be expected to consider are:

108.1 whether the selection criteria were objectively chosen and fairly applied;

108.2 whether employees were warned and consulted about the redundancy;

108.3 whether, if there was a union, the union's view was sought, and

108.4 whether any alternative work was available?

111. In determining whether the dismissal for a potentially fair reason, is fair or unfair, section 98(4) ERA 1996 provides;

> "the determination of the question of 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."

112. We have taken into account the cases of Seddington and Another v Virgin Media Ltd [2009] UKEAT/0539/08, suitable alternative employment; and Polkey v AE Dayton Services Ltd [1988] AC 344, on procedural unfairness.

Conclusion

Unfair dismissal

113. From our findings of fact in relation to the financial position the respondent was in, and its decision to restructure, we have come to the conclusion that the reason for the claimant's dismissal was redundancy. There was a diminution in the requirements to have all the Welders working at the Water Orton site, s.139(b)(i) ERA 1996.

114. A fair procedure was followed. The selection matrix was objectively applied to all Welders. Mr Bailey approached the selection process with an open mind, and was quite pragmatic as he gathered relevant evidence, and was prepared to alter the scores as part of the consultation process which he did. We accepted his evidence. The claimant's score was again increased on appeal in relation to sickness absences, but was not enough to save him from redundancy as he scored the lowest in his pool.

115. In relation to the list of issues, paragraph 4(v)a, Mr Bailey did not take into account as a factor against the claimant, the fact that he was on furlough

as the score was increased by Mr Bailey during consultation from 1 to 3. This was acknowledged on appeal.

116. In paragraph 4(v)b, the claimant alleged that he was marked down on his skill set in the selection process. Mr Bailey told the tribunal that he observed the claimant while he was at work for a limited period. He also had a handover from his predecessor whose views of the Welders accorded with his. His time with the Welders prior to furlough was the same as the claimant. We conclude that the claimant was not marked down. There were faults with the claimant's welds, and his work abroad was before his stroke. Mr Bailey was able to justify the claimant's scores.

117 As regards paragraph 4(v)c, being scored by someone who had very little knowledge of his work, we repeat the above paragraph. Mr Bailey is a qualified engineer, and has a CSWIP in Visual Welding Inspection qualification.

118. In relation to paragraph 4(v)d, the claimant alleged that he was marked down because he had arguments over him closing the shutter doors. He refused to comply with Mr Bailey's instructions not to close the shutter doors. The other Welders did not want the shutter doors closed. With the doors open it did not affect the quality of the other Welders' welds. The claimant was not working collegially with the other Welders. He also challenged the decisions taken by the other Welders and by Mr Bailey. He was, therefore, given an appropriate score.

119. In paragraph 4(v)e, the respondent agreed that some of the claimant's absences were attributable to his disability and were not counted against him. Only one absence on appeal was taken into account giving him a score of 5 which was not enough to save him from redundancy.

120. In relation to paragraph 4(v)f, the claimant stated that he was called for consultation meetings when he was advised to shield during Covid. On 15 October 2020, in an email to Ms Sarah Smith, he asked for an update on his return to work, stating that he was eager to return to work and that he felt that being off work was having a detrimental effect on his well-being. He wanted to return to work. He attended the group consultation meeting on 26 October 2020. He also attended the second consultation meeting on 2 November 2020. If he wanted to participate remotely the respondent would have obliged as it did for the appeal hearing which was originally due to be conducted by Teams.

121. The pool for redundancy, the claimant alleged, was small and excluded people with similar or lesser skills than the claimant, paragraph 4(v)g. Mr Hopkins was originally in the pool but as Team Leader his role was not affected by the redundancy exercise, the Welders were the affected employees with similar job descriptions and skill sets. The respondent properly selected the pool.

122. The claimant asserted that he was not considered for alternative duties, paragraph 4(v)h. We find that the claimant had the opportunity of suggesting other work he could do and was provided with a list of vacancies but he did not apply for any of the vacant posts. There was no evidence that there was suitable alternative employment for him. The respondent satisfied the burden placed on it by showing that it had made available to the claimant vacancies to which he could have applied, and if successful, save his employment with the respondent. He did not argue that they were unsuitable.

123. The claimant argued that his selection was materially influenced by his disability, paragraph 4(v)i. The respondent's position was that the claimant had a stroke and recovered from it. It had no knowledge of his disabilities because he did not disclose it.

124. He further claimed that he was dismissed because the selection process was unfair, paragraph 4(v)j. In relation to our findings and above conclusions, the selection process was not unfair but was fairly applied taking into account the information it had on the claimant and properly and fairly applying the selection criteria. As the claimant did not apply for any of the vacant posts, his dismissal fell with the range of reasonable responses.

125. Applying Williams v Compair Maxam, the respondent followed its selection criteria which was objectively and fairly applied. The claimant chose not to apply for any of the vacant positions, the respondent, therefore, satisfied the

obligation placed on it, Seddington and Another v Virgin Media Ltd. The claimant's unfair dismissal claim is not well-founded and is dismissed.

Disability

126. We conclude that the claimant's disabilities were: COPD; Alpha 1 antitrypsin deficiency; atrial fibrillation; and stroke. The respondent did not have knowledge that these were disabilities during the redundancy selection process as the claimant did not disclose them as he feared he would lose his job.

127. He had undergone regular health assessments but none picked up any of the disabilities. In one report reference to lung function was attributed to occupational asthma. At the welfare meeting he attended on 24 March 2020, he only reported a weak chest attributed asthma. The doctors notes and letters which the claimant produced during the hearing, the respondent said that it did not receive during his employment.

128. As regards the claimant's stroke, although the respondent knew of this condition it was unaware nor could it have reasonably been made aware, that the symptoms continued or that the claimant required reasonable adjustments in relation to that medical condition.

129. This means that the sections 15 and 20 claims are without merit but we shall, nevertheless, in the alternative, consider them in turn.

Discrimination arising in consequence of disability

130. It is the claimant's case that arising in consequence of his disabilities, he suffered from a reduced ability to concentrate; impaired agility; sickness related absences; and being at high risk and was advised to shield during the coronavirus pandemic. As already stated, the respondent had no knowledge of the symptoms being related to the claimant's disability.

131. The claimant further alleged that the respondent had treated him unfavourably having regard to paragraph 4(v)a-j, in the list of issues. Again, the respondent was unaware of the claimant's disabilities at all material times.

132. In relation to whether the claimant was dismissed for a reason arising in consequence of his disability, we are satisfied that the claimant was dismissed by reason of redundancy, in that, he was one of two who had the lowest scores and were made redundant. This claim is not wellfounded and is dismissed.

Failure to make reasonable adjustments

133. The provision criterion or practice as set out in the list of issues, as requiring the claimant to carry out his normal job without any adjustments or to be

on furlough during the pandemic. This is specific to the claimant and is not of general application to the workforce or to a large section of it. It is, therefore, difficult for the claimant to establish a provision criterion or practice of general application.

134. Quite apart from the fact that the respondent did not have the necessary knowledge, either actual or deemed, of the claimant's disabilities, the claimant was candid in his evidence when he told the tribunal that he never informed the respondent of any reasonable adjustments to remove or ameliorate the substantial disadvantages arising out of his disabilities.

135. He never requested that the consultation meetings should be conducted virtually or remotely, and was willing to return to work on 15 October 2020, before the group notification of the restructuring, which suggests that he was prepared for the meetings to be at his place of work. The respondent had no reason to believe otherwise.

136. The respondent did not have knowledge of the need to provide reasonable adjustments, such as alternative duties during the furlough period, or finding a way of enabling the claimant to return to work on 2 August 2020. He was furloughed at his own request which he made on 3

April 2020. He did not, during the first period contact the respondent requesting that he should return to work. Furlough was extended on 24 April 2020. He did not put in a request to return to work until 15 October 2020. While he was on furlough it would have been difficult for the respondent, given the operation of the CJRS scheme, to provide alternative duties for him during that period.

137. The claimant was told in writing by the respondent on 29 October 2020, that his furlough was due to come to an end on 31 October 2020. As the Government extended the furlough scheme, all affected employees were to remain on furlough and had 100% of their wages paid during the consultation process.

138. The respondent was not aware, nor could have reasonably been made aware, of the need for any adjustments during the consultation process.

139. The claimant had failed to articulate how the closing of the shutter doors and keeping his fan on was a reasonable adjustment. It is not part of the pleaded case as set out in the agreed list of issues. All Welders were provided with a fan, so the provision of it was not particular to the claimant. The painters worked a safe distance away from welding to avoid the inhalation of paint fumes. This claim is not well-founded and is dismissed.

<u>Out of time</u>

140. The claimant commenced early conciliation on 19 January 2021. The certificate was issued on 2 March 2021. One month less one day is 1 April

2021. The claimant presented his claim on 2 April 2021, one day out of time.

141. He submitted that the alleged discriminatory acts form a course of conduct ending with his dismissal on 10 November 2020.

142. We have come to the conclusion that the claimant is a litigant in person. The delay is one day which did not affect the cogency of the evidence. He would suffer the greater hardship were we to strike out the claims, whereas the respondent had prepared a bundle and witness statements. We exercised our just and equitable discretion to extend time. Unfortunately for the claimant, all of his claims are not well-founded and are dismissed.

143. The provisional remedy hearing listed on 6 March 2023, is hereby vacated.

144. In our view the claimant was ably and professionally represented by his niece who had thoroughly prepared her case for cross-examination and submissions. The fact that the claimant is unsuccessful is no reflection on the quality of her representation, but on the evidence, our findings of fact, and our application of the law to those findings in our conclusions.

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Employment Judge Bedeau

Date: 9/12/2022

Sent to the parties on: 15/12/2022

N Gotecha

For the Tribunal Office