EMPLOYMENT TRIBUNALS

Claimant: **Mr Steven Putt**

Respondent: **Goodfish Limited**

Heard at: **Birmingham** **On: 8,9,10 & 11 November 2022**
By CVP

Before: **Employment Judge Broughton**
Members: **Mr Spencer**
Mr Kelly

Representation / witnesses
Claimant: in person and Mrs D Putt, wife
Respondent: Paul Roberts, solicitor
Witnesses: Jamie Kerin, FD, Cheryl Bradbury, HR, and Greg McDonald, CEO

REASONS
for judgment of 11 November 2022

The claimant's claim of unfair dismissal and discrimination arising from disability in relation to his selection for redundancy succeeded.

His other claims failed and were dismissed.

Opening comment

1. At the outset, we want to acknowledge the incredibly difficult circumstances which the Claimant has been courageously facing since his cancer diagnosis.

2. We also recognise the challenging circumstances for smaller/medium sized businesses during, and as a result of, the Covid pandemic.

Findings of Fact

3. The Clamant was employed by the Respondent as a process, tooling and maintenance supervisor from 1 June 2015.

4. At the time he was aged almost 56.

5. His contract provided for a notice period of 1 week for each years' service and the right for the Respondent to both place him on garden leave and to require him to take any accrued holiday during his notice period.

6. The Claimant said that, from the outset, Greg McDonald, CEO, had promised him the role of maintenance manager when the incumbent, BH, who was 67 at the time, retired.

7. The maintenance manager actually continued working until he was 72, only retiring in July 2020.

8. The Respondent acknowledged that there may have been a discussion about this possibility but, on their case, there had been no guarantees.

9. We observe, at this stage, that the fact that the previous maintenance manager went on working for the Respondent into his 70's and, indeed, the Claimant was employed with a potential view to take over that role in his late 50's, does not, on the face of it, support any presumption of age discrimination. That, however, is far from determinative.

10. It would be unusual in our experience for there to be any guarantee of a promoted role at some future date, especially before employment had even commenced. We would, nonetheless, acknowledge that this may well have been the hope and intention of both parties at that stage.

11. That said, in circumstances where the Claimant may have had alternative offers, it would not be unusual for a potential employer to identify potential promotion opportunities.

12. As it transpired, the Claimant was promoted to process, tooling and maintenance manager at some point, although we heard that came with no material change to his duties and he had no direct reports. It also emerged that, ultimately at least, the Claimant earned more than the maintenance manager, so, for him, the maintenance manager role, even if offered, wouldn't really be considered a promotion.

13. Both the Claimant and the maintenance manager had reported to the process engineering manager, the head of the technical department, although, after he left and wasn't replaced, they then reported to the site leader, Guy McDonald.

14. In around 2018, the Respondent appointed an apprentice maintenance engineer, RH.

15. It became common ground that this was part of the Respondent's succession planning, potentially for the maintenance manager role. This appears to confirm that the Respondent did not consider the Claimant to be an automatic replacement or, at the very least, that by this stage, they were already considering an alternative. That said, it was not in dispute that this was not discussed with the Claimant at the time.

16. It was also not in dispute that the Claimant was a loyal, hard-working employee with a good attitude. He'd had no sickness absence in the first 4 years of his employment.

17. Sadly, the Claimant was diagnosed with melanoma cancer in July 2019. He had an operation to remove it from his ear and neck in September 2019 and returned to work after just seven weeks.

18. He was supported by the company at the time and received full sick pay, despite no contractual right to the same. On his return to work, he was receiving chemotherapy. He was offered time off and/or shorter shifts, but he wanted to keep working normally and did so.

19. In November 2019, the Respondent recruited a tooling specialist, Les, from one of their suppliers to work with the Claimant. The Claimant said this was to assist him as the workloads were increasing. Whether or not they were, it was not in dispute that the Respondent's Cannock site was loss making throughout.

20. Due to the Claimant's diagnosis and treatment, he was classed as clinically extremely vulnerable and so, when the Covid 19 pandemic hit, he was required to isolate. He was put on furlough by the Respondent in March 2020.

21. The Respondent operated a skeleton staff during the first lockdown with employees gradually returning across the summer of 2020.

22. In July 2020, the Claimant received a letter from the Chief Executive thanking him for 5 years of service to the company.

23. Also in July 2020, the maintenance manager, BH, retired. It was common ground that the Claimant made no reference to any alleged succession planning (for him to assume the maintenance manager role) until he was already in the redundancy consultation process, over 6 months later.

24. That said, the Claimant had other things on his mind in July 2020 as, regrettably, by then, his cancer had returned such that he needed to have a 16-hour lifesaving operation. The Respondent remained supportive. Thankfully, the operation appears to have been successful.

25. It is of note that the maintenance manager was not replaced by anyone at that stage. This perhaps illustrates a downturn in work which is

unsurprising given that the country was only just emerging from the first lockdown.

26. It also shows that any succession planning was far from set in stone. This was further confirmed as, when the maintenance apprentice qualified as a maintenance engineer in August 2020, he remained in that role for several months.

27. The medical evidence suggested that the Claimant may have been fit to work from the start of September 2020, but no issue arose until the end of October, perhaps because he may still have been required to shield at that stage.

28. The furlough scheme, however, was due to end on 31 October 2020 and so there was obviously a need for both parties to assess the situation.

29. On 27 October 2020, the Claimant emailed Cheryl Bradbury, the Respondent's HR Manager, about a possible return to work on 2 November 2020. She asked whether he had received approval from the Oncologist and the Claimant said that he had spoken to his GP and was going to do so again after his discussions with her.

30. We are satisfied that the Claimant did want to return to work, and not purely for financial reasons. We would also acknowledge that there would need to be appropriate measures in place. The Claimant was still significantly more vulnerable than others who may not have had the same diagnosis or treatment regime.

31. On 28 October 2020, the Claimant had a telephone conversation with Mrs Bradbury in which he said that he wanted to return to work on a phased or part-time basis. Mrs Bradbury expressed certain reservations and concerns, which we accept were genuine, regarding whether that would be safe because of the Claimant's vulnerability. She also expressed that there was a lack of work to be done.

32. Mrs. Bradbury suggested that the Claimant may need to go off sick, having used, if he so chose, his remaining holiday entitlement.

33. Whilst this appears to have been no more than a preliminary conclusion in discussions that were ongoing, it does seem to indicate that, in the absence of enough work to be done, the Respondent's preference was to keep the (absent and more vulnerable) Claimant off.

34. This was confirmed when the Claimant suggested a possible job share with Les as, initially at least, this was not something the Respondent was willing to consider. Mrs Bradbury did, however, indicate that any future redundancy exercise may have required the Claimant to be pooled with Les.

35. The Respondent's preference was further confirmed by the fact that Mrs Bradbury then had what she believed to be an "off the record" conversation in which she said she could offer the Claimant a settlement for him to leave the company that would be roughly equivalent to what he would have been entitled to by way of redundancy.

36. From the evidence that we have heard, whilst ultimately this was not an offer which the Claimant was keen to take up, we do not consider that it was improper for such an offer to be made.

37. It was made without any pressure being put on the Claimant and as no more than an option to consider. Any reference to potential redundancy situations in the future was nothing more than a statement of the reality.

38. In those circumstances, we are satisfied that it was not only a protected conversation there was also no unambiguous impropriety and so the "without prejudice" rule is engaged and the evidence on this is inadmissible.

39. That said, at the time, we would acknowledge that the other confirmed options, of statutory sick pay or a settlement, were relatively thin on the ground. However, we don't accept that the door had been completely closed on a potential return to work at that stage.

40. There were discussions about the potential requirements for a return to work, including the Respondent, reasonably in our view, asking for a specific fit-note from the Claimant's treating professionals. They also discussed the appropriate covid precautions which would need to be in place to facilitate a return.

41. The Respondent gave evidence that everyone received specific Covid safety training on return as well. All of those matters were legitimate discussion topics in the context of a potential return to work. They were sensible precautions and, as mentioned, the Claimant was more vulnerable than most.

42. After the telephone conversation, the Claimant made a further proposal for a work return by email. The response to that, from Mrs Bradbury, was that it was going to be considered. As a result, it was apparent that, at that stage, a return to work had not been completely ruled out.

43. That said, we would acknowledge that the Claimant believed that the Respondent's attitude towards him changed in October 2020 when they had previously been very supportive.

44. It was while consideration was still being given to a potential return to work that the Government extended the furlough scheme.

45. On 1 November 2020, the Claimant asked Mrs Bradbury to confirm that he would remain on furlough, and, on 2 November 2020, she confirmed that he would.

46. After that point, the Claimant did not pursue his request for a return to work. It appears, therefore, that, once the furlough scheme was extended, this offered a solution that worked for everybody, protecting the Claimant from his vulnerabilities and also ensuring a level of financial support whilst waiting for workloads to increase.

47. In January 2021, vulnerable people were again advised to shield and that still applied to the Claimant.

48. Along with many other businesses, the Respondent was suffering a downturn in work, and we heard that they made a significant loss in January 2021.

49. The management decided that they needed to take significant cost saving measures. They decided to close down certain functions and, indeed, handed the toolroom back to the Landlord. They were going to sell some equipment and move some elsewhere. They were going to outsource certain additional tasks.

50. They envisaged removing certain roles from the business, including the Claimant's. We heard that they made 3 other redundancies: a waste in cleanliness controller, who apparently went willingly, a setter and a senior quality shift leader.

51. There were no minutes of the management meeting in which those decisions were taken, nor any surrounding emails but that is not always unusual in smaller businesses. We do, however, observe that the Respondent's apparent preference, for the Claimant to be the one who remained off work in October 2020, seemingly carried through to these discussions, albeit not the potential pooling with Les or, indeed, anyone else.

52. On 2 February 2021, the managers met the Claimant remotely and told him that his role had been provisionally selected for redundancy. They got his job title wrong, apparently due to historic HR failings. They talked him through a presentation, and he was then invited to attend a consultation meeting on 4 February 2021.

53. We heard that later that day, 2 February 2021, the maintenance engineer, RH, resigned. This was the former maintenance apprentice, who had qualified in August 2020. He had continued in his role largely covering for the former maintenance manager but, because of the particular circumstances in the economy and in the Respondent's business, he had been required to multitask, including in areas he didn't find very satisfying, and that was part of the reason for his resignation.

54. On 3 February 2021, the Claimant asked for the meeting to be postponed due to his health and it was rearranged for 5 February 2021. The Claimant then requested a further postponement which was granted, again on health grounds.

55. Also on 5 February 2021, the Respondent, in an effort to retain the maintenance engineer, offered to promote him to maintenance manager, with a significant (around £7000pa) pay rise. Ultimately that offer was accepted but he didn't formally commence in the role until 1 April 2021.

56. On 16 February 2021, the Claimant was advised to continue shielding. He subsequently went into hospital and so the consultation meeting was postponed again. It actually took place, remotely, on 22 February 2021.

57. The Claimant was allowed to be accompanied by his partner for support and also a work colleague. A discussion took place which included

    a. the rationale for the redundancy,
    b. the rationale for the Claimant's role being selected,
    c. whether or not a pool should have been used and
    d. whether the Claimant could have done certain of the roles of others as well as
    e. whether the Claimant had been promised the maintenance manager role and
    f. whether the Claimant could be kept on furlough for longer.

58. In the context of point f above, the Claimant said that Jamie Kerin, the Respondent's Finance Director, had told the Claimant that he "had already cost them thousands of pounds". The Respondent said that this was merely an explanation of the reality that, keeping the Claimant on furlough, was not a cost-free option. It does, perhaps indicate, however, that, having been very supportive, the Respondent's patience was wearing thin.

59. On 23 February 2021, the Respondent offered the Claimant alternative employment as an injection moulding operative. That was a much lower-level role, initially on £8.91 per hour. The Claimant's previous effective rate had been more than double that.

60. The Claimant was invited to a further consultation meeting on 25 February 2021.

61. Throughout this period there were various email exchanges and questions being raised by the Claimant, some of which were answered directly or in meetings, but some were not. That was certainly the Claimant's perspective.

62. We heard that the Claimant was actually signed off sick by reason of his cancer and stress on 24 February 2021, although it didn't appear that the sick note was ever submitted to the Respondent.

63. The second consultation meeting took place remotely on 25 February 2021 and the Claimant was again supported by his partner and a colleague. It was a lengthy meeting.

64. The discussions from the previous meeting were revisited and the Claimant was informed that the maintenance engineer had been promoted to maintenance manager. The language used implied that this had happened several months earlier and certainly long before the redundancy consultation process began.

65. That, of course, was not true as the offer had only been made after the Claimant was put at risk and, indeed, had not even taken effect at the time of this meeting. The Claimant asked on more than one occasion for the details of that appointment, including the relevant dates, and never received them. That was the case even at the appeal stage.

66. The Respondent's obfuscation on this issue at the time suggested that they may have had something to hide.

67. After a lengthy discussion and a break, the Respondent confirmed that the Claimant's role was to be made redundant but that the offer of alternative employment remained open, they said, until 5 March 2021.

68. The Claimant, having initially rejected that offer of a much lower role, asked for more time. As a result, the deadline was extended until 12 March 2021. The Claimant was told that another consultation meeting could be arranged to discuss alternative employment, if desired.

69. The Respondent had previously said there would be at least 3 consultation meetings following the original notification, but, in the end, there only appeared to be the two on 22 and 25 February, albeit a further meeting about the alternative job was offered. That said, there is no requirement for a minimum number of meetings

70. We heard that, in relation to the offer of the injection moulding operator role, the Respondent subsequently offered to increase the pay rate to £10.50ph to assist the Claimant. That was still significantly below what he had been earning, which was roughly equivalent to £19ph, and, ultimately, he decided not to accept it. It was common ground that was his right and there was no suggestion that this role amounted to a suitable alternative for redundancy payment entitlement purposes.

71. The Claimant obtained a further sicknote on 11 March 2021 with the same diagnosis but, again, it didn't appear that it was sent to the Respondent.

72. On the same day the Claimant sent an email with numerous questions to the Respondent whose reply simply said that comprehensive answers had already been given. As already mentioned, however, it was clear that some of those questions, particularly those regarding the appointment of the maintenance manager, hadn't been answered at all.

73. On Friday 12 March 2021, the Claimant rejected the offer of alternative employment. His reasons given were

    a. the low level of pay,
    b. shift work
    c. status and
    d. it not matching his skills.

74. On the following Monday, 15 March 2021, the Respondent confirmed that the Claimant's employment would end on 16 April 2021.

75. Also on 15 March 2021, the Respondent announced that a maintenance engineering apprentice had been appointed and was starting work that day. The process of recruitment must have started at least a few weeks prior to this but the Respondent was unable to enlighten us further on the specific dates etc nor, indeed, why the Claimant had not been informed of it during the consultation process.

76. On 19 March 2021, the Claimant submitted detailed grounds of appeal to the Chief Executive Officer, Mr Greg McDonald, and was invited to attend an Appeal Hearing.

77. Initially the Chief Executive wanted that hearing to be in person, to support him due to a vocal disability. Ultimately, however, after the meeting had been postponed a couple of times, and the Claimant had been admitted to hospital again due to sepsis, the meeting took place remotely.

78. The Claimant objected to Ms. Bradbury's presence at that meeting, albeit she was only the notetaker. The Respondent said that, as a small/medium sized business with only 1 HR person, they felt that was reasonable as she was playing no part in the decision-making process.

79. The appeal was considered by the Chief Executive and a detailed response provided in writing rejecting it. The reasons were said to be answering all of the Claimant's points but, again, that wasn't entirely the case. Once again, in relation to the appointment of the maintenance manager, the details, such as his date of appointment, reasonably requested by the Claimant, were not provided.

80. Those are our findings of fact. At the outset of the Hearing, we confirmed that the issues as identified by EJ Coghlin at the Preliminary Hearing in this matter were those which we needed to determine and they have been repeated, as presented, below:

The Issues

1. Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.1.2 If not, was there conduct extending over a period?
1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.1.4.1 Why were the complaints not made to the Tribunal in time?
1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.
2.2 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:
2.2.1 the respondent adequately warned and consulted the claimant;
2.2.2 the respondent adopted a reasonable selection decision, including its approach to a selection pool;
2.2.3 the respondent took reasonable steps to find the claimant suitable alternative employment;
2.2.4 dismissal was within the range of reasonable responses.

3. Direct discrimination (Equality Act 2010 section 13)

3.1 The claimant was 61 at the relevant time, and disabled by reason of cancer.
3.2 Did the respondent do the following things:
3.2.1 Failing to appoint the claimant to role of maintenance manager upon the retirement of the previous occupant of that role, B H, and instead appointing Robbie Holder to the role.
The claimant estimates that Mr Holder was at the time in his early 30s and was not disabled.
3.2.2 Placing the claimant on furlough in late October 2020. The claimant compares his situation with that of the other three members of the team, Mr Andy Dicken, an individual known to the claimant as Les, and Mr Holder. The claimant estimates that Les was in his early 50s, Mr Dicken was in his late 30s or early 40s and Mr Holder in his early 30s. The claimant believes that none of these individuals was disabled.
3.2.3 In October 2020, refusing to allow the claimant to return to work by saying there was no work for him.
3.2.4 In October 2020, suggesting that the claimant take redundancy on grounds of ill-health.
3.2.5 In October 2020, refusing to consider or agree to the claimant job sharing with Les and commenting insensitively that “Les wouldn’t be too happy with that” and that “there may have to be a pool and matrix selection and you may both be going”.
3.2.6 In February 2021, identifying the claimant’s role as redundant.
3.2.7 The finance director, Jamie Kerin, making the remark in the

consultation meeting on 22 February 2021 that “you have cost us thousands of pounds.”
3.3 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.
Insofar as the claimant relies on actual comparators, these are set out in the text at 3.2.1 and 3.2.2 above.
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 in the same circumstances.
3.4 If so, was it because of age (in the case of the allegations at 3.2.1 and 3.2.2 above) and/or because of disability (in the case of all of the allegations at 3.2.1 to 3.2.7)?
3.5 Did this treatment amount to a detriment?
3.6 In respect of age discrimination only: Was the treatment a proportionate means of achieving a legitimate aim? The respondent denied age played any part and did not seek to justify any less favourable treatment found

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

4.1 Did the respondent treat the claimant unfavourably in the manner set out at paragraphs 3.2.1 to 3.2.7 above?
4.2 Did the following things arise in consequence of the claimant’s disability:
4.2.1 the claimant’s absence from work on furlough for health-related reasons;
4.2.2 from January 2021 onwards, the claimant’s identification as being extremely clinically vulnerable.
4.3 Was the unfavourable treatment because of either or both of those things?
4.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
4.4.1 The respondent only advanced a justification defence in relation keeping the claimant on furlough in October 2020 which they said was a proportionate means to keep him safe.
4.5 The Tribunal will decide in particular:
4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
4.5.2 could something less discriminatory have been done instead;
4.5.3 how should the needs of the claimant and the respondent be balanced?

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

5.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
5.2 A “PCP” is a provision, criterion or practice.
5.3 The first PCP:
5.3.1 Did the respondent have a PCP (in October 2020) of not allowing, or being reluctant to allow, staff to return to work where it perceives concerns about their health?
5.3.2 Did that PCP put the claimant at a substantial disadvantage

compared to someone without the claimant's disability, in that he was absent from work for disability-related reasons, and was perceived by the respondent as at risk, and therefore was unable to work?
5.3.3 What steps could have been taken to avoid the disadvantage? The claimant suggests (a) taking appropriate safety precautions; (b) adjusting its expectations; (c) allowing him to return to work; (d) allowing him to work reduced hours.
5.4 The second PCP:
5.4.1 Did the respondent have a PCP (in early 2021) of requiring staff to attend redundancy consultation meetings and requiring the claimant in particular to attend a meeting on 5 February 2021?
5.4.2 Did that PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was too unwell to participate fully in that meeting?
5.4.3 What steps could have been taken to avoid the disadvantage? The claimant suggests that the respondent should have postponed the meeting in a timely way (though he accepts that the meeting was postponed shortly before it happened).
5.5 In the case of both PCPs:
5.5.1 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage identified above?
5.5.2 Was it reasonable for the respondent to have to take the steps in question and when?
5.5.3 Did the respondent fail to take those steps?

6. Remedy for discrimination and unfair dismissal

General
6.1 What financial losses has the claimant suffered?
6.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
6.3 If not, for what period of loss should the claimant be compensated?
6.4 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
6.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
6.6 Did the respondent or the claimant unreasonably fail to comply with it?
6.7 If so is it just and equitable to increase or decrease any award payable to the claimant?
6.8 By what proportion, up to 25%?
Unfair dismissal only
6.9 Should the claimant be reinstated or re-engaged? (if these remedies are sought)
6.10 What basic award should be made for unfair dismissal?
Discrimination only
6.11 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
6.12 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
6.13 Has the discrimination caused the claimant personal injury and how

much compensation should be awarded for that?
6.14 Should interest be awarded? How much?
Other
6.15 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?
6.16 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
6.17 Would it be just and equitable to award four weeks' pay?
7. Holiday Pay
7.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

Decision

Burden of Proof

81. We reminded ourselves of the burden of proof in discrimination cases and, specifically, that it is for the Claimant to establish facts from which we could conclude that discrimination had occurred. If so, the burden would switch to the Respondent to show cogently that their actions were not tainted with discrimination in any way.

82. It is rare for there to be clear evidence of discrimination and so we are required to look at all the circumstances and, where appropriate, we may draw adverse inferences from any related acts or omissions.

Direct discrimination and discrimination arising from disability

83. Turning first to the claims of direct age and disability discrimination.

84. The Claimant was 61 at the relevant time and disabled by reason of cancer and neither of those facts were in dispute.

85. The first allegation was whether the Respondent had failed to appoint the Claimant to the role of maintenance manager upon the retirement of the previous incumbent and, instead, that they had appointed the previous maintenance apprentice, RH, to the role.

86. The Claimant estimated that RH, who was not disabled, was in his early 30s and that was not disputed.

87. We note that nobody was actually appointed on the retirement of the previous incumbent, nor for many months thereafter. Indeed, RH only started in the role after the Claimant had been confirmed as redundant. That said, during the Claimant's consultation period, the Respondent failed

to answer direct questions about the date of appointment and created the impression, at least, that this had happened weeks or months earlier.

88. Nonetheless, the Respondent claimed that the apprentice (RH) had been hired as part of their succession planning for the maintenance manager role. As a result, they said, they were considering this prior to the Claimant being diagnosed with cancer.

89. In those circumstances, the Claimant was willing to accept, before us, that this wasn't because of his disability.

90. In any event, we don't accept that the Respondent would have guaranteed the Claimant such a role, nor did it appear to be a promotion. We would, however, accept that there had been a discussion about the possibility of the Claimant taking over this role, which suggests that he was, at some stage, considered likely to have the necessary skills and experience to do so.

91. It is important to note that, when the claim was presented, the Claimant was under the impression that RH had been appointed on, or shortly after, the retirement of the previous maintenance manager. He only discovered the true position during disclosure.

92. As a result, the allegation was, principally, that the Claimant should have been appointed to the role on or shortly after the retirement. We would acknowledge that, at that time, the Claimant was very unwell and undergoing lifesaving surgery. However, he never raised the issue at all until he was put at risk. That, perhaps, confirms our view that there had been no guarantee.

93. Furthermore, RH was not appointed at the time of BH retirement, nor on qualification, suggesting that he, too, was not going to be automatically promoted.

94. In fact, it seems likely that the maintenance manager role was not going to be filled. It was only when RH resigned, that he was offered the role in an attempt to retain him.

95. When we are considering allegations of direct discrimination, we need to consider the comparators and, specifically, whether there were any material differences between their circumstances.

96. It was not in dispute that RH had particular experience in relation to electrical installations and had a more up-to-date electrical qualification. That is not to say that the Claimant couldn't have obtained that accreditation. It was also not in dispute that the Claimant had the same level of qualification as BH and could have updated his qualification in a few days.

97. The Respondent said that RH had significant significant further skills in electrical installations that would have taken the Claimant a couple of years to acquire. Their evidence on that, however, was very vague both in terms of the specific skills or qualification required, but also in relation to the extent of their need for the same.

98. In any event, there was no reason to believe that age would have played any part in this decision, not least because the previous incumbent was allowed to continue working until the age of 72 and, indeed, the Claimant was in his 50's when appointed. The Respondent would have known then, when discussing the possibility of a future maintenance manager role, that the Claimant would be around 60 before commencing.

99. We also heard that the Claimant had been promoted, even if in name only, in his late 50s and, in fact, earnt more than BH.

100. We accept that there were some differences in the skills and training of the Claimant and his comparator, albeit not as large as the Respondent suggested.

101. However, the Respondent had been very supportive of the Claimant with regard to his disability and, even if he had been "guaranteed" the maintenance manager role, that was no longer the case prior to his diagnosis. We do not believe he would have been appointed to the role "upon retirement" of BH absent his disability, or, indeed, had he not been absent on furlough or sick leave.

102. RH was not appointed "upon retirement" of BH either.

103. There was little to suggest that age played any part in the Respondent's decision at the time and, other than RH being younger, all the evidence suggested otherwise.

104. Therefore, as far as an allegation of either direct age or disability discrimination, or under s15 EqA, allegation 1 must fail.

105. Whether the Respondent failed to properly consider the Claimant's position, because of his absence or otherwise, upon the resignation of RH and/or prior to offering RH the promotion in February 2021, we will return to below.

106. The next allegation was in relation to the Claimant being kept on furlough in late October / early November 2020.

107. In this regard, the Claimant compared himself to 3 other members of the team (including the maintenance engineer) who had all remained at, or returned to, work prior to that date.

108. He estimated that their respective ages were between their early 30s and early 50s. There was no evidence that any of the comparators were disabled.

109. There was no dispute that the Claimant was placed / kept on furlough from early November 2020.

110. There was no evidence that this decision was influenced by age. The 3 comparators were already working, whereas the Claimant had been shielding.

111. Whilst the Claimant was no longer required to shield, he remained more vulnerable and we accept that it was that, coupled with the lack of available work, once the furlough scheme was extended, which was the reason he remained on furlough.

112. In fact, the Claimant asked to remain on furlough at a time when his request to return to work was still being considered.

113. In those circumstances, the Claimant's treatment was, potentially, not less favourable, but, in any event, was not because of his age or particular disability.

114. There clearly was a link, however, between the Claimant remaining on furlough and his vulnerability and already being on furlough. These were matters which arose from his disability.

115. The Claimant wanted to return to work and, as a result, we would acknowledge that keeping him on furlough, at a lower rate of pay, was unfavourable treatment.

116. That said, the Respondent argued that their actions were justified and, specifically, that they had the legitimate aim of keeping their employees safe.

117. We would accept that was a legitimate aim and that, in circumstances where there was not enough work for everyone, it was proportionate for the most vulnerable to be asked to remain on furlough, especially where, as here, the employee had requested it.

118. The next allegation was similar, in that, in October 2020, it was said that the Respondent refused to allow the Claimant to return to work, saying that there was no work for him.

119. We accept there was a discussion about a return to work and indeed a discussion about there potentially not being enough work. We don't accept, however, that the Respondent went so far as to say the Claimant could not return to work.

120. The email record shows that the Claimant made a proposal that was still under consideration at the time that the furlough offer was extended. It was not unreasonable for the Respondent to have required more health information, nor to review their workloads.

121. Whilst that process was ongoing, the furlough offer was extended, and the Claimant contacted the Respondent asking if he would be put on furlough. That was agreed and the issue of a return to work was not raised again.

122. In those circumstances, we don't accept that there was a refusal to allow the Claimant to return and, in any event, the reason for his treatment was not his disability. Rather, it was his vulnerability and the availability of furlough. As with allegation 2, therefore, we accept that the Respondent's actions were justified.

123. Fourthly, it was said that, in October 2020, the Claimant was offered a severance package / redundancy equivalent.

124. We don't accept that being given an additional option to others, without any duress, would amount to less favourable treatment. As already found, we accept that the offer wasn't improper, let alone one of unambiguous impropriety, and so it was part of a protected conversation.

125. Next, also in October 2020, was an allegation that the Respondent refused to consider or agree to a job-share with the tooling specialist, Les, and, further, that the Respondent had made a comment that Les wouldn't be too happy and there may have to be a pool and matrix made for selection for a redundancy situation in the future.

126. It was not in material dispute that something along those lines was said, nor that it was factual. There was no evidence that the comment was because of the Claimant's cancer.

127. That said, the refusal of the job share option was, at least in part, related to the to the fact that the Claimant was on furlough and was vulnerable. However, for similar reasons to those detailed in relation to allegations 2 and 3, we accept that, in October / November 2020 it was reasonable and justified for the Claimant to be the one to remain on furlough.

128. We would observe, however, that in flagging a potential future redundancy situation to the Claimant and not others at that time, it did, perhaps, indicate a level of prejudgment, however unconscious, that he may be the one to be made redundant.

129. In addition, the suggestion at that stage of a potential pool with Les illustrated that the Respondent's subsequent argument, that there was a unique role redundancy affecting the Claimant, was less clear cut than the case presented to us.

130. The next allegation of direct discrimination was in relation to the Claimant's role being identified as redundant, which ultimately resulted in his dismissal. We do not accept that was directly because he had cancer, not least because of the support he had been offered but we will return to this issue when considering the unfair dismissal and this aspect of the section 15 claim.

131. Finally, in relation to direct discrimination, the allegation was that the Finance Director, Jamie Kerin, said, in the consultation meeting on the 22 February 2021, that "you have cost us thousands of pounds".

132. There was no dispute that there was some reference in that meeting by Mr Kerin to the furlough scheme having cost the company thousands of pounds.

133. The correct comparator for direct discrimination would be another individual, without cancer, who had been furloughed.

134. In those circumstances, we think it likely that Mr Kerin would have said exactly the same thing and, therefore, it was not because of the Claimant's disability.

135. The comment was factual It was, however, related to the Claimant's furlough status in the context of the Section 15 claim.

136. We are satisfied that the context was to explain to the Claimant that the furlough option was not one of zero cost. Whilst he may well have perceived that negatively and, perhaps, understandably so, that was not the intention. It was not an unreasonable point for Mr Kerin to make.

137. We do not, therefore, accept that the comment amounted to unfavourable treatment. In any event, it was justified in the context in which it was made.

138. We would acknowledge, however, that such a comment indicated that the Respondent was aware of the increasing costs of keeping employees on furlough and, perhaps, that their patience with, and support for, the Claimant was running out.

139. So, all the age and disability discrimination allegations do not succeed, save in relation to the section 15 claim about the Claimant's selection for redundancy and, ultimately, his dismissal. We return to those issues below.

Reasonable adjustments

140. Moving then to the reasonable adjustments claims.

141. The first was that the Respondent had a provision, criteria or practice of not allowing, or being reluctant to allow, staff to return to work when it perceived concerns about their health.

142. We do not accept that the Respondent denied staff a return to work but do accept that they were reluctant to allow a return where they perceived concerns about their health. So, the question was, did that put the Claimant at a substantial disadvantage?

143. The disadvantage was, potentially, both financial and occupational. He was absent from work for disability related reasons and was perceived by the Respondent to be at risk. That was not an unreasonable perception. He clearly was at greater risk than others. It would be arguable, therefore, that the Claimant would have been at a greater disadvantage had the Respondent required, or even allowed, a return to work.

144. It was reasonable for the Respondent to consider whether they needed further medical advice and what precautions would need to be in place and, indeed, to consider what work may have been available.

145. While that process was ongoing, the furlough scheme was extended and the Claimant seemingly requested it, with no pursuit of his enquiry about a return to work thereafter, so that was the end of the matter from the Respondent's perspective.

146. There was no suggestion that the Respondent wouldn't have taken appropriate safety precautions and we heard that they did for other employees. The other issues about whether there was a potential return on a reduced hours basis or otherwise didn't reach any conclusion.

147. We accept that the respondent acted reasonably in requiring further information and considering the Claimant's request. We further accept that they reasonably believed that the Claimant was happy to remain on furlough once the offer was extended.

148. In those circumstances, they had no knowledge of disadvantage and so the duty to make an adjustment didn't arise. In any event, the steps the Respondent took were reasonable.

149. The second provision, criteria or practice was alleged to be that the Respondent required staff to attend redundancy consultation meetings and, in particular, required the Claimant to attend a meeting on 5 February 2021.

150. We don't accept that there was such a PCP in place. It was in the Claimant's interest to attend consultation meetings and they were postponed on a number of occasions at his request.

151. In fact, the meeting on 5 February 2021 did not take place. So, in those circumstances, we cannot say that the Claimant was put at a

substantial disadvantage because he was too unwell to participate in a meeting that didn't happen.

152. Moreover, with regard to other meetings, we are satisfied that the Claimant was able to participate fully, with the support of his partner, in person (albeit remotely) and also in writing before and after those meetings. In some ways that was an adjustment that would have removed any such disadvantage in any event.

153. The proposed adjustment was that the Respondent should have postponed the meeting in a timely way as it was not in dispute that they did postpone it. It had been postponed the day before as well as the information about his health came through.

154. In such a short timeframe, we do not accept that there was any substantial disadvantage in relation to any perceived delay in postponing.

155. We note that there were further postponements at appeal stage. That was not one of the specific issues in front of us, but we would acknowledge that the initial requirement or request for the meetings to be in person was because of the Chief Executive's vocal disability.

156. In any event, once the Claimant produced appropriate medical evidence that meeting was also converted to be heard remotely.

Unfair dismissal / selection under s15 EqA

157. We first considered the reason for the dismissal which was in dispute as the Claimant alleged, at least at times, that he considered the redundancy situation to have been a sham.

158. We accept that the Respondent was in a difficult financial situation and making a loss throughout. They were making cost savings and other redundancies, including in the technical department, where a setter was also made redundant.

159. The Claimant aligned himself with the other senior employees in the technical department: maintenance engineer / manager, process engineer and tooling specialist.

160. Those 4 employees were reduced to 3 after the redundancy exercise, albeit a maintenance apprentice was also recruited who would work part-time whilst studying. There was still a reduced requirement for employees to carry out work of a particular kind at a particular place and so a redundancy situation did exist. This also reduced the overall payroll costs.

161. The generalist nature of the Claimant's role spanned the specialisms of the 3 other members of staff. We accept the Respondent's evidence that some machines had been sold and others transferred and that they were going to be carrying out less preventative maintenance and so the balance

of the work being done had changed, as had the number of full-time equivalent employees.

162. The Claimant acknowledged that he was warned of a potential redundancy situation in October 2020 and so that was adequate in our view. It did, however, potentially indicate a level of predetermination as there was no evidence that other employees were similarly warned at the time.

163. When we considered the consultation process, however, we did have some significant concerns, not least that the Claimant raised certain valid questions and some of those were not answered, most tellingly in relation to the maintenance manager appointment.

164. The Respondent's decision, that the Claimant had a unique role, was, in theory at least, potentially reasonable. Whilst it may be that other employers may have come to a different conclusion, we are satisfied that it wouldn't have been possible to pool, in the ordinary sense, the Claimant with all 3 other individuals who he suggested, because those individuals wouldn't be able to do the jobs of the others, even if the Claimant could.

165. So, in those circumstances, the nature of the Claimant's generalist role was unique, and it was not necessarily unreasonable to treat it as a role redundancy which would mean that selection didn't arise. That is the case even if, as the Claimant said, "his role was transferable, and he personally could have done any of those 3 jobs".

166. We would accept that the Claimant could have been pooled with the tooling specialist, Les, as has been indicated in the October discussions. It may well be that Les had certain specialist skills that the Claimant lacked but that could have been addressed with higher scores in certain categories in a selection matrix.

167. We would also accept, similarly, that the Claimant could have been pooled with the maintenance engineer as, at one stage at least, the Respondent had considered that he may well have been suitable for the maintenance manager role and had similar qualifications to the previous incumbent. Again, if RH had, as claimed, superior qualifications and skills they could have been acknowledged in a selection matrix.

168. That is not to say, of course, that the Respondent should have adopted one of those pools merely that they were alternative options available.

169. Had the Claimant's role been fairly selected for redundancy that would still leave a potential decision on "bumping". The Respondent said that they had considered that, and rejected it, because of certain unique skills of the other individuals, whether they be in tooling, electrical installation or otherwise. Again, however, their description of these was somewhat vague and largely not accepted by the Claimant.

170. So, we return to our considerable concern in relation to what happened with regard to the maintenance manager role.

171. The Respondent concealed information from the Claimant during the consultation process, even when he asked direct questions. Specifically, he was not informed that the maintenance engineer had resigned, nor that he had been offered the maintenance manager role, nor that he had accepted it, nor, indeed, that they were then proposing to recruit a new maintenance apprentice role.

172. All of that suggested that the Respondent had something to hide. If, as they claimed, the Claimant fell well short of the necessary qualifications for the role, there would have been no need to conceal the resignation, promotion or new appointment.

173. That tended to support the Claimant's case that he was largely suitable for a maintenance role. The fact that it was concealed was not only a significant failing in the consultation process but also gave rise to serious questions arising about the Claimant's selection for redundancy itself.

174. Concealing the true position with both of the new maintenance roles suggested to us that the Respondent probably knew that the Claimant could make a case regarding his suitability for such a role. Preventing him doing so suggested a level of predetermination, however unconscious, that it was the Claimant who was to be made redundant, rather than any particular role.

175. His potential redundancy had clearly been contemplated, at least, as far back as October 2020 at a time when there was no evidence that the Respondent was considering putting others at risk, in the technical department or elsewhere. That is, perhaps, unsurprising, given that the Claimant was furloughed and the Respondent had been getting by without him.

176. In those circumstances, given the potential for us to draw adverse inferences, reverting briefly to the section 15 claim, the Claimant had established facts from which we could conclude that his selection for redundancy, which was clearly unfavourable treatment, was related to his absence, which arose from his disability.

177. Having concealed such important matters throughout the consultation and appeal process, and where there were no contemporaneous notes or even much clarity regarding the original decision, the Respondent was in no position to provide cogent proof that the Claimant's selection was in no way whatsoever tainted with discrimination.

178. They did not advance a justification defence in relation to this part of the claim.

179. That is not to say, necessarily, that the Respondent could not have legitimately identified the Claimant's more generalist role as at risk, whether in isolation or alongside one or more of his colleagues.

180. Much of the case, however, was focused on a suggestion by the Claimant that, when the maintenance engineer resigned, the Respondent then created a vacancy for maintenance manager. He said that was a vacancy that should have been offered to him.

181. We don't accept all of that submission. The fact that the Respondent was willing to recreate that role for the resigning engineer, did not require them to do the same for the Claimant.

182. That said, it seems to us, that the resignation created a potentially suitable alternative role. This arose during the Claimant's redundancy consultation process. The Respondent has a duty to try to avoid redundancies.

183. There was clear evidence that, at one stage at least, the Respondent considered that the Claimant was likely to be suitable for a maintenance management role. There was no evidence that the Claimant was less skilled, experienced or qualified than the previous incumbent. He could have updated his electrical qualifications within a few days.

184. The Respondent may have considered that the maintenance engineer was more skilled than the Claimant in some areas and, indeed, vice versa. The fact is that, during consultation, a resignation was submitted and therefore a vacancy arose. To exclude knowledge of that vacancy from the consultation meant that the Claimant had no opportunity to make the representations he was making before us in relation to whether a maintenance job would have been suitable for him.

185. Given that the Respondent concealed this information we prefer the Claimant's evidence that he did largely, but not completely, have the skills and experience to do the majority of a maintenance role. In many ways he would have been over qualified for the apprentice position.

186. We stress this is the maintenance engineer job because there would have been no obligation on the Respondent to upgrade that to a management role.

187. When the Respondent received RH's resignation, they could have asked the Claimant if he was interested in the maintenance engineer role. If he was not, they could simply continue with the redundancy consultation whilst taking steps to try to retain RH, if they wished. The issue was that the "manager" vacancy only arose when the maintenance engineer resigned with the Respondent wanting to retain him making him an improved offer.

188. The real issue is the Claimant was completely unaware of that and in fact the Respondent sought to present a different picture, specifically that the maintenance manager had been appointed a significant period prior to the consultation process, again without the Claimant's knowledge.

189. The most concerning aspect was that the Claimant asked the question on more than one occasion and received no response. It seems to us that the Respondent was aware that they were concealing this information and that it was an unfortunate truth for them.

190. Something similar happened in relation to the subsequent appointment of the maintenance apprentice because, again, the Claimant was not informed of that, let alone given an opportunity to express an interest or, indeed, his views about an alternative structure or ways of covering the maintenance function.

191. Both of those matters were significant failings in the consultation process and sufficient to take the Respondent's actions outside the range of reasonable responses and make the dismissal unfair, whilst also pointing to his original selection having been predetermined and the whole redundancy process, therefore, tainted with discrimination.

192. We then had to go on to consider what would have happened but for the unfairness. That is always difficult when a Respondent has not put the appropriate matters before a Claimant in the consultation process.

193. We appreciate that, but for the unfairness / discrimination there were a number of potential permutations to the events that followed. We have considered those, in the context of what may have happened and a just and equitable outcome, whilst focusing on what we believe to have been the most likely.

194. The issue, it seems to us, would be, however the redundancy consultation started, what would have happened had a fair process been followed, including the Claimant being informed of the resignation of the maintenance engineer.

195. The Claimant would say, we imagine, that he could have done the role if his electrical qualification were updated. We are prepared to prefer his evidence on this given the lack of transparency from the Respondent.

196. Then we would need to consider whether the maintenance engineer role, at a lower level and only £27,000pa, a significant reduction from the Claimant's approximate £40,000pa, would have been accepted.

197. We have taken into account the Claimant's evidence that he would, potentially, have accepted the maintenance apprentice role if he had been offered it but we find that unlikely, not least because he rejected a role at a similar rate of pay to the apprentice.

198. The maintenance engineer role would have had higher pay and status than the rejected role but still reflected a significant reduction in pay and status from the Claimant's previous role. In those circumstances, we think there was a prospect of 50% that he might have accepted that role and therefore the compensation will be reduced accordingly.

199. The respondent was entitled to require the Claimant to take his unused holiday during his notice period and so his claim in that regard fails and is dismissed.

200. All outstanding matters will be addressed at a remedy hearing.

Employment Judge Broughton

23 December 2022