Case No: 1601617/2021, 1601618/2021, 1601619/2021, 1601620/2021, 1601621/2021, 1601622/2021, 1601623/2021, 1601624/2021, 1601625/2021, 1601626/2021, 1601627/2021, 1601628/2021.

EMPLOYMENT TRIBUNALS

Claimants: Mr C Micallef, Mr R Andrews, Mr R Bayliss, Mr S Bellamy, Mr M Edwards, Mr J Hayel, Mr M Hayel, Mr D Marshall, Mr C Macauley, Mr L Macauley, Mr J Riemer, Mr J Stewart.

Respondent: Welsh National Opera

Heard at: Cardiff Employment Tribunal

On: 5, 6, 7, 8, 9, 12,13, 14, 15 & 16 September 2022

Before: Employment Judge R Harfield
Mr P Bradney
Mr M Pearson

Representation
Claimant: Mr Cowley (CAB)
Respondent: Mr Lewis-Bale (Counsel)

RESERVED JUDGMENT

1. All claimants' complaints of age discrimination are not well founded and are dismissed;
2. Mr C Micallef and Mr J Hayel's complaints of protected disclosure detriment and dismissal are not well founded and are dismissed;
3. Mr J Hayel's complaint of failure to make reasonable adjustments is not well founded and is dismissed;
4. Mr J Hayel's complaint of unfair dismissal is successful;
5. All other claimants' complaints of unfair dismissal are not well founded and are dismissed;
6. If required Mr J Hayel's successful unfair dismissal complaint will be listed for a remedy hearing.

REASONS

Introduction

1. The claim form for all claimants was presented on 14 October 2021. The claim form rider confirmed that all claimants were bringing unfair dismissal and direct age discrimination complaints. It was identified that Mr Micallef and Mr John Hayel were bringing protected disclosure

detriment and dismissal complaints. In addition, Mr. John Hayel brings a disability discrimination complaint of failure to make reasonable adjustments. ET3 response forms were filed denying the claims.

2. Employment Judge Moore held a case management hearing on 14 March 2022. EJ Moore produced an initial list of issues which the parties subsequently updated, as set out below. Further information was also provided about the alleged protected disclosures [164 – 170] and [171- 172].

3. We had before us a bundle extending to 477 pages. References in brackets [ ] are a reference to the page number in the bundle. We had a proposed timetable, an updated List of Issues and a Chronology of Key Events. We had written statements from and heard oral evidence from all 12 claimants. We also had before us a witness statement from Mr Sherrard for the claimants. Mr Sherrard was not in attendance at the hearing. He lives in Cornwall. Conscious of the distance, we gave the option for Mr Sherrard to attend by video. We were told Mr Sherrard had said he would not attend under any circumstances and the claimants did not wish to compel him to attend. We return to the weight we give Mr Sherrard's evidence in those circumstances at the relevant point below.

4. For the respondent we heard oral evidence from and had written statements from Mr Michaelis, Mr Barden, Mr Lang and Ms Woodward. Both representatives provided written closing arguments and spoke to them verbally. We have not set out all of their submissions in full detail, but we took all submissions into account. We were able to complete our deliberations but there was insufficient time to hand down an oral judgment. Judgment was reserved to be delivered in writing. EJ Harfield apologises for the delay which has been caused by the pressure of other judicial commitments and the length of this reserved judgment. We were grateful to all the parties co-operation in getting this case heard.

The Issues to be decided

5. The updated list of issues is as follows:

"1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 22 April 2021 may not have been brought in time.
1.2 Were the ***discrimination complaints*** *made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*
1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?
*1.3 Was the **unfair dismissal / detriment claims** made within the time limit in section 111 / 48 of the Employment Rights Act 1996? The Tribunal will decide:*
1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?
1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 Were the Claimants dismissed?
2.2 If the Claimants were dismissed, what was the reason or principal reason for dismissal?
2.3 Was it a potentially fair reason?
2.4 (Mr Micallef and Mr J Hayel only) Was the reason or principal reason for dismissal that the Claimants had made a protected disclosure? If so, the Claimants will be regarded as unfairly dismissed.
2.5 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimants. The Tribunal will usually decide, in particular, whether:
2.5.1 The Respondent adequately warned and consulted the Claimants;
2.5.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
2.5.3 The Respondent took reasonable steps to find the Claimants suitable alternative employment;
2.5.4 Dismissal was within the range of reasonable responses.
2.6 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimants?

3. Remedy for unfair dismissal

3.1 Do the Claimants wish to be reinstated to their previous employment?
3.2 Do the Claimants wish to be re-engaged to comparable employment or other suitable employment?
3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimants caused or contributed to dismissal, whether it would be just.
3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimants caused or contributed to dismissal, whether it would be just.
3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
3.6.1 What financial losses has the dismissal caused the Claimants?
3.6.2 Have the Claimants taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.6.3 If not, for what period of loss should the Claimants be compensated?
3.6.4 Is there a chance that the Claimants would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.6.5 If so, should the Claimants' compensation be reduced? By how much?
3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.6.7 Did the Respondent or the Claimants unreasonably fail to comply with it?
3.6.8 If so is it just and equitable to increase or decrease any award payable to the Claimants? By what proportion, up to 25%?
3.6.9 If the Claimants were unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
3.6.10 If so, would it be just and equitable to reduce the Claimants compensatory award? By what proportion?
3.6.11 Does the statutory cap of fifty-two weeks' pay apply?
3.7 What basic award is payable to the Claimants, if any?
3.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimants before the dismissal? If so, to what extent?

4. Protected disclosure – Mr Micallef and Mr J Hayel only
4.1 Did the Claimants make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
4.1.1 What did the Claimants say or write? When? To whom? The Claimants says they made disclosures on these occasions:
4.1.1.1 January 2018 Meeting between Constandinous Micallef and Leonora Thomson.
4.1.1.2 Autumn 2019 Constandinous Micallef exchanged emails with the Technical Director
4.1.1.3 Winter 2019 – 2020 Constandinous Micallef had several meetings with the Technical Director, relating to exchange of emails.
4.1.1.4 Early March, call from Technical Director to Constandinous Micallef
4.1.1.5 December 2020, Constandinous Micallef and John Hayel arranged a meeting with CEO
4.1.1.6 Barber of Seville tour.
4.1.2 Did they disclose information?
4.1.3 Did they believe the disclosure of information was made in the public interest?
4.1.4 Was that belief reasonable?
4.1.5 Did they believe it tended to show that:
4.1.5.1 a criminal offence had been, was being or was likely to be committed;
4.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;
4.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;
4.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;
4.1.5.5 the environment had been, was being or was likely to be damaged;

4.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.
4.1.6 Was that belief reasonable?
4.2 If the Claimants made a qualifying disclosure, it was a protected disclosure because it was made to the ***Claimants employer****.*

5. Detriment (Employment Rights Act 1996 section 48)

5.1 Did the Respondent do the following things:
5.1.1 ***Select the claimants for redundancy;***
5.1.2 ***Failed to offer suitable alternative employment****.*
5.2 By doing so, did it subject the Claimants to detriment?
5.3 If so, was it done on the ground that they ***made a protected disclosure / other prohibited reason?***

6. Remedy for Protected Disclosure Detriment

6.1 What financial losses has the detrimental treatment caused the Claimants?
6.2 Have the Claimants taken reasonable steps to replace their lost earnings, for example by looking for another job?
6.3 If not, for what period of loss should the Claimants be compensated?
6.4 What injury to feelings has the detrimental treatment caused the Claimants and how much compensation should be awarded for that?
6.5 Has the detrimental treatment caused the Claimants personal injury and how much compensation should be awarded for that?
6.6 Is it just and equitable to award the Claimants other compensation?
6.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
6.8 Did the Respondent or the Claimants unreasonably fail to comply with it?
6.9 If so is it just and equitable to increase or decrease any award payable to the Claimants? By what proportion, up to 25%?
6.10 Did the Claimants cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the Claimants compensation? By what proportion?
6.11 Was the protected disclosure made in good faith?
6.12 If not, is it just and equitable to reduce the Claimants compensation? By what proportion, up to 25%?

7. Disability – Mr J Hayel only

7.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
7.1.1 Did they have a mental impairment: dyslexia?
7.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
7.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
7.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
7.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

7.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
7.1.5.2 if not, were they likely to recur?

8. Direct age discrimination (Equality Act 2010 section 13)

8.1 The Claimant's age group is between 43 and 66 and they compare themselves with people in the age group ***that is much younger****.*
8.2 Did the Respondent do the following things:
8.2.1 ***Select and dismiss the claimants for redundancy***
8.3 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.
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.
The claimants rely on a hypothetical comparator.
8.4 If so, was it because of age?

9. Reasonable Adjustments (Equality Act 2010 sections 20 & 21) (Mr J Hayel only)

9.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?
9.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
9.2.1 ***The requirement of the role which equated to the one which had had occupied to produce written reports***
9.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that Mr Hayel would be unable to complete written reports in the form required
9.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
9.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:
9.5.1 Voice activated software
9.5.2 Delegation of report writing to an alternative member of the team
9.5.3 Use of a digital recorder to record meetings, training etc
9.6 Was it reasonable for the Respondent to have to take those steps?
9.7 Did the Respondent fail to take those steps?

10. Remedy for discrimination or victimisation

10.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
10.2 What financial losses has the discrimination caused the Claimant?
10.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
10.4 If not, for what period of loss should the Claimant be compensated?

10.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
10.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
10.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
10.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
10.9 Did the Respondent or the Claimant unreasonably fail to comply with it?
10.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?
10.11 By what proportion, up to 25%?
10.12 Should interest be awarded? How much?

Findings of fact

Introduction

6. We do not need to make findings on every point put before us in this case but where we do need to make findings on contested issues we do so applying the balance of probabilities. There are 12 claimants. They were known as the Stage Crew or Stage Technical Team. Mr J Hayel was the Master Carpenter at the time of his dismissal. He had been employed since 1974. He was age 66 at the time of dismissal. Mr Micallef was the Deputy Master Carpenter at the time of his dismissal. He had been employed since 1991. He was age 60 at the time of dismissal. Mr Stewart was Assistant Master Carpenter. He had been employed since 1993. He was age 57 at the time of dismissal. Mr Riemer was Head of Flies and Rigging. He had been employed since 1986. He was age 59 at the time of dismissal. Mr C Macauley was Property Master. He had been employed since 1976. He was age 66 at the time of dismissal.

7. Mr Andrews was Senior Flyman. He had been employed since 1991. He was age 60 at the time of dismissal. Mr Bayliss was a Flyman. He had been employed since 1992. He was age 59 at the time of dismissal. Mr Bellamy was a Senior Wingman. He had been employed since 1994. He was age 64 at the time of dismissal. Mr M Hayel was a Senior Wingman. He had been employed since 1991. He was age 64 at the time of dismissal. Mr Marshall was Stage Right Wingman. He had been employed since 1989. He was age 58 at the time of dismissal. Mr L Macauley was Stage Left Wingman. He had been employed since 1998. He was age 43 at the time of dismissal. Mr Edwards was a Stage Loader. He had been employed since 1996. He was age 59 at the time of dismissal.

8. Mr Michaelis is Technical Director. He oversees the creating and touring of productions including set building, prop preparation and the transportation of sets. He has three direct reports, the general manager for Cardiff Theatrical Services ("CTS"), The Technical Manager (Mr Barden), and the Head of Production. Mr Michaelis worked his way up through the WNO, starting originally as stage crew. Mr Barden first worked for the respondent from 2007 until 2012. He returned in his current post in the Autumn of

2019. Mr Barden as Technical Manager oversees the Technical Operations team who are responsible for taking the shows (including scenery, props, and costumes), putting them on stage and taking them on tour.

9. Mr J Hayel, as Master Carpenter, was head of the stage crew and reported to Mr Barden. Mr Barden had other direct reports such as the head of lighting, head of wardrobe and head of wigs and make-up. Mr J Hayel worked closely with Mr Micallef as Master Carpenter and Deputy Master Carpenter respectively.

10. Part of this case is about alleged protected disclosures raised by Mr J Hayel and/or Mr Micallef, mainly with Mr Michaelis.

Claimed protected disclosure to Leonora Thomson

11. The first claimed protected disclosure relied upon relates to a meeting Mr Micallef says he had with the then CEO, Leonora Thomson, in January 2018. He says in his witness statement that in the meeting they discussed: (a) the fact that poor scheduling planning, construction and decision making was contributing to the waste of public money over many years; (b) worries over health and safety through the lack of Design Construction Management which also has a knock on effect to costs; (c) concerns about restructuring the touring stage crew without consultation; (d) certain individuals within a department being given different titles, doing the same job but having wage increases outside of the rest of the company, causing resentment as many believe the raises are based on friendships and relationships rather than abilities. It is the first two points that are relied upon as being alleged protected disclosures by Mr Micallef. We did not hear evidence from Ms Thomson. We accept that this is the gist of what Mr Micallef said to Ms Thomson about concerns he had.

12. Mr Micallef says that a few weeks later Mr J Hayel had a similar, separate conversation with Ms Thomson. In his witness statement Mr J Hayel says that "*both Tarki (Constandinous Micallef) and myself went to see the then CEO of the company to complain about the way my department were being treated and to point out their dislike and contempt towards the crew."* At first blush this tends to suggest they went together, whereas Mr Micallef says they were separate conversations. But in any event Mr J Hayel does not rely upon this a protected disclosure in his own case. He explains in his witness statement the context from his perspective. He says that the Technical Department were starting to try and lay off quite a few members of his department which he did not think was a good idea as it took a long time to train people. He says that they identified ways to save money rather that lose jobs, such as scenery that was built for performances that was never taken on tour. Mr J Hayel says he believes that Ms Thomson understood the concerns and there were no lay offs at the time. He says it was after this he felt that attitudes towards the crew started to get worse.

13. Mr Michaelis says that he had wished to restructure the Stage Technical

Department since 2017. He says that he did not know at the time that Mr Micallef or Mr J Hayel had raised concerns with Ms Thomson or that they had met with her. He says the restructuring did not go ahead at that stage as they were very busy and it fell into abeyance. Mr Lang, likewise says he did not know that Ms Thomson had supposedly stopped any restructuring in 2017/2018. He says Ms Thomson had her own artistic plan for the WNO, which included a set of 3 Operas as a themed season (i.e. different to the model the respondent says they subsequently were looking to shift to, as set out further below). We return to this claimed protected disclosure in our discussions and conclusions below.

Claimed protected disclosure(s) about HR

14. Mr Micallef says that on 22 July 2018 he had a telephone conversation with Hang Barry in HR to request two further individuals be added to a list of applicants for the roles of temporary stage technicians. He says she said no as the closing date had just expired. The date had been brought forward but Mr Micallef was unaware of this. He says she told him that he should have been aware as it was on a notice board in scenery street (a storage area and thoroughfare). He says he explained that they had been based at the East Moors stores so he would not have seen it, and also that one of the individuals had only recently come to his attention on the Don Pasquale mini tour. He says that Ms Barry then said "we have to be seen to be doing things properly and long gone are the days that people got jobs just because of you or Johnny Hayel's say so." Mr Micallef says that he was shocked and told Ms Barry that he had always told people there was a recruitment procedure to follow and he took exception to her questioning his integrity without any substance or proof. Mr Micallef told Mr J Hayel about it. As set out in Mr J Hayel's witness statement they then felt that HR were not there to support them but instead were doing the bidding of the Technical office, such as (in the viewpoint of Mr J Hayel) firing people.

15. On the face of it, some 15 months after the incident with Ms Barry, Mr Micallef emailed Mr Michaelis with concerns about the HR team by way of an email dated 14 October 2019 [322]. He copied in Mr Lang. The email said:

"*Dear Jan.*

I have spoke with you on several occasions over a lengthy period of time of my concerns at the path that I and many colleagues believe the company are going down and their feelings towards our Human Resources department. There have been others-but one example of my experience with HR was with Hang Barry..... On the 22nd of July I rang Hang- requesting that a further two individuals be added to our list of applicants for the roles of temporary stage technicians. She bluntly said "no" as the closing date had just expired. Unbeknown to me the closing date had been brought forward. On explaining I was not aware of this, she said "I should have been, as it was posted on one of the notice boards in scenery street." I further explained that for several weeks we had been basing ourselves at our companies stores (East Moors Rd) and would not have seen the

notice, even if I had-one of the potential applicants had only recently come to our attention while working with WNO on our recent mini-tour production of Don Pasquale. It was at this point, and I quote, "we now do things properly, and long gone are the days that people get jobs based just on yours and Johnny Hayels say so." I was shocked by her outburst. I informed her that on a regular basis over many years myself and John had been approached on dozens of occasions by people seeking employment. My response has always been that there is a company procedure of applying through the appropriate channels, along with an interview process. This has always been the case, unless there were extenuating circumstances. I told her I took exception to her questioning my integrity without any substance or foundation..... Her manner was rude, dismissive, provocative and defamatory.....

I was simply doing what I have been doing for many years in my position as Deputy Master Carpenter-to try and find technicians with the skills required for our companies needs-regardless of any circumstances no technician has ever been employed without the knowledge and permission of a Technical Manager or Technical Director..... Immediately after the call ended, I spoke to John Hayel my line manager informing him about the conversation that I had just had.

The reason for me informing you of our conversation is to highlight the significance of Hangs perception or opinion of me and possibly others.... It would appear that I am a person that she may believe to be untrustworthy and unprofessional. "I am surprised and very disappointed that she seems to have formed such an opinion.".. She may have shared these feelings with other members of her department, or indeed other members of the company.... Due to her role-it is not only unprofessional it could also be very damaging for me in my role as a line manager..... I may in the future need help, support or advice from our HR department as many do during their careers. I now feel for me it would futile as I am not sure that I could be treated without prejudice. It would appear that I have been judged as to not be worthy or trusted in the decision making that my role at times requires.

Other colleagues have shared their own experiences, where they feel unheard, aggrieved and even angry after emails, meetings or telephone conversations with the department. Hence my decision to write to you..

HR are the only personnel that touch and effect every single person within the company, we should all feel completely confident that they are impartial, approachable and without prejudice-regardless of their own personal feelings, especially at a time where the company are rightly encouraging us all to show more restraint and be civil in our dealings with each other- However, so as to when and if there are incidents-we should all feel HR will without bias be able to keep an open mind-as I am sure what we as a company do not want to achieve is a workforce that are afraid to question or challenge each other for fear of reprisals or complaints being made against them, as this may then allow personnel with long standing grievances and vendettas to surface and take advantage of the misfortune of others while at their most vulnerable and become involved with a maliciousness that the company are trying to eliminate... I am sure we do not want to create a passive aggressive environment where some may be aware of colleagues personal or professional difficulties- know their

triggers points, and use this knowledge against them...It would be a very sad day where we unwittingly create a culture of "getting in first" to make a complaint as to seek an advantage-again it is so important we have the belief in HR that they will be vigilant and guard against these possibilities happening....It is vital we have trust in HR so that complaints are investigated fairly and consistently, as so that the complainant and accused are afforded the same unbiased treatment regardless of their status, department or persona.

I do believe Hang was wrong with the content and manner in which she spoke to me. However, I have no desire to make a complaint. It would be more productive to try and find out why suddenly there is such a lack of trust amongst individuals and departments-something I have never experienced in my many years at the company.

In defence of HR, It has been commented that their workload is as heavy than at any time that anyone can remember. Could it be that managers are not managing situations as well as we should-myself included. Are there breakdowns in communication, which leads to a frustrated work-force, and rather than manage situations or personnel, are we now waiting for an opportunity-seize upon it, then pass it on to HR, so what may have been better resolved with good managerial practice, suddenly escalates.... However, if incidents are passed onto HR then this should not exonerate or excuse personnel's behaviour.

My tone is not one of accusatory, it is one of reflection and concern as these issues have been a topic of conversation across different parts of the company for quite some time..... I am not writing this from a position of being a disgruntled employee-on the contrary I have been very fortunate and privileged to work for WNO. In my 30 years of service the company has been very good to me and been very good for me..... I do feel the need to speak up. I can no longer sit back watch and listen and say nothing as there are those that feel there may possibly be some alarming patterns developing, others would also like to speak up, but many find this difficult. A couple of years ago I voiced my concerns about something that I was very uncomfortable with, I should have raised my head above the parapet then-I did not and it is something that I have since very much regretted.

I am not sure to whom and to where I end up going with these issues-you as my Technical Director are my first port of call.... On a personal level, I feel I do need to speak to somebody, it should be to Human Resources, unfortunately at this moment in time I have lost faith and trust in the department as it would deem that they have never had any trust or faith in me.
Many Thanks.
C. Micallef.
Deputy Master Carpenter."

16. The list of issues appears to assert that further alleged protected disclosures were made in the emails and meetings that followed between Mr Micallef and Mr Michaelis. We therefore summarise the evidence we have about this and return to the point in our decision making below.

17. We do not have dates of the alleged meetings which makes the exact

sequence of event difficult to track. Mr Micallef says Mr Michaelis said in their first meeting about it all that Mr Lang, as new CEO, wanted it sorted and he asked Mr Micallef to open dialogue with HR which Mr Micallef initially agreed to.

18. Mr Michaelis emailed Mr Micallef on 1 November 2019 [324] which referred to their meeting and asked whether the email was an official complaint and whether Mr Micallef wanted to raise a grievance. Mr Michaelis said he would try to facilitate rebuilding the relationship with HR. Mr Micallef said [327] in his email reply that he did not wish to make a complaint against any individual or raise a grievance. He said the conversation he reported was just an example of employee dismay with a department that seems to feel it is unaccountable. He said working relationships had not improved.

19. A meeting with HR was arranged but it was cancelled at the last minute as Ms Halliday-Jones was unwell. Mr Micallef says that at a further meeting with Mr Michaelis, Mr Michaelis asked him to retract his criticism of Ms Barry as she had not been given the opportunity to defend herself, which was unfair. Mr Micallef says that he declined to do so as he was not making a complaint but highlighting and wondering why she had such a poor perception of him and what was fuelling those perceptions. Mr Michaelis denies this exchange happened as described by Mr Micallef. Mr Micallef says that a further meeting again, Mr Michaelis had alleged that Mr Micallef had implicated him. Mr Micallef says he said he had "implicated everybody and accused nobody, and if any person hadn't done anything wrong then there was nothing to fear, as I have implicated myself as I am a line manager." Mr Michaelis denies saying this. We return to these disputed exchanges in our conclusions below.

20. Mr Micallef says that about 6 weeks after the original meeting with HR was cancelled, he was invited to another meeting with conditions he was not comfortable with. He says he declined to attend, and he had also found out about some more disturbing incidents which had taken place. He does not clearly say what they were in his witness statement. It seems likely this meeting invite relates to an email Mr Michaelis sent on 21 February 2020 [327] again seeking to arrange an informal meeting to include Ms Halliday-Jones in HR. Mr Michaelis said: "I *firmly believe that your concerns need addressing at the same time as giving the Manager of the department an opportunity to respond to the email."* The meeting was arranged for 27 February, but on 24 February Mr Micallef refused to attend [329], saying Mr Michaelis was aware of his personal reasons in not wanting to attend and that he had explained this previously too. He said his concerns were for Mr Michaelis to act upon.

21. In early March 2020 Mr Lang asked Mr Michaelis to, in turn, ask Mr Micallef if he would meet with Mr Lang about the emails sent and the concerns raised. Mr Michaelis telephoned Mr Micallef, who was on tour in Bristol at the time. It was agreed a meeting would take place in the next few weeks. The meeting, however, never happened because several days later, due to Covid, the public were advised not to go to theatres. 24 hours

after that the WNO suspended touring.

22. Mr Micallef, both in the further particulars of alleged protected disclosures, and his written witness statement, sets out at some length, what he says he planned to discuss at the meeting. He terms it an "agenda." It is accepted, however, that no formal agenda was sent to Mr Lang that would have given Mr Lang written advance notice of the issues, and that the meeting itself never took place. The matters identified in the further particulars about Mr Micallef's "agenda" therefore cannot amount to protected disclosures as the information was never actually communicated.

Other concerns held by the claimants

23. Whilst they are not protected disclosures ultimately relied upon, it is worth briefly setting out here that Mr Micallef had other concerns about some things he said were happening both within the crew and relating to other employees of the respondent. For example, he says he spoke to Mr Michaelis about a crew member who had been dismissed but who, on the back of what the crew member had been told at the time of dismissal, was trying to get re-employed. The crew member felt he was being ignored. Mr Micallef says he raised concerns about two crew members who were suspended on a tour of Don Pasquale in late 2018 about the suspension and that he had been told the original investigator had been taken off the case because he was too sympathetic. He says there was a complaint that HR had not communicated the full picture of what was happening and why. Mr Michaelis accepts the concerns were raised but says the suspensions at the time they were levied were the correct course of action. He says that the original investigator was removed because HR had advised the investigator had made a passing comment in an interview which could be seen as prejudicial to the interests of the crew members (not that the investigator was too sympathetic towards them).

24. Mr Micallef also says he complained about the subsequent treatment of one of the crew members who faced further disciplinary investigations in the spring or summer of 2019. He says he also raised concerns that the alleged victim was given employment in CTS which he felt was favourable treatment.

25. Mr Michaelis was the investigating officer in relation to a chorister. We are given dates for this for both 2016 and 2019 so the exact sequence of events is not clear. However, Mr Micallef was raising concerns about the chorister's wellbeing, whether she was getting support, and also the actions of HR in sending her an investigation report at a time when she was vulnerable. He says the report was sent on the instructions of HR, despite Mr Michaelis raising concerns about the course of action. He also complains that documents in the investigation were not fairly drafted. Mr Michaelis says his understanding is that occupational health and counselling support was offered to the chorister but was rejected by her. Mr Micallef says he was also concerned about how a casual worker was questioned by HR about an alleged homophobic remark. He says he felt

the questioning was seeking to implicate the wider crew.

26. It is not necessary for us to decide the issues in this case to get into the detail of these concerns Mr Micallef says he held and expressed. Rightly or wrongly Mr Micallef was receiving information from various sources that was making him question some of the actions of HR. It seems likely that these were things discussed in the wider crew in general, and over time were leading to a sense from the crews' perspective, rightly or wrongly, that HR were on the side of managers.

27. At around the same time period the numbers in the stage crew were reducing as those on seasonal contracts were not having their contracts renewed. Discussions were also starting (which we return to below) potential changes to the way the crew worked. This one of the things that Mr Micallef and Mr J Hayel say they spoke to Ms Thomson about and that they also spoke to Mr Lang about when he started in post. Mr Micallef and Mr J Hayel and the rest of the team did not like what was happening. They were worried they were losing experienced staff who it took a long time to train and that the crew were under threat from HR and managers. They felt that the crew were undeservedly seen in a bad light. Much of the responsibility for these thing the claimants lay at the door of HR and/or Mr Michaelis. From the claimants' subjective position they felt under threat and that they had no where to go as they did not trust HR either. The crew also felt that CTS staff were being treated more favourably to them.

Impact of Covid

28. As mentioned briefly above, the pandemic then struck. On 22 March on site working was suspended. The claimants then had periods of furlough and periods in which they were brought back in to work. CTS is a profit making arm of the respondent. For example, they make sets for third parties. The previous understanding had been that it was not part of the claimants' job description to help or work for CTS unless it was a WNO production. During the pandemic the claimants were asked to do work to help CTS on the basis it would help both CTS and the WNO and keep jobs alive. For example, in January 2021 there was a zoom meeting with Mr Michaelis and Mr Barden where they were asked to load the Barber of Seville show from the stores and lay out flats for CTS to refurbish the set. Originally this was relied upon by Mr Micallef and Mr J Hayel as being a protected disclosure but by closing submissions it was not. We therefore do not need to make detailed findings of fact about it.

Mr Sherrard

29. Mr Sherrard was previously employed as a touring stage technician. He says in his unsigned witness statement (which was not approved or tested under oath because he declined to give oral evidence),he met Mr Barden in July 2020 as Mr Barden had agreed to meet up with him as a favour to return some tools to Mr Sherrard. He says: "Mr Barden was implying to me that there would be a good chance of full-time work (stage positions) in the future and that a lot of the "full-timers" were coming up to retirement

and it was time for the "old guard to leave."

30. Mr Barden agrees he met up with Mr Sherrard on 14 July 2020 to give him back his tools, as Mr Sherrard had been away when lockdown was implemented. Mr Barden says they talked about the fact that at the time the company was planning to restart touring as soon as possible after the pandemic and there would be a number of fixed roles available. He says he was trying to cheer Mr Sherrard up as Mr Sherrard was worried about work. He says he was not referring to the 8 new roles in the subsequent restructure process as that was not within his knowledge at the time. Mr Barden says he did not start working on the detail of these roles until the Spring of 2021. He says he did not know in 2020 that there were going to be offers of voluntary redundancy, and the 8 roles had not been planned out at this time for him to be able to discuss them with Mr Sherrard. Mr Barden denies saying that people would be shocked about who would be going or that he said full timers were coming up to retirement and the old guard need to leave. He says he did then contact Mr Sherrard in August 2021 to tell him about vacancies for freelance work in Autumn 2021.

31. Given that Mr Sherrard did not give evidence under oath and his witness evidence was untested, we are unable to accept his evidence where it contradicts that of Mr Barden. Moreover, we accept that Mr Barden did not know the detail of the subsequent restructuring in July 2020 to be able to talk to Mr Sherrard about it. In our judgement, it is more likely that he was talking about opportunities for fixed roles coming up, because at that time they were hopeful touring would restart and he was trying to cheer up Mr Sherrard. On the balance of probabilities, we therefore do not find that Mr Barden said that a lot of the full timers were coming up to retirement, it was time for the old guard to leave, with the insinuation that, in effect, their jobs would be coming up for Mr Sherrard to apply for.

December 2020 meeting with Mr Lang

32. Mr Lang met with Mr Micallef and Mr J Hayel in December 2020. Some of the content is relied upon as being claimed protected disclosures. First, the claimants say that they both raised concerns about huge amounts of money being wasted, especially in the last few years. They say that they discussed that tens of thousands of pounds had been wasted recently on the last tour of Carmen. They say they said it was not only through poor construction but also dangerous construction and that the whole crew were unanimous in their worries of what was being allowed and authorised. It is said they have other examples, but we are not given the detail of that. They say that they also gave many examples on ways to save money which had been put to managers but nothing was done. Again, there is no further detail about that. They say they said the respondent seemed to have had a culture of questioning an employee's one hour overtime – which is completely acceptable – however when it came to large costs where savings could be made – there was no appetite to do so.

33. Mr Lang's recollection is that Mr Micallef said the set was too heavy and

Mr Lang had agreed that it was too big for touring. He says the respondent took the feedback on board and it was useful for future touring. Mr Lang says that he recalls Mr Micallef raising concerns that he believed huge amounts of money were being wasted and that the respondent was in breach of their Arts Council of Wales grant funding conditions. He says it is not the case and there are no condition attached to the use of grant monies. He says he believes the opinion expressed was a throw away comment with no substance behind it.

34. Mr Michaelis was not at the meeting, but he has relevant evidence to give in that he accepts that previously in the autumn of 2019 Mr J Hayel, Mr Micallef and Mr Riemer had raised concerns about the weight of the Carmen set, saying it was too heavy. Mr Michaelis says he agreed it was heavy but says he did not agree it was dangerous. He says the set was reduced in size by about 20% and says that a rehearsal session was then arranged to ensure the crew were happy with the changes made.

35. The second point is that the claimants say they brought to Mr Lang's attention concerns about CTS and the possibility of a conflict of interest as Mr Michaelis is also head of CTS. CTS, although affiliated to the WNO, is a profit making organisation. The claimants say they highlighted that, in their view, the respondent was being charged large sums of money by CTS for very average and overpriced work. They comment that: "It seemed that work was being carried out at the cost of WNO and its public money." They say they questioned whether it was in the WNO's interests, or moral or legal, to be so closely associated with CTS, as it seemed they were using WNO staff and equipment to the benefit of a profit making organisation whilst getting rid of members of the WNO technical crew." The latter was a reference to the fact that one crew member's fixed term contract had not been renewed, and another 3 were about to be let go when their year rolling contract expired. As set out above, reductions in the size of the crew was a long standing concern of the claimants.

36. Mr Lang accepts that Mr Micallef and Mr J Hayel raised concerns about CTS, saying there was a potential conflict of interest as the WNO Technical Director was also the head of CTS. Mr Lang says this is not correct as CTS has its own managing director, board of directors and independent chair but that two WNO board members sit on the CTS board to help the two organisation stay aligned.

37. Mr Michaelis says he understands that Mr Micallef and Mr J Hayel raised concerns about the respondent wasting public money albeit not directly with him. He says he understands they raised potential conflict of interest concerns about CTS. He says CTS is a wholly owned subsidiary of the WNO that operates in the private sector. He says that any profits made are reinvested into the WNO. CTS has its own board and chairman. Two WNO board members sit on the board of CTS but he says there is no conflict of interest as their interests are aligned. He says he understands that Mr Lang addressed these concerns when he met with the two claimants in December 2020.

38 We make relevant findings about what we considered was said, and what the claimants' believed at the time, in our conclusions below.

39. Mr Micallef says that he touched on other topics with Mr Lang including crew members losing their jobs, the worrying and escalating poor treatment of employees, the lack of duty of care shown especially towards vulnerable people, inconsistencies in how incidents or people were investigated, favouritism and questionable pay rises. He says he made it clear he was prepared to speak to the board in the future about his concerns. He says there was no more time to go into things as the room was booked for a rehearsal. A future meeting with Mr Lang was discussed for when work resumed post-pandemic. Mr Lang says he does not recall these other concerns being raised with him other than he potentially knew about the concerns surrounding the chorister. We do not need to make findings about all this as they are not relied upon as protected disclosures but as we have said, subjectively, these were the kind of thing that were troubling Mr Micallef and probably some of the wider crew to some extent.

Zoom meetings

40. During covid pandemic meetings were held with the crew by zoom. It is alleged by the claimants that Mr Michaelis and Mr Barden made comments to them that were age discriminatory. The claimants rely on these alleged comments not as being pleaded allegations of discrimination in their own right. They rely on the alleged comments in support of their pleaded age discrimination case relating to their redundancies. It is therefore necessary for us to make findings of fact as to whether they occurred or not. Mr Cowley in closing submissions relied on four particular allegations. One relates to a comment allegedly made in person to Mr M Hayel and one to a comment allegedly made in person to Mr Micallef. Two others relate to the zoom meetings.

41. Mr Micallef alleges "our ages are mentioned on several occasions" in relation to the zoom meeting, but the only detail he gives in his statement is that it was Mr Hayel stating to Mr Michaelis on an occasion we have not date for: "*we don't have any of the younger ones left because you have got rid of them."* It is not an allegation against Mr Michaelis and even if it was said by Mr J Hayel we know nothing at all about the context. On the face of it, it is just reflective of Mr Hayel's own opinion.

42. Mr J Hayel says in his witness statement: "Jan and Grant had already started to end the contracts of the younger members of the crew and during a zoom meeting he then said he was going to sort out an aging crew." Mr Hayel does not identify in his witness statement if that was Mr Michaelis or Mr Barden. Mr Michaelis and Mr Barden deny saying this. In closing submissions Mr Cowley said it was Mr Barden but Mr J Hayel also said in evidence it was Mr Michaelis who mentioned age in zoom meetings not Mr Barden. It may also be that Mr J Hayel's case that this incident and the one above happened at the same time, as he said in oral evidence there was a discussion about the younger crew going, getting rid of the younger crew, and he had asked what about the older crew with a

response "we need to sort out the aging crew." It is difficult to deal with this allegation, and indeed the allegations of these type in general because of the confusion and the lack of detail. We do not know when it was supposed to have been said and we do not know the detail of the wider context in which it was allegedly said. If it was said no one complained about it at the time, and we know that Mr Micallef was willing to raise matters which concerned him or the team. The oral evidence received from the other claimants was also inconsistent and unclear. One said he heard age related comments in banter but not on zoom. Another said age was mentioned on zoom but he was not actually at the meeting. Others said they had not witnessed anything. Some said they thought something was said but they could not remember what. Some said Mr Barden made comments once or twice but he could not remember what they were other than being about aging/ getting on bit. Whereas another said it was Mr Michaelis that had said he had a problem with an aging crew. This was not evidence they had put in their witness statements despite bringing age discrimination claims and we are given no dates or wider context as to the alleged discussions. On balance, we do not find it established on the balance of probabilities that it was in fact said that Mr Michaelis and/or Mr Barden were going to sort out the aging crew or words to the effect.

42. Mr M Hayel alleged for the first time in his oral evidence that on an unknown date he was putting on a harness and Mr Barden commented words to the effect that was he not too old to be doing that. Mr Barden denies this. It was not within Mr M Hayel's witness statement (or indeed anywhere else) and we are given very little detail about the event in question or when it was supposed to have happened. Again, on the balance of probabilities we are unable to find it was said.

43. We return to the comment allegedly said to Mr Micallef below, as we know the date that particular allegation relates to.

The restructure proposals

44. Mr Michaelis had wanted to restructure the stage technical team for some years, dating back to around 2017. In June 2019 Mr Lang started as General Director and when he started he was informed of the potential need to restructure the stage technical team and that it was something that had been considered for many years and had been on Mr Michaelis' agenda for some time. Mr Barden says, and we accept, that when he left in 2012 one of the reasons he left was he felt the respondent was not tackling issues relating to efficiency, health and safety and practices, including (but not limited to) in the stage department. He returned in 2019 after conversations with Mr Michaelis that the respondent was ready to start looking at these things and make changes. Mr Barden says that early on after his return, before the formal restructure plan was drawn up, he talked informally with the leadership group of the stage department and the whole department about changes being needed, and seeking informal input. These discussions are referenced above at paragraph 27, as it is one of the matters that was making the claimants feel vulnerable.

45. The pandemic and lockdown gave the respondent the time and opportunity to consider the restructure idea in more detail. The restructure proposal was initially raised with the WNO Board in November 2020. The claimants did not know about the formal proposal put before the Board at the time.

46. Mr Michaelis started to discuss the restructuring proposals in more detail with the management team in around January 2021. He prepared an up to date draft on 29 March 2021. Mr Barden was also involved in devising the new structure and job descriptions. The more detailed proposal was discussed with the Board in March 2021. Mr Michaelis also had discussions with BECTU who were recognised for collective bargaining purposes for the stage crew staff other than the more senior staff (Mr J Hayel, Mr Micallef, Mr Stewart, Mr Riemer, Mr C Macauley). In particular an amended House Agreement was being negotiated with BECTU.

47. Ms Woodward is HR Director and started employment with the respondent on 6 April 2021. Prior to her start she had a discussion with Mr Michaelis. He said he had been having conversations with BECTU and wanted to check if she agreed with the proposed approach to the process, and gave her some draft documents.

48. The final restructure proposal was put before the Board and approved on 5 May 2021. On 6 May 2021 and 11 May Ms Woodward and Mr Michaelis had further meetings with BECTU about the restructure proposal. On 12 May 2021 Mr Michaelis emailed BECTU [378] with, in confidence, the restructure proposal. In response to some queries he emailed BECTU further on 13 May 2021 [377]. He said that a review of the contractual BECTU agreement with terms and conditions was still in draft but they would hopefully be able to share it the next week in first draft for discussion. Mr Donavan from BECTU asked in his email of 13 May 2021: "In comparing the current post holders (7) with your Proposals, (8), would it not be less controversial to avoid redundancy's by slotting the existing 7 into the new roles, thereby retaining their working knowledge of WNO?" Mr Michaelis responded to explain that the numbers needed to take into account there were Head of Department positions so that there were in fact 12 permanent members of staff and only 8 permanent positions in the new structure.

49. BECTU asked for there to be at least 3 collective consultations with them, ideally before the invitations to 121s. Mr Michaelis agreed to this.

50. On 20 May Mr Michaelis emailed BECTU to say that he was calling a meeting on 24 May with the stage staff to inform them of the restructure proposal. He said they will be serving the notification and inviting staff to forward requests for voluntary redundancy ("VR"). He outlined a timeline proposing two further meeting with BECTU on 27 May and 3 June to discuss the new agreement, and 7 June for the deadline for VR applications. He earmarked 9 June as "Decision on VR made and invite letters for individual consultations are sent out." A further meeting was planned with BECTU for 10 June about the new agreement with individual

consultations starting on 14 June running to 28 June. Documents were provided including the restructure proposal, the briefing narrative for 24 May, FAQs, and the proposed new BECTU/WNO agreement.

51. Mr Donovan asked that the VR window be held open until the first individual consultation meetings had been held. He said it would give employees an opportunity to discuss the plans before making an informed decision on whether or not they wish to exit voluntarily. Mr Michaelis [379] responded to suggest that they evaluate uptake in the first period and extend it past the deadline to the 16 June in case there were staff who need longer to come to a decision. He said he thought overall there should be enough opportunity to evaluate the personal options based on the provided documentation and the option of individual questions to the HR team. Mr Donovan said that sounded like a sensible approach [379].

52. Originally the stage technical team had 18 members of staff. As we have already referred to, prior to the pandemic that number was reducing.

53. On the evidence before us, we find there were various factors behind the restructure proposals. These included:

(a) Financial concerns. Before the pandemic the respondent had been facing financial pressures and were predicting an increased financial deficit and to be operating at a loss in the next financial year. The crew were the largest team in the organisation;

(b) Uncertainty about whether and when there would be a return to pre-pandemic levels of work and touring, and anticipation that there would be less large scale projects. This was against the background of an existing decline in audience numbers, an anticipated slow audience return rate post lockdown, and also an awareness that, pandemic aside, most of the audience did not come to all 3 of the annual opera performances that were being taken on tour and which traditionally rotated at a tour venue over 3 days;

(c) Existing employees, including the claimants, worked in a two team structure as a day crew and a night crew. The day crew would come in to a touring venue, set the scenery up, rehearse the scene changes and then go home. The night crew would do the night performance. As just stated, the traditional model was to tour with three shows and so the night crew would, overnight, also change the set over for the next day's show. If the respondent changed to delivering one opera back to back, they would reduce the changeovers between stage crews and reduce the manpower needed throughout the week. Two crews would not be needed on tour but instead one smaller team, supported by local technicians if needed;

(d) It was also felt that the two crew model meant there could be a lack of continuity and they wanted those responsible for rehearsing the show to also be responsible for its performance. They wanted to move to show specific working. The respondent wanted to introduce a Technical Show Manager, assisted by a Technical Show Supervisor to take responsibility

for the artistic presentation of each show, which was a new way of working;

(e) There was a desire to change the employee's contracts to annualised hours contracts with individualised scheduling. The existing day crew and night crew model was seen as inflexible as the whole crew had to be called in and not just one or two individuals, even for small tasks. There were rigid hours in which they could be called. The arrangement was seen as inefficient and inflexible. There would be periods of time where a crew team would not be doing any work but still receiving full pay. When touring sometimes they would then work excess hours and claim enhanced overtime payments (as they were contractually entitled to do). The thinking was that the annualised hour contract would mean they could pay employees when they were actually needed to do the work;

(f) An expectation that there would be less major scale productions and more mid and smaller scale events (as well as international touring) where they needed flexibility about which staff were used and when;

(g) A desire to have less permanent staff, and make more use of staff on temporary contracts so that they had the flexibility to hire staff when needed for demand spikes as opposed to having permanent staff there to cover all eventualities;

(h) A desire for managers to take on more responsibilities such as financial matters, health and safety and HR management. For example, for managers to become involved more in planning, scheduling of staff, monitoring absences, approving holidays, undertaking staff reviews, undertaking risk assessments and monitoring of health and safety;

(i) A desire to ensure, contractually, that they were able to have staff work for CTS, on profit making work.

54. The respondent therefore decided it wanted:

(a) A new staffing structure;

(b) New job descriptions;

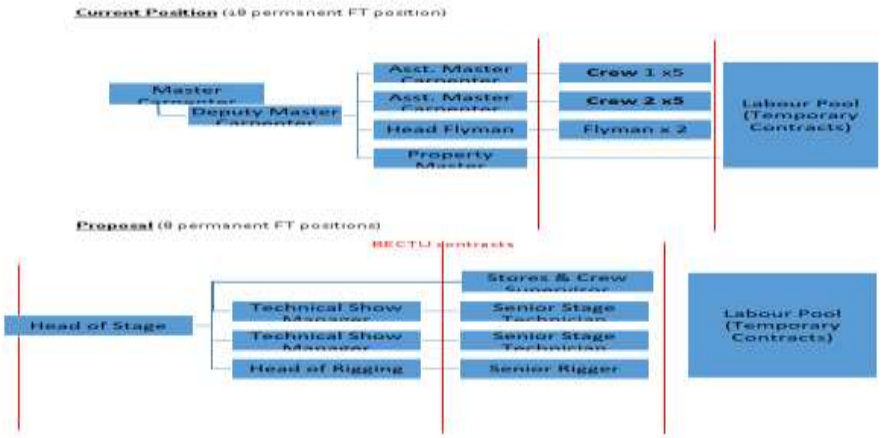
(c) To reduce the number of permanent employees from 12 (as it then stood out of the 18 establishment number) to 8 new roles;

(d) To change the collective house agreement and terms and conditions to annualised hours and individual scheduling;

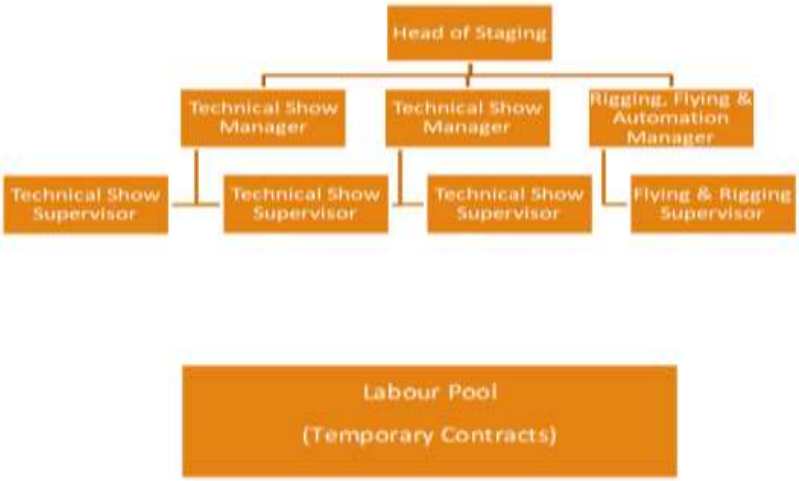
(e) To change the contractual arrangements on ancillary payments to reflect what the respondent believed was wider industry practice;

(f) To change touring subscriptions and travel payments to reflect actual expenditure.

55. Page [413] sets out a diagram of the existing structure compared to the proposed new structure as follows.



56. In the final version the job titles changed slightly so that the proposal became:



57. The job descriptions for the proposed new roles can be found at [347] to [376]. For example, the Head of Staging role states the responsibilities include: “Carry out and/or oversee the creation and ongoing review of risk assessments and Safe Systems of Work for all Stage Department activities. Plan and implement the Stage Department equipment maintenance programme, ensuring compliance with relevant regulations including: PUWER, WAH and Electricity at Work, and, in conjunction with the Rigging and Automation Manager: LOLER. Ensure compliance with CDM2015 during all “construction” projects involving scenic, staging or rigging elements. Often acting as Principal Contractor for main stage construction work… With the Assistance of the Technical Operations Manager and HR, manage and develop the Stage Department’s administrative systems ensuring that all time sheets, holiday records, inspection records and other staffing related data is maintained and up to date. Be responsible for Stage Department budgets, giving updates and forecasts as necessary thus ensuring that budgets are on target and that

any potential deviation is promptly notified… Provide reports and information as may be required in the execution of these duties."

58. As stated the Technical Show Manager and Supervisors (amongst other things) were to take responsibility for the artistic presentation of each show. The Flying, Rigging and Automation Manager had responsibilities to carry out and/or oversee the creation and ongoing review of Risk Assessments and Safe Systems of Work for rigging and automation activities and to manage the planning and implementation in compliance with relevant regulations and to comply with CDM2015 during delegated construction projects involving rigging, flying and automation elements. The holder would, for example, also be responsible for delegated budgets and be required to produce reports as may be required.

59. The Technical Show Supervisors would have some managerial responsibilities such as assisting with the line management of delegated stage department staff, assigning individual roles and responsibilities, assisting, with departmental recruitment, training and appraisals, creating and review risk assessments and Safe Systems of Work for delegated activities, assisting with ensuring compliance with CDM2015 during delegated construction and with ensuring compliance with other regulations, and assisting with the administration of time sheets, holiday records, and other staffing related data. The Flying & Rigging supervisor job description had similar requirements.

Zoom meeting with Mr Lang

60. The imminent restructuring proposals were unknown to the claimants until 24 May 2021. In the meantime they were invited to and attended a Zoom meeting or meetings on or around 20 May 2021. The arrangement of this Zoom meeting or meetings became an unexpected point of contention during the course of the hearing. Mr Micallef in his witness statement says that on 20 May 2021 they were invited to a "Strategic Planning Meeting" on Zoom with just Mr Lang, Mr Barden, and the crew. He says it was a crew specific meeting and that they discussed the plans ahead, they were all very positive, and looking forward to getting back to a form of normality and the upcoming tour and plans for the future were discussed. It is said for the claimants there was a wholesale failure to mention the restructure, and potential redundancies and the meeting was all very upbeat which meant they were even more knocked for six when the redundancies were announced a few days later.

61. Mr Lang said in oral evidence that the Strategic Planning Meeting was company wide and that the invitees were deliberately mixed up across departments and that it was not a crew specific meeting. He said he delivered the same session 10 times over. All agree that the PowerPoint displayed is that which starts at [416] which is headed "Strategic Plan-Colleague Consultation May 2021." Its content is generic in nature.

62. Mr Cowley said, having taken instructions, that the claimants' position was that there were two meetings: the general Strategic Planning Meeting and

a crew specific meeting with Mr Lang. Mr Micallef was recalled to give evidence, but his evidence did not really marry with those instructions. Mr Barden said he had helped arrange collective access for staff who did not have the technology to connect and Ms Woodward said that invitees may not have been able to see everyone who was present.

63. On the best we could with the mixed picture before us, we concluded that it was Mr Lang's aim to have meetings that were cross departmental and he thought it was that which he was delivering. It is possible, however, the claimants (or some of them) may have attended en masse and they may not have been clear on which other attendees were invited or were there. The point is that from Mr Lang's perspective he was holding one of a series of company wide meetings to try and encourage employee engagement in planning the route ahead in general for the company. He did not believe he was delivering something specific to the stage crew.

Alleged comment to Mr Micallef

64. Mr Micallef says that on Friday 21 May 2021 he was limping at work and Mr Barden saw him and asked how he was. He says he replied: "fine nothing serious maybe a bit of old age." He says Mr Barden said: "yes we'll have to do something about the ageing ones." Mr Micallef says in his statement "Maybe a flippant remark? I made a note of time and date, as have noticed our ages had been remarked upon more recently."

65. Mr Barden denied saying this. He says that it was Mr Micallef who would raise age not Mr Barden. For example, he says that when asked to call the team back from furlough to unload scenery for CTS, part of Mr Micallef's objection was that he was too old and too senior in role to be carrying out the work. Mr Micallef in turn denies this saying that concerns were about safety and the appropriateness of working for CTS.

66. We have not been given the note Mr Micallef says he made. It would also be a highly risky comment for Mr Barden to make given the imminent restructure announcement. On the balance of probabilities we are unable to make a finding of fact that the comment was made by Mr Barden.

Meeting to place at risk of redundancy

67. On 24 May 2021 the claimants were invited to a meeting at which they told they were being placed at risk of redundancy. Mr Michaelis says he read out the script he had prepared found at [396]. There is a dispute in this case, including amongst the claimants themselves, as to the degree to which Mr Michaelis read out the entirety of this script. Some say he did not at all. Others say he read out parts but not others. Some were adamant things were definitely not said. Others were less certain saying they just could not remember it being said. Some witnesses contradicted themselves to a certain extent saying both of these things. Witnesses remembered different parts of it. Some said it was difficult to hear in the room. Everyone talked about the shock they were under.

68. We are satisfied, and find, that Mr Michaelis did read out [396] in its entirety. He had prepared the draft for that purpose. Such a meeting and delivery of the message is not a task that most people would relish, and being clear about what is going to be said is important, hence the preparation of a script. This makes it more likely that Mr Michaelis stuck to his task and read out the pre-prepared script. We accept, however, that it may well be that much of the information he imparted was simply not taken in by the claimants whether through shock, difficulties in hearing or not taking in what it all meant. The claimants all said the meeting was not very long, maybe some 8 – 10 minutes. We are satisfied that there was sufficient time for Mr Michaelis to have read out the document, and he probably said little more, if anything.

69. Mr Michaelis therefore said:

"1. WNO is experiencing one of the most difficult times ever in the light of the pandemic
2. Budgets, even before the pandemic, were under pressure. In future years we are predicting an increased financial deficit and are predicting to be operating at a loss for the next financial year.
3. Looking forward into the short to medium term future, our business has to change to be more financially responsible and will increasingly focus on activities other than main scale activity, which will lead us to having to adopt a more flexible working model.
4. The current Stage crew house agreement and working practises throughout the section are not set out to achieve a more flexible way of working and currently require a high level of management to enable projects running outside of main scale activity.
5. Senior roles in the department need to take a higher level of financial, H&S and HR management responsibility to be able to work more autonomously.
6. We are lacking the ability for income generation through not being able to exploit commercial opportunities.
7. The Stage crew department is the highest staffed technical touring department and in its current form not fully utilised year round, especially with a reduction in the summer activity and restrictive working practises.
We are serving a notification of restructure of the stage department today with the following aims:
1. Implementation of a new staffing structure
2. Review and implementation of new job descriptions for Managers and staff
3. Reduction of overall numbers of permanent employees from 12 current positions to 8 which means that we will need to make redundancies
4. Change of the house agreement to annualised hours and harmonisation with industry practise on ancillary payments
5. Change of touring subs and travel payments to reflect actual expenditure
Before carrying out individual consultations, we are in a position to invite requests for Voluntary Redundancies up until the 7th June. Subject to acceptance, an enhanced offer will be made for the voluntary redundancy the details of which are included in personal letters to be handed out at the end of this briefing.
Anyone not applying and being accepted for VR, will have the opportunity to apply for the new roles, the job descriptions of which are included in the notification letter. Individual and Union consultations will be held from the 14th

June onwards for a period of two weeks, ending on the 28th June.
For the avoidance of doubt, the restructure has been sanctioned by the WNO board and the General Director. The union has been informed and will participate in the process where needed. Should you have any further questions please contact the HR department."

70. Mr Michaelis said that he would not be taking any questions and the crew should go home, read the package and contact HR if they had any questions. Mr Michaelis and Ms Barry from HR then left.

71. At the meeting on 24 May 2021 the claimants were given a pack which contained an individualised version of the letter found at [382]. It said:

"Redundancy letter due to restructuring
Over the last year, Welsh National Opera (WNO) has been experiencing, together with the rest of the performing arts companies, one of the most difficult times ever. After the closure of operations in March 2020 the normal operations of the Company have been suspended, which has effectively stopped most technical operations.

As the UK is trying to recover from the effect of the pandemic, we still do not have a full understanding of when we will be able to return to performances. Until such time that auditoria can return to selling full capacity, the touring model for us and the venues will not be cost effective and will require a much greater flexibility of how we serve our communities.

Therefore, WNO's operating model needs to change to a more flexible model, integrating a higher focus on "non-main scale" productions, and the technical department needs to be able to cope with a demand from increased activity and programme work and a higher demand of flexibility. The mix of programming is anticipated to integrate more mid-scale work, small scale events as well as international touring.

I am therefore writing to inform you that WNO are proposing to restructure the Touring Stage Department, and after reviewing our options and considering the new structure required, we have concluded that it is possible that we will need to lose the 12 existing roles in the Department and create 8 completely new and substantially different roles. These new roles will have an increased focus on financial responsibility and commercial awareness.

As a result of these proposed changes, your role will effectively disappear and therefore it is necessary to place you at risk of redundancy. I should stress that this is only a provisional decision and WNO will continue to consult with you to find ways to avoiding your redundancy. Further details of such consultations will be provided over the coming weeks.

If the proposal does go ahead, you will be given the opportunity to apply for the new roles in the proposed structure. We will also discuss reasonable training requirements as part of any new roles with you. Should you be unsuccessful in an application for a role in the proposed structure, and unless we can identify any alternatives, you may be dismissed by reason of redundancy. In such a case, you

would be entitled to a statutory redundancy pay.

The Company wishes to avoid having to make compulsory redundancies and would, therefore, like to invite anyone who is interested to apply for voluntary redundancy. In order for you to make an informed decision on whether voluntary redundancy is of interest to you, details of your potential redundancy payments are enclosed.

If you decide you would like to apply, please let me know by completing the enclosed form (Application for Redundancy) and return it to me before 4pm on 7 June 2021. Please note that any indication of your interest in voluntary redundancy will not bind you to this decision in the future.

Following the deadline, the Company will consider any applications for voluntary redundancy received and will notify the individuals of the outcome. The Company reserves the right to decline any applications, and these will be assessed in line with current and future business needs and the on-going viability of the Company. A meeting will be arranged to discuss the acceptance or refusal of any submitted applications with individuals.

I appreciate how this news may have affected you personally and I understand that this can be an unsettling time and would like to take the opportunity to remind you of the Employee Assistance Programme (EAP) which is available to you for support in situations such as this. The EAP can be contacted 24 hours a day, 7 days a week… [Contact details were set out]

I would like to thank you for your continued work and support during this difficult period. If you have any questions regarding the contents of this letter, please do not hesitate to contact me.

Yours sincerely,
Alison Woodward
Director of Human Resources…

Enclosed
1. Statutory and Voluntary Calculations
2. Redundancy Payment Ready Reckoner
3. Redundancy and Lay off Policy and Procedure
4. Application for Voluntary Redundancy
5. Proposed Structure
6. Job description – Head of Staging
7. Job description – Technical Show Manager
8. Job description – Rigging, Flying and Automation Manager
9. Job description – Technical Show Supervisor
10. Job description – Flying and Rigging Supervisor
11. Frequently asked questions and answers"

72. The 11 enclosures were in each individual's pack that they took away and can be found at [283 – 294, 347 – 376, 397, 398, 399 to 403, 404 to 410]. The enhanced redundancy payment was calculated at 1.5 x the statutory entitlement. The claimants were each given a statutory redundancy

calculation and a voluntary redundancy calculation. By way of example, for Mr Bayliss the difference was between £6709.13 and £8721.87. For Mr J Hayel it was £26,559.60 compared with £34,715.60.

73. The form on which the claimants could apply for voluntary redundancy said: "The Company is currently undertaking a consultation process with the possibility that employees may be made redundant. As part of the consultation process, the Company would like to invite affected employees to indicate whether they would like to be considered for voluntary redundancy" [398]. The form said that expressing an interest did not commit the individual to the decision and likewise the company was not obliged to accept the application.

74. The FAQs [399 to 403] spoke of the need to change to a more flexible model, with increased activity and programme work on mid scale work, small scale events and international touring. The FAQs said the existing working practices were too restrictive with 4/5/6 day weeks and there were no scheduling or budgeting or H&S documentation carried out compared to other departments. It was said that was why there was the creation of 8 completely new and different roles that will have an increased focus on financial responsibility and commercial awareness to align with the new operating model. The FAQs said there was a higher level of responsibility set on the senior roles with an emphasis on people management. The supervisor roles would be more show specific with a higher level of management accountability. The FAQs said there was no redundancy pool and all 12 roles were at risk. The FAQs said the decision whether to accept a request for VR would be made by 9 June and it would be assessed in line with current and future business needs and the ongoing viability of the company. It was said the VR package was better than statutory and intended to be better than compulsory terms to try and incentivise employees to leave on a voluntary basis and minimise the need for compulsory redundancies. The claimants were again told they could contact Ms Woodward or Ms Barry if they had any queries.

75. The FAQs said that if an individual did not take VR, the respondent would assume they will be applying for the new roles. It was said should an individual be unsuccessful for a role in the proposed structure and unless they could identify any alternatives the individual may need to be made redundant. It was said there would then only be an entitlement to a statutory redundancy payment. It was said an application for a new role would not be automatically accepted and there would be a recruitment process. The FAQs said there was a right to a 4 week trial period in an alternative role and if the individual or the company felt the new role was not suitable employment would terminate with an entitlement to a statutory redundancy payment. The FAQs also say there would be a probationary period and if the company was dissatisfied with performance the company may extend the probation period or it may be terminated.

Mr J Hayel and Mr Michaelis discussion

76. On or around 26 May Mr J Hayel went to speak to Mr Michaelis. Mr

Michaelis called Ms Woodward and asked her to join them. Before she arrived Mr J Hayel says he said to Mr Michaelis "you know I cannot take on this new contract" and that Mr Michaelis said "I know" or "yes I know, I want changes." Mr J Hayel was referring to his literacy difficulties. Mr J Hayel says he was expecting Mr Michaelis to say it would be ok as Mr Michaelis would help him as he had done in the past. Mr J Hayel says that he realised then he needed to take the VR terms. He says he knew that he would never be able to undertake the contract as it involved budgeting, writing daily reports etc which had never been needed before in any capacity. He says there was no guarantee would be successful in an application and then his redundancy payment would be halved. He says it was too much to lose if he did not get the job and that he also knew they would all be going. He also said he thought if he went then, they may chose others for the jobs and he was hoping Head of Staging would be offered to Mr Micallef. Mr J Hayel's case is, as we return to separately below, that the respondent used his disability to set up the new contract to get rid of him. He says he was not ready to retire and wanted to carry on for quite a few more years. The respondent disputes that Mr J Hayel wanted to carry on working. Mr Michaelis says Mr J Hayel said he was happy to apply for VR as he was already considering retiring at the time and he was glad for the opportunity to go when he still had his health. He says Mr J Hayel said he would have preferred to stay a little longer to train someone up to take on his role but that he was also looking forward to retirement. Mr J Hayel denies saying this. Mr Michaelis said he could not remember the specific exchange with Mr Hayel about not being able to do the new contract (albeit he accepts the meeting itself happened). He also indicated that if it was Mr J Hayel's recollection he would take Mr Hayel's word for it but he thinks he would have been more guarded in his language than Mr Hayel remembers. We return to this when considering Mr J Hayel's individual unfair dismissal and disability discrimination complaints.

77. Mr J Hayel handed over his VR application form. On 26 May 2021 Ms Woodward sent Mr J Hayel a letter [248] referring to their discussion on 26 May 2021 and writing to confirm receipt of his application for voluntary redundancy which had been accepted. The acceptance was said to be subject to agreeing the details of termination date and handover. The letter said that therefore Mr J Hayel was invited to attend a meeting on 10 June to finalise the detail and confirm his redundancy payment. He was told of his right to be accompanied and that the meeting may result in the termination of his employment on the grounds of voluntary redundancy. Mr J Hayel was thanked for this contribution to the WNO.

Other VR applications

78. On either 26 or 27 May 2021 Mr C Macaulay applied for voluntary redundancy. (The dates on the letter at [246] are contradictory). Mr J Hayel's letter had made specific reference to their face to face discussion discussion, but otherwise Mr Macaulay's letter was in identical terms to that sent to Mr J Hayel, as were the other claimants.

79. On 28 May 2021 Mr M Hayel put in his application as did Mr Bellamy. They were accepted on 1 June.

80. On 2 June Mr L Macaulay applied as did Mr Marshall, and Mr Riemer. They were accepted on 3 June. Mr Edwards and Mr Andrews also applied that day but their applications were not accepted until 7 June.

81. On 3 June the claimants were called to East Moors to undertake stores work. Mr Barden was there and he told the crew that for legal reasons he could not answer any of their questions. He did answer one question from Mr Micallef whether the company had budgeted for them all to be made redundant, and he said they had.

82. Mr Micallef asked if they could arrange a group meeting with Mr Michaelis or Mr Lang. He also asked for the contact details of the Chair, Ms Vaughn Jones who he said had said that anybody could contact her personally any time. Mr Barden telephoned Ms Woodward. He returned to say that they would not be permitted a group meeting. Mr Michaelis says this was his decision as he believed this was an individual matter and any worries or questions could be addressed at individual meetings.

83. Mr Micallef says that he also told Mr Barden how unfair, appalling and upsetting the whole process was with their long careers and they felt they were being ushered out the back door and kept away from speaking to anybody. He says he referred to the meeting only a few days earlier with Mr Lang. He alleges that Mr Barden said “Aidan was supposed to bring it up, but he doesn’t like to give bad news, but a senior manager would write an email to the rest of the company acknowledging and thanking us for our valued contribution to WNO.” If Mr Barden said that he was mistaken as to Mr Lang’s intent. We do not find that Mr Lang was ever intending to mention the restructure and potential redundancies, in what was a company wide series of meetings.

84. On 6 June at 10:29 in the morning Mr Micallef sent Ms Woodward an email [386]. He said he was not a spokesperson or speaking on anyone’s behalf but as a line manager he felt there was a responsibility to attempt to keep open lines of communication for those who may still possibly be interest in remaining, regardless of his own decision. He said there had not been any consultation with any personnel at that time. He said there had been some confusion as they had thought there would only be 4 redundancies amongst the 12 with the other 8 being looked upon for the 8 new positions, subject to fitting the criteria. He said that Ms Woodward had had a conversation with Mr Barden on 1 June and that she had asked Mr Barden to send her apologies as it was not as clear as it might have been. He said it had become clear that the whole 12 redundancies had been budgeted for which he said came as a surprise as they had been told they were proposals only. He said that following conversations with Mr Barden it had become clear that the company had already decided to take the option. He asked if it was true. He referred to the cost of the restructure and that it was being done without exploring the possibilities of continuing with a group who had proven qualities. He said there was very little that

was not already being done by those already employed and that they were equipped to deal with increased activity and increased flexibility.

85. Mr Micallef said he was aware that the form is not a committal from either side but an informed decision could only be made after discussion and consultation to fathom out if there was an appetite from the company to move forward with those that might want to continue. He said it would be easier to make an informed decision if there were meetings to explore all options whether viable or not and that the absolute minimum they deserved was to walk away confident that the company had exhausted all options and avenues. He said that BECTU had had the benefit of meetings already and that those of the claimants (75%) who were not represented by a union were waiting for the same meetings. He said everyone should have the same information.

86. Mr Micallef in his email said that as it was less than 2 weeks since the proposal along with losing time due to their initial confusion, "would it not be unreasonable to suggest a delay as to find more time to open dialogue with those who may wish to do so?" He said Mr Barden had said they could not have a meeting with anyone but that they could be given the chairman's contact details through Ms Woodward. He referred to the work done during the pandemic including for CTS and that they were now being targeted for redundancy and not CTS. He said they could not understand why the respondent wished to be rid of the crew. He said "our ages have been mentioned on several occasions, yet our sickness record as a group is exemplary." He said they seemed to be looked upon in a very poor light which was undeserved.

87. At 10:56 on 6 June Ms Barry circulated a copy of the draft amendment house agreement by email [384]. The email from HR said that it only applied to the Supervisor roles and that the Head of Staging and the Manager roles would be based on 44 hours a week with a requirement to work such additional hours as may be necessary for the proper performance of duties without extra remuneration. Ms Barry said if they had any questions they could contact her.

88. Mr Barden says that at some point he had an individual discussion with Mr Stewart about the new roles. He says he thinks he would have indicated to Mr Stewart that he was a good candidate for the roles, probably as Show Manager or Supervisor. Mr Stewart did not agree with this in his evidence. He says they discussed the roles to a degree and also the new structure, including annualised hours. He did not think Mr Barden had directly said he would be a good candidate. We preferred the evidence of Mr Barden on this point and find it is likely that they did have a conversation in which Mr Barden was encouraging Mr Stewart to go for the roles. It would be an odd thing for Mr Barden to make up or misremember and several witnesses commented upon Mr Stewart's skills and desire to stay.

89. On 7 June Mr Stewart, Mr Bayliss and Mr Micallef applied with their applications being accepted the same day. Ms Woodward had not replied to Mr Micallef's email by the time he applied.

Ms Woodward's email to Mr Micallef

90. On 11 June Ms Woodward replied to Mr Micallef's email. She said that the consultation process would be an ongoing requirement for those who did not opt for VR and would commence in earnest once the VR period had closed. She confirmed all 12 roles were at risk due to the fact the 8 new roles were substantially different. She said that the 12 redundancies had been budgeted because it would not be appropriate to commence a restructure without budgeting for all eventualities. She said that the SMT had been through a vigorous assessment of future requirements and the decision had been made on financial assessment and business need. She said the team had been given the opportunity of applying for the revised roles if they felt they were able to meet the requirements, that the job descriptions consisted of different skill sets than the current roles, and that the requirements of the roles were based on annualised hours contracts. She said that they had been clear that if colleagues wished to apply they would welcome their application but they would need to demonstrate at interview that they meet the skills, knowledge, attitude, and qualifications that WNO requires of the revised positions. She said if individuals did not wish to go through that process then VR was offered at an enhanced rate. Ms Woodward said any normal redundancy process would consider VR prior to consultations so that only those who wished to continue their employment would be consulted with. She said they were not obliged to offer VR but chose the to offer the option at an enhanced rate after providing colleagues with information about the new roles so that they were able to make an informed decision about whether to apply. She said all colleagues had the same information, whether members of the union or not.

91. In terms of the request for more time for dialogue, Ms Woodward said that all colleagues had been given her contact details and were advised to contact her with queries but done had done so. She said she understood Mr Micallef himself had now submitted his request for VR. She confirmed it was the request for a group meeting which had been refused as the discussions were about individual work arrangements and every colleague had been invited to an individual meeting. She said she would not provide the personal email address for the chair without prior authority but she was happy to forward on any correspondence should it be appropriate to do so. She said the Board were fully aware and had agreed to the process. She said there was recognition of the work done by the crew but the organisation was going through a fundamental change and restructuring is always a difficult time for those involved. She said being placed at risk of redundancy was not about ability or attitude but the WNO needed to do things differently moving forward and the new roles were different in skill set, experience and contractual requirements. She said any further questions could be raised at their meeting but Mr Micallef could also contact her in the meantime.

92. Mr Micallef responded by email on 11 June [390]. He said he only received the proposed contract on late Sunday morning hence his reason

in submitting his VR form on Monday which was the last day. He said he did not take the decision lightly but having received the proposed contract he felt he could not be a part of that contract, which in his opinion would be impractical for the future. He referred to anticipated difficulties when the company returned back to full touring with difficult theatres and challenging shows. He said he felt that changes had been decided upon without involving them when they had the knowledge and experience. He said "My reasons for informing you of these details is that during our brief exchanges Ive sensed that there are some that may feel that those from the crew had little desire to remain – I can assure you "that was not the case." "Myself included.""

Individual meetings

93. Mr Edwards, Mr M Hayel, Mr J Hayel, Mr Andrews, Mr Bellamy, Mr Bayliss, Mr C Macaulay's meetings took place on 10 June. Mr Micallef, Mr Marshall, Mr L Macaulay, Mr Reimer and Mr Stewart had meetings on 15 June. All were sent letters on 15 June confirming that their requests for VR had been accepted. All the letters said employment was to terminate on 27 June with pay in lieu of notice. Individual figures were given for notice pay, redundancy pay and outstanding holiday pay [for example 259]. All the letters said that part of the terms of the voluntary agreement were that the individuals would be unable to apply for any jobs within the Company for at least 6 months.

94. There are short typed notes of the individual meetings held found at [429 - 433]. On both parties version of events they do not record everything that was said. Mr Michaelis says that the meetings were short and most claimants seemed to be interested in when they would receive their redundancy payments. He says that no one raised issues about the process or asked for more time or for another meeting but seemed happy to take the offer. He said they did not ask about alternative employment or indicated they were feeling pressured to apply for VR. According to the notes Mr C Macauley said he was looking forward to retiring. Mr C Macauley said in oral evidence that was because there was a toxic atmosphere and he could not wait to get out of there. Mr Riemer, according to the notes, said he was happy to be going so had no questions. According to the notes Mr M Hayel said he just wanted it sorted. In oral evidence he said he could not remember this. Mr Marshall agreed he had said he just wanted it sorted out. He said he was angry so was not challenging what was happening at the time. Mr Bellamy asked what would happen if he decided to apply for one of the new roles and Ms Woodward told him that they would pause the VR process and he should submit his application. Mr Bellamy then stated he wanted to continue with VR.

95. Mr Micallef, according to the notes and Ms Woodward's evidence said that he felt the new structure would not work and the WNO was making the wrong decision about this. He said, according to the notes, that they would never find anyone as experienced as the crew. Ms Woodward says Mr Michaelis acknowledged Mr Micallef's concerns and said he could apply

for any of the new roles if he felt strongly about this, but that Mr Micallef said he had no intention of applying as he had done his time.

96. Mr Micallef's version of events is that he said he would have been interested in seeing how this new way would have been and there were others who also would have. He says Mr Michaelis shook his head and said "we're going down a different path" and that Ms Woodward said the same. He says that Ms Woodward also said there would be redundancies in other departments. He says he was told the company wanted to go in a different direction with different technicians with different skills sets. He says Mr Michaelis did not say he could apply for the new roles.

97. We consider it likely that if Mr Micallef said something along the lines of being interested in seeing how the new way would have been, it was a reference to Mr Micallef's opinion, as reflected in the notes, that he did not think the new way of working would work. That also reflects the content of Mr Micallef's earlier email and Mr Micallef's account of their conversation. We also consider it likely that if Mr Michaelis made a comment along the lines of going down a different path it was a reference again to the proposed new way of working, compared to what Mr Micallef may have in mind as to the best way forward. We do not find, on the balance of probabilities, that Mr Michaelis said words to the effect to Mr Micallef, or was indicating to him, as Mr Micallef's account appears to suggest, that he did not want Mr Micallef or others to stay or that they wanted to have different technicians.

98. We also find it is likely, as contained within the notes, that Mr Michaelis told Mr Micallef that he could apply for any of the roles and that Mr Micallef said he had no intention of applying as he had done his time. Mr Micallef did not directly deny saying the latter part. Instead, he talked about the fact he felt his only option was to beg for his job and that the crew were proud people and were being told, without being told, that they were not wanted. He said they had to keep their pride and dignity and go with their heads held high. We return to this below, but it seems likely to us that this kind of attitude expressed in the individual meetings probably led the respondent to think that many of the claimants were content to take VR, or at least content to take it in the context in circumstances in which things were not going to stay as they were.

99. Mr L Macauley said in oral evidence that he was told he could reapply for work after 3 months. It is said that everyone else was told it was 6 months. There is no mention of this within the typed notes but they contain no references to anyone being told about restrictions on fresh applications. Ms Woodward's evidence was that everyone was told in the meetings that they could not reapply for 6 months. The same thing is stated in the letter that followed the meetings. Mr Andrews also confirms in his written witness statement that Mr Michaelis said to him: "Are you aware you cannot apply for any positions in the WNO for six months?" In our judgement, on the evidence before us, we do not find it likely that Mr L Macauley was told 3 months and everyone else was told 6 months. We find it more likely that he was told 6 months and has simply

misremembered this in the course of his oral evidence. On the whole we accept that the content of the typed notes of the meetings reflects from the respondent's perspective key things that were said, albeit they are not verbatim notes or a complete record of everything said.

The legal principles

Unfair Dismissal

100. Section 94 of the Employment Rights Act 1996 ("ERA") provides for the right not to be unfairly dismissed. Under section 98(1) it is for the employer to show the reason or principal reason for dismissal and that it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The potentially fair reasons for dismissal set out in subsection (2) include "that the employee was redundant."

101. Section 98(4) of the 1996 Act deals with the fairness of the dismissal. It provides: *"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."*

102. Section 139 of the Employment Rights Act 1996 provides that: *"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—…*
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

103. Safeway Stores PLC v Burrell [1997] ICR 523 sets out a three stage test for the examination of redundancy dismissals. Was the employee dismissed, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished (or was it expected to), and was the dismissal caused by the cessation or reduction. In Murray v Foyle Meats [1999] ICR 827 it is made clear that dismissal of an individual whose role includes work that has not ceased or diminished, but which arises because another kind of work carried out by the employer has ceased or diminished can be a redundancy. It is the cause of the dismissal which a tribunal will examine not whether the kind of work carried out by that particular employee has ceased or diminished.

104. A tribunal cannot, when the respondent has made a business decision to alter a business structure, consider the reasonableness of that as a

business decision. If it is a poor commercial decision, or based on a wrong premise, that might lead to a consideration of whether it is the genuine reason for a change. But if it is a genuine reason, the tribunal cannot consider a dismissal unfair because the decision to make the change was not reasonable or commercially sound. See James W Cook and Co. (Wivenhoe) v Tipper [1990] IRLR 386 and British Engines v Walsh EAT 68/00, EAT/553/00.

105. The leading case in the case of selection for redundancy is Williams v Compair Maxam Ltd, [1982] IRLR 83, which sets out five key principles that a tribunal should consider when approaching the question of the fairness of a dismissal in redundancy situations.

- The employer should seek to give as much warning as possible of impending redundancies, to allow those who may be affected, to take early steps to inform themselves of relevant facts, consider alternative solutions.

- The employer should consult a union, if there is one in place, as to the best means by which the desired management result can be achieved fairly, with as little hardship to the employees as possible. It is said that it is desirable that criteria be agreed as to how to select employees to be made redundant.

- The next stage is where there is no agreement as to the criteria to be adopted. The employer will establish criteria for selection which do not solely depend on the opinion of the person making the selection.

- The fourth point is that the employer will seek to ensure that the selection is made fairly in accordance with these criteria.

- Finally, the employer will seek to see whether instead of dismissing an employee, he could offer him alternative employment.

106. These are not rules but guidelines and will not apply to every particular set of circumstances involving a redundancy. A tribunal will apply 98(4), looking at the size and administrative resources of the respondent, and asking itself the question whether the respondent was reasonable in deciding to dismiss this employee, for this reason (in the sense of the decision and the process followed being within the range of reasonable responses open to an employer in the circumstances).

107. The respondent in this case places reliance on the judgment of HHJ Richardson in Morgan v Welsh Rugby Union [2011] IRLR 376, where it was said:

> *"29. There are some redundancy cases, of which this is one, where redundancy arises in consequence of a re-organisation and there are new, different, roles to be filled. The criteria set out in Williams did not seek to address the process by which such roles were to be filled.*

> *30. We shall turn in a moment to the authorities which support this proposition. But it is, we think, an obvious proposition. Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas Williams type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion.*
>
> *31. In Akzo Coatings v Thompson (EAT/117/94) His Honour Judge Peter Clark said: "There is, in our judgment, a world of difference between the way in which an employer approaches selection for dismissal in a redundancy pool where some will be retained and others dismissed. It is to that exercise which points 2–4 in the Williams guidelines are directed. These observations have no application when considering whether the employer has taken reasonable steps to look for alternative employment. The Tribunal's approach was wholly erroneous in law."*

108. The EAT in that case stressed that these were "*not principles of law, but standards of behaviour*." Ultimately each case has to assessed on its own facts applying section 98(4). This was reiterated more recently in Gwynedd Council v Barratt and others [2020] UKEAT 0206 18 0306 where it was said if the recruitment is to the same or substantially the same role as one which the employee was doing, then the exercise may not involve "*forward-looking*" criteria at all, but be something closer to selection from within a pool.

109. The claimants place reliance on Corus Hotels v Williams UKEAT/0014/06. There the employer conceded that there will be circumstances where an employer who is acting reasonably in an unfair dismissal context will have to give priority to a potentially redundant employee and appoint them to a vacancy for which they are suited even though there may be better external candidates. The concession did not extend to making an appointment to a post for which someone was not suitable. The EAT held that the tribunal were entitled to take into consideration in their overall decision as to the fairness of the dismissal, on the facts of that case, that the employer had thought they should appoint the most desirable candidate and did not give weight to the fact the claimant was a redeployee.

Direct Age Discrimination

110. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

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

Unlike other protected characteristics, it is possible for a respondent to justify direct age discrimination by showing the treatment is a proportionate means of achieving legitimate aim.

111. Age is a protected characteristic and section 5 says that a reference to person who has a particular protected characteristic is a reference to a person of a particular age group. A reference to an age group is then said to be a reference to a group of person defined by reference, to age, whether by reference to a particular age or a range of ages.

112. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13: "*there must be no material difference between the circumstances related to each case."*

113. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; Bahl v Law Society 2004 IRLR 799.

114. Section 136(2) of the Equality Act provides that:

"*If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred."*

Section 136(3) goes no to say that "subsection (2) does not apply if A shows that A did not contravene the provisions."

115. Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of

discrimination. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37.

Making a protected disclosure

116. Under section 43A ERA, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. A qualifying disclosure must fall within section 43B ERA and also must be made in accordance with any of sections 43C to 43H. Section 43B says:

"(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

117. Section 43C provides a disclosure made to the employer will be a qualifying disclosure.

118. There are therefore a number of requirements before a disclosure is a qualifying disclosure. First, the disclosure must be of information capable of tending to show one or more of the types of wrongdoing set out at Section 43B. In order to be such a disclosure "*It has to have sufficient factual content and specificity such that it is capable of tending to show one of the matters in subsection (1)"* (Kilraine v London Borough of Wandsworth [2018] ICR 185). Determining that is a matter for evaluative judgment by the Tribunal in light of all of the facts of the case. The question is whether, taking into account the evidence as to context, the information is "capable" of satisfying the other requirements of the section i.e., could a worker reasonably believe that it tended to show one of the specified matters (Twist v DX Limited UKEAT0030/20).

119. Second, the worker must believe the disclosure tends to show one of more of the listed wrongdoings. Third, if the worker does hold such a belief it must be reasonably held. Here, the worker does not have to show that the information did in fact disclose wrongdoing of the particular kind relied upon. It is enough if the worker reasonably believes that the information tends to show this to be the case. A belief may be reasonable even if it is

ultimately wrong. It was said in Kilraine that this assessment is closely aligned with the first condition and that: "*if the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable to tending to show that listed matter, it is likely that his belief will be a reasonable belief."*

120. Fourth the worker must believe that the disclosure is made in the public interest. Fifth, if the worker does hold such a belief, it must be reasonably held. The focus is on whether the worker believes the disclosure is in the public interest (not the reasons why the worker believes that to be so). The worker must have a genuine and reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making disclosures: Chesterton Global Ltd v Nuromhammed [2018 ICR 731. In particular it was said "*I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."*

121. In Chesterton it was also said that there was no value in seeking to provide a general gloss on the phrase "in the public interest" but that the legislative history behind the introduction of the condition establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. The question is to be answered by the tribunal on a consideration of all the circumstances of the particular case, but relevant factors may include:

(a) the numbers in the group whose interests the disclosure served
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
(c) the nature of the wrongdoing disclosed;
(d) the identity of the alleged wrongdoer.

122. It was also said that the broad intent behind the legislation is that workers making disclosures in the context of private workplace disputes should not attract the statutory protection accorded to whistleblowers. However, there may also be cases where the disclosure is of a matter that relates to an interest that is personal in character but there are nevertheless features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker. The question is to be answered by the tribunal on a consideration of all the circumstances of the particular case.

123. It was said in Dobbie v Paula Felton t/a Feltons Solicitors UKEAT/0130/20/OO that "*Generally, workers blow the whistle to draw attention to wrongdoing. That is often an important component of why in making the disclosure they are acting in the public interest."* In Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601 Bean LJ drew a

distinction between the claimant making disclosures about being deprived of commission he thought was rightfully his (not a protected disclosure) compared to making a disclosure about commission which contains information which in the individual's actual and reasonable belief tended to show malpractice such as committing a regulatory offence (which was likely to have met the public interest test).

124. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. The tribunal must recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest. Sixth, the disclosure has to be made to an appropriate person.

Protected Disclosure detriment

125. Under Section 47B(1) a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Under section 47B(2) the section does not apply where the detriment in question amounts to a dismissal within the meaning of Part X (because dismissals are governed by Section 103A within Part X ERA).

126. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment (see Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 713 applying Derbyshire v St Helens MBC [2007] UKHL 16 and Shamoon v Chief Constable of Ulster Constabulary [2003] ICR 33.)

127. There must be a link between the protected disclosure or disclosures and the act (or failure to act) which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. In Manchester NHS Trust v Fecitt [2011] EWCA 1190 it was said that "*section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."* This is a "reason why" test. The Tribunal has to look at why (consciously or unconsciously) the decision maker acted as he or she did. It was said in Jesudason that:

> *"Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under Section 47B."*

Protected disclosure dismissal

128. Section 103A ERA provides:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

129. When asking what was the reason or principal reason for a dismissal it is again a "reason why" question. In Price v Surrey County Council and the Governing Body of Wood Street School [2011] UKEAT/0450/10/SM it was said:

"Thus it is the "making" of the protected disclosure which is the focus of attention, and which must be the principal reason for the dismissal…"

Protected disclosure - burden of proof

130. Where a claimant has established that there has been a protected disclosure and they have suffered a detriment, it is for the employer to show that the detriment was not because of the disclosure; that is, that the disclosure did not materially influence - in the sense of being more than a trivial influence - the employer's treatment of the Claimant (see Fecitt).

131. In a protected disclosure unfair dismissal claim, the employer bears the burden of proof of showing the reason for the dismissal. Where an employee disputes the reason given by the employer, an evidential burden arises to cast some doubt on the employer's reason. The employee has to demonstrate some evidential basis for questioning the employer's reason. The stages as explained by the Court of Appeal in Kuzel v Roche Products Ltd are: (a) has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason? (b) if so, has the employer proved the reason for dismissal? (c) If not, has the employer disproved the section 103A reason advanced by the claimant? (d) if not, dismissal is for the section 103A reason. However, if the employer does not show to the satisfaction of the tribunal their asserted reason, it does not follow that the tribunal is obliged to find the reason is as put forward by the claimant. That said, the EAT also endorsed the proposition that in practice in many cases the tribunal can make findings of fact about what was operating in the mind of the decision makers and therefore, in practice, only a small number of cases will ultimately turn upon a burden of proof analysis.

Disability

133. Under section 6 of the Equality Act 2010 a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his ability to carry out normal day to day activities. Under section 212 "substantial" means more than minor or trivial.

134. Under paragraph 2 of Schedule 1, an effect of an impairment will be long term if it has lasted for at least 12 months, or is likely to last for at least 12 months or the rest of the person's life.

135. When assessing the impact on ability to carry out normal day to day activities, the focus is on what a disabled person cannot do or can only do with difficulty, rather than on things the person can do: Goodwin v Patent Office [1999] ICR 302. However, depending on the facts of a case, what a claimant actually can do may throw significant light on the question of what he cannot do: Ahmed v Metroline Travel Limited UKEAT/0400/10.

136. The effect on the individual of the disability has to be compared with how he would carry out the activity if the individual did not have the disability: Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763.

137. Under section 6(5) Equality Act a tribunal must take account of the "Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability" ("the Guidance") to the extent the tribunal thinks relevant. Under Section 14 Equality Act 2006, the Equality and Human Rights Commission has also issued a Code of Practice which under section 15 which must again be taken into account where it appears to the tribunal to be relevant. The Code and Guidance are not to be construed as if statutes and must always give way to the statutory provisions if, on a proper construction, they differ from the Code or Guidance. If an answer under the statute is clear, it may not be necessary to consider the Code or Guidance: Elliott v Dorset County Council.

138. Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763, concerned a senior police officer who discovered late into his career and life, when preparing to take exams to become a superintendent, that he suffered from dyslexia. The dispute was about whether carrying out exams or assessments, for the purposes of promotion, was properly to be described as a normal day to day activity.

139. In Paterson it was held, taking the UK domestic law on its own, that carrying out an assessment or examination was a normal day to day activity as was the act of reading and comprehension. The Employment Appeal Tribunal also held the decision in Chacon Navas meant "*we must read section 1 of the 1995 Act*[1] *in a way which gives effect to European Community Law. We think it can be readily done, simply, by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life*."

140. In Chief Constable of Dumfries &Galloway Constabulary v Adams [2009] UKEAT/0046/06 the Employment Appeal Tribunal said:

[1] The predecessor to the Equality Act 2010

‘‘We take from the court's [the ECJ’s] use of the term "professional life" is that when assessing, for the purposes of section 1 of the DDA, whether a person is limited in their normal day-to-day activities, it is relevant to consider whether they are limited in an activity which is to be found across a range of employment situations. It is plainly not meant to refer to the special skill case such as the silversmith or watchmaker who is limited in some activity that the use of their specialist tools particularly requires, to whom we have already referred. It does though, in our view, enable a Tribunal to take account of an adverse effect that is attributable to a work activity that is normal in the sense that it is to be found in a range of different work situations. We do not, in particular, accept that "normal day-to- day activities" requires to be construed so as to exclude any feature of those activities that exists because the person is at work, which was the essence of the first ground of appeal. To put it another way, something that a person does only at work may be classed as normal if it is common to different types of employment.”

141. The current version of the Guidance says:

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples including shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

…D10 However, many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving, using everyday objects such as a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner.”

142. In Sohbi v Commissioner of Police of the Metropolis [2013] UKEAT/0518/12, difficulties making an application to be a police officer (due to dissociative amnesia) was found to amount to a substantial adverse effect on a normal day to day activity which related to the claimant’s active participation in professional life. The Employment Appeal Tribunal expressed concern whether applying to be a police officer, was a one off activity, and not a day to activity. The Employment Appeal Tribunal, however, considered itself bound by the observations in Paterson that carrying out an assessment or an examination was a normal day to day activity and concluded that the fact an activity is performed only intermittently does not make it any the less a day to day activity. The Employment Appeal Tribunal also considered itself bound by the ECJ authorities and held that despite the language used in the domestic

legislation, "*a person must be regarded as a disabled person if their condition has a substantial and long-term adverse effect on any activity of theirs which relates to their effective participation in professional life.*"

143. The Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061 the Court of Appeal approved the phrase "*normal day-to-day activities should be given an interpretation which encompasses the activities which are relevant to participation in working life.*"

144. Under paragraph 5 to Schedule 1, if measures (such as medical treatment) are being taken to treat or correct an impairment, and the person would suffer a substantial adverse effect on their ability to carry out normal day to day activities without the measure/medical treatment, then the impairment is treated as having a substantial adverse effect.

145. In the seminal disability discrimination case of Goodwin v The Patent Office [1998] The Employment Appeal Tribunal said:

"*What the Act of 1995 is concerned with is an impairment of the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus, a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be 'Yes', yet their ability to lead a 'normal' life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions, or which bus to take, the answer would be 'No'. Those might be regarded as day-to-day activities contemplated by the legislation and that person's ability to carry them out would clearly be regarded as adversely affected. Furthermore, disabled persons are likely, habitually, to play down the effect that their disabilities have on their daily lives. If asked whether they are able to cope at home, the answer may well be 'Yes', even though, on analysis, many of the ordinary day-to-day tasks were done with great difficulty due to the person's impaired ability to carry them out. …*"

146. Paragraphs B7-B10 of the Guidance deal with the "effects of behaviour"/coping strategies and says:

"*B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance*

strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities. …

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do or can only do with difficulty…

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.".

147. In Elliott it was said: "*where a person has an impairment that substantially affects her/his ability to undertake normal day-to-day activities the person is unlikely to fall outside the definition of disability because they have a coping strategy that involves avoiding that day-to-day activity. This part of the guidance is concerned generally with avoidance of things that are not a component of normal day-to-day activities. The provisions also make clear that if a coping strategy may breakdown in some circumstances, such as when a person is under stress, it should be taken into account when considering the effects of the impairment."*

Duty to make reasonable adjustments

148. The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) –

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

149. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

150. In Environment Agency v Rowan [2008] ICR 218 it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

151. The words "provision, criterion or practice" ["PCP"] are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In Ishola v Transport for London [2020] EWCA Civ 112 it was said:

"*all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."*

It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

152. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

153. Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212.

154. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.

155. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

156. In County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;

- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;

- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;

- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s)

- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:

    - The extent to which taking the step would prevent the effect in relation to which the duty is imposed;

    - The extent to which it is practicable to take the step;

    - The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;

    - The extent of its financial and other resources;

    - The availability to it of financial or other assistance with respect to taking the step;

    - The nature of its activities and size of its undertaking;

- If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

Discussion and Conclusions

Did Mr Micallef make a protected disclosure when he had a meeting with Leonora Thomson in January 2018?

157. We now apply our findings of fact to the issues we have to determine in this case. We start with the claimed protected disclosures. It was confirmed in closing submissions (and this reflects the list of issues) that only Mr Micallef was relying upon his meeting with Leonora Thomson as being a protected disclosure. It was also confirmed that it was only the first two bullet points that Mr Micallef uses to summarise what he asserts he said in that meeting as being protected disclosures [164], i.e:

- "Poor scheduling, planning, construction and decision making is

contributing to the waste of hundreds of thousands of pounds of public money".

- Worries over heath and safety through the lack of DCM (Design Construction Management) which also has a knock on effect on to costs."

158. In his witness statement Mr Micallef puts the first bullet point slightly differently that poor scheduling, planning, construction and decision making was contributing to the waste of public money over many years. We have found as a matter of fact that was the gist of what Mr Micallef said to Ms Thomson. It was said in oral closing submissions Mr Micallef's case is that he believed his first disclosure was information tending to show breach of a legal obligation, namely breach of the grant conditions from the Arts Council of Wales/ the Welsh Government. Mr Micallef's case is that he believed his second disclosure was information about an unsafe working environment and this was information tending to show that the health and safety of any individual had been, was being, or was likely to be endangered. Mr Cowley said in particular that it was said that the lack of design construction management was causing the danger. The other ways that alleged meeting content was said to amount to protected disclosures, as set out at [171], were not ultimately pursued in closing submissions.

159. We do not find that Mr Micallef disclosed information capable of tending to show that the respondent had failed to comply with any legal obligation to which they were subject. On his own account of the conversation as set out by him, he did not say that poor scheduling, construction and decision making (themselves being allegations lacking factual content and specificity) contributing to a waste of public money, was considered by him to be a breach of Arts Council of Wales or Welsh Government grant conditions. What he said lacked sufficient specificity both in factual content and in sufficiently identifying an alleged breach of a legal obligation.

160. The second bullet point also did not have sufficient factual content and specificity such that it was capable of tending to show that that the health and safety of any individual had been, was being, or is likely to be endangered. We accept that what he said, within context, would be likely to taken to mean that he felt there was a lack of adherence to the Construction (Design & Management) Regulations 2015, which regulate the health and safety of construction projects. However, that does not make it a disclosure of information tending to show any individual had had, or was facing their health and safety being endangered. What he said, did not, for example, include examples of incidents where he said people had been placed at risk, or other specific worries he had about the endangerment of people's health and safety. On the case as put to us, we do not find Mr Micallef made a protected disclosure in his discussion with Ms Thomson. We would add that in any event we would not have found that any disclosures at this meeting gave Mr Michaelis any feeling of ill will towards Mr Micallef or motivated him to not offer Mr Micallef suitable alternative employment down the line.

Did Mr Micallef make any protected disclosures in his emails and discussions with Mr Michaelis?

161. Of the email at [322], Mr Cowley, said in oral closing submissions that what was relied upon were the concerns expressed throughout the email that HR were not treating people with trust and confidence, the complaint about the comment by Ms Barry relating to recruitment, and the fact the crew were being given the impression they were being treated as unprofessional and untrustworthy. He said Mr Micallef's case was that this was information tending to show breach of the implied duty of trust and confidence in a contract of employment (not just for him but others too) and it was therefore a disclosure of information tending to show that a person had failed or was failing to comply with a legal obligation.

162. What, in essence, Mr Micallef was communicating in his email was that he felt Ms Barry, in her comment, was unjustly questioning his integrity and he also took objection to her manner. He was saying he felt she believed him to be untrustworthy and unprofessional. He said (without giving details) that others had also been upset by HR. He was saying it was important because employees needed to feel that HR would treat them in an unbiased way. He was saying he did not wish to make a complaint but wanted to know why there was that lack of trust, and he had lost faith and trust in the HR department.

163. We do not find that Mr Micallef believed his disclosure tended to show that there was breach of a legal obligation. On the face of it there was a 15 month gap between the phone call with Ms Barry and his email to Mr Michaelis. One possibility is that Mr Micallef has the year wrong in his claim and his witness statement and that both events happened in 2019. We did not appreciate this potential discrepancy at the time, so it was not raised with Mr Micallef. But even if that is the case there was a 3 month gap between the phone call with Ms Barry and the email to Mr Michaelis. Either way, it was a significant gap. In his email Mr Micallef said he did not wish to raise a formal complaint. The phone call with Ms Barry is the only part of that email that has any specificity, but we do not find that Mr Micallef at the time he sent his email believed Ms Barry or the respondent was in breach of the implied duty of trust and confidence in his contract of employment and in breach of a legal obligation. The delay, his lack of a formal complaint and the way in which he was using it as an example of what he said were wider concerns about HR, do not support that position. He refers to trust and confidence in his email, but we do not find that is a reference to the implied contractual term now relied upon.

164. We do not consider the rest of Mr Micallef's first email or what he says about his other exchanges with Mr Michaelis over the Autumn and Winter of 2019/2020 likewise can amount to a protected disclosure. There is no, with sufficient specificity and factual content, disclosure of information capable of tending to show, breach of a legal obligation (4.1.1.2, 4.1,1.3 of the list of issues). Mr Cowley referred to the further particulars at 165 which refer to "meeting 2" which says in its last sentence "the toxic atmosphere between HR managers and employees was escalating." We

can find no evidence, however, that this is what Mr Micallef said to Mr Michaelis. We cannot find such a reference in his emails and or it being set out in his witness statement. We also would not find in any event that any of these exchanges had a material influence on the decision to select Mr Micallef to be a risk of redundancy or to not offer him suitable alternative employment. All the crew were treated the same way, and had the option of applying for VR, or applying for the jobs. We would not find that Mr Michaelis held any ill intent to Mr Micallef for raising his concerns about HR or Ms Barry. Mr Michaelis was trying to sort it out.

Did Mr Micallef make a protected disclosure in early March in his telephone call with Mr Michaelis?

165. Mr Cowley accepted in closing submissions that the section in the further particulars headed "Spring 2020" [166], which appears to reference 4.1.1.5 in the list of issues, about a phone call between Mr Micallef and Mr Michaelis in early March 2020 cannot amount to a protected disclosure. It was simply a call about arranging a meeting with Mr Lang which never took place. Moreover, the matters identified at length at [166 – 168], termed the meeting agenda, were not raised with Mr Lang as the meeting did not take place.

Did Mr Micallef and Mr Hayel make a protected disclosure in December 2020?

166. The two claimants say that they made three protected disclosures to Mr Lang. They say the first was about misuse of public money, which is said to be in breach of grant conditions, and that this was a disclosure of information, tending to show (and they believed it tended to show) breach of a legal obligation. Secondly, they say they made a disclosure of information about dangerous construction which was information tending to show (and they believed it tended to show) that the heath and safety of individuals had been or was being endangered. Thirdly, they say that their disclosure of concerns about CTS was a disclosure about breach of grant conditions, and again was information tending to show (and they believed it tended to show) breach of a legal obligation. The other potential protected disclosures relating to that conversation with Mr Lang found at [172] were not pursued in closing submissions.

167. Mr Micallef says he raised with Mr Lang that a large amount of money was wasted on the recent tour of Carmen. Mr J Hayel says they said the company were wasting so much money building massive sets that were never used. Mr Lang confirms concerns were raised about the Carmen set and that it was too big for touring. It is not in dispute that the respondent were not able to take parts of the Carmen set, built for the Wales Millennium Centre stage, on tour. Mr Lang also confirms he recalls Mr Micallef raising concerns he believed huge amounts of money were being wasted, and that they were in breach of Arts Council of Wales funding conditions. Based on Mr Lang's evidence (as bizarrely neither of Mr Micallef or Mr J Hayel's witness statements assert they specifically mentioned breach of Arts Council of Wales funding conditions), we accept

that it was said.

168. We accept, within that context, that the two claimants therefore did make a disclosure of information which they personally believed tended to show that the respondent was failing to comply with a legal obligation relating to Arts Council of Wales funding conditions. There was sufficient specificity. It was linked in discussion to the Carmen set.

169. Mr Lang is clear in his evidence that there was no breach, and there are no conditions attached as to the spending of grant money. He may well be right, but the claimants do not have to show the wrongdoing actually existed. They do, however, have to establish that their belief was reasonably held. Here, from the perspective of the claimant's we find their belief was reasonably held. They were not in senior management positions where they had ready access to Arts Council grant conditions. They were working on the basis the WNO was in receipt of public funding, including from the Arts Council. They thought there was significant wastage, particularly in relation to the Carmen set. It was not unreasonable for them in their positions to suppose there would be conditions on grant funding as to, for example, the efficient use of public funds.

170. We consider that Mr J Hayel and Mr Micallef had mixed motives when going to see Mr Lang, and in what they said. Much of it was because they felt the crew was under threat and their general disgruntlement with Mr Michaelis. However, we accept that they did both personally believe that their disclosure about the Carmen sets and wasting public money was made in the public interest. It would be of wider public interest that public money provided through grants to an Arts organisation was being properly spent. Likewise, we consider that belief in the public interest was reasonably held. We find they did make a protected disclosure in that regard.

171. Mr Micallef says he said there had been dangerous construction on the Carmen set, and that the crew were worried. The statement about dangerous construction is embedded in a paragraph that is largely concerned with the alleged wastage of money, rather than health and safety. Mr Lang says that Mr Micallef said the set was too heavy. He says that amendments were at the time made to the set following these concerns. Mr Michaelis says concerns were originally raised with him by the two claimants and Mr Riemer in the Autumn of 2019, that they believed the set was too heavy. This was before Carmen went on tour. He says he agreed it was heavy but did not agree it was dangerous in anyway. He says they agreed to make substantial changes to the set and it was reduced by about 20% before it was taken on tour.

172. We accept it is likely as part of the wider discussion about the Carmen set, there was a discussion about the set having originally been too heavy to take on tour, with the claimants repeating what had been said to Mr Michaelis originally at the time. We therefore find it is likely that the claimants said to Mr Lang words to the effect they had told Mr Michaelis at

the time that the set was too heavy and dangerous. Mr J Hayel was Master Carpenter and Mr Micallef assistant Master Carpenter so we accept it was their responsibility to know and raise what loads they considered the crew could safely handle.

173. However, at the time it was said to Mr Lang we do not find that the claimants made a disclosure of information that they believed tended to show that the health and safety of any individual had been endangered. The claimants had done what their role required, which was to raise at the time with Mr Michaelis, their concerns they believed taking the heavy set on tour, constructed as it was, would be dangerous. The set was then changed before it was taken on tour. In those circumstances, at the time it was later being reported to Mr Lang, we do not consider that they believed, or that it was reasonable for them to believe, that the health and safety of an individual had been, was being or was likely to be endangered. Ultimately safety had not been endangered and it was not going to be as the set had been altered and the tour completed.

174. Turning to CTS, we accept that the gist of what the claimants said to Mr Lang was that they considered Mr Michaelis to have a conflict of interest in being Technical Director of the WNO and also, as they believed it, head of CTS. The concern expressed was, in effect, they believed CTS, as a profit making organisation, to be profiteering from the resources of the WNO. They believed work was being carried out at the cost of WNO, and sometimes for unnecessary work (such as when sets were built too big for tour and had to be made smaller), using public money and using WNO staff and equipment. They questioned whether it was in the WNO's interests, to be so closely associated with CTS and when WNO technical crew were losing their jobs (through fixed term contracts not being renewed). As previously set out, the claimants believe that misuse of WNO resources could place the WNO in breach of their grant conditions. They thought that Mr Michaelis was in control of the funds.

175. The respondent's answer to this is that it is simply and wholly incorrect. CTS is the commercial arm of the WNO, building sets both for the WNO and outside companies. At the end of each financial year all profits are ploughed back into the WNO. The respondents say that the claimants cannot have reasonably believed what they say they did as information about CTS and its relationship with WNO is publicly available. Ms Woodward said she discovered it for herself before joining the WNO by doing some research on google.

176. We accept that the information disclosed had sufficient specificity that it was capable of tending to show breach of a legal obligation and that the claimants subjectively believed that it was. We also have to assess from the viewpoint of the claimants whether, in their positions and knowledge, that belief was reasonable. Mr Micallef and Mr J Hayel had not done the kind of research into CTS that Ms Woodward had done (and indeed it would be difficult for Mr J Hayel to do so). It is apparent from their evidence that the concerns about the ethics of the CTS relationship had been widely held within their team for some time and a topic of

conversation. They saw the sets being built, and being altered, which they thought was wasteful, and which fed their concerns. It was probably also fed by the fact everyone worked on the basis that the crew, under their contracts, could not work for CTS. They had also been given information by a WNO driver, as set out within Mr Micallef's statement, who had said he found it unusual that everything was being paid for by the WNO, including drivers, but all invoices were being sent to CTS. We accept that they were not aware at the time that all profits of CTS were ploughed back into the WNO.

177. In those circumstances, whilst it appears likely now that the claimant's concerns about CTS were unfounded, we accept that based on what they knew and had been told at the time, their belief that the information they were disclosing tended to show breach of a legal obligation was reasonably held. We also accept they believed the disclosure was made in the public interest. There were mixed motives for what they were saying to Mr Lang, including concerns about the crew, and animosity towards Mr Michaelis who they blamed for various things. But we accept they did in part believe the disclose was in the public interest, relating to the proper use of public funds, and that belief was reasonably held for the same reasons already set out.

Did the Mr Micallef and Mr J Hayel make a protected disclosure in January 2021 relating to the Barber of Seville Tour?

178. Mr Cowley again did not rely upon this in his oral closing submissions. Mr Micallef was unable to confirm in oral evidence that it was actually him who asked if they could postpone the Barber of Seville work in the zoom call and Mr J Hayel also did not identify himself as having said it. In total we have therefore found that the two particular claimants made two protected disclosures in their meeting with Mr Lang in December 2020.

What was the reason or principal reason for the claimants' dismissal?

179. For Mr Micallef and Mr J Hayel to succeed in their protected disclosure dismissal complaints we have to find that the principal reason for their dismissal was the making of their protected disclosure(s). We asked Mr Cowley how that left the rest of the claimants. Mr Cowley said that it was not argued that the remaining claimants were, in effect, collateral damage, and that the entire restructuring exercise was designed as a way to target Mr Micallef and Mr J Hayel for blowing the whistle. He said it was accepted the restructuring, with the reduction in the number of roles, could amount to a redundancy situation. He said that the claimants' case was that the failure to offer Mr Micallef and Mr J Hayel suitable alternative employment was due to the making of protected disclosures. We asked him where that left the other claimants who did not have protected disclosure complaints. He said there was also a failure to offer suitable alternative employment there, but that the reasoning behind it was different for the other claimants.

180. We find that the reason for all the claimants' dismissals was that a genuine

restructuring exercise led to a reduction in the number of job roles and changes to the remaining job roles in the stage technical team. We find that the respondent genuinely considered that the changes were such that it was not possible to directly slot the claimants in to posts in the new structure. A decision was therefore made to offer potential voluntary redundancies and then run a selection exercise, in which the claimants not taking voluntary redundancy, could competitively apply for one or more of the new roles. The claimants for a variety of reasons, which included that they did not consider the new job roles were for them, decided to apply for and were granted voluntary redundancy, ultimately bringing their employment to an end.

181. We are satisfied, and it appeared was ultimately accepted by Mr Cowley on behalf of the claimants, the principal reason for dismissal was redundancy.

182. We would add that we asked the parties, and they did not invite us to consider the claimant's positions on a role by role basis. For example, one potential argument could have been that it would be easier to say that Mr C Macauley's job had disappeared compared to other job roles where it might be argued by the claimants they were closer to the "new roles." Mr Cowley did not invite us to go down that route. He accepted that in any event the reduction in the overall number of roles would suffice to amount to a redundancy situation.

183. The claimants' complaints about unfair dismissal therefore relate to section 98(4) fairness considerations. We are going to address the unfair dismissal considerations that are common to all claimants before returning to the age discrimination complaints and Mr Micallef and Mr J Hayel's whistleblowing complaints. We will then turn to Mr J Hayel's disability discrimination complaint and its interrelationship with his individual unfair dismissal claim.

Unfair dismissal - Fairness of the restructuring and voluntary redundancy process

<u>The meeting on 24 May 2021</u>

184. We have found as a matter of fact that Mr Michaelis did read out the script he had pre-prepared. The claimants were then given the pack of documents to go away and read. The claimants were told Mr Michaelis would not answer questions and they should go away and read the pack and channel any questions through HR.

185. We do not find that the decision to adopt this process was outside the range of reasonable approaches that an employer in the respondent's position could have taken. As the claimants' lack of or conflicting recollections show, the news was a shock and was a lot to take in. It is sensible in those circumstances to also have a pack of information that can be read through in their own time. The claimants submit that they were manual workers, not office workers, and that they were not used to

dealing with such packages of written information. We do not find that takes the process followed outside of the reasonable range. Time was given to them for the packs to be read, and they had the ability to ask questions through HR. Relying solely or primarily on oral communications would bring with it a real risk of misunderstandings and mis- recollections. The respondent was trying to achieve a balance. It is unfortunate but inevitable that in this kind of situation, however the message is imparted, the recipients are shocked and upset.

186. We do not find that the decision to not accept questions at the meeting on 24 May 2021 was a decision no reasonable employer could have taken in the circumstances. It was within the reasonable range for the respondent to decide, as we are satisfied they did here, that they wanted the claimants to have the opportunity to digest the information before asking questions.

187. We are satisfied that it was within the reasonable range for the respondent to decide that questions should then be channelled through HR. It is reasonable for an employer to want to have a defined structure in place and for HR to act as that conduit. The claimants make the point that Mr Michaelis and Mr Barden knew them, their work, and what the new roles would encompass better than HR. However, we are satisfied and accept that HR would have passed on queries as required.

188. The claimants also say they had no trust in HR that they would get help from them. Some of the historic issues regarding trust of the HR team were known to the respondent. We do not consider, however, that this takes the decision to channel queries through HR as being outside the reasonable range. It is HR's role to take on this type of responsibility and manage this kind of process. The claimants had also been directed to Ms Woodward who was new to the organisation and the HR department.

189. The claimants also complain that Mr Barden declined to speak with them to answer their queries, saying it was for legal reasons. Mr Barden said in evidence he had been discouraged from doing so, other than direct questions about the new role requirements. He said he could see the sense in it as there was otherwise a risk of mixed messages. We again consider that it was within the reasonable range to have such a system in place and to wish to channel queries through one conduit where they could be individually and collectively managed. Mr Barden would also have otherwise faced a difficult situation. As one of the claimant's acknowledged, they were bombarding him with questions.

<u>Further group meetings</u>

190. We find that it was within the reasonable range for the respondent to decide that they did not want to hold further group meetings but wanted to engage in individual consultation. Likewise, Mr Michaelis' decision to refuse Mr Micallef's request for a group meeting was not a decision no reasonable employer could have made in the circumstances. We accept that the claimants functioned as a team and felt more comfortable in a team dynamic. However, it was not outside the reasonable range for the

respondent to decide that they wanted to deal with any questions individually. It was ultimately an individual decision whether to take voluntary redundancy or whether to apply for one or more of the new jobs and which ones. There is always a risk in a group setting that some individuals do not feel that they can say or ask everything that they want to. In the claimants' situation ultimately, they may have had to compete against each other for the new posts which compounds that risk.

Zoom meeting on 20 May 2021

191. We do not find it was outside the reasonable range for Mr Lang not to have mentioned the impending restructure when he held his zoom meeting on 20 May 2021. We accept that it may well have ended up that the majority of the claimants attended the one meeting, facilitated by Mr Barden. But we do not find that Mr Lang was aware of this or that in any event he intended to hold a meeting specifically with the crew. Mr Lang's deliberate intention was to mix up the workforce and the meeting was not about the restructure. As such, it would have been inappropriate for him to mention it in front of the whole workforce and his content was planned for the whole workforce. We appreciate that the claimants say that they felt particularly shocked on the 24 May because they had felt that Mr Lang was positive and forward looking. But he was in a difficult situation, as if he had not invited the crew to his whole company sessions, he would have been open to criticism for that too. If Mr Barden said something along the lines that Mr Lang should have mentioned it but did not like to give bad news, then he was mistaken about the nature of Mr Lang's meetings.

The consultation process with BECTU

192. We do not find it was outside the reasonable range to undertake consultation with BECTU prior to individual consultation sessions. Irrespective of numbers of union members, the respondent was obliged to consult with BECTU. As Ms Woodward said in evidence, it also the tribunal's industrial experience that it is standard practice for union consultation to occur before individual consultations, even for those who are not union members or who are not within the group of workers for which the union has collective bargaining rights. The claimants had the same information as BECTU and were, once the VR process came to an end, going into an individual consultation period.

Changes to terms and conditions

193. The amended terms and conditions were not sent to the claimants until the morning of 6 June 2021. They covered things such as the annualised hours working arrangement and changes to things like overtime payments. The claimant say that they were not able to properly consider the changed term and conditions before the VR deadline of 7 June 2021.

194. In fact, Mr J Hayel, Mr C Macaulay, Mr M Hayel, Mr Bellamy, Mr L Macaulay, Mr Marshall, Mr Riemer, Mr Edwards, Mr Andrews cannot have considered it critical information for their decision making as they had all

put in their VR requests by 2 June 2021 without asking for the information.

195. We do not know why the contractual terms were not in the pack that was given, and we agree that it would have been prudent for them to have been for completeness. However, when Mr Micallef asked for the terms they were provided. There is no suggestion that anyone else had asked for them (although Mr Micallef does appear to have been an unofficial spokesperson, despite saying in his email he was not) before Mr Micallef did. The claimants also knew some of the key principles behind the proposed new contractual terms. Mr Michaelis referred to annualised hours in his script and the FAQs spoke of need for flexibility and outdated working practices. The claimants were also at the very start of the process, where VR was being canvassed. Those who wanted to stay would have received more information and there is a limit on how much information needed to be provided before the claimants could make a decision about whether they wished to apply for VR. It is the tribunal's industrial experience that many employers may canvass interest in VR first before providing detailed information about new jobs to those who are interested in staying. Furthermore, the claimants knew they could ask questions and they also knew that if they applied for VR by the 7 June deadline they would still have the option to change their minds and that there were individual consultation meetings coming. The respondents were also seeking to achieve a balance in how much paperwork to give the claimants (and indeed the amount of paperwork is something the claimants also complain about).

196. It is also pointed out that the contractual changes only applied to the supervisor posts and not to the claimants in more senior positions. By 6 June that left Mr Micallef and Mr Stewart. The accompanying email did, however, state that the management roles would be based on 44 hours a week with additional hours as required without extra remuneration. Mr Micallef did not raise any lack of understanding of this in his subsequent email of 7 June.

Change to model of shows on tour

197. The claimants say that if it had been explained to them at the time that there was a planned change to the way shows were taken on tour, meaning there would not be changes of performance (and therefore set) each night on tour, they may have been more inclined to stay as their workload would have reduced. That point does not appear to have been led in evidence from the claimants, but that point aside, we accept the evidence of Mr Barden that this kind of change in modelling away from back to back working had been discussed with Mr J Hayel and Mr Micallef previously, when discussions were had about aspired changes to ways of working such as show specific working, and annualised hours.

Pressure to accept Voluntary Redundancy?

198. The claimants say that they were placed under significant pressure to accept VR because there was no guarantee another role would be found

for them, and they would have to complete against outside applicants for the new roles. They point out that if they were unsuccessful and alternative employment could not be found then they would only be entitled to a statutory redundancy payment, and would lose the enhanced redundancy payment. Most of the claimant's said (amongst other reasons for why they took VR) that they considered it too big a gamble to take.

199. The claimants also point to the fact that the FAQs said that if they were successful in obtaining a new role they would have a 6 month probationary period and if they did not successfully pass this then their employment could be terminated. They say they did not know and could not have been reasonably expected to know that in fact, with their length of service, it would not be as straight forward as that.

200. The claimants say that the documents were deliberately drafted in a way to discourage them from applying for the jobs and the respondent's aim throughout was to get them to leave. It is said the atmosphere was toxic so the claimants had little faith that any applications would be considered fairly. It is said that the intention to dismiss the entire crew can also been seen from the haste in which letters were sent accepting the applications for VR. It is said that the fact the letters accepting the VR applications made no reference to still being able to withdraw their applications for VR show they were deliberately drafted to make the claimants believe they were bound to proceed with the redundancy process. It is further said that the refusal of Mr Micallef's request for an extension of time again shows the respondent was trying to prevent them changing their minds.

201. We do not find that the respondent's aim or expectation was that all of the claimants would opt for VR. We accept the evidence of Mr Michaelis and Mr Barden that they were surprised when this happened. We found their evidence genuine. Mr Barden spoke about how there were several of the claimants that could easily have fulfilled the new roles, and potentially others too with training and support. Mr Barden spoke with Mr Stewart about being a good candidate. It would also not be in their interests to lose all that experience and expertise in one fell swoop. That that happened does not mean it was their aim from the start. We took Mr Michaelis through a process of identifying which of the jobs might be the closest for each claimant. He did at multiple points identify that with many of the claimants' years of experience they had various options open to them. He also said, which we accept, that they had wanted people to be ambitious, and anticipated that individuals may apply for multiple roles, at both supervisor and manager level.

202. Some departures from within the crew would have been inevitable as the posts were reduced from 12 to 8 (subject to suitable alternative employment elsewhere in the company). We accept the respondent's evidence that in those circumstances they did not feel it appropriate to just offer statutory redundancy and that they wanted to offer enhanced terms to reflect the length of service of those who would be affected and to encourage and reward volunteers to come forward that would potentially reduce compulsory redundancies.

203. One option would have been for the respondent to allow those who went for one of the new roles but were unsuccessful, and also unsuccessful in obtaining any other suitable alternative employment, to still be entitled to the enhanced terms. However, we cannot say that it was outside the reasonable range not to have planned such an arrangement. It is common industrial practice for enhanced terms to only be offered at the start of a redundancy process, and with statutory terms thereafter, because part of the purpose is to encourage volunteers to come forward. We also do not find the decision not to do this, was indicative of an intention to force the claimants to leave through deliberately making them an offer to good to miss. The whole point of an offer of enhanced redundancy terms is to offer an enhancement, and the case law principles that give guidance on what a fair process may look like have as one of their principles, the offering of VR to potentially reduce or remove compulsory redundancies.

204. We do factor into our deliberations that the claimants were facing the prospect, if they did not take VR, of having to go through a competitive process for the new jobs and that the new jobs were not being ring fenced solely for their group but would be opened up for external applicants. But we do not consider that meant that the respondent had planned all along for all the claimants to leave. We accept that the respondent was acting on legal advice that the new jobs appeared to be sufficiently different that they would be justified in opening them up externally. The respondent would not have known who would apply for VR or who would apply for which posts, and what skill or qualification gaps they may be left with. Moreover, we cannot find that the respondent would not have considered, at selection stage, prioritising a claimant who met the minimum criteria for a role over and above an external applicant. The eventuality never happened and the hypothetical was not put before us in evidence.

205. We also do not find that the respondent deliberately devised an open competitive process as a means to encourage the claimants to take VR. A competitive process would be needed because there were fewer roles. The respondent wanted the claimants to consider being ambitious and consider if they wanted to go for more than one role. There is always a risk in these situations that an employee may be unsuccessful and be left with statutory redundancy terms only. It is not a situation that is unique to the restructure the claimants were facing. As we have said, offering VR only at the outset is a common industrial practice. It was a choice that each individual claimant had to make weighing up their own position, not a threat, or a deliberate ploy.

206. The evidence from some of the claimants was that they considered the atmosphere to be toxic and that they had little faith their applications would be considered fairly. We accept that some did feel that way. But we do not find that this reflected the respondent's position. We also do not consider that the channelling of questions through HR was intended to discourage the claimant's from applying for a new job or to make them lose faith in the process.

207. Some of the claimants' evidence was also that a turning point for them was when Mr Barden confirmed that all of their redundancies had been budgeted for. They took that to mean that the outcome was pre-judged. Again, they may have felt that way, but we do not consider it reflects the true position. We find, as Ms Woodward explained in her email to Mr Micallef, it was budgeted for because they had to budget for the worst case scenario in terms of expense. We accept any prudent employer would do so.

208. The claimants also suggested in evidence that the job descriptions, with the additional responsibilities, were deliberately written to put them off. We do not find that was the case. We find the additional responsibilities reflected a genuine wish on the part of the respondent held for some time and was one of the fundamental reasons behind the whole restructure. It had been a desire both of Mr Barden and Mr Michaelis for a significant period of time. Both Mr Michaelis and Mr Barden said that Mr Barden was having to undertake a disproportionate amount of administration for the department such as HR tasks, health and safety tasks and budgets. There were a mixture of people taking on the risk assessments and DCM obligations. That the respondent may not have subsequently been able to fill all the roles they wished, or that they have had to recruit less experienced staff combined with training and qualification commitments, does not mean it was not their genuine aim.

209. The FAQ about the consequences of a successful candidate not passing their probationary period could have been drafted more clearly, so that it did not lead to an inference that an employee, with continuity of service, could simply be dismissed if they failed a 6 month probationary period. There is obviously a need not to make FAQs too long and too complicated, but we accept it could have been worded better. The expression "may be terminated" is clumsy drafting. We do not, however, find that it was drafted with an aim of discouraging the claimants from applying for new roles. We accept it was as drafted by the respondent's lawyers. None of the claimants asked any clarification questions about it at the time when they could have done so if it was troubling them. We do not consider that the respondent would reasonably have anticipated that how it was drafted would potentially scare the claimants into taking VR.

210. We also do not consider that Mr Michaelis' evidence that he had not at the time specifically considered which claimants could undertake which roles, in the sense of trying to slot them in, was indicative of an intention that none of them would apply or be successful. It was indicative of a wish to follow a fair process at selection stage.

211. We gave careful consideration to the point that the claimants' applications for VR were accepted as they came in. Some were accepted the same day and some a few days later. Mr Michaelis approved each individual acceptance. The VR application form had said the respondent could refuse applications based on business need. The respondent did not follow a process of waiting until the VR deadline and then collectively looking at who had applied, where that left them, and then reaching a

decision on all the VR applications together. We did not, however, conclude that this meant there was a wish or a plan that none of the claimants would stay and that this is demonstrated through accepting their applications, and therefore dismissing them on redundancy grounds, done with indecent haste. We accept Mr Michaelis' evidence that he did not feel it was right to refuse a VR request from someone who was saying they wanted to leave, and he also wanted people to stay who were committed to the new ways of working. He was also following the process he understood to be recommended by HR and their solicitors. We would also add that part of the sense of haste the claimants complain about was contributed to by the fact some of them made their VR applications so promptly. That is not a criticism of them, but it in part explains the timeline.

212. We do not find that the letters accepting the VR applications were deliberately written to exclude a further notification to the claimants that they could still withdraw their applications for VR, as a means to coerce the claimants out. We accept the letter was as drafted by the respondent's lawyers. Furthermore, all of the claimants were clear in their evidence that they knew they could still withdraw from the process and indeed the evidence of some was that when they put their VR applications in on 7 June, one of the reasons they did so was because they knew they could still withdraw and they wanted to keep their options open.

213. That the respondent was not deliberately trying to hide the right of withdrawal from the claimants is show by the consultation meeting of Mr Bellamy. He asked what would happen if he wanted to apply for one of the jobs and was told the VR process would be put on hold so that he could apply. Mr Micallef was also given the option. The primary aim of the letter was also about taking forward those who had on the face of it willingly applied to leave. The letter also talks about the fact their employment "may" terminate and does not tell them that they cannot change their minds. Indeed, as already said, the claimants knew they could.

214. We did hear evidence about ongoing negotiations with other departments about changes to terms and conditions, rather than processes involving redundancy exercises. We do not consider that demonstrates a deliberate desire to treat the claimants differently because of a desire to get rid of them. We consider it is more reflective of the particular changes the respondent wanted to make, including to job roles and the number of jobs (and where the fixed term staff contracts had already been brought to an end) to the stage crew team. It further reflected Mr Michaelis and Mr Barden's views that it was unlikely the scale of the change they were seeking to make would be achieved by agreement given they considered their previous efforts to discuss the type of changes they wanted to make had been unsuccessful. Mr Micallef said himself in his consultation meeting, he did not think the proposed new ways of working would work.

<u>Mr Micallef's request for an extension</u>

215. Mr Micallef's request for further time to consider VR was made on 6 June 2021 and the VR deadline was 7 June 2021. It was not outside the

reasonable range for Ms Woodward not to be able to respond to Mr Micallef's email within a day. It was also a long email and not one, for example, that urgently set out in a heading that it was an urgent request for more time. It is a request towards the end of the email couched almost as a tentative enquiry rather than clear and urgent request for more time: "*As it as has been less than two weeks since we received this proposal, along with losing time due to our confusion, would it not be unreasonable to suggest delay to as to find more time to open dialogue with those that may wish to do so."* Set within the context of the whole email, it also reads more as request for more time to allow a group meeting to happen, rather than there being individual needs for more time to consider their positions. Mr Micallef and the claimants already knew the respondent was following a process of individual discussions, not group meetings. Moreover, Mr Micallef knew that if he applied for VR he was still able to retract his application.

216. The claimants argue that the refusal to allow an extension adds weight to the belief that the respondent was attempting to prevent them changing their mind and withdrawing their applications. They point to the fact that Mr Michaelis had the exchange with BECTU about potential requests for extensions. We do not consider the fact that Mr Micallef's extension was not granted before the VR deadline is indicative of an effort by the respondent to stop the claimants changing their minds. There is no evidence that Ms Woodward had delayed in responding to Mr Micallef to, for example, deliberately time him out. In our judgment, it is more likely that she was not able to deal with his email until when she did no 10 June and by that time the fact of the matter was that Mr Micallef had submitted his application. As already stated, he knew full well that he was able to retract it if he wished and Mr Michaelis also said to him at his subsequent meeting he could apply for the jobs.

<u>Consultation with the claimants</u>

217. We do not find that there was a lack of meaningful consultation, or that the consultation process was outside the reasonable range, or that the consultation process followed was indicative of a wish to close down the claimants. As Ms Woodward explained in her email response to Mr Micallef, the respondent was at the start of the process. At the first stage they were offering the opportunity for VR at an enhanced rate prior to individual consultations starting. The tribunal's industrial experience accords with that of Ms Woodward, that it is often the case that employers will run a process in that way and indeed that Unions will encourage employers to seek volunteers first to avoid or reduce compulsory redundancies. The claimants were not left without any port of call; they were clear they could contact HR with questions. They all accepted this in evidence. The claimants had also been told they were at risk of redundancy, that it was a provisional decision, and that WNO would continue to consult with them to find ways to avoid their redundancy, with further details of consultations to be provided over the coming weeks. It is not unreasonable to seek to deal with a VR process first.

218. The respondent had plotted out a rough timescale for the subsequent consultation meetings and for applications to be made for the new roles. We did note a lack of clarity from the respondent as to how the application process would work. For example, Mr Michaelis thought there would be application forms and Ms Woodward said it was more likely to be expressions of interest with guaranteed interviews. But we did not consider that the lack of definitive detail meant the respondent had decided the claimants should leave. We found it was attributable to the fact that the respondent was still at the early stage of the process and was administering the VR process before finalising plans for the next stage.

Selection method followed and suitable alternative employment

219. The claimants submit that the respondent should have followed a process of job matching and slotted them into the remaining roles. It was said for example, that Mr J Hayel should have been slotted into head of staging. When we enquired about the impact on, for example, Mr Micallef in being denied the opportunity of applying for that role in circumstances where there was no deputy in the new structure, we were told the respondent should have demoted him to technical show manager.

220. We considered this line of argument to be wholly unrealistic. There were 12 employees and only 8 roles. A simple slotting in could not happen. Further, with a flattening of the management structure it was not only Mr Micallef that would face either a forced demotion or redundancy, potentially without any ability to apply for a role with progression and in circumstances in which the claimants on their own account had years of experience on which to build.

221. It struck the tribunal that the claimants may have had in mind a process in which they got round the table with the respondent and divided up the roles amongst those who wanted to stay. If that was the case, then it was not unreasonable for the respondent to not take or agree to that course of action. Such a strategy could leave some individuals worse off and marginalised with a legitimate ground to complain. The respondent needed a process in which they could ensure they were appointing candidates with the right skills and qualifications for the jobs.

222. Mr Cowley did later concede that some form of selection process may have been required, but that it should not involve external candidates. There were various paths the respondent could have followed. One pathway could have been to try to place the claimants within pools and follow a selection process, applying for example a skills matrix where there were more employees in a particular pool than jobs in the new structure. But we do not consider it was outside the range of reasonable responses not to follow that process. We accept there was not a straightforward match between the existing jobs and the jobs within the new proposed structure. The two most extreme examples are Mr C McAulay and Mr Edwards, but the technical show managers and technical show supervisors also overlap with various of the former roles held by multiple claimants who were multi-skilled. It would bring a risk of claimants saying

they were in the wrong pool, or had been left out of any pool, or deprived of opportunities.

223. We could therefore understand why the respondent went down the route of placing all the claimants at risk and giving them all the opportunity to apply for all the roles as potential suitable alternative employment. We do not find that approach to be outside the reasonable range.

224. This brings us back to the question of opening up the process to external applicants. Here the claimants rely on the Corus case to argue it was outside the reasonable range to open up the process to external applicants, and that priority should be given to employees at risk of redundancy who can meet the minimum role requirements. The respondents point to Morgan v WRU to argue that a competitive process involving external candidates was not found to be unfair.

225. The reality is that neither case mandates that there is a single, defined route to fairness. Each case turns on its own facts and an application of section 98(4). On balance, we did not consider that a decision to open up applications to external candidates meant the process followed was one no reasonable employer could have taken in the circumstances. It was within the reasonable range. The respondent had grounds on which to question whether they would be able to fill all the competencies they were looking for from the claimants, with suitable training also being provided. They would have wanted to have the new structure in place for autumn touring. As we have said, whether, it would have been fair to have selected an external candidate over one of the claimants we simply cannot assess because the situation never materialised and it would depend upon the particular facts. We cannot find that the respondent would not have given a claimant priority in a selection process over an external candidate if that claimant met the minimum job role requirements because the eventuality never materialised and the hypothetical question was not asked of the respondent's witnesses. On what we do know, and given the early stage the redundancy process was at, we cannot find that the general structure, that was intended to be followed, was outside the reasonable range.

Summary of ordinary unfair dismissal complaints

226. In summary, whilst we have found that some of the drafting of the documents could have been improved, taking a step back and looking the situation overall we could not find that the process followed was outside the reasonable range. We find the respondent did act reasonably in all the circumstances in treating redundancy, expressed through the voluntary redundancy applications which were accepted, for the claimants (other than Mr J Hayel) as sufficient reason to dismiss the claimants. There is a separate point specific to Mr J Hayel that we address separately below. The other claimants' ordinary unfair dismissal complaints do not succeed.

227. We would add, however, that it did strike us that it was a shame there was such a lack of mutual understanding on both sides. We do accept the

general picture the respondent took from many of the claimants was that they did not want to be a part of the changes being proposed, and that they wished or were content to take VR. We use the word "content" rather than "happy" as it would not have been lost on the respondent that at least some of the claimants would have preferred to stay, but with things remaining as they were. Some of the claimants said that to us in evidence.

228. From the claimants' perspective the general perception we had was one of feeling unwanted whilst also wanting to maintain their pride. Many of the claimants did not want the respondent to see that they were hurting and wanted to leave with their heads held high. They took the notion of having to go through an application process as being akin to begging for their jobs which their pride would not let them do or they felt was pointless (as well as their other reasons for taking VR). We think it likely that some did want to leave on the offered VR terms anyway, particularly with the changes they were facing. But some in reality were seeking some active encouragement to consider staying and applying for the roles. But they did not display that to the respondent, and they submitted their applications and went along to the final meetings, not having asked any questions, and saying very little or indeed in some cases saying they were looking forward to going or just wanted it all finalised. Some of the claimants specifically said that if was for the respondent to come to them if the respondent wanted them to stay, and not for the claimants to make the move. The historic sense of resentment did not help together with the subjective notion the claimants had formed as a group that the process was all prejudged. It is also likely that once some claimants decided to go for VR, there was a domino effect.

229. The respondent did not get that message from the claimants because of the other signals they were picking up. Therefore the VR applications were made and then accepted.

230. We do not consider the respondent would reasonably picked up a different message from Mr Micallef's email of 6 June, which reads more about wanting a group meeting and to have discussions about wholesale different ways of running the whole process or indeed not having the process at all. That Ms Woodward thought it was clear to the claimants that they were encouraged to apply for the new roles if they wanted to do so, and if they believed they had the right skills, is reflected the email response she sent to Mr Micallef on 10 June. This disconnect between claimants and respondent, as we have said, is the shame of the situation, but it does not, in our judgement, render the dismissals unfair. The respondent was understandably reacting to what they saw, and their process followed was, for the reasons already given, within the range that reasonable employer in the circumstances would apply.

Protected Disclosure detriment and dismissal – Mr Micallef and Mr J Hayel

231. We have found the reason for the claimants' dismissals was redundancy, through the restructure placing their roles at risk and a decision to accept the claimants' applications for VR. There can only be one principal reason

for dismissal and as such Mr Micallef and Mr J Hayel's protected disclosure dismissal complaints cannot succeed, as the principal reason for dismissal cannot be the making of their protected disclosures. Mr Cowley appeared to accept as such in closing submissions but there was no formal withdrawal of the protected disclosure dismissal claims. For completeness we confirm that we are satisfied that the respondent's restructuring exercise was genuine, and the respondent was genuinely seeking to make, for business reasons, the changes they were seeking to make. We do not find that it was, for example, a sham restructuring exercise designed to secure the exit of Mr Micallef and Mr J Hayel (or other claimants) because of the raising of protected disclosures. The protected disclosure dismissal complaints are not well founded and are dismissed.

Protected disclosure detriment

232. Mr Cowley in closing submissions did not pursue the detriment complaint relating to "selecting the claimants for redundancy" as he accepted that as all the claimants had been selected (or placed at risk) he did not think the complaint was sustainable. That complaint for Mr Micallef and Mr J Hayel is therefore dismissed upon withdrawal.

233. Mr Cowley said the focus in the whistleblowing complaints was on the failure to offer Mr Micallef and Mr J Hayel suitable alternative employment. They argue that a material influence on the decision not to offer Mr Micallef and Mr J Hayel suitable alternative employment was the making of their protected disclosures. In particular, Mr Cowley said the making of their protected disclosures was a material influence in the decision to not simply slot Mr Micallef and Mr J Hayel into new roles in the new structure. As already mentioned, we asked him how that left the other claimants. He said their position was that they also were not slotted into new roles when they should have been, but that the motivation behind that was different. We accept of course that the making of a protected disclosure need only be a material influence on the impugned conduct of the employer; it need not be the sole or even predominant reason.

234. We have set out already above our findings that the process of placing all the claimants at risk, with the claimants then being given the opportunity to apply for one or more of the new roles (if they did not take VR), was made because:

(a) For financial and operating reasons, there was to be a proposed reduction in the number of new posts in the team, compared to the number of old posts;
(b) The respondent genuinely considered the new posts were different to the previous posts, with different skills and qualifications required and different ways of working;
(c) They believed they could not just slot the claimants into the new roles because there were fewer roles, the roles were different, and there were multiple potential options for the claimants;
(d) They believed given the reduction in roles, and the changed

responsibilities, that, in effect, the old roles ceased, and the appropriate course of action was to allow the claimants to apply for a variety of roles should they wish to do so. The respondent would then conduct a selection exercise.

235. We accept this was the genuine reasoning, and that it was not motivated in any way by Mr Micallef and Mr J Hayel making protected disclosures. We do not find that Mr Michaelis bore animosity towards Mr Micallef and Mr J Hayel for raising concerns about CTS or about wastage on set building with Mr Lang in December 2020. The concerns about the Carmen set having been unsuitable for touring and requiring alterations was known and had been discussed, dealt with and taken on board. It was already known by Mr Lang who said the same. Mr Michaelis and Mr Lang knew that the set building difficulties did not place them in breach of grant funding conditions. In short, there was nothing for Mr Lang or Mr Michaelis to be worried or bothered about or for Mr Michaelis to fear or feel resentful about it being raised. Likewise, Mr Lang and Mr Michaelis knew the true position in relation to CTS. They knew there was no conflict of interest or financial impropriety. Again, there was no reason for Mr Michaelis to feel fearful or resentful about it being raised by the claimants with Mr Lang.

236. We are satisfied the raising of the protected disclosures played no part in the reason why the respondent adopted the restructuring process that they did, or in not simply slotting Mr J Hayel and Mr Micallef into new roles without a selection exercise. None of the claimants were slotted in for the reasons already given, and we are satisfied that Mr J Hayel and Mr Micallef were treated the same way as all the other claimants; there was not some additional factor at play relating to Mr Michaelis bearing a particular grudge against Mr Micallef and Mr J Hayel.

237. The claimant's written closing submissions assert that Mr Michaelis was also motivated about disclosures being raised about disciplinary processes. We have not found that any such protected disclosures were made. But in any event we did not consider that the way in which the restructuring process was structured, including how suitable alternative employment was to be dealt with, was influenced by resentment towards Mr Micallef or Mr J Hayel for any reason, including other concerns that Mr Micallef said he held or was raising or was considering raising. Similarly, we did not consider that the drafting of the job descriptions for the new roles was motivated by such considerations. These were business led decisions that had behind them a genuine desire to change the model of working, hours of working and job responsibilities.

238. We also do not find that the decision to open up the process to external applicants was motivated in any way because of protected disclosures made by Mr J Hayel or Mr Micallef. The decision was made on the basis of legal advice and because of the differences to the roles and new responsibilities and with the respondent not knowing who would apply for VR or for what roles. We do not find that Mr Michaelis was motivated in any way by ill intent towards Mr J Hayel and Mr Micallef for raising protected disclosures, for the reasons we have already given. Again, all

the claimants were treated in the same way in that regard. The protected disclosure detriment complaints are not well founded and are dismissed.

Age discrimination

239. The claimants argue in being selected and dismissed for redundancy they were treated less favourably because of age. They say their ages ranged from 43 to 66 and that other than Mr L Macauley, who was age 43, all of them were over the age of 55. They argue that Mr L Macauley was collateral damage in a restructuring process that they say was designed to get rid of an aging crew and therefore was because of age. They compare themselves to a younger, hypothetical age group.

240. The respondents say that Mr L Macauley is a comparator that disproves the claim the claimants are bringing. They say he shows that age had nothing to do with the restructuring exercise, which affected the whole group including Mr L Macauley at a younger age. They say his circumstances show that whatever age profile the crew would have had, they would have been subject to the same treatment.

241. In the tribunal's judgement this is not the kind of case that is assisted by finer arguments about the construction of an appropriate comparator. It is better to focus on the reason why the impugned treatment happened.

242. The claimants invite us to infer a discriminatory rationale drawing on various factors including, they say, alleged age discriminatory comments made by Mr Barden and Mr Michaelis, the alleged offer to Mr L Macauley that he could apply for a new job after 3 months (whereas 6 months was said to other claimants) and the alleged comments to Mr Sherrard.

243. The claimants rely on comments they say were made by Mr Barden and Mr Michaelis relating to age. We have not, however, ultimately made finding of fact that these comments were made. We also have not found as a matter of fact the comment allegedly made to Mr Sherrard was made. We also have not found as a matter of fact that Mr L Macauley was offered the opportunity of applying for a new job after a 3 month gap.

244. The claimants also point to the fact that Mr Michaelis testified that no consideration had been given for the need for succession planning as a strategic aim. They say that is implausible and again shows that age was a major factor in the decision to run a redundancy exercise and, they say, the indecent haste in which the exercise was done. They say it was done to allow the respondent to recruit a team with a younger age profile.

245. In terms of the selection of the claimants for redundancy, (which we take to mean the placing of the claimants at risk of redundancy), we do not find it was materially influenced by considerations of age. The decision to restructure was made for the reasons we have already given, summarised at paragraph 234 above. This led to the claimants' roles being placed at risk with the option to go for VR or apply for a new role or roles. It was for genuine business led decisions, and not as a means to remove the crew

because of their age profile. We have already found that the respondent was not seeking or expecting all of the claimants to take VR or that the process was designed or manipulated to coerce them into leaving. Again, as already said, it was not in the respondent's interest for the whole crew to leave in one fell swoop.

246. We consider it likely the respondent thought some of the claimants may potentially choose to leave if they found the VR terms attractive, but that others would stay and apply. We do not consider, however, that contemplating some may potentially choose to take VR, meant there was less favourable treatment of the claimants materially influenced by age. It is the whole point of offering VR. The fundamental motivation behind the VR offer was because there were fewer new roles than old roles, meaning that if the plan went through some of the claimants would end up redundant unless there was alternative employment available in other departments. Hence the very reason why employers offer VR terms; to try and avoid compulsory redundancies. We do not consider it was hiding any aim to remove some or all of the crew on age grounds.

247. Furthermore, offering someone the option of taking, at their own choice, an enhanced payment to leave, is not less favourable treatment because of age. It is favourable treatment and not to their detriment. Moreover, it is not treatment that differs to how anyone else of a different age would be treated, and it is not because of age. We consider that whatever age profile the team or its individual members would have had, the restructure plan and the VR offer would have been made with the expectation or hope of some kind of VR take up (to reduce compulsory redundancies), because they were business led, operational decisions. It was then a matter of personal choice for the claimants, as to what they would decide to do. That was not controlled by the respondents and anybody of any age profile would be in that position and get to make the same decision.

248. Similarly, we do not consider that the construction of the new role profiles was done as a way to force the claimants to go because of their age profile. We are satisfied, as already stated, there were genuine operational reasons behind the planned changes and the respondent would have wished to make those changes whatever the age profile of the crew because it was about new ways of working. Moreover, if the respondent was, as we have found, also expecting some of the claimants to stay and apply for these new roles, it is not indicative of a desire to achieve, as the claimants suggest, the removal of an aging crew. It was about giving options. Mr Stewart was encouraged to consider the new posts by Mr Barden.

249. The claimants criticise Mr Michaelis for saying he deliberately did not, in his mind, match claimants to roles. However, Mr Michaelis' point was that he was seeking to be open minded until the selection needed to be made, and that he had wanted some claimants to be ambitious in thinking about whether they wanted to apply for roles with more responsibilities. As such, and given at the point the claimants left, the process was at an early stage, the respondent did not have a clear projection as to who would end

up where. Mr Barden candidly said that he thought there were some claimants that could easily pick up the roles, but that others would need more support. But again, he said he deliberately tried to keep an open mind, because there was a selection process to come. We considered that was an honest, human, appraisal of the situation. A crew with a different, younger age profile, but with an equivalent mix of backgrounds, aptitudes, ambitions and skill sets again would have ended up in the same situation.

250. In terms of succession planning considerations, there is no fixed retirement age, and the respondent's statistics show in general they have a workforce with an older age profile. We did not consider it likely that Mr Michaelis did in fact have, as he termed it, a succession planning strategic aim, outside of the restructuring plan he was seeking to put in place. He had been wanting to restructure the crew along the same lines for some years; that was his plan. It would have been within his contemplation that some of the crew may not want those changes and may not want to stay or may want to take VR for any number of personal reasons. Mr Barden spoke about how he had discussed ideas such as show specific working with Mr J Hayel and Mr Micallef previously, and that whilst they always welcomed the dialogue, they did not see the kind of changes he wanted to make as being workable. Mr Stewart's father had been the Master Carpenter who had introduced the two crew system. It seems likely there was within the crew, a loyalty to the systems they were used to following and thought worked well. Both Mr Michaelis and Mr Barden spoke about how it was important that if people wanted to stay in the new roles, it would involve "buy in" to the new ways of working. A contemplation that some may choose to take VR and not want to move to the new way of working was in a way a form of succession planning. But it was not about age; it was about commitment to the changes. Crew members with a younger age profile, but otherwise in the same position as the claimants, would have been seen in the same way. Mr Michaelis would have wanted to achieve the same things and would have acted in the same way.

251. In terms of the claimants' dismissal, that ultimately came about due to the respondent accepting the claimants' voluntary redundancy applications. We are satisfied that the respondent would have accepted the VR applications for individuals in the same circumstances as the claimants but who had a different age profile. They accepted the VR applications because the respondent thought the claimants had decided to accept, and were content to accept in the circumstances they found themselves in, the VR terms. The respondent did not consider it was right to not accept VR for an individual who wanted to go, and they wanted individuals to stay and apply for roles who were committed to the changes the respondent wanted to make. Age considerations were not a material influence on that decision making process. Likewise, we consider that faced with the same timescale of VR applications, the respondent would have acted in accepting them in the same timescale that they did, were they to have crew members in the same situation but with a different age profile.

252. The complaints of age discrimination are not well founded and are dismissed. We concentrated on the reason why the treatment happened,

as we were able to, and we had to make detailed findings of fact in the case in general in any event. However, even if we were to find the burden of proof shifted (which is not a given bearing in mind our other findings) we would be satisfied that the respondent had discharged the burden. Age was not a material influence on the decisions made by the respondent.

Mr John Hayel – Disability

253. Mr J Hayel says he was a disabled person by reason of an impairment of dyslexia. We were provided with little evidence in support of establishing the impairment. Mr J Hayel has never had a formal documented diagnosis and his impact statement reads more as being a general witness statement about what happened to him, rather than being about the impact on day to day activities. From what we do have before us in evidence we make the following findings.

254. Mr Hayel said in oral evidence that for much of his life there was no word for what people now refer to when talking about dyslexia. He left school being called illiterate and he was ashamed of that. He has spent his life embarrassed that he cannot read and trying to hide it.

255. At some point in his career he tried to go to night school at City Road in Cardiff to get help with his reading. The person running the course told him he was not illiterate, and she thought he might be dyslexic. It was the first time he had heard that word and it sounded a better word. He could recall her saying he seemed like clever person to her. He could not continue with the course as he was away touring, so he carried on with the way he was living his life before.

256. His reading is limited. He can look at a statement or a memo and pick out a word he understands and then try to work out roughly what it all means.

257. He worked at the WNO for 48 years and worked his way up, being Master Carpenter for 30 years. He was offered the post by a previous line manager, Fred Carrow. Mr Hayel told Mr Carrow he had problems with reading and Mr Carrow said that was not the skill he was looking for and that he would help Mr Hayel. Over the years Mr Hayel has confided in line managers, including Mr Carrow, Mr Parr and Mr Michaelis, about his literacy difficulties, but told them it was confidential and he did not want anyone else to know about it. His managers kept his confidence, which meant that it is not documented anywhere in work, and HR did not know about his difficulties.

258. Mr Hayel has a photographic memory which has helped him hide his reading difficulties. He can remember every piece of scenery from the Operas performed by the WNO over the years.

259. He did not want colleagues to know about his literacy difficulties, but he thinks that some of them, such as Mr Micallef probably did know, and helped him, but they never told him that they knew.

260. Over the years, and particularly latterly, Mr Hayel has had to attend health and safety courses. He was frightened that people would find out that he could not read. Mr Hayel says that Mr Michaelis helped him with a course by siting next to him to help him. He says he was also allowed by the trainers to take work home with him and his wife would help him. He could follow a PowerPoint talk through and when the tutors were talking about health and safety he understood it and could participate in group discussions. He would be in Mr Michaelis' group. He says Mr Michaelis would write things out and show him what boxes to tick. He says in group meetings he would talk and Mr Michaelis would write his answers down. Mr Michaelis says that when there were written tests they made assessors aware of literacy issues. Mr Michaelis says Mr J Hayel participated in the active course work like everyone else, and did not seem to have a problem following PowerPoint or the case files that were discussed in training. There is not an extensive dispute between Mr Michaelis and Mr Hayel in this regard. On balance we consider it likely that Mr Michaelis did help Mr Hayel with writing things down, but that they would be Mr Hayel's own answers.

261. Mr J Hayel could deal with documents such as packing lists, drawings, stage plans, and weekly schedules in work because he encountered them regularly and he knew how they should look. Mr Carrow taught him to understand technical drawings. Mr Hayel knew the crew's schedules and people would talk to him about the schedules every day and he knew what they should look like. But he could not write a schedule out, someone else always did that. He did not write a single email in 40 years of working with the respondent. He would get Mr Micallef to send out emails. He never sent a single memo. He knew how to do a risk assessment but could not put one down on paper.

262. Sometimes a manager might talk him through a document, but it was not generally the case. Sometimes he would take a document away, go to the toilet, and try to work it out from the words he could recognise. One of his coping strategies was to also take things home with him and get his wife to read them out to him. With the advent of smartphones, he was then able to take a photograph and send it to his wife and she could call him and talk to him about it.

263. He has strong pictographic skills. He was able to pass his driving test and learn road signs. He is able to look at a map and somehow then know how to get to a destination.

264. He accepts he was able to participate normally in work because of the limited requirements for reading and writing and with the strategies in place.

265. Mr Michaelis says he was not aware that Mr J Hayel is dyslexic. He says Mr Hayel that over the years he had looked at numerous documents with Mr Hayel such as packing lists, risks assessments, drawings and weekly schedules. He says that Mr Hayel was reading and interpreting those and the discussions they had did not give him an indication that Mr Hayel had

a serious underlying medical condition. Mr Michaelis says all he was aware of was a slight weakness in Mr J Hayel's ability to read and write and he assumed this was around literacy. Mr Barden says he was not aware that Mr J Hayel said he was dyslexic. But he says he was aware that Mr Hayel struggled with paperwork and computer access. He says it was not impacting on Mr Hayel's day to day activities.

266. The respondent asserts that the impairment relied upon did not have a substantial adverse effect on Mr Hayel's ability to carry out day to day activities. It is said Mr Hayel could manage his team day to day and interpret the documents required to do his role. It is said that if the tribunal finds there was any impairment it was nothing more than minor or trivial and the claimant has provided no evidence beyond this.

267. In our judgement, the claimant has a mental or physical impairment of literacy difficulties. We are not in a position to make a diagnosis as a tribunal, or define its organic cause, but we are satisfied that what Mr Hayel has is an impairment. He clearly is a capable, intelligent, thoughtful individual. We were given no information about the impact of Mr Hayel's literacy impairment in his home life. Notwithstanding the evidential limitations we are satisfied, on balance, that the impairment has a more than minor or trivial effect on his ability to read. We accept that when generally faced with a document Mr Hayel can only make out the odd word. He barely looked at the bundle when giving evidence. In work the impact was limited to some extent because of the nature of Mr Hayel's duties and because of the strategies he had in place. He tended to work with the same forms and documents day in and day out which he had learned through repetition. Other documents he would, in secret, get his wife to help him with. The tribunal thought it likely that those around Mr Hayel such as Mr Michaelis, Mr Barden and Mr Micallef probably also adjusted the way they dealt with documents and Mr Hayel, potentially themselves almost automatically in a sense as time went on. Mr Hayel was well respected, and they were clearly aware he did not want any reference made to any literacy difficulties or attention drawn to it, and they respected his wishes.

268. In our judgement, the ability to read, in itself, is a normal day to day activity and in the claimant's case is substantially adversely effected. It is identified as a normal day to day activity in the Guidance and by the Employment Appeal Tribunal in Paterson.

269. The claimant's literacy impairment has a more than minor or trivial effect on the claimant's ability to write. He cannot write an email or a memo or a document such as a schedule or a risk assessment, which are common activities in the world of work. In our judgment, the ability to write, in itself, is a normal day to day activity that in the claimant's case is substantially adversely effected. It is identified as a normal day to day activity in the Guidance.

270. The claimant's situation is an example of the point made by the EAT in Goodwin that disabled people often adjust their lives and circumstances to

enable them to cope. The claimant has adopted a lifestyle which limits the amount that he has to read and write. He has adopted a lifestyle where he lives his life finding ways to hide his impairment. The act of being able to communicate with those around you, and to go to work and function in work, and to do those things with confidence and without the worry of being caught out or found out or embarrassed is a normal day to day activity.

271. The very facts of this case also demonstrate the limits the impairment placed upon the claimant's ability to progress in work. The respondent wanted the new head of stage to take on significant administrative work such as report writing and budget preparation. Mr Hayel accepts he could not do that, at least without adjustments. The responsibilities, absent adjustments, were a bar to Mr Hayel's effective participation in professional life. Mr Hayel also struggled with training courses without someone there to assist him and without being able to take parts of it home for help. Even if it is an infrequent activity the case law shows this can still count because it was a bar to Mr Hayel's effective participation in professional life.

273. We do not find this is a situation where the claimant adopted coping or avoidance strategies that altered the effects of the impairment to the extent they were no longer substantial. Mr Hayel was still hiding that he could not read documents, or getting help in secret. He could not, without assistance attend training. He could not send an email or write a memo. He could not attend training courses and pass their requirements without assistance. That is not effective participation in professional life. But we would also find in any event that the claimant's avoidance strategies were not strategies it would be reasonable to expect the claimant to adopt such as to find he ceased to become a disabled person. They were strategies adopted to avoid substantial embarrassment, limited his work sphere, and meant he operated under a constant worry of being found out. If those coping strategies were taken away there would be a further substantial adverse effect on normal day to day activities of reading, writing, communicating in his working life and his exposure to embarrassment.

274. We have to assess the position cumulatively. Overall we are satisfied that the claimant's impairment had at the relevant time, a more than minor or trivial adverse effect on his ability to carry out normal day to day activities. The respondent did not dispute the issue of "long term" if we found the above test was met. We therefore find that the claimant was a disabled person by reason of a literacy impairment.

Reasonable adjustments

275. We find that the respondent knew or could reasonably have been expected to know that the claimant had the disability. Mr Hayel's line managers knew he had problems with reading and writing. Mr Barden had noticed without being directly told. We accept they were not able to make or know of a diagnosis of dyslexia. However, they were in a position to know and perceive that Mr Hayel had an impairment and an impairment

that had a long term substantial adverse effect on his ability to carry out the normal day to day activities of and associated with reading and writing. We consider that Mr Michaelis and other managers before him knew that it was more than minor literacy issues. Mr Michaelis had put the arrangements in place to assist Mr Hayel on health and safety courses.

276. The PCP relied upon is "the requirement of the role which equated to the one which he had occupied to produce written reports." It is inelegantly put, however, it is easily understood to mean the requirements of the new head of stage role which had a requirement to produce written reports. The disadvantage is also self evident in the difficulties Mr Hayel would have fulfilling that part of the role, which was known to the respondent through Mr Michaelis.

277. The steps that the claimant identifies that could have been taken to avoid the disadvantage are said to be voice activated software, delegation of report writing to an alternative member of the team, use of a digital recorder to record meetings and training etc.

278. Mr Michaelis says Mr Hayel did not raise concerns about making reasonable adjustments to the new role and that if Mr Hayel had requested adjustments they would have looked into implementing them. He said other staff have had literacy courses facilitated. Ms Woodward said the same, saying that there are members of staff with dyslexia who have had software provision, IT training, a referral to occupational health and an Access to Work referral which has led to grant funding. We do not consider that the respondent would not go through a similar process or make provisions for Mr Hayel.

279. Mr Hayel did not have these things because there had never been a formal disclosure by him of his literacy difficulties. He had told his managers in confidence, asking them not to tell anyone else, and they had maintained that confidence. For Mr Hayel to access the kind of support he has identified, it would have necessitated others in the respondent organisation knowing about his literacy difficulties such as HR. Wider knowledge would be needed so that he could be referred to occupational health, or for formal assessment elsewhere, and so that IT needs and recommendations could be assessed etc. If an adjustment turned out to be delegating report writing, that other individual would need to know.

280. We cannot see that Mr Hayel would have wanted the attention that would come with such actions being put in place. He did not mention to Mr Michaelis that he had the adjustments now proposed in mind because they would help him with the head of staging role. Or, for example, he did not say he would be interested in being assessed and seeing what support was there. He worked his whole 48 year professional life keeping his condition secret. When he gave evidence to us, he spoke about the difficulties he had in giving that evidence because he had not ever wanted it to be known.

281. Mr Hayel did speak to Mr Michaelis about the role to say he did not think

he could do it, and hoping Mr Michaelis would say not to worry and they could in effect carry on with the existing strategies they had in place. But that was Mr Hayel's hope, not an express request. He says that Mr Michaelis said he knew, and that he wanted changes. Mr Michaelis says his comment was probably more guarded than that. Mr Michaelis would have known that Mr Hayel would have difficulties with the additional requirements of the role, without going through a process of being assessed and then the availability and appropriateness of adjustments being formally considered. So whatever exact wording was used Mr Michaelis probably made some acknowledgement of the additional requirements of the role. What Mr Michaelis did not do was say to Mr Hayel that if wanted to apply for head of staging, there potentially could be that process of Mr Hayel going for an assessment of his condition, and getting further assessments to see what support could be provided and funded but that it would involve telling others, such as HR about Mr Hayel's condition. That they would not long be able to maintain it confidentially.

282. But the disability discrimination case before us is the reasonable adjustments claim about voice activated software, a digital recorder and delegation of report writing. Pre-supposing that they would be reasonable steps to take, we cannot find that the respondent failed to take them. We consider that (pre-supposing there was a role for Mr Hayel) it is likely they are the kind of steps the respondent would be able and likely to take, if appropriate. They are the kind of steps taken for others. We therefore cannot find that the respondent failed to take them. They never had the opportunity to do so.

283. The complaint of failure to make reasonable adjustments is not well founded and is dismissed.

Mr J Hayel – Unfair Dismissal

284. We identified above that there was a particular issue we would return to in relation to Mr J Hayel's unfair dismissal claim. Mr J Hayel's case is that the respondent deliberately prepared the head of stage profile to include administrative requirements, knowing he could not do them, to get rid of him. We do not find this is the case. For reasons already given above, we find that these were genuine activities and responsibilities the respondent wanting the head of stage role to encompass. In relation to Mr Hayel's unfair dismissal there, is however, a point that concerns us that is related to the analysis of the reasonable adjustments claim above.

285. Mr Michaelis was faced with an incredibly long standing member of staff whom he had built that relationship of confidence with. We do consider, and find, that it was outside of the range of reasonable responses for Mr Michaelis not to have had that express conversation with Mr J Hayel to say that if he wanted to apply for head of staging, there potentially could be that process of Mr Hayel going for an assessment of his condition, and getting further assessments to see what support could be provided and funded but it involved telling others, such as HR about Mr Hayel's

condition. We do consider, it is a discussion any reasonable line manager in Mr Michaelis' position would have had.

286. It is a narrow point but it is an important point as it relates to the options Mr Hayel had in the face of being put at risk of redundancy. We therefore do find that Mr J Hayel's dismissal was unfair because in the circumstances, including equity and the substantial merits of the claim, the respondent did not act reasonably in treating their reason as a sufficient reason for dismissing the claimant.

287. However, we make a further point relating to remedy. We are entirely certain that if Mr Michaelis had said those things to Mr J Hayel, Mr Hayel would have said he did not want to go through that process and that he wanted to proceed with VR. We say this because we have already heard and assessed the evidence on the point. Mr Hayel had built his whole career around no one other than a handful of managers knowing about his literacy difficulties. Mr Hayel understandably struggled giving his evidence to the tribunal for that reason. We do not see there is any prospect that he would have wanted HR to know about his difficulties, or to go for various assessments, some of which may be in the workplace, or for colleagues to see him using equipment, or a colleague, for example, being asked to take up the delegation of report writing. For all his years of close working with Mr Micallef they had never had that express discussion. We therefore consider it inevitable that Mr J Hayel would still have taken VR in any event because he would have seen it as maintaining his own privacy and dignity.

288. We say that now because it is likely to have a significant impact on remedy. It may be that the parties can reach agreement. They should confirm the position within 28 days, and if they are unable to reach terms, should set out how long a remedy hearing is required for Mr J Hayel's unfair dismissal claim.

Employment Judge R Harfield
27 January 2023

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 30 January 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche