EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr James Tapner	**v**	Autotech Reading Limited

Heard at: Bury St Edmunds **On:** 27 February - 1 March 2023

Before: Employment Judge S Moore
Members: Ms L Durrant
Ms S Elizabeth

Appearances
For the Claimant: In person
For the Respondent: Ms J Duane, counsel

This has been a remote hearing on the papers to which the parties did not object. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

JUDGMENT

(1) The claim for whistleblowing detriment is dismissed.
(2) The claim for automatic unfair dismissal is dismissed.
(3) The claim for ordinary unfair dismissal is dismissed.
(4) The claim for disability discrimination (failure to make reasonable adjustments) is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 2014 until 12 November 2020, when he was dismissed on grounds (the Respondent says) of redundancy. He has brought claims of disability discrimination by

way of failure to make reasonable adjustments, automatic unfair dismissal for making a protected disclosure, being subject to a detriment for making a protected disclosure, and unfair dismissal.

2. At the outset of the hearing the Respondent conceded that at all material times the Claimant was a disabled person within the meaning of the Equality Act 2010 by reason of autism spectrum disorder (Asperger's or ASD) and that it had knowledge of the Claimant's disability.

3. The remaining issues in respect of liability had been identified at a Preliminary Hearing on 30 May 2022 as follows:

1. Protected disclosures (whistleblowing) (Employment Rights Act 1996 section 43B)

1.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

1.1.1 The Claimant says he made disclosures on these occasions:

1.1.1.1 On 16 September 2020 verbally in a redundancy consultation meeting with Jackie Jones;
1.1.1.2 On 1 October 2020 verbally in a redundancy consultation meeting with Jackie Jones;
1.1.1.3 On 3 November 2020 verbally in the redundancy appeal hearing with Duncan Leftley.

1.1.2 Did he disclose information?
1.1.3 Did he believe the disclosure of information was made in the public interest?
1.1.4 Was that belief reasonable?
1.1.5 Did he believe it tended to show that the environment had been, was being or was likely to be damaged (section 43B(1)(e) of the Employment Rights Act 1996)?
1.1.6 Was that belief reasonable?

1.2 If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

2. Whistleblowing detriment (Employment Rights Act 1996 section 48)

2.1 Did Duncan Leftley tell the claimant at the appeal hearing that he was attempting to make other employees look bad?

2.2 By doing so, did he subject the Claimant to detriment?

2.3 If so, was it done on the ground that he made a protected disclosure?

3. Automatic and ordinary unfair dismissal

3.1 Was the reason or principal reason for dismissal that the claimant made one or more protected disclosure? If so, the Claimant will be regarded as unfairly dismissed.

3.2 If not, what was the reason or principal reason? The Respondent says it was redundancy. If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

3.2.1 The Respondent adequately warned and consulted the claimant;
3.2.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
3.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;
3.2.4 Dismissal was within the range of reasonable responses.

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

4.1 Did the Respondent have the following PCP?

4.1.1 Application of the criterion of 'team working' when selecting for redundancy.

4.2 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant had difficulty with social communication and with interacting with others as a result of having ASD?

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

4.4 What steps could have been taken to avoid the disadvantage? The Claimant suggests that the Respondent could have made an adjustment to the score or carried out some other reasonable adjustment.

4.5 Was it reasonable for the Respondent to have to take those steps?

4.6 Did the Respondent fail to take those steps?

5 The Record of the Preliminary Hearing (which took place on 30 May 2022) records that if the Claimant wished to amend his claim in respect of failure to make reasonable adjustments, particularly to include the "initiative" and/or "flexibility" criterion, he was required to make the application by 27 June 2022. The Claimant didn't make any such application.

The Facts

6 We heard evidence from the Claimant and, for the Respondent, from Aidan McCarron (AM), the Managing Director of AutoTech, Jackie Jones (JJ), Head of People Development at AutoTech, and Duncan Leftley, majority shareholder in AutoTech (and the appeal manager). We were also referred to an agreed bundle of documents.

7 In the light of that evidence, we make the following findings of fact:

8 The Respondent is a privately-owned vehicle body repair business. In addition to the Reading business, where the Claimant worked, it also has three other separately registered limited company body shops in the same area: AutoTech Slough Ltd, AutoTech ARC Ltd and AutoTech High Wycombe Ltd. The companies carry out vehicle body repairs, the majority of which are insurance funded work, emergency service contracts, fleet/hire car providers and retail work.

9 The Claimant commenced working at AutoTech Reading Ltd on 23 June 2014 as an apprentice painter and was subsequently employed as a paint technician.

10 On 5 August 2014 he signed a pre-employment medical questionnaire and in answer to the question, 'Are you considered to have a disability?" he ticked "yes" and wrote "Asperger's".

11 On 20 June 2019 the Claimant completed another medical questionnaire which asked about mental illness. Again, he ticked "yes" and wrote "autism/Asperger's".

12 In January 2020 Charles Goswell (CG) commenced employment with the Respondent and became the Claimant's line manager, and line manager of the Claimant's two colleagues in the paint shop, Nathanael Shepperd (NS) and Sam Noyes (SN).

13 Whereas NS and SN got on well with CG the Claimant did not, and he felt that CG harassed and bullied him and did not allocate him a fair share of the work.

14 On 4 March 2020 the Claimant was subjected to an Informal Performance Review by CG for below standard performance. On the same date an investigation meeting also took place into an allegation the Claimant had driven a customer's vehicle out of the workshop on 3 March 2020 at excess speed, spinning the wheels, and then slammed the key cabinet and threw trestles in anger. The record of the investigation contains three short handwritten statements from three different witness attesting to the incident. The notes of the investigation meeting, which the Claimant signed, record CG asking the Claimant if would like to see the CCTV to remind him of the incident and the Claimant declining. The Claimant had signed the notes as being a fair reflection of the meeting but at the hearing alleged they must since have been altered, because *he* had wanted to view the CCTC but CG

had not allowed him to. We are not satisfied the notes were fabricated or altered, the phrasing of them has a "ring of truth", the handwriting flows seamlessly from one page to the next, and they contain small mistakes and crossings out which are consistent with them being genuine.

15 The bundle contains a file note dated 20 March 2020 stating that there needed to be a "marked improvement" in the Claimant's overall performance. The file note is signed by CG, and also by the Claimant underneath the phrase "I confirm that I have read and understood the content of this file note and that this file note will be placed on my file…".

16 On 23 March 2020 the UK went into national lockdown because of the COVID-19 pandemic.

17 On 26 March 2020 a further incident arose between the Claimant and CG in respect of a car the Claimant had painted, which became the subject of a second investigation.

18 That same evening the Claimant raised a grievance against CG by way of email to JJ. In the course of that grievance, he stated "Unfortunately for someone who does suffer from depression, anxiety and autism I've found this a very tough time. My confidence and self-esteem are at an all-time low and I feel very deflated, inadequate and not good enough. I don't feel anyone should be made to feel this way or be told if you don't like or agree then you should fuck off. I should be able to approach my manager but that is difficult when you get told "I don't give a fuck"…Since Charles has been the manager I've been alienated, pushed away and made to feel worthless."

19 On 26 March 2020 the Respondent wrote to the Claimant, and all employees, to seek agreement to the use of furlough arrangements to temporarily reduce the number of staff. A set of criteria were attached for the purposes of a scoring system to decide who would remain at work. The criteria had the headings, "Skills Set"; "Performance"; "Flexibility"; "Team Working" and "Attendance". The scoring systems was as follows: Poor, 2.5; Average, 5; Good, 7.5; and Very Good, 10. The Claimant signed the letter to indicate his agreement.

20 On 31 March 2020 the Claimant was placed on furlough leave and the Reading site was closed. In fact, the Respondent closed three out of its four sites, given the impact of lockdown on the volume of traffic and hence vehicle repair work.

21 By letter of 1 April 2020 the Claimant's grievance against CG was acknowledged by JJ and the Claimant was advised that the grievance would need to be temporarily postponed due to the site being closed.

22 On 1 June 2020 the Reading site re-opened with skeleton staff, namely AM with the support of Group Support Manager, Pete Cullen (PC). On the same day, 1 June 2020, the Claimant was advised that the Respondent was looking to reduce the number of roles in some areas, and his role was

potentially at risk of redundancy. Although the first consultation meeting was due to be held on 5 June 2020 on 3 June 2020 the Claimant was informed by letter his role was no longer at risk of redundancy and he was not required to take part in that process. In the event four redundancies were made in Reading at that time (in other areas of the business).

23 In early July 2020 more employees were brought off furlough and back to work using the agreed criteria. Although the SN and NS were brought back, the Claimant was not. AM made those decisions, using the criteria set out in the furlough letter. He says, and we accept, that he did not refer to any other manager when making his decision, and, in particular, did not refer to CG, who himself was still on furlough at the time AM made his decisions.

24 On 22 July 2020 the Claimant spoke with JJ on the telephone and asked why he had not been invited back to work. His evidence is that JJ told him that part of the reason was the criteria and also that it wouldn't be appropriate for the Claimant and CG to be working in the same place whilst there was still an on-going investigation. JJ's evidence was that she told the Claimant that the criteria had been used to make the decisions, and while the Claimant may have expressed the view *he* didn't think it would be appropriate for him to be in the same workplace as CG, she didn't tell him that. On balance, we prefer JJ's evidence which is supported by AM's evidence that he made the decision as to who to bring back from furlough based on the criteria set out in the furlough letter. Further, in the meeting of 29 September 2020, the Claimant doesn't allege to JJ that she had previously told him he was kept on furlough because of his difficulties working with CG, rather he raises it as a hypothesis: ("It could almost come across as Charlie was on site and the investigation process was still going on. It wasn't viable for me to come in while Charlie was on site with the bullying and investigation still going on. If that's the case, I think that's very unfair..").

25 By email dated 31 July 2020 JJ informed the Claimant that CG was no longer employed by the Respondent and asked him if in these circumstances he wished to proceed with his grievance. The Claimant responded by email stating that he did wish to continue with the grievance process. The Claimant was subsequently invited to a Grievance Hearing on 12 August 2020. In view of CG's dismissal, the Respondent decided not to proceed with the investigation into the incident on 26 March 2020 and mention of that incident was removed from the Claimant's file.

26 By letter of 17 August 2020 (sent by email) JJ wrote to the Claimant further to the meeting of 12 August 2020, noting the Claimant felt that due to CG's employment having been terminated, his grievance had been "resolved by default rather than due to [the Claimant's] personal situation". The letter also stated: "As I explained, the current level of claims volume is around 53% and therefore the site is not able to have a full complement of resource under the current situation. I also explained in detail the way the selection criteria have been used and scored in returning people to work." The Claimant responded by email of the same date, thanking JJ for hearing his concerns and "helping

put some issues I've raised to rest". He continued "Although as discussed, I will remain patient until a time the company can request me back to work without jeopardising Autotech as a company at risk. After our discussion I'm less apprehensive as to whether I'm good enough, so the wait is a lot easier on myself, whether that has to be October or even before."

27 In September 2020 the Claimant was asked whether he would be able to work in Slough for a week. The Claimant declined. The reason he gave JJ was that his mother had a brain tumour and was imminently expecting an operation but she could have a seizure and die before it was removed; the Claimant didn't want to be a long distance away in case anything happened. At the hearing the Claimant said the reason, or part of the reason, he declined the offer, although he didn't mention it at the time, was because Slough was not a suitable location for him because it was a 40-minute drive away and he found driving in traffic difficult.

28 By email dated 14 September 2020 the Claimant was advised that his role was at risk of redundancy. He was further informed that consultation would be a mix of face to face (with social distancing and government guidance being adhered to) and by phone. The Claimant's colleagues NS and SN were also informed they were at risk of redundancy – the Respondent's intention being to reduce the painters in the paint shop from three to two employees. The Claimant was also informed of the selection criteria and scoring system, which were very similar to those used for bringing employees back from furlough. The differences were that there was an additional category of "Initiative" and the categories, "Skills Set", "Flexibility", and "Performance" were given double weight (whereas "Team Working", "Initiative" and "Attendance" were given single weight).

29 On 16 September 2020 the Claimant had his first consultation meeting with JJ. The Claimant raised the concern that the figures that would be used on the scoring matrix would be unfair to him because CG hadn't given him enough work, and that had been part of his grievance. The Claimant was asked whether anything else in the criteria didn't feel fair to him and the Claimant raised the fact he hadn't been invited back from furlough, and that when he had asked about that had been told his attendance, and the marking of that criterion, had been a factor. He said he didn't think that was fair because NS, had had more time off sick than he had but had been allowed to take the time as annual leave here and there. The Claimant was then asked about the other criteria (including Team Working) and the Claimant said that his performance had been affected by other people's work input to make themselves look good and again brought up what he said was the unfair distribution of the work by CG, including CG giving NS easier jobs. He also asked questions in respect of the "Attendance" criterion. Notably, however, he didn't raise any other concerns about the Team Working criterion.

30 Towards the end of the meeting the Claimant said that one of his colleagues (NS) washed his spray gun in the restroom sink, which was an environmental hazard because paint would get into the waterways. In cross-

examination he accepted he had seen this happen before he stopped attending work on 31 March 2020, that it had been happening for years but he hadn't reported it before. When it was put to him that he raised the matter in the meeting in order to point a finger at his colleague, he replied "Even if I did, it doesn't change the circumstances."

31 The Claimant declined an offer of a second consultation meeting on 25 September 2020.

32 A third consultation meeting took place on 29 September 2020. Prior to the meeting the Claimant sent an email to JJ (dated 29 September 2020) stating: "I would also like to add for team work if possible, I allowed Natty to use my spray gun and equipment that I purchased myself, to allow him to do the job and earn the company money" and as regards SN "I have only seen him paint twice in 6 years of me being employed with the company, and I had to mix his colours and undercoat for him. Sam solely preps and occasionally panels."

33 At the meeting on 29 September 2020 the Claimant was told his role was still at risk of redundancy, and he would be told the outcome of the redundancy process and issued with his individual score at the final meeting on 1 October 2020. As regard his concerns about "efficiencies" (Performance) he was told that due to the team ethos agreed the previous year, and the work allocated being complex to individualise, the efficiencies had been scored the same for all three employees. There was also a response to the other points the Claimant had made in relation to the Attendance criteria. The Claimant had prepared his own self-assessment of each of the criteria. As regards "Team Work" he stated:

"I would consider myself excellent when it comes to teamwork. When I think of teams, I don't just think of the paint shop as a team by the whole workshop and the site staff as one. I've always had the attitude if I can help, I will. Sometimes, unfortunately, I get taken advantage of in the process.

I work as a team to help turn the oven cycles around for the quickest and most efficient time as possible. This helps out the company, work providers and customers. If there is time when I have any downtime, I, on the occasions, have been painting. And it has only been two members of staff. So, either me, or Sam. For any period of time, I've helped with prep, priming and [inaudible], polishing in between my jobs. And I'll be between ovens.

And so, if they're both on bake and I have nothing to do, I don't sit around. I will go and start being at the job to help relieve them with not having to do that job and continue to do what my peers are doing.

I'm also often asked by Carlos about helping with heavy equipment, spot welding or just anytime he needs a hand. And so, I'm there to help. Not just at the paint shop. I also assist the paint shop in any troubleshooting or queries they have at the job at hand. This is especially true when it comes to any ICT-based issues. I get quite a lot of that in fact. It often takes up quite a

bit of my time. When I'm in the middle of doing something, like, they go, come look at this. And that takes 15, 20 minutes. And you do that twice a day. That's 20 minutes, it becomes 40 minutes, and that a long time. But there are times quite often, I am called to look at this, look at that. I have no issue doing that because it is helping my team. And unfortunately, I'm fined because of that. That puts you back. And that could push you back. So it's unfair."

34 The Claimant also told JJ that he was confident he would be the one who was made redundant because he hadn't been back to work whereas the other two painters had been back in. He also said that if that was because of the investigation into his grievance with CG, then that was unfair because CG had treated him very badly and he had lost a lot of money being on furlough. However, JJ insisted that they had used the criteria in the right way to bring people back from furlough and the grievance the Claimant had against CG had not impacted anything.

35 On 1 October 2020 the Claimant had a final consultation meeting and was served notice of his redundancy. His brother Mark accompanied him to that meeting. The Claimant had been scored by AM and PC. They had both scored him the same scores and given him the following scores against the selection criteria: Skill Set 15; Performance 20; Flexibility 15; Team Working 7.5; Initiative 7.5; Attendance 10. The Claimant's average total was therefore 75.

36 During the meeting the Claimant complained he had been set up to fail because he hadn't been at work so his work was not fresh in the mind. Further SN was not even a painter. JJ stated that SN's job description was that of a prepper painter, and since they could all paint and all prep, they were based in the same group.

37 During the meeting the Claimant also said: "If you do a drugs test there are people that would fail from the people that were at risk. They would put paint down the sink. It's illegal. It's against environmental laws. That's not fictional. That's fact." When it was put to him in cross-examination that the reason he said those things to JJ was so one of his colleagues would be dismissed instead of him, he replied "Absolutely, but it doesn't change what happened."

38 On 7 October 2020 the Claimant appealed stating he believed "the grounds on which I was chosen for redundancy has been handled unfairly and with prejudice. After reviewing my at-risk score sheet, I would suggest the criteria on which I have been selected, excluding performance and attendance, to be purely opinion based. I feel the scores I've been awarded, as opposed to the initial criteria description does not accurately represent me or my work. I also have concerns regarding previous topics I have made the company aware of, I feel this information has been mitigated and unreasonably disregarded."

39 An appeal hearing was arranged for 3 November 2020.

40 On 29 October 2020 the Claimant was provided with the scores of his colleagues (on an anonymised basis). Whereas the Claimant had scored a total average of 75, the two other employees had scored total averages of 80 and 87.5. As regards the criterion of "Team Working", one of them had been scored 7.5 by both markers (the same as the Claimant) and the other had been scored 10 by both markers.

41 At the meeting on 3 November 2020 the Claimant reiterated that he felt the Respondent had been unfair to him all year as he hadn't been allowed to return to work and he felt CG was responsible. He wanted the information as regards how his scores had been reached. He also gave examples of his flexibility and then said, "These people are allowed to throw industrial paint down the sink, but that's OK…One of them is allowed to come in high on drugs, but that's OK…OK what Natty I know does is he doesn't clock off. Sometimes he leaves it running or gets Sam to clock him off. If you look, watch the camera, you'll see him going by four, five o'clock".

42 DL stated that PC, AM and JJ had made the decisions as regards who returned from work, and CG was not back at work when those decisions were made. As regards the scores given in the redundancy process, these were the opinions of two people both professionals in the business and they were the only two managers who could have done the marking. DL also informed the Claimant that they had consulted with 73 people across the business (including the other sites) and 23 had been made redundant. DL agreed he would give the Claimant information about how his scores had been reached and go through the marking again with PC to check everything was correct.

43 The Claimant was also given the opportunity to apply for the same role at either High Wycombe or the Slough site, which he declined.

44 The Claimant's appeal was dismissed by letter of 10 November 2020. As regards the influence of CG and the Claimant's grievance, the letter stated: "the site was re-opened with a reduced workforce on 1 June 2020 by [AM], MD, and [PC], Group Support Manager, following its temporary closure due to the Covid-19 lockdown and the impact on the volume of incoming claims. The criteria issued to all employees prior to furlough was used in selecting people to return to work from furlough on a phased basis and this was reviewed by Aiden and Peter, although Charlie had been requested to do this prior to the temporary closure his information was not used due to a number of confidential issues which arose during lockdown… You discussed with [JJ]… your request for a rota to be put in place for the paint shop…It was explained to you that we had used the criteria as issued with the furlough letters and would continue to do this given the pandemic circumstances. It would not be commercially viable to us as a business to continually rota staff under these unprecedented circumstances, given our size and structure". In evidence DL stated that at the relevant time the furlough rules required employees to be off work for a minimum period of 3-weeks, and with all the challenges of managing the business during the

pandemic it was not possible to introduce and manage a 3-week on, 3-week off, rota.

45 The letter attached as an appendix, the managers' justification of their scoring for the Claimant. As regards Team Working, the comment from PC reads: "Tends to work on his own with less interaction with the others. Has offered on occasions to support the business when needed although this was of benefit to both parties. Doesn't engage with the team always and will leave others to carry on at times." The comment from AM reads: "Can be a great team player when he wants to be, this is not always the case, can come across as individually minded when he feels he isn't included or doesn't agree with the solution proposed."

46 The Claimant said in evidence that when he read those comments this was the first time he realised that the criterion of Team Working had put him at a substantial disadvantage in comparison with NS and SN, who are not disabled by reason of Asperger's.

Conclusions

Protected Disclosures

47 We are prepared to accept the Claimant made disclosures of information on 16 September 2020, 1 October 2020 and 3 November 2020. We further accept the Claimant held a reasonable belief both that the disclosures were in the public interest and that they tended to show the environment had been, was being or was likely to be damaged for the purposes of section 43B(1)(e) Employment Rights Act 1996. In this respect we consider that the fact the timing of the Claimant's disclosures was for the self-serving purpose of putting his colleague in a bad light, in the hope of securing his own job, does not mean he could not reasonably believe the disclosure was also in the public interest.

48 Nevertheless, we are not satisfied the Claimant was subject to a detriment for making the disclosure or that it was the reason, or a principal reason, for his dismissal.

49 As regards the detriment claim (sections 47B and 48 Employment Rights Act 1996), the transcript of the appeal meeting shows that DL did not in fact tell the Claimant he was attempting to make other employees look bad, using those particular words. In any event, we do not accept the comment that DL did make - that the Claimant was making the other employees sound like the worst employees in the world - was a detriment done to the Claimant on the ground he had made a protected disclosure. First, we accept DL's evidence that he had actually made the comment in response to the Claimant's allegations about employees being high on drugs and leaving early without clocking off (rather than the Claimant's assertion about the paint in the sink). Secondly, and in any event, we find the comment was said simply in response to the fact of the Claimant making accusations about his colleagues, and that DL's reaction would have been the same regardless of

whether those accusations amounted to protected disclosures or not. Thirdly, we do not accept that the making of the comment, that the Claimant was making the other employees sound like the worst employees in the world, constituted a detriment to the Claimant.

50 The whistleblowing detriment claim is therefore dismissed.

51 As regards the claim for automatic unfair dismissal, the Claimant himself said in evidence, "I don't believe it had anything to do with why I was made redundant. It was only relevant to my appeal."

52 Further we are satisfied on basis of the evidence and factual chronology set out above that due to the Covid-19 Pandemic there was a genuine diminution in the requirements of the Respondent for employees to carry out work of all kinds, including in the paint shop, and that the reason, or principal reason, the Claimant was selected for redundancy was not that he had made a protected disclosure.

53 Accordingly, the claim for automatic unfair dismissal is dismissed.

Ordinary Unfair Dismissal

54 As stated above, the reason for the Claimant's dismissal was redundancy, which is a potentially fair reason for dismissal under section 98(1) ERA.

55 The question is therefore whether the Respondent acted reasonably in all the circumstances as treating that reason as sufficient to justify dismissing the Claimant. In this respect, in a redundancy situation, an employer will not normally act reasonably unless it warns and consults employees about the proposed redundancy, adopts a fair basis on which to select for redundancy, and considers suitable alternative employment.

56 On basis of the evidence and factual chronology set out above we are satisfied the Respondent warned and consulted the Claimant.

57 The next question is whether the Respondent adopted a fair basis on which to select for redundancy.

58 In this respect, the Claimant suggested the pool was not fair because SN was a "prepper" and not a painter. However, we consider the Respondent acted reasonably in including SN in the pool. SN could paint as well as "prep" and the three employees – the Claimant, NS and SN – had all worked as a team together in the paint shop engaged in similar work.

59 As regards the selection criteria themselves, these were clear, transparent, and objective, and the Claimant took no issue with them. He did, however, take issue with how they were applied to him. In this respect, it is not for us to step into the shoes of the employer, unless there is evidence of bad faith or an obvious error. While the Claimant considered his marks had been influenced by CG either directly or indirectly (because CG had tainted the

views of AM and/or PC) we are satisfied this was not the case. Notably CG had been dismissed before the redundancy exercise commenced. Further we accept DL's evidence that he was very much alive to the Claimant's concern that the marking had been tainted by CG and spoke with AM and PC before and after the appeal meeting to ensure it had not been.

60 We note the file note of the incident on 20 March 2020 remained on the Claimant's file, and that it was remarked upon by AM in his comments about the Claimant regarding the "Skill Set" criterion. However, when JJ was asked about this, she said this was not an inadvertent error but rather she had considered the matter and decided that file note should remain on the file. Her reasoning was that the matter had been concluded, the Claimant had signed the notes of the investigatory meeting, and the incident in question had been witnessed by three employees. We consider this was a reasonable position to take.

61 The Claimant also took issue with how knowledgeable PC and AM were about his work, and whether they were in a position to mark him fairly. In this respect AM's evidence was that he was on site at least once a week and at times had been on site for several months at a time to assist new managers. The Claimant contested that AM had ever been on site for months at a time. He further submitted that when AM was giving evidence it became apparent AM had not realised the Claimant had a NVQ qualification level 3 and was therefore a senior painter with ability to sign off paint jobs. In fact, AM's evidence was not that the Claimant was *not* level 3 qualified, and a senior painter, but rather that NS was regarded as the senior painter in the paint shop and the person designated at Reading to sign off the paint jobs. While, plainly, it was not ideal that the redundancy exercise had to be done while no general manager was in place at Reading, we are satisfied that given CG had been dismissed and no replacement had been made, AM and PC were the most appropriate persons to carry out the process. Indeed, the Claimant has never suggested that anyone else could have done it or should have been consulted.

62 We have also considered whether the fact the Claimant was on furlough at the time of the redundancy procedure, whereas SN and NS were not, rendered the process unfair. In this respect, we understand why the Claimant felt this placed him at a disadvantage, but we cannot find any unfairness in the process adopted. Plainly, given the COVID-19 pandemic, the Respondent was entitled to furlough staff, and as lockdown lifted and the levels of work increased (to some extent) it was entitled to bring staff back off furlough. Further, the Respondent adopted fair criteria for selecting which employees should come back to work, and we accept AM's evidence that he made the decisions in relation to the Claimant and the other employees in the paint shop because CG was also on furlough at that time. Although the Claimant's submitted he should have been given the chance to work on a rota basis, we consider the Respondent acted reasonably given the furlough rules in place at the time and the challenging circumstances. In this respect we accept Ms Duane's submission that the Respondent simply didn't have "the bandwidth" to implement a rota system of three weeks-on, three weeks-

off due to the constant changes in the regulations and the acute challenge it faced of simply trying to keep the business afloat.

63 The Claimant relied on an excellent appraisal in received in August 2019, as evidence that his dismissal on grounds of redundancy, just over a year later, must have been unfair. However, all of the Respondent's witnesses accepted the Claimant was indeed a very good employee who had scored highly in the redundancy exercise, but it considered all three employees in the paint shop were very good employees and, unfortunately, because of the effects of the pandemic, one of them had to be made redundant.

64 We note for completeness that the Claimant didn't allege the Respondent failed to make reasonable efforts to find him suitable alternative employment.

65 In the light of the above, the claim of ordinary unfair dismissal is dismissed.

Disability Discrimination

66 The Respondent has accepted that at all material times the Claimant was disabled by reason of Asperger's and that it knew this to be the case. However, it disputes that the criterion of "Team Working" put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, and if the criterion did so place the Claimant at a substantial disadvantage, that it could reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage.

67 Given the Respondent's concession, we are surprised the Respondent did not have any formal discussions with the Claimant about his disability, its impact, and any adjustments he might need during his 6 years of employment. Although the Respondent gave evidence that certain adjustments were made, such allowing the Claimant time to cool off on occasions, or taking more time and care to explain things to him, these accommodations were informal and made without any input from the Claimant

68 Nevertheless, despite the above observation, we are not satisfied the Claimant was put at a substantial disadvantage by the criterion of "Team Working" compared to someone without his disability. In his appraisal dated 21 August 2019, the Claimant scored 9-10 for "Team Working", out of a possible 10, with the comment "he is an integral part of the team in the Paint Shop". The Claimant also scored 8-9 for Communication Skills, with the comment "This has improved vastly over last year in terms of communicating with staff. Also controlling temper." Moreover, in the marking of the Team Working criterion for the actual redundancy exercise the Claimant scored 7.5 from both markers, which were exactly the same marks as one of the other two employees, with only the third employee scoring more highly with a score of 10 from both markers. On the evidence before us, it is therefore hard to see any disadvantage, let alone a substantial one.

69 Further and in any event, even if the Claimant was put at a substantial disadvantage by the teamwork criterion the Respondent could not reasonably have known about it. Despite an extensive discussion about all the criteria, including Team Working, in the redundancy consultations meetings, the Claimant never suggested he was disadvantaged by it. Indeed, he described himself as "excellent" at teamwork. Further when asked when he first realized that he was disadvantaged by the Team Working criterion, he replied not until he saw the marking comments that were sent to him with the outcome of his appeal letter. If the Claimant did not know he was disadvantaged by the Team Working criterion until after his dismissal, it does not seem to us the Respondent could reasonably have known about it either.

70 It follows that the claim for disability discrimination (reasonable adjustments) is dismissed.

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Employment Judge S Moore

Date: 3 March 2023

Sent to the parties on: 31 March 2023
T Cadman
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For the Tribunal Office