Case Number:- 3304964/2022;
3312645/2022;
3301684/2023.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr John Airey	**v**	IRIS Group Limited

Heard at: Cambridge

On: 8, 9, 10 and 11 July 2024
Discussion in Chambers: 12 July 2024
Judgment given: 16 July 2024

Before: Employment Judge Tynan

Members: Mr A Fryer and Mr C Grant

Appearances
For the Claimant: In person
For the Respondent: Mr T Kirk, Counsel

JUDGMENT

1. The Claimant's complaints that he was subjected to detriments and dismissed because he made a protected disclosure and directly discriminated against because of disability are not well founded and are dismissed.

2. The Claimant's complaint that he was unfairly dismissed contrary to s.98 of the Employment Rights Act 1996 succeeds.

3. Had the Respondent not acted unfairly in the matter, the Tribunal determines that the Claimant would have been dismissed by reason of redundancy by 19 October 2022.

REASONS

Background

1. The Claimant has brought three Employment Tribunal claims against the Respondent. He claims to have been subjected to detriments and dismissed for making protected disclosures, that the termination of his employment was an act of direct disability discrimination and, in the alternative, that he was unfairly dismissed contrary to s.98 of the Employment Rights Act 1996.

2. At a case management hearing before Employment Judge Hutchings on 9 December 2022, the Claimant withdrew his claims that the Respondent had made unauthorised deduction from his wages and discriminated against him because of religion and disability. He explained that his religious discrimination claim had been made in error. Employment Judge Hutchings noted that the Claimant was quite clear in telling her that he did not want to bring a claim for disability discrimination and that his second claim should not be understood as including any such claim. She therefore issued a judgment on 9 December 2022 dismissing his deduction from wages claim as well as his various discrimination complaints. Subsequently, on 6 February 2023, the Claimant issued a third claim which included a claim of disability discrimination: the complaint relates to his dismissal, specifically that the timing of the decision to place him at risk of redundancy was "suspicious" as it came just a matter of days after the Respondent had received an occupational health report in relation to him.

3. Notwithstanding what the Claimant told Employment Judge Hutchings on 9 December 2022 and that she dismissed certain of his claims at that date (meaning that he is precluded from bringing fresh claims in respect of those matters), the Claimant has sought to re-introduce them, ostensibly by way of background information though at times pursuing them as if they were still live claims.

4. In response to the Claimant's request for guidance as to why he could not introduce new matters as he saw fit, we explained that the claims above had been dismissed, but also drew his attention to the often cited observations of Langstaff J in Chandhok v Tirkey UKEAT/0190/14/KN that, "*an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings*". There has been no application by the Claimant to amend his claims to add any new complaints. In any event, he cannot seek to re-introduce claims that have been dismissed by means of an amendment to his remaining claims.

5. Tribunals can have regard to background matters, including other allegedly discriminatory conduct by an employer, when making findings and coming to a judgment on the claims before them. However, this has

to be done in a fair and proportionate way, particularly so that new or previously withdrawn claims are not allowed in through the back door and so that employers are not prejudiced by having to deal with extensive allegations that have either not been pursued as claims or have previously been withdrawn.

The Hearing

Evidence

6. The Claimant had submitted witness statements on behalf of himself and Bernadette Fitzharris. Ms Fitzharris was the Claimant's workplace companion at his redundancy appeal hearing. She did not attend Tribunal to give evidence.

7. The Claimant is disabled by reason of Asperger's Syndrome and bi-polar disorder. We made adjustments for the Claimant, including regular breaks and indeed unscheduled breaks as needed. We are mindful that people with Asperger's Syndrome can become upset at slight changes in routine and can also have difficulty managing their emotions, leading to outbursts. We endeavoured to provide as much certainty as possible for the Claimant, for example by taking breaks and finishing the hearing each day at the times we said we would. We regularly reminded the Claimant what would be happening next or later in the hearing, and throughout the hearing we identified the specific issue that was under consideration so that he would have as much certainty as possible. When the Claimant experienced outbursts, we did not react or admonish him but instead gave him time and space to 'decompress' before continuing. In view of his restrictive patterns of behaviour and sometimes rigid thinking style, we permitted the Claimant to make statements from time to time in the course of cross examination on any matters that were on his mind. We endeavoured to use unambiguous language in our communications with the Claimant and encouraged Mr Kirk likewise, as well as re-framing certain questions by Mr Kirk to support the Claimant's understanding and participation.

8. In all of our interactions with the Claimant we were mindful of the contents of two reports in the Hearing Bundle, namely, a report by Dr Stefan Gleeson of Cambridge Lifespan Asperger Syndrome Service (or 'CLASS' for short) dated April 2010 and a more recent occupational health report by Sumeet Vohra dated 11 July 2022 which was commissioned by the Respondent. The CLASS report describes the Claimant's communication issues and restrictive patterns of behaviour in some detail: his difficulties in that regard were evident during the final hearing.

9. Whilst he undoubtedly endeavoured to provide a truthful and accurate account of events as he perceived them, as indeed did the Respondent's witnesses, we have not approached his, or their, evidence uncritically. We have borne in mind the growing judicial recognition that when a witness is

doing their best to recount events as they recall them, even when those events are presented with confidence their evidence may not always be a reliable guide to what happened. In Gestmin SGSP S.A. v Credit Suisse (UK) Limited and Another [2013] EWHC3560 (Comm), Leggatt J (as he then was) made observations about the distorting effects of litigation on the reliability of oral evidence and, said that it may be more reliable to base findings on inferences drawn from contemporaneous documents and known or probable facts. As we shall come back to, the contemporaneous documents in this case do not always support what the Claimant says in evidence or the inferences that he invites the Tribunal to draw.

10. We have regard to the fact that the Claimant has experienced significant long term mental health issues. His bi-polar disorder is co-morbid with his Asperger's Syndrome. We find that they adversely impacted both his concentration and his ability to recollect certain events when giving evidence at Tribunal, including an incident on 20 December 2021. Whilst we have made allowance for this, we have also borne in mind that a feature of the Claimant's Asperger's Syndrome is that he frequently misreads people and situations. In our judgement, this has resulted in him misinterpreting certain key events. For example, the fact that the Claimant still regards the temporary removal of two pieces of kit from his work space as theft, evidences how he can perceive situations in ways that others do not.

11. The Equal Treatment Bench Book includes the following guidance in relation to Specific Learning Disabilities:

> "People with SpLDs will be concerned about how their behaviour might be perceived: inconsistencies could imply untruthfulness. Failure to grasp the point of a question could come across as evasive. Lack of eye contact could be misinterpreted as being 'shifty' and an over-loud voice might be regarded as aggressive. The overriding worry is that a loss of credibility occurs when they do not 'perform' as expected".

12. The Practice Guidance issued by the President of the Employment Tribunals on 22 April 2020 says:

> "Misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness."

13. We have borne both sets of guidance in mind in coming to a judgment.

14. We observed the Claimant to have a particularly discursive style of communication, ill-suited to the 'cut and thrust' of cross examination. It is a feature of his condition. Dr Gleeson observed that the Claimant lacks flexibility of thought: in our judgement that has manifested in difficulties with the 'back and forth' of the hearing, including a reduced or impaired ability to provide quick responses, an increased need for information and

context around questions, and a need for direction from the Tribunal from time to time to keep him on track.

15. For the Respondent we had witness statements and heard evidence from:-

    15.1. Martin Sanders, Facilities Director;

    15.2. Tim Johnstone, Development Operations Director - Mr Johnstone was the Claimant's manager and handled his redundancy;

    15.3. Bernadine Blair, Senior Director, Software Engineering - Ms Blair heard the Claimant's appeal against redundancy; and

    15.4. Helen Stead, HR Director responsible for the Engineering teams at the Respondent.

16. There was a single Hearing Bundle running to 366 numbered pages. The Bundle was supplemented by various documents in the course of the hearing. Any page references in this judgment correspond to the Hearing Bundle. Any references to the issues in the case are to the issues as set out in Employment Judge Hutchings' List of Issues at pages 70 – 73 of the Hearing Bundle and in the Agenda for Case Management at pages 105B and 105C of the Hearing Bundle; the latter document summarises the issues in the Claimant's third Employment Tribunal claim.

Law and Submissions

17. Both the Claimant and Mr Kirk made written closing submissions. The Claimant additionally filed a Skeleton Argument in advance of the final hearing. The Claimant elected not to make any oral closing submissions. He is not prejudiced by his decision in that regard since we have read and considered what he says in both his Skeleton Argument and Submissions document.

18. As Mr Kirk has set out the law in some detail in his submissions, we do not repeat it here, save to confirm that it fairly and accurately summarises the law applicable to the claims. We return later in this judgment to the law and authorities governing unfair dismissal.

19. As regards the Claimant's whistleblower detriment claims we are concerned with sections 43B(1) and 47B(1) of the Employment Rights Act 1996. Section 43B(1) provides as follows:

    43B Disclosures qualifying for protection

    (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, is being or is likely to be deliberately concealed.

Section 47B(1) provides as follows:

47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

20. The Claimant asserts that he was dismissed for blowing the whistle. Section 103A of the Employment Rights Act 1996 provides:

103A Protected disclosure

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.

21. Later in this judgment we set out the law, including relevant case law, regarding 'ordinary' unfair dismissal.

22. As regards the Claimant's complaint that he was discriminated against, section 13(1) of the Equality Act 2010 provides as follows:

> 13. Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

23. At paragraph 20 of his written submissions, Mr Kirk reminds the Tribunal that the mere fact that an employee is treated unreasonably (does not suffice to justify an inference of unlawful discrimination: Zafar v Glasgow City Council [1998] ICR 120). Nevertheless, discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. Otherwise, mere proof that an employer has behaved unreasonably or unfairly will not by itself trigger the transfer of the burden of proof to an employer, let alone prove discrimination (see in particular paragraphs 98 to 101 of the Court of Appeal's judgement in Bahl v The Law Society and others [2004] IRLR 799.

24. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, it was held that a Tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and appeal against the rejection of those grievances. The EAT said:

> 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristics."

Preliminary Issue

25. We must first determine whether the Claimant made a qualifying disclosure within the meaning in section 43B(1) of the Employment Rights Act 1996. If he did not do so, his whistleblowing complaints cannot succeed. In order to qualify for protection under s.43B(1): the disclosure must be of information; the worker must believe that the information tends to show one or more of the matters in paragraphs (a) – (f) of s.43B(1) of the 1996 Act; that belief must be reasonably held; the worker must additionally believe they are making their disclosure in the public interest; and their further belief in that regard must also be reasonably held.

26. When assessing reasonableness in this context, the question is what the Claimant reasonably believed rather than what a hypothetical objective worker might reasonably have believed. It is a subtle but potentially important distinction as it requires a Tribunal to have regard to the individual worker, including their knowledge, experience and circumstances: in other words to consider the matter from their perspective. A worker need not be right in order for them to have protection as a whistle blower. In this case, we approach the matter from the perspective of someone with Asperger's Syndrome who grew up in care and who says he witnessed fires at the special school to which he was transferred when he was 14 years old. We further have regard to the fact that the Claimant has been a dedicated first aider for most of his adult life and that he says he was trained in fire awareness by a former fire-fighter who instilled in him "that smoke is more damaging than fire".

27. The disclosure relied upon by the Claimant is an email he sent Mr Sanders and Ms Stead on 3 December 2021 (pages 170 – 171). Although he refers in that email to a noisy office environment potentially having a detrimental effect on staff and thereby creating a health and safety issue, paragraph 3.1.1 of the List of Issues identifies that it is the expression of fire safety concerns that are relied upon. The Claimant wrote,

> "Dear Martin and Helen
>
> I will agree to moving desks however this is under protest and has to be a desk as close as possible to the one that I am at now. As I tried to make clear from my desk I can see whether there is smoke coming from the exit door in front of me to my left. I should mention that I have more substantial fire awareness training than that given by Iris."

He went on to say,

> "My Health and Safety concerns were dismissed entirely out of hand. There is no point in having an evacuation plan if you cannot carry it out. I doubt that Martin Sanders knows what the evacuation plan for the Peterborough site is, or even cares …
>
> I shall be taking this up with the HSE Representative and ACAS. I will also be monitoring the usage of my current desk and will move back if it remains unused."

28. The Claimant's email followed discussions with Mr Sanders and Ms Stead in the context of a planned re-organisation within the Respondent's Peterborough office. We find that he was anxious about the matter and that his Asperger's Syndrome was a significant factor in this regard. As the CLASS report notes, he prefers to do things the same way and has a somewhat rigid style of thinking, with the result that he finds it more difficult than neurotypical people to accept and navigate change. As the CLASS Report notes, (page 335 of the Hearing Bundle):

> "Any situation that seems to be out of place will be perceived by someone with Asperger's as a stressful situation as they tend to have perfectionist tendencies..."

29. At paragraph 13 of his witness statement, Mr Sanders states that he and Ms Stead sought to reassure the Claimant that he would still be able to discharge his duties as a fire warden. Ms Stead refers to the matter in paragraph 6 of her witness statement. She acknowledges that the Claimant was raising health and safety concerns. We find that she and Mr Sanders understood that the Claimant was concerned to ensure that he would continue to be able to support a safe, efficient and effective evacuation of the area for which he was responsible in the event of a fire and in this regard that he felt it was important for him to have a clear view of the nearest means of escape so that he would know if smoke was coming from the exit so that he could redirect people to other means of escape as appropriate. Whilst we are certain that the Claimant did not welcome the office move and indeed we think was resistant to it, and notwithstanding this may have been a material factor in his overall thinking, we are satisfied that the Claimant's email involved a disclosure of information to Mr Sanders and Ms Stead and that he believed the information in question tended to show that health and safety could be endangered.

30. Although the Claimant accepts that there is no legal requirement for fire wardens to be able to see their nearest fire exit and that he understood this at the time, nevertheless we are satisfied that he believed at the time that the company's evacuation plan might prove ineffective in the event of a fire. We have noted already that he told Mr Sanders and Ms Stead that he intended to take the matter up with the HSE and ACAS. Three weeks later he contacted Peterborough City Council to say that he felt unable to raise concerns about health and safety with the business (pages 164A and B). It evidences to us that he had in mind the safety of others and not just himself.

31. We find that the Claimant genuinely believed the Respondent was failing to act upon his health and safety concerns as an employee and breaching its obligations to ensure the health, safety and welfare of its staff and others, including by the provision of safe systems at work and safe means of egress, even if he understood that there was no legal requirement that he should be able to see the nearest fire escape. In our judgement, particularly given the Claimant's childhood experiences and commitment to first aiding and to health and safety more generally, but also given his rigid thinking style and tendency to perfection, it was reasonable for him to believe that the information disclosed by him tended to show the matters in paragraph (b) and (d) of s.43B(1) of the Employment Rights Act 1996.

32. Regardless of his own anxieties in the matter and any personal resistance to the office move, we are in no doubt that the Claimant believed he was

disclosing information in the public interest, namely, to ensure there were effective evacuation arrangements in place in the event of a fire at his workplace that would ensure that he, his colleagues and anyone visiting the site were safe. This was not an issue primarily of personal concern to him, where the wider public interest was tenuous or difficult to discern. The Claimant is a committed first aider and in our judgment it was entirely reasonable for him to believe that he was raising an issue that went beyond his own responsibilities in the matter and touched directly upon whether others would be safe in the event of a fire, including that his concerns should be taken seriously.

33. Accordingly, in the circumstances, in our judgement the Claimant's email of 3 December 2021 to Mr Sanders and Ms Stead was a qualifying disclosure. We are further reinforced in our conclusion in this regard by the fact that Mr Sanders arranged for additional signage to be put up in the office directing people to the fire exists. Regardless of whether or not he thought this additional signage was strictly necessary, we assume that Mr Sanders dedicated time and allocated resource to the matter because he considered that the Claimant was raising potentially legitimate concerns. Indeed, he wrote to the Claimant on 6 December 2021 as follows:

> "Thanks again for your time and thanks for taking your responsibilities as fire warden very seriously. It really does make a difference when we have full engagement."

The actions he took in response to the Claimant's concerns and, as we find, his genuine expression of gratitude rather undermines the Respondent's contention that the disclosure did not qualify for protection.

34. The question then is whether he Claimant was treated as alleged in paragraph 4.1 of the List of Issues, if so, whether those matters constitute detriments for the purposes of s.47B(1) of the Employment Rights Act 1996, and whether they were done on the ground that the Claimant made his qualifying disclosure on 3 December 2021.

35. Our findings and conclusions in relation to the claimed detriments are as follows:

Detriment 1

Equipment belonging to the Claimant was taken from his desk in his absence on 20 December 2021

36. It is not in dispute that two pieces of equipment, or kit, belonging to the Claimant were removed from his desk on 20 December 2021, the day of the office move. Although the move had been under discussion for some time, the Claimant did not arrive in the Peterborough office until approximately 10.30am that day. He says that he was dealing with an urgent issue with the Respondent's ParentMail system, presumably

remotely from home. The Facilities team had informed staff at the Peterborough office that the team managing the move would be on site from about eight o'clock that morning. The Claimant's team advised Mr Sanders that they would not need support with the move as they would only be moving laptops and computers, something they could do themselves. On the day, IT needed access to the Claimant's and his colleagues desks to progress the move. In the Claimant's absence, his monitor was relocated to his new desk space, as was the equipment of one of his colleagues who was also out of the office. As this was being done, the Claimant's colleague Simon Ward, Senior Architect, observed that he seemed to be using an unauthorised piece of kit, namely a network switch. The Claimant disputes that its use by him was unauthorised. Mr Ward believed that the network switch represented a network security concern. Separately, he reported to Mr Sanders that an uninterrupted power supply, namely a USP battery, used by the Claimant was hot to the touch. Mr Sanders believed the battery to present a potential fire risk: he was additionally aware from direct personal experience in the matter that hydrogen sulphide, a highly toxic substance, can be released when USP batteries overheat. On the strength of what Mr Ward had told him, Mr Sanders asked Mr Ward to disconnect the battery and remove it from the Claimant's desk space until he was able to collect it.

37. Although he had not been asked to do so by Mr Sanders, Mr Ward also removed the network switch. We understand that it had a label on it potentially identifying it as the property of an unknown company. Given that Mr Sanders had asked for the USP battery to be temporarily removed, and given Mr Ward thought the network switch was a potential security concern, we can appreciate why Mr Ward thought it prudent to remove the network switch as well as the battery. He would have had no way of then knowing whether its use had been authorised or if it had been PAT tested.

38. To this day, the Claimant does not understand, let alone accept why Mr Sanders and Mr Ward acted as they did on 20 December 2021. He cannot see beyond the fact that this was his kit, that his prior consent was not sought before it was removed, that he regards this as theft (notwithstanding the kit was kept safe and returned to him within two or three days) and that he had been using the kit at work for some time (indeed, he maintains that he had been authorised to do so by a previous ParentMail Director). In our judgement, his understanding of the situation, particularly as it would have presented to Mr Ward and Mr Sanders, has been significantly impacted by his Asperger's Syndrome, specifically his inflexible thinking style. As Ms Vohra observed in July 2022, restrictive and repetitive patterns of behaviour are common characteristics of Asperger's Syndrome and they impact negatively on day to day life. The impact on 20 December 2021 was that the Claimant could not adapt his thinking to reflect the situation that had then arisen and which had presented to Mr Sanders and Mr Ward. The Claimant told Dr Gleeson in 2010 that, *"he tends to concentrate on the small detail rather than the whole*

picture" and *"struggles with putting himself in other people's shoes"*. In our judgement that encapsulates his response on 20 December 2021: he concentrated on the small detail rather than the whole picture and was incapable of putting himself in Mr Sanders' and Mr Ward's shoes, specifically that they were faced with potential risks to health and safety and to network security. Over the intervening two and a half year period he has still been unable to see the whole picture, or put himself in Mr Sanders' and Mr Ward's shoes. Instead, he has ruminated on the small detail. He became particularly agitated when discussing these events at Tribunal and was unable to see the matter from any other point of view.

39. The Claimant continues to assert that the two items in question were required as an adjustment for his disability, in the sense of being auxiliary aides. In her report, Ms Vohra said,

> "I am not aware of any actual medical reason for Mr Airey to be using any particular equipment or hardware at work."

When we endeavoured to explore with the Claimant why he required his own kit as opposed to equivalent, compliant kit supplied by the Respondent, he became distressed and left the Tribunal hearing room. The strength of his reaction, including his inability to articulate why he needed to use his own kit at work, evidences his rigid thinking and confirms that something others would regard as a minor issue continues to cause him a disproportionate level of upset. Unlike Ms Vohra, we consider that there is a medical explanation for the Claimant's need to use his own equipment at work, even if the specific kit was not required as an auxiliary aide in the sense that is generally understood.

40. Be that as it may, we are not concerned in this case with whether it would have been a reasonable adjustment to permit the Claimant to continue using his own kit at work. There is no s.20/21 Equality Act 2010 claim before the Tribunal. Instead, the issue is whether the Respondent subjected the Claimant to detriment by removing his kit from his work space on 20 December 2021. In our judgement it did not. Whereas under s.43B(1) of the Employment Rights Act 1996, we are concerned with what the Claimant reasonably believed in terms of his disclosure, the separate question of whether any treatment complained of amounts to a detriment for the purposes of s.47B(1) of the 1996 Act is to be determined entirely objectively, namely, as Mr Kirk submits, whether a reasonable worker would or might take the view that the actions of the employer were in all the circumstances to their detriment. An unjustified sense of grievance cannot amount to a detriment.

41. In our judgement a reasonable worker would not (and for the avoidance of doubt, might not) have taken the view that what happened on 20 December 2021 was to their detriment, or that it placed them at a disadvantage. Given that the Claimant disclosed concerns that he might be unable to fully and effectively discharge his responsibilities as a fire

warden, it is perhaps ironic that he complains about Mr Sanders' and Mr Ward's actions, which we find were in furtherance of their respective responsibilities. They identified potential risks to health and safety and to network security, and in the absence of the Claimant they took proportionate action to address those perceived risks. Putting aside that objectively this did not place the Claimant at a disadvantage, it was plainly not because the Claimant had done a protected act. In the case of Mr Sanders, his constructive response to the Claimant's concerns is evidenced by the various remedial actions he took in response to them, as well as the patient, enquiring and positive way in which he engaged with the Claimant over the following months, as described in paragraphs 16 and 17 of his witness statement and evidenced in his various communications with the Claimant. As regards Mr Ward, there is no evidence that he was aware the Claimant had done a protected act. In any event, he provided an innocent explanation to the Claimant at the time for why he had acted in the matter as he had, apparently causing the Claimant to tell him not to lecture him on health and safety.

Detriment 2

The Claimant was not allowed to bring his own equipment into the office after 22 December 2021.

42. The complaint relates to two periods in time. Confirmation of the initial instruction to the Claimant to remove his kit from the Respondent's premises is at page 165 of the Hearing Bundle, namely in an email from Karl Boldy, End User Services Operations Manager, who told Mr Sanders and Victoria McGuire, Head of End User Services, that the kit was with another colleague Zaria Davis to release to the Claimant under instruction to take it home and not connect it to an IRIS network / power point. That instruction was effectively relayed to the Claimant by Ms McGuire, who copied Ms Davis and Mr Sanders into her email to the Claimant. We find that Ms McGuire was the relevant decision maker and that Mr Boldy was simply acting on her instructions.

43. There is no evidence in the Hearing Bundle to suggest that Ms McGuire, or for that matter Mr Boldy, knew that the Claimant had made a protected disclosure such that it may have materially influenced their actions or decisions in relation to him. They were not copied into his email of 3 December 2021 or the emails that ensued, and there is no evidence to suggest that they were apprised of them or told that the Claimant had made a protected disclosure. Nor were they copied into the further emails that ensued when the Claimant's kit was removed on 20 December 2021, in which the Claimant suggested that this was retaliation for having raised health and safety concerns. There is nothing whatever to suggest, or from which we might infer, therefore that they were subjecting the Claimant to detrimental treatment because he had raised concerns.

44. In any event, we do not consider at that stage that a reasonable worker would consider that they were being placed at a disadvantage by being asked not to bring their own kit into the office in circumstances where the person making the request was responding to concerns and believed that the kit in question did not comply with the group IT Change Management Policy, or Facilities Management controls. The issue is not whether Ms McGuire was right, rather whether she genuinely believed on the information then immediately available to her that the kit was non-compliant. In our judgement, a reasonable worker would accept that she had to make a swift decision in the matter on relatively limited information and that she had been guided in the matter by her understanding as to the group's policy and controls.

45. On 2 February 2022, the Claimant emailed David Adams, Group Technical Authority, seeking permission to continue using the UPS battery and network switch. He said that it mattered a great deal to him as someone with Asperger's Syndrome, but did not provide any further explanation other than to say it was "literal access technology" (page 203B). Mr Adams responded on 10 February 2022 to say that he had considered the request, but saw no reason to approve it. He referred the Claimant to the Network Management Policy and explained why any prior permission would have been, *"out dated"*. However, he went on to identify an alternative solution, namely that the Claimant's desktop could be re-located to the Comms room where multiple network ports were available and multiple USP backed power points could be used.

46. Once again, we observe that we are not concerned with whether the Claimant's request ought to have been accommodated as a reasonable adjustment for disability. Viewed objectively, a reasonable worker would not regard themselves as having been disadvantaged by the proposed solution identified by Mr Adams. The requisite detriment has therefore not been established. In any event, there is nothing to suggest that Mr Adams knew the Claimant had made a protected disclosure such that it might have informed Mr Adams' decision in the matter. Mr Adams provided a credible explanation for his decision, which was in accordance with the Respondent's documented policy and which it cannot be suggested was designed or implemented in response to the Claimant's disclosure. The complaint is not well-founded.

Detriment 3

The Claimant was issued with a written warning in his grievance outcome of 18 January 2022.

47. The grievance outcome is at pages 199 – 202 of the Hearing Bundle and was provided by Ms Stead. She addresses the grievance in paragraphs 9 to 19 of her witness statement. The "warning" to which the Claimant objects was not a disciplinary warning issued pursuant to the Respondent's Disciplinary Policy. Ms Stead wrote,

> "Unfortunately as you know from the meeting that we had on 7th January, it has been necessary to investigate the incident that took place on the 20th December as it was reported that you were shouting and acting aggressively towards another employee of IRIS. I understand that the Christmas period made your recollection of the incident difficult, however I need to be clear that this is not acceptable behaviour in the workplace from anyone.
>
> I understand that you have not had a plan in place to support management of your disability at work, and I appreciate that your condition may make colleague interactions difficult especially in a situation of change or if you are frustrated. Therefore, I wanted to let you know that no formal action will be taken against you in relation to this incident. As an outcome of the investigation into the complaint, the plan put in place to support and help you will also cover support in how you manage your colleague interactions at work." (page 202)

48. Mr Sanders' account in relation to the events of 20 December 2021, referred to by Ms Stead, has been consistent throughout, in spite of the Claimant's assertions to the contrary. Mr Sanders first provided an account on 24 December 2021 (pages 174 – 175). He said that he had heard the Claimant shouting in the office and believed he was shouting at Mr Boldy. He specifically recollected that others had not raised their voices to the Claimant, that the Claimant had been shouting loudly and that it was not pleasant for others in the office. Further contemporaneous accounts from Mr Boldy and Mr Ward likewise identify that the Claimant was shouting. Mr Boldy described the Claimant as having shouted at him loudly and aggressively and that when Mr Ward had asked him to calm down, he had become more angry and *"more vigorous with hand movements"* (page 177). Mr Ward reported that the shouting was directed mostly at Mr Boldy, but that the Claimant also shouted at Mr Sanders when he came over a short while later.

49. Ms Stead's decision on the Claimant's grievance notes that by the time she spoke to him about the matter after Christmas, he had difficulty recollecting the incident. However, her notes of their discussion on 6 January 2022 (page 181) capture that the Claimant said, *"he shouted because he was refused to get his items back".* Her reference to there having been an *"altercation"* (page 184) does not alter or detract from the fact that all the contemporaneous evidence, including the Claimant's own account, points to him shouting at Mr Boldy and possibly at Mr Sanders, rather than both sides having shouted at one another.

50. We note that the Claimant told Dr Gleeson in 2010 that he had difficulties with his temper at times. The Claimant told the Tribunal that he gets into verbal altercations with others and this has made him increasingly anxious about going out. His communication issues are well documented, including that he is prone to misunderstandings. We can understand why he may have become frustrated on 20 December 2021, particularly if, as was the case at Tribunal, he found it difficult to explain why the kit was

particularly important to him, but also if he lacked the ability to see things from others' point of view. We can equally understand why his frustration in the matter may have led to an outburst from him. As we have noted already, people with Asperger's Syndrome can have greater difficulty in regulating their emotions. Ms Stead was plainly alive to these possibilities when she wrote to the Claimant on 18 January 2022.

51. The Claimant may be unable by reason of his Asperger's Syndrome to see the matter from her perspective, but Ms Stead's decision on the Claimant's grievance was thorough, thoughtful and compassionate. She expressed herself sensitively in the matter and took particular care to document the Claimant's concerns and perceptions when confirming her decision. We would go as far as to describe her letter as faultless. Even if the two passages referred are read in isolation, we consider that a reasonable worker would not (and might not) regard themselves as having been disadvantaged by being reminded that shouting is not acceptable behaviour, particularly where, as here, Ms Stead acknowledged that the Claimant's condition could make colleague interactions difficult, especially in a situation of change or if he was frustrated, and, perhaps mindful of his propensity to literal interpretation, but in any event simply in order to reassure him in the matter, was explicit that no formal action would be taken in relation to the matter.

52. In our judgement, the Claimant was not subjected to detrimental treatment by Ms Stead when she wrote to him on 18 January 2022 in the terms that she did. He has a genuine albeit unjustified sense of grievance in the matter.

53. We would have said in any event that the reason Ms Stead reminded the Claimant that shouting and acting aggressively in the office was not acceptable behaviour in the workplace, was because she wanted to reinforce acceptable standards of behaviour in the office, but also to make the Claimant aware of the impact of his actions on others in case he had not appreciated this. She had a responsibility in the matter to Mr Boldy and others who had been affected by his conduct and because, as she said and we accept, she wanted to put in place a plan to support the Claimant in managing his colleague interactions in the future. Her email contained a detailed workable plan in that regard. There is no basis to infer that she was materially influenced in her approach by the fact that the Claimant had made a protected disclosure. It may well have been part of the immediate background and context, but it was not the reason or even a factor in why she wrote what she did.

54. For the reasons set out above, the Claimant's detriment claims are not well-founded and are dismissed.

Dismissal

55. The Claimant claims that he was dismissed because he made a protected disclosure, complains that his dismissal was an act of direct disability discrimination and also claims that he was unfairly dismissed.

56. As the Claimant had more than two years' service with the Respondent, it has the burden of establishing that it had a potentially fair and lawful reason for terminating his employment.

57. As Mr Kirk notes in his written submissions, the Claimant can only succeed in his s.103A complaint if his protected disclosure was the reason, or principal reason, why the Respondent terminated his employment.

58. As regards his discrimination complaint it is sufficient that his disability materially influenced the relevant decision makers in their decisions in relation to him, it need not be the reason or principal reason for dismissal.

59. We agree with Mr Kirk's submissions at paragraphs 38 – 43 of his written submissions, namely that there is no evidence of any factual nexus between the Claimant making his disclosure and being dismissed some nine or ten months later, let alone that the disclosure was the reason or principal reason for dismissal, including why he was selected for redundancy. We cannot usefully add to Mr Kirk's submissions in the matter.

60. Likewise, we agree with Mr Kirk that the Claimant has not advanced any primary facts from which it could be inferred that the Claimant was dismissed, including by being selected for redundancy, because he was disabled by reason of Asperger's Syndrome and / or bi-polar disorder. The claim proceeds essentially on the strength of a bare assertion, founded it seems in suspicions that have arisen in the Claimant's mind because he was placed at risk of redundancy within a short time of the Respondent receiving an occupational health report in relation to him which provided details of his disability. In our judgement, his suspicions in the matter are unfounded. The Respondent's attitude and approach is encapsulated in Ms Stead's 'faultless' email of 18 January 2022, already referred to, and by her subsequent efforts to engage the Claimant in an occupational health referral, which he delayed, and which he then declined to discuss with Ms Stead in spite of her documented persistent efforts in that regard.

61. It is curious, to say the least, that the Claimant now suggests he was dismissed because he was disabled in circumstances where he declined to meet with Ms Stead and Mr Johnstone to discuss recommendations for workplace adjustments and they were encouraging him to have that discussion. Ms Stead's email of 19 August and her two emails of 1 September 2022 speak for themselves, as does Mr Johnstone's email of

5 September 2022. In our judgement, it is relevant in this regard that they were actively seeking to engage with the Claimant right up to the start of the redundancy consultation process, further undermining the Claimant's claim that the redundancy was cover to get rid of a disabled employee. In the case of Mr Johnstone he had in fact known for some months that the Claimant had a formal diagnosis of Asperger's Syndrome and bipolar disorder, and indeed before that had always understood the Claimant to have "different needs" which he had managed directly with the Claimant. It is unclear therefore why it might be suggested he only took steps to get rid of the Claimant much later on, having worked effectively with him for at least 18 months.

62. We agree with Mr Kirk's submissions at paragraphs 48 – 50 of his written submissions. We might add that the Claimant was treated no differently to other colleagues in the organisation who were put at risk of redundancy.

63. We note that in the Claimant's initial five-page response to being placed at risk, he made only brief mention of his disability. He wrote,

> "Finally, there is absolutely no sign in the redundancy selection matrix of any allowance for disability. Seems to me your scoring is biased. I have recalculated my score to be 48, the maximum – it's up to you to prove that's wrong (it isn't)." (page 274)

64. We do not agree that it is for the Respondent to prove that he was not entitled to the maximum score. He asserted bias without any further explanation and likewise offered no further explanation as to why he should receive the maximum possible score when assessed against the redundancy selection criteria. His bare assertions in that regard cannot support the requisite inference that he was discriminated against. Instead, the Claimant remained focused upon the fact, he said, that he was being targeted as a whistleblower. He wrote,

> "… it looks like a bogus redundancy where the real reason is that I made a protected disclosure or disclosures and that I am entitled to apply for interim relief". (page 270)

65. Subsequently, on 29 September 2022, the Claimant wrote,

> "I would I think be entitled to bring a direct discrimination claim as the redundancy was targeted in September, the busiest month in education of the whole year as the company knows I have bi-polar disorder, i.e. timed to cause the maximum stress." (page 262)

To the extent his disability was identified as a relevant consideration, he was relating it to the timing of the process rather than the fact per se that he had been selected and placed at risk.

66. When the Claimant appealed against his redundancy he did not say that he had been dismissed by reason that he was disabled. Instead he repeated that he had been dismissed for blowing the whistle, something he reiterated during his appeal hearing with Ms Blair on 18 October 2022.

67. Finally, when the Claimant told Employment Judge Hutchings on 9 December 2022 that he was not pursuing a disability discrimination claim, he did not say that he believed his dismissal was an act of direct disability discrimination.

68. There is a significant weight of evidence which supports that the Respondent identified a genuine need for redundancies within its business, including the role performed by the Claimant and his colleague, Mr Nix. The Claimant did not challenge the fact that the Respondent's senior leadership were tasked to identify and deliver savings of over £500,000 in the Engineering budget. Vacant roles were put on hold and Mr Johnstone and his senior colleagues were reminded that they should not assume that others would identify the necessary cost efficiencies so as to excuse them from focusing on the issue and identifying where efficiencies could be achieved. As we explained to the Claimant, as long as a respondent acts lawfully in the matter and does not, for example, discriminate against workers or act against whistleblowers, it is not the function of a Tribunal to second-guess it in terms of its strategy and decisions. Instead, it is for a respondent's board and shareholders to determine for themselves an acceptable level of profitability and how the business should be structured, including how any associated risks, for example by reason of the creation of 'single points of failure', should be managed. It is essentially beside the point that the Claimant believes the Respondent was already sufficiently profitable or that it created avoidable risk when it removed his role. The evidence further confirms that the Claimant was only placed at risk of redundancy after he and Mr Nix were first scored by Mr Johnstone using a set of selection criteria and scoring matrix that was used to identify others who were to be placed at risk. In our judgement, the Respondent has amply discharged its statutory burden of establishing the existence of a potentially fair reason for dismissing the Claimant, namely redundancy. It has satisfied us that it genuinely identified a reduced need for employees to do work of the particular kind performed by the Claimant, even if the Claimant himself believes that both he and Mr Nix should have been retained.

69. Accordingly, and for the further reasons set out above and in Mr Kirk's submissions, the Claimant's claims that he was dismissed because he made a protected disclosure and that his dismissal was an act of direct disability discrimination are not well -founded and are dismissed.

70. The proposals that emerged were that the head count would potentially reduce by six, including one of the two Dev Ops Engineers working on ParentMail. This meant that either the Claimant or his colleague Martin

Nix would be at risk, or indeed that until one of them was selected they could both be said to be at risk. The rationale and identified associated risks are set out at page 252 of the Hearing Bundle. We do not think it could reasonably or realistically be suggested that this was other than a genuine response to the Board's requirement for significant cost efficiencies to be made. In the longer term it was identified that there might be scope to off shore the Dev Ops function altogether, something that indeed has happened, in or around April this year.

71. Before we set out our findings and conclusions, we think it helpful to set out the Law in relation to unfair dismissal particularly in the context of redundancies.

The law in relation to redundancy dismissals

72. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer – section 94 of the Employment Rights Act 1996 ("ERA" 1996). It is not disputed that the Claimant qualified for that right.

73. S.98 Employment Rights Act 1996 provides:

> 98 General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show–
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it–
>
> (a) …
> (b) …
> (c) is that the employee was redundant,
> (d) …
>
> (3) …
>
> (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.

74. On the basis that we are satisfied that the Claimant was dismissed by reason of redundancy, the fairness or otherwise of his dismissal falls to be determined in accordance with well-established principles applicable in cases of redundancy related dismissals, including as laid down in Williams v Compair Maxam Ltd [1982] ICR 156, and most recently by the EAT in Haycocks v ADP RPO Ltd [2023] EAT 129 and Valimulla v Al-Khair Foundation [2023] EAT 131.

75. The authorities set out the following guiding principles:

a. An employer will normally warn and consult either the employees affected or their representative(s);
b. A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious consideration being given to the response;
c. The purpose of consultation is to avoid dismissal or ameliorate the impact;
d. A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable;
e. The Tribunal's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss;
f. It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect;
g. Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process, though the use of a scoring system does not make a process fair automatically.

76. The Employment Appeal Tribunal in Haycocks noted that starting with Compair Maxam the theme surrounding reasonableness in redundancy situations is that it reflects what is considered to be good industrial relations practice; that employers acting within the band of reasonableness follow good industrial relations practice. What amounts to good practice will vary widely depending on the type of employment, the workforce and the specific circumstances giving rise to the redundancy situation. However, there are certain key elements. First amongst these is that a reasonable employer will seek to minimise the impact of a redundancy

situation by limiting numbers, mitigating the effect on individuals or avoiding dismissal by engaging in consultation. Valimulla serves as a reminder that in order to be meaningful, consultation must take place at a time when it can potentially make a difference, and in such a way that responses to a proposal are considered and reflected upon prior to a decision being made.

77. In the course of the proceedings we drew the parties attention to the Court of Appeal's judgment in British Aerospace v Green and ors 1995 ICR 1006, in which it was said that the task for a Tribunal is to satisfy itself that the method of selection is not inherently unfair and, in the particular case, that it has been reasonably applied. Employers have a reasonable degree of discretion in their choice of selection criteria and the manner in which they apply them. As in misconduct cases, Tribunals must avoid what is often referred to as the substitution mindset, that is to say substituting their own view as to what scores employees in a selection pool should receive. It is not the proper function of a Tribunal to effectively act as a further layer of appeal for a dissatisfied employee. The Tribunal's task instead is to consider whether a reasonable employer could have chosen and implemented the method adopted in the particular case before it.

78. Pursuant to s.123.1 of the Employment Rights Act 1996 where a Tribunal upholds a complaint of unfair dismissal it may award compensation as it considers just and equitable in the circumstances, having regard to the losses sustained by the claimant in consequence of dismissal. In accordance with the well-established principles in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the likelihood that the employee's employment would still have terminated in any event. The burden of proving that an employee would or might have been dismissed in any event rests with the employer. Nevertheless, Tribunals are required to actively consider whether a Polkey reduction is appropriate. In Software 2000 Limited v Andrews and Others the EAT reviewed the authorities at that time in relation to Polkey and confirmed that Tribunals must have regard to all relevant evidence including any evidence from the employee. The fact that a degree of speculation is involved is not a reason not to have regard to the available evidence unless that evidence is so inherently unreliable that no sensible prediction can be made. It is not an all or nothing exercise, rather it involves a broad assessment of matters of chance.

79. Applying Polkey principles in practice requires an evidence-based approach drawing upon common sense and experience. In the final analysis any final decision must meet the requirement of justice and equity.

Findings of Fact and Conclusions

80. In paragraphs 26 – 35 of his witness statement, Mr Johnstone describes the process he followed to the point at which the Claimant was notified he was at risk. We accept Mr Johnstone's effectively unchallenged evidence in this regard, but also what he says were the factors he took into consideration when scoring the Claimant against the redundancy selection criteria. Although the Claimant does not agree with the scores he was given, in our judgement that does not detract from the fact this is how Mr Johnstone saw it at the time. The Claimant scored 28 points, whereas Mr Nix scored 44 points. The Claimant has seemingly never challenged the scores given to Mr Nix: he certainly did not challenge them in the course of this hearing.

81. The Claimant was notified in a call on 21 September 2022 that there was a potential redundancy situation. It seems that he left the call before Mr Johnstone was able to convey all the information he had proposed to provide to the Claimant. Mr Johnstone followed up with a detailed email the same day in which he stated that, "a preliminary scoring and selection process has been completed and I must advise you that unfortunately you are now provisionally at risk of redundancy" (page 257). The selection criteria, scoring matrix and the Claimant's scores were not then provided to the Claimant. Mr Johnstone also wrote to the Claimant on 21 September 2022 essentially repeating what he had said in his email. The Claimant was told that he would not be required to work during the consultation process to enable him to concentrate on the process. The Claimant was treated no differently in this regard to his colleagues who were also put at risk. We accept it was genuinely intended by the Respondent as a supportive measure.

82. In both his email and letter, Mr Johnstone said the purpose of the consultation that would follow would be to review the selection criteria and scoring process and explore ways of avoiding or mitigating the impact of redundancy.

83. There are no minutes of the first consultation meeting on 22 September 2022, though Ms Mistry, a People Partner within the company, emailed the Claimant on 22 September to confirm that she and Mr Johnstone had gone through the selection and scoring with the Claimant during this first meeting (pages 274 and 275). The scoring sheet was attached to her email. There is a copy of the scoring sheet at pages 278 – 282 of the Hearing Bundle. It is clear therefore that when the selection criteria and the Claimant's scores were first discussed with him on 22 September 2022, copies were not made available to him to enable him to engage fully with what he was being told. In which case, the Claimant went into that initial discussion at a disadvantage, with 'one hand tied behind his back' so to speak.

84. The Claimant sent a detailed five-page email to Ms Mistry on Friday 23 September 2022, in which he challenged the business case or rationale for making redundancies. He disputed that his role was genuinely redundant, questioned the use of five of the seven selection criteria and made extensive comments regarding how he had been scored against the selection criteria. His email was timed at 12:11pm on 23 September 2022. By 11:43am on Monday 26 September 2022, Ms Mistry responded, stating,

> "The selection criteria is best practice and used widely across many companies to assess roles in a redundancy situation. Each criteria is relevant to the Dev Ops role and for consistently assessing individuals identified in a selection pool. We will therefore continue to use the proposed selection criteria and note that you have not suggested any additional relevant criteria." (page 269)

85. The speed and brevity of her response, including her failure to engage with the specific objections raised by the Claimant, evidences to us a closed mind, notwithstanding Ms Stead's evidence at Tribunal that the criteria are very much a matter for discussion. Our conclusions in this regard are reinforced by Mr Johnstone's evidence at Tribunal, namely that in contrast to what was said in his letter of 21 September 2022, the selection criteria were effectively not up for discussion.

86. The second consultation meeting took place on 29 September 2022. Again, there are no minutes or notes of the meeting, though Ms Mistry summarised the matters that were discussed in an email to the Claimant the same day (page 268). As a result of the representations in his email of 23 September 2022, the Claimant's score for 'Skills' had been increased from 1 to 2, namely 'Has some of the technical and practical skills required for the role that is to be performed in the future'. The weighting attached to this particular criteria had the effect of increasing his total score to 30. As Mr Nix had scored 44, and on the basis that the Respondent was unwilling to re-visit the underlying rationale and proposed new structure, the Claimant remained at risk of redundancy. Ms Mistry identified that the next step in the consultation process would be to explore alternative roles within the Respondent. A follow up consultation meeting was proposed for 4 October 2022, though in the event rescheduled to 5 October 2022.

87. The Claimant's immediate response to Ms Mistry's email of 29 September 2022 was to suggest he would report the Respondent to the ICO and that the rationale for redundancy looked dishonest to him (page 268).

88. The Claimant declined to attend the third consultation meeting to discuss alternative roles within the Respondent. Ms Mistry followed the matter up on 6 October 2022 with an email in which she noted this was the purpose of the meeting and that to date the Claimant had failed to indicate an interest in alternative roles. A vacancy list had been provided to him and

whilst there were no alternative roles for him in Dev Ops, it was noted that training could be made available for roles that he felt suited him. The Claimant suggested at Tribunal that he had not received Ms Mistry's email of 6 October 2022, which had included details of the outplacement support available to him through Credo, because his access to his work email account had been disabled. However, we believe he is mistaken in that regard since further emails at page 299 of the Hearing Bundle evidence that he continued to send and receive emails from and to his IRIS email account as late as 10 October 2022.

89. On the basis he had not expressed an interest in alternative roles, the Claimant was provided with indicative details of his redundancy pay on 6 October 2022 and informed by Ms Mistry that there would be an option of enhanced redundancy subject to a settlement agreement. A final consultation meeting was arranged for 10 October 2022. Much of this information was reiterated to the Claimant in a letter dated 6 October 2022 (pages 296 – 297).

90. At the Claimant's request the final consultation meeting was pushed back to 12 October 2022. He confirmed at that meeting that he did not wish to apply for any of the notified vacancies as he did not consider them to be suitable roles and that he had no further proposals to make in support of a different course of action to that proposed by the Respondent. His selection for redundancy was therefore confirmed and he was informed that his employment would terminate by reason of redundancy.

91. Whilst we agree with the Claimant that the Respondent's Redundancy Policy (pages 157 – 159 of the Hearing Bundle) reads on the basis that payment in lieu of notice is the exception rather than the rule, we accept Ms Stead's evidence that in practice the Respondent does terminate with a payment in lieu and that the Claimant's five colleagues who left the business by reason of redundancy around the time he did each exited the business immediately with a payment in lieu of notice. We are satisfied that the Claimant was treated consistently with others. Whilst we recognise that the effect was potentially to deprive the Claimant and his colleagues of a further period during which discussions might otherwise have continued regarding opportunities for re-deployment, the Claimant had been aware from 6 October 2022 that he would be terminated with payment in lieu of notice but had not asked to be placed on garden leave to facilitate ongoing discussion of such opportunities or other ways to avoid or mitigate the redundancy of his role. Whilst he referred to the matter again within his appeal and at his appeal hearing with Ms Blair, his stated aim on appeal was to return to his substantive role rather than to be afforded a further opportunity to secure an alternative role within the Respondent.

92. It is not in dispute that during a Dev Ops 'all hands' Teams call on 6 October 2022, Mr Johnstone announced that the Claimant and another

colleague would be leaving the business. Mr Johnstone thereby pre-empted the outcome of the consultation process. The Claimant's actions in declining to attend the meeting on 5 October may have made redundancy more likely, but Mr Johnstone did not then know whether the Claimant might in fact elect to explore opportunities for redeployment or indeed might have something else to say on the subject of his redundancy that could potentially affect the final outcome.

93. In our judgement, the Respondent treated the Claimant unfairly by unreasonably failing to consult him and indeed Mr Nix, in advance regarding the proposed redundancy selection criteria and thereafter scoring the two of them in an open and transparent way so that there could be no appearance of the provisional selection having an inevitability about it. As we have observed already, Ms Mistry's email of 26 September 2022 evidences a closed mind in terms of the selection criteria that were used, compounded by Mr Johnstone's misunderstanding on the issue as well as his actions in making an announcement which pre-empted the planned final consultation meeting.

94. We do not accept that consulting on the selection criteria would have created undue risk for the company by unsettling others who were scored but not placed at risk. On Ms Stead's evidence, it might have led to no more than two or three other employees being informed that they were within a redundancy selection pool and could be put at risk following a scoring exercise. There is no particular evidence that Mr Nix would have been destabilised by being told this, let alone that he might thereby contemplate leaving the organisation. In any event, the speed with which discussion of the selection criteria was closed down, without even discussing them with the Claimant at his scheduled meeting on 29 September 2022, reinforces that the Respondent acted unreasonably in the matter.

95. In our judgement, this particular unfairness was not corrected on appeal, as the selection criteria were no re-examined or re-opened for discussion within that process. It is irrelevant in this regard that we are also of the view that there was nothing inherently or obviously unreasonable about the selection criteria that were used by the Respondent. In our judgement they were a balanced set of criteria that an employer might reasonably adopt in order to select for redundancy. Similarly, the weighting applied by the Respondent was 'within the band of reasonable responses', that is to say a reasonable employer might weight the criteria as the Respondent did, so that the scoring was focused more heavily upon retaining employees with relevant skills, qualifications, training and experience, who were assessed as having performed more strongly in their role. The fact that 'Versatility', 'Timekeeping', 'Disciplinary record' and 'Absence' were not weighted goes some way to addressing the Claimant's stated objection to their use within the selection exercise i.e, less weight was attached to them. In any event, they are consistent with the sorts of criteria we have

seen employers use in other cases that have come before us and with which we are familiar by reason of our respective professional and industrial experience.

96. Section 98(4) of the Employment Rights Act 1996 requires that we have regard to all the circumstances of the case when determining whether or not an employer has acted reasonably in the matter. We note in this regard that there were carefully crafted notes available to Mr Johnstone and the other managers who were required to score employees in a selection pool (page 277A), which were intended to keep them on track when scoring employees who might be at risk. The notes included specific guidance on avoiding discrimination, with examples. The guidance alerted Mr Johnstone to the various ways in which scoring can work against those with a disability or other protected characteristics. Notwithstanding Mr Johnstone's misunderstanding in relation to whether the selection criteria were open to discussion, and with the exception as we shall come to of 'Versatility', the guidance together with the available contemporaneous documents in the Hearing Bundle, including Mr Johnstone's documented 'Manager's justification' that was part of the completed matrix for the Claimant and Mr Nix, enable us to be confident that Mr Johnstone scored them both fairly, in the sense that the scores he gave them reflected his genuine and reasonably held belief as to the scores they should receive when assessed against each criteria. We do not accept, as the Claimant suggests, that the process was used as cover to get rid of him. As we shall come to in a moment, Mr Johnstone departed from the documented scoring matrix when assessing the Claimant against 'Versatility', but that does not detract from the fact that he approached the task in good faith or that there were no other errors in his approach to the scoring. His evidence at Tribunal was consistent with the 'Manager's justification' he provided at the time.

97. The Claimant became agitated and distressed at Tribunal when the issue of 'Versatility' was discussed. In his 'Manager's justification' Mr Johnstone made reference to certain historic events in giving the Claimant a score of '2', namely 'Has shown reluctance, but not refused, to take on different functions/duties or to be trained in them'. The 'Manager's justification' evidences that Mr Johnstone focused on whether the Claimant was *able* to perform different functions, rather than whether he was *willing* to take on different functions. The ability and willingness to perform different functions and duties might be thought to be the best indicators of versatility, but the scoring matrix was drafted in terms that it was an employee's attitude or willingness that mattered. In that regard, Mr Johnstone specifically noted that the Claimant had shown an interest in broadening his impact on other educational portfolio products. Therefore, he ought reasonably to have awarded the Claimant a score of '3' against this criteria, namely 'Willing to perform different functions/duties or be trained in them'. As 'Versatility' was not a weighted criteria, a score of '3' would have increased the Claimant's total score to 31.

98. There are no grounds for us to question the other scores Mr Johnstone gave the Claimant without thereby substituting our own views and scoring for his. The score he gave the Claimant for 'Skills' accords with the Claimant's own representations on the matter (see page 272), specifically that he had not then been able to fathom out how to manage Data Dog and had not yet done his AWS exams. On that basis alone, we cannot conclude that Mr Johnstone unreasonably determined that the Claimant did not have all the technical and practical skills necessary for the future. The Claimant has not challenged Mr Nix's score of 4 against this criteria.

99. As regards 'Relevant qualifications, training and experience', the Claimant effectively advocated for a score of 2 (see again page 272) namely, that even without the AWS qualification or certification he had all of the essential qualifications, training and experience for the role that was to be performed in the future. He did not say in his email of 23 September 2022 that he was within the ambit of a score of '3' or '4' by reference to the indicators that would warrant such a score. He has not challenged Mr Nix's score of '4' against this criteria.

100. In terms of 'Job performance', the informal PIP process did not reflect in the Claimant's score which was focused instead on adherence to timescales and quality of work. Whilst the Claimant may have a valid point when he says that he had no clear objectives (Mr Johnstone admitting in this regard in the course of his evidence that he is not a fan of objective setting), in terms of his and Mr Nix's relative scores, the Claimant's position is somewhat hampered by his own documented comment,

> "Martin Nix at the risk of sounding needlessly mesonic does an even better job than me".

If these were his thoughts in the matter, we cannot say that Mr Johnstone acted outside the band of reasonable responses in awarding the Claimant '2' against '3' for Mr Nix. On the strength of the Claimant's own views in the matter they were at least one point apart. In any event, Mr Johnstone provided an objective, well-reasoned explanation for the scores that he awarded them. There are no grounds for us to go behind those scores without thereby substituting our own views in the matter for Mr Johnstone's genuine and reasonably held views in the matter.

101. The Claimant does not take issue with the scores he received against the other criteria, presumably because he received the maximum scores possible. The fact he scored '4' for 'Disciplinary record' rather undermines the complaints he makes regarding the claimed warning in Ms Stead's email of 18 January 2022 and the informal PIP process in June 2022.

102. In conclusion, save that the appeal did not as we say correct the unfairness around the lack of consultation regarding the proposed selection criteria and that Mr Johnstone acted unreasonably when scoring

the Claimant in terms of 'Versatility', we cannot identify any other aspect of the consultation process that was unfair, let alone discriminatory. On the latter issue, whilst was possibly the Claimant's inexperience in the matter, it was left to the Tribunal to explore with Ms Blair whether her thinking and approach might have been influenced by the Claimant's disability, in particular any feelings of frustration or irritation with him because of how he conducted himself when they met on 18 October 2022. She more than satisfied us that his disability was not a factor in her thinking or decision in relation to him on that day or indeed subsequently.

103. Ms Blair's letter of 24 October 2022 engaged fully with the issues raised in the Claimant's appeal, even if he had been unwilling or just unable due to his unsettled state to say more when they met on 18 October 2022. For the reasons already set out, we do not agree with Ms Blair's finding that the Claimant was consulted in a fair and meaningful way about the selection criteria. But that does not alter that her decision on the appeal was commendably thorough and balanced, and that she treated him fairly in terms of the appeal.

104. Whilst we consider that the Respondent acted unreasonably in the particular circumstances and accordingly that the Claimant was unfairly dismissed, we are certain that this unfairness had only a limited impact on the process and made no difference to the outcome. We are certain that had the Respondents consulted on the criteria before proceeding to score the Claimant and Mr Nix and indeed the others who were at risk, the criteria would ultimately have remained unchanged. As we have observed they were reasonable selection criteria and were underpinned by clear guidance and a clear scoring matrix. They were applied consistently to the others at risk.

105. Mr Johnstone unreasonably gave the Claimant a score of 2 for 'Versatility' when a score of '3' was reasonably indicated by his own 'Manager's justification'. However, an additional point would still have left the Claimant 13 points adrift of Mr Nix. As Mr Kirk has also pointed out, even if the Respondent had agreed to remove all of the criteria initially objected to by the Claimant in his email of 23 September 2022, the Claimant would still have been selected to be placed at risk, since Mr Nix would have scored 28 against 16 for the Claimant using those criteria. In either scenario therefore, the Claimant would still have been at risk and in our judgement the outcome would have been that the Claimant would have been made redundant.

106. We conclude that consulting about the selection criteria would at most have extended the overall redundancy consultation process by one week and that the Claimant's employment would inevitably have terminated by reason of redundancy by 29 October 2022.

Employment Judge Tynan

Date: 20 August 2024

Sent to the parties on: 29/08/2024

For the Tribunal Office.

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