EMPLOYMENT TRIBUNALS

Claimant: **Mr S Monroe**

Respondent: **Gem Security Systems Ltd**

Heard at: **Bristol (days 3 to 5 via CVP)** **On: 24th – 28th June 2024**

Before: **Employment Judge David Hughes**
Mr P Bompas
Ms G Mayo

Representation
Claimant: In person
Respondent: Ms K Tucker, HR Consultant

JUDGMENT having been sent to the parties on 22.07.2024 and written reasons having been requested on 24.07.2024 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Who everyone is

1. The Respondent carries on business, inter alia, dealing with masterkey-type security systems. The precise scope of its business is not relevant to this dispute, and it was not necessary to go into the technical detail of the business.

2. The Claimant was employed by the Respondent from 31.07.2012 to 29.04.2022, initially as a Master Key Technician, and shortly thereafter as a Master Key Manager.

3. The Claimant is disabled, by reason of osteoarthritis. In November 2021, he was provided with a crutch to help him walk, and diagnosed with Psoriatic Arthritis.

4. The Respondent called the following witnesses:

(a) Neil Winterson operations director;

(b) Kelly Tucker of "HR Star";

(c) Natalie Winterson HR/personal development director;

(d) Melanie Crewe – the Respondent's Health and Safety and Installations manager;

(e) Lauren May – her job title was not identified;

(f) Grant Robertson, a Multi-Skilled Locksmith;

(g) Ewan Hamilton, a workshop manager

5. The Respondent also asked us to consider statements from Matthew Norton and Rebecca Parry, and we have done so.

Scope of the dispute

6. The case came before Employment Judge Bax in March 2023, at which he summarised the case as follows:

57. The Claimant was employed by the Respondent between 31 July 2012 and 29 April 2022 as a Masterkeying Manager. The Claimant is disabled by reason of osteoarthritis and experiences pain if he walks for extended periods and getting in and out of his car. He was provided with a crutch to help him walk in November 2021 and diagnosed with Psoriatic Arthritis on 26 January 2022. It is alleged that there was a failure to make reasonable adjustments, in relation to the provision of a suitable ergonomic chair, the provision of a suitably sized parking space, to allow him to have access to the video surveillance system. A grievance was raised on 1 April 2022, which was not upheld. At the stage 2 meeting on 7 April 2022, his request for a blue badge space was substantiated and his request for access to the surveillance system was refused. After the meeting he was asked to remain for a meeting and was told about potential redundancies and his and one other role were at risk. Only the Claimant's role was removed. The Claimant raised concerns about being at risk from Covid-19 and the Respondent not following guidelines. He says he was told that he was obsessing about covid. On 31 January 2022, the Claimant created an updated sign (having previously been given a different sign) saying people had to wear a mask and be vaccinated before entering his room if he was there and was asked to remove it.

58. The Response form was completed by HR Star Consulting Limited. It was said his employment started on 31 August 2012. In the grounds of resistance HR Star Consulting was listed as a second Respondent. The Claimant was invited to apply for an alternative role, Multi Skilled Locksmith Manager, however declined to do so. The Claimant was dismissed by reason of redundancy and did not appeal the decision. The Claimant's worsening physical condition was not ignored and he was offered fully paid leave. 2 parking spaces could not be allocated, the Claimant was allowed to choose the most convenient space and all staff were asked to be prepared to move their vehicle if they were in the adjacent space. The Claimant was provided with a suitable chair within 5 weeks of his request. The cameras

were not meant for staff use and the internal telephone system was adequate.

7. Employment Judge Bax prepared a list of issues, as follows:

1. Time limits

1.1 The claim form was presented on 22 September 2022. The claimant commenced the Early Conciliation process with ACAS on 15 July 2022 (Day A). The Early Conciliation Certificate was issued on 25 August 2022 (Day B). Accordingly, any act or omission which took place before 16 April 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

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

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide: 1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide: 1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 Was the Claimant dismissed?

2.2 Was there a genuine redundancy situation within the meaning of s. 139 of the Employment Rights Act 1996? The Claimant says it was fabricated to dismiss him because the Respondent was irritated by his complaints and grievances. The Respondent was not in financial straits

2.3 What was the reason for dismissal? The Respondent asserts that it was a reason related to, redundancy which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

2.4 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether: 2.4.1 The Respondent adequately warned and consulted the Claimant;

2.4.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.4.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

2.5 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
2.6 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects; 2.6.1 The alternative role was the effectively the same role that the other at-risk manager already undertook, so it was not really an alternative
2.6.2 He was dismissed because he had raised concerns, complaints and grievances
2.6.3 The consultation period was very short
2.6.4 The pool of at-risk employees was too small and further employees should have been considered.
2.6.5 Having said that the vacant Key technician role would be filled in the at-risk letter, the Claimant was told by Phil Edmunds, MD, that it would not be filled at the first meeting.
2.6.6 The decision was a foregone conclusion.
2.7 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

3. ***Protected disclosure ('whistle blowing')***
3.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:
3.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:
3.1.1.1 On about 12 January 2022 in a meeting with Natalie Winterton[1] and Ewan Hamilton, that the business was not enforcing government guidelines, namely that staff were not requiring members of the public to wear a mask at the customer counter and would speak through the hole designed to pass objects through and were not wearing a mask when to do so.
3.1.1.2 On three occasions raised with the finance manager that she was not wearing her mask properly the Respondent was not taking effective steps to prevent the spread of covid-19
3.1.2 Were the discloses of 'information'?
3.1.3 Did he believe the disclosure of information was made in the public interest? It was in the public interest to minimise the risk of the spread of Covid-19.
3.1.4 Was that belief reasonable?
3.1.5 Did he believe it tended to show that: 3.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation, namely the rules in relation to covid-19 and mask wearing.
3.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered;
3.1.6 Was that belief reasonable?
3.2 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to; 3.2.1 to the Claimant's employer?

Dismissal (Employment Rights Act s. 103A)
4.1 Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?
4.2 The Claimant did have two years' service and the questions which the Tribunal will have to address are:

[1] Referred to in the list of issues in this way. We apologise to her for the misspelling of her name, and that of her husband.

4.2.1 Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?
4.2.2 Has the Respondent proved its reason for the dismissal, namely redundancy?
4.2.3 If not, does the Tribunal accept the reason put forward by the Claimant or does it decide that there was a different reason for the dismissal?

Detriment (Employment Rights Act 1996 section 47B)
5.1 Did the Respondent do the following things:
5.1.1 On 12 January 2022, Ms Winterton responded to the Claimant's concern by saying words to the effect that they were not fining any people, which was dismissive.
5.1.2 On 12 January 2022 told the Claimant that he was obsessing about covid-19.
5.1.3 Following the Claimant's occupational health assessment, failed to follow the recommendations made by the consultant in January 2022, namely for the Respondent to review their policies in relation to Covid-19 measures, provide an ergonomic chair and the Claimant was capable of holding conversations about his concerns regarding covid-19.
5.1.4 Held the initial redundancy meeting on 7 April 2022, immediately after the grievance appeal hearing.
5.1.5 Put the Claimant at risk of redundancy;
5.2 By doing so, did it subject the Claimant to detriment?
5.3 If so, was it done on the ground that he had made the protected disclosure(s) set out above?

6. Disability
6.1 The Respondent accepts that at all; material times the claimant was disabled by reason of Arthritis

7. Discrimination arising from disability (Equality Act 2010 section 15)
7.1 Did the Respondent treat the Claimant unfavourably by:
7.1.1 In September 2021, temporarily docked some of the Claimant's pay after he had gone home when there was a hostage at the industrial trading estate and he could not access the building
7.1.2 Ignored his requests for reasonable adjustments and that his condition was worsening
7.1.3 Selected him as being at risk of redundancy;
7.1.4 Dismissing him
7.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that he has reduced mobility, unable to walk long distances, has difficulty getting in and out of his car and experiences high degrees of pain:
7.3 Was the unfavourable treatment because of any of those things?
7.4 Was the treatment a proportionate means of achieving a legitimate aim? (to be provided in an amended response)
7.5 The Tribunal will decide in particular:
Was the treatment an appropriate and reasonably necessary way to achieve those aims;
7.5.2 Could something less discriminatory have been done instead;
7.5.3 How should the needs of the Claimant and the Respondent be balanced?
7.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

8. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

8.1 Did a physical feature, namely:

8.1.1 the parking spaces were too narrow for the Claimant to get in and out of his car;

8.1.2 The men's bathroom did not have means to assist someone to get up from the lavatory.

put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he had restricted mobility, experienced pain on moving after being immobile for a few minutes. To get in or out of his car he needed the door to be fully open so that he could swing his legs around due to the pain and restriction of movement?

8.2 Did the lack of an auxiliary aid, namely an appropriate ergonomic chair, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he had restricted mobility, experienced pain on moving after being immobile for a few minutes?

8.3 Did the lack of an auxiliary aid, namely providing access to the Claimant for the CCTV, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he had to walk to the ladies bathroom only to discover someone was in there, or had to walk to other people's desks to find if they were there when they did not respond to a phone call or to find out who was available. This was difficult due to his restricted mobility and pain?

8.4 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

8.4.1 A grab rail in the men's bathroom to assist with getting up (the Respondent says that there was a disabled bathroom for the use of the Claimant);

8.4.2 Provide an ergonomic chair

8.4.3 Made him a parking space wide enough for him to get in and out of his car and allocate it to him

8.4.4 To provide him access to the CCTV system.

8.5 Was it reasonable for the Respondent to have to take those steps and when? The Respondent says that this was provided by 16 March 2022

8.6 Did the Respondent fail to take those steps?

9. ***Victimisation (Equality Act 2010 s. 27)***

9.1 Did the Claimant do a protected act as follows:

9.1.1 Raising his grievance dated 1 April 2022 that there had been a failure to make adjustments;

9.2 Did the Respondent do the following things:

9.2.1 Selected the Claimant as being at risk of redundancy

9.2.2 Dismissed the Claimant.

9.3 By doing so, did the Respondent subject the Claimant to detriment?

9.4 If so, was it because the Claimant had done the protected acts?

10. Remedy

<u>Unfair dismissal</u>

10.1 The Claimant wishes to be reinstated to their previous employment or re-engaged to comparable employment or other suitable employment. Should the Tribunal order reinstatement? The Tribunal will consider, in particular, whether such an order is practicable and, if the Claimant caused or contributed to the dismissal, whether it would be just to make it and upon what terms it ought to be made.

10.2 What basic award is payable to the Claimant, if any?

10.3 If there is a compensatory award, how much should it be? The Tribunal will decide:
10.3.1 What financial losses has the dismissal caused the Claimant?
10.3.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
10.3.3 If not, for what period of loss should the Claimant be compensated?
10.3.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
10.3.5 If so, should the Claimant's compensation be reduced? By how much?
10.3.6 Does the statutory cap of fifty-two weeks' pay apply?
Detriment (s. 47B)
10.4 What financial losses has the detrimental treatment caused the Claimant?
10.5 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
10.6 If not, for what period of loss should the Claimant be compensated?
10.7 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?
10.8 Is it just and equitable to award the Claimant other compensation?
10.9 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?
Discrimination or victimisation
10.10 What financial losses has the discrimination caused the Claimant?
10.11 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
10.12 If not, for what period of loss should the Claimant be compensated for?
10.13 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
10.14 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
10.15 Should interest be awarded? How much?

8. After the CMH at which this order was made, the Claimant sought to re-visit the list of issues. The case came before Employment Judge Gray on 01.11.2023, who confirmed the list of issues prepared by Employment Judge Bax.

9. The preparation of this case by the parties has left a lot to be desired. Disputes about the content of the bundle required the intervention of the Regional Employment Judge. The bundle was prepared in a format that did not allow it to be marked up. This was a considerable obstacle to our pre-hearing preparation. The statements prepared on behalf of the Respondent were in a similar format, and despite the express order at the CMH, did not have paragraph numbers. The Claimant's statement did have paragraph numbers, but its format shared the problems.

10. The hearing timetable allowed for reading time. We ordered the parties to address the format issues, so that the statements and bundle could be put into a more useful format. The issue regarding the statements was dealt with quickly. That concerning the bundle took longer to address.

11. The hearing was originally listed as a hybrid hearing, with the Claimant and one Tribunal member attending via CVP. On the first two days, a number of technical issues arose, which meant that considerable time was lost. The issues often related to the microphones in the hearing room, and it was judged that the hearing was likely to progress more smoothly if the hearing was converted to a fully remote hearing. The Tribunal decided to do that, having heard from the parties and they having no objection.

12. The live evidence was completed within the timetable set by Employment Judge Bax. We record our thanks to the parties for enabling that to happen.

Law

Unfair dismissal - redundancy

13. The Employment Rights Act 1996 ("ERA), s98, insofar as is relevant to this case provides as follows:

> ***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—*
> *…*
> *(c) is that the employee was redundant, or*
> …

14. It is clear that redundancy is a potentially fair reason for dismissal.

15. Redundancy is defined by ERA s139, which provides:

> ***139.— Redundancy .***
> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*

(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.
(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
(3) For the purposes of subsection (1) the activities carried on by a [local authority]1 with respect to the schools maintained by it, and the activities carried on by the [governing bodies]2 of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
(4) Where—
(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and
(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,
he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).
(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.
(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.
(7) In subsection (3) "local authority" has the meaning given by section 579(1) of the Education Act 1996.

16. In the case of Safeway Stores plc v Burrell[2] approved by the House of Lords in Murray and another v Foyle Meats Ltd (Northern Ireland)[3], the following 3-stage test was approved for determining whether a dismissal is by reason of redundancy:

a) Was the employee dismissed? If so,

b) Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one of the other economic states of affairs in s.139(1) exist)? If so,

[2] [1997] ICR 523 (EAT)

c) Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2?

17 Question a) above poses no difficulty in this case. It is common ground that the Claimant was dismissed.

18 Insofar as question b) is concerned, this is a commercial judgement for the employer to make. If we are satisfied that the Respondent made a genuine commercial decision that it could make better use of its resources by asking other members of staff to absorb the Claimant's duties, and if we are satisfied that that was the genuine reason for the Claimant's dismissal – the test posed in question c) above - then the merits or otherwise of that decision are not a matter for the Tribunal.

19 In Polkey v AE Dayton Services Ltd[4], in which it was held that an employer will not normally act reasonably unless it;

a) warns and consults employees about the proposed redundancy;
b) adopts a fair basis on which to select for redundancy; and
c) considers suitable alternative employment.

20 Regarding consultation, an employer must have an open mind and still be capable of influence about the matters that form the subject matter of the consultation. Although the subject of the consultation will depend on the circumstances, it should usually include an opportunity for the employee to comment on the basis for selection, to challenge the redundancy selection assessment and explain any factors that might have led to their selection of which the employer might not have been aware, to put forward ways to avoid their redundancy, consideration of any alternative positions that may exist, and to address any other matters or concerns the employee may have.

21 Regarding selection, an employer has a wide measure of flexibility in defining the selection pool. A selection pool of one has been held to be fair: see Alvis

[3] [2000] 1 AC 51
[4] [1988] AC 344

Vickers Ltd v Lloyd[5] and Wrexham Golf Club Co Ltd v Ingham[6]. So long as the employer's choice of pool was within a range of reasonable responses, it is not for the to substitute our own view as to what the pool should have been.

22 A dismissal is likely to be unfair if the employer makes no reasonable effort to consider whether suitable alternative employment is available with its organisation – see Hazell v Earl[7].

Unfair dismissal - Whistleblowing

23 ERA s103A 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*.

24 Protected disclosures are defined in ERA s43B 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.*
> *(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.*
> *(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*
> *(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is*

[5] EAT/0785/04
[6] UKEAT/0190/12
[7] [1976] IRLR 296

not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
(5) In this Part "the relevant failure" , in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

25 In order to be a qualifying disclosure, a disclosure must be one of information. Information can cover statements that could also be categorised as allegations – see Kilraine -v- London Borough of Wandsworth[8] - if the statement has sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a) to (f) of s43B(1) of the Employment Rights Act 1996.

26 It is also required that the person making the disclosure have a reasonable belief that the disclosure is in the public interest.

27 Public Interest is not defined in legislation. In Chesterton Global Ltd -v- Nuromohammed[9], the Court of Appeal said that a disclosure may be in the public interest even when it relates to a breach of the worker's own employment contract. The Court of Appeal identified the following as things that must be taken into account:

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

Detriment

28 ERA s47B 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.
(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or

[8] [2018] ICR 1850.
[9] [2018] ICR 731.

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
(a) from doing that thing, or
(b) from doing anything of that description.
(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
(b) it is reasonable for the worker or agent to rely on the statement.
But this does not prevent the employer from being liable by reason of subsection (1B).
(2) This section does not apply where—
(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal (within the meaning of Part X).
(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker" , "worker's contract" , "employment" and "employer" have the extended meaning given by section 43K.

29 In order to qualify as a detriment, the Tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that they had been disadvantaged in the circumstances in which they thereafter had to work. An unjustified sense of grievance cannot amount to a detriment, but a justified and reasonable one may well do so – see Shamoon -v- Chief Constable of the Royal Ulster Constabulary.[10]

Discrimination arising from disability

30 The Equality Act 2010 ("EA"), SS20 & 21, provides as follows:

20 Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not

[10] [2003] UKHL 11 [2003] ICR 337

disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.
(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.
(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.
…[11]

21 Failure to comply with duty
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2);

[11] Table omitted from these reasons

a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Victimisation

31 EA s27 provides as follows:

27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Time limits

32 ERA s48 provides as follows:

48.— Complaints to employment tribunals
(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G.
(1XA) A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of section 44(1A).
(1YA) A shop worker may present a complaint to an employment tribunal that he or she has been subjected to a detriment in contravention of section 45ZA.
(1ZA) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 45A.
(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
(1AA) An agency worker may present a complaint to an employment tribunal that the agency worker has been subjected to a detriment in contravention of section 47C(5) by the temporary work agency or the hirer.
(1B) A person may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47D.
(2) On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(2A) On a complaint under subsection (1AA) it is for the temporary work agency or (as the case may be) the hirer to show the ground on which any act, or deliberate failure to act, was done.
(3) An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures , the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)—
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on;
and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.
(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).
(5) In this section and section 49 any reference to the employer includes—
(a) where a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3));
(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.
(6) In this section and section 49 the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/ 93)—

- *"agency worker";*
- *"hirer";*
- *"temporary work agency".*

33 EA s123 provides as follows:

23 Time limits
(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Overriding objective and duty of the parties

34 The Employment Tribunal Rules of Procedure 2013 provide, at rule 2, as follows:

2. Overriding objective
The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense.
A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

What happened

35 The statements prepared in this case did not always focus on the issues truly in dispute. The statements prepared by witnesses on behalf of the Respondent often included what might be described as favourable character references about the Respondent. We did not find these useful in resolving the issues in dispute.

36 The Tribunal will not address every factual difference between the parties, but will confine itself to the matters that appear to be relevant to the issues identified by Employment Judge Bax.

37 It is right to say that the parties did not always find it easy to stick to matters relevant to the list of issues. If we do not address or determine particular factual points, it is because we do not consider them germane to the issues identified by Employment Judge Bax.

38 When resolving factual disputes, the Tribunal does so on a balance of probabilities.

39 The Covid-19 pandemic, and the measures taken in England to address that, form a significant part of the background to this case. However, the parties did not address us on the changing regimes that were in place at different times. The Tribunal was conscious of the dangers of attempting to rely on recollection as to what specific measures were in force at any one time, all the more so because one member of the panel lives in Wales. We therefore have not attempted to identify particulars of the measures in force at any particular time.

The Claimant's health

40 The Claimant's health position was summarised by Employment Judge Bax, quoted above.

Car parking

41 At one time, the Claimant travelled to work by bicycle. That stopped in Spring 2021, due to hip pain.

42 The Claimant told us that he struggled to find parking spaces at his workplace that were suitable for him. This is because his physical difficulties required him to open fully the door, in order to enter and exit his car. This meant that he needed more space between his car, and any neighbouring car, than might be available in conventional parking spaces. We accept the Claimant's evidence as to his physical needs.

43 The Claimant referred to the Respondent's Covid policy, which says:

> ***TRAVEL TO SITE:***
>
> *Wherever possible workers should travel to site alone using their own transport and sites need to consider:*
>
> - *Parking arrangements for additional cars and bicycles.*

44 The wording of the policy is open to criticism, in that it can hardly be for workers, rather than the Respondent, to consider parking arrangements for additional cars. But on a sensible reading of this policy, the

Respondent's policy required it to consider parking arrangements for additional cars and bikes.

45 That is not, however, the same thing as parking spaces with additional space for those with accessibility needs. And the consideration that the policy required needed to be viewed with realism.

46 The Respondent's premises is on a trading estate. We were told that, following the arrival of one particular other business, a furniture store, on the estate, parking spaces were at a premium. However, we were also told that public transport links to the location are good.

47 The bundle of material before us contained a diagram of parking spaces on the estate, and indicated that 10 spaces were linked to the Respondent's units. The Respondent's workforce numbered in the twenties. None of the spaces was reserved to a particular person, for example any director, and none of them was even marked as being for the use of the Respondent or its customers more generally.

48 The Claimant received a blue badge on 02.03.2022. He said in his statement that he immediately told Mr Hamilton about this. This wasn't challenged, and we accept it.

49 There was then a time when the Claimant tested positive for Covid-19 on 17.03.2022. He returned to work on 29.03.2022, in circumstances into which we will go later.

50 The material before us included an email from Mr Hamilton to the Claimant, dated 30.03.2022 – the day after the Claimant had returned to work from his Covid absence - which read (insofar as is relevant) as follows:

Disabled Parking. Gem do not have to provide a disabled parking bay and we are not going to do so , as we have previously discussed parking is a premium. Why is the current arrangement not working? Can you not park on the double yellow with your blue badge?

51 We did not have any email to which Mr Hamilton's email responded, but we accept that the Claimant did send a request to Mr Hamilton requesting an accessible parking space.

52 In evidence before us, the Claimant said that this proposal was not satisfactory. Had he parked on double yellow lines, he would have had to display a timer on his car, and move it every 3 hours. This strikes the Tribunal as a reasonable concern.

53 We were also told that the Respondent's parking spaces were insufficient for the needs of its staff and customers. Despite the good public transport links, we were told – and it was not challenged – that the Respondent's staff would often park on roads outside the trading estate.

54 On 14.04.2022, Mr Winterson emailed the Respondent's staff, saying as follows:

> *Steve Monroe has a deteriorating medical condition that will require total hip replacement in the near future. His condition makes it imperative for him to be able to fully open his car door when entering and exiting his vehicle.*
>
> *GemSec is in the process of sorting out an accessible parking space for him. In the meantime, when a staff member parks next to his vehicle, can they please let him know. He will contact you just before he needs to leave so that you can momentarily move your vehicle to allow him to fully open his car door*.

55 The first paragraph was a sharing of details of the Claimant's condition, to which he did not object. The second was a request that employees make an adjustment to their parking behaviour, to allow the Claimant to exit his car.

56 On one view, the Respondent's suggestion was a practical one, although the Tribunal can see how the Claimant might perceive his possible need to ask others to move their car as becoming a burden.

57 Was it reasonable to ask the Respondent to do any more than offer this arrangement to the Claimant?

58 On balance, we think it was not. The Claimant – initially at least – accepted this proposal.

59 We are mindful that a later grievance about the parking issue was upheld by Ms Tucker – an independent HR professional who assisted the Respondent, as well as acting as its advocate (and being a witness) at this hearing.

60 The grievance decision – which Ms Tucker considered on appeal – was dated 08.04.2022, and read (insofar as is relevant to this point) as follows:

> *1. Request for a blue badge parking space.*
>
> > *Following the meeting, your grievance is substantiated, and the Company will be taking appropriate action in the form of allocating a parking space to you which will ensure you have enough space to fully open your car door and will be allocated outside the front of the building*.

61 It is not clear to us whether this statement meant that the Respondent was going to give the Claimant what he wanted, which was a blue-badge parking space. However, an indication that something more was in prospect was that Mr Winterson described the arrangements he set out, in his email of 14.04.2022, as being "*in the meantime"*.

62 It may be that, in time, the arrangements would have been shown to be inadequate. But, in the context of the lack of parking spaces, the Respondent was suggesting an interim measure that had the prospect of allowing the Claimant to park properly, and which the Claimant himself accepted.

63 In closing, the Claimant mentioned how the parking arrangement was working. He talked about having to park in a loading bay to ask a neighbouring business to move cars parked in the Respondent's spaces. This was not dealt with in evidence. Whilst the Tribunal is anxious not to let an unrealistically strict application of procedural norms get in the way of a full consideration of the issues, in a case in which neither side is

legally represented, it seems to us that to consider something said for the first time in closing, would be unfair to the Respondent.

Observance of and attitude towards Covid-19 measures

64 On 12.01.2022, the Claimant had a meeting with Ms Winterson and Mr Hamilton. In that meeting, we accept that the Claimant did complain he believed that the business was not enforcing government guidelines.

65 A note of the meeting was kept, and included in the material before us. Insofar as is relevant to this point, the note read as follows:

Covid 19

Nats explained as a company we cannot enforce lateral flow testing, but we are making lateral flow tests available in the workplace. As per Mel's Email we are passing on the Gov recommendation for testing twice a week. We are doing everything we can do, as recommended by the Gov. In fact, we are going further and asking people to wear a mask when visiting the masterkey department as per Steve's request. Steve asked what Gem's Stance is, Nats replied, Gems stance is we are giving everyone the opportunity to test.

Steve asked can we ask customers to wear masks and if they don't, can we refuse to serve them. Ewan replied we can ask and offer them a mask. If they refuse, Gems policy is to still serve them as we aren't allowed to question them why they don't wear a mask.

We made Steve aware that Mel is attending a Covid 19 Seminar in a couple of weeks and Gem will implement any recommendation that may arise from the seminar.

Steve suggested we made new signs and worded it better Steve's sign suggestion,

To our valued customers, you are required by law to wear a mask when entering these premises and subject to being fined for non-compliance.

Nat's said its not law and it's only mandatory and that fines are being disputed all the time. We will not be using Steve's suggestion. Steve disagreed, Nats said we are not going to get into a discussion about fines.

Nats has asked me to clarify her statement,

Regarding the law/mandatory discussion- I was referring to common law, not civil law. To finish, my views on mask wearing being law-there are not exceptions to breaking the law and therefore would be no exceptions if this was law, as it stands you can be 'excepted' from this.

This was Nats point.

Steve asked for clarification about mask wearing on the trade counter. Ewan replied we are asking customers to wear a mask and offer one if they aren't. We have asked Gem employees to wear a mask when serving on the counter, out of respect for the customers who we are serving. As we have a screen we don't really need to or required to. We talked about customers coming in and not wearing a mask (George). Ewan explained that he has asked George numerous occasions to wear a mask and George replied he is exempt. Ewan knows that's not to be true, but we are not allowed to ask them to prove or questions him and that he finds it frustrating.

Steve gave an example of Neil coming into his office on his first day back after testing positive for covid. Steve felt Neil's Positive Covid test should have been common knowledge, to enable other members of staff to keep their distance should they wish. Steve asked if he could know if colleagues have had covid and their vaccination status. Nats explained we are not allowed to give out people's medical history and its personal and as a company are not required to capture this data. We finished off the talk on covid-19 as saying we will know if Gem needs to do more after Mel as attended the seminar.

Ewan said to Steve he is worried that he is obsessing over covid and feels it might be affecting his mental health, along with his health problems and pain he is in. Nats said stress can impact and cause flare ups in his arthritis. We both advised Steve to talk to his doctor not just about his physical health but also his mental health. Steve said he has been reading up on his meds and is not sure if the meds he is taking, lessen the protection of his Covid Vaccination. Steve said he is worried about an inhaler he is taken and read up that it may lessen his vaccine, so has stopped taken it. Nats wanted to make clear to Steve, if he needed to take time off, take it. Mental health can show up in physical symptoms. Steve asked how will that affect his paycheck? Nats explain that we have to record sickness and the Bradford factor is used to catch out those that are off sick same time, ie; on a Friday afternoons and Mondays= long weekend. Nats agreed to rectify½ days pay and change sickness on breath to other. Nats said we are living in a pandemic and people will not be discriminated if they have time off due to covid. We have a sickness policy and if you do need to have time off work, the first day is unpaid as written in the policy.

66 The note does not purport to be a verbatim record of the meeting. There is another version of this note in the material before us, described by the Claimant in the course of the proceedings as the Respondent's version. However, attention in the evidence focussed on the note we have quoted.

67 We are satisfied that the note is a generally accurate record of the discussion.

68 The Claimant did ask if customers who refused to wear masks could be refused service at the counter. Mr Hamilton said that, in such circumstances, the Respondent's policy was to serve customers nonetheless. In the context, we think this must refer to face-to-face service.

69 This is contrary to the content of an email sent by Ms Crewe on 30.11.2021. This email read, insofar as is relevant to this issue, as follows:

From 4am this morning face coverings were put in place for public facing areas. There is a sign up on the door requesting our customers to wear a mask whilst in the trade counter. If a customer comes in not wearing a mask, we can ask if they require one, but if they refuse we cannot force them to wear one.

The trade counter staff will wear a mask when serving and also have the protection of the large screen. However, if they need to serve a customer in the trade counter area and the customer is not wearing a mask this face to face service can be refused. When serving outside i.e. Car Keys, this will be at your own judgement to wear a mask.

The Office staff are not public facing areas so do not have to legally wear a mask. There are masks available to all staff, please feel free to take one if you would like to wear a mask whilst away from your desk.

Thank you all for your cooperation in keeping each other and our customers safe.

70 Asked about this, Ms Winterson initially said that the counter area had screens, which limited the need for face masks. But the plain fact is that, in November 2021, Ms Crewe had told staff that customers who refused to wear a facemask in the counter area could be refused face-to-face service.

71 The Tribunal asked whether the passage:

Nat's said its not law and it's only mandatory and that fines are being disputed all the time. We will not be using Steve's suggestion. Steve disagreed, Nats said we are not going to get into a discussion about fines.

Meant that:

(a) The Claimant was told that customers who refused to wear a mask could not be denied service;
(b) The Claimant pushed back and this;
(c) When he did so, Ms Winterson shut down the conversation.

72 Ms Winterson said that she thought she was talking about fines. We find this suggestion hard to accept. It seems to us to be self-evident that the Respondent could not fine customers, and we do not think the Claimant was suggesting that it could. What the Claimant was asking for was, the right for staff to be able to refuse service to customers who refused to wear a mask.

73 That suggestion, we are satisfied, was consistent with what Ms Crewe had emailed in November 2021.

74 We are mindful that the parties did not take us through the detail – or at all – of the covid restrictions at different times in the events that concern us. But perhaps less important than that, for the purposes of this dispute, is that the Claimant appears to have been asking the Respondent to allow the implementation of its own policy. That is, we find, a self-evidently reasonable request.

75 That self-evidently reasonable request was closed down by Ms Winterson.

76 Later in the meeting, the Claimant complained about a customer repeatedly coming into the premises without a face mask. The note has Mr Hamilton saying that he knew the customer's claimed justification for not wearing a mask, was false. We accept that that was said.

77 We accept that the discussion about Neil going into the Claimant's office happened. On this point, we think that the Claimant's request to know the vaccine status and covid history of coworkers, went too far: we do not think the covid situation gave the Claimant any legitimate expectation to be privy to the medical history of his colleagues.

78 We accept that Mr Hamilton did say that he was worried about the Claimant obsessing over Covid. That concern, together with the concerns expressed over the Claimant's mental health by Ms Winterson and the contradiction in the meeting of the Respondent's earlier policy about refusing service, lead the Claimant to feel that his concerns about covid were being belittled.

79 The Claimant was right to so feel. We find that Ms Crewe's efforts re covid measures were genuine. But we do not have the same confidence about Ms Winterson. Her attitude shown by the note of that meeting, the discomfort she expressed about her own views on vaccines, indicated an ambivalence about covid measures. She and Mr Hamilton were dismissive of the Claimant's legitimate concerns about Covid-19.

80 We did not find Mr Hamilton to be an impressive witness. Mr Hamilton's primary loyalty in giving evidence appeared to be to the Respondent. The Claimant was under the impression that Mr Hamilton was his friend. Even allowing for the fact that giving evidence can involve saying things one would rather not about a friend, Mr Hamilton's answers in evidence seemed to us to wish to damage the Claimant. He agreed – with some apparent reluctance - that they were friends, and he spoke of how, when both were at risk of redundancy, the Claimant was supportive and the only person with whom he could talk about the possible redundancy. But Mr Hamilton claimed that he felt "*bullied*" by the Claimant in one incident, when the Claimant mentioned legal action against former employers, and the possibility of legal action against the Respondent. But not only was the Claimant not cross-examined about this, it seems fanciful to suggest that mentioning legal action against the Respondent could constitute bullying of Mr Hamilton. He also described himself as feeling "*hoodwinked*" by that meeting, a word that is memorable, colourful, but unidiomatic in the context in which Mr Hamilton employed it. Mr Hamilton told the Claimant, in cross-examination, that he did feel the Claimant could be antagonistic – an answer which took the Claimant by surprise. Mr Hamilton told us that dealings with the Claimant took a considerable amount of his time, and we accept that that is probably true. Little if anything turns on the meeting to which Mr Hamilton referred. Where this part of his evidence did assist us, was in revealing an approach that, we

consider, placed damaging the Claimant above the need for accurate evidence.

81 The Claimant told us that, on three occasions, he raised with the Respondent's finance manager that she was not wearing her mask properly. It was not covering her nose. The Claimant agreed that he did not raise this with anyone else at the Respondent. We accept that he did indeed raise this mask-wearing shortcoming with the person in question.

82 Also relevant to the Respondent's attitude is what happened when the Claimant himself contracted Covid. He had tested negative at home, and was asked by Mr Hamilton to come into work that same day, contrary to the Respondent's policy. That is consistent with the attitude we have found Mr Hamilton and Ms Winterson to have. However, it is right that we note that, when he tested positive, the Claimant himself did not test at home, but only after coming to work.

83 We find that the Claimant made these communications, at the 12.01.2022 meeting and the reports to the finance director, and that they were made because the Claimant believed that it was in the public interest to minimise the risk of spreading covid-19. He was concerned primarily, but not solely, with his own health.

Occupational health report

84 An occupational health report on the Claimant was prepared. The assessing clinician was Dr Greg Irons MBChBMFOM, and the report is dated 17.01.2022, based on an assessment dated that day.

85 The report refers to a number of questions posed in the referral. The questions included the following, with answers:

How does he feel his mental health is currently, does he feel it is impacting on his physical health?

Mr Monroe did not describe any significant mental health concerns. He described some worries about how longer term treatment for his arthritis might impact his immune system and subsequent risk from coronavirus. He is also careful about his exposure to coronavirus given his need to attend medical assessments, to obtain appropriate treatment for his conditions. He related some concerns regarding adherence to coronavirus procedures in the workplace in this regard.

We discussed the changing nature of the coronavirus epidemic in the UK and the newest variant of concern, Omicron. Non-pharmaceutical interventions such as social distancing, ventilation and mask wearing continue to be the mainstay of government advice where individuals cannot work from home. Lateral flow tests which provide early indication of coronavirus infection may be helpful. You may wish to review your current coronavirus policies and procedures in line with the latest government guidance to ensure they remain current.

Vaccination plus booster provides the greatest protection against the current variant of concern and Mr Monroe has received all three doses.

Can he have a rational conversation regarding his condition or concerns (covid)?

I could not detect any significant mental health concerns and I believe Mr Monroe is capable of holding conversations regarding his medical conditions and concerns regarding coronavirus in the workplace.

86 The above may appear, in isolation, to be innocuous questions from an employer concerned about the wellbeing of an employee. However, they come in the context of the meeting of 12.01.2022, when Mr Hamilton suggested that the Claimant was obsessing about Covid, and queried his mental health.

87 Mr Hamilton also emailed the Claimant on 31.01.2022, in which he said that the Claimant was "*…unduly concerned by the coronavirus…*".

88 We find that the questions posed of Dr Irons are consistent with, and support the conclusion that Mr Hamilton and Ms Winterson sought to play down the Claimant's entirely legitimate concerns about Covid, to the extent of seeking to suggest that he was obsessing about Covid and that his mental health and sound judgement were affected by this. Mr Hamilton persisted in this approach, despite Dr Irons' answer quoted above.

<u>Redundancy</u>

89 The Claimant's grievance, on which we have touched above when dealing with the parking space, was dealt with at a meeting on 07.04.2022.

90 Immediately after the grievance meeting, a second meeting with the Claimant took place, at which he was told that his position was being considered for redundancy.

The Respondent's financial position

91 We were told that business plans developed in 2019 were put on hold because of the covid pandemic and the resulting restrictions.

92 As far back as 02.08.2019, Phil Edmonds, a now-retired managing director of the Respondent, emailed Mr and Ms Winterson in the following terms:

> *I'm currently doing some planning work for 2020.*
> *One of the areas I'm looking at is overhead management, particularly effectiveness and cost of staff.*
> *To share some of my current thinking with you, I will be doing my usual presentation to the staff in October. At this stage I will be talking about profitability or lack of it in 2019 and our plans for 2019 bonus and 2020 targets. If we* ***want/need a plan for managing staff overheads*** *this could be the precursor for a redundancy package in 2020 to manage our costs.*
> *An exercise to identify potential areas of the business where we could have surplus staff would be useful. Perhaps looking at the business department by department could help.*
> *Saying that, we still need to provide for the future so we would need to look at taking on additional apprentices at the same time.*
> *Phil*

93 On 19.01.2021, Mr Edmonds, emailed Mr Winterson the following figures:

	Sales	Profit	%
2018	£135,693	£73,393	54.08
2019	£116,178	£64,524	55.53
2020	£90,901	£60,706	63.96

94 Mr Edmonds observed in that email that "*Profit is barely covering staff costs*".

95 That wording is curious. Profit would ordinarily represent just that – the profit element of sales, after costs such as salaries. But it is clear that those figures show a significant decrease in the value of sales from 2018 to 2020.

96 On 15.03.2022, Mr Edmonds emailed Mr Winterson, Ms Winterson and others, saying:

If we combine SO and Low Margin work my calculations show that -

SI contributes 64.9% of our profit and carries 60.5% of our salary costs

SO contributes 35.1% of our profits and carries 39.5% of our salary costs

There can be cross overs between the two but I believe they cancel each other out.

These figures give us the basis to make the minor changes to improve efficiency and therefore profit. I can split out Low Margin but I don't think it would help as SO and LM are so closely connected

97 SI means, we were told, "Supply and Installation". SO means "Supply Only".

98 Mr Winterson said in his statement that the figures for 2021 were turnover £116,296, profit £72,230, representing a profit percentage of 62.96%.

99 The turnover and profit figures were not challenged.

100 In March 2022, a business case was developed. There were at least two draft versions of this case, which read as follows:

Business Case, Masterkey DepartmentManager, March 2022

Gem Security Systems Ltd (GemSec) have established a need to reduce overheads, streamline the business and change the business model to increase efficiencies. Consequently, the Masterkey Manager and Masterkey Technician areat risk of redundancy, for the following reasons:

i. **The 'suppl't' onl•t" funetion is not eontributing suffieiently to profit.**

The supply only area of the business is not generating the profit needed, therefore this function needs to become leaner. By contrast, a larger percentage of profit is being created by the supply and install function, which requires a degree of flexibility from its employees. For this reason, the business requires all employees across the front of office to be multi skilled locksmiths.

tt._1.__ **There is a need to streamline efficiencies.**

By reducing overheads and improving efficiencies it is deemed that this will lead to the increase in profit needed. Currently there are two Managers within this area of the business which is not needed.

Employees affected.

The entirety of the Masterkey department Manager is at risk of redundancy, totalling a number oftwe one employees.

Impact to other employees.

The impact to other employees in the business, regarding workload, is minimal if not non-existent.

GemSec do, however, recognise that the risk of redundancies in an organisation can be unsettling to both those involved and the wider business, and will therefore be transparent with their communication with all employees to help them through this period of change.

Alternatives to redundancy.

Due to the reasons outlined above, the alternatives to redundancy are few, and therefore limited to other vacant positions in the business. This business case suggests the need for multi skilled locksmiths to provide flexibility across all areas of the business, and therefore GemSec will be recruiting for 1 full time and 1 part time multi sl(illed locl(smiths.

Consultation period.

Those informed of their risk of redundancy will enter a 2-week period of consultation to ensure a fair and thorough redundancy process has been followed, where GemSec will consider any alternatives to redundancy.

101 We set out the draft business case in full, and in the font and colouring that we have in the hearing bundle, because the colouring and underlining show where amendments were made.

102 The final draft of the business case was dated April 2022, by which time one employee in a relevant role, the master key technician, had left the business. The final draft read as follows:

Business Case, Management, April 2022

Gem Security Systems Ltd (GemSec) have established a need to reduce overheads, streamline the business and change the business model to increase efficiencies. Consequently, the Masterkey Manager and Wap£ t>use[12] Manager are at risk of redundancy, for the following reason: (in manuscript) "workshop"

i. There is a need to streamline efficiencies.
By reducing overheads and improving efficiencies it is deemed that this will lead to the increase in profit needed. Currently there are two Managers within this area of the business which is not needed.

Employees affected.
The Masterkey Manager and W r\ehouse Manager are at risk of redundancy, totalling a number of two employees. (again in manuscript) "workshop"

Impact to other employees.
The impact to other employees in the business, regarding workload, is minimal if not non- existent.

GemSec do, however, recognise that the risk of redundancies in an organisation can be unsettling to both those involved and the wider business, and will therefore be transparent with their communication with all employees to help them through this period of change.

Alternatives to redundancy.
Due to the reasons outlined above, the alternatives to redundancy are few, and therefore limited to other vacant positions in the business. Due to a resignation, the business will be looking to recruit one Masterkey Technician (in manuscript) "PHIL STATED (illegible) DAVE KEEM (illegible) BE REPLACED"

Consultation period
Those informed of their risk of redundancy will enter a 2-week period of consultation to ensure a fair and thorough redundancy process has been followed, where GemSec will consider any alternatives to redundancy.

[12] This is how it appears in the bundle. There appears to have been some corruption in the bundle-creation process, but it was not suggested that anything turned on this. The probable true word is "warehouse", and the manuscript "workshop" is intended to correct this.

103 This version of the business case was given to the Claimant at the second of the meetings on 07.04.2022.

104 A job description was prepared for what was described as a new role of “Masterkey Manager”. It read as follows:

JOB DESCRIPTION

This is a multi-faceted position concerned with all aspects pertaining to the organisation and day to day operation of the Masterkeying Workshop {"ASSA Room") as well as serving as a company representative outside of the workshop as needed.

JOB DUTIES & RESPONSIBILITIES PRODUCTION OF ASSA/ABLOY LOCKS/KEYS

Provide Masterkey Technician with production sheets detailing jobs to be completed and any Abloy products that are to be rekeyed
Produce Delivery Notices to be used in processing completed orders

CUSTODY OF LOCK/KEY RECORDS

Ensure that all "restricted" lock/key requests have proper authorisations which are recorded Maintain highly accurate records in "Superlock" program as well as other electronic databases
and hardcopy "paper trails" MASTERKEY SYSTEM DESIGN
Create actual systems "in-house" using "Superlock" program as well as in coordination with ASSA factory for more complex applications
Create "demonstration" sample systems for use by Sales Staff in promotion of our services IN-HOUSE REPRESENTATION
Meet with clients, manufacturers representatives, and salespeople and provide in-depth demonstration of our facility and capabilities

FIELD REPRESENTATION

Visit our clients at their places of business and give training, perform lock/key cupboard audits,etc.

Represent GemSec and Masterkey Department at trade shows, conventions, etc. INVENTORY CONTROL
Perform stock taking on a regular basis and immediately inform someone with purchasing authority of any perceived or anticipated stock shortfalls
ADDITIONALLY

Maintain all shop equipment to provide for its correct operation and proper calibration

Design and produce any and all documentation or forms that enable efficient production, inventory control, and recordkeeping
Ensure that all proper safety procedures are observed in the Masterkey Workshop

105 On 26.04.2022, Mr Edmonds had emailed staff, in the following terms:

Hi all I'd like to make you aware of our current situation. Gem is looking to streamline the business to be more profitable and efficient. Although we achieved record sales last year, once we paid tax, we had only £5,000 left to reinvest in the business. If we are to grow there needs to be more money available to reinvest. We are fortunate to still be in business following the pandemic, however we do now need to make some significant changes. The Supply Only part of the business operates in a very competitive market so our profit margins here are lower than the Supply and Install part. This is why we need to make Supply Only more efficient. The first change we need to make is to merge the Masterkey Department with the Workshop, staffed by multi skilled locksmiths working across the whole. This means that the roles of Masterkey Manager and Workshop Manager were to be made redundant and replaced with a Multi-skilled Locksmith Manager. Redundancies are something we will always try to avoid, however sometimes they are necessary. Having followed the process of consultation we'd like to inform you that Ewan will be taking over this management role. Steve Monroe will be taking redundancy, his last day being this Friday. I'd like to take this opportunity to thank him for his service and wish him well for the future. This is a difficult time and we appreciate your sensitivity with this matter. Please contact me or Natalie if you have any questions or this raises any concerns.

106 The was a consultation meeting on 26.04.2022. In that meeting, the Claimant presented proposals that, he hoped, would avoid the Respondent having to make his role redundant. His proposals were;

a) Closing the New Projects Office, a location that the Respondent had taken and which the Claimant understood to be rented on a month-to-month lease;
b) Choosing other staff whom the Claimant contended to be less vital for day-to-day operations for consideration of redundancy;
c) Raising the price for some keys on which the Respondent's costs had risen. The Claimant said these had almost doubled in cost, without the Respondent's prices increasing;
d) Using an alternate supplier to ASSA, which the Claimant considered to have immense hidden costs, due mainly to a lack of quality

control, and inadequate stocking levels. This, the Claimant said, wasted staff time, and was also forcing the Respondent to keep more parts in stock than was necessary.

107 The Claimant put these proposals forward in the meeting of 26.04.2022. They did not find favour with the Respondent. The Claimant was told that he was going to be dismissed by reason of redundancy. He told us, and we accept, that he was given pre-prepared documentation, informing him of this. The letter was in the bundle, and was signed by Ms Tucker.

108 Mr Edmunds' email of 26.04.2022 could, of course, have been written after the meeting with the Claimant. We were not told the time of day at which the meeting with the Claimant was held. But it, and the fact that pre-prepared documentation was ready to give to the Claimant at the meeting, indicate that the Respondent had already determined, before the meeting, that the Claimant would be dismissed, notwithstanding any representations that he might make. We find that as a fact.

109 He was told of his right to appeal, but did not exercise it. He told us that this was because he believed that the right of appeal to an independent HR person was non-existent, as there was no independent HR person.

110 We accept that the Claimant genuinely believed that the independent HR person, in fact Ms Tucker, was not, in fact, independent. We note that Ms Tucker was, and appears still to be, a HR consultant who is not employed by the Respondent but has a relationship with it lasting some years. The Claimant did not explore this in cross-examination of Ms Tucker, but appeared to treat the fact that she was paid for her services by the Respondent to make it self-evident that she was not independent. For that reason, he said that any appeal would be "*a pointless endeavour*".

111 The Claimant was invited to apply for the new role. He didn't do so. He told us that it was because he was not eligible for the role, as he termed it, because he did not meet the qualifications. He maintained that

the job description for the new role was drawn up with Mr Hamilton in mind.

112 That the Claimant genuinely believed this to be the case, we readily accept.

113 We also think that the Respondent gave him some reason to believe it to be so. The holding of the first redundancy meeting on 07.04.2022, immediately after the grievance meeting, was tactless, and showed appalling judgement. We were told that Ms Tucker advised that the two meetings be held on different dates. Because of the distance she lives from the Respondent's premises, she advised that one of the meetings be held remotely. Mr Edmonds did not heed this advice, insisting that both meetings take place face-to-face.

114 That was a poor decision, one that could have been designed to reduce the Claimant's confidence in the good faith of the process.

115 The less-than-confidence-inspiring appearance was compounded by the fact that the Respondent did not even, at the end of the grievance meeting, hold the redundancy meeting first with Mr Hamilton, and then with the Claimant. This was thoughtless, and was poor treatment of an employee whose work ethic the Respondent professed to praise.

116 Despite that thoughtlessness, the weight of the evidence supports the Respondent genuinely believing that it did not need both the Claimant and Mr Hamilton's roles. The evidence to which we have referred reflects longstanding financial concerns about the viability of the business. It shows, we find, a genuine consideration of the staffing needs, and a genuinely identified belief that efficiency savings could be made by creating the new role. The change in the drafts of the business case reflected evolution of it and the fact that one relevant employee had left the business in the drafting process. We see nothing sinister in this.

117 Was the pool selected for consideration a fair one? We think it was. Two roles were identified as no longer being needed, the business needs capable of being satisfied by one. We are satisfied that a pool including

the individuals who occupied those two roles, and no-one else, was fair in all the circumstances of the case.

118 The Respondent did warn the individuals that they were at risk of redundancy.

119 Although it went through the motions of a consultancy, we are not satisfied that the Respondent did more than go through the motions. The preparation of documentation telling him that he was to be dismissed is indicative of that. It is noteworthy that no draft documentation telling Mr Hamilton that he had been selected for dismissal, which may have been prepared 'just-in-case', was disclosed, indicating that no such documentation exists. Nor was it contended in evidence that the letter for the Claimant had been prepared 'just-in-case'.

120 That said, we must consider the practical consequences of this. It is unfortunate, to say the least, that the parties – including the Respondent, despite having Ms Tucker's assistance – did not address us on this. But it seems to us that it was highly unlikely that even a genuine consideration of the Claimant's representations would have changed anything. We were told that the additional premises has, in fact, been given up by the Respondent. But no matter what was done, it seems probable that the view that the two existing roles represented an inefficiency, would remain.

121 We do not accept the Claimant's contention that the job description for the new role was a sham to justify his selection for redundancy. As was pointed out in evidence, there were some aspects of the new role for which he was more qualified than Mr Hamilton, for example his command of the software used in the creation of some masterkeys. And both the Claimant and Mr Hamilton told us that the latter was genuinely worried about his prospects of getting the new role. Notwithstanding our misgivings about Mr Hamilton's evidence, we accept that that was so. That is inconsistent with him perceiving the job description of the new role as having been designed with him in mind, still less with any kind of unspoken 'nod and wink' that he would get it.

122 The Claimant did not help himself by not applying for the new role. In this dispute, scoresheets for the new role were disclosed. We were told, and accept, that these would have formed part of the decision as to who got the new role, had the Claimant applied. We will not prolong these already lengthy reasons by setting out the scoresheets in full, because they did not, in fact, have to be used. But the difference between the scores was only 4 points – the Claimant scored 37 to Mr Hamilton's 41. In evidence, the Claimant identified what the Respondent accepted to be an error in his scoring, which would have brought his score up to 40 points: a one point difference.

123 The Claimant was concerned that his requests for reasonable adjustments, time off that he would need for then-forthcoming surgery (since performed) meant that it was obvious that he would not get the job. But even a brief analysis of the score sheets brought him to within 1 point of Mr Hamilton. The Claimant was too ready to dismiss the job description as a sham and applying for it as a pointless endeavour.

Accessible toilet

124 In December 2021, the Claimant asked for a grab rail to be installed in the men's toilet. This was because of physical difficulties caused by his conditions in getting on and off the toilet. He was told it was to be done. It was not disputed that the Claimant's need for this was genuine.

125 It didn't happen. Instead, in February 2021, the Claimant was told that he would be using the female toilet, which doubled as an accessible toilet. This had a grab rail, and the Claimant did not contend that the physical facilities were inappropriate. He says this solution was not satisfactory because;

a) It was an inconvenience to female co-workers – related to this, he had heard female coworkers complain about a "*sweaty man*" having used their toilet when Mr Edmonds had had to use it;
b) He needed to use the toilet regularly, due to medication he was taking;
c) That up to 3 people – he said in his statement, in evidence the consensus seemed to be 2 people - at a time could use the men's

toilet, whereas only one at a time could use the female/accessible toilet;

126 A floor plan in the bundle showed the different toilets to be adjacent to one another.

127 It was not disputed that there are fewer women employed at the premises than men. There were 7 women.

128 The cost of adding a rail in the men's toilet probably was minimal. But against that, the Respondent already had on its premises an accessible toilet. What, one may wonder, is the point of that, if it is to be asked to make adjustments to the other toilet?

129 We are mindful of the complaints about Mr Edmonds that the Claimant says he overheard. But it is in the nature of the use of toilets that complaints about less than fragrant use of them are apt to be made.

130 The Respondent is a small business. It is required to make reasonable adjustments. But if the needs of the Claimant's conditions and the limitations they imposed upon him were reasonably met by existing facilities, it seems to us that no adjustment was reasonably necessary.

CCTV

131 The Claimant says, and it was not disputed, that he had access to viewing the Respondent's internal CCTV system for many years. At some point, this access was withdrawn. In February 2022, he asked if his access to the CCTV could be restored. The reasoning he explained in his statement was that the cameras allowed him to see if someone was at their desk, if he needed to contact them. This avoided unnecessary walking. He also said that it would allow him to see if the accessible toilet was occupied, as it was generally left with the door ajar when not occupied.

132 This request was refused. Mr Hamilton emailed the Claimant on 16.02.2022, saying:

Reference the request for cameras, you can not have the cameras on your computer. I understanding your reasoning for your request. If you are unable to reach somebody by phone, please drop them an email with a TM. This works the same for us in the workshop, should we need to contact you and you don't answer the phone, we will send you an email.

133 The Claimant seemed oblivious to the intrusion that him being able to see coworkers whenever it took his fancy, might constitute. Asked to address the Tribunal on how that might be weighed against the benefit to him, he was unable to do so.

134 Access to the CCTV would have brought some benefit to the Claimant. He would have been able to avoid some walking. But insofar as the toilet is concerned, there was always the possibility that someone might enter in the time between him leaving his desk, and him arriving at its door – another possibility that did not seem to have occurred to him until the Tribunal asked him about it. To contact coworkers, he had a telephone, although we acknowledge that he told us that the telephone system caused him difficulties. He had email. These days, email is a very common method of communication, to which we do not think the Claimant could reasonably object.

Chair

135 The OH report, to which we have already referred, said the following:

> *You may wish to consider reviewing his seating arrangements to ensure that an appropriately supportive ergonomic chair is available.*

136 The Claimant was happy with the chair that was provided, in 16.03.2022. But he complains that it took 58 days to source one.

137 When he initially requested the chair, Mr Hamilton suggested that he apply for an Access to Work grant. The Claimant took great exception to this, for reasons that he appeared to consider too self-evident to need explanation to us. It may be that this was an inappropriate suggestion, we simply have not been provided with the information from which we could decide that.

138 The Claimant, it seems to us, started to press for the provision of a chair from 10.02.2022. He himself allowed a period of time to elapse between the receipt of the OH report, and pursuing this. On 15.02.2022, Ms Winterson emailed the Claimant, saying that she would liaise with one Oliver about the provision of a temporary chair.

139 The Claimant was offered time off, on full pay, whilst waiting for a chair. He did not accept this, because, he told us, of his dedication to his work. We accept this as genuine, but it strikes us as unlikely that the Respondent would make this offer, and then unduly delay the sourcing of a chair.

Time

140 Although the Respondent contended that time was a live issue, it gave us no real assistance on the point, and but for a question from the Tribunal would not have addressed it at all in closing. It did not address us on the exercise of the discretion that exists under EA s123. On the question of acts extending over a period of time, or continuing acts, it contended initially that each act of which the Claimant complained should be viewed in isolation. It also suggested that a dividing point between different states of affairs might be the Claimant's surgery – a date that the Respondent did not know, and took place after his dismissal.

141 This lack of assistance was not satisfactory from a party that had the assistance of an independent HR consultant at the hearing. Rule 2 is directive – the parties and their representatives **shall** assist the Tribunal to further the overriding objective. Identifying issues as being in dispute, and then not giving the Tribunal assistance on their resolution, does not further the overriding objective.

Conclusions on the issues

Issue 2 – unfair dismissal

142 There is no dispute that the Claimant was dismissed.

143 We are satisfied that there was a genuine redundancy situation.

144 We are satisfied, on balance, that the Claimant's dismissal was because of the redundancy situation.

145 We are satisfied that the Respondent adequately warned the Claimant of the risk of redundancy, but we are not satisfied that it adequately consulted with him.

146 We are satisfied that the Respondent adopted a reasonable selection decision, including its approach to the selection pool.

147 We are satisfied that the Respondent took reasonable steps to find the Claimant suitable alternative employment.

148 The question of sanction posed in issue 2.5 does not seem to us to arise in the context of a redundancy dismissal.

149 Regarding the express challenges in issue 2.6, we find as follows:

(a) The alternative role was not effectively the same as the other at-risk manager;
(b) The Claimant was not dismissed because he had raised concerns, complaints and grievances;
(c) The pool composition was not too small;
(d) The issue at 2.6.5 this was no longer relevant as the individual concerned had resigned, and the business case evolved;
(e) The decision to dismiss the Claimant was not a foregone conclusion at the outset of the process, but it was one that had been reached by the time of the final meeting.

150 To the extent that the procedure followed by the Respondent was not fair, we think it is overwhelmingly likely that the Claimant would have been dismissed in any event, and at the date he was dismissed. The redundancy situation was genuine. Whatever other measures might be adopted, it seems to us to be nigh-on impossible to imagine that the Respondent would not want to eliminate what it saw as the inefficiency of having the two managerial posts occupied by the Claimant and Mr

Hamilton. The new post was genuine. The Claimant chose not to apply for it. In making that decision, he made his dismissal all but inevitable.

Issue 3 – protected disclosure

151 We are satisfied that the Claimant did make the disclosures mentioned in issues 3.1.1.1 and 3.1.1.2.

152 We are satisfied that those disclosures were disclosures of information.

153 We are satisfied that the Claimant believed the disclosures to be in the public interest, and that that belief was reasonable.

154 We are satisfied that the Claimant believed that the disclosures did tend to show a person had failed or was likely to fail to comply with the rules related to covid-19 and mask wearing, and that the health and safety of an individual or individuals was being or was likely to be endangered. His belief was reasonable.

155 There is no dispute that the disclosures were made to the Claimant's employer.

Issue 4 – dismissal ERA s103A

156 The making of the protected disclosures was not the principal reason for the Claimant's dismissal.

157 The Claimant did have two years' service.

158 The Claimant has produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosures.

159 The Respondent has proven its reason for dismissal, namely redundancy.

Issue 5 – detriment

160 On 12.02.2022;

A) Ms Winterson did respond to the Claimant's concern by saying words to the effect that they were not fining any people, which was dismissive;
B) The Claimant was told that he was obsessing about covid-19

161 Following the OH assessment, the Respondent;

A) Re the question posed by issue 5.1.3, the substantive issue is less that the Respondent failed to follow the recommendation that it review its covid-10 measures, but that Ms Winterson and Mr Hamilton actively undermined the measures that had previously been decided upon;
B) It is not disputed that the initial redundancy meeting was held immediately after the grievance appeal hearing;
C) The Claimant was put at risk of redundancy.

162 We consider that all of the above subjected the Claimant to a detriment.

163 We are not satisfied that any of the above steps were taken because the Claimant had made protected disclosures. The redundancy situation was genuine. The undermining of covid-measures was based on Ms Winterson's beliefs, not in any response to the Claimant. The timing of the initial redundancy meeting was the result of genuine – if no less lamentable for that – tactlessness and poor judgement.

<u>Issue 7 – discrimination arising from disability</u>

164 Regarding the question posed in issue 7.1.1, the Claimant said in his statement that this happened, but that he was subsequently reimbursed. This was not challenged, and we accept that this happened.

165 The Claimant's requests for reasonable adjustments were not ignored. Not all were granted, but not to grant a request is not the same thing as ignoring it;

166 The Claimant was selected to be at risk of redundancy, and was dismissed.

167 The above did not arise because of his disability, save for the incident in 7.1.1. He attributed this to his disability in his statement, and this was not challenged. But the redundancy situation and selection were genuine.

Issue 8 reasonable adjustments

168 The car parking spaces that were too narrow for the Claimant to be able to enter and exit his car did put him at a substantial disadvantage with someone without his disability, as did the men's toilet lacking means to assist him to get up from the toilet.

169 The lack of an ergonomic chair did put the Claimant at a substantial disadvantage, for the reasons posed in issue 8.2.

170 We are not satisfied that the lack of CCTV put the Claimant at a substantial disadvantage compared to someone without his disability. Such a person would have been happy to telephone or email colleagues, and would have appreciated the risk that someone might enter the accessible toilet whilst the Claimant was on his way there.

171 As to issues 8.4, 8.5 and 8.6

A) The Respondent could have installed a grab rail in the men's toilet, but it was not reasonably required to do so;

B) The Respondent could provide an ergonomic chair, and did so, within a reasonable time;

C) It does not seem to us that it was practically possible to provide the Claimant with a wide enough parking space. Steps were taken to address this when he had his blue badge, which were, in all the circumstances, reasonable;

D) The Respondent could have provided him with access to the CCTV, but it was not reasonable to do so.

Issue 9 - victimisation

172 The Claimant did raise a grievance on 01.04.2022, that there had been a failure to make reasonable adjustments.

173 The Claimant was selected as being at risk of redundancy, and dismissed.

174 In doing so, the Claimant was subjected to a detriment, but this was not because the Claimant had done the protected acts, for the reasons we have set out.

Time

175 The most economical way of dealing with the time point under the EA is for us to say that we would have no hesitation in exercising our discretion to allow the Claimant to bring any element of these claims that may be out of time. The Respondent's treatment of the Claimant, in its attitude towards his reasonable concerns about covid-19, and in relation to the timing of the first redundancy meeting, was poor. And the Respondent has simply not bothered to give us any reason why we should not exercise our discretion in his favour. He may be disappointed with some of our findings, but it seems to us that the Claimant is entitled to a ruling on the merits of his claims.

176 That said, it seems to us that all the things about which the Claimant complains, happened after 16.04.2021. We do not see, therefore, that any of the Claimant's complaints are prima facie out of time.

Remedy

177 The list of issues stated that the Claimant wished to be reinstated or reengaged. He did not advance arguments in support of this. Had he done so, we would not have thought either was practicable, given that he was dismissed because of a genuine redundancy situation.

178 The Claimant received a redundancy payment, the appropriateness of which was not in dispute, He therefore receives no basic award.

179 There was a significant amount of agreement as to the compensatory award. The Claimant had originally sought a compensatory

award extending to his 67th birthday. However, he modified that, limiting his claim to the date of the originally listed Tribunal hearing. He did not, before us, seek to claim beyond that date.

180 For its part, the Respondent accepted the accuracy of the calculations in the schedule of loss. These gave a net figure of £35,218.44.

181 The agreement as to the basis of the compensatory award was a silver lining to a very large cloud: the question of a *Polkey* deduction.

182 The Respondent contended that a deduction of 100% was appropriate, as it was inevitable that, had it acted fairly, the Claimant would have been dismissed.

183 The Claimant contended for a zero-percentage reduction. He relied on an email dated 05.11.2021, when Alex Baker had said to him:

> *Hi Steve*
> *Just wanted to back up what we spoke about earlier today after the MMT meeting.*
> *You wanted me to discuss the retirement age as in the Gem contract it states 65 years old as the retirement age. This is because it was printed before The national retirement age changed to 67. You will not be forced to leave when you reach retirement age but it is up to you if you wish to do so.*
> *The only thing we can ask of you, if you would like to stay employed until 67 that you can carry out your job role with all mental and physical faculties in- tact. Also just to answer the question of why you are not in the MMTmeeting. This is because we need to keep the amount of people attending as low as possible to minimise the impact on the trade counter and the phones. Any issues you might want to be discussed in the meeting please let Ewan (who is your line manager) know so he can bring this up. As Ewan is your line manage any issues you may have day to day please run them by him going forward.*

184 The Claimant contended that this email was an assurance that he would be able to work until he was 67.

185 The Claimant's argument on this was unrealistic. It ignores our finding that it was overwhelmingly likely that, had the Respondent followed

the proper procedure, he would have been dismissed in any event, on the date he was dismissed.

186 It was overwhelmingly likely. But it was not quite totally inevitable.

187 Had the Respondent followed a fair procedure, we think that the chances that it would have fairly dismissed the Claimant, are 95%. We therefore order that his compensatory award be reduced by 95%. That leaves him with a compensatory award of £1,760.92

Employment Judge David Hughes

Date 13.08.2024

REASONS SENT TO THE PARTIES ON
18 October 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE