THE INDUSTRIAL TRIBUNALS

CASE REF: 6347/20

CLAIMANT: **Aubrey Percy**

RESPONDENT: **Lenalea Electronics Limited**

JUDGMENT

The unanimous judgment of the tribunal is that all claims are dismissed.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr A Carlin**
Mr I Carroll

APPEARANCES:

The claimant was represented by Ms L Maguire, Barrister-at-Law, instructed by GCS Solicitors.

The respondent was represented by Ms E McIlveen, Barrister-at-Law, instructed by Rosemary Connolly Solicitors.

SUMMARY

1. The respondent is a small company which, at the relevant times, employed approximately 25 people and manufactured electronic components.

2. The claimant had been employed by the respondent for approximately three years before being made redundant following a redundancy selection exercise.

3. The claimant suffered from back pain and osteoarthritis. At the time of the selection for redundancy he had been absent on sick leave following a hip replacement. The respondent conceded that he had been disabled for the purposes of the Disability Discrimination Act 1995 ("the 1995 Act") at the time of the dismissal.

4. The claimant alleged that:

    "(i) He had been unfairly dismissed (unfair selection for redundancy) for the purposes of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order").

(ii) His selection for redundancy had been an act of unlawful discrimination on the grounds of his disability contrary to the 1995 Act and on the ground of his age contrary to the Employment Equality (Age) (Northern Ireland) Regulations 2006."

5. The claimant was clear that he was bringing no claim alleging disability-related discrimination or a failure to put in place reasonable adjustments contrary to the 1995 Act and that he was bringing no claim of unlawful victimisation under any legislation. The claimant had also originally brought a claim of alleged sex discrimination, contrary to the Sex Discrimination (Northern Ireland) Order 1976 but that was withdrawn.

The claim of unlawful discrimination was a claim alleging direct discrimination only.

RELEVANT LAW

Unfair Dismissal/Unfair Selection for Redundancy

6. Article 130(1) of the 1996 Order provides:-

"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 Paragraph (2); or

... ."

Article 130(2) of the 1996 Order provides:-

"A reason falls within this paragraph if it –

...

(c) is that the employee was redundant;

... ."

Article 130(4) of the 1996 Order further provides:-

(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or

unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

7. In ***Polkey v AD Dayton Services Ltd [1988] ICR 142***, Lord Bridge stated:-

> *"In a case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."*

8. In ***Langston v Cranfield University [1988] IRLR 172*** stated:-

> *"Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer."*

9. In ***Mugford v Midland Bank [1997] IRLR 208***, the EAT stated:-

> *"It will be a question of fact and degree for the tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee."*

Direct Disability Discrimination

10. Section 3A of the 1995 Act provides:

> *(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.*

Section 17A(1B) provides:

> *"Where, on the hearing of a complaint under subsection (1) the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal should uphold the complaint unless the respondent proves that he did not so act.*

Direct Age Discrimination

11. The Employment Equality (Age) Regulations (Northern Ireland) 2006 (the 2006 Regulations) prohibit discrimination on grounds of age unless it is justified. The initial burden is on the claimant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that an act of discrimination has occurred. If the claimant succeeds in proving such facts the burden shifts to the respondent to prove that any detrimental acts were in no sense whatsoever connected to the claimant's age or the protected act or acts.

In particular the 2006 Regulations provide at:

> ***"3.***—*(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —*
>
> *(a) on the grounds of B's age, A treats B less favourably than he treats or would treat other persons,… and A cannot show the treatment….to be a proportionate means of achieving a legitimate aim.*
>
> *(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other. …*
>
> ***7.***— *(2) It is unlawful for an employer, in relation to a person whom he employs at an establishment in Northern Ireland, to discriminate against that person— …*
>
> *(d) by dismissing him, or subjecting him to any other detriment. …*
>
> ***26.***—*(3) In proceedings brought under these Regulations against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description. …*
>
> ***42.***—*(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent—*
>
> (a) *has committed against the complainant an act to which regulation 41 (jurisdiction of industrial tribunals) applies; or*
>
> *(b) is by virtue of regulation 26 (liability of employers and principals) or regulation 27 (aiding unlawful acts) to be treated as having committed against the complainant such an act,*

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act."

Shifting Burden of Proof

12. In ***Frank McCorry and Others v Maria McKeith [2016] NICA 47,*** the Court of Appeal stated:

> *"The Shifting Burden of Proof.*
>
> *[35] While Ms McKeith did not advance a claim for disability related discrimination in relation to the period before the dismissal decision, her background treatment in the preceding months did inform the approach of the Tribunal in relation to the dismissal decision. The background included the requirement that Ms McKeith remain absent from work for periods to look after her disabled daughter. Had it arisen for decision, the Tribunal would have concluded that the previous treatment of Ms McKeith amounted to disability related discrimination (paragraph 132).*
>
> *[36] On taking into account that background and the evidence in relation to the dismissal of Ms McKeith, the Tribunal stated that "the shifting burden of proof is going to be crucial" (paragraph 136).*
>
> *[37] The Burden of Proof Directive (EEC) 97/80 was extended to the United Kingdom in 1998 and Article 4(1) provided –*
>
> > *"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them have established, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."*
>
> *[38] Section 17A(1B) of the 1995 Act provides –*
>
> > *`Where, on the hearing of a complaint under sub-section (1), the complainant proves facts from which the Tribunal could, apart from this sub-section, conclude in the absence of adequate explanation that the respondent has acted in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act.'"*
>
> *[39] The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in Wong v Igen Ltd (2005) EWCA Civ 142. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the Tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the*

employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.

[40] The issue was revisited by the Court of Appeal in England and Wales In Madarassy v Nomura International plc [2007] EWCA Civ 33 which set out the position as follows (italics added) –

> *"56. The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent `could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal `could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. `Could conclude' [in the Act] must mean that `a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.*
>
> *58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the Tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the*

treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

[41] The Tribunal was satisfied that Ms McKeith had established a prima facie case that she had been directly discriminated against because she had been the primary carer of her disabled daughter (paragraph 147). The Tribunal then found that the Ardoyne Association had not put forward any convincing or coherent explanation for its decision to make Ms McKeith redundant (paragraph 148). It was accepted on the hearing of the appeal that, if this was a case where the burden of proof shifted to the employer, there had not been a sufficient explanation. Accordingly, the challenge was concerned with whether the evidence before the Tribunal was such that a prima facie case of associative direct discrimination had been made out.

[42] In this regard the Tribunal set out a number of facts which concerned Ms McKeith having been sent home on previous occasions because of her disabled daughter, Ms Burns' belief that she should be at home with her disabled daughter, the reluctant piecemeal and incomplete nature of discovery, the other two persons who were made redundant at the same time were first re-engaged as volunteers and then rehired, the evasive and unconvincing evidence of the Manager and the non-compliance with statutory dismissal procedures. The Tribunal stated ". If this is not a case where the burden of proof should shift, no such case exists" (paragraph 147).

[43] We are satisfied that, as outlined by the Tribunal, there was such evidence of a difference in status, a difference in treatment and a reason for differential treatment that, in the absence of an adequate explanation, a Tribunal could conclude that the employer committed an unlawful act of associative disability discrimination. The burden on the Ardoyne Association was not discharged. It followed that the Tribunal would find disability discrimination.

[44] We are not satisfied on any of the appellant's grounds of appeal. The appeal is dismissed."

PROCEDURE

13. This case had been case managed and detailed directions had been given in relation to the interlocutory procedure and the witness statement procedure.

14. Each witness swore or affirmed and then adopted their previously exchanged witness statement as their entire evidence in chief, before moving on to cross-examination and brief re-examination.

15. The claimant gave evidence on his own behalf, in an original witness statement and a replying witness statement prepared by him after sight of the respondent's witness statements. The claimant called no other witnesses.

16. The two Directors of the respondent company, Mr David Foster and Mr Simon Pollock gave evidence on behalf of the respondent, together with Mr Conn Mulholland who was a consultant with an independent accountancy firm.

17. The tribunal heard evidence on Monday 9 August and Tuesday 10 August 2021. Oral submissions were heard on Wednesday 11 August 2021 and the panel met immediately thereafter and separately on 2 September 2021 to reach the decision. This document is the decision.

RELEVANT FACTS

18. The claimant did not go through a formal recruitment or interview process with the respondent company to obtain employment in 2016. He had asked Mr Simon Pollock whether there had been any vacancies. Following that approach, the claimant met with Mr Pollock and Mr David Foster.

19. The claimant had retired from previous and entirely unrelated employment. He was in receipt of a significant pension. The claimant's motive in securing employment with the respondent company was to *"get me out of the house"* and *"provide a focus"*.

20. At that point in 2016, the claimant had been engaged in a manual job in building and maintenance work in a project which had been coming to an end. There had been no suggestion that the claimant had experienced any difficulty with that manual employment. The business of the respondent company had been increasing and they were in a position to offer the claimant further employment.

21. The claimant did not refer to any disability or even to any medical condition in the course of this informal interview and did not suggest that there had been any restriction on his ability to carry out duties either specifically in relation to his work as an electronic assembly technician or more generally in respect of any reasonable instruction to do other work. Given the claimant's employment history, and the nature of his current employment at that stage, Mr Pollock and Mr Foster had had no reason to regard the claimant as either disabled for the purposes of the 1995 Act or as suffering from any medical condition.

22. Following that informal interview, the claimant was employed as an electronics assembly technician from 12 December 2016. Although the tribunal was not directed to the claimant's contract of employment, both parties agreed that the contract of employment had made it plain that, in addition to specific duties as an electronics assembly technician, the claimant would be required, from time to time, to carry out other reasonable duties as required by the respondent.

23. The original employment had been on a five day week, full-time basis. In April 2018, at the claimant's request, his contract was varied by the respondent to allow for a four day working week with reduced hours.

24. The respondent company, at the relevant times, had employed approximately 25 individuals. Having read the witness statements and having observed the cross-examination and re-examination of the witnesses, the tribunal is content that it had been usual for employees, including even the two Directors and owners of the business, to perform maintenance, gardening or building work outside the

scope of their normal duties from time to time. It had been a small, growing company and, particularly in the context of the move to new premises in or around 2018, that had been part of normal working life.

25. For example, Mr Foster, one of the two Directors, who had poor eyesight and had been registered as blind, still regularly performed such duties. In his case, taking into account his disability, those duties had included tasks such as oiling hinges, bleeding radiators and general lifting and carrying.

26. Mr Pollock, the other Director, had performed heavier tasks on a regular basis and had been in the habit of attending the company premises at weekends to do so in the company of another employee.

27. The claimant had been tasked from time to time in the early part of his employment to conduct various maintenance, gardening or building jobs. However the tribunal, after hearing the witnesses, is content that such requests were intermittent at best and that the claimant had worked for the vast majority of his time as an electronic assembly technician working on cables and circuit boards at a bench.

28. The claimant complains in particular that he had been asked to conduct deliveries and *"heavy lifting"*. However it is clear that the products and components which had to be lifted and moved by the claimant were relatively light in weight and would not have exceeded five kilograms. He also complains that, at the time when the respondent company moved to a new factory, he had been asked to move machinery and heavy equipment. It seems clear that this was a request made to all members of staff during that move and that the claimant had not been requested to move any heavy item manually. The company had possessed a forklift truck and several pallet trucks. The claimant also complains that he had been asked in and around 2018 to erect signs and to erect a water pipe at the front of the factory building. That had required a certain amount of digging through a thin layer of tarmac. The claimant had been accompanied by another employee who had also been temporarily moved from his ordinary duties. That employee had been younger than the claimant. It had been up to the claimant and the other employee to decide who did what task. The same day, the claimant had been asked to weed around the factory perimeter.

29. On the following day, the claimant had been asked to erect relatively lightweight sheets of insulation against a roller door to reduce the heat that had been entering the building during a particularly hot spell. He told the Health and Safety Officer, Mr Stephen McDowell that he had been experiencing back pain and that he was not fit to conduct that task. He wrote an email with the Health and Safety Officer to Mr Pollock and Mr Foster highlighting that problem. He stated that he did not wish to continue with maintenance or building jobs.

30. The claimant alleges that shortly thereafter Mr David Foster approached him and stated that *"if we had known about your issues, we would not have employed you, you can carry on making cables."* Mr Foster denies that allegation. The tribunal does not find the claimant's allegation credible.

31. In the first place, Mr Foster had himself been disabled at that point, having been registered as blind. It is highly unlikely that an individual with a particular protected characteristic, such as disability, would discriminate against another individual with

the same protected characteristic in the manner alleged, or at all. In ***Chief Constable v Sergeant A, [2000] NICA 48*** the Court of Appeal looked at a situation where it had been alleged that an officer who had possessed a protected characteristic had discriminated against another officer who had possessed the same protected characteristic. It stated:

> *"This is on its face so extraordinary a proposition that one must look for some evidence to support it or some compelling reason why it might be accepted."*

It further described this as *"a remarkably unlikely conclusion."*

It is also not credible, given the relatively low level of building or maintenance duties required of the claimant, that such a remark would have been made or that Mr Foster would have reached that view. Such duties had not been an important part of the claimant's employment. The claimant had worked for the overwhelming majority of the time as an electronic assembly technician.

Furthermore, having observed the claimant give evidence and, in particular, respond to questioning, the tribunal does not find it remotely credible that the claimant had decided to accept such an outrageous remark (if it had been made) and to sit back and do nothing. The tribunal does not accept the claimant's evidence that he had been content to go back to his bench and to continue with his electronic assembly work without taking that matter further. Turning the other cheek is, no doubt, a virtue but in this case it seems highly unlikely. The allegation appears to have first been made by the claimant in his detailed letter of appeal of 13 December 2019, some 18 months after it is alleged the remark had been made in May 2018.

In short, the tribunal does not accept that this allegation was truthful and that has implications for the tribunal's assessment of the claimant's credibility.

32. The respondent held a Support and Supervision meeting with the claimant on 13 December 2018. The claimant did not raise any health difficulties, did not allege that he had been disabled and did not allege that Mr Foster had made the alleged remark in May 2018. He stated that he had *"no problems with the job."*

33. The claimant also complains that in early 2019, at least seven months after he had been asked to put up the insulation sheets, he had been asked to install soap dispensers and toilet roll holders in the women's toilets in the factory. Those duties had been entirely in accordance with the claimant's contract of employment and did not in any way involve work which would have been more physically demanding than the claimant's ordinary duties as an Electronic Assembly Technician.

34. The claimant then complained that, again in early 2019, he had been instructed to erect scaffolding, including scaffolding planks and to load some blocks. The scaffolding work required the erection of two trestles. The claimant alleges that he had also been required to chisel off plaster and cement from a wall. He states that at this point he complained to Mr Pollock that he had been one of the oldest employees and suffering from a disability.

That allegation was denied by Mr Foster in cross-examination and was never put in cross-examination to Mr Pollock.

The tribunal concludes that the claimant carried out these duties but that he raised no complaint at the time. The respondent had no reason at this point to believe that the claimant had been disabled for the purposes of the 1995 Act. It knew that he had complained on one occasion, some seven months, earlier of back pain after one bout of manual work. In particular, he did not state that he had been the oldest employee or that he suffered from a disability.

35. On appointment the claimant had had absolutely no experience in electronic assembly or indeed in factory work. His previous employment had been entirely unrelated. In March 2017, the respondent arranged for the claimant to attend an IPC course in electronics assembly. The claimant completed that course. That course had been both a practical and theory course involving all aspects of the claimant's work in relation to electronic assembly.

36. That qualification was not a legal requirement before an employee could be engaged in this area of work. In fact, the claimant had already worked as an electronic assembly technician for some three months before undertaking the IPC course.

37. The normal practice was for that qualification to be renewed every two years with a much shorter theory rather than practical course. That was described by the two Directors of the respondent company, in unrebutted evidence, as not necessary and simply a *"marketing tool"* which would enable the respondent company to indicate to prospective customers that current employees had both the basic qualification and the relevant renewal certificates.

38. The claimant was not placed on a renewal course in March 2019. The respondent company had been particularly busy at that time. Other employees who had recently been appointed were put forward for the basic IPC qualification in the same way as the claimant had been after his appointment. The claimant, for the purposes of comparison, could not point to any employee engaged as an electronics assembly technician who had been put forward for a renewal qualification at that time when the claimant had not been put forward for that renewal qualification.

39. As indicated above, the claimant had not raised any issue of disability or ill health on his recruitment. He states that he had time off for steroid injections in his hip in June 2017 and sought to argue that this automatically meant that the respondent company had been aware at that point that he had been disabled. The tribunal does not accept that argument. In the collective experience of the tribunal, it is not uncommon for employees to receive injections or physiotherapy or some form of medical treatment for conditions such as back pain or frozen shoulder or aches and pains generally. That does not mean, and cannot mean, that in such circumstances an employer is fixed with the knowledge, not just of the nature of the particular medical condition involved, but that that medical condition at that time satisfied the statutory requirements of the 1995 Act. It cannot be argued that simply because an employer is aware at one point, or even at several points, that an employee has had contact with a healthcare professional, that that employer must know that the employee was disabled.

40. The claimant alleges that in May 2018 he had made Mr Pollock aware that he had *"severe lower back pain and hip problems"*. The tribunal concludes that he had stated at that particular time that he had suffered from back pain after one bout of manual work. However he had not alleged that he had suffered from any disability or from any chronic condition. That complaint of back pain on that occasion, even combined with knowledge of an injection on one or more occasions does not mean that the respondent was fixed with knowledge of disability within the meaning of the 1995 Act.

41. In June 2019, after a period of negotiation with the largest customer of the respondent company, Mr Foster and Mr Pollock came to the conclusion that they would eventually lose that contract with effect from the end of 2019. The reduction in workload was anticipated to be over 50% and that had obviously serious implications for the workforce and indeed for the survival of the company.

42. In early September 2019, the claimant informed the respondent that he was going for a hip replacement in the middle of October. On 9 October, the claimant was approached by Mr Foster and Mr Pollock shortly before he went off on sick leave to have that operation. In the course of that conversation, the Directors asked him what his plans were. The claimant, in his argument to this tribunal, but not at the time, took serious exception to such an enquiry. However, given the uncertainty of not just the outcome of such an operation but the duration of any recovery period, the tribunal concludes that it had been entirely reasonable for the respondent company to ask the claimant in such circumstances what his intentions had been. Furthermore, the tribunal accepts the evidence of Mr Foster and Mr Pollock that they had heard gossip to the effect that the claimant did not plan to return after his operation to work for the respondent company. It had been an entirely innocent and proper request and did not, as the claimant now alleges, indicate that the respondent had in any way decided to get rid of the claimant.

43. Mr Pollock and Mr Foster initially tried to identify new customers who might replace, at least in part, the volume of work that was about to be lost. Those efforts proved unsuccessful and in late September 2019, Mr Pollock and Mr Foster approached the accountancy firm which employed Mr Mulholland to get further advice in relation to the appropriate redundancy process. The respondent company had not conducted any such process before. Following an initial telephone call between Mr Foster and Mr Pollock and Mr Mulholland, a meeting was arranged between the three individuals in the offices of the accountancy firm on 9 October 2019. Mr Mulholland gave Mr Foster and Mr Pollock appropriate advice including a flowchart based on the LRA Guidelines. Alternatives to redundancy were discussed. The numbers of people who might have to be made redundant and the selection criteria were also discussed.

44. Subsequently, Mr Mulholland met with the internal accountant Ms Smith and with the production manager Mr Mulholland on 17 October and 22 October respectively, to collect appropriate data for use in relation to standard redundancy criteria.

45. The claimant sought to argue that, in some way, the collating of that information in advance of the final settling of the criteria, had been sinister in some respect and he argued in particular that this indicated that the criteria had been selected as a result of that information to specifically target the claimant. When it was put to counsel for

the claimant that it would be appropriate, given the nature of that argument, for the particular criterion or criteria which had allegedly been chosen to target the claimant to be identified and in particular for any departure from standard industry criteria or indeed from the LRA Guidelines to be identified. That was not done.

46. Mr Mulholland met Mr Foster and Mr Pollock again on 31 October 2019 to discuss progress.

47. A further meeting took place on 19 November 2019. Mr Foster and Mr Pollock agreed that the redundancy pool should be the production area which contained the claimant and that six redundancies were needed. The redundancy criteria were settled. Those criteria were:

    (i) Skills/qualifications.

    (ii) Attendance.

    (iii) Time Keeping Record.

    (iv) Disciplinary Record.

    (v) Performance.

    Each criterion received one, two or three marks. In general terms, one mark was "*poor*"; two marks "*average/good*" and the three marks "*excellent*".

48. At a further meeting on 25 November 2019, Mr Foster and Mr Pollock decided to implement the redundancy procedure. It was decided to inform all staff at an initial meeting on 26 November 2019. Since the claimant was then on sick leave following his hip operation, it was decided to inform him by telephone immediately after the meeting with all staff then in the workplace.

49. The initial meeting with staff took place on 26 November 2019. Mr Foster, Mr Pollock and Mr Mulholland conducted the meeting. The loss of the contract was explained together with the consequent impact on the company. The production area containing the claimant would be affected and redundancies would be required.

    The redundancy process, including consultation and individual meetings, was outlined. Individual letters were handed out to each affected employee.

50. After that initial meeting, Mr Foster, Mr Pollock and Mr Mulholland spoke to the claimant in a teleconference call. The claimant was invited to an individual meeting. The claimant did not mention disability or the remark which he alleges Mr Foster made on 28 May 2018.

51. The individual meetings with affected staff, including the claimant, took place on 26 November and 27 November. The meeting with the claimant took place on 27 November.

52. Mr Foster, Mr Pollock and Mr Mulholland were present at the individual meeting with the claimant. He was told in detail of the process and of the right to appeal any decision.

Alternatives to redundancy, including short-time working, were discussed but the respondent indicated that they would not be satisfactory. The claimant did not mention either disability or the remark which he alleges Mr Foster made on 28 May 2018.

53. The scoring exercise was completed by 28 November 2019. The claimant complained only of his scores under two criteria: skills/qualifications and performance. In the absence of a formal appraisal system, the scoring in relation to skills/qualifications and in relation to performance was informed by the Production Manager's assessment and the assessment of Mr Foster and Mr Pollock. That process was necessarily subjective but, even if a formal appraisal system had been in place, that would still have been the case.

No account was taken of either the non-renewal of the claimant's IPC qualification, or of his absence on sick leave following his hip replacement.

54. Five staff in the redundancy pool were selected for redundancy, including the claimant. They were informed of their selection on 28 November 2019.

55. The claimant who was still absent on sick leave, was informed of his selection in a teleconference call on that date by Mr Foster and Mr Pollock. The claimant was not happy with that decision. A meeting was arranged for 4 December 2019.

56. The claimant met with Mr Foster, Mr Pollock and Mr Mulholland on 4 December 2019. It is clear that the claimant had been visibly angry and that the meeting had been tense and uncomfortable. The claimant alleged that he had been targeted for redundancy and that Mr Foster and Mr Pollock had simply wanted to get rid of him. However, he did not refer to the remark that he later alleged had been made by Mr Foster. He was reassured that, in relation to the scoring for skills/qualifications, his IPC training had been treated as current. The redundancy process, the scoring, the need to make redundancies and alternatives to redundancy were discussed. The claimant was reminded of his right to appeal. He stated that he would not appeal. His redundancy selection was confirmed.

57. The claimant lodged a letter of appeal on 13 December 2019. The claimant, in summary, alleged that he had been unfairly dismissed and that he had been discriminated against on ground of age, disability and gender. The latter argument has been abandoned. The claimant also argued that there had not been a redundancy situation. That argument has also been abandoned.

58. The claimant queried why he had not been given a copy of the scoring matrix with the redundancy letter but accepted that he had been given it later on 5 December 2019.

59. The claimant queried the notice period which would have impacted on his statutory redundancy calculation. That issue was resolved.

60. The claimant stated he had been the oldest person in the redundancy pool and that he had been selected. That necessarily meant that the other four employees selected for redundancy were younger than him: one was slightly younger but also age 56, one was 12 years younger, one was 16 years younger and one was 22 years younger.

61. The claimant also argued that he had been a trainer. That is simply incorrect. He had never been an IPC accredited trainer. As an existing employee, he might have shown recent employees where items had been stored etc but he had never been a trainer.

62. The claimant argued that two other employees had been selected for fire warden training and he had not been selected. However that had occurred when the claimant had been absent on sick leave and he would not have been available for selection.

63. The criteria, Skills/Qualifications, Experience, Attendance, Timekeeping, Disciplinary, and Performance each received a separate score between 1 and 3.

    The claimant complained only in relation to his scores for Skills/Qualifications and for performance.

64. The claimant was scored two for Skills Qualifications and two for Performance, with a total score of 15.

    A score of two was an average/good score.

65. The claimant argued that he should have received a score of 2.5 or 3 under either or both selection criteria.

66. Detailed notes on the scoring matrix in respect of individual employees referred variously to:

    (i) the employee being unco-operative;

    (ii) below average performance;

    (iii) the employee being unproductive;

    (iv) the employee making frequent mistakes;

    (v) the employee requiring frequent management;

    (vi) the employee doing important work;

    (vii) the employee's skills increasing;

    (viii) the employee being considered competent in all aspects of the role.

    These notes informed the individual scores given to each employee.

67. The notes in respect of the claimant stated that he lacked competency in crimping *"which is considered critical skillset".* It seems clear that the claimant, after those difficulties had become apparent, had not been given such work.

It was further noted that the claimant had *"below average productivity".* The claimant accepted in cross-examination that he had probably been slower than the others.

It was further noted that the claimant required a lot of management/supervision and that he had been disruptive to the productivity of other staff.

68. The claimant particularly complained about the scores given to Jekaterina Styozkina. That employee had had significant relevant experience with different employers here and in Latvia.

The notes in respect of her stated:

> *"Recent Employee. Made great advances. Picks up everything willing to stay to get job done. Above average high end productivity range – little supervision required – no quality issues."*

Ms Stjozkina was scored 2.5 for Skills/Qualifications and 3 for performance, with a total score of 17. She was not selected for redundancy.

69. The claimant also referred to Almarie Carr. She had also been a recent employee. The notes recorded:

> *"Competent skills for length of employment. Willing to work – little supervision required. No staff management issues – No quality issues."*

Ms Carr was scored two for Skills/Qualifications and three for Performance, with a total score of 16. She was not selected for redundancy.

70. The claimant also referred to Jonathan McEvoy. The notes in respect of him recorded:

> *"Recent employee. Good competent skills. Little supervision required – no staff management issues – no quality issues.*

Mr McEvoy was scored two for skills/qualifications and three for performance, with a total score of 16. He was not selected for redundancy.

71. An agency employee was not included in the redundancy selection process for obvious reasons.

72. The effective date of the claimant's redundancy was 5 December 2019.

73. The appeal was heard by Mr Kevin Jennings an accountant from a practice in Newry. He met the claimant, Mr Foster and Mr Pollock. The appeal was dismissed.

74. Nothing further of significance occurred before the claimant lodged his tribunal proceedings.

75. A further side issue emerged in relation to holiday pay. The argument in relation to this point appeared confused and contradictory and at the end of the hearing the tribunal was confused as to what the issue was in relation to the holiday pay calculation. Nevertheless it was made plain on behalf of the claimant that the allegation, whatever that allegation was, in relation to holiday pay was not an allegation of unlawful discrimination but simply an indication of how the respondent allegedly viewed the claimant. On that basis, the tribunal needs record nothing further in relation to that point other than the respondent company agreed to pay the claimant £320.23 in respect of holiday pay even though it maintained it had not been legally required to do so.

DECISION

Unfair Dismissal/Unfair Selection of Redundancy

76. The unanimous decision of this tribunal is that the respondent company had been facing a genuine redundancy situation which had required a significant reduction in its workforce. It had lost its major customer with effect from December 2019. Its efforts to find alternative sources of business had been unsuccessful. While the claimant had initially sought to challenge the existence of a redundancy situation in his internal appeal, that is a matter which was not pursued at the tribunal.

77. The respondent determined that the workforce needed to be reduced by six employees but when one employee departed for other reasons, the number of redundancies had been reduced to five.

78. The redundancy pool was the production area which had contained the claimant. The choice of that particular pool was not challenged by the claimant before the tribunal. In any event, having heard the evidence, in particular the evidence of Mr Foster, the unanimous decision of the tribunal is that the choice of pool had been correct and indeed that there was no reason for the tribunal to doubt that the need for five redundancies was correct.

79. The redundancy selection criteria were perfectly standard and conformed to LRA Guidance. Although the claimant pursued, at some length, an argument before the tribunal that these criteria had been specifically chosen to target the claimant, the claimant had been unable to identify which criterion or criteria had been chosen for that purpose. A great deal of time was spent pursuing an argument which was utterly groundless.

80. The respondent company had engaged in genuine and reasonable consultation with all the employees; both in a general meeting with all staff and then subsequently on an individual basis with staff in the redundancy pool. There were further meetings, including a particular meeting between Mr Foster, Mr Pollock, Mr Mulholland and the claimant.

81. Alternatives to redundancy were discussed. Those conclusions were ruled out on reasonable grounds.

82. The redundancy scoring exercise had been conducted fairly. The claimant had relatively long service but this was not a *"last in, first out"* situation. The use of such a criterion in redundancy selection is now relatively unusual and causes its own potentially discriminatory difficulties. In relation to the skills/qualifications criterion, the respondent did not reduce the claimant's scoring to reflect the non-renewal of his IPC qualification. The non-renewal of that qualification seems to be his primary source of complaint in this area. In relation to the performance criterion, it is clear that the claimant's performance had not been as good as that of some of his colleagues, including those colleagues who had not been selected for redundancy. In particular he had had difficulties with management and particular difficulties in micro-crimping and crimping generally. The claimant also accepted in cross-examination before the tribunal that he had been slower than his colleagues.

83. The respondent has demonstrated that the reason for the claimant's dismissal had been redundancy; a potentially fair reason for his dismissal for the purposes of the 1996 Order.

84. The redundancy procedure had been both careful and fair. It had also complied with the three step statutory procedure required by legislation where an employee is dismissed.

85. This had been a fair dismissal for the purposes of the 1996 Order and the claim of unfair dismissal is dismissed.

Age Discrimination

86. The claimant appeared to be annoyed that the respondent had recruited some employees during 2019 to complete its outstanding orders, particularly with the customer whose business it had lost with effect from the end of 2019. That had been necessary for the respondent company to complete those orders in accordance with its contractual obligations.

87. The claimant objected to the fact that some younger individuals were not selected for redundancy. He repeated that he had been the oldest person in the pool and he had been selected for redundancy. That argument meant of necessity that every other person selected for redundancy had been younger than him; in two cases considerably younger than him. In such a small statistical pool, the fact that the claimant was the oldest person in that pool is not sufficient evidence to enable a tribunal to reasonably conclude that age discrimination had occurred.

88. The onus of proof in this matter has not shifted to the respondent. There would have to be some prima facie evidence of unlawful age discrimination. There was none.

89. The reality was that the respondent company, in a difficult situation, did its best to apply a redundancy procedure fairly and to take into account, not the age of any individual employee, but their proper scoring against the selected criteria.

90. The claimant raised in particular the fact that his IPC qualification had not been renewed after two years. However that renewal is not a legal requirement. The non-renewal had not been reflected in his redundancy scoring. The respondent company had been busy at the time fulfilling existing orders and looking for other

work. It had concluded that the renewal of the IPC Certificate was no more than money making operation for the company running that certification. It would have been renewed in due course if the claimant had remained in employment.

91. The redundancy scoring exercise had been uninfluenced by age. The claimant had simply been less skilled and had not performed not as well as those employees who were not selected for redundancy.

92. The claimant had been intermittently asked to do other duties in accordance with his contract. That had been asked of other employees including Mr Foster. There was no evidence that this had had anything to do with his age.

93. The core of the claimant's argument appear to be, although it was never fully articulated as such, that "*last in, first out*" should have determined the outcome. That of course cannot be the case. He also appeared to argue that because there had not been a formal job appraisal scheme in operation, any assessment of performance in particular but also any assessment of skills would necessarily have been subjective and therefore wrong. The reality of course is that any such assessment, either through a formal appraisal system or through an ad hoc assessment would be subjective in nature. It cannot be the case, as the claimant appeared to argue at one point before the tribunal, that he should have been given a blank scoring matrix so that he could have suggested his own scores. In short, the onus of proof has not shifted to the respondent because there is no prima facie evidence of age discrimination before the tribunal and the claim of unlawful age discrimination is dismissed.

Disability Discrimination

94. The tribunal is satisfied that the claimant, at the time of his dismissal had been disabled for the purposes of the 1995 Act. The tribunal is also satisfied that the respondent would have known of that disability at the point where the claimant had indicated that he was going on sick leave for the purposes of a hip replacement operation. However before that point, there is no convincing evidence that the claimant had told the respondent that he had at any point been disabled. Furthermore, there is nothing which would reasonably have alerted the respondent company to that fact.

95. That issue is, in any event not determinative of the decision of the tribunal in this respect. Whether or not the respondent had been aware of the claimant's disability at any earlier stage, the onus of proof in relation to disability discrimination, or indeed for disability related discrimination has not shifted to the respondent. There is no prima facie evidence that he had been treated badly because of his disability or for disability-related reasons.

96. The claimant alleged in particular that Mr Foster had made a particularly discriminatory remark to him in or around May 2018. For the reasons set out above, the tribunal does not find that allegation credible.

97. The claimant had intermittently been asked to do other work that did not fall within the duties of an electronic assembly technician. However that other work had been infrequent, had complied with his contract and had been asked of other employees

including Mr Foster and Mr Pollock. There was no evidence of the claimant being singled out on the ground of disability or disability-related reasons.

98. There is no prima facie evidence of any other alleged act of discrimination.

99. The claimant's scoring in respect of the redundancy selection exercise had not been affected by his disability or by disability-related reasons. His absence on sick leave for the hip replacement operation had not influenced his score. That absence had been ignored.

100. The claim of unlawful discrimination on the ground of disability or, if it had been made, on the ground of disability related reasons, is dismissed.

Summary

101. All claims are dismissed.

Vice President:

Date and place of hearing: 9, 10 and 11 August 2021, Belfast.

This judgment was entered in the register and issued to the parties on: