THE INDUSTRIAL TRIBUNALS

CASE REF: 625/21

CLAIMANT: **Richard Linton**

RESPONDENT: **FP McCann Ltd**

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 N Jones

APPEARANCES:

The claimant appeared in person and was unrepresented.

The respondent was represented by Mr B Mulqueen, Barrister-at-Law, instructed by Millar McCall Wylie Solicitors.

BACKGROUND

1. The claimant had been employed as a production operator between 5 January 2015 and 22 September 2020. He had resigned his employment by letter on 10 September 2020, giving one week's notice.

2. The relevant part of the respondent's operations was the manufacture of pre-cast concrete drainage systems including manhole covers and pipes. The claimant had been employed operating various machines manufacturing those systems.

3. The claimant suffered from health difficulties from approximately 2016 onwards.

4. In his claim to the tribunal, the claimant alleged:

   (a) That he had been constructively and unfairly dismissed contrary to the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order).

   (b) That he had been disabled for the purposes of the Disability Discrimination Act 1995 (the 1995 Act) in the relevant period between 2016 and his resignation in 2020.

(c) That the respondent had failed to put in place reasonable adjustments contrary to the 1995 Act.

(d) That the respondent had directly discriminated against the claimant on the ground of his disability contrary to the 1995 Act.

(e) That the respondent had unlawfully harassed the claimant contrary to the 1995 Act.

(f) That the respondent had unlawfully victimised the claimant as a result of a protected act contrary to the 1995 Act.

(g) That the respondent had unlawfully subjected the claimant to a detriment because he had raised health and safety concerns contrary to the 1996 Order.

PROCEDURE

5. The claimant lodged his IT1 on 21 November 2020. He was represented by MKB Law who drafted that claim form on his instructions. That claim form was not amended.

6. That claim form identified the type of complaint that the claimant wished to make as:

"Discrimination – disability

Unfair Dismissal

Health and safety detriment – victimisation."

7. In that claim form the claimant identified the medical issues which he alleged had meant that he had been disabled for the purposes of the 1995 Act as:

(a) Night sweats.

(b) Chronic fatigue.

(c) Pins and needles in hands, arms and legs.

(d) Light-headedness.

(e) Dizziness.

8. The claimant raised a series of complaints about the respondent but it was sometimes unclear what statutory claim or claims he was making in relation to each such complaint.

9. The claimant alleged that lighter duties had been recommended by his GP and had not been provided promptly. He alleged that he had been pressured to work harder and that he had been moved to other Departments without risk assessments and that there had been a failure to put in place reasonable adjustments.

10. The claimant also alleged that he had been notified that he was *"selected for redundancy".* The claimant further alleged that no proper process had been followed in relation to this *"selection"*. The claimant asserted that this selection was discriminatory *"based on his medical issues"* and that when he challenged the respondent on this, *"the respondent did not proceed with compulsory redundancy".* All of that necessarily implies that the respondent had decided to make the claimant redundant, had communicated that decision to him and had then, when challenged, changed its mind.

11. The claimant further alleged that on 7 July 2020 he had lodged a grievance and had notified in that grievance that his health had deteriorated as a result of the treatment of the respondent and the failure to make reasonable adjustments. The claimant alleged that this grievance was a protected act and that he had been victimised as a result of that protected act, including by the respondent's failure to respond to that grievance. All of that necessarily implied that a clear and formal grievance had been made on that date, that it had raised those issues as a grievance and that it had been ignored by the respondent.

12. The claimant further alleged that he had been subject to disciplinary sanctions, because he had been absent from work for health reasons, that he had been given a verbal warning and a written warning in July 2020 for that reason and that correct procedure had not been followed in relation to those sanctions. He alleged that these sanctions had been related to his disabilities and were therefore discriminatory. The claimant further stated that he had informed the respondent during a meeting that he *"was diagnosed with chronic fatigue syndrome"*.

13. The claimant also alleged that he had lodged an appeal against those disciplinary sanctions on 24 July 2020, that this appeal was also a protected act, and that he had been victimised as a result of that protected act, including by the respondent's failure to process that appeal.

14. The claimant further alleged that on 21 July 2020 he had attended a meeting with the HR Manager, Mrs Greer-Sayer, who had commented to the claimant about his father, saying *"ole boy lying at home raring to go and the young boy stuck on the sofa"*. He alleged that Ms Greer-Sayer and the claimant's manager Mr O'Kane had laughed at this remark. He alleged that this remark had been harassment on the ground of disability.

15. The claimant further alleged that in the same meeting on 21 July 2020 he had been pressurised by Ms Greer-Sayer and by Mr O'Kane to undertake forklift truck work in another Department.

16. On 22 July 2020 the claimant sought voluntary redundancy from the respondent. He alleged that, during a meeting on 30 July 2020 to discuss that application, he had been told that he would need to work five full weeks' notice before his voluntary redundancy and that he would not be permitted to have sick leave during that notice period. He further alleged that he had been subjected to *"false accusations"* that he had been working elsewhere while on furlough.

17. The claimant further alleged that he had been subject to detrimental treatment for raising health and safety concerns, although it is not clear which of his alleged statements to the respondent related to this ground.

18. The respondent lodged the response on 8 January 2021 denying those claims.

19. The claim was case managed on 9 June 2021. The parties were directed to lodge an agreed statement of the precise legal issues for determination and were issued with directions in relation to the interlocutory procedure and the witness statement procedure. The hearing of this case was listed for 24-28 January 2022, 31 January 2022 and 1 February 2022 at Adelaide House. The claimant had been represented by MKB Law during this Case Management Preliminary Hearing. The respondent had been appreciated by Millar McCall Wylie.

20. On 18 October 2021 MKB Law lodged agreed legal and factual issues on behalf of the claimant.

21. Those issues did not identify, with sufficient clarity, the precise incidents in respect of which the claimant was alleging each of the following breaches of statute:

    (a) a failure to make reasonable adjustments contrary to the 1995 Act;

    (b) direct discrimination contrary to the 1995 Act;

    (c) harassment contrary to the 1995 Act;

    (d) victimisation contrary to the 1995 Act;

    (e) unlawful health and safety detriment contrary to the 1996 Order.

    (f) Constructive and unfair dismissal contrary to the 1996 Order.

22. The claimant was equally unclear in giving evidence and in making submissions. Leaving aside the allegation of constructive unfair dismissal, it would appear that the alleged incidents which primarily related to the heads of claim were:

Reasonable Adjustments

The claimant alleged that he had not been given light duties quickly enough. He alleged that he had been pressured to work harder. He alleged he had used his annual leave to cover sick absences. He was placed on the Core Drill which he regarded as light duties but was then asked to work on different machines between 8 April 2019 and 10 October 2019. He returned to the core drill after 18 October 2019 and this continued until March 2020 when he was placed on furlough.

Direct Discrimination

The claim form alleged that the claimant had been "*selected*" for redundancy because of his alleged disability.

He also alleged that he had been given a verbal and a written warning in respect of two occasions on which he had been absent on sick leave.

He also alleged that during a meeting on 30 July 2020 to discuss his application for voluntary redundancy, he had been told he would not be allowed to take sick leave

during his five week notice period and that he would have to work on a Betodan machine during that period.

He alleged excessive pressure, verbal abuse, and false accusations.

Harassment

The claimant alleged he was harassed by Ms Greer-Sayer saying on 21 July 2020, *"old boy lying at home raring to go and the young boy stuck on the sofa".*

He alleged excessive pressure, verbal abuse and false accusations.

Victimisation/Disability

The claimant alleged that he had lodged a grievance on 7 July 2020 and that this was a protected act. He also alleged that he had lodged an appeal against his written warning and that this also was a protected act. It was not particularly clear which alleged incidents were said to have been as a result of either or both those alleged protected acts. However the claimant alleged in particular that the respondent had not dealt with either the alleged grievance or the alleged appeal.

Health and Safety Disclosure Detriment

As indicated above, the precise nature of this claim was unclear. However the claimant alleged that he had made such disclosures in relation to health and safety issues and that he had suffered detriment as a result.

PROCEDURE

23. On 29 November 2021, MKB Law came off record for the claimant and the claimant thereafter was unrepresented.

24. During a further Case Management Preliminary Hearing on 14 January 2022, at which the claimant represented himself, the claimant applied for four Witness Attendance Orders against former colleagues.

25. That request for Witness Attendance Orders was further considered at another Case Management Preliminary Hearing on 17 January 2022. Two applications were refused on the basis that any evidence that these two individuals could have brought was either not relevant or would not have advanced the claimant's case. Witness Attendance Orders for a Mr James Lees and a Mr Andrew Brown were granted.

    The length of the hearing was reduced from seven days to five and was listed for 24 to 28 January 2022.

26. No application for reasonable adjustments in the conduct of the hearing was made by the claimant or by his solicitor at any stage in these proceedings and it was apparent to the tribunal, during the final hearing, that no reasonable adjustments had been required.

27. The claimant gave evidence in chief through two witness statements. His father, Mr George Linton, also gave evidence in chief through a witness statement. Both were cross-examined.

A witness statement on behalf of a Mr Adam Hunter was submitted on behalf of the claimant but the respondent confirmed that it did not intend to cross-examine Mr Hunter and his statement was simply taken at face value.

28. The two witnesses compelled to attend the hearing on foot of Witness Attendance Orders gave evidence at 2.00 pm on the second day of the hearing Tuesday 25 January 2021. Neither had anything of relevance to say about this case and were not cross-examined.

29. The respondent called two witnesses who gave evidence in chief by way of witness statement and were then cross-examined. They were Ms Barbara Greer-Sayer (HR Manager) and Mr Oisin O'Kane (Line Manager).

30. The evidence was heard on Monday 24 January and Tuesday 25 January 2022. Submissions were heard at 10.00 am on 26 January 2022.

31. The tribunal reserved its decision. This document is that decision.

RELEVANT LAW

Unfair Dismissal

Constructive Dismissal

32. In ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***, the Court of Appeal (GB) set out the basic propositions of law relating to constructive dismissal. It stated that they were:-

> *"1. The test for constructive dismissal is whether the employers' actions or conduct amounted to a repudiatory breach of the contract of employment:* ***Western Excavating (ECC) Ltd v Sharp [1998] IRLR 27****.*
>
> *2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see, for example,* ***Malik v Bank of Credit and Commerce International SA [1997] IRLR 462****,* ***464 (Lord Nicholls) and 468 (Lord Steyn).*** *I shall refer to this as 'the implied term of trust and confidence'.*
>
> *3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract; see, for example, per Browne-Wilkinson J in* ***Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347****;* ***350.*** *The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship'.*

4. *The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in **Malik** at p464, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".*

5. *A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last throw in a serious of incidents. It is well put at para 480 in Harvey on Industrial Relations and Employment Law –*

> *'Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify him taking that action, but when viewed against the background of such incidents, it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship'."*

33. In ***Brown v Merchant Ferries Ltd [1998] IRLR 682***, the Northern Ireland Court of Appeal said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there has been a breach of contract.

Unfair dismissal

To ground a successful claim, a constructive dismissal must, of course, also be unfair.

34. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

> *"130-(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 is either a reason falling within paragraph (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 paragraph if it –*
>
> *(b) relates to the conduct of the employee,*

(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."

Disability

35. It is clear that the question of whether or not the claimant was disabled for the purposes of the 1995 Act has to be determined by reference to the dates of the alleged acts of discrimination – ***Cruickshank v VAW Motorcast Ltd [2002] IRLR 24***.

36. The Court of Appeal (NI) stated in ***Jason Veitch v Red Sky Group Ltd [2010] NICA 39:***

[4] Section 1 of the 1995 Act defines "disability" thus:

"(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities.

(2) In this Act `disabled person' means a person who has a disability."

[5] Section 1 is expanded by Schedule 1 to the Act paragraph 1 of which provides:

"'Mental impairment" includes an impairment resulting from or consisting of a mental illness."

Proof that the illness is a clinically recognised one is no longer required.

Paragraph 4(1) of Schedule provides a list of categories to be considered when determining whether or not a person has an impairment within the meaning of the Act:

"(1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day to day activities only if it affects one of the following –

(a) mobility;

(b) manual dexterity;

(c) physical coordination;

(d) continence;

(e) ability to lift, carry or otherwise move everyday objects;

(f) speech, hearing or eyesight;

(g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger."

[15] In relation to the appellant's disability claim ***Goodwin v Patent Office [1999] IRLR 4*** *established that a Tribunal has to address four questions:*

(a) Did the applicant have an impairment either mental or physical?

(b) Did the impairment affect the applicant's ability to carry out normal day to day activities in one of the respects set out in Schedule 1 paragraph 4(1) and did it have an adverse effect?

(c) Was that adverse effect substantial?

(d) Was the adverse effect long-term?

[16] As stated by Underhill J (P) in ***J v DLA Pyper UK LLP (UK EAT-0263-09-RM****):*

"(1) It remains good practice in every case for a Tribunal to state conclusions separately on the questions of impairment and of adverse effect (and in the case of adverse effect the questions of substantiality and long-term effect arising under it) as recommended in ***Goodwin****.*

(2) However, in reaching those conclusions the Tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day to day activities is adversely affected on a long-term basis and to consider the question of impairment in the light of those findings."

Earlier in paragraph 38 the judgment stated:

> *"There are, indeed, sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most cases it will be easier – and it is entirely legitimate – for the Tribunal to park that issue and ask first whether the claimant's ability to carry out normal day to day activities has been adversely affected – one might say impaired – on a long-term basis. If it finds that it has been, it will in many or in most cases follow as a matter of common sense inference that the claimant is suffering from a condition that has produced that adverse effect – in other words an impairment. If that inference can be drawn, it will be unnecessary for the Tribunal to try to resolve difficult medical issues of the kind to which we have referred. This approach is entirely consistent with the pragmatic approach to the impairment issue propounded by Lindsay P in the Ripon College case and endorsed by Mummery LJ in McNichol. It is also in our view consistent with the Guidance paragraphs A3-A4."*

Direct Disability Discrimination

37. 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.*

Reasonable Adjustments

38. An employer is under a duty to take such steps as are reasonable adjustments to prevent any provision criterion or practice applied by him or on his behalf from placing the disabled person at a substantial disadvantage compared to those who are not disabled.

Harassment

39. An employer will be taken to have unlawfully harassed an employee on the ground of disability if he engages in unwanted conduct which has the purpose or effect of:

> (a) violating the disabled person's dignity; or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Victimisation

40. An employer unlawfully victimises an employee for the purposes of the 1995 Act if he treats that employee less favourably by reason that the employee has done a protected act. In the context of this case the protected act would have to be either that the employee had alleged that the employer had contravened the 1995 Act or that he had otherwise done anything in relation to the 1995 Act in reference to the employee.

Health and Safety Disclosure Detriment

41. Under the 1996 Order, an employee may not be subjected to any detriment if, being an employee at a place where there was no health and safety representative or committee, or where it was not reasonably practicable to contact them, the employee brought to the employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

Shifting Burden of Proof

42. 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."

RELEVANT FINDINGS OF FACT

Disability

43. The evidence put forward by the claimant to establish a disability, as alleged in the claim form, was confused and inconclusive.

44. On 17 August 2018 he had complained to a medical practitioner of feeling tired and sleeping a lot. He was seen by a nurse and there was no onward referral. There was no diagnosis.

45. On 13 December 2018, he complained of a three year history of night sweats. His blood tests and X-ray were normal. There was no diagnosis.

46. On 14 March 2019, the claimant was examined at the Ulster Independent Clinic. The consultant stated:

> *"Significantly he has a past history of anxiety 2-3 years ago treated with a long term course of antidepressant therapy that was later withdrawn."*
>
> *I suspect that symptoms of anxiety are a primary driver of his sweating and fatigue."*
>
> *I have encouraged Richard to make contact with you to explore further assessment and management of possible anxiety."*

There was no diagnosis.

47. On 3 April 2019, the claimant attended the Emergency Department of Causeway Hospital to complain of *"feeling tired and lower back pain for 6 months".* No abnormality was detected and he was discharged, again with no diagnosis.

48. On 6 September 2019, in response to a query from the respondent, the claimant's GP stated that the claimant had been referred on 21 February 2019 to Thoracic Medicine to investigate possible sleep apnoea syndrome. No diagnosis was made. No recommendation in relation to duties was made.

49. During a routine health surveillance exercise conducted on all employees, on 10 March 2020, the Occupational Health specialist recorded everything as normal. In the medical notes supporting that Occupational Health report on the 10 March 2020, the claimant noted to the Occupational Health specialist *"night sweats ongoing".* He further stated that he was on the waiting list in relation to sleep apnoea and that an investigation was ongoing in relation to diabetes. He also said that his fatigue was ongoing. The claimant did not report to the Occupational Health specialist that any concerns had been raised about anxiety/depression.

No diagnosis was made.

50. The GP's notes and records disclosed that on 17 July 2020:

> *"Had a chat to patient on ongoing issues with fatigue, day time sleeping, night sweats, paraesthesis in hands. Investigation was noted. He doesn't feel symptoms related to mood but feels stress aggravates symptoms. Adding a significant impact on his quality of life. Discussed input from mental health programme – will think about it."*

51. It is also of note that the claimant applied for voluntary redundancy on 22 July 2020 referring to:

> *"Richard needs time and rest and focus on his health both mentally and physically".*

The claimant accepted in cross-examination that he had raised a mental health issue at that point.

52. It was also notable that in that request for voluntary redundancy on 22 July 2020 the claimant stated:

> *"By taking all things into consideration because of his ill-health (suspected ME/CFS and sleep apnoea)."*

That was a clear recognition by the claimant at that point that his condition had not been diagnosed and that even at that stage his tests had continually come back clear. It had been speculated or suspected that he suffered from either ME/CFS or sleep apnoea. The claimant sought in cross-examination to correct that note, which at that stage had been in existence for some 18 months, by stating that the word *"suspected"* should have proceeded "*sleep apnoea*" and should not have qualified ME/CFS. There is no indication anywhere in the documentation that the claimant had sought at any point before his cross-examination to indicate that that request for voluntary redundancy had been incorrectly phrased.

The tribunal therefore concludes that by 22 July 2020, there had been no diagnosis. Even at that late stage, two different conditions were suspected to have been the cause of the claimant's symptoms.

53. It is also clear from the GP's notes that the claimant mental health symptoms had continued. For example on 29 July 2020 the notes record *"mental health assessment"*.

54. The claimant was referred to the chronic fatigue clinic by his GP on 17 July 2020. That was a referral for investigation and not a diagnosis.

The GP's referral stated:

> *"This 34 year old gentleman has a four year history of fatigue despite sleep being up to 15 hours per day. Excessive tiredness after activity. Night sweats, frontal headaches, paraesthesia and occasional palpations. He has been allocated light duties at work. The symptoms for having a significant*

impact of his family life and mental health. He does not feel low mood or anxiety are the cause of his symptoms however. He has been seen by endocrinology and a private physician. He is currently awaiting sleep studies. I feel this gentleman is likely suffering from chronic fatigue syndrome. I attach his private medical review for your information. I would appreciate any physiological assessment and treatment you can provide."

That is not a diagnosis of chronic fatigue syndrome and it is not a medical report setting how that syndrome in the case of the claimant, at the relevant period, satisfied the requirements of the 1995 Act.

For the purposes of that referral, the claimant set out his medical symptoms. It is noticeable that despite repeated references in his GP's notes and records and the repeated treatment and support offered to him in relation to mental health, he did not refer to mental health difficulties in that one page of symptoms which the claimant had prepared for that referral. It is also noticeable that despite the references in his GP's notes and records to knee pain which he had been suffering for nine months plus, he made no reference to knee pain either.

55. Concerns about the claimant's mental health difficulties continued thereafter, with repeated contacts with the mental health support team.

56. On 27 October 2020, after the claimant's resignation on 10 September 2020, the GP's notes disclose that the chronic fatigue team had been trying to increase exercise tolerance with the claimant, but the claimant felt that this had been limited by *"by bi-lateral knee pain which he had experienced for about nine months. He stated that this meant that he felt unstable and that he reported daily pain."* There was no medical opinion or evidence stating that the serious knee pain, creating instability and daily pain, had been related to CFS/ME. It had not been put forward as a disability in the ET1.

57. The claimant's contact with the mental health support team continued into 2021 with references on 8 February, 22 February, 3 March, 8 March and 9 April 2021.

58. In April 2021 the claimant complained of pain in his lower back and thoracic area but *"knees mainly"*.

59. The claimant, through his then solicitors, did not, in response to a Notice for Additional Information state with any clarity what the alleged disability had been and how it was to be proven. The reply simply stated:

"Please see attached medical evidence".

As outlined above, that medical evidence is at best confusing and inconclusive.

60. The alleged chronic fatigue syndrome did not prevent the claimant driving a significant distance to and from work on a daily basis. It did not, for significant periods, prevent him attending work.

The claimant accepted in cross-examination that the *"pins and needles"* to which he referred in the ET1 did not prevent him in any way performing day to day activities. He accepted that the "*dizziness*" and *"light-headiness"* to which he referred in his claim form did not in any way prevent him from carrying out day to day activities. He accepted that the *"night sweats"* did not prevent him carrying out his day to day activities.

61. When challenged in cross-examination in relation to disability, the claimant accepted that, despite being represented by a solicitor until November 2020, he had not obtained a medical report containing a formal diagnosis of CFS/ME and setting out how that medical condition had impacted on his day to day activities for the purposes of the 1995 Act.

The most that the claimant could refer to in this respect was the referral to the CFS clinic (which was a referral and not a diagnosis) and to the GP sick notes issued to the respondent. Sick notes issued on 18 September 2020, 16 October 2020, 13 November 2020, 11 December 2020 and 8 January 2021, after the claimant's resignation, contained the words:

> *"Diagnosis Chronic Fatigue Syndrome. Reason: Chronic Fatigue Syndrome – anxiety also".*

Those brief references do not explain who had diagnosed CFS, when CFS had been diagnosed, or how that condition had impacted on day to day activities for the purposes of the 1995 Act. The addition of "*anxiety*" further confused the issue. Those sick notes had in any event post-dated the relevant period ending on 10 September 2020

62. In summary, the tribunal concludes that the claimant had been well aware of his need to establish, as a matter of evidence, that he had been disabled for the purposes of 1995 Act in the relevant period. That responsibility has not been properly addressed. It is possible that clear and specific medical evidence exists somewhere which indicates that in the relevant period up to 10 September 2020, the claimant had been diagnosed with CFS and setting out how that condition, as opposed to anxiety, knee pain, sleep apnoea or diabetes, had impacted on his day to day activities. However, if so, the tribunal has not been referred to it.

ALLEGED INCIDENTS

63. The claimant alleged that employees in the manufacturing premises were busy and had been told to *"dig deep".* He states in his first witness statement that this alleged remark had been directed to all employees and not just to the claimant himself. The respondent deny ever using the phrase *"dig deep"*. In any event, the fact that in an manufacturing environment, employees were busy and that all employees were encouraged to work hard, in whatever terms, is entirely unsurprising and cannot on any rational approach amount to the basis for a claim before this tribunal. It is not clear why this allegation was set out in the claimant's evidence in chief.

64. The claimant further alleged that two *"time and motion officials"* were engaged between 2017 and 2019 by the respondent. As above, this is entirely unsurprising and cannot, again on any rational basis, form the basis for a claim before this

tribunal. It is not clear why this allegation was set out in the claimant's evidence in chief.

65. The claimant stated that when he had been ill between 2016 and 2019, Mr O'Kane, his line manager, had allowed him to use annual leave to cover his absences. This had been done to avoid the claimant approaching sick absence triggers and to avoid the claimant losing money. This had been, on any rational reading of the events, a generous act on the part of Mr O'Kane designed to assist the claimant in a period during which he had complained of fatigue and during a period when medical investigations had proved fruitless. This had been done with the consent of the claimant and there had been no evidence that he had been prevented or discouraged from taking sick leave. It cannot, on any rational basis, form the basis of a claim for this tribunal. Again, it is not clear why this allegation was set out in the claimant's evidence in chief.

66. The claimant complained that the respondent *"then started to review my absences as I had triggered the absentee notification procedure"*. He referred to a meeting which took place on 28 February 2019 with line management. That meeting had been conducted properly and an employer is entitled and indeed obliged to review lengthy sick absences. The primary concern of the employer had been the claimant's failure to comply with the absence notification procedure. The claimant confirmed in cross-examination that he had been aware of the absence notification procedure and that he had failed to follow that procedure.

The approach of the respondent in relation to this matter cannot, on any rational basis, form the basis of any claim before this tribunal. The claimant had been absent from work for a week and had not complied with the absence notification procedure.

67. The claimant alleged that he had raised concerns in March to May 2019 about his health issues and in particular about his operation of a Vihy 2 machine. That machine was operated by either two or three people any at one time, depending on the particular product which was being manufactured by that machine. The claimant had not, at any stage been left to operate the machine on his own. Again that is not a matter which could, on a rational basis, form the basis for a claim for this tribunal. It had preceded the letter from his GP (see below) on 13 June 2019.

68. The claimant alleged that a letter from his GP on 13 June 2019 had recommended light duties and that the respondent had not complied with that recommendation before August 2019. The reality was that that letter from the claimant's GP was less than clear. It did not state that the claimant had been suffering from a disability or even from any particular health issue. It did not provide any diagnosis, it did not recommend light duties and it did not specify, in the context of the claimant's employment, what light duties would have been appropriate in any event. The letter simply stated:

> *"The patient listed below is being investigated for fatigue and sleep issues. These tests are ongoing. He asked for a letter to support his application for light duties until this investigation is complete."*

That letter was, at best, half-hearted in its support for any application on the part of the claimant for lighter duties. It did not say that light duties were necessary, it did

not say what those light duties would be, and it did not say why those light duties would be necessary. It had simply indicated that the claimant wanted such a letter. Again the existence of that letter cannot, in any rational basis, ground a complaint before this tribunal. Given the terms of that letter, and the intervention of the July holidays, the respondent reacted properly to this letter.

69. The claimant then complained about the conduct of a meeting on 5 August 2019 between the claimant and his line manager, Mr Oisin O'Kane and the HR manager, Ms Barbara Greer-Sayer. He stated that the meeting *"did not go very well"* and that the respondent did not come across as *"very helping or sympathetic towards my issues"*. He referred to what he described as the minutes of the meeting.

These were not the minutes of the meeting. What the claimant had referred to was what he had apparently recorded in a diary function on his telephone in relation to that meeting. That record was headed *"first meeting with HR 5 August 2019"*. It is highly unlikely that anyone compiling a contemporaneous record and signing it, as the claimant maintained, on 5 August 2019 would have known that this was the first meeting, in what later because a series of such meetings. The fact that it was described as the first meeting rather than *"a meeting"* clearly indicates that this was a document compiled by the claimant on his telephone long after the relevant event. Furthermore, the note which the claimant alleged he had signed on 5 August 2019 refers to an alleged agreement by the respondent to review the position in three months' time. The allegedly contemporaneous note stated that *"the three month review referred to above never took place."* It is, of course, obvious that, if it had been a genuine diary note completed and signed on 5 August 2019 by the claimant, it would not have referred to a failure three months hence to implement what he alleged to have been an agreement to review the position.

70. The tribunal prefers the recollection of Ms Greer-Sayer and of Mr O'Kane. It was clear that this meeting had been probably conducted. The claimant had confirmed during that meeting that he had still received no diagnosis of any specific medical complaint. He had stated that it was *"suspected sleep apnoea"*. Various roles for the claimant, including driving a forklift truck had been discussed and had been deemed unsuitable. It had been decided that the Core Drill had been the best option and that the claimant would be moved immediately to the Core Drill. It is clear from the wages sheets for the week commencing 11 August 2019 that that had happened promptly. The evidence of Mr O'Kane and Ms Greer-Sayer is supported by the actual minutes of the meeting which appear genuine. The minutes confirm that driving a forklift truck had been excluded as an option along with other different options for the claimant and that the Core Drill was suitable. The claimant had stated *"willing to try in the short term"* and Mr O'Kane had stated *"will get you moved immediately"*.

71. The claimant alleged that he had been moved almost immediately from the Core Drill after about two days by Mr O'Kane and that he had been asked to work at various Departments on the production line. He stated *"as I am a kind person"* he gave the respondent the benefit of the doubt and did not say "*no*".

The allegation by the claimant that he had been moved almost immediately from the Core Drill to other work was not supported by any corroborative evidence. If that had been done by the respondent, as alleged by the claimant, within two days of the meeting on 5 August 2019, the claimant would have immediately complained

and would have immediately objected to any such move. In the context of that meeting, and the detailed discussions which had taken place during that meeting, it is simply not credible that the claimant had accepted an immediate move from the Core Drill to another machine because he was *"a kind person"*. It is notable that the claimant had been accompanied by a colleague during that meeting on 5 August 2019, who had supported him in his request for lighter duties. That colleague was not called to give evidence to this tribunal. The two witnesses called by Witness Attendance Order by the claimant did not give evidence that the claimant had been moved shortly after the meeting on 5 August to other machines and regularly thereafter. At the absolute height, their evidence was that, on occasion, on some unspecified dates in 2019, the claimant had worked on other machines. That is not disputed by the respondent. Work at the Core Drill machine was not required on each and every day and where work on that machine was not required the claimant had been relocated temporarily. It is also notable that in the claimant's "*diary*" completed on his telephone, the claimant recorded in relation to a meeting on 18 October 2019:

> *"Core Drill and meeting for a review of my medical report, they asked how I was doing in the Core Drill Department, I told them I am doing ok so far. I agreed that I would continue working at the Core Drill machine."*

72. If it had been correct, as currently alleged by the claimant, that an agreement to place the claimant, by and large, working on the Core Drill had been reached on 5 August 2019 and then almost immediately reneged upon by the respondent, the claimant would have at least remarked on that situation in his *"contemporaneous"* note of events in his diary. In contrast, his note reads as if his work on the Core Drill had been progressing as promised. He stated *"I told them I am doing ok so far".* He stated that he agreed *"that I would continue working at the Core Drill machine."* Previous references in these diary notes refer only to intermittent transfers to other machines which is entirely consistent with the respondent's position.

73. The claimant was placed on furlough in March 2020 in the first Covid lockdown. He complains that another person operated the Core Drill on occasion in his absence. That allegation was unsupported by evidence any and in any event is irrelevant to the claims before the tribunal.

74. The claimant made various allegations that other employees had been required to work during furlough. Those allegations were entirely unsupported by evidence and in any event have nothing at all to do with the current claims.

75. On 4 June 2020 the claimant attended a meeting in the factory while he had been otherwise absent on furlough. He was told that there was to be a redundancy process and that he had been placed on the list of people potentially facing redundancy.

76. Again the claimant has misrepresented his claim in this respect. In his claim form, he alleged that:

> *"9. On 4 June the claimant was notified that he was selected for redundancy. No proper process was followed in relation to the selection."*

That claim form, completed by his solicitor on instruction, therefore claimed that the claimant had been selected for redundancy and that the process to select the claimant had been improper.

The claimant had never been selected for redundancy. He had been part of a large group of production workers who were in the *"at risk"* group. Furthermore a proper process had been followed by the respondent in relation to a redundancy selection exercise. At the conclusion of that exercise, the claimant had not been selected for redundancy.

It is difficult to see what claim the claimant wishes to advance in this respect. In his evidence in chief, he criticised being based in the group at risk for redundancy. He criticised the scoring matrix. It is clear from the marking sheets to which the tribunal was referred, that the redundancy selection process had been conducted fairly and that Mr O'Kane, in particular, had marked the claimant in such a way to ensure that he was not selected for redundancy.

77. The claimant then alleged that on 12 June 2020 he was told to return to work on 15 June 2020 and then placed on the MasterCast machine. He alleged that he had been told to work late in two days and put under pressure. The claimant alleged that he had been humiliated. The tribunal prefers the evidence of Mr O'Kane. While the claimant had been asked to work from time to time on other machines, the tribunal does not accept that he had been put under undue pressure or humiliated.

78. The claimant further alleged that on 24 June 2020 Mr O'Kane *"belittled me in front of the staff and employees by using me as an example. He said "Ricky you clocked in at 7.30 and you are clocking out of 4, that is not good enough.""* The tribunal prefers the clear evidence of Mr O'Kane that he had been asked to work from time to time in other machines when the Core Drill was not required but he had never mentioned stress and was never belittled or put under pressure.

79. The claimant then alleged that on 29 June 2020 he had been directed to work on a Betodan machine. The tribunal prefers the clear evidence of Mr O'Kane that the claimant had not stated that he was unable to operate this machine for a period and that he had said he was willing to give it a go.

80. The claimant then made allegations in relation to an employee, Ryan Taylor who had been made redundant by the respondent. Those allegations are irrelevant to the claims before the tribunal.

81. The claimant then alleged that on 7 July 2020 he told Mr O'Kane in the respondent's office that his health had taken a dip. The claimant alleged that this was completely ignored and that he had been sent back to the Betodan machine to work on his own without help. He alleged that he had applied for four days annual leave to get away from the *"stress and confusion"* and that it was refused. The tribunal does not accept the claimant's evidence in this respect. The last minute request for four days leave in July had been refused for good reason.

82. The claimant alleged that he had sent a grievance on that day to Adele Caskey in the HR Department. This is the alleged grievance that he stated formed a protected act for the purposes of his victimisation claim. He alleged that this

grievance had been ignored. That *"grievance"* had clearly not been a grievance. It had been a request for information. Importantly, it contained none of the allegations in the preceding paragraph. Furthermore, the fact that an application at the last minute for four days leave in July had been partly refused is not surprising and certainly not indicative of unlawful discrimination.

83. This communication on 7 July 2020 read:

> *"Hi Adele,*
>
> *Thank you for the confirmation.*
>
> *Just a few questions regarding my position at work,*
>
> *I have been working on the factory floor on two different machines since being back from furlough on 15 June and I have seen an increase to my symptoms. The last four weeks now regarding my ill-health issues resulting in me having to miss days at work,*
>
> *Checking to see if this is my new position now at work?*
>
> *Or is there any timeframe on when I can go back to the Core Drill machine?*
>
> *Which was adjustments giving by head of HR and line manager due to my health reasons.*
>
> *Kind regards*
>
> *Richard Linton."*

84. The claimant was taken in cross-examination to the grievance procedure and confirmed that he had been familiar with that procedure. There is no way in which that communication of 7 July can be read as a grievance. At its height, it was an enquiry as to the current position in relation to his work location. The tribunal is sure that the claimant knew that this had not been a grievance and his attempt to rewrite this letter as a grievance, which had then been ignored by the respondent, is disingenuous.

85. The claimant received two warnings. One verbal and one written. The first was given on 10 July 2020 for failing to comply with the respondent's absence notification procedure on three occasions; 25 June 2020, 3 July 2020 and 6 July 2020. There was no penalty for sick absence.

The second warning was given on 20 July 2020 for failing to comply with the respondent's absence notification procedure on 15 and 16 July 2020. There was no penalty for sick absence.

The claimant acknowledged that he had been aware of the absence notification procedure and that he had not complied with that procedure.

Again, despite the claimant's attempt to misrepresent the position, he had not been disciplined for being sick or for being absent in sick leave.

86. The claimant alleged that he had made a written appeal against that written warning and that he had lodged that appeal on 24 July 2020. He alleged that this appeal was again a protected act and that he had received no response to this appeal. The letter which the claimant alleged he had sent as an appeal was undated.

The respondent stated that it had not received any appeal and alleged that it had not been lodged.

The document, which the claimant alleged had been a written appeal, was undated and read:

> *"Dear FP McCann Limited*
>
> *Appealing disciplinary*
>
> *I would like FP McCann Limited to give me an explanation on how I could possibly make contact to the company when I crash and sleep for long periods due to my ill-health (suspected ME/CFS and sleep apnoea) and have no other persons with me at the time being off absent on those days."*

The tribunal does not accept that the claimant had sent the letter to the respondent. He did not state in the meeting on 21 July 2020 (below) that an appeal was pending and he did not pursue what he now alleges had been an ignored appeal, before seeking voluntary redundancy and before submitting a resignation. It is also notable that when the District Councillor, Mr McQuillan had heard the claimant's complaints on 21 July 2020 and then wrote to the respondent, he did not raise any issue about a pending disciplinary appeal or about the disciplinary penalty. If the claimant had, in fact, raised any dispute about the disciplinary penalty with Mr McQuillan, Mr McQuillan would have raised that matter and he did not.

87. The claimant asked for an informal meeting on 21 July 2020 with Mr O'Kane and Ms Greer-Sayer. Various roles were discussed and, as indicated above, the forklift truck role was ruled out. He was allocated to the Core Drill.

88. The claimant alleges that, at this meeting, Ms Greer-Sayer made the following remark *"old boy lying at home raring to go and the young boy stuck on the sofa."*

The tribunal has had the opportunity of listening to Ms Greer-Sayer and observing her being cross-examined. It is patently obvious that this is not the sort of language that Ms Greer-Sayer would have used. She speaks precisely and is not given to colloquialisms. The tribunal does not accept that this remark had been made and prefers the evidence of Mr O'Kane and Ms Greer-Sayer, each of whom denied that the statement had been made.

89. The claimant alleged that following the meeting on 21 July 2020 he spoke to a local District Councillor and, following that meeting, decided to apply for voluntary redundancy. Mr McQuillan wrote a *"to whom it may concern"* note after the meeting. That was the day after the second disciplinary meeting. It is notable that Mr McQuillan did not mention the written warning or any forthcoming appeal against that warning.

90. That request for voluntary redundancy had been carefully prepared by the claimant with the assistance of his then partner. It is significant that that request was written in the following manner:

> *"I am writing on behalf of Richard with his consent, first we both would like to thank you and FP McCann on trying to help Richard with his issues, unfortunately Richard is struggle (sic) with daily activities at present and we feel and have been advised also that Richard needs to take time and rest and focus on his health both mental and physically as he could run into difficulties in the future, so we are writing to ask if FP McCanns would consider giving Richard his redundancy by taking all things into consideration because of his ill health (suspected ME/CFS and sleep apnoea)."*

91. It has to be remembered that this request was shortly after the conclusion of a redundancy selection exercise during which the claimant had objected to being considered for redundancy and in respect of which the claimant now seeks to allege that it had been unlawfully discriminatory to have considered him for redundancy. It is also not the sort of language that an employee would use just before he claims that he was driven out of employment and constructively dismissed. It is not the sort of language an employee would use if, as the claimant now alleges, the respondent had consistently failed to assist him in dealing with his medical issues. The claimant thanked the respondent for helping him. It is also not the sort of language an employee would use if, as he now alleges, he had been aggrieved by the disciplinary action and and had been preparing an appeal.

92. The claimant handed in that request for voluntary redundancy on 22 July 2020. A meeting was arranged between the claimant and Ms Barbara Greer-Sayer on 30 July 2020.

93. The claimant alleged that Ms Greer-Sayer had started the meeting by *"accusing"* him of working for another employer during the furlough period. It is apparent that what had actually happened was that Ms Greer-Sayer had simply stated that another employee, who had wished to remain anonymous, had informed the respondent that the claimant had been working for another employer during the furlough period. That was not a matter which was pursued or investigated by the respondent or indeed where disciplinary proceedings had been started. The claimant's denial was accepted by the respondent. This apparently is the basis for the complaint in the present proceedings of *"false accusations"*.

94. The claimant alleged that, in the course of this meeting, Ms Greer-Sayer had stated that if the respondent were to be considered for voluntary redundancy, he would need to work his full five weeks' notice and that he would not be allowed any sick leave during that five weeks' notice. The tribunal does not accept that version of events. It is highly improbable that any HR manager would advise any employee that he was not entitled to sick leave at any time including during any period of notice. It is much more probable that what had actually happened was that the claimant had asked for payment in lieu of notice during the notice period, which is what had happened in relation to those employees selected for compulsory redundancy during the previous exercise. Because this was a request for voluntary redundancy, outside the scope of that redundancy selection exercise, the claimant was told that, if the voluntary redundancy was granted, he would have to work his

normal period of notice of five weeks. There had been no statement that he would not have been entitled to sick leave during that period.

95. The claimant immediately went out on sick leave until he resigned on 10 September 2020. There is no indication that the respondent had refused to allow the claimant sick leave during this period. There is no indication that any disciplinary action was taken against the claimant during this period.

The tribunal is content that the claimant's allegation that he had been told that if he took further sick leave he would be dismissed (an allegation he had also made to his GP) was false. It is simply not credible and is not consistent with what occurred thereafter.

96. The claimant resigned from his employment by 10 September 2020. That letter of resignation stated:

> *"I am writing to inform you that by way of this letter I am giving you one week's notice of my resignation from my employment with the company.*
>
> *You are and have been aware of my ill health issues over the last four years for which I am still undergoing medical investigations. Unfortunately my current employment conditions and adjustments at PNI is having a serious detrimental effect on my ill health at present as well as having a huge impact on my life as a whole. I therefore have no option but to leave my employment with the company."*

There was no mention of a diagnosis or of any specific medical condition. The claimant referred to *"investigations".*

97. The claimant made no attempt to find alternative employment following his resignation. In fact he was clear in that he has refused two offers of employment from friends.

DECISION

Constructive Unfair Dismissal

98. It is clear that the respondent had, within the practical limits of its manufacturing operation, done its best to assist the claimant at all times to continue in employment.

There had been no repudiation of the claimant's contract of employment. The redundancy selection procedure, the two disciplinary proceedings and the meetings with the claimant had all been conducted properly. The claimant had not been constructively dismissed. When he resigned, he had been on sick leave and his application for voluntary redundancy had been pending. He had been facing no further disciplinary action. The respondent had done nothing which could properly be regarded as a repudiation of the employment contract.

99. The claim of constructive unfair dismissal contrary to the 1996 Order is dismissed.

DISABILITY

100. The claimant had been legally represented in this matter throughout the interlocutory process and until 29 November 2021. The claimant would have been aware that the onus had been on him to establish disability within the meaning of the 1995 Act, and as alleged in his claim form.

101. The claim form had identified specific medical issues but had not included depression/anxiety or knee pain. The claimant in cross-examination did not assert that night sweats, pins and needles, light-headiness or dizziness had any particular impact on his ability to carry out day to day activities for the purposes of the 1995 Act.

That left what was described in the claim form as *"chronic fatigue"* and what was described by the claimant elsewhere and in evidence as *"chronic fatigue syndrome"* or *"CFE/ME".*

102. While it is almost universal practice in such claims for the claimant to produce a medical report substantiating the diagnosis of a specific condition, and outlining in detail the specific impact on day to day activities as defined by the 1995 Act, that is not a pre-condition to a claim. In ***Veitch***, the Court of Appeal stated:

> "*19. From the way in which it did express itself it appears that the tribunal elevated the production of medical evidence on the issues at each stage of the* ***Goodwin*** *inquiry to the status of a necessary proof. That is to overstate the position.*"

The tribunal, in the regrettable absence of a specific medical report, still has to address the questions set out in ***Goodwin.***

103. The first such question is *"(a) did the applicant have an impairment either mental or physical?"*

Looking at the disability as alleged in the claim form, and maintained in evidence, ie *"chronic fatigue"*, the tribunal concludes on the balance of probabilities, taking into account all the medical evidence set out above, the answer is yes. The claimant did suffer from an impairment during the relevant period, even though it appears to be the case that it might only have been diagnosed following the claimant's resignation.

104. The second question is *"did the impairment affect the claimant's ability to carry out normal day to day activities and did it have an adverse effect?*

Clearly, the degree of fatigue alleged by the claimant and recorded in the GP notes and records (and elsewhere) would affect the claimant's ability to carry out relevant activities and it would have had an adverse effect. There is no clinical test which would prove the existence of that fatigue or its severity. However, on the balance of probabilities, the answer to both parts of this question is *"yes"*.

105. The third question is: *"Was that adverse effect substantial?"*

In the absence of a detailed specific medical report, the tribunal again has to assess the claimant's own evidence and the documentary evidence he has provided. Again on the balance of probabilities the answer is *"yes"*.

106. The fourth question is *"was the adverse effect long-term?"* Again the answer, on the balance of probabilities, is *"yes"*. The impairment, and the effect, had lasted from 2019 to 2021.

107. The tribunal therefore, on balance, concludes that the claimant had been disabled for the purpose of the 1995 Act during the relevant period leading up to his resignation.

Reasonable Adjustment

108. The claimant stated that his symptoms of fatigue had got worse in 2019. The respondent, through Mr O'Kane, kept in touch with the claimant in regard to continuing investigations and allowed him to use annual leave to avoid breaching sick leave triggers.

109. On 13 June 2010, the claimant's GP provided a very non-committal letter to the respondent simply stating that the claimant was being investigated *"for fatigue and sleep issues".* It stated *"He asked for a letter to support his application for light duties until his investigation is complete".*

The letter simply said what the claimant had wanted. It did not make any such recommendation.

The claimant was invited to meeting on 5 August 2019 to discuss that letter.

110. On 5 August 2019, the claimant's symptoms were discussed and he was moved to the Core Drill.

111. On 6 August 2019, the respondent wrote to the GP. It pointed out that due to the nature of the job there was little scope for light duties. Those light duties which had been identified would last for a few weeks at the most. The respondent asked for an update on the medical investigations and asked *"is there any specific recommendations you wish to make about him?"*

112. On 6 September 2019, the GP replied to the respondent. It did not provide any recommendation.

113. The claimant was placed on furlough on 26 March 2020.

114. During the redundancy exercise in June 2020 (which did not select the claimant for redundancy) his absences due to his medical condition were excluded for marking purposes.

115. He was required to comply with a standard absence notification procedure and was disciplined for two breaches of that procedure.

116. The respondent continued to keep in touch with the claimant in relation to his medical condition. On 21 July 2020, the claimant attended a meeting with

Mr O'Kane and Ms Greer-Sayer and his medical symptoms and the scope for further adjustments were discussed in detail.

117. On 23 July 2020, in response to a further query from the respondent, the GP wrote to the respondent:

> *"With regards to recommendations I can make about him, I would support Dr Connor's assessment that light duties would be more suitable until investigations are complete. I do not feel I am qualified to give specific information however on what duties these are. I would recommend you organise an official Occupational Health assessment for this."*

118. The respondent still had no recommendations as to what light duties would be suitable and in the context of a concrete manufacturing plant, whether those duties existed.

119. The day before that letter from the GP, the claimant applied for voluntary redundancy, thanking the respondent *"on trying to help Richard with his issues".*

120. A meeting was held, one week later on 30 July 2020, to discuss his application. The claimant was told that he would be required to work his notice, unlike the compulsory redundancy scheme. The claimant was not told he would not be eligible for sick pay during the redundancy scheme.

121. The claimant went on sick leave and resigned on 10 September 2020.

122. The respondent had, in the context of a context of a concrete manufacturing plant, put in place all reasonable adjustments as required by the 1995 Act. The claim alleging a failure to make reasonable adjustments is dismissed.

Direct Discrimination/Harassment

123. As indicated above, it was difficult to determine which alleged incidents were alleged direct discrimination and which were alleged harassment.

124. The claimant alleged generally that he had been put under pressure to work hard. The tribunal is satisfied that the claimant had not been put under undue pressure or pressure related to his disability.

125. The claimant had not been subjected to disciplinary penalty because of his absences or because of his disability. He had been subject to disciplinary penalties because he had failed to comply with a sick absence notification procedure.

126. The claimant had not been selected for redundancy. He had been scored properly and fairly in a redundancy selection exercise. His sick absences as a result of his disability had been excluded.

127. The claimant had not been pressured or instructed to drive a fork lift truck.

128. The claimant had not been told on 30 July 2020 that he would not be allowed to take sick leave during his notice period if voluntary redundancy were granted.

129. The claimant had not been subjected to *"false accusations"* that he had been working during furlough. A report had been put to him for comment and his denial had been accepted. The allegation had been made to the respondent and the respondent had been entitled to put that allegation to the claimant for comment. The tribunal is satisfied that this would have been done in relation to any employee in similar circumstances, whether or not that employee had been disabled.

130. The tribunal concludes that Ms Greer-Sayer did not say on 21 July 2020 *"old boy lying at home raring to go and the young body stuck on the sofa".* Ms Greer-Sayer denies making such a remark. Mr O'Kane denies that any such remarks was made. The tribunal is content that this is not the sort of language Ms Greer-Sayer would have used.

131. The tribunal has considered all of the claimant's allegations and concludes that the claims of direct discrimination and harassment contrary to the 1995 Act are dismissed.

<u>Victimisation</u> (Disability)

132. The claimant has identified two alleged protected acts. Firstly he alleged he lodged a formal grievance on 7 July 2020. Secondly, he alleged he lodged an undated appeal against the imposition of a written warning for failure to comply with the sick absence notification procedure. Those appear to have been the only two alleged protected acts.

133. The claimant did not lodge a grievance on 2 July 2020. That had been a simple request for information. It was not a protected act.

134. The claimant did not lodge an appeal against the written warning. The tribunal concludes that that alleged appeal had not been lodged.

135. Even if there had been a protected act within the terms of the Act, the tribunal concludes for the reasons set out elsewhere in this decision, that the claimant did not suffer any detrimental treatment for any reason.

136. The tribunal therefore dismisses the claims alleging victimisation contrary to the 1995 Act.

<u>Victimisation</u> (Health and Safety)

137. This part of the claim was not pursued by the claimant at hearing.

138. In any event, the tribunal concludes that the respondent treated the claimant fairly at all times and that he was not subjected to detrimental treatment.

139. That claim is dismissed.

Employment Judge:

Date and place of hearing: 24-26 January 2022, Belfast.

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