EMPLOYMENT TRIBUNALS

Claimant: **Mr C Dibnah**

Respondent: **RB Health Limited**

Heard at: **Leeds by CVP** **On:** **2-6 November 2020**

Before: **Employment Judge Maidment**
Members: **Mrs JL Hiser**
Mr AJ Senior

Representation
Claimant: Mr D Flood, Counsel
Respondent: Mr M Sethi QC

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well founded and succeeds due to a lack of reasonable consultation. However, pursuant to the principles in the case of **Polkey** the claimant would have been fairly dismissed in any event had a fair procedure been followed and without any extension of the effective date of termination.

2. The claimant's complaints of disability discrimination, harassment and victimisation all fail and are dismissed

REASONS

Issues

1. The claimant worked as a packaging technologist and brings a complaint of unfair dismissal arising out of the purported redundancy from his position. The claimant was at all material times a disabled person and, in addition, brings claims of disability discrimination arising out of his dismissal and in respect of specific aspects of his treatment in the period prior to it. The respondent's position is that the claims in respect of the dismissal have been brought within the applicable time limit, but not those which predated

dismissal and in circumstances where there is no continuing act or course of conduct.

2. The issues in this case had been identified during a process of case management culminating in Employment Judge Cox setting out all of the allegations in an Annex to her case management orders at a preliminary hearing on 13 January 2020. At the outset of this hearing, the tribunal went through those allegations which were confirmed by both parties' counsel as the entirety of the issues for the tribunal to determine. This was in circumstances where the respondent accepted the claimant's status as a disabled person and made it clear that, in the context of the complaints of victimisation, it did not accept that there had been any protected act. Further, on behalf of the claimant, all complaints of direct discrimination were withdrawn. For the avoidance of doubt, the claim of a discriminatory dismissal would be reliant on a claim of indirect discrimination and victimisation.

3. However, at the commencement of submissions, Mr Flood, on behalf of the claimant, referred to his written submissions which, the tribunal suggested, sought to redraw the list of issues. Mr Flood said that, on a review, he had considered that the preliminary hearings which had taken place in this case did not in fact summarise or reflect all the information the claimant had provided regarding his claims. In his written submissions, Mr Flood had included cross-references to Employment Judge Cox's Annex, to a summary of the issues provided at an earlier stage by Employment Judge Shulman and to a document in which the claimant had provided further information. Prior to determining the approach the tribunal would take (where it appeared that not all of the expanded issues may have been addressed in evidence), the tribunal sought to follow through these cross-references in respect of the first allegation. In doing so, it was not in fact clear that the suggested expanded allegation was reflective of information previously before the tribunal. On reflection, Mr Flood's position was that he was not now saying that the tribunal needed to make findings on any issues not in Employment Judge Cox's Annex. Furthermore, he considered that there were some claims which, on the basis of evidence now given, were to be withdrawn. An adjournment was allowed then for Mr Flood to review the Annex. On reconvening, Mr Flood took the tribunal through the Annex and to a number of specific allegations which were no longer pursued and/or where alternative causes of action were no longer to be relied upon. The tribunal, immediately below, sets out Employment Judge Cox's Annex marked up showing the deletions Mr Flood had identified as flowing from his aforementioned narrowing of the issues.

4. In the tribunal's conclusions it has addressed only those issues which have survived and which are set out so as to reflect the deletions made. The tribunal has however in the conclusion section retained the original numbering of the allegations in the Annex.

"ANNEX

The parties agree that the Claimant worked for the Respondent from 24 October 1995 to 11 June 2018. He worked as an R&D Packaging Associate. He brings claims of unfair dismissal and various forms of disability discrimination.

Unfair dismissal

The Claimant alleges that the Respondent had no fair reason for dismissing him and that the reason for his dismissal amounted to unlawful disability discrimination.

In the alternative, if the reason for his dismissal was redundancy, the decision to dismiss him for that reason was unreasonable because:

the decision to dismiss him was pre-determined.

the consultation on his redundancy was inadequate as it began without the Claimant being informed of the basis on which he had been provisionally selected for redundancy;

it was unreasonable not to draw the pool for selection more widely, to include the posts of Senior R&D Packaging Associate based in Hull and Associate 3D Innovation based in Slough; and

the Respondent did not make reasonable attempts to identify alternative employment for him.

Disability discrimination

The Respondent accepts that the Claimant was disabled at all material times as a result of narcolepsy with associated cataplexy. The Respondent has not contested that it had knowledge of his disability at all material times.

The Claimant alleges he did two protected acts:

~~1. In June 2016 he raised a grievance about being subjected to a performance improvement plan (PIP).~~

On 18 September 2018 he sent the Respondent an email complaining about being left in the building when he was immobile as a result of a cataplexic episode.

The allegations of discrimination are as follows:

In the period leading up to January 2016, the Respondent applied a practice of requiring employees to meet a certain standard of performance. That put the Claimant at a substantial disadvantage because of the effect of his disability on his performance. Alleged to be a breach of the duty to make reasonable adjustments: the Respondent should have adjusted the standard required of him.

In January 2016 the Respondent put the Claimant under a PIP ~~and froze his salary~~. Alleged to be a detriment because of something arising in consequence of his disability, namely the effect of his disability on his performance.

In June 2016, Ms Julie Sagona informed the Claimant that he should "consider his role within the organisation if he felt the treatment he was receiving was making him so ill". ~~Alleged to be victimisation because of protected act 1~~ and discrimination because of something arising in consequence of his disability, namely, the treatment he received as a result of the impact of his disability on his performance.

1. ~~In an email dated 22 June 2016, Mr Bobkov endorsed Ms Sagona's comment by referring to it as "kind advice" and failed to take any action in relation to it. Alleged to be victimisation because of protected act 1.~~

In June 2017, Mr Bobkov asked the Claimant's colleagues for feedback on his performance in areas where there might be criticism. Alleged to be ~~direct discrimination because of the Claimant's disability or~~ discrimination because of something arising in consequence of his disability, namely, the effects of the Claimant's disability on his performance.

The Respondent adopted a practice that employees were expected to evacuate the building on the sounding of the fire alarm. That put the Claimant at a substantial disadvantage because, as a result of his disability, he might be immobile. Alleged to be a failure to meet the duty to make reasonable adjustments.

2. ~~On 18 September 2017 the Respondent left the Claimant in the building. Alleged to be discrimination because of something arising in consequence of his disability, namely a cataplexic episode.~~

On or after 18 September 2017 the Respondent reprimanded the Claimant for not leaving the building during the fire alarm and required him to attend an investigatory hearing in relation to his email of complaint. Alleged to be harassment, victimisation because of protected act 2, or discrimination because of something arising in consequence of the Claimant's disability, namely, his inability to leave the building in response to the fire alarm.

The Respondent adopted a practice of subjecting employees to a reprimand if they fail to leave the building in response to a fire alarm which put the Claimant at a substantial disadvantage, because, as a result of his disability, he was more likely to be unable to leave the building. Alleged to be a failure to meet the duty to make reasonable adjustments.

In September 2017, on a train from Slough to Birmingham Mr Bobkov told the Claimant that he wanted to review his performance and, the following day, in a hotel foyer, told the Claimant that he was underperforming and that, "if he didn't listen, we can get rid of you". Alleged to be harassment ~~or victimisation~~.

In November and December 2017 the Respondent adopted the practice of reviewing employees' performance regardless of whether they were at work or not. This put the Claimant at a substantial disadvantage because, as a result of his disability, he was more likely to be off work and unable to engage in the performance process. Alleged to be a failure to meet the duty to make reasonable adjustments.

In the period leading up to November and December 2017, the Respondent applied a practice of requiring employees to meet a certain standard of performance. That put the Claimant at a substantial disadvantage because of the effect of his disability on his performance. Alleged to be indirect discrimination and a failure to meet the duty to make reasonable adjustments.

In November and December 2017 the Respondent assessed the Claimant's performance as not meeting the required standards and decided not to grant him a salary increase. Alleged to be a discrimination because of something arising in consequence of his disability, namely the effect of his disability on his performance.

On 11 June 2018 the Respondent dismissed the Claimant. Alleged to be ~~direct disability discrimination~~, indirect discrimination (on the basis that the dismissal resulted from the application of a practice of requiring employees to meet a certain standard of performance)~~ or victimisation because of his protected acts~~."

Evidence

5. This hearing was conducted, by agreement between the parties, by CVP videoconferencing. The tribunal had been provided with an electronic bundle and electronic copies of all the witness statement evidence. The bundle of documents was in an agreed form numbering, on its face 718 pages, albeit it was in fact significantly expanded with supplementary pages which had not all been consecutively paginated using the original system of numbering.

6. The tribunal heard firstly from the witnesses called on behalf of the respondent: Mr Denis Bobkov, Global Packaging Manager, Mr Simon Campbell, Regional Packaging Director, Clare Walker, Category Group Director Health Wellness and Rachael Starkey, HR Manager – UK Supply, Hull R&D Health. The claimant then gave evidence on his own behalf.

7. A small number of additional documents were added without objection relating to occupational health appointments which did not take place. The claimant was also allowed to add to the bundle a document setting out a list of side effects potentially arising out of medication taken. The tribunal, however, did not allow Mr Flood to re-examine the claimant on these documents in circumstances where they had not been referred to in evidence and where Mr Sethi had not cross-examined the claimant on them. A similar direction was made in respect of documentation which was already in the bundle representing third-party research papers. The tribunal has nevertheless read these documents.

8. Having considered all relevant evidence the tribunal makes the following factual findings.

Facts

9. The respondent is a multinational manufacturer of pharmaceutical and household cleaning products. The claimant was employed by 24 October 1995 to 11 June 2018, latterly in its R&D Packaging Department and based in Hull.

10. Around February 2013 the claimant was diagnosed with 2 neurological conditions, narcolepsy and cataplexy. The effect of those conditions is that the claimant can suffer from excessive sleepiness and when he is suffering from stress can become unable to move and loses muscle control which, in turn, can lead to physical collapse. This can leave him in a full state of paralysis for a period of time. The claimant takes daily medication and stated in evidence that there were a number of side effects to this, including mood and behaviour changes. The claimant takes strong antidepressants to address his cataplexy and amphetamines to keep him awake. There is no dispute that by reason of those conditions the claimant was, at all material times in this case, a disabled person.

11. At various times the claimant was managed by Mr Simon Campbell, Regional Packaging Director, who described the packaging department in Hull as a close team who were all very passionate about what they did. His evidence regarding his close personal and professional relationship with the claimant, as well as the claimant's attitude towards his disability was unchallenged. After the claimant's diagnosis in 2013 the claimant was quite open in talking about his condition with the team. He would tell jokes about it and stories about how his cataplexy used to affect him. Mr Campbell's evidence was that his conditions were known to everyone and "we just managed it". He said that it did not seem to have an adverse effect on the claimant's duties and he never complained about it causing him any specific issues. The claimant seemed to get on well at work and the normal stressors of a heavy workload or demanding deadlines did not seem to set off his cataplexy. The only time the team saw it was when the claimant was telling jokes and laughed so much that he set off an attack which would last for a few seconds. When it was over they all (the claimant included) laughed about what had just happened. Mr Campbell was aware that on occupational health advice, however, the claimant might be slow to complete tasks could not tolerate being unduly hot or sudden changes in routine and had to refrain from minute taking. The respondent was also advised to allow flexible working arrangements – the claimant accepted that he was able to vary his hours to start work later if necessary and leave a bit later at the end of the working day. The claimant was not to work in manufacturing sites, in the laboratory, with power tools in the workshop or in a lone working environment. He says in reality he sometimes worked alone, although there was no evidence of him complaining or raising a concern. He was not required to drive on business. A sleep room was made available for his use, although a little distance away and one used also by another disabled employee.

12. The claimant accepted that at no stage did occupational health recommend any adjustment to the performance review system or to the expected standards of performance.

13. In October 2015 Mr Denis Bobkov, Global Packaging Manager, took over management responsibility for the claimant. The claimant's position then was of Global Packaging Associate focusing on the respondent's Veet brand, which occupied up to 80% of his time. The rest of his working time was involved in supporting Mr Bobkov in project work including looking for savings that could be made in relation to packaging. The claimant was Mr Bobkov's only direct report.

14. Around 2 weeks after taking up his role, Mr Bobkov was told by his own line manager, Peter Atkins, about the claimant's conditions, albeit not in great detail. He learned more from the claimant directly when they had their first one-to-one meeting in Hull in November 2015. Mr Bobkov asked him about any limitations he had as a result of his condition and the medication he took. Thereafter, Mr Bobkov undertook his own research over the internet to learn a little more about the claimant's conditions. He was not aware of and did not review occupational health reports produced in respect of the claimant on 24 July 2013, 19 March 2014 or 14 May 2014. The last of these referred to the claimant as currently being in a "holding" position. Mr Bobkov was unaware of that. He told the tribunal that in regular meetings he had with the claimant, including by Skype, the claimant did not say anything which caused him to review occupational health reports or consider further the effects of the claimant's conditions.

15. The respondent had in place a system of annual performance reviews, known as PDRs. The claimant predominantly had previously received an overall rating of "strong" – the third highest out of four. These included ratings given by Mr Bobkov's predecessor, Alex Emmerlich. The most recent had been completed on 16 November 2015 by Mr Atkins together with the claimant and Mr Bobkov, who had by this stage been managing the claimant for only a very short time. Mr Bobkov's view was that whilst the overall rating remained "strong", this was with some criticisms and gaps in performance. The need was raised for the claimant to concentrate time more fully on the delivery and execution aspect of his role. A "step change" needed to be taken on the claimant's approach to communications. Mr Atkins mentioned that it should come as no surprise to the claimant, given feedback he had received from Mr Atkins himself, his own boss, Chris Padain, Global Packaging Director and Mr Emmerlich, that communications had regularly come across as being inappropriate, extremely lengthy incorrectly addressed and negative in tone. This was said to more than overshadow the claimant's technical ability and functional delivery. There was said to be an ideal opportunity now to work closely with Mr Bobkov and for him to support the claimant by mapping a development plan to address the behavioural side of the claimant's performance. The claimant in cross-examination said that he was on strong medication which "can make you short tempered". He accepted that this was never a point raised by occupational health or raised with occupational health by him. He had not raised this during the PDRs. The claimant did not agree with criticisms in this PDR. He felt he was scored negatively for projects which were never going to do anything for the business and at times by people without the necessary knowledge of the role of a packaging technologist. Criticisms about performance which referred to the leadership charter were not relevant to him.

16. The claimant was taken to criticisms of his performance in PDRs since 2008. In 2009 the claimant was said to have a tendency to focus on negatives in new projects. The claimant's view of that was that he should use his experience to highlight problematical issues. He accepted that this was an issue he was able to rectify, but disagreed with the criticisms. In 2010, with Lisa Perry as his line manager, it was identified that he needed to take a more proactive lead. The claimant told the tribunal that he admitted that the prioritisation of tasks was not a strong point. However, he had issues with Ms Perry's ability to assess him and had raised a complaint

about this PDR. A number of "adequate" ratings were given. The claimant accepted that the issues raised as shortcomings were matters where, with due effort, he would be able to show an improvement.

17. In 2011, Ms Perry described the claimant as disengaged. He told the tribunal that he disagreed and referred to a project which had been "killed". He put criticisms of failing to attend team meetings down to a lack of recognition that he had spent a significant amount of time in China that year. A 2012 review conducted by Mr Campbell referenced a need to chase the claimant, keep him focussed and an issue about meeting deadlines.

18. The claimant was absent due to his disability impairments in 2013 (when they were diagnosed and then medicated) and in that year's review he thanked the respondent for its patience and understanding on his return to work. In the 2014, the claimant's then manager, Alex Emmerlich referred to a need to improve communication and to be on time, short and to the point.

19. After the aforementioned 2015 PDR, a series of discussions took place between Mr Bobkov, Mr Atkins and Julie Sagona of HR about how to address the claimant's performance issues. She suggested drawing up an informal PIP as a tool to measure the claimant's performance against set criteria. The use of a PIP fell within only the formal stages of the respondent's capability procedure, but Ms Sagona advised that there was no reason why it could not be adapted as a tool during an earlier informal stage. They appreciate the negative connotations of an individual being subject to a capability process, but thought that this could be avoided by addressing the issues outside the formal procedure. Mr Bobkov accepted that an employee who had received a "strong" rating in a PDR would not expect to go straight onto a PIP, but said that that was why they had decided on addressing the issues informally.

20. Mr Bobkov started drafting the PIP in December 2015 echoing the PDR. He discussed it initially with Mr Atkins. However, Ms Sagona was not satisfied that it contained enough information, clear examples and how they wanted the claimant to address particular issues, such that the document was almost completely redrafted. Mr Bobkov accepted he had not completed such a document before. The final document was something of a collaboration with inputs included from Mr Padain. Their discussions did not involve any consideration of the claimant's medical conditions. No one questioned whether there might be a link between the claimant's behaviours and his conditions.

21. The claimant's informal PIP was presented to the claimant by Mr Bobkov at a meeting in February 2016. The claimant had not been informed in advance that he was to be placed on any PIP. He agreed before the tribunal that it focussed on issues of attitude and communication, included support measures, gave a timeframe for improvement and referred to the possibility of promotion if the perceived gaps in performance could be closed. When raised that there had been no suggestion from the claimant that his medical condition was a factor in his performance, he said that he had been diagnosed with a mental disability 10 years ago and "why would I want to blow the trumpet about that." When asked where any medical person had

ever said that his attitude issues were caused by his disability, the claimant said that it was never looked at and was not raised by occupational health.

22. The claimant emailed Ms Sagona on 4 April 2016 raising a grievance about pay issues, but which included a complaint about being placed on an informal PIP for his behaviour despite his "strong" rating across objectives in the preceding PDR. He asked why he had received no prior warning of this. He also questioned why additional feedback had not been sought from those with whom he had the closest working relationships. He wanted to know if other employees had been put in a similar position to him after being rated "strong" during the end of year PDR. Mr Bobkov did not see this but was aware that the claimant had raised a grievance.

23. In the initial stages of the PIP the claimant was observed by Mr Bobkov, for instance at a review on 30 April 2016, to have shown improvements and had fully met his objectives against many criteria.

24. The claimant's grievance was rejected but he appealed that decision and attended an appeal hearing on 9 June 2016. The claimant did not attend work the following day, which caused the respondent to be concerned about his health. Mr Padain emailed Ms Sagona and Mr Atkins that day stating: "… Carl is unable to accept some facts which are not exclusive to him… He continues to challenge with high emotion as yesterday… I personally feel that his ongoing absence is unacceptable, Carl is paid to do the job and the feedback from the appeal yesterday should not provoke such a response. Please can you confirm the HR view on this, and how we can move forward as this is starting to consume far too much time vs the value received in return."

25. Mr Bobkov said that the claimant returned to work and he thought everything had been finally resolved. The claimant visited occupational health on 11 July 2016. The report (which Mr Bobkov saw sometime in July) said that the recent sickness arose from the claimant having felt quite upset following the grievance meeting. He was disappointed that he had not had any occupational health appointments since 2014. He was said to be suffering from a short-term bout of heightened emotion following the grievance meeting. The claimant was said to be fit to undertake his normal duties. The only information occupational health said they wished to reiterate was that the claimant was likely to fall within the remit of the Equality Act 2010 in view of his disclosed health issue. His condition was long-term and consideration might be given to an annual OH review assessment. It did not appear at the current time that he needed any workplace modifications or adjustments. It might however be sensible for a management led stress risk assessment to be undertaken. There is no evidence that the respondent took any steps to action this. Mr Bobkov, appreciating that he had little experience in such matters, kept HR updated and followed their advice.

26. The respondent's OH provider reported the claimant having missed follow-up consultations scheduled for 7 and 26 September and an instance on 15 September 2016 when they had been unable to contact him. The claimant's evidence was that he had never been advised of any of these appointments.

27. At a PIP review on 17 June, Mr Bobkov had noted that after improvements had been seen there had been a worsening in performance over the

preceding few weeks. This included negative feedback given in his behaviour and communication style during the grievance and appeal process as well as the claimant's de-prioritisation of certain tasks. Mr Bobkov noted that they had been considering closing the informal PIP, but that it would now continue to 5 August 2016 as originally planned. The claimant's view was that he was kept on the PIP after Mr Jones, who had heard his appeal, had spoken to Mr Padain. The tribunal does not have evidence before it to allow it to reach such similar conclusion.

28. On 22 June 2016 the claimant emailed Ms Sagona, who had been present at the review meeting. He suggested that he had been told by her during the review that one of the outcomes of the PIP was that the claimant should consider his future at the respondent as perhaps it was no longer the right place for him to work. She responded promptly saying that this did not accord with her own recollection and Mr Bobkov replied in an attempt, he said, to reassure the claimant that there was no desire to remove him. Mr Bobkov described to the tribunal the claimant's recollection of what was said as being "emotionally coloured". The atmosphere was more "kind", the claimant was given options/advices as to what might happen, but no ultimatum. The claimant's account is not accepted and on balance what he took from the words stated is different from the words actually used. The claimant was upset at the meeting. Ms Sagona and Mr Bobkov quickly rejected the claimant's account and Ms Sagona, as a HR professional at this stage of a process is more likely to have spoken in a measured and guarded fashion. Future events do not corroborate the claimant's view of the respondent's intentions.

29. In late 2016, Mr Bobkov completed with the claimant his year-end PDR for 2016. This is a confusing document which includes comments from the midyear point and is a mixture of the claimant's own comments and self-assessment as well as those of Mr Bobkov. The claimant considered himself to merit a rating of "strong", the rating third out of four and above the bottom rating of "needs improvement".

30. Mr Bobkov recommended the claimant focus on the 2 main things which could impact his performance a lot, namely positive thinking/attitude and respecting timelines. He also wanted the claimant to accept new challenges and look for opportunities outside of his "comfort zone". Assessments were then recorded against specific objectives in projects which the claimant had been working on. On some. Mr Bobkov rated the claimant as "strong". Performance was then assessed against specific targets set. In respect of one relating to ITB toilet blocks it was recorded that the claimant didn't show the required level of attitude/engagement and was rated as "needs improvement". Against another, concerns were noted regarding the claimant's emotional self-control with negative feedback received in relation to his behaviour communications during the grievance process including an excessively lengthy email to HR without clear solutions suggested and "aggravated/confrontational behaviour" during the appeal. Mr Bobkov had received feedback from those involved in that process, HR and Mr Padain. Mr Bobkov noted an unsuccessful attempt to try the claimant outside the Veet product and only one demonstration of willingness to accept new challenges.

31. Mr Bobkov ultimately decided to give the claimant an overall rating of "strong". He said to the tribunal that the decision was 50:50, but that 2 hurdles which were distracting the claimant was a salary a freeze, which would continue with a lower rating, and the PIP. He wanted to remove those barriers by giving a rating higher than "needs improvement" and now end the informal PIP. The claimant's view before the tribunal remained that he should never have been on the informal PIP in the first place.

32. In preparation for the next mid-year PDR, Mr Bobkov requested feedback from those the claimant had worked for against the competency of time management and respecting deadlines. He picked out this competency to seek feedback on as he saw it as a weak spot in the claimant. He had failed, as Mr Bobkov saw it, to meet the deadlines on the project managed by Mr Bobkov himself. Mr Bobkov said he was trying to be more objective and wanted to see if there was evidence of delay on other projects the claimant had worked on. The claimant was copied in on this request as Mr Bobkov said he wished to be transparent. The claimant responded complaining that the focus was on one point of weakness, that the feedback would be negative and he didn't need 8 people to tell him this. He was concerned that the request would not capture any of the positives and things that were being done well. Mr Bobkov replied disagreeing, advising the claimant not to look for "dirty tricks" and saying that the first feedback he had received was very positive. The tribunal has seen correspondence from one individual from whom feedback was requested, the R&D Director, suggesting that this approach was unfair to the claimant. One manager's feedback was that she did not see the claimant as proactive and that he had a non-professional attitude. Another said that had missed meetings or joined late. Two managers responded in positive terms. The claimant said that the people with negative issues were inexperienced or didn't like to be challenged.

33. In mid-September the claimant put himself forward to be an employee representative on proposals by the respondent to close its final salary pension scheme. Mr Bobkov emailed the claimant on 18 September saying that he and the claimant's key stakeholders had serious problems with his performance and said that the distraction of a substantial involvement in the pensions issue was "too much" and that his participation was not approved from Mr Bobkov's side.

34. Shortly after the claimant's disability diagnosis in 2013 a buddy system had been set up to ensure that, if the fire alarm went off, someone would be around to escort the claimant from the building to ensure he could exit safely. The packaging team had rehearsed how the claimant could be helped down the stairs using a specialised chair, albeit this did not involve the claimant himself. The fire marshal was also made aware of the claimant's specific circumstances, as the claimant acknowledged. The claimant was not the only person with potential difficulties in exiting the building.

35. Fire drills occurred around 3-4 times each year, where no issues were raised by the claimant. There was, however, an occasion on 18 September 2017 when the claimant was not assisted to leave the building and remained at his desk. As a result, there was a review of the evacuation process and a revised plan was drafted with the intention that it would be finalising after

consultation with the claimant. However, as will be explained below, the claimant was then absent from work.

36. The issue had been brought to the respondent's attention by an email the claimant sent to Rachel Pearson, a health and safety representative and friend of the claimant. This was sent during the fire drill when the claimant was alone in the building. The claimant said that he had suffered a cataplectic episode when the fire alarm had gone off which had left him immobilised. Then, after everyone else had left, he had recovered, but feared, he told the tribunal, that a subsequent physical relapse was still possible. He walked over to the kitchen area to get some water and then took his medication. He considered that he was then safe – no fire engines had arrived so that he was clear that this was just a drill. He then typed the email. This was given the subject heading of "Burning to Death." He said he was sitting at his desk 10 minutes into the evacuation and that no one had come to see why. He went on: "The smoke is getting to be intoxicating". He said that his medical notes said that should he have a cataplexy he needed to be escorted out of the building and that this was therefore a breach in health and safety "so the next time my desk is reported as messy then you need to ask is this really an issue." When put to the claimant that there was no complaint there of disability discrimination, the claimant said that he was complaining about being left in the building. He accepted that what he raised was a health and safety issue and said that there was "no need to raise any disability concern". The claimant said that he knew now that what he had written was unprofessional but he hadn't at the time. Ms Pearson was a friend.

37. Ms Pearson replied by email that the claimant had been reported missing by the fire marshal. She thought there was a need to write up a fire evacuation plan with named people to escort him. The claimant met with Tracy Hemming-Tayler of HR on 20 September, who said that an occupational health referral had been arranged for 27 September and Mr Campbell had been spoken to about buddys in the event of a fire alarm. A written agreement was to be put in place. She advised the claimant that if he was not suffering from an attack, then he should leave the building immediately. Waiting at his desk was putting himself and colleagues in danger. She confirmed this discussion by email.

38. On 27 September the claimant was travelling to Birmingham on a train with Mr Bobkov. Mr Bobkov raised that he wanted to conduct a review of the claimant's performance. The claimant took that to mean that he wanted to conduct the review there and then. The claimant said that was not appropriate. The tribunal accepts that this was a misinterpretation and that Mr Bobkov quickly clarified that he wanted to do it whilst he was in the UK. The claimant's view was that Mr Bobkov backtracked.

39. Before they attended an exhibition together at the Birmingham NEC the next day, Mr Bobkov met with the claimant in the foyer of the hotel at which Mr Bobkov was staying. Whilst the discussion took place at their own table, this was a public area with people walking past them and with other occupied tables in the vicinity. Both of them recalled a group of women sitting to the other side of the foyer who got up and left partway through their conversation. Mr Bobkov accepted that the discussion about the claimant's performance did at times become heated. He explained to the claimant that

he, Mr Padain and Mr Atkins had been discussing the claimant's performance for some time. The claimant wanted Mr Bobkov to pay attention to and recognise the good things he had done. Mr Bobkov wanted to concentrate on the issue of meeting deadlines and timeliness, which he considered were the factors bringing the claimant's performance down. From Mr Bobkov's point of view, he was trying to motivate the claimant when he said that in the absence of sufficient improvement the other way was to go to a formal PIP and that things could move quite fast. The tribunal does not accept that Mr Bobkov ever said that the respondent could "get rid of" the claimant, as the claimant alleges. Mr Bobkov obviously appreciated the upset that the use of such words would cause given the previous issue which had arisen at the meeting with Ms Sagona and would in all likelihood have been more careful with his choice of words as a result. He did, however, advise the claimant that in the event of continued underperformance, one possible outcome could be the termination of his employment. The claimant did not make a contemporaneous note, but did refer to the conversation and the words he believed had been used in a subsequent email to his trade union. Again there is a difference between the message the claimant took from the words and the actual words used.

40. Mr Bobkov accepted before the tribunal that he would not in future have such a meeting in this type of public space. He recognised that it was his fault and he had not organised it properly.

41. After the meeting the claimant and Mr Bobkov attended the exhibition but walked round it separately coming across each other in passing from time to time. The claimant said that the upset of the hotel meeting caused him to have around 7 cataplexy attacks when he was leaving the exhibition. Mr Bobkov did not see the claimant at that time and was not aware of this.

42. The claimant emailed Ms Starkey and Ms Hill of HR on 29 September referring to the exhibition in Birmingham the previous day. He said that the discussion about his performance caused a degree of heightened emotion/distress. He referred to his cataplexy attacks and the inappropriateness of the timing and location of the discussion. He said that he had been to see his doctor and she had advised him that he should not return to work until the end of October at the earliest. The claimant subsequently submitted a series of fit notes giving cataplexy as the reason for his absence which covered him up until the day his employment ended. The claimant did not return to his normal duties thereafter.

43. On 9 October 2017, Ms Hill wrote to the claimant inviting him to an investigation meeting on 16 October regarding the purpose and intent of the email to Ms Pearson on 18 September, during the fire drill, and whether his actions surrounding the incident were appropriate. Due to the claimant's sickness absence, this meeting never took place. The claimant considered that he had been reprimanded by this invitation to a meeting where he was given a right of accompaniment and where he felt there was an insinuation of more of an issue than in fact existed. He confirmed before the tribunal that he was not aware of any practice in the respondent of reprimanding individuals who failed to leave a building in response to a fire alarm.

44. Mr Bobkov was aware of an occupational health report in respect of the claimant on 18 October 2017. The claimant told OH that the increase in his

symptoms could be related to work issues. He said that prior to that increase in symptoms his condition may have impacted "slightly" on his performance but that he felt he was doing well. He referred to the recent incident where there had been a fire alarm and where he did not leave the building as he had had an attack.

45. When put to him in cross-examination, Mr Bobkov gave his view at the time that there was no direct correlation between the claimant's symptoms and his performance at work. The claimant had in the majority of cases set his own deadlines or agreed to them, yet had failed in some important tasks. He had never said that his condition impacted on his performance. Mr Bobkov had changed the deadlines and chased these up, but considered that the claimant did not feel them to have been a priority. Before his absence, Mr Bobkov had worked with the claimant for almost 2 years and felt like the claimant "operated like a normal person". He accepted that in September 2017 his reaction to a stressful situation may have been linked with his condition.

46. Mr Bobkov completed the claimant's year-end PDR for 2017 in the claimant's absence. This included criticisms of the claimant's performance. It did not refer to his illness. This document was, for Mr Bobkov, primarily to set targets, but he accepted before the tribunal that it would have been fair to include details of the claimant's absence and in particular that he had been off during the last quarter of the year with the possibility that his health had affected performance. Mr Bobkov said that he was trying to be objective. When he referred to Project Anemone and a failure to select a lead option by 3 November, he said that this should have been completed by the end of August. The assessment was based on what the claimant had done up to September – he was not penalised for his period of absence. The claimant was rated as "needs improvement", a consequence of which was that the claimant had no entitlement to a pay rise. The claimant said to the tribunal that he was always scored on a level playing field as his colleagues, i.e. no allowance was made for his disability.

47. Whilst the claimant was absent, Mr Bobkov assumed responsibility for Project Anemone, the most important one relating to the Veet brand. Other projects were de-prioritised, others were frozen or given to other employees temporarily.

48. As will be explained, from January 2018 there was a reorganisation, part of which involved the removal of the Veet brand, on which the claimant primarily worked, to Health and therefore out of Mr Bobkov's area of responsibility.

49. The respondent has gone through a number of significant reorganisations over recent years. Previously it had been one legal entity but with 3 divisions: health, hygiene and home. In October 2017 a decision was taken to split the respondent into 2 separate entities following a large acquisition – a change which was referred to internally as RB 2.0. The most significant split was between health and hygiene/home brands. The destination of some brands was more obvious than others and decisions on the splits were taken at board level.

50. Prior to RB 2.0 packaging had been divided into a global and a regional team both of which were subdivided into health, hygiene and home. The global team worked on developing ideas, working with R & D, whereas the regional teams were responsible for the manufacturing and sometimes factory based. Packaging was no longer to remain one department. Where a role was linked to a particular brand, it would be allocated to health or hygiene/home ("HyHo") in line with that brand. Chris Padain, as Global Packaging Director, undertook this review of functions. He also identified the need for a new role of Sustainability Manager at the senior Band B level to reflect the increased focus of the business on sustainability in all packaging. That introduced an overall headcount issue as the respondent always challenged any increase in headcount and looked to departments to refocus on the priorities within them.

51. One of the proposals made by Mr Padain was that the claimant's role on the Veet product could be absorbed by the Senior Packaging Associate who worked on the Scholl brand. Across other areas of the business there was a similar reflection of the effective de-prioritisation of these 2 brands – they were established but more static brands than others within the business. This proposal resulted in the disappearance of the claimant's role. Veet was placed within the Health business within a subcategory of Health Hygiene. Like Scholl it is a cosmetic product and, although they do different things, the way in which they are delivered (in tubes, jars and aerosol cans) are the same. Those synergies meant that there was no need, it was considered, for separate projects for each brand. One person could be asked to look after both brands.

52. The Scholl packaging was the responsibility of Mr Angus Athey, a Band C Senior Packaging Technologist whereas the claimant operated as a Packing Technologist at the lower Band D. The new structure did not give them a Band B manager to report to and with a reporting line to a Band A manager instead, there would be a requirement for greater initiative and autonomy. It was felt that Mr Athey was already operating at that level, identifying synergies, managing stakeholders and leading and directing others to complete the work. He would be best placed to identify synergies between the Veet and Scholl brands and to combine efforts into projects which could benefit both brands. The claimant's work was more involved in his own project delivery. Mr Athey would rely on the cross functional teams based in each factory to help achieve the project outcome – previously, the claimant had been doing the project work as part of such a cross-functional team. Mr Athey also worked on the Durex brand but lost that responsibility as part of the re-organisation.

53. The claimant has referred to a role undertaken by Mr Tom Kenworthy. He had been involved in a Veet project, but this had been just one of his projects and his responsibility was primarily in relation to e-commerce and the packaging for online product sales. He was a 3D CAD design expert based in Slough due to the close working relationship with both marketing and the commercial team also based in Slough. His role was not significantly affected by RB 2.0 and was very different in nature to the claimant's.

54. The claimant was informed by letter of 16 April 2018 of the restructure and the impact on his role. He was invited to attend a redundancy consultation

meeting on 18 April. Mr Padain emailed Ms Georgina Hill, HR Business Partner, on 17 April explaining the rationale for the claimant's redundancy. He explained the efficiencies that were considered to be created by combining the packaging leads for the Veet and Scholl brands. He stated: "By combining the 2 existing positions we have created a larger role that requires more experience as well as leadership agility vs what Carl can bring to the role."

55. Although absent due to sickness, the claimant attended this meeting accompanied by a trade union representative. Mr Campbell and Ms Hill attended on behalf of the respondent. Mr Campbell accepted in cross-examination that that the decision had already been taken as to the (non) pooling of the claimant's role and the only options were then to see if there was another role for the claimant, otherwise he would be made redundant.

56. Mr Campbell outlined the reasons for the proposal and provided a number of organisational charts. He explained why the claimant's role was affected. The claimant was provided with the respondent's list of vacancies and Mr Campbell highlighted roles which he felt might be suitable. The claimant's position was that they were not suitable. One was based in India and the other was as a Packaging Innovation Assistant which the claimant felt was too junior for him. It was agreed that the claimant would review the list further and provide feedback at a second consultation meeting.

57. Ms Hill also with the claimant's agreement looked at the possibility of any other roles but the only opportunities identified were in Nottingham and Derby which were factory based and not considered suitable alternatives by the claimant in any event. Given the claimant's absence from work, it was also agreed to make a further referral to occupational Health to obtain an up-to-date assessment of his fitness for work.

58. Mr Campbell's position was that the meeting went well although he got the impression that the claimant was going through the motions and wanted the redundancy.

59. The claimant was advised that an occupational health appointment had been scheduled for 2 May 2018. The claimant responded by email of 26 April saying that his sickness certificate had been extended for the remainder of his contract. When the comment was queried by the respondent, the claimant replied saying that he believed the only viable option available to was to take redundancy.

60. Ms Hill emailed the claimant on 27 April 2018 to confirm the next consultation meeting would be used to discuss his preferences in relation to other opportunities. The claimant responded enquiring whether or not there were any comparable vacancies in other teams. Ms Hill explained that there were not, but that she would let him know if there were any changes.

61. An occupational health report of 2 May 2018 advised that the claimant was fit to return to work if a suitable role could be identified.

62. A second consultation meeting took place on 4 May. No progress was made regarding the identification any alternative positions. The claimant then confirmed that he had no further suggestions and that redundancy was his

preferred option. The remainder of the discussion was regarding his severance payment. There was subsequent email correspondence regarding its calculation. His redundancy dismissal was confirmed by letter of 12 June 2018 and, in line with the respondent's redundancy policy, he received a severance payment of £100,338.07.

63. The claimant told the tribunal that he gave up during the consultation process. It was making him ill and "I needed out".

64. The claimant appealed the decision to terminate his employment by letter of 29 June 2018. His appeal was heard by Clare Walker, Category Group Director Health Wellness. Mrs Walker did not know the claimant. She had been involved in RB 2.0. She described this as involving a move away from employees' duties being focused on specific brands to an application of resources across brands. A department like packaging could then focus on more than one brand where there were synergies, for example, similar packaging formats. The decision to proceed with RB 2.0 had been made at Board level and affected numerous roles. The respondent worked through the different levels of position and a number of employees were made redundant when the need for them to perform duties of a particular kind ceased or diminished. Mrs Walker's own role was affected and she saw her previous role transfer over to Hygiene/Home.

65. The claimant raised 8 separate grounds of appeal. He attended a meeting with Mrs Walker on 4 July 2018, accompanied by his union representative. Rachael Starkey attended as HR support. At the beginning of the hearing Ms Starkey asked the claimant what he was looking for as outcome. Amongst other things, he confirmed that he was "not looking for a return to RB". Indeed, that was the view which Mrs Walker formed during the hearing. The claimant confirmed that he had not raised any of his appeal points during the redundancy consultation process. Mrs Walker considered that the claimant had not wished to make any efforts to find alternative employment despite assistance given by Ms Hill in particular. He confirmed during the hearing that there was nothing which met his skill set and his preference remained in packaging. He also expressed a reluctance to take a role at a lower level as that would have impacted on any future redundancy. At one point the claimant raised that he believed he was still owed outstanding expenses, some of which went back to 2012. There was also a discussion of each of the claimant's individual points of appeal.

66. Mrs Walker adjourned the hearing to consider her decision and asked Ms Starkey to clarify with Mr Campbell and Mr Padain the business reasons for the changes in the packaging department and the claimant's redundancy. Ms Starkey received that by telephone when she was travelling.

67. Having received feedback from Mr Starkey, Mrs Walker considered her decision. The decision ultimately was to reject the claimant's appeal and she confirmed that by letter of 17 July 2018 explaining her reasons.

68. The claimant's first ground was that he disputed that there was a genuine redundancy as another person at the same level had been tasked with many of his duties. Mrs Walker was satisfied that there had been a reduced requirement for employees in packaging. The restructure had resulted in the need for a new Senior Associate working across the Veet and Scholl

brands looking for synergies. This produced efficiencies with developments being applied across each brand. She felt it was clear that there was no longer any need for 2 employees to perform these duties and it was clear to her that the duties previously performed by the claimant as a Packaging Associate had been absorbed (by Mr Athey).

69. The claimant's second ground was that he ought to have been pooled with Mr Athey and Mr Kenworthy. Mrs Walker was satisfied that they were all different roles and it was reasonable not to have pooled them in any selection exercise. Mr Athey's position was at a higher level involving more strategic input regarding the direction of the brand which better qualified him in identifying synergies between the brands in the new structure. Mr Kenworthy's position was considered to be very different for the reasons already explained above.

70. The claimant's third ground was that there had been a lack of meaningful consultation. Mrs Walker did not agree. She reviewed the documentation relating to the consultation meetings. She noted the attempts to advise the claimant of any potential alternative employment. The claimant had rejected the opportunity to look at other roles with transferable skill sets. The claimant's position had been that redundancy was his preferred option. She noted that he had had the benefit of trade union representation during the consultation process, but had not raised the challenges he was doing on appeal.

71. The claimant's fourth ground related to a lack of the use of any selection criteria, but, given Mrs Walker's conclusion on pooling, she did not consider any form of selection to have been necessary.

72. The claimant's fifth ground was that his dismissal was because of his disability, including his absence which had led to Mr Athey taking over some of his projects. Mrs Walker was surprised by this argument given the widespread effects of RB 2.0 and she also thought that the claimant had been supported for a number of years, with due account taken of his state of health. During the hearing the claimant gave examples of performance management procedures which he did not agree with, but she felt that the rationale for redundancy was clear and robust without room for performance issues to have influenced the decision. She accepted in cross-examination that his disability could at times have made his performance sub-optimal, but she had seen a number of performance concerns which were not attributable to the claimant's disability. Various people, including Mr Bobkov and Mr Athey had covered the claimant's duties whilst he had been absent. This appeared to be a practical decision to ensure key tasks were completed, but the subsequent restructure was based on broader and long-term business requirements.

73. Her understanding was that Jacques Van Diepen had determined the top line restructuring issues in the department, but that the fine tuning at an organisational headcount level had been a matter for Mr Padain, who would have had the final sign off. They would have decided the areas to be prioritised or deprioritised early on. She felt that she had sufficient evidence of the rationale for the decision making from Mr Padain. This indeed matched what was happening elsewhere in the business, with the Scholl and Veet brands also coming together in marketing and R & D, for instance.

She was not surprised that these brands were ceasing to stand alone in the packaging area. In other areas a senior manager in Scholl had been taken out of the structure and the brands were being allocated reduced resources. She reviewed Mr Padain's email to Ms Hill of 17 April 2018 and thought that it made absolute sense. She was clear that, at Director level, Mr Padain had been involved in these decisions.

74. For her, the decision to combine Veet and Scholl in packaging was a decision reflecting what was happening across the business. It might have been linked to the new Sustainability position in terms of headcount, but that was a separate decision. The disappearance of the claimant's role was not primarily driven by the need to make an economy. Mrs Walker explained to the tribunal that she had considered the claimant's work history. She was aware of the earlier performance management, including by Mr Bobkov, through information provided by Ms Starkey. She had OH reports and documentation surrounding the fire drill incident. She was aware of the issues surrounding the performance review in Birmingham. She considered that his disability formed no part of the reason for the claimant's redundancy.

75. The claimant's sixth ground was that his selection had been influenced by his absence. Mrs Walker had seen no evidence of that and noted that no selection criteria had been applied, which might have included an assessment of attendance.

76. The claimant's seventh ground of appeal was that alternative roles offered to him were unsuitable. Mrs Walker accepted that was the claimant's view but did not believe that the respondent was at fault. It was a matter for the claimant whether he considered that to be the case but HR had highlighted additional roles which might have been suitable and for him to consider. Mrs Walker encouraged the claimant to consider SQRC roles (safety, quality, regulatory and compliance). Her view was that the claimant did not wish to hear this. She was clear that the claimant was capable, including in the light of his disabilities, of doing these and other roles suggested as possible alternatives.

77. The claimant's final eighth ground of appeal related to a decision not to pay all of his expenses.

78. The claimant had identified other potential alternatives in his tribunal claim. A packaging associate role at a lower grade had not become available until after the claimant had left the business. A senior packing technologist role had been factory based and therefore unsuitable for the claimant. A role of product data compliance arose again only after the claimant's employment had terminated.

Applicable Law

79. Section 98(1) of the Employment Rights Act 1996 ("the ERA") provides:

> "*(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 -*
>
> *the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2) or*

some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

80. Redundancy is a potentially fair reason for dismissal pursuant to Section 98(2)(c) of the ERA. Redundancy itself is defined in Section 139(1) of the ERA as follows:

> *"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
> *(a) the fact that his employer has ceased or intends to cease—*
>
> *to carry on the business for the purposes of which the employee was employed by him, or*
> *to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business—*
>
> *for employees to carry out work of a particular kind, or*
>
> *for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
>
> *have ceased or diminished or are expected to cease or diminish."*

81. In **Murray –v- Foyle Meats Ltd 1999 ICR 827** the House of Lords considered the test of redundancy and Lord Irvine suggested that Tribunals should ask themselves two questions. Firstly, does there exist one or other of the various states of economic affairs mentioned in the section? Secondly, was the dismissal wholly or mainly attributable to that state of affairs?

82. Section 98(4) of the ERA provides:

> *"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *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*
>
> *shall be determined in accordance with equity and the substantial merits of the case."*

83. The Tribunal in a redundancy case will be concerned with reasonableness in the advance warning of redundancy, in the quality of individual consultation, the method of selection for redundancy and in the employer's efforts to identify alternative employment. How this test ought to be applied in redundancy situations has been the subject of many judicial decisions over the years but some generally accepted principles have emerged including those set out in the case of **Williams –v- Compair Maxam Ltd 1982 IRLR 83** where employees were represented by an independent union.

84. The Tribunal also refers to the case of **Capita Hartshead Limited v Byard [2012] IRLR 814** and in particular a passage of Silber J as follows:

85. *"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:-*

> *'It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: The question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted' (per Browne – Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18]);*
>
> *'[9]… The courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn' (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother [2005] All ER(D) 142(May));*
>
> *'There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It will be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem' per Mummery J in Taymech Limited v Ryan [1994] EAT 663/94, 15 November 1994, unreported):-*
>
> *The employment tribunal is entitled if not obliged to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that*
>
> *Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible for an employee to challenge it.".*

86. Dismissals may be unfair for lack of individual consultation. In **Rowell v Hubbard Group Services Ltd 1995 IRLR 195** the EAT, whilst recognising that there are no invariable rules, endorsed the comments of Glidewell LJ in **R v British Coal Corporation 1994 IRLR 72** in the context of collective consultation as guidance also in terms of the sufficiency of individual consultation – in particular that the person consulted should be given the opportunity to properly understand the matters being consulted on and to express his views, with the consultor thereafter considering those views

properly and genuinely. An employee should have an opportunity to contest his selection for redundancy (see **John Brown Engineering Ltd v Brown 1997 IRLR 90 EAT**).

87. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

88. The duty to make reasonable adjustments arises under Section 20 of the 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

89. The Tribunal must identify the provision, criterion or practice applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial.

90. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

91. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

92. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus

is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

93. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

94. Indirect discrimination, as defined in Section 19 of the Equality Act 2010, occurs where:

> *"A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *it puts, or would put, B at that disadvantage, and*
>
> *A cannot show it to be a proportionate means of achieving a legitimate aim."*

95. The complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which states:

> *"(1) A person (A) harasses another (B) if -*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

(b) the conduct has the purpose or effect of—

violating B's dignity, or

creating an intimidating, hostile, degrading, humiliating or offensive environment for B……

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(c) the perception of B;

(d) the other circumstances of the case;

(e) whether it is reasonable for the conduct to have that effect."

96. A claim based on "purpose" requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what the true motive or intent actually was. The person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

97. Where the Claimant simply relies on the "effect" of the conduct in question, the perpetrator's motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect. The fact that the Claimant is peculiarly sensitive to the treatment accorded him does not necessarily mean that harassment will be shown to exist.

98. The Tribunal was mindful that section 26 does require there to be unwanted conduct related to a protected characteristic. This is wider than the predecessor legislation which required the conduct to be *"on the grounds of"* the protected characteristic, but the breadth of the current section 26 must have limits - the test in harassment claims has changed so as to require an associative rather than causative link with the protected characteristic – nevertheless the conduct complained of must still relate to the protected characteristic with the focus on the motivation for the conduct of the alleged perpetrator.

99. Pursuant to section 27 of the Equality Act 2010:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

B does a protected act; ….

100. Sub-paragraph (2) of this section provides:

> *(2) Each of the following is a protected act –*
>
> *(a)bringing proceedings under this Act; ……*
> *(c)doing any other thing for the purposes of or in connection with this Act;*
> *(d)making an allegation (whether or not express) that A or another person has contravened this Act."*

101. As regards the meaning of "detriment" the tribunal refers to the case of **Chief Constable of West Yorkshire Police –v- Khan [2001] 1 WLR** where it was said that the term has been given a wide meaning by the Courts and quoting the case of **Ministry of Defence –v- Jeremiah [1980] QB 87** where is was said that *"a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".* There does not have to be any economic loss inflicted upon an employee for him or her to have suffered a detriment.

102. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. There is an initial burden on the Claimant to prove facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has contravened Section 27. The burden then passes to the Respondent to prove that discrimination did not occur. If the Respondent is unable to do so, the Tribunal is obliged to uphold the discrimination claim.

103. In the **Khan** case Lord Nicholls put forward that the "by reason that" element *"does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in* ***Nagarajan –v- London Regional Transport****, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

104. It is again clear from the authorities that a person claiming victimisation need not show that the detrimental treatment was meted out solely by reason of the protected act. If protected acts have a "significant influence" on the employer's decision making, discrimination would be made out. It is further clear from authorities, including that of **Igen Limited**

–v- Wong [2005] ICR 931, that for an influence to be "significant" it does not have to be of great importance. A significant influence is rather *"an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial."*

105. Section 123 of the Equality Act 2010 provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the expiry of the period in which the person might reasonably have been expected to implement the adjustment. The Tribunal has an ability to extend time if it is just and equitable to do so.

106. Applying these principles to the facts as found the tribunal reaches the following conclusions.

Conclusions

107. The tribunal considers firstly the claim of ordinary unfair dismissal, appreciating a need to potentially revisit its conclusions dependent on its findings in the complaints of discrimination. The tribunal concludes that the reason for the claimant's dismissal was redundancy, arising out of a need for fewer employees to undertake work of a particular kind. That is a potentially fair reason for dismissal.

108. The evidence does not support the dismissal as being by reason of, for instance, the claimant's capability. The tribunal makes this finding mindful of Mr Padain's involvement in the decision making and the adverse views expressed by him and Mr Atkins of the claimant's performance and behaviour at various times. There was no restructuring aimed at the claimant's removal or to obscure an alternative reason for dismissal. The respondent had undertaken periodic restructuring exercises which had left it as a single entity but with 3 divisions of health, hygiene and home. The respondent decided instead that it was in the future to operate as two separate entities, one encompassing health brands and the other hygiene/home. This had an impact on many employees, who found the brand upon which they worked reassigned to one of the two divisions. The effect was greatest for those working on hygiene brands with a health aspect. This was a top-level board decision and cascaded down through each area of the business for relevant business leaders to then decide what that would mean for specific roles. The claimant's department of packaging straddled the new divisions and the proposal emerged from Mr Chris Padain to remove the claimant's role, the predominant purpose of which was to deliver packaging solutions for the Veet brand. At the same time there was no longer to be any role dedicated to packaging development on the Scholl

brand, the predominant purpose of Mr Athey's role, albeit performed at a higher level than the claimant. The tribunal accepts that at the same time, Mr Padain had seen the need for a new position of Sustainability Manager, given the importance of such issues within the business, and that the respondent typically challenged itself whenever costs were to be added as to whether efficiencies could be made in other areas. The combination of the Veet and Scholl packaging management functions provided that counterbalancing efficiency, but the tribunal does not consider that the appointment to the new Sustainability position was the driving factor in the removal of the claimant's role. Mrs Walker's evidence, including in terms of the combination of the two brands across other areas of the business, provided the best explanation for the redundancy of the claimant's role and indeed coincides with the explanation which Mr Padain emailed to HR shortly before the consultation with the claimant began.

109. That decision arose out of the lack of recent and potential growth in both of those brands and a business decision that they be de-prioritised. Furthermore, companywide, there was a combination of functions including in marketing and research and development previously dedicated to one or the other of those brands. That was in circumstances where there were obvious synergies between the products. Certainly, in packaging the products were similar in the sense that they could be applied by the customer using similar technologies and methods. Whilst Mr Athey had also undertaken some work on the Durex brand, this was to be removed from him and both his and the claimant's role disappeared from the structure and were therefore at risk of redundancy. There was no selection of the claimant for redundancy or any unreasonableness on the respondent's part in failing to place him in a pool with similar employees and perform a selection exercise between them. The tribunal has been pointed to no evidence as to whom such a pool might reasonably have encompassed.

110. There was nevertheless an alternative role available working on packaging for the Veet and Scholl brands.

111. The claimant had no genuine opportunity to be considered for that role given that, prior to the commencement of consultation, it had been determined that Mr Athey was more suitable to be given that position.

112. The claimant ought reasonably to have been made aware of the opportunity before it was closed off to him and to have been able to make representations regarding his retention in a combined Veet/Scholl role.

113. Certainly, the tribunal can only conclude that there was a lack of genuine and meaningful consultation where, not only the disappearance of the claimant's role, but also that the new role in the structure would go to Mr Athey were predetermined and not up for discussion. A genuine consultation process would have allowed room for the claimant to understand the decision-making both at the stage of the removal of his role and of the appointment of Mr Athey to the combined role and make

representations in favour of his retention. Such a defect in consultation is, in the circumstances, sufficient to render the claimant's dismissal unfair. The consultation was much fuller at the appeal stage where Mrs Walker took reasonable steps to investigate the points put forward by the claimant. She was of course dealing with representations which the claimant had not made at the earlier stage to Mr Campbell. However, the consultation was fundamentally lacking at an earlier stage and the deficiency was not cured on appeal.

114. The tribunal concludes nevertheless that, had a fair consultation with the claimant taken place, it would have made no difference to the outcome. The respondent would reasonably have concluded that the new role ought to be undertaken by Mr Athey, who was already in a position of higher responsibility to the claimant in the health division where Veet was to be moved, which involved more strategic thinking and project management rather than what was involved in merely delivering a project. That was indeed even more relevant now to the combined position in circumstances where the role would involve the need to identify synergies and work with a broader range of stakeholders and factory-based colleagues in the development of packaging products which could be utilised by both brands. There was no longer to be a Band B manager for the incumbent to report to, so that there would be a greater need to act autonomously in circumstances where Mr Athey already sat as Band C in contrast to the claimant at band D. The claimant would have been fairly dismissed with a 100% degree of certainty and in circumstances where his employment would not have been extended beyond the date is in fact terminated.

115. The respondent acted reasonably in seeking to identify alternative positions which the claimant may have been interested in and bringing them to his attention. The roles may not have been regarded as suitable by the claimant and perhaps with some justification, but it was nevertheless reasonable for the respondent to give the claimant the option.

116. No evidence has ever been produced that Mr Athey had expressed an interest in voluntary redundancy.

117. The claimant has raised the position of Mr Tom Kenworthy as a role for which he should have been considered, but he was an associate in 3D CAD design working closely with e-commerce. His skill set was very different to the claimant's as had been his previous job functions where he had simply been involved in a particular Veet project for a period of time. In addition, the role was based in Slough due to the need to work closely with of marketing and the commerce team based there. The claimant would not have been interested in a relocation.

118. Without his retention in the new Veet/Scholl role, the claimant was not interested in exploring the possibility of alternative positions. He felt that he had been worn down by the business and the recent performance

management process and that, whatever role he undertook, the respondent would be looking for a reason to get rid of him. He was concerned that, if that happened in a more junior position, any future redundancy or severance payment would be affected. Whilst he raised arguments regarding the grounds of his redundancy in the appeal he submitted, the reality is that the claimant was not, as he expressly stated indeed, looking to return to the respondent. The evidence is certainly that the emphasis of the claimant by this stage was on enhancing his financial compensation.

119. In these proceedings, vacancies for alternative roles have been identified by the claimant. The role of Packaging Associate was not however available at the time of his dismissal and was at a level which would not have been acceptable to him. A Senior Packaging Technologist role in health was required but was based at the respondent's Nottingham factory and would not have been suitable for the claimant. A role of product data compliance arose again only after the claimant's employment had terminated.

120. In circumstances where the claimant is understood to have already received a statutory redundancy payment, the question of an entitlement to a basic award does not appear to arise so that the tribunal does not anticipate any need or basis for a hearing as to remedy.

121. As regards the claimant's complaints of disability discrimination, a common contention in many of them is that performance issues raised with the claimant arose out of or related to his disability impairments. Indeed, in evidence the claimant's primary contention in respect of behavioural issues was that these were affected, not by his primary condition, but by the effects of the combination of medication he took to suppress it. The claimant and his condition was diagnosed only in 2013 and the medication prescribed inevitably, therefore, thereafter. However, the evidence is of the claimant having similar performance issues raised with him substantially prior to that date covering his manner, method of communication and a perceived inability to prioritise and to meet project deadlines.

122. In fact, the claimant was at pains to point out that there were many things he had done well throughout his employment (including in the last few years of it) where there was no suggestion from him that this performance had been adversely affected. The claimant's case was that the respondent effectively concentrated on a small number of areas where there were perceived but not entirely justified deficiencies in performance to the exclusion of all the other things which he did extremely well. The claimant at times said that there was nothing wrong with his performance and at other times that by making some effort on his own part he would be able to improve in the areas the respondent regarded him as being deficient. He did not suggest that due to his disabling impairment he would be unable to show that improvement.

123. Furthermore, the claimant did not at any stage raise with those who managed him or occupational health that behavioural, communication or timeliness issues were a product of his conditions or medication, including such that reasonable adjustments ought to be made to alleviate any disadvantage he was suffering. This was in the context of the respondent having put in place and managed the claimant successfully being restricted from working, for instance, in a factory environment, in a laboratory environment and using power tools. The claimant had also been given leeway regarding his hours of work.

124. Whilst the tribunal can well understand a reluctance on the claimant as a disabled person to, in his words, "blow the trumpet" about his disabilities, the claimant was willing and able to discuss the aforementioned adjustments and for his duties to be restricted. Furthermore, the uncontested evidence of Mr Campbell is that the claimant bore the inevitable burden of his condition very well and with significant good humour. He clearly worked with a supportive group of colleagues who knew all about his condition and were not unempathetic towards it.

125. Even at the stage where the claimant went to occupational health, knowing that serious questions were being raised regarding his performance, he did not raise with the occupational health advisers that adjustments were required which would assist him to meet the respondent's standards or result in consideration being given to amending those standards or how they were assessed.

126. The tribunal has no medical evidence of a connection between his behaviour or performance and his disability or the medication he took as a result. The claimant has supplied drug information sheets which show the possibility of a number of side effects which can include impact on concentration and effects on mood. These are listed as potential side effects of many medications and as such are insufficient to provide a basis for the tribunal finding as fact the linkage for which the claimant contends. Similarly, general academic studies on the claimant's conditions or their effects which were contained within the agreed bundle but not referred to in evidence do not help the tribunal in concluding exactly how the claimant was affected by his condition/medication and why. This is not a case where the claimant has taken the tribunal to specific behaviours and attempted to explain their cause or origin. That includes anything said at the grievance appeal. The claimant's union representative considered that Mr Jones knew how to "press the claimant's buttons" but the tribunal cannot conclude that any reaction of the claimant arose from his disability – there is little said other than that the claimant's medication could make him short-tempered. His communication and attitude appears however to have been sub-optimal, from the the respondent's perspective, for a long time, certainly prior to the claimant taking the medication

127. The tribunal then addresses the specific allegations in turn.

Allegation (1): In the period leading up to January 2016, the Respondent applied a practice of requiring employees to meet a certain standard of performance. That put the Claimant at a substantial disadvantage because of the effect of his disability on his performance. Alleged to be a breach of the duty to make reasonable adjustments: the Respondent should have adjusted the standard required of him.

128. The tribunal's overarching conclusions above regarding a lack of linkage between his disability/medication on the claimant's performance prevents a related finding that the requirement on employees to meet a certain standard of performance placed the claimant as a disabled person at a substantial disadvantage because of the effect of his disability.

129. Again, at no point did occupational health advise that any adjustment was required to the performance appraisal system or the standards to be expected of the claimant. Nor was this something the claimant raised with them. The claimant should be viewed in the context of the respondent having made the adjustments to the claimant's working arrangements to assist him in the performance of his duties. These included the restriction on a factory, laboratory and lone working environment, not operating machinery, his ability to come in late, a lack requirement on him to drive, a buddy system in respect of fire alarms and allowing him to sleep when required with the possible use of a sleep room made available.

130. The respondent did not act in breach of the duty to make reasonable adjustments in failing to adjust the standard required of him.

Allegation (2): In January 2016 the Respondent put the Claimant under a PIP. Alleged to be a detriment because of something arising in consequence of his disability, namely the effect of his disability on his performance.

131. The claimant being placed on even an informal performance improvement can be said to amount to unfavourable treatment even if aimed at enabling and assisting the claimant to achieve a better and satisfactory level of performance. Very few people like to be placed upon such a plan, not least because the next step is a move to a formal process where a failure to meet the standards can ultimately result in dismissal.

132. Again, however, the tribunal's findings are that the claimant's performance issues were not linked to his disability or the medication he took. The reason for the informal PIP arose from issues relating to attitude and communications, but little attempt has been made by the claimant to explain any specific linkage to any specific example of bad attitude or communication held against him, which led to this performance management.

133. In any event, had the question of proportionality been reached, the steps taken by Mr Bobkov enabled an opportunity for improvement without the more immediate threat of potential dismissal which would have arisen from a formal PIP.

Allegation (3): In June 2016, Ms Julie Sagona informed the Claimant that he should "consider his role within the organisation if he felt the treatment

he was receiving was making him so ill". Alleged to be discrimination because of something arising in consequence of his disability, namely, the treatment he received as a result of the impact of his disability on his performance.

134. The tribunal has made a factual finding on the balance of probabilities that the comment attributed to Ms Sagona by the claimant was not in fact made. The claimant was told that his employment might ultimately be at risk if he did not address the performance issues, but this in any event arose out of his genuine performance issues which again did not in turn arise out of his disability/medication.

Allegation (5): In June 2017, Mr Bobkov asked the Claimant's colleagues for feedback on his performance in areas where there might be criticism. Alleged to be discrimination because of something arising in consequence of his disability, namely, the effects of the Claimant's disability on his performance.

135. The tribunal does not consider that the request amounted to unfavourable treatment. Mr Bobkov simply requested feedback and did so in an open and transparent manner. One of the recipients of the request thought it to be inappropriate, but Mr Bobkov was seeking to make an objective assessment of the claimant's ability to meet deadlines in circumstances where if he had simply assessed the claimant based on his own personal experience, that assessment would have been negative. In fact 2 out of the 4 responses received were favourable to the claimant. There is evidence within the respondent of the use of 360° appraisals and indeed encouragement at times from the claimant to speak to others who had worked with him.

136. In any event, again, the requested feedback was unrelated to and did not arise out of the claimant's disability/medication.

Allegation (6): The Respondent adopted a practice that employees were expected to evacuate the building on the sounding of the fire alarm. That put the Claimant at a substantial disadvantage because, as a result of his disability, he might be immobile. Alleged to be a failure to meet the duty to make reasonable adjustments.

137. Clearly, the respondent expected employees to evacuate the building on the sounding of the fire alarm. A sudden event such as the fire alarm did create a heightened risk of the claimant suffering a cataplexy seizure which, when it occurred, had the effect of making him immobile for a period potentially of some minutes and making him in the aftermath still prone to a form of physical collapse. The claimant was disadvantaged by his disability such that the duty to make reasonable adjustments arose.

138. Insofar as this complaint is a general one overarching the claimant's period of employment from 2013, it must fail on the facts as found. The tribunal accepts that adjustments were place reflecting occupational health advice. One of these adjustments involved the anticipation of the claimant having difficulties in the event of a fire alarm such that Mr Campbell arranged a buddy system so that a number of employees within the claimant's team needed to be and were aware of his difficulty and were to

take responsibility for ensuring that the claimant was evacuated. The fire marshals completed a rollcall outside the building to ensure everyone had left. The marshal for the claimant's area was aware of the claimant's potential difficulties. Whilst the tribunal makes no finding that the claimant had himself have been involved in any rehearsal, it accepts that the claimant's team had ensured that they understood how to use an available evacuation chair to remove the claimant from the building, if ever necessary. This system did break down on 18 September 2017 in circumstances where the claimant was left unassisted in the building during a fire drill. This did however represent an isolated breakdown in a system in place, which represented a reasonable adjustment for the claimant and cannot amount in itself, in all the circumstances to a failure to make adjustments. As a result of the failure, the process was reviewed and a Fire Evacuation Plan was drafted. The aim was to finalise this with the claimant when he returned to work, but, in circumstances where he remained absent due to sickness, that opportunity did not arise. This was the first time the buddy system had been formalised in a written plan and it represented an improvement for the benefit of the claimant. It did not however represent that there had not prior to the plan been a reasonable adjustment in place to alleviate the claimant's disadvantage.

Allegation (8): On or after 18 September 2017 the Respondent reprimanded the Claimant for not leaving the building during the fire alarm and required him to attend an investigatory hearing in relation to his email of complaint. Alleged to be harassment, victimisation because of protected act 2, or discrimination because of something arising in consequence of the Claimant's disability, namely, his inability to leave the building in response to the fire alarm.

139. Dealing firstly with the allegation of victimisation, this is reliant on the claimant's email to Ms Pearson on 18 September 2017 amounting to a protected act. The claimant raises in that what might be viewed as a complaint of a breach of health and safety. However, there is no express suggestion that he has suffered from discrimination or that the respondent has failed in any duty it might have under the Equality Act 2010. The tribunal appreciates that, in appropriate cases, an inference of a complaint of discrimination might be drawn and that it should look at the overall context and not necessarily confined itself to only the exact words used in one single communication. Nevertheless, the tribunal still cannot conclude that it was implicit within the communication or ought to be inferred from it that the claimant was, for instance, asserting that there had been a failure to make a reasonable adjustment. He raised his cataplexy, but only in the context of his health and safety having been risk.

140. In any event, the claimant was not reprimanded for not leaving the building. He met informally on 20 September 2017 with Ms Hemming-Tayler who advised on what he should do in the event of a fire evacuation. The tribunal has already referred then to the subsequent drawing up of a fire evacuation plan to help ensure that the claimant was provided with the assistance he required on any future fire alarm.

141. The claimant was by letter of 9 October invited to attend an investigatory meeting to discuss the purpose and intent of his email to Ms

Pearson and whether his actions on the day had been appropriate. This was in the context of the claimant sending the email with the subject heading of "Burning to Death" and referring to smoke inhalation in the body of email. This was not accurate and it was obvious that the claimant was seeking to make a point. He accepted in evidence that he was aware that it was just a fire drill with no risk to his health and safety and accepted that his email had been "unprofessional". Again, the tribunal cannot conclude that being invited to an investigation meeting in all these circumstances, could reasonably be viewed by an employee as constituting an act of detrimental treatment. There was no suggestion of any sanction and the matter was not of such triviality that the respondent's actions might reasonably have been viewed to be disproportionate.

142. The respondent's actions in the context of the complaints of harassment similarly cannot constitute unwanted conduct and, in any event, whilst the claimant's disability issues form a background, the respondent's actions were related to the claimant's admitted unprofessional response to the situation and not intrinsically to his disability. Even if the respondent's actions had the effect of creating a hostile, offensive or degrading atmosphere for the claimant, it was not in all the circumstances reasonable for them to have that effect.

143. Finally, the complaints on this issue of discrimination arising from disability must also fail. The treatment did not arise out of the claimant's disability, but out of his reaction to the situation he had been placed where there is insufficient causal link with his disabling condition itself or the difficulty it created for him in leaving a building during a fire alarm. Certainly, if the tribunal is wrong, the conversations with the claimant and the invitation to the investigatory hearing were with the legitimate aim of ensuring the claimant's future safety and addressing his admitted unprofessional behaviour. The respondent's actions were clearly proportionate. No disciplinary sanction was applied - an investigation meeting of course never went ahead with no evidence of the respondent seeking to take further steps to rearrange it.

Allegation (9): The Respondent adopted a practice of subjecting employees to a reprimand if they fail to leave the building in response to a fire alarm which put the Claimant at a substantial disadvantage, because, as a result of his disability, he was more likely to be unable to leave the building. Alleged to be a failure to meet the duty to make reasonable adjustments.

144. The tribunal has heard no evidence and can make no finding of the respondent adopting a practice of subjecting employees to a reprimand for failure to leave the building in response to a fire alarm. It would be amazed, however, if it did not have such a practice. The claimant's complaint must in any event fundamentally fail because he was not on the tribunal's findings reprimanded in any sense whatsoever.

Allegation (10): September 2017, on a train from Slough to Birmingham Mr Bobkov told the Claimant that he wanted to review his performance and, the following day, in a hotel foyer, told the Claimant that he was underperforming and that, "if he didn't listen, we can get rid of you". Alleged to be harassment.

145. The tribunal's factual findings do not support the detrimental treatment the claimant claims to have suffered in respect of this allegation, save that Mr Bobkov did tell the claimant on the train journey that he wanted to review the claimant albeit, immediately he appreciating that the claimant had misunderstood that he was seeking an immediate review there and then, clarifying that he wished to undertake this during his visit to the UK. There was no discussion of the claimant's performance on the train journey. Further, Mr Bobkov did the following day in the hotel lobby refer to the possibility of a process leading to the termination of employment – he did not say that the respondent could "get rid of" him. Mr Bobkov accepted before the tribunal that the location of the meeting was not appropriate and he would not try to conduct such a meeting in a similar location in the future.

146. Mr Bobkov raised the issues he did because of his perception of the claimant's underperformance. He was never seeking to have the discussion on the train and the inappropriate venue arose out of Mr Bobkov having limited time to conduct the review, being unable to book out a meeting room at the hotel and making an honest misjudgement regarding the appropriateness of the discussion proceeding in the hotel lobby. In the context of a complaint of unlawful harassment, the treatment was not related to the claimant disability. It arose out of his performance and Mr Bobkov's attempts to address it which were completely unrelated to the claimant's disability or, on the tribunal's findings, any issues which arose out of it.

Allegation (11): In November and December 2017 the Respondent adopted the practice of reviewing employees' performance regardless of whether they were at work or not. This put the Claimant at a substantial disadvantage because, as a result of his disability, he was more likely to be off work and unable to engage in the performance process. Alleged to be a failure to meet the duty to make reasonable adjustments.

147. Mr Bobkov completed the claimant's annual performance review during November and December 2017 in circumstances where he had been absent from work from 29 September 2017 due to sickness. This is a complaint of a failure to make reasonable adjustments. There is however no evidence before the tribunal of the respondent having a general practice regarding the conducting of performance reviews when employees were absent from work. Nor can it be said that if such a practice existed the claimant was placed at a substantial disadvantage. There is no evidence that he was more likely to be off work and unable to engage in a performance review process as a disabled person. In fact, there is no evidence of the claimant having any earlier material absences from work other than during a period in 2013 during which his conditions were diagnosed.

148. In any event, the tribunal has found that the claimant's performance was assessed on the basis of what he had done prior to his absence and without him being penalised for the period of absence. Where targets are recorded as having been missed, they were due to be completed prior to his absence and therefore his ratings were not affected by this period of absence. The claimant was given a "needs improvement" rating which resulted in him not receiving any salary increase for the subsequent year. The claimant has not pointed to any specific steps Mr Bobkov ought to have

taken as a reasonable adjustment and how such steps might have avoided or alleviated any particular disadvantage. The occupational health report not indicate that any adjustments were required to the PDR process. If the process had not been completed then the claimant would not have been given any rating - certainly then he would not have received a pay rise. No targets would have been set for the following year. The claimant is not suggesting that he ought to have been involved in the PDR when unfit to attend work. Had he been involved there is no basis on which the tribunal could conclude that he would be given a higher rating. Again, the claimant was not penalised in the assessment by his period of absence during the last quarter of the year. Again, the tribunal cannot conclude that any adverse assessment of the claimant's performance arose from his disability in circumstances where therefore adjustments ought to have been made of the assessment or in any respect. This complaint must also fail.

Allegation (12): In the period leading up to November and December 2017, the Respondent applied a practice of requiring employees to meet a certain standard of performance. That put the Claimant at a substantial disadvantage because of the effect of his disability on his performance. Alleged to be indirect discrimination and a failure to meet the duty to make reasonable adjustments.

149. The claimant has not shown, as relevant to a complaint of indirect discrimination or a failure to make reasonable adjustments, that he was disadvantaged in being required to meet a certain standard of performance by his disability. The linkage between performance issues and his disability/medication is not made out. The claimant was not penalised for not being able to perform work during his period of absence.

Allegation (13): In November and December 2017 the Respondent assessed the Claimant's performance as not meeting the required standards and decided not to grant him a salary increase. Alleged to be a discrimination because of something arising in consequence of his disability, namely the effect of his disability on his performance.

150. The failure to grant a salary increase was an automatic consequence of an assessment that the claimant had not met the required standards and was rated as "needs improvement". As has already been stated, that assessment cannot be said to have arisen out of the claimant's disability/medication. The linkage between performance failings and his disability/medication again has not been made out. The claimant was not penalised for not being at work or being unable to complete his work during his period of absence from late September 2017.

Allegation (14): On 11 June 2018 the Respondent dismissed the Claimant. Alleged to be indirect discrimination (on the basis that the dismissal resulted from the application of a practice of requiring employees to meet a certain standard of performance).

151. The claimant's dismissal did not arise from was not related to any practice of requiring employees to meet a certain standard of performance. Even if the claimant was disadvantaged by being required to meet that standard (which it has been held in a number of contexts during his

employment, he was not) his dismissal was by reason of redundancy and not because of his disability or, more particularly, because of any failure to meet performance standards. His dismissal arose out of him holding a stand-alone position which was no longer required and where his work was combined into a new role which subsumed the packaging work required for the Veet brand together with that required for the similarly de-prioritised Scholl brand.

152. All of the complaints of discrimination, victimisation and harassment must fail and are dismissed.

153. Even had the tribunal reached a different conclusion in respect of the allegations of unlawful discrimination, they were all submitted outside of the applicable time limits with the exception of the final Allegation 14.

154. The claimant contacted ACAS to commence early conciliation on 30 July 2018 and an ACAS certificate was issued on 30 August 2019. The claimant's complaint was then presented to the tribunal on 30 September 2018. As a result, all acts complained of which occurred before 30 April 2019 are outside the applicable time limit. The tribunal has not in the claimant's evidence been presented with evidence of an explanation for his delay. Had the claimant's dismissal arisen out of the respondent's assessment of the claimant's capabilities which in turn arose out of the claimant disability/medication, then he might have been able to draw a linkage between some of the earlier, in particular, performance assessments and a discriminatory dismissal. There is, however, on the tribunal's findings no such discriminatory dismissal and no ability to argue that there was a continuing act of discrimination. It would not, in the absence of an explanation for delay, have been just and equitable to extend time to allow the tribunal jurisdiction in these complaints of unlawful discrimination.

Employment Judge Maidment

Date 26 November 2020