EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Richards	v	Brocade Communications UK Ltd

Heard at: Reading by CVP

On: 12 to 15 July 2021 and
28 October 2021 and
On: 20 December 2021 in private

Before: Employment Judge Hawksworth
Ms G Binks
Mr A Kapur

Appearances
For the Claimant: Miss H Platt (counsel)
For the Respondent: Mr N de Silva QC (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's complaint of failure to make reasonable adjustments is well-founded and succeeds. The respondent failed to make the following reasonable adjustments:

   1.1. applying a redundancy policy with objective selection criteria and consideration of actual duties, skill set, experience and performance, so that the alignment decision in respect of the claimant was consistent and objective;

   1.2. adequately consulting with the claimant; and

   1.3. offering the claimant suitable alternative employment by modifying his role or offering a new role.

2. The claimant's complaint of unfair dismissal is well founded and succeeds.

3. The claimant's complaints of direct disability discrimination and direct age discrimination fail and are dismissed.

4. The claimant's complaint of indirect disability discrimination and indirect age discrimination fail and are dismissed.

5. A remedy hearing will be listed to decide remedy.

REASONS

Claim, hearings and evidence

1. The claimant was employed by the respondent from 28 June 2004 until his dismissal for redundancy on 31 December 2017.

2. In a claim form presented on 11 April 2018 after a period of Acas early conciliation from 16 January 2018 to 31 January 2018, the claimant made complaints of unfair dismissal, disability discrimination and age discrimination. The respondent presented its response on 2 July 2018 and defended the claim.

3. The full merits hearing was listed for ten days starting on 12 July 2021. For judicial resourcing reasons, the time allocation had to be reduced to four days, 12 to 15 July 2021. The parties both wished to proceed with the reduced time allocation, and agreed that most if not all of the evidence on liability could be completed in the four days available.

4. The hearing took place by video (CVP). The respondent's counsel had prepared helpful opening submissions and a cast list/chronology of main events. The tribunal heard the evidence of the claimant and, for the respondent, Joe McHugh, Regan McGrath and Marc Simons. The evidence of the claimant's witnesses Marcus Jewell and Alison Marr was accepted by the respondent.

5. There was an agreed hearing bundle with 1031 pages. Page references in this judgment and reasons are to the agreed bundle.

6. On the afternoon of 13 July 2021, the second day of the hearing, an issue arose between the parties about the scope of the claimant's claim. The tribunal considered this before the hearing began on 14 July 2021. We decided that:

    6.1 the claimant's claim includes the issue of the substantive role of Romain Schneider before and after the acquisition of the respondent by Broadcom; and
    6.2 the complaint of a failure to consider or offer alternative employment includes the failure to offer an existing vacancy and the failure to create a new role.

7. Written reasons for this decision were requested and sent to the parties on 28 July 2021.

8. There was insufficient time in the reduced allocation to hear submissions. It was agreed that the respondent would have the opportunity at the resumed hearing to call further evidence on the issue of the role of Mr Schneider before and after the acquisition of the respondent by Broadcom.

9. The hearing resumed on 28 October 2021, the date having been listed taking into account the availability of the parties and their representatives. The respondent served a witness statement for Mr Schneider and a supplemental statement for Mr McGrath. The claimant's representative did not have any cross-examination questions for Mr Schneider or for Mr McGrath on his supplemental statement. Additional documents were added to the bundle by consent, as pages 1032 to 1241.

10. Both parties' counsel prepared helpful closing submissions and made oral submissions.

11. Judgment was reserved. A deliberation day was listed for 5 November 2021 but this had to be postponed to 20 December 2021. The parties are aware of the reason for the postponement. The employment judge apologises for the subsequent delay in the promulgation of this reserved judgment and reasons and the impact on the future conduct of the case.

The Issues

12. The issues for us to decide were set out in an agreed list of issues which was discussed and amended slightly at the start of the hearing. The issues for us to decide are as follows (the numbering is retained from the agreed list).

1. Protected Characteristics

a. Disability: it is agreed that the Claimant was disabled by reason of his renal cancer from 2005 onwards and at all material times the Respondent was aware of this.

b. Age: The Claimant was aged 59 in 2017 and the Respondent was aware of this at all material times.

2. Unfair dismissal

a. it is accepted that there was a genuine redundancy situation. The issues are therefore:

i. Was there adequate warning and/or consultation either collectively or individually and a real attempt to avoid redundancies?
ii. Did the Respondent adopt a fair basis on which to select for redundancy, including having a fair or objectively selected pool?
iii. Did the Respondent take such steps as were reasonable to avoid or minimise redundancy by redeploying potentially redundant employees within its own organisation?
iv. Was it within the band of reasonable responses not to consider bumping?
v. Did the process adopted discriminate because of age or disability (see below)?
vi. Did the Respondent adequately consider suitable alternative employment?

The Respondent contends that there was no suitable alternative employment.

b. did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant and was dismissal within the range of reasonable responses?

3. Collective redundancy

a. This complaint was withdrawn by the claimant.

4. Direct disability discrimination:

a. Did the Respondent treat the Claimant less favourably than Joy Gardham and/or Romain Schneider and/or a hypothetical comparator by:

i. failing to offer suitable alternative employment (comparators: Joy Gardham, Romain Schneider and hypothetical);
ii. dismissing the Claimant (hypothetical comparator);
iii. not upholding his appeal (hypothetical comparator)?

b. If so, was that because of disability?

5. Indirect disability discrimination

a. Of the following acts:

i. the redundancy policy it followed;
ii. not having a written procedure (the Respondent admits that it did not have a written redundancy procedure);
iii. not having an objective pool;
iv. not using selection criteria;
v. not considering bumping;
vi. not adequately consulting;
vii. not seeking to avoid redundancies;
viii. not offering suitable alternative employment;
ix. not considering the impact of dismissal on employees.

Save in respect of (i), which the Respondent admits could be a PCP, are the remaining acts capable of amounting to a policy, criterion or practice?

b. In respect of the acts at (i) — (ix) above, did the Respondent in fact apply those PCPs to the Claimant?

c. Did any PCP put, or would it put, disabled employees at a particular disadvantage when compared with employees without cancer, in particular:

i. by leading to dismissal;
ii. by the impact of dismissal on life expectancy, availability of medication and health;
iii. by the impact of the loss of private medical insurance and/or life cover that cannot be secured at an affordable level because of the disability; and
iv. by not upholding an appeal against dismissal?

d. Did it, or would it put, the Claimant at that disadvantage?

e. Can the Respondent show it to be a proportionate means of achieving a legitimate aim? The Respondent relies on legitimate aims of business efficiency and ensuring that the Respondent and/or Broadcom retained the relevant skills it needed.

6. Discrimination for a reason arising from disability

a. This complaint was withdrawn by the claimant.

7. Failure to make reasonable adjustments:

a. Of the following acts:

i. the redundancy policy it followed;
ii. not having a written procedure (the Respondent admits that it did not have a written redundancy procedure);
iii. not having an objective pool;
iv. not using selection criteria;
v. not considering bumping;
vi. not adequately consulting;
vii. not seeking to avoid redundancies;
viii. not offering suitable alternative employment;
ix. not considering the impact of dismissal on employees.

Save in respect of (i), which the Respondent admits could be a PCP, are the remaining acts capable of amounting to a policy, criterion or practice?

b. Did any PCP(s) put the claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant relies on the following substantial disadvantages:

i. leading to dismissal;
ii. the impact of dismissal on life expectancy, availability of medication and health;
iii. the impact of the loss of private medical insurance and/or life cover that cannot be secured at an affordable level because of the disability; and
iv. not upholding an appeal against dismissal?

c. Did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage? The Claimant states that the Respondent should have made the following reasonable adjustments:

i. Applying a redundancy policy which included fair and objective selection criteria, scoring from a pool, consideration of actual duties, skill set and experience rather than job title, consideration of past performance;
ii. Having a written policy so that those who made the decision as to who was placed in the SAN BU pool and who was placed in the IP GEN pool was consistent, objective, non-discriminatory, justifiable and fair;
iii. Adequate consultation on all of the process so that employees could offer ways of avoiding redundancies;
iv. Offering suitable alternative employment should it have been available;
v. Considering the impact of dismissal on disabled employees (in terms of the loss of PMI/life cover and considering weighting in favour of disabled employees);
vi. Not dismissing the Claimant; and
vii. Upholding his appeal.

8. Direct age discrimination

a. Did the Respondent treat the Claimant less favourably than Joy Gardham and / or Romain Schneider and/or a hypothetical comparator in their 30s or 40s by:

i. failing to offer suitable alternative employment (Comparators: Joy Gardham, Romain Schneider and / or hypothetical);
ii. dismissing the Claimant;
iii. failing to uphold his appeal?

b. if so, was the treatment because of age?

c. Can the Respondent show the treatment to be a proportionate means of achieving a legitimate aim? The Respondent relies on legitimate aims of business efficiency and ensuring that the Respondent and/or Broadcom retained the relevant skills it needed.

9. Indirect age discrimination

a. Of the following acts:

i. the redundancy policy it followed;
ii. not having a written procedure (the Respondent admits that it did not have a written redundancy procedure);
iii. not having an objective pool;
iv, not using selection criteria;
v. not considering bumping;
vi. not adequately consulting;
vii. not seeking to avoid redundancies;
viii. not offering suitable alternative employment;
ix. not considering the impact of dismissal on employees (in terms of availability of life cover /private medical insurance and effect on health, availability of medication and life expectancy)

Save in respect of (i), which the Respondent admits could be a PCP, are the remaining acts capable of amounting to a policy, criterion or practice?

b. In respect of the acts at (i) — (ix) above, did the Respondent in fact apply those PCPs to the Claimant?

c. Did any PCP(s) put, or would put, employees in their 50s/60s at a particular disadvantage when compared with employees in their 20s/30s or 40s, in particular:

i. by leading to dismissal;
ii. by the impact of dismissal on life expectancy, availability of medication and health;
iii. by the impact of the loss of private medical insurance and/or life cover that cannot be secured at an affordable level because of age; and
iv. by not upholding an appeal against dismissal?

d. Did it, or would it put, the Claimant at that disadvantage?

e. Can the Respondent show it to be a proportionate means of achieving a legitimate aim? The Respondent relies on legitimate aims of business efficiency and ensuring that the Respondent and/or Broadcom retained the relevant skills it needed.

10. Remedy

a. Should the Claimant be reinstated or re-engaged?

b. What compensation is the Claimant entitled to?

c. Should there be any uplift for failure to follow ACAS procedures?

d. Is a Polkey reduction appropriate?

Findings of fact

13. We make the following findings of fact based on the evidence we heard and read. We heard a lot of evidence during the hearing, and we do not attempt to include everything here. We set out here the facts which we have found of most assistance in deciding the relevant issues.

The respondent's business

14. The respondent is part of a global group of technology companies specialising in data and storage networking products. This is an area of work employing very technical language and frequent use of acronyms. We set out a brief outline of some aspects of the respondent's business which are relevant to the issues we have to decide.

15. The respondent's business activities prior to 2017 included designing and selling systems for storing digital data, known as Storage Area Network ('SAN') business, and also designing and selling systems to allow clients to connect to the internet or to their own networks, known as Internet Protocol ('IP') business. The respondent carried out two types of IP business: i) Switching Routing and Analytics ('SRA'), where the connection is made using hardware devices and software networking, also known as Local Area Networking or 'LAN' and ii) wireless networking where the connection is made without cables, also known as Wireless Area Networking or 'WAN'. There were also other smaller areas of business. Another aspect of the respondent's business which we need to explain briefly is that the respondent often worked in partnership with companies who manufacture IT products and those companies are referred to as Original Equipment Manufacturers ('OEMs').

16. Prior to 2017 the global operations of the Brocade group, of which the respondent was a part, were organised regionally and not by reference to these business lines. Employees were grouped according to geographical region, selling a range of products and services to clients based in their region.

Acquisition of the respondent by Broadcom

17. In November 2016 it was announced that Broadcom Inc ('Broadcom'), a global IT company, proposed to acquire Brocade. The acquisition was to take the form of a purchase of shares. The acquisition was delayed pending regulatory approval from the US, and did not complete until 2 November 2017, a year after the announcement of the proposed acquisition. The completion of the acquisition was announced on 17 November 2017.

18. Importantly, under the terms of the acquisition, Broadcom only wanted to purchase Brocade's Storage Area Network (SAN) business. It did not want to acquire the IP business or the other smaller areas of business. This meant that Brocade had to sell off or try to sell off those parts of its business to other purchasers, either before or shortly after the acquisition by Broadcom.

19. This posed a challenge to Brocade because its organisational structure was not neatly delineated by business activity. It was organised by region rather than by business line. To make it possible to sell off different parts of the business to different purchasers, the workforce had to be restructured, so that it was organised by business activity. Very shortly after the announcement of the proposed acquisition, Brocade began an alignment process, moving employees into business units, to facilitate the sale of the parts of the business which Broadcom would not be purchasing.

20. There was therefore a major reorganisation of the business between November 2016 and November 2017. During this time Brocade identified or set up business units, each dealing with a specific business activity, then aligned employees to the various business units and sought buyers for each of the units. Employees aligned to a business unit which was sold were transferred to the purchasing company.

The alignment process

21. For the respondent (that is the UK part of the global Brocade group) the alignment process focused on the organisational structure across all parts of the business in Europe, the Middle East and Africa ('EMEA'), not just the UK. This can be seen from the organisation charts, for example pages 131 and 150 which show the structure of the EMEA West Sales part of the business before and after the acquisition by Broadcom.

22. The alignment process was more straightforward for some employees than for others. One reason for this was because Brocade had historically developed and grown through acquisitions of other companies. Businesses acquired more recently were easier to delineate. For example, Ruckus Wireless was acquired by the respondent in November 2016 and at the time of the announcement of the acquisition by Broadcom, its employees had yet to be fully integrated into the wider business. The Ruckus Wireless business was preserved as a separate business unit, and sold to another purchaser in November 2017.

23. For other employees, the nature of their role made it easier to align them. For example, employees who concentrated solely or predominantly on the sale of one particular product could be aligned into the business unit for that product. Similarly, an OEM relationship manager might, because of the relationship with a particular manufacturer, use only one or mainly one product, and so they could be aligned to the business unit which included that product.

24. However, the alignment process was much more difficult for those employees whose responsibilities covered numerous business activities or products. This made it less clear which business unit they should be aligned to (or, put another way, there might be more than one business unit to which they could be aligned). This particularly applied to senior members of the business, including senior management teams who were, prior to the restructuring, responsible for all business activities across a particular geographical region.

25. Various parts of Brocade's business were sold off during the course of 2017 (page 374). Employees who had been assigned to those business units transferred to the purchasers of those businesses.

26. Employees who were not aligned to the business units which were being sold off were assigned to one of two business units in anticipation of the completion of the acquisition by Broadcom. The two business units were called the Storage Area Network business unit (the SAN BU) and the Internet Protocol General business unit (the IP General BU).

27. The SAN business unit was the part of Brocade's business which was to be acquired by Broadcom (if the purchase completed). Those employees aligned to SAN were those who had identified future roles within the part of the business which would be continued by Broadcom (the SAN business). Those assigned to the IP General business unit had no identified future role because Broadcom was not purchasing the IP General part of the business. Purchase of the IP General business unit by another purchaser was unlikely, because staff on the unit did not do a specific business activity which would make it appealing to a purchaser. So, when the acquisition by Broadcom closed, redundancy consultation was likely to follow for staff assigned to IP General. If there was no alternative role for them, they were likely to be made redundant.

28. It can be understood from this that the decision as to whether to align an employee to the SAN business unit or to IP General business unit played a very significant part in whether they would have a job after the acquisition.

29. There was no written policy for the alignment exercise and no explanation as to how the business would decide which employees or which roles should be aligned to which business unit. There was no consultation with employees about the alignment exercise. Brocade did not consider there to be any requirement to consult over the potential redundancies, because the acquisition by Broadcom was still subject to regulatory approval and therefore was not certain.

30. On 23 December 2016 a 'talking points and FAQs' document was sent to leaders and managers. It said it was not to be distributed to employees (page 195). The information provided to describe how Brocade had determined who was aligned with the SAN business (page 197) said as follows:

> *"The identification process was highly collaborative, vetted across all functional executives and guided by a common set of criteria. In many cases, identification as 'SAN' was clear based on one's entire job function and duties (i.e.: role & responsibilities, key accounts and domain knowledge). Where cross-functional dependencies or duties across businesses existed (i.e.: day-to-day duties, customer support that impacted across various product lines), business leaders consulted to reach a conclusion aligned with the majority of one's duties. While your current organizational reporting structure remains unchanged, you are considered as aligned with the SAN business."*

31. Despite the reference to a collaborative process, there were no minutes before us of any collaboration meetings and we were not aware of any taking place.

32. Despite the reference to a common set of criteria, there was no document setting out what criteria were applied. We heard evidence about whether in carrying out the alignment process the respondent considered roles only, or whether it focused on an individual employee's skills and capability. The respondent's approach was inconsistent. For example, Mr Simons, the UK based manager who considered the claimant's redundancy appeal, focused on the kind of work being carried out, not an individual's performance, although performance could be relevant as a criteria to select from a pool.

33. Mr McGrath, who was based in Canada, was the Vice President of America Sales and from May 2017 the Vice President of Worldwide Sales. He took a different approach. In carrying out the process of matching roles in the existing organisation with available roles in the future organisation, he relied on the knowledge of local managers as to who was "doing the job and competent at the job". He said criteria would include "ongoing performance and a variety of other things sales managers would find valuable, such as impact to the business." He agreed that an assessment of the person as well as the role would be part of the process.

The claimant's role

34. The claimant's claim arises against that background.

35. The claimant had 18 years' experience in the IT storage market when he joined the respondent on 28 June 2004 (page 85). His first role with the respondent was as an OEM Territory Sales Representative. He excelled in his role as a sales representative.

36. The claimant was promoted a number of times over the years. By 2011 he was one of two regional sales managers in the UK. He had responsibility for SAN business in the UK. He was very successful in this role and was awarded the 2011 EMEA Sales Manager of the Year. In 2013, he was promoted to a sales leadership role with responsibility for improving sales effectiveness and efficiencies across the EMEA region. He was seen as a proven strong sales leader.

37. On 27 November 2015 the claimant was promoted to the role of Director – EMEA Operations, reporting to Marcus Jewell, the respondent's Vice President EMEA (page 169). The parties agreed that the claimant's role was effectively chief of staff to Mr Jewell. The role included:

    37.1 Back up support for Mr Jewell for Governance of the EMEA business;

    37.2 Support with corporate communications;

    37.3 Forecast process improvements;

    37.4 Sales Enablement (sales enablement is about equipping others to enhance their sales skills to generate sales efficiencies and

improvements, by way of training, guidance, techniques, processes and procedures); and

37.5 Driving and managing existing and new programs.

38. The claimant did not manage a team. His was a 'standalone' role supporting Mr Jewell. It was also not a customer facing role; it was internal facing and focused on sales processes and development of the sales operation. It was not aligned to one sales product. In this role the claimant was regarded as a 'remarkably key member of the sales team' (page 183).

39. The claimant had been diagnosed with cancer in 2005. He had had medical treatment under the respondent's private medical insurance for a period of around 12 years. The private medical insurance had provided the claimant with faster medical treatment, with access to a wider range of medication and with access to that medication sooner than if he had not had the insurance cover.

40. In November 2016, at about the time the proposed acquisition of the respondent by Broadcom was announced, the claimant had a heart attack which required emergency surgery. Mr Lindholm, the respondent's group senior vice president for worldwide sales emailed the respondent's HR director to highlight the risk that the circumstances (by which he meant the risk of dismissal as a result of the major reorganisation) meant that the claimant might lose his medical insurance coverage in a situation where he was facing long term significant medical expense. Mr Lindholm asked the HR director for input as to how the respondent might mitigate these risks for the claimant. The HR team responded to say they would be looking into benefit provision to understand the options which may be available (page 183). Nothing was communicated to the claimant or his managers about this until December 2017.

41. Soon after the acquisition was announced, Mr Jewell asked Alison Marr, his executive assistant, to compile lists of all EMEA sales and sales engineering staff broken down into business units. Ms Marr asked the claimant, who was very familiar with the sales organisation, to assist her in making sure that all individuals were placed in the right business units. This process was done quickly and was carried out by reference to job title, there was no reference to job descriptions and no formal process of skills assessment.

42. As a senior manager, the claimant was one of those employees who had responsibility for a number of different business activities within a region. His role could not continue in the same form after Brocade began separating into business units. The functions the claimant and Mr Jewell had carried out were now being done within the separate business units. In November 2016 the claimant and Mr Jewell discussed the claimant's role. The claimant said he would accept a change in role so that he could remain employed and keep his private medical insurance, even if that meant having lower responsibilities. Mr Jewell and the claimant agreed to change the claimant's role so that he would focus on supporting the group's strategic and biggest SAN customers (pages 1024 and 1025).

43. The claimant was initially assigned to the SAN business unit. He appears on a list of 'retention employees' on 4 November 2016 (page 175). His name was then on lists of SAN employees dated 1 December 2016 and 6 January 2017 (pages 1020 and 217). He was informed that he was assigned to the SAN business unit.

44. However, by 3 February 2017 a decision had been taken to move the claimant and a manager based in Germany off the SAN business unit. An email dated 3 February 2017 explains the decision, saying that 'the primary reason is that their roles are not critical when reviewing the core needs of the SAN BU' and that there was 'no sales enablement function planned for the SAN BU and so [the claimant's] role is not needed' (page 243).

45. The sales enablement part of the claimant's role was no longer needed. Support to Mr Jewell was no longer needed, as Mr Jewell would be leaving the respondent. The respondent still needed some aspects of the claimant's role, such as support and prioritisation of corporate relationships for the SAN business (page 169). There was no reference in the email of 3 February 2017 to any other aspects of the claimant's role other than sales enablement. There was no explanation as to why the changes to the claimant's role which Mr Jewell had agreed were not or could not be put in place.

46. The reason given for the removal of the manager in Germany from the SAN business unit is 'Reduction required in the number of SE managers —his current org can be further collapsed across the other SE managers. The other SE leads are both more seasoned and more senior and can cope with the broader scope of responsibilities invoked by this change in the planned organisation'. (SE stands for Systems Engineering.)

47. Some discussions followed this between HR staff in various parts of the business about notifying the claimant and his colleague of their removal from the SAN business unit. On 6 February 2017 an HR director in the US business asked 'Will there be issues since we've notified them previously as SAN?' (page 245). The UK HR lead replied to say that she would 'work with Stuart Cooper [VP Systems Engineering EMEA] on the messaging as given [the claimant's] personal circumstances and [his colleague's] pure SAN background, there will be an emotional response' (page 245).

48. On 7 February 2017 the claimant's line manager, Mr Jewell had a skype chat with the UK HR lead about the removal of the claimant and his colleague from the SAN business unit:

> *"MJ: bit pissed with [Mr Cooper] et al on this I worked to save them and they have thrown 2 under the bus*
>
> *HR: pressure on numbers I think*
>
> *MJ: I get it but this is not objective there are weaker people*
>
> *HR: talking to [Mr Cooper] this was a role based decision rather than skills or capacity"*

49. It is clear that the description of the decision as purely role based was not accurate. The reasons given for the removal of the claimant's colleague (that there were 'more seasoned and more senior managers' who could cope with broader responsibilities) clearly indicate that factors such as skills and experience were taken into account.

50. We accept Mr McGrath's evidence that ultimately he had responsibility for the decision to remove the claimant from the SAN list. His evidence was supported by an email exchange in late December 2016 which referred to his decision to remove some employees from the SAN business unit (page 195). We find on the basis of other contemporaneous documentation (including the above Skype chat between Mr Jewell and the UK HR lead) and Mr McGrath's evidence that he relied on local management, that it was likely that the decision was taken in conjunction with Mr Cooper. Mr McGrath's decision was driven by pressure on numbers. He said that there were a lot of good people who couldn't be retained, including his chief of staff who worked in a role similar to the claimant.

51. It was very clear to us from the evidence we heard and read that the decisions by senior managers as to who would be aligned to the SAN business unit were taken in an ad hoc, subjective way, without any formal assessment and without reliance on clear objective criteria. Whether changes could be made to someone's role such that they could be aligned to the SAN business depended on who their manager was, whether that manager thought their skills and experience had sufficient impact on the business, and whether that manager was successful in persuading those with the final decision. For the claimant, his manager Mr Jewell supported his case to be aligned to the SAN business unit and therefore stay on in the business, and took steps to change the claimant's role to try to achieve this. Mr Jewell's view did not prevail, perhaps because he was leaving the business. Instead, Mr Cooper and Mr McGrath made the final decision and when dealing 'pressure on numbers' decided that the claimant would be one of those to be removed from the business unit, and not to have an identified future role.

52. When he heard that he had been taken off the SAN list, the claimant contacted Mr McGrath on 3 and 17 February 2017 by email and by phone (page 1021). He set out his skills and explained that his main contribution with the respondent had been in successful SAN sales and management. Mr McGrath spoke to the claimant briefly on the phone but did not get back to him after that.

53. Mr Jewell left the respondent in May 2017.

Redundancy consultation

54. The acquisition by Broadcom completed on 2 November 2017 and was announced on 17 November 2017. After this the group HR team began managing termination and settlement processes and other employment procedures arising from the acquisition in 12 countries across Europe (page 439). In the UK, around 30 of the respondent's employees, including the claimant, had been assigned to the IP General business unit. They had no

identified roles in the part of the business which was being acquired by Broadcom and they were at risk of redundancy.

55. A conference call was held with the respondent's employees in the IP General business unit on 20 November 2017. They were told that a collective consultation process would be starting shortly. They were told that alternative employment within Broadcom was unlikely. A draft settlement agreement had been sent to the employees and they were told that all employment benefits would cease at the termination date.

56. After the completion of the acquisition by Broadcom, there was a change to the respondent's internal IT systems. Training on the new system was provided to employees but not to those in the IP General business unit (page 445).

57. On 21 November 2017 the claimant received a letter from the respondent warning him that he was at risk of redundancy (page 437). The letter explained:

> *"As you are aware, you were assigned to the IP General business unit following the internal alignment of the business earlier this year. During the course of this year business units have been sold to other buyers, and negotiations are continuing in respect of the potential sale of the Network Edge business unit to Arris.*
>
> *The acquisition by Broadcom was by way of a share sale and therefore you remain employed by the Company, but which in turn is now owned by Broadcom. Broadcom has reviewed the parts of the Company which it has acquired and concluded that it has a diminished requirement for the services provided by those employees aligned to the IP General business unit and those that have been assigned transition roles. After considering all possible options, the Company has concluded that there is a risk that it will be unable to continue to provide work for the IP General employees and for those in transition roles and that it may therefore have to make redundancies."*

58. In his evidence to us Mr McHugh said that the reference to 'all possible options' having been considered must have been referring to the possibility of the IP General business being sold. He could not give any other examples of possible options which could have been considered at this stage.

59. The letter went on to say that there would be a consultation exercise, during which the respondent would be exploring ways of avoiding compulsory redundancies and minimising the number of employees affected. Employee representatives would be appointed. It was anticipated that the process would take between 3 and 4 weeks.

60. Employee representatives were appointed for the IP General business unit and collective consultation with them began on 23 November 2017 (page 515). The HR1 form which the respondent submitted to the Insolvency Service at this time to give notice of the proposed redundancies was

returned by the insolvency service because it gave only 22 days' notice rather than the 30 days required by statute (page 508). It was resubmitted with a new date of 24 December 2017 as the date of the first proposed dismissal (page 509).

61. Collective consultation meetings were held on 23 and 30 November and 5 and 14 December 2017. The respondent confirmed that there were no vacancies for which those at risk could be considered (pages 515 and 716).

62. At the time of the acquisition, employees with identified roles in the business were given new Broadcom email addresses. Employees in the IP General business unit were not given Broadcom email addresses. On 1 December 2017 the employees in the IP General business unit had their IT access removed, making it difficult for them to communicate with the respondent and with each other for the purposes of the collective consultation. Mr McHugh had to request the reinstatement of IT access for this group of employees (pages 442 and 596).

Consultation with the claimant

63. The claimant's individual consultation meeting took place on 8 December 2017 with Ms Dhanoa from HR. No notes were taken of the meeting. We accept the claimant's evidence that during this meeting Ms Dhanoa said that she was not aware of any selection process or the criteria for redundancy selection. She said it was all handled at 'corporate level'. She said that the respondent did not appear to have a policy to consider alternative positions. She sent the claimant a copy of a settlement agreement for him to consider. This was the only individual consultation meeting the claimant had.

64. On 11 December 2017 the respondents replied to a letter from the claimant's solicitors sent on 30 November 2017 (pages 592 and 700). The respondent's HR director said that the company did not have a specific redundancy policy, and that it did not have an ill health retirement policy. Enhanced severance payments were available on redundancy, subject to the employee entering into a settlement agreement. The letter said that the claimant had not been placed in any selection pool. He had been identified as having a 'stand alone sales enablement' role, and there was no requirement for sales enablement activity within the remaining SAN business unit, so he was at risk of redundancy.

65. Mr McHugh was involved with preparing the response to the claimant's solicitors. He carried out some enquiries as he wanted to understand whether the claimant's selection for redundancy was based on his disability. He spoke to Joy Gardham, the regional sales director for EMEA Sales (West). She said that Mr Cooper knew more about the decision to move the claimant into the IP General business unit. Mr McHugh spoke to Mr Cooper and explained he wanted to understand why the claimant's role was selected and to receive reassurance from him that his role selection was not connected to his disability in any way. Mr McHugh concluded that the claimant had been placed at risk of redundancy because there was no requirement for someone to undertake his unique role in the new business structure. Mr McHugh found out that there was also another employee

based in North America with the same roles and responsibilities whose role was also terminated at or around the time of the acquisition. Mr McHugh felt satisfied that the decision to select the claimant for redundancy was not influenced by the claimant's medical condition in any way.

66. Mr McHugh also made some enquiries into medical insurance. During the consultation process the claimant had raised with the respondent that he would lose the benefit of the company's medical insurance if made redundant. In an email on 13 December 2017 Mr McHugh asked the senior manager for global benefits to ask whether it would be possible to extend the claimant's cover under the company policy for a short time after the termination of his employment (page 708). Mr McHugh explained that the claimant had had cancer for a number of years, and said,

> *"Whilst his condition is managed, he's been dependent on the private health coverage for medication and treatment, and he has not been able to find an insurer that will cover him personally once his employment terminates."*

67. Personal private health insurance was not an option for the claimant. Because of his pre-existing conditions, he was either refused cover, or policies were prohibitively expensive. The position is the same for life insurance policies.

68. On 19 December 2017 Mr McHugh received a response which said that the respondent could not extend medical insurance for any employee, and the only way to do that would be for the individual to enquire about individual cover after leaving the respondent (page 747). Mr McHugh passed this information to Ms Dhanoa who informed the claimant.

69. The respondent allowed another employee in IP General to remain on garden leave for one month before being dismissed with two months' notice. This was to allow her to have some specific medical treatment (surgery).

70. The respondent also provided permanent health insurance as a benefit to employees (page 993). This benefit was payable to employees on long term sickness absence. After 26 weeks of absence, the insurer paid 75 % of monthly earnings up to £78,750 of annual income. At the time of the alignment exercise and the formal consultation, the claimant was not eligible to claim under this insurance as he had not had 26 weeks sick leave

<u>The claimant's dismissal</u>

71. The claimant was given notice of dismissal in a letter dated 29 December 2017 (page 757). He was dismissed with effect from 31 December 2017, with pay in lieu of three months' notice. He was 59 at the time of his dismissal.

72. The decision to dismiss the claimant at this stage was taken by Mr McHugh. A number of other employees in the IP General business unit were dismissed for redundancy on the same day.

73. As a result of the dismissal, the claimant lost his access to private medical insurance. This has affected the treatment he receives. He has longer waiting times for diagnosis and treatment and less continuity of care than previously. This has caused him increased pain and worry and has had a significant impact on his quality of life and overall health.

74. The claimant appealed against his dismissal by letter of 8 January 2018. The appeal hearing took place on 29 January 2018 (page 905). The appeal was heard by Mark Simons. He was junior to the claimant. Mr Simons had never previously dealt with an appeal against dismissal, or any disability case. He had had no training on redundancy, appeals against dismissal, disability or the Equality Act 2010.

75. In his evidence to us Mr Simons accepted that he was aware when conducting the appeal that a decision had been taken to remove the claimant from the SAN business unit, but he did not know who had made that decision. His review was centred around the role the claimant was performing and his conclusion was that the role was no longer required. In reaching this conclusion he spoke to Mr Cooper and Ms Gardham about the respondent's requirements. He did not take any notes of those conversations.

76. On 18 March 2018 Mr Simons wrote to the claimant to say that his appeal had not been upheld (page 965).

The claimant's comparators

77. Romain Schneider was a colleague of the claimant who was aligned to the SAN business unit and who remained with Brocade after the acquisition by Broadcom.

78. He was based in Geneva. At the time of the proposed acquisition announcement in November 2016, he was working in a sales engineering operations and enablement role (page 1102). His responsibilities included technical training, recruitment, and process optimization. He did not manage a team. He had a similar role to the claimant's. It was described as a standalone role supporting a more senior manager. Mr Schneider supported Mr Cooper (page 142).

79. After the announcement of the proposed acquisition, Mr Cooper spoke to Mr Schneider about changing his role. Mr Cooper said that Broadcom did not wish to retain internally focused operations roles dealing with internal customers, and that Mr Schneider could not be retained working solely on the work he was undertaking. However, Mr Cooper still considered the project and operations work that Mr Schneider was undertaking as important to the business and he wanted him to continue this work. Mr Cooper said that to enable Mr Schneider to do this within the post-acquisition structure, he needed to be given some additional responsibilities and a team to manage.

80. Mr Cooper identified a pre-sales manager role managing a team of sales engineers focused on OEM clients across a number of territories including

Switzerland, Eastern Europe, Russia, the Middle East and Africa. This role was allocated to Mr Schneider, in addition to his project and operations work. On 6 January 2017 Mr Schneider was described as being 'back on the SAN list'. Mr Cooper had spoken with an HR director and Mr McGrath to reinstate him on the list (page 218).

81. On 27 February 2017, in response to a query about Mr Schneider's role after the acquisition, Mr McGrath sent an email (page 1180) which said:

> *"I altered his role and eliminated someone else and he now manages all of the [Sales Engineers] focused on the OEM partners."*

82. The person who was 'eliminated' was the manager in Germany who was removed from the SAN list and referred to with the claimant in an email of 3 February 2017 (page 243). The manager from Germany led the team of sales engineers who focused on OEM partners. That team was reallocated to Mr Schneider. The organisation charts on page 142 and page 1193 referred to by Mr Schneider in his witness statement show Mr Schneider as the new manager of the team by 27 February 2017. Page 1193 has a bullet point stating '[Previous manager] team under Roman'. The change of manager of one team member from the manager in Germany to Mr Schneider is also noted on page 323.

83. Up to and following the Broadcom acquisition Mr Schneider continued with this dual role, managing the team of engineers while continuing his project and operational duties. In February 2018 he was given an additional role as OEM Sales Manager for Huawei, a new customer to the business.

84. We had no evidence about Mr Schneider's age.

85. Prior to the acquisition by Broadcom, Joy Gardham was the regional sales director for EMEA Sales (West). Her role included both SAN and IP (LAN). She was appointed to this role in around June 2013. The claimant had been performing the role on an interim basis prior to Ms Gardham's appointment. Ms Gardham was appointed rather than the claimant, because she had more IP experience than him. If the role had been solely SAN business, Mr Jewell would have appointed the claimant to it.

86. In the alignment process Ms Gardham's role changed so that it only encompassed SAN business. The IP elements were dropped from her role. Her SAN role was expanded to include responsibility for France (pages 130 and 148).

87. The claimant accepted at the conclusion of the hearing that Ms Gardham was not a suitable comparator for his complaint of age discrimination.

88. After the sales of the various parts of Brocade's business and the completion of the acquisition by Broadcom, Brocade's workforce was dramatically reduced in size. Its global workforce fell from 4,437 to 1,754 and its EMEA workforce (which included the respondent's workforce, that is the UK workforce) fell from 544 to 195. The claimant was one of two senior managers who were made redundant.

The Law

Protected characteristics

89. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010. Cancer is a disability pursuant to paragraph 6 of schedule 1 of the Equality Act.

90. Age is a protected characteristic under sections 4 and 5 of the Equality Act.

Direct discrimination

91. Section 13(1) of the Equality Act 2010 provides:

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

92. Section 13(2) says that in a claim of direct discrimination on grounds of age, A does not discriminate:

> *"if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."*

Indirect discrimination

93. Section 19 of the Equality Act 2010 provides:

> *"(1) 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.*
>
> *(2) 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) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) 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,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

Failure to make reasonable adjustments

94. The Equality Act imposes a duty on employers to make reasonable adjustments. The duty comprises three requirements, in this case, the first requirement is relevant. This is set out in sub-section 20(3). In relation to an employer, A:

> *"(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."*

95. The EHRC Code of Practice says that transferring a disabled worker to fill an existing vacancy is a step which it might be reasonable for employers to have to take as a reasonable adjustment (paragraph 6.33). It gives the following example:

> *"An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade."*

96. In *Archibald v Fife Council* [2004] ICR 954, explaining the duty to make reasonable adjustments, Lady Hale said in paragraphs 67 to 70:

> *" … to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others."*

97. In *Chief Constable of South Yorkshire v Jelic* (UKEAT/0491/09/CEA), the EAT held that a tribunal is not, as a matter of law, precluded from holding that it would be a reasonable adjustment to create a new job for a disabled employee in substitution of their existing post, if the particular facts of the case supported such a finding, and agreed with the observations of the EAT in *Southampton City College v Randall* [2006] IRLR 18, explaining that in that case (at paragraph 46)

> *"It was not being suggested that the employer should have created a post which was not otherwise necessary. In fact, the College had embarked upon a substantial reorganisation and restructuring process. The Claimant's line manager conceded in evidence that he had had 'a blank sheet of paper' for this process and for the job specifications which resulted. The Tribunal held that it would have been possible in these circumstances to devise a job which would both take account of the employee's disability and harness the benefits of his successful career and experience, but the employer was found not to have taken this or any other reasonable step to accommodate a long-serving and valuable employee. The EAT found that this conclusion was open to the tribunal on the specific facts of the case."*

<u>Burden of proof in complaints under the Equality Act 2010</u>

98. Sections 136(2) and (3) provide for a shifting burden of proof:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) This does not apply if A shows that A did not contravene the provision."

99. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

100. In a complaint of failure to make reasonable adjustments, for the burden to shift, the claimant must demonstrate that there is a PCP causing a substantial disadvantage and evidence of some apparently reasonable adjustment that could have been made (*Project Management Institute v Latif* 2007 IRLR 579, EAT).

101. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

102. Where the burden shifts to the respondent the respondent can defend the claim by showing that it did not know the claimant was disabled, that the reason for the unfavourable treatment was not the 'something' alleged by the claimant, or that the treatment was a proportionate means of achieving a legitimate aim.

103. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

Unfair dismissal

104. Section 98 of the Employment Rights Act sets out the tests for determining whether a dismissal is fair or unfair. Subsection 1 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—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

105. Redundancy is a reason falling within subsection (2).

106. If the reason for dismissal is a potentially fair reason within sub-sections (1) and (2), then the tribunal must go on to consider whether the dismissal is fair in all the circumstances of the case, and, under sub-section (4):

> *"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

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

Conclusions

107. We have applied the legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide. We have addressed the issues in a different order to the list of issues. We have started by setting out our conclusions on the complaint of failure to make reasonable adjustments, then the complaint of unfair dismissal, and finally the complaints of direct and indirect discrimination.

Failure to make reasonable adjustments

108. The respondent agrees that from 2005 onwards the claimant was disabled within the meaning of section 6 and schedule 1 of the Equality Act because of cancer, and that at all material times the respondent was aware of this.

109. A PCP is a provision, criterion or practice. The claimant relied on the following PCPs:

    109.1 the redundancy policy the respondent followed;
    109.2 not having a written procedure (the respondent admits that it did not have a written redundancy procedure);
    109.3 not having an objective pool;
    109.4 not using selection criteria;
    109.5 not considering bumping;
    109.6 not adequately consulting;
    109.7 not seeking to avoid redundancies;
    109.8 not offering suitable alternative employment;
    109.9 not considering the impact of dismissal on employees.

110. The respondent accepts that the first of these amounts to a PCP. We conclude that the redundancy policy followed by the respondent was a PCP that was applied to the claimant. The redundancy policy was unwritten. The redundancy policy followed by the respondent was to conduct an alignment exercise starting in November 2016 in anticipation of formal consultation which took place later. The alignment process very largely determined who would be redundant and subject to the later formal consultation. The alignment exercise and the formal consultation both formed part of the respondent's redundancy policy.

111. The other PCPs relied on by the claimant are the reverse of the reasonable adjustments which the claimant says should have been made to the policy (for example, a PCP of not having a written procedure requires the adjustment of having a written policy, or a PCP of not adequately consulting requires the adjustment of adequately consulting). That does not take things very much further than the first PCP (the redundancy policy itself) and we have concluded that the other PCPs the claimant proposes are better seen as encompassed within the wider PCP of the redundancy policy as a whole, or as part of the suggested reasonable adjustments, rather than being separate PCPs in themselves.

112. On the issue of PCPs therefore, we have concluded that the policy adopted by the respondent from November 2016, including the alignment exercise and the formal consultation process, was a PCP.

113. We have next considered whether the redundancy policy followed by the respondent put the claimant at a substantial disadvantage in comparison with people who are not disabled. The claimant relies on four points which can be summarised as the risk of the policy leading to dismissal and the impact which dismissal would have on him because of his disability, including the impact of the loss of private medical insurance and/or life cover that cannot be secured at an affordable level because of disability.

114. A substantial disadvantage is one which is more than minor or trivial. A substantial disadvantage may arise where people who are not disabled are disadvantaged as well as the disabled person, but the disadvantage 'bites harder' on the disabled person.

115. The claimant had had medical treatment under the respondent's private medical insurance for a period of around 12 years. It had provided him with faster medical treatment, earlier access to some medication and a wider range of medication than if he had not had the insurance. On dismissal, the claimant was not unable to buy or to afford a personal health insurance policy for himself and he lost this benefit. This meant that there were delays in the claimant's diagnosis and treatment and less continuity of care. Loss of private medical insurance caused him increased pain and worry and had a significant impact on his quality of life and overall health.

116. The impact of the loss of this benefit would not be as substantial for people who are not disabled, who would be able to buy a replacement policy more easily and affordably. The life cover which the claimant was provided as part of his terms and conditions of employment was also lost.

117. We accept that the redundancy policy did put the claimant at a substantial disadvantage in comparison with people who are not disabled, in that the risk of dismissal and the consequent loss of the private medical insurance was more of a disadvantage to the claimant. The risk of dismissal was a disadvantage to everyone who was at risk of dismissal under the respondent's redundancy policy, but it 'bit harder' on the claimant because of the significant additional impact of dismissal on him arising from loss of the private medical insurance on which he had relied for many years.

118. The respondent was aware that the claimant would be substantially disadvantaged in this way by being dismissed under the redundancy policy, because Mr Lindholm had brought it to the attention of the respondent's HR team in November 2016.

119. Our conclusions on these parts of the legal test mean that the respondent was under a duty to take reasonable steps to avoid the substantial disadvantage to the claimant which arose from the PCP. The final limb for us to consider is whether the respondent complied with that duty.

120. The claimant has set out detailed steps he says the respondent could have taken. In summary there are three points: having a fair and objective redundancy policy and a written policy for the alignment decision, having adequate consultation and offering suitable employment so that the claimant was not dismissed.

121. We have considered whether each of the steps suggested by the claimant would have avoided the disadvantage to him, if so whether it was reasonable for the respondent to take it, and if so whether the respondent failed to take it.

i to ii) applying a redundancy policy with fair and objective selection criteria and consideration of skill set, experience and performance, and a written policy so that the alignment decision was consistent and objective

122. We have found that the criteria which were applied during the alignment process were not clear or consistent. This particularly affected senior managers including the claimant, whose broad management roles meant that it was less clear which business unit they should be aligned to. We have found that some UK managers thought that the alignment exercise was about role only, but that senior managers who made the decisions took individual skills, experience and performance into account, and, in the absence of a written policy, did so in a subjective way without any formal assessment or clear objective criteria. We have found that the respondent made changes to the roles of two managers so that they were then aligned to the SAN business unit and had identified roles. Changes which were proposed to the claimant's role for the same reason were not taken forward, without adequate explanation. The claimant's offer to accept a role with lower responsibility in order to remain in employment, was not properly considered.

123. In circumstances where the claimant was at a substantial disadvantage because of the additional impact of dismissal on him, a policy with clear and consistent criteria would have had a good prospect of reducing or avoiding that disadvantage. It would have enabled the claimant's skill set, experience and performance and the proposed change to his role to have been transparently considered by the respondent and dealt with in a way which was consistent with the approach taken for Ms Gardham and Mr Schneider.

124. We have concluded that a policy setting out clear and objective criteria for the alignment decision would have been a reasonable adjustment for the respondent to have made. A simple policy (probably but not necessarily written) explaining to decision makers in the alignment exercise the criteria to be applied and how the assessment of skills, experience and performance was to be carried out would have ensured consistency. This would not have been onerous, in fact having a policy may have made the process easier.

iii) adequately consulting with the claimant

125. The formal consultation which took place in November and December 2017 was too late to prevent the disadvantage to the claimant, as there were no suitable job roles remaining in the SAN business unit by then. Although the claimant attempted to communicate with Mr McGrath, the claimant only had very limited discussions at the alignment stage.

126. Consultation at the alignment stage would have had a good prospect of removing or reducing the disadvantage to the claimant. Consulting the claimant at the start of the alignment exercise should have highlighted fairly quickly to the respondent that there were disability issues they needed to consider in the claimant's case. It would have been an opportunity for the respondent to consider, as part of its wider consideration of roles within the senior management team, the claimant's skill set, experience and performance, the proposed change to his role and his offer to accept a role with lower responsibilities.

127. A simple process for consultation with the claimant would not have been onerous for the respondent. It could have been carried out in writing or by having a short meeting.

iv to vii) offering the claimant suitable alternative employment, considering the impact of dismissal, not dismissing the claimant and upholding his appeal

128. As explained above, we found that the claimant's complaint in respect of the failure to consider or offer alternative employment includes the failure to offer an existing vacancy and the failure to create a new role. An offer of alternative employment would have removed the disadvantage to the claimant. It would have meant him not being dismissed; he could have remained in employment and retained his benefits including his private health insurance.

129. We have decided that it would have been reasonable for the respondent to have modified the claimant's role as discussed by the claimant and Mr Jewell to incorporate more work on the SAN business so that the claimant could remain aligned to the SAN business unit. For clarity, we are not referring to modifying the role because the claimant needed reasonable adjustments to perform it. Rather, we are referring to modifications to the role by increasing the SAN element of the role so that it could be aligned to the respondent's SAN business unit, rather than the IP General business unit which was the unit of staff who had been identified as not having a future role.

130. Offering the claimant a modified role would have been a reasonable step for the respondent to have taken because:

    130.1 The claimant had significant experience in SAN business activities from previous employment and gained during the 12 years' service he had with the respondent at the time in question. It was his main area of expertise. His roles with the respondent over the years had mainly been on SAN activity; he was not considered to be as expert on the IP side.

130.2 He was a high performer and very well regarded;
130.3 The respondent still needed parts of the claimant's role to be carried out;
130.4 The claimant's manager had agreed changes to the claimant's responsibilities to increase focus on SAN areas of business and there was no adequate reason put forward by the respondent as to why this was not workable;
130.5 The claimant was originally aligned to the SAN business unit from November 2016 and was only moved from the SAN business unit in February 2017;
130.6 Changes were made to Ms Gardham's role. Her role, like the claimant's, included SAN and IP elements and was changed so that the IP parts of the role were removed, and she was given a new area of responsibility (France). Her role became a fully SAN role, enabling her alignment with the SAN business unit;
130.7 Similarly, changes were made to Mr Schneider's role. His role, like the claimant's, was stand alone and not client facing. He was allocated responsibility for another manager's team (resulting in that manager no longer having an identified future role, bumping him out of his role). This change allowed Mr Schneider to take the other manager's place on the SAN business unit as explained by Mr McGrath in his email of 27 February 2017.

131. The duty to make reasonable adjustments is, as the EHRC Code on Employment makes clear in paragraph 6.2, a cornerstone of the Equality Act. It requires employers to take positive steps to ensure that disabled people can access and progress in employment. As Lady Hale explained in *Archibald v Fife Council*, to the extent that the duty requires it, the duty to make reasonable adjustments requires an employer to treat a disabled person more favourably than others. The EAT held in *Southampton City College v Randall* and *Chief Constable of South Yorkshire v Jelic* that creating a role or devising a role for a disabled person may, if the particular facts of the case support it, amount to a reasonable adjustment.

132. Overall, it was clear from the various changes to the outcome of the alignment exercise that during this exercise the respondent was reallocating responsibilities and considering the organisational structure of its senior management team. The respondent could have, as part of that process, addressed the substantial disadvantage the claimant was facing by making changes to his role to enable him to remain in the SAN business unit and therefore to remain employed. This would have been a reasonable adjustment to have made for the claimant, and would have removed the substantial disadvantage to the claimant. That would also have been treating him consistently with Mr Schneider and Ms Gardham.

133. The respondent relied heavily on the fact that as the claimant was in a standalone role, he was in a pool of one for redundancy purposes. However, at the alignment stage there was no pooling. The respondent considered its organisational structure more widely than this. This is evident from the reallocation of a team to Mr Schneider (also in a standalone role), from a manager who was not performing the same role as him.

134. Changes to the claimant's role to enable him to remain in the SAN business unit may not have resulted in another employee being bumped from their role, but if they had, this would still have been reasonable because of the substantial disadvantage the claimant was under and because the respondent had been able to do that in Mr Schneider's case.

135. Changes to the claimant's role may also not have resulted in the creation of an entirely new role for the claimant. Mr Jewell thought that it was possible to make changes to the claimant's role to retain him on the SAN business unit, similar to the way in which Ms Gardham's role was changed. However, even if the changes required were such that the claimant was effectively being moved into a newly created role, we consider that this would still have been a reasonable adjustment to make for the claimant in the circumstances of this case, particularly given the extent of reallocation of duties and reorganisation of management structure which the respondent was undertaking at the time.

136. The claimant had particular reasons related to his disability which meant that he would be substantially disadvantaged if he could not remain in his employment, in particular the loss of his benefits. We are not suggesting that the respondent should have created a post which was not necessary or should have kept the claimant on in his old role even though that was no longer needed. However, we have decided that it would have been possible for the respondent to have offered the claimant a modified or new role, allowing him to remain in the SAN business unit, and avoiding the disadvantage to him of dismissal.

137. However, the respondent did not turn its mind to the claimant's disability. Mr McGrath, who made the decision that the claimant should be moved from the SAN business unit, saw the claimant as one of a number of good people who could not be retained because of pressure on numbers. Mr McHugh considered whether the claimant's selection for redundancy had been influenced by his medical condition and decided that it had not. But there was a wholesale failure by the respondent to consider whether the claimant needed to be treated differently because of his disability, that is, whether he needed adjustments to prevent him being at a disadvantage. The respondent failed to consider this and followed a redundancy policy which resulted in the claimant being one of two senior managers who were made redundant, despite Mr Lindholm having explained in November 2016 the disadvantage the claimant was under from dismissal.

138. We have therefore concluded that the respondent failed to make these reasonable adjustments:

    138.1 applying a redundancy policy with objective selection criteria and consideration of actual duties, skill set, experience and performance, so that the alignment decision in respect of the claimant was consistent and objective;
    138.2 adequately consulting with the claimant; and

138.3 offering the claimant suitable alternative employment by modifying his role or offering a new role.

Unfair dismissal

139. The reason for the claimant's dismissal was redundancy. This is a potentially fair reason for dismissal. The claimant accepts that there was a genuine redundancy situation.

140. We need to consider whether in the circumstances (including the size and administrative resources of the organisation) the respondent acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the claimant. In doing so we are not considering what we would have done or making the dismissal decision ourselves. Instead we are considering the range of approaches which a reasonable employer could take in these circumstances, and whether the respondent's approach fell outside that range.

141. We considered the issues agreed by the parties.

i) Was there adequate warning and/or consultation either collectively or individually and a real attempt to avoid redundancies?

142. The respondent decided that there was no requirement to warn or consult employees in the alignment exercise, either collectively or individually. The respondent took this decision because acquisition was subject to regulatory approval and so it was not certain that the acquisition would go ahead and that there would be redundancies. A similar situation was considered by the EAT in *UK Coal Mining Ltd v NUM (Northumberland Area) and anor* 2008 ICR 163 in the context of a claim about the duty to consult under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. The EAT distinguished between a business decision 'mooted as a possibility' (where the duty to consult will not arise), and one which is 'fixed as a clear, albeit provisional, intention' (where the duty will arise, even though there is still something provisional about the intention).

143. The claimant in this case has withdrawn his claim about collective consultation, but the way in which the distinction is put is helpful here. After the acquisition announcement, a decision had been taken which amounted to a clear, albeit provisional, intention. Acquisition by Broadcom had gone beyond something which was being mooted as a possibility. There was a clear intention that the respondent would be acquired by Broadcom, albeit that intention was provisional on regulatory approvals being obtained.

144. The determinative nature of the alignment exercise was recognised by managers as they were carrying it out. They were making decisions which would determine who would be in the IP General business unit, the unit for employees who had no identified role in the future business. Despite this, there was no considered policy to avoid redundancies at the alignment stage. Rather, the respondent's decision makers considered on a subjective basis which senior managers they wanted to retain and then reallocated responsibilities and changed roles to achieve that.

145. The respondent's decision not to consult at the alignment stage meant that by the time the formal consultation began around a year later, after the closure of the acquisition, the important and meaningful decisions about who would have roles in the future business had been taken many months earlier and there could be no real attempt to avoid the claimant's redundancy. The respondent itself did not view the formal consultation process as a meaningful process, as it decided not to provide employees in the IP General group with email addresses and withdrew their IT access while still consulting them.

146. The individual consultation process for the claimant was also inadequate. The redundancy warning letter sent to the claimant on 21 November 2017 referred to consideration of all possible options, but by this stage it was too late for any real alternatives, other than the sale of the IP General business unit, which was unlikely. In the claimant's only individual consultation meeting there was no consideration of alternatives to redundancy and the person conducting the meeting thought there was no policy to consider alternative employment. Whether she meant that there was no written policy or no policy at all, she gave no consideration to the possibility of alternative employment for the claimant. The focus of the meeting was on the redundancy payment and settlement agreement. The failure to take notes of the claimant's individual consultation meeting also reflects the lack of importance which the respondent attached to the process.

147. The respondent's decision not to consult employees during the alignment process rendered the formal consultation process meaningless for the claimant. It meant there was no real attempt to avoid redundancy for the claimant. This took the decision to dismiss him outside the range of reasonable responses. A reasonable employer would have consulted the claimant at the point of the alignment exercise and taken steps at that stage to avoid redundancy.

ii) Did the Respondent adopt a fair basis on which to select for redundancy, including having a fair or objectively selected pool?

148. The alignment exercise divided employees into groups who either had identified roles in the future business or did not. That was essentially a redundancy selection procedure. There was no written policy or criteria for the alignment exercise, meaning that there was a lack of transparency with the criteria which the respondent used to align employees to the SAN business unit or IP General busines unit. The decision makers did not apply consistent criteria, and where individual skills, experience and performance were being assessed, there was no objective process by which to make that assessment.

149. By the time the formal consultation process started, the selection for redundancy was simply selection of whole of the IT General group.

150. The basis of selection for redundancy adopted by the respondent for the claimant was not fair. Again, the respondent relied heavily on the fact that

the claimant was in a standalone role and a pool of one. However, the respondent's approach to the alignment process did not involve pools. It took steps to prevent redundancy for Mr Schneider who was also in a standalone role. The inconsistency of treatment means that the decision was not within the range of reasonable responses. A reasonable employer in this situation would have adopted transparent and objective criteria for selection at the point of the alignment exercise and would have treated employees consistently.

iii) Did the Respondent take such steps as were reasonable to avoid or minimise redundancy by redeploying potentially redundant employees within its own organisation?
iv) Was it within the band of reasonable responses not to consider bumping?
v) Did the process adopted discriminate because of age or disability?
vi) Did the Respondent adequately consider suitable alternative employment?

151. We have considered these points together.

152. The respondent's approach to suitable alternative employment was also outside the range of reasonable responses. The process by which the respondent revised the initial alignment decision and modified Ms Gardham and Mr Schneider's roles but not the claimant's was not transparent or in line with any clear criteria. The lack of consistency in relation to modification of roles led to the claimant being removed from the SAN business unit, while Ms Gardham and Mr Schneider's roles were modified to result in their inclusion in the SAN business unit. A reasonable employer would have ensured a consistent approach to modification of roles to avoid redundancy and would have considered this for the claimant as part of the alignment process.

153. The respondent also failed to consider the claimant's offer to accept a role with lower responsibilities to avoid dismissal. This was also outside the range of reasonable responses.

154. We next consider bumping. Bumping is a voluntary procedure; the obligation to act reasonably does not mean that an employer must consider bumping. We have found that it would have been a reasonable adjustment to consider bumping when looking at modifying the claimant's role or providing him with a new role. By this we mean the sort of bumping exercise which was adopted in Mr Schneider's case, where another employee's responsibilities were allocated Mr Schneider so that he could remain in the SAN business unit. The tests for reasonable adjustments and reasonableness in the context of unfair dismissal are of course different tests. It does not follow that, because we have found that this type of bumping would have been a reasonable adjustment for the claimant, it is outside the range of reasonable responses in the unfair dismissal context for the employer not to have considered bumping.

155. We have in mind that the question is what a reasonable employer would do in the circumstances. The inconsistent treatment between the claimant and Mr Schneider is significant. We have decided that it was outside the range

of reasonable responses for the respondent not to have also considered allocating a role or responsibilities from another employee to the claimant so that he could be aligned to the SAN business unit.

156. We have found that the respondent's approach to suitable alternative employment for the claimant amounted to a failure to make reasonable adjustment and that the respondent failed to make reasonable adjustments in relation to a written policy and adequate consultation. The process adopted by the respondent and therefore the dismissal of the claimant was discriminatory because of disability.

157. We have concluded that the decision to dismiss the claimant was outside the range of reasonable responses in that:

    157.1 the respondent failed to consult the claimant during the alignment process and therefore did not adopt a meaningful process to warn or consult him about redundancy;
    157.2 the respondent selected the claimant for inclusion in the IP General business unit without applying transparent and objective criteria;
    157.3 the respondent did not adequately consider suitable alternative employment, including failing to offer a modified role by allocating other duties to him or bumping another employee so that he could remain in the SAN business unit; and
    157.4 the respondent failed to make reasonable adjustments for the claimant.

158. We have concluded therefore that the claimant's dismissal was unfair, and his complaint of unfair dismissal is well founded and succeeds.

159. The respondent said that if the dismissal was procedurally unfair, the claimant could have been fairly dismissed at the same time or a short time later in any event. We have not concluded that a fair dismissal could have taken place at the same time or within a short time in any event. We have found that the respondent did not adequately consider suitable alternative employment which would have enabled the claimant to remain in the SAN business unit and not be dismissed.

<u>Direct disability discrimination</u>

160. The respondent failed to offer the claimant suitable alternative employment by way of an modified role. He was treated less favourably in this regard than his comparators Mr Schneider and Ms Gardham whose roles were modified to facilitate their alignment to the SAN business unit. However, we have not found 'something more' from which we could conclude that the difference in treatment was because of the claimant's disability. The problem with the respondent's approach was that it failed to give proper consideration to the claimant's disability. We have found that this amounted to a failure to make reasonable adjustments for him, but we have not found any evidence from which we could conclude that the respondent's treatment was because of his disability.

161. The claimant was dismissed and his appeal was not upheld. We have not found any evidence from which we could conclude that this treatment was because of the claimant's disability. There was no basis to suggest that a hypothetical employee, in circumstances with no material difference to the claimant's circumstances, would have been treated more favourably. We have not found that the respondent would have taken steps to retain the claimant if he had not been disabled.

162. The complaint of direct disability discrimination therefore fails.

Direct age discrimination

163. The complaint of direct age discrimination was that the claimant, who was 59 at the time of dismissal, was treated less favourably than Mr Schneider or a hypothetical employee in their 30s or 40s. (The claimant no longer relies on Ms Gardham as a comparator in relation to this complaint.)

164. We have found that the claimant was treated less favourably in this regard than Mr Schneider in relation to the offer of suitable alternative employment in the form of a modified role. However, we did not have any evidence as to Mr Schneider's age. In any event, we have not found any evidence from which we could conclude that the difference in treatment between the claimant and Mr Schneider was because of age or that the claimant was treated less favourably than a hypothetical employee in their 30s or 40s.

165. Similarly, we have not found any evidence from which we could conclude that the claimant's dismissal and the failure to uphold his appeal was because of his age.

166. The complaint of direct age discrimination therefore fails.

Indirect discrimination

167. We have explained above our conclusion that the respondent's redundancy policy was a PCP. This policy was applied to the claimant and to people without the claimant's disability and people of a different age to the claimant.

168. In a complaint of indirect discrimination under section 19 of the Equality Act, we need to consider the question of whether the PCP results in group disadvantage. In this case this means considering whether the respondent's redundancy policy put or would put people who share the claimant's protected characteristics at a particular disadvantage when compared with those who do not. There was no evidence before us about this. The claimant's counsel invited us to find that the crux of the issue was the effect on the claimant, but we do not consider that we can simply extrapolate from the effect of the policy on the claimant to make general findings about disadvantage to disabled people or people of the claimant's age. In short, there was no evidence of group disadvantage such that we could conclude that there was indirect discrimination requiring justification by the respondent.

169. The complaints of indirect discrimination fail and are dismissed.

Summary

170. In summary:

171. The claimant's complaint of failure to make reasonable adjustments is well-founded and succeeds. The respondent failed to make the following reasonable adjustments:

    171.1 applying a redundancy policy with objective selection criteria and consideration of actual duties, skill set, experience and performance, so that the alignment decision in respect of the claimant was consistent and objective;

    171.2 adequately consulting with the claimant;

    171.3 offering the claimant suitable alternative employment by modifying his role or offering a new role.

172. The claimant's complaint of unfair dismissal is well founded and succeeds.

173. The claimant's complaints of direct disability discrimination and direct age discrimination fail and are dismissed.

174. The claimant's complaint of indirect disability discrimination and indirect age discrimination fail and are dismissed.

Remedy

175. Notice of relisted remedy hearing will be sent separately.

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Employment Judge Hawksworth

Date: 13 January 2022

Judgment and Reasons sent to the parties on 19 January 2022

For the Tribunal Office