EMPLOYMENT TRIBUNALS

Claimant: **Mr S Myers**

Respondent: **Hilton UK Hotels Limited**

HELD at Newcastle CFCTC **ON: 28 February, 1, 2 and 3 March 2022**

BEFORE: **Employment Judge Loy**
Members: **Mr R Dobson**
Mr J Adams

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr K Wilson, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of unfair dismissal contrary to sections 94 & 98 Employment Rights Act 1996 is not well-founded and is dismissed.**
2. **The complaint of discrimination arising from disability contrary to section 15 Equality Act 2010 is not well-founded and is dismissed.**
3. **The complaint of failure to make adjustments contrary to sections 20 & 21 Equality Act 2010 is not well-founded and is dismissed**.

REASONS

1. An oral Judgment was delivered at the end of the hearing on 3 March 2022. The claimant immediately after Judgment was given requested written reasons.

The claimant's claims

2. By a claim form presented on 3 February 2021, the claimant brought claims of unfair dismissal, direct disability discrimination contrary to section 13 of the Equality Act 2010 ("EQA"); discrimination arising from disability contrary to section 15 EQA; failure to make reasonable adjustments contrary to sections 20 and 21 EQA.

3. At a preliminary hearing before Employment Judge A M S Green on 29 April 2021, the claimant withdrew his claim for direct disability discrimination. On 29 April 2021, Employment Judge A M S Green dismissed the claimant's claim for direct disability discrimination contrary to section 13 EQA upon withdrawal by the claimant.

4. The response form was amended after further particulars were provided by the claimant. The amended grounds of resistance and the claim form are at page 73 to 84 of the bundle.

The hearing

5. The hearing was conducted in person at the Newcastle Civil Family Courts and Tribunals Centre. The claimant gave evidence on his own behalf. He called no further witnesses in support of his claim.

6. The respondent called the following witnesses:

   (a) Ms Olivia MacGill, Commercial Director;

   (b) Ms Yvonne Love, HR Business Partner covering Scotland, Ireland and the North of England;

   (c) Ms Mercedes Wilkinson, Food and Beverage Manager at the Newcastle Gateshead Hotel;

   (d) Mr Stewart Lorrimer, Area General Manager responsible for a number of hotels including the Newcastle Gateshead Hotel.

7. The parties had prepared an extensive bundle of documents consisting of 735 pages. The bundle of witness statements ran to 78 pages. The Tribunal read the documents referred to in each of the witness statements and also to any additional documents referred to at paragraph 5 of the respondent's Opening Note For Trial.

8. The morning of the first day of the hearing was set aside for reading. The evidence was heard in the afternoon of the first day and on the second and third days of the hearing. The parties made submissions in the morning of the fourth day of the hearing (3 March 2022). The Tribunal deliberated and delivered an oral Judgment in the afternoon of the fourth day of the hearing.

The issues

9. A list of issues had been drawn up and agreed between the parties prior to the commencement of the hearing. That list of issues is set out in Employment

Judge A M S Green's preliminary case summary at the preliminary hearing on 29 April 2021 and is as follows.

1. Time limits

1.1 Was the discrimination claim made within the time limit in EQA, section 123? The Tribunal will decide:

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

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

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

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

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

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy. At the hearing the respondent relied in the alternative on some other substantial reason.

2.2 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

2.2.1 The respondent adequately warned and consulted the claimant;

2.2.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.2.3 The respondent took reasonable steps to find the claimant suitable alternative employment;

2.2.4 Dismissal was within the range of reasonable responses.

2.3 Alternatively, the respondent says the reason was a substantial reason capable of justifying dismissal, namely a business reorganisation falling short of redundancy.

3. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

4. Disability

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did he have a physical or mental impairment: depression and impaired mobility arising from a hip replacement.?

4.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to permanently treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 Selecting him for redundancy?

5.2 Did the following things arise in consequence of the claimant's disability:

5.2.1 Fatigue; and

5.2.2 Reduced performance?

5.3 Was the unfavourable treatment because of any of those things? Did the respondent select the claimant because of that?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

5.6 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1 Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1 Working at pace

6.2.2 Heavy duty tasks

6.2.3 The respondent expectation to perform the role "as is"

6.2.4 The redundancy selection process

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

6.4 Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 Variation of duties to enable him to continue his role as a food and beverage assistant

6.5.2 Rest periods

6.5.3 Assistance from team members (e.g. to lift heavy tables and put them in place – and other heavy-duty tasks)

6.5.4 Providing a table trolly to enable the claimant to move tables

6.5.5 Reducing his hours for a period of time

6.5.6 Two people should have scored the claimant in the redundancy selection process

6.5.7 Failing to consider all the claimant's annual reviews in the redundancy selection process

6.5.8 Failure to provide the selection matrix prior to the 1 to 1 consultation meeting

6.6 Was it reasonable for the respondent to have to take those steps?

6.7 Did the respondent fail to take those steps?

10. The Tribunal agreed with the parties to consider liability only at this hearing with remedy to be considered at a later stage, if appropriate. For that reason the Tribunal has not set out in the list of issues matters relating to remedy relating to the claims brought by the claimant.

Findings of fact

11. The claimant joined the respondent on 9 October 2015 as a casual worker under a Worker's Agreement. The claimant was engaged as a Food and Beverage Assistant. On 1 January 2017 the claimant commenced employment under a permanent contract of employment as a Food and Beverage Assistant with the respondent. For all present purposes the respondent treated the claimant's period of continuous employment as starting on 9 October 2015.

12. On 13 June 2019, the claimant had an accident at work. The claimant was clearing a meeting room, picked up a glass and jug and turned but his foot became stuck on the tablecloth. He then fell to the floor and landed on his left hip causing it to fracture. An accident/incident report of this matter is at page 178 of the bundle.

13. On 14 June 2019, the following day, the claimant underwent a total hip replacement procedure. The claimant commenced a period of sickness absence from which he did not return by the time of the termination of his employment on 6 November 2020.

14. On 15 June 2019, Ms Mercedes Wilkinson, Food and Beverage Manager, sent an email to the claimant expressing concern about his welfare. The email is at page 180 and 181 of the bundle. The claimant responded to Ms Wilkinson saying that he appreciated Ms Wilkinson's concern.

15. From 18 July 2019, the claimant checked in with Ms Wilkinson. The claimant informed Ms Wilkinson that at that point in time he was unable to indicate to her a potential return to work timeframe. That email is at page 189 of the bundle.

16. On 25 July 2019, Ms Wilkinson called the claimant. The respondent's Long Term Ill Health Policy (bundle pages 193-198) envisages a four week welfare

meeting after four weeks of sickness absence. A letter confirming that call is at page 192 of the bundle. Ms Wilkinson indicates to the claimant in that letter that the respondent would be keeping in touch with the claimant to discuss how he is feeling and to discuss the option of an Occupational Health referral.

17. On 1 August 2019, Ms Wilkinson and the claimant had a long term absence meeting by telephone, the notes of that meeting are at page 199 of the bundle. The claimant informed Ms Wilkinson that he would need a revision to his hip operation in approximately 10 years' time given the nature of the operation and wear and tear. Ms Wilkinson provided the claimant with a copy of the respondent's Managing Long Term Ill Health Policy.

18. On 2 October 2019, Ms Wilkinson emailed the claimant with an indication that the respondent wished to refer the claimant to Occupational Health. A note of that Long Term Absence Interview is at page 206 of the bundle. Ms Wilkinson specifically said to the claimant that she would need to have him in for a face to face meeting looking for a phased return and a referral to Occupational Health.

19. On 24 October 2019, Ms Wilkinson emailed the claimant enclosing a copy of the Managing Long Term Ill Health Policy (bundle page 231).

20. On 21 November 2019, the claimant and Ms Wilkinson had a Long Term Absence meeting. The notes of that meeting are at page 240 of the bundle. The claimant was specifically asked by Ms Wilkinson about the effect on his mental health of the claimant's accident and subsequent post-operative recovery. The claimant responded by saying he could not work at pace and that he was concerned about the danger of having to undertake a revision operation to his hip replacement in due course. He also said that in respect of the doctor's advice, he couldn't do the same work and that he could not stand or walk constantly. He said that he must now have a job which would be "sitting down". Ms Wilkinson informed the claimant that an appointment with Occupational Health was to be arranged. The claimant also said in response to Ms Wilkinson's question regarding his mental health that his "mental health is okay". (paragraph 24 page 18 of Ms Wilkinson's witness statement).

21. On 1 December 2019, the claimant gave his consent to an Occupational Health referral and for a report to be received by the respondent in line with the respondent's Managing Long Term Ill Health Policy.

22. On 15 January 2020, the claimant met with an Occupational Health Advisor from Medigold Consultancy, the respondent's contracted Occupational Health provider.

23. On 20 January 2020, (bundle pages 243 – 245) the Medigold Consultancy sent its report by letter to the respondent. It was addressed to Ms Sharon Hay, HR Manager. In that report there is no mention of any impact on the claimant's mental health of the claimant's accident or its post-operative process. There is also no mention of any pre-existing mental health condition whether related to the accident, operation or otherwise. The conclusion of the report was that the claimant would be fit to return within the next two weeks, if a role was available for him that did not involve moderate or heavy manual tasks. The report said that the claimant felt that due to his left hip operation <u>he would not be able to return to his previous role as a Food and Beverage Assistant there are moderate and heavy tasks within this role and it is fast paced (at paragraph 25 of the witness statement of Mercedes Wilkinson page 18).</u> As is recorded at page 243 of the bundle, the Occupational Health report indicated it was the

claimant's own position that he would not be able to return to his previous role as a Food and Beverage Assistant and that the claimant also had health and safety concerns regarding his general wellbeing.

24. At pages 243 – 244 of the bundle, the claimant's indication as to a role which he could do is set out. The claimant told the Occupational Health Advisor that he would be able to return ***"to a role such as Business Centre Coordinator which does not involve manual tasks. I [the Occupational Health Advisor, Ms Lynn Reed] understand that this is an administrative role which involves dealing with customers".*** This role was to become a matter of dispute between the parties. Simply put, the claimant (no doubt acting sincerely) considered that there was a free standing role of Business Centre Coordinator that did not involve moderate or heavy tasks and was not fast paced. It was the respondent's position that there never had been any such discrete role within the Food & Beverage Department, and that the Business Centre was covered by Food & Beverage Assistants on a rotating basis. Even when a Food & Beverage Assistant was assigned to the Business Centre for a particular shift that Food & Beverage Assistant was also required to carry out the usual tasks of a Food and Beverage Assistant (including the moderate and heavy tasks and fast paced work which the claimant said he couldn't do) as part and parcel of being assigned to the Business Centre since supporting the Business Centre was not needed on a full time basis.

25. On 10 March 2020 the claimant had a return to work meeting with Ms Olivia MacGill, Commercial Director. Sharon Hay, HR Manager was also in attendance to take the notes. Ms MacGill gave extensive evidence in her witness statement (and was cross examined) about this particular meeting.

26. Ms MacGill explained that she read the Occupational Health Report as preparation for the meeting. Ms MacGill noted that the claimant complained that if he over-exerted himself he needed to take pain medication as required. The claimant also indicated that he suffered from pain if he walked too far. Ms MacGill also noted that it was the claimant's own position that due to his hip operation the claimant would not be able to return to his previous role as a Food & Beverage Assistant because there are moderate and heavy tasks within that role and that it is also fast paced.

27. Ms MacGill also noted what the Occupational Health Advisor (Lynn Reed) had said about the nature of the "Business Centre" role, in particular that she had evidently been told (presumably by the claimant) it was a purely administrative role undertaken exclusively in the Business Centre. At that early stage, Ms MacGill was aware that the Occupational Health Advisor had only been told by the claimant about the Business Centre Coordinator activities.

28. Furthermore, the claimant had also evidently told the Occupational Health Advisor that there were no moderate or heavy manual tasks within the role (as the claimant described it) of Business Centre Coordinator and that if the claimant was required to move items he could use equipment such as a chair-trolley or someone else could move the equipment for him. Ms MacGill's evidence describes that as "a bit of a misunderstanding" as the "Business Centre" is actually a bit of a misnomer. Whilst traditionally in the hotel context a "Business Centre" tends to be in a room where business people can go to log into a computer to open documents when staying at the hotel, it is not what the respondent mean by the term when we used in the Newcastle Gateshead hotel. Ms MacGill explains that the "Business Centre" in the Newcastle Gateshead

Hotel. The Business Centre is essentially the floor at level -1 where there are 10 different meeting rooms that can be booked for meetings.

29. At paragraph 8 of her witness statement Ms MacGill says that the respondent does not have a role within the hotel called "Business Centre Coordinator". Ms MacGill's evidence in that respect is corroborated by Ms Wilkinson who was the on-suite Food & Beverage Manager at the Newcastle Gateshead Hotel. Ms MacGill also points out that the role of the Business Centre is a reactive one by which she meant that the Food & Beverage Assistant assigned to the Business Centre on an given shift would have to run up to the floor above where the kitchen is located to get food or replenishments for drinks or have to move the coffee machines from one place to another. Ms MacGill said in evidence that it was not a desk based role and any impression that the claimant may have given the Occupational Health Advisor to that effect was simply wrong. Ms MacGill estimated that only between 20 and 30 minutes maximum on a shift was spent working at the computer putting the revenue charges through for the day and processing any requested signage. The balance of time on the shift would be spent carrying out the activities of a Food & Beverage Assistance responsible for the running of the usual operational tasks alongside servicing the needs of the Business Centre.

30. At paragraph 11 of her witness statement, Ms MacGill sets out the associated duties in connection with servicing the Business Centre. Amongst other things, Ms MacGill said that the Food & Beverage Assistant assigned to the Business Centre would have to collect refreshments and beverages from the fridges in the kitchen at level 0, load them onto a trolley and move to level -1 where the Business Centre is located; set out refreshments area and coffee machines; bring down coffee machines from the restaurant at level 0 as breakfast finishes; setting up in rooms; changing room layouts with the furniture in accordance with the needs of the customer; add or remove additional chairs for confirmed delegate numbers arriving; if time permits before lunch to lend support to the restaurant at floor 0 with the breakfast turnaround (cleaning down tables and setting up for any lunches); helping with the room set up in the Gateshead Suite large conference room if required; collecting lunch items from the kitchens at level 0 and take them to the Business Centre at level -1 for lunch; assisting if time permits to help with lunches in the restaurant; refreshing meeting rooms during the lunch break; removing and adding any new linen for any stained or wet tablecloths; dirty cups and glasses; clearing crockery from meeting floors as clients go back into the meetings; and take all the crockery etc to the kitchen dishwasher area at level 0 and load up the racks; afternoon refreshments in the kitchen and take down to the level -1 Business Centre; clear any crockery still left after breakfast in the lunch area; move coffee machine back up to restaurant at level 0; begin checks of meeting rooms for any equipment left; make sure any boxes/stands/equipment that needed to be couriered are taken to the back door loading bay; if time permits clearing down the rooms in readiness for the next day. All in all Ms MacGill's evidence was that there was a substantial amount of Food & Beverages Assistant work to be done at the same time as servicing the Business Centre, there were also moderate to heavy tasks and fast paced work involved in the servicing of the Business Centre within itself including moving on a constant basis between floors.

31. On 14 March 2020, Ms Wilkinson returned from annual leave. The way matters were left at the end of the return to work meeting on 10 March 2020 is important

for the purposes of understanding what gave rise to some of the disputes in this case. As Ms MacGill explains at paragraph 14 and following of her witness statement, 20 the Hotel was closed due to the Covid-19 lockdown implemented by the Government.

32. So what happened at the meeting on 10 March 2020 is important to the matters which gave rise to the disputes in this case. As Ms MacGill indicates at paragraphs 14 and following of her witness statement, she outlined to the claimant that the respondent did not have any dedicated Business Centre roles but that what people did was look after the meeting rooms as part of their role as a Food & Beverage Assistant.

33. The claimant had pointed out that people on Linked-In (principally Megan Flaherty) had referred to themselves on Linked-In as Business Centre Coordinators. Ms MacGill explained that what a team member choose to state on their Linked-In profile is not audited or sanctioned by the Hotel. Ms MacGill confirmed that Megan Flaherty's role at the respondent was a Food & Beverage Assistant (that was her actual job title). Accordingly, what the claimant had seen on Linked-In was not the same as what the respondent had authorised and was not a reflection of the practical reality how of things were organised at the hotel.

34. Ms MacGill therefore made it clear to the claimant that the respondent did not have a specific role dedicated as Business Coordinator. A Food & Beverage Assistant assigned to the Business Centre would therefore be required tom carry out a significant degree physically demanding work.

35. Also at that meeting, the claimant said that he could not continue working in the Food & Beverage role. He said that the only thing that he could do was work in the Business Centre. Ms MacGill again explained that she was concerned that the Occupational Health Advisor had been wrongly informed (without suggesting for a moment that the claimant had intended to mislead the Occupational Health Advisor). The impression that the Occupational Advisor appeared to have been given was that no moderate or heavy tasks were involved when an F&B Assistant was asked to attend to the Business Centre on a particular shift. In fact, the requirement to be reactive to customer demands meant that heavy and moderate tasks were required on a daily basis when attending to the Business Centre. on a daily basis.

36. At the end of paragraph 16 of Ms MacGill's statement, Ms MacGill explained to the claimant that the respondent ***"could look at a trial in the Business Centre to see whether he could work there and whether it suited him."*** The claimant, for reasons he did not explain, rejected that offer.

37. The meeting continued with the claimant indicating that he could not serve Breakfast as he couldn't "be standing serving tea and coffee and could not be walking around". The claimant also said that he could only move for one hour per week without pain and could not stand "in any role for more than one hour".

38. Ms MacGill explained to the claimant that she "felt slightly stuck" as how to move matters forward. She explained that any operating role within the Hotel does have standing for more than one hour and that the environment that they work in is generally physical in nature. The claimant's response to this was to say that ***"he understood that if there was no job it would have to be incapacity"***, by which Ms MacGill took him to mean that he thought he would be dismissed. However, Ms MacGill's position was that she would try to resolve the situation by finding a position for the claimant which he could undertake with

or without adjustment(s). The claimant went on to say that he "***couldn't do cleaning, dishwashing or lifting pans, as they were all manua***l. A Concierge role would also involve lifting. It was for this reason that the claimant said he could only do Business Centre work at which point Ms MacGill reaffirmed that the respondent has no such dedicated role.

39. Also at that meeting, the claimant mentioned for the first time to the respondent that he had been experiencing depression "for nine years". As Ms MacGill said at paragraph 22 of her witness statement, she had previously been unaware of that. The Tribunal accepted that evidence.

40. The meeting ended with Ms MacGill adjourning and letting the claimant know that she would consider all of the available information and invite the claimant to a further meeting to discuss more options. Ms MacGill says in her evidence, accepted by the Tribunal that she was "***very open to working with [the claimant] to support a return to work and further consider how [the respondent] may be able to get [the claimant] back into the workplace, making adjustments to roles as far as possible."***

41. Put simply, the meeting was adjourned for further consideration of the roles that the claimant could potentially do including what adjustments could be made to those roles once identified.

42. On 14 March, Ms Mercedes Wilkinson returned from annual leave. Had Ms Wilkinson not been absent on annual leave she would have conducted the return to work interview with the claimant instead of Ms MacGill.

43. On 24 March 2020, the Hotel closed due to the first Government lockdown. Ms Hay, on the same date, wrote to the claimant indicating that the return to work meeting which had been adjourned would need to be postponed due to the lockdown (bundle page 246). The claimant was placed, with his consent, on furlough in accordance with the Government's job retention scheme. On 22 May 2020, the claimant's furlough (along with that of his colleagues) was extended again with his consent.

44. On 19 July 2020 the Hotel reopened. Initially after 20 July 2020 and the hotel operated on a restricted basis.

45. On 23 July 2020, the claimant and his colleagues furlough was extended again with consent.

46. On 30 July 2020, the respondent announced formal redundancy consultation which had become necessary as a result of the downturn of business consequent upon the Covid-19 pandemic and the lockdown. The previous year had approximately 79% occupancy whereas in the current year it was running at approximately 27%. In these circumstances, the respondent announced proposals for approximately a 30% reduction in the Newcastle Gateshead Hotel headcount. Originally there had been 194 colleagues at the hotel and this was to be reduced to 132 subject to consultation. Food & Beverage Assistants (23.6 FTEs) was to reduce by 8.1 FTEs. A proposed total reduction of 37 FTEs was proposed in relation to the Newcastle Gateshead Hotel as a whole.

47. By a letter dated 30 July 2020 (bundle page 359 – 360) the Hotel staff were informed of the proposed redundancies and the reason for them as well as publishing the guidance for elected representatives.

48. On 13 August 2020, the respondent commenced the 45 day collective consultation required under section 188 TULRA. The employee representatives had been elected by that stage for the Food & Beverage Assistant grouping. The individual selection method was also put forward for consultation at the first collective consultation meeting. The only question that arose at that meeting regarding the selection method was whether or not the two assessors who were to carry out the work performance and skills assessments would be from the same department.

49. The selection assessment matrix was as follows:

    49.1. There were four criteria on the selection matrix: attendance, disciplinary, work performance and skill level.

    49.2. In terms of work performance and skills two independent individuals (both of whom would know the person being assessed) would separately rate each person at risk and the average score would apply;

    49.3. The lowest scoring individuals would be selected for redundancy;

    49.4. The respondent would confirm any "adjustments" made to the process to avoid discrimination in the process; and

    49.5. It was proposed that length of service would only be considered as a tie breaker in the event of equal overall ratings. However, a difference on the original selection basis of a single point would be considered sufficient to separate one person over another.

50. The proposed selection process was also discussed in detail with the elected representatives at the first meeting and was aligned to ACAS Guidance.

51. In August 2020, the proposals were reviewed due to the continuing Government restrictions. This led to updated proposals which were communicated to the employees on 2 September 2020 (bundle pages 460-512). In relation to the Food & Beverage pool, a further reduction of an additional 1.9 FTEs were proposed (again subject to consultation) so that the original reduction of 8.1 FTEs was increased to 10 FTEs.

52. On 18 August 2020, Ms Hay emailed the claimant identifying his Food & Beverage elected representatives at the collective consultation meetings (bundle page 365). At the same time, an FAQ guide was sent to all team members (bundle pages 446 – 454).

53. On 3 September 2020, the first collective consultation meeting took place (bundle pages 513 – 514). The proposed selection matrix was again discussed at this meeting with the employee representatives. Ultimately, the matrix was approved in unamended form by the employee representatives.

54. On 16 September 2020, a second collective consultation meeting took place with the employee representatives.

55. On 21 September 2020, (bundle pages 534-538), the claimant emailed his representative (Bethany Dodgson) with a number of questions that he wished to be presented at the collective consultation meeting (bundle pages 543-545).

56. On 30 September 2020, the third collective consultation meeting took place (bundle pages 560-564). In total 60 redundancies were implemented.

57. On 14 October 2020, the General Manager of the hotel sent the workforce a letter (bundle pages 578-579) to update the staff in relation to the status of the redundancy proposals.

58. On 16 October 2020, there was an All Team Members call at which it was announced that the respondent would be proceedings with the proposed reductions. The claimant was unable to attend this meeting (bundle pages 578-586). There was no amendment to the proposal to reduce the Food and Beverage pool by 10 FTEs.

59. On 16 October 2020, a letter was sent to the claimant confirming what had been said on the All Team Members call earlier on the same day. The claimant was invited to a 1:1 meeting to take place on 23 October 2020 (bundle pages 581-582).

60. On 16 October 2020, the claimant emailed his employee representative, Bethany Dodgson. The claimant explained that he hadn't been able to attend the All Team Members call and asked for an update. Ms Dodgson responded to the claimant and the claimant thanked Ms Dodgson for so doing (bundle pages 583-584).

61. On 23 October 2020, the claimant had his first individual consultation meeting (bundle pages 602-607). In accordance with the request from employees, payments were discussed as well as process and redeployment. The claimant indicated at that meeting that he did not wish to be considered for redeployment.

62. On 24 October 2020, the claimant sent the respondent an email to indicate (for the first time) that he felt rushed and distressed during the meeting the previous day (bundle pages 587-588). The claimant referred to his depression in that email. As Ms Wilkinson explained in her witness statement, this was the first that she knew the claimant suffered from depression.

63. On 27 October 2020, Ms Hay replied to the claimant's letter of 24 October 2020 (bundle pages 589-590). The claimant was given details of the respondent's Employee Assistance Programme to support his wellbeing.

64. On 28 October 2020, the claimant replied to Ms Hay. The claimant said in terms that he did not want to be referred for a second referral to Occupational Health (bundle pages 608-609).

65. The scoring was subsequently undertaken by Ms Wilkinson and Jake Cavanagh – Mr Cavanagh ran the Conference and Events Department. Accordingly, the claimant was scored by two senior members of the Food and Beverage Team, both of whom were familiar with the nature and quality of the claimant's work. In accordance with the desire to avoid discrimination in the selection process, the claimant was assessed on his pre-injury period of employment during which his performance could not have been impaired by his hip injury., by definition, affected by his physical disability. That pre-injury period was used to assess both then claimant's work performance and his skills.

66. The Skills Assessment Matrix for the claimant prepared by Ms Wilkinson is at pages 690-691 of the bundle and the Skills Assessment Matrix prepared by Mr Cavanagh is at pages 692-693. Independently, both managers arrived at the same scores for the claimant. The claimant scored full marks in respect of both attendance and disciplinary record. The claimant was given a score of nine for work performance. This was consistent with his annual review for 2018 which categorised him as "meeting targets". The reason he did not receive a

higher score in the selection matrix for work performance and skills was that the quality of his work required checking by supervisors more frequently than others within the same grouping. The higher scores were allocated to Food and Beverage Assistants whose work did not require any checking by a supervisor.

67. In relation to skills, the claimant also scored nine – also reflecting his annual review in 2018 where he was assessed as competent in most areas. The reason that he did not get a higher score was because he was less familiar with more areas of the hotel than some of his colleagues. The claimant did not wish to work behind the bar (a matter of his choice rather than relating to any disability). The higher scores were given to Food and Beverage Assistants who could either work behind the bar or generally across more areas of the hotel.

68. On 31 October 2020, the claimant had a second consultation meeting and was told that he had been selected for redundancy subject to that consultation. The claimant asked (but did not receive at this stage) copies of the scoring matrix which contained his assessments. Instead, he was told that the assessments and scores would be discussed at the meeting.

69. On 3 November 2020, the claimant had his second individual consultation meeting (bundle pages 624-625). The claimant asked Ms Wilkinson and Mr Cavanagh whether they were confident, should the matter go to a Tribunal, that they'd fairly scored him. The scores that he had received were explained to him. In particular, it was explained that he had been scored in relation to work performance and skills on the basis of the period when he was fully fit before his accident and absence. It was explained that two independent managers had scored him and that they had come to the same scores. He was also informed that HR had conducted an independent audit of all scores including the claimant's to ensure that it was reliable and secure. The claimant said he was not interested in any alternative vacancies. This meeting was adjourned so that Ms Wilkinson and Mr Cavanagh could review the ratings at the claimant's request.

70. On 5 November 2020, a further individual consultation meeting with the claimant was reconvened. Mr Wilkinson and Mr Cavanagh reviewed their scores and was satisfied that they were reliable and secure. The claimant was told that he was "a solid asset to the team" and that his scores did not reflect badly on his performance. As Ms Wilkinson's witness statement at paragraph 68 indicates, it was simply a case that others had scored higher than the claimant.

71. Ms Hay asked the claimant to confirm that the 1:1 form was a true reflection of the meetings that he had had and the claimant emailed agreeing that it was (bundle pages 622-623).

72. On 10 November 2020, the claimant appealed his selection for redundancy (bundle pages 631-632).

73. On 16 November 2020, the claimant received his scoring matrix, prior to his appeal hearing

74. On 17 November 2020, the claimant's appeal hearing took place (bundles pages 685-689). The appeal was undertaken by Stewart Lorrimer, Area General Manager. The claimant asserted that his depression had caused fatigue and reduced performance. As a consequence. he believed his scores had been influenced by his disability. The respondent, however, was not aware

of any fatigue affecting his performance and was not aware of any reduced performance by the claimant. Indeed, it was the claimant's positive case in his evidence that his depression had not impaired his performance. It was explained again to the claimant that he had been scored on his period of employment prior to his hip injury. It was also explained to him that he was not scored down in any way because of fatigue. His colleagues had scored more strongly because they could do the Bar (and other areas) as well as the fact that some of his colleagues work did require checking by a supervisor.

75. Mr Lorrimer explained that because the assessment had related to a period before any adjustments were potentially required and that the possibility of future adjustments being required was therefore not taken into account to any extent whatsoever. Mt Lorrimer confirmed that the respondent had already suggested adjustments, including a trial in the Food and Beverage Assistant role allocated to the Business Centre. The truth of the matter was that the respondent didn't get to the stage of actually identifying adjustments because Covid-19 intervened and the plans to reconvene his return to work meeting were overtaken by those events.

76. Nevertheless, Mr Lorrimer went on to look at the points of appeal raised by the claimant on a hypothetical basis. The possibility of varying of duties would have been explored further if it had been possible to reconvene the return to work meeting. Rest periods would also have been considered, but Mr Lorrimer noted that in the Business Centre the requirement was for independent working, so it would be hard to have breaks where there was no one to cover. In terms of assistance from Team Members, Mr Lorrimer explained that this would have been looked into. Similarly, although the hotel at that time did not have a table trolley it was something that the hotel could certainly have looked into.

77. Mr Lorrimer adjourned the appeal hearing to speak to Mercedes Wilkinson and Sharon Hay about the claimant's points of appeal

78. On 17 September 2020, Mr Lorrimer wrote to the claimant dismissing his appeal and confirming that his redundancy would stand. Mr Lorrimer's letter confirming the outcome of his appeal is at pages 625-656 of the bundle. In his witness statement, Mr Lorrimer sets out his overall findings on each of the points of appeal that the claimant had raised.

79. The first ground of appeal – that the claimant believed that he'd been unfairly made redundant on the grounds of abuse of procedure. The claimant had objected to the fact that his furlough had been extended on 31 March 2021 and he said that the respondent was not utilising it fully. Mr Lorrimer explained that ongoing restrictions meant that it was inevitable that the hotel would continue with low or no occupancy for the foreseeable future and that recovery was slow. An extension of the furlough scheme had been considered but was not financially viable for the hotel to retain at risk employees on the furlough scheme. Mr Lorrimer also noted that the claimant had by that point not consented to ongoing furlough which made his argument in the words of Mr Lorrimer "a moot point".

80. The second ground of appeal was that the claimant believed he'd been unfairly selected for redundancy based on grounds of unfair selection process and disability discrimination.

81. Mr Lorrimer noted that no objections had been raised to the selection assessment matrix and that it had been consulted upon collectively with the

employer representatives and approved. The claimant had also received all relevant information during the process including being updated on the Skill Assessment Matrix which was aligned with ACAS best practice and had comprehensive guidance expressly containing advice of how to avoid discrimination. Mr Lorrimer also explained that two managers had scored him independently and provided explanations to support their ratings. In relation to attendance, the claimant had scored full marks not least because his physical disability and related absence had been discounted. Mr Lorrimer also noted that his scoring in the Skills Assessment Matrix was consistent with his PDR ratings from 2018. The claimant said his reduced mobility and history of depression had influenced the rating was not something that Mr Lorrimer could agree with. Having been scored on his pre-absence performance there was nothing to indicate there was any discrimination or other unfairness in the implementation of the Skills Assessment Matrix to the claimant.

82. The third ground of appeal was that he believed the claimant had been unfairly dismissed on the grounds that he had not been offered or considered for suitable alternative employment.

83. Mr Lorrimer explained that a small number of vacancies had been created as part of the restructure, notably chefs in the kitchen but these roles were created as "closed pools" and reserved for team members in those departments who were at risk, as those were the colleagues who had the specific skill sets required for the roles in question. Had there been insufficient applications (which there was not) those outside the pool would have been invited to apply.

84. The reality was that this was a reduction in headcount due to economic difficulties as a consequence of which inevitably there would be a reduction in numbers otherwise the required savings could not have been made. The claimant had also been encouraged to register on the Alumni forum and careers website should vacancies arise in the future. The claimant had declined to do so. A list of 20 vacancies had been advertised at that point in time. Alternative roles had also been discussed at the consultation meetings on 3 and 5 November 2020. In those circumstances, Mr Lorrimer concluded that there was no failure to consider the claimant for the limited number of alternative roles that were available.

85. The fourth ground of appeal was that the claimant believed he had suffered disability discrimination in that the respondent was reluctant to conclude his return to work meeting.

86. Mr Lorrimer concluded that there were genuine attempts to continue with the long term ill health management process and facilitate the claimant's return to work. That could only apply, however, if he was successful at the Assessment Matrix stage. In those circumstances, he had been selected for redundancy and it was for that reason and that reason only that the return to work meeting was not continued. Mr Lorrimer also noted that the claimant had refused to consent to an updated Occupational Health Report which would have been necessary to facilitate his return to work had he been retained from the redundancy process. Mr Lorrimer could in those circumstances find no evidence to support the contention that the claimant had not been fully supported by the respondent nor being discriminated against in any way.

87. In those circumstances, Mr Lorrimer confirmed his decision to uphold the decision to terminate the claimant's employment by reason of redundancy in a letter dated 17 November 2020.

The relevant law

Unfair dismissal – section 94/98 ERA

Definition of redundancy

88. Section 139(1)(b) ERA provides for the meaning of redundancy for the purposes of, amongst other things, unfair dismissal. It is in the following terms:

"*An employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to - … the fact that the requirements of the business –*

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish".

89. In case Murray v Foyle Meats [1999] ICR 827, the Employment Appeal Tribunal identified the two questions that section 139 requires the Tribunal to address:

(i) Does one of the various states of economic affairs in the section exist;

(ii) Is the dismissal attributable wholly or mainly to that state of affairs?

Unfair dismissal in redundancy cases

90. The leading case is Williams v Compair Maxam Ltd [1982] ICL 156, in which the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. At 162 the EAT identified the following matters that typically fall to be considered by the Tribunal:

(i) Whether the selection criteria were objectively chosen [including consideration of agreement with the union] and fairly applied;

(ii) Whether employees were warned and consulted about the redundancies;

(iii) Whether any alternative work was available.

91. At 161E-F, the EAT said that :

"It is not the function of the … 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."

92. Taymech Limited v Ryan [1994] UK EAT/663/94/1551, Mummery P said:

"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 as 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."

The band of reasonable responses and rule against substitution apply.

93. Mugford v Midland Bank [1997] IRLR 208, the EAT said:

"It will be a question of fact and degree for the … tribunal to consider whether consultation with the individual … was so inadequate as to render the dismissal unfair. … The overall picture must be viewed by the tribunal up to the date of termination."

The Tribunal should also take into account the collective consultation undertaken by an employer where that obligation applies when deciding whether consultation in the round is fair or unfair.

94. Lloyd v Taylor Woodrow Construction [199] IRLR 782 the EAT confirmed that a failure in consultation can be cured at the appellate stage.

Selection criteria

95. The following general principles can be discerned from the authorities regarding the requirement of fair selection criteria:

(i) Selection criteria should as far as possible be objective and not depend solely on the opinion of the person making the selection – Compare Maxam.

(ii) Objectivity in criteria is important but Underhill J in Mental Health Care (UK) Ltd v Biluan [2013] UK EAT/0248/12/SM:

"*The goal of avoiding subjectivity in bias is of course desirable but it can commit to higher price; and if the fear is that employment tribunals will find a procedure unfair only because there is an element of "subjectivity" involved that fear is misplaced*."

96. In British Airways plc v Green [1995] ICR 1006 the EAT said:

"In general the employer who sets up a system of selection which can reasonably be described as fair and applies it without overt sign of conduct which mars its fairness will have done all the law requires of him …

… documents relating to retained employees are not likely to be relevant in any but the most exceptional circumstances … the tribunal is not entitled to embark upon a reassessment exercise … it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, and that ordinarily there is no need for the employer to justify all the assessments on which the selection for redundancy was based."

97. In Dabson v David Cover and Sons LLTD [2011] UKEAT/0374/10/SM the EAT indicated that the Tribunal should not examine actual scoring unless there has been bad faith or obvious error.

Definition of some other substantial reason

98. The respondent relies in the alternative on some other substantial reason as the prima facie fair reason for dismissal. In the context of a business reorganisation it is sufficient for the employer to show that there is "*sound, good business reasons"* for the reorganisation (Hollister v NFU [1979] ICR 542). Soundness is to be judged from the perspective of management rather than the tribunal – the question is whether the reason is one "which management thinks on reasonable grounds is sound" – see Scott and Co v Richardson [2005] UK EAT/0074/04.

Discrimination arising in consequence of disability

99. Section 15(1) EQA concerns discrimination arising out of disability and provides:

A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

100. The Tribunal had regard to the guidance in Pnaiser v NHS England [2016] IRLR 170, EAT, paragraph 31.

101. The Supreme Court stated in Williams v The Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65 that there is probably little different between "unfavourable" treatment and other phrases such as "disadvantage" or "detriment" found in other provisions of the EQA.

102. To expand upon the guidance provided by Simler J in Pnaiser the Tribunal must decide:

(1) Whether there was unfavourable treatment.

(2) What the reason for that unfavourable treatment was. The focus is on the mind of the employer at this point. If there is more than one reason, it will be sufficient to establish causation that something has a "significant influence". In deciding this the employer's motives are not relevant.

(3) Whether that reason was "*something arising in consequence of disability*". This is a looser test compared to "*caused by*", as emphasised by Simler J in Sheikholeslami v Edinburgh University [2018] IRLR 1090. This is an objective test and does not depend on the thought process of the employer. Nor is it necessary for the employer to know that "*something arising*" arises in consequence of the disability.

Put simply, the Tribunal must address two separate questions regarding causation:

(i) Did the "*something"* arise from the claimant's disability and

(ii) Was that "*something"* the reason for the claimant's unfavourable treatment) Basildon v Thurrock NHS Trust v Weerasinghe [2016] ICR 305). In Charlesworth v Dransfield Engineering Services Ltd [2017] UKEAT/0197/16/JOJ, Simler J said that an effective cause was *"an influence or cause that does in fact operate on the mind of a putative discriminator whether consciously or subconsciously to a significant extent and so amounts to an effective cause."*

103. A respondent may objectively justify unfavourably treatment in a section 15 EQA case if it can establish that the treatment was a proportionate means of achieving a legitimate aim. To be proportionate, the treatment must be an appropriate means of achieving a legitimate aim and also reasonably necessary in order to do so: Homer v Chief Constable of West Yorkshire [2012] in UKSC 15 at [20-25].

104. The principle or proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. It is for the Tribunal to conduct that balancing exercise and make its own assessment of whether the latter outweighs the former; there is no range of reasonable responses test. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys and Hansons plc v LAX [2005] EWCA Civ 846 Pill LJ at [19-34].

The duty to make reasonable adjustments

105. The Tribunal has had regard to the provisions of sections 20 and 21 EQA as well as the correct approach to their interpretation as set out Environment Agency v Rowan [2008] IRL 20 EAT. At [27]:

"In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify:

(a) The provision, criterion or practice applied by or on behalf of an employer, or

(b) The physical feature of premises occupied by the employer;

(c) The identity of non-disabled comparators (where appropriate); and

(d) The nature and extent of the substantial disadvantage suffered by the claimant …

Unless the Employment Tribunal has identified the format as we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature placing the disabled person concerned at a substantial disadvantage."

106. The burden is on the claimant to show the provision, criterion or practice to demonstrate the substantial disadvantage incurred, and to demonstrate a *prima facie* case there was some apparently reasonable adjustments which could have been made – Project Management Institute v Latif [2007] IRLR 579. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 it was held that

"*[T] The duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage"*.

107. The substantial disadvantage must apply in respect of the disabled person compared to *"persons who are not disabled*". ET said in Sheikholeslami v Edinburgh University [2018] IRLR 1090 at [48].

"The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP."

108. If a substantial disadvantage is not made out such as where non-disabled people are equally disadvantaged by the PCP no duty to make adjustments will arise.

109. The test of reasonableness in the case of a reasonable adjustment is an objective one – Smith v Churchill Stairlift Plc [2006] ICR 524. Paragraph 6.28

EHRC Code of Practice on Employment sets out some of the factors which may be taken into account when assessing what is a reasonable step for an employer to take:

"Whether taking a particular step would be effective in preventing the substantial disadvantage:

- *The practicability of the step;*
- *The financial and other costs of making the adjustment and the extent of any disruption caused;*
- *The extent of the employer's financial or other resources;*
- *The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work; and*
- *The type and size of the employer."*

Knowledge of disability

110. It is a defence to a claim for failure to make reasonable adjustments that the respondent does not have knowledge (whether actual or constructive) of disability. It is also a defence to a claim of failure to make reasonable adjustments if the respondent does not have knowledge that the alleged PCP *was likely to give rise to the substantial disadvantage – para 20(1)(b), Schedule 8 EqA 2010.* These are two separate questions, and it is only if the employer has knowledge in relation to both of them that liability will arise – in Wilcox v Birmingham CAB Services Ltd [2010] UKEAT/0293/10/DN.

111. The duty to make reasonable adjustments operates objectively, and a failure to consult on reasonable adjustments will not in itself amount to a breach of duty to make reasonable adjustments. In Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664 at [71]:

"the only question is, objectively, whether the employer has complied with his obligations or not…if he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance: but that is enough."

112. The following additional principles also emerge from the case law:

112.1. While redeployment to a new role may be a reasonable adjustment, it is unlikely to be reasonable automatically to appoint an employee to a role where the employer genuinely believes that the employee fails to meet the essential requirements of the role – Wade v Sheffield Hallam University [2013] UKEAT/0194/12/LA.

112.2. Sometimes there is uncertainty as to whether a particular adjustment would be effective. In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 [29]:

"so far as efficacy is concerned, it maybe that it is not clear whether the step proposed would be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when a assessing the question of reasonableness."

112.3. In general terms, the reasonableness of a particular adjustment will always depend on the circumstances of the particular case – *para 6.29 EHRC Code of Practice on Employment.*

Conclusions

113. The Tribunal conclusions follow the structure of the issues identified at the case management hearing on 29 April 2021, set out at pages 52 to 56 of the bundle.

114. The Tribunal was not asked to consider the time limits under section 123 EQA and proceeds from the basis that the claims are all presented in time.

Unfair dismissal contrary to section 94, 98 ERA 1996.

What was the reason or principal reason for dismissal?

115. The Tribunal finds that the sole reason for the claimant's dismissal was redundancy. The facts and matters in the mind of both the dismissing manager, Ms Wilkinson and the appeal stage manager, Mr Lorrimer were the serious economic circumstances experienced by the respondent's hotels which arose out of the very significant and widely known impact on the hospitality sector of the Covid-19 pandemic and the related lockdown restrictions which led to the closure of the respondent's Newcastle Gateshead Hotel for several months starting on 2 April 2020.

116. The Tribunal accepted the evidence given by the respondent, specifically Mr Lorrimer, about the very significant reduction in occupancy rates and other commercial revenue streams during 2020. That led to a decision to make a significant number of redundancies across the hotel group, including the Hilton Gateshead where the claimant worked as a Food and Beverage Assistant. The Tribunal was satisfied that these economic circumstances led to a reduced requirement for employees to carry out work of the kind for which the claimant was employed, satisfying the meaning of redundancy set out at section 139(1)(b) ERA.

117. The Tribunal specifically rejects the claimant's assertion that the real reason for his dismissal was what he perceived to be the impact of his disabilities on his ability to perform his role proficiently. There was simply no evidence from which it might be possible to infer that the respondent considered any perception of disability. It was the claimant's own case that his depression didn't impeded his performance and the period of assessment for selection purposes was at a time prior to the claimant injuring his hip. There was no discernible perception by any of the respondent's managers that they perceived the claimant as disabled at all, let alone that any such perception influenced negatively the selection of the claimant for redundancy. The economic circumstances were the sole and genuine reason for the claimant's dismissal which also regrettably affected a significant number of his colleagues.

Did the respondent act reasonably in all the circumstances of the case in treating that as a sufficient reason to dismiss the claimant?

118. The Tribunal is satisfied that the claimant was adequately warned and consulted about his potential redundancy. The respondent carried out an extensive collective consultation process with elected representatives, a process in respect of which the claimant was kept fully informed and indeed in

which he actively engaged. The claimant accepted in evidence that the elected representatives, including Bethany Dodgson, his own representative, did a good job during that process.

119. The respondent also carried out a reasonable individual consultation process with the claimant. The claimant was invited to and attended two individual consultation meetings at which he was provided with sufficient information to enable him to understand and challenge his selection for redundancy. That is evidenced not least by the fact that he did just that. The claimant fully participated in the individual consultation process.

120. The Tribunal find that the selection pool identified by the respondent was a pool that fell within the band of reasonableness required by section 98 ERA. Specifically, the Tribunal finds that the respondent's approach to casual workers was reasonable. A significant part of the respondent's workforce is comprised of casual workers engaged on workers, rather than employee, contracts. The distinction drawn by the respondent between "true casuals" and "regular casuals" was rational and practical. Including "regular casuals" in the selection pool and thereby increasing the claimant's risk of selection was not unreasonable. The respondent also had a duty to act fairly towards all of its employees including its casual workers.

121. The respondent accepted that there could be no hard and fast rule determining whether a casual worker should be considered to have employment status, but it nevertheless considered each case on its merits before including or excluding as the case may be a particular casual worker in/from the pool. This was based essentially on the regularity with which a casual worker had done work over a period of 12 months. The Tribunal notes that the proposal to include regular casuals in this way was the subject of collective consultation and this Tribunal is slow to find a matter consulted upon at the collective level nevertheless renders an individual dismissal unfair. The Tribunal accordingly find that the inclusion of casual workers in the pool was not unreasonable. Essentially, the respondent was balancing its employment risks and the rights of the casual workers in a reasonable way.

122. The Tribunal is also satisfied that the selection criteria adopted by the respondent were fair and reasonable. They combine objective HR data on discipline and attendance with two more subjectively assessed criteria on work performance and skills. Indeed, the claimant appeared to focus more on the application of those criteria to his own case rather than make criticism of the selection criteria per se. The respondent took appropriate steps to balance out any subjectivity by getting two separate independent managers to mark those at risk of redundancy on work performance and skills as well as arranging for an HR audit to provide checks and balances to the system.

123. The selection criteria were also consulted upon collectively in what was on any view a thorough and professional process.

124. The Tribunal do not find unfairness in the fact that Jake Cavanagh did not physically sign the claimant's assessment sheets. The claimant was right when he pointed out that Jake Cavanagh had not done what the sheet intended and signed it under his own hand. However, the Tribunal find it is very likely that Mr Cavanagh simply typed his own name electronically, and we were wholly satisfied that the assessment itself was done by Mr Cavanagh which we find to be the issue of substance. In other words, there was no meaningful impropriety

arising out of the absence of a physical signature on the claimant's assessment sheet.

125. The Tribunal is satisfied in these circumstances that the application of the selection criteria to the claimant was reasonable and was supported by secure data in the form of a 2018 performance review for the claimant.

126. The Tribunal is also satisfied that the steps the respondent took to identify alternative employment were reasonable. The practical reality was that this was a headcount reduction exercise with a significant net reduction in the overall number of FTE employees. This in itself narrows the scope for redeployment or for finding suitable alternative employment. Such roles as were identified were of a specialist nature such as kitchen staff and chefs. Those roles were filled from within the initial pools where the required skills were likely to be found, and the Tribunal finds that this approach cannot be considered unreasonable.

127. Looking at the process and substance of the decision to dismiss the claimant for redundancy, and taking all the circumstances into account, the Tribunal was satisfied that the respondent acted reasonably in treating redundancy as a sufficient reason to dismiss the claimant as required by section 98(4) ERA.

128. In the circumstances the claimant was not unfairly dismissed contrary to sections 94/98 ERA and the claimant's claim for unfair dismissal therefore fails.

Disability status

129. The respondent conceded that the claimant's depression and his physical mobility impairment caused by his hip replacement both amounted to a disability under section 6 EQA 2010.

Knowledge of disability

130. Knowledge was conceded by the respondent in respect of the claimant's physical impairment.

131. It was the claimant's own evidence that he had not brought his depression to the knowledge of the respondent in terms. It was the claimant's own evidence that his depression did not impair his performance as a Food and Beverage Assistant due in part to effective coping strategies he'd deployed. The Tribunal therefore finds that the respondent had no actual knowledge of the claimant's depression at the time that is relevant to these proceedings. The Tribunal finds that the respondent had no constructive knowledge of the claimant's depression at any time relevant to these proceedings. The Tribunal also finds that the respondent had no actual or constructive knowledge that any PCP put the claimant to a substantial disadvantage in. The Tribunal carefully considered whether the fact he was assisted by Remploy to find work with the respondent was sufficient to fix the respondent with constructive knowledge. The Tribunal finds that this did not put the respondent on notice either the claimant had depression or on notice to make further enquiries, particularly given the passage of time since his original appointment in 2015 and his creditable performance during his employment.

Discrimination arising from disability contrary to section 15 EQA

132. The Tribunal has nevertheless gone on to consider all the claimant's claim of disability discrimination on their merits, notwithstanding the Tribunal's findings on knowledge in respect of depression.

133. The respondent did treat the claimant unfavourably by selecting him for redundancy. Fatigue and reduced performance the Tribunal find arose in consequence of the claimant's disabilities. However, the Tribunal does not find that the claimant's selection for redundancy was because of either the claimant's fatigue or his reduced performance. The Tribunal finds that the reason why the claimant was selected for redundancy was because of the economic pressure facing the respondent and the fair application of reasonable selection criteria to him which led to him falling below the overall mark beneath which employees were selected for redundancy. Crucially, the Tribunal finds that neither fatigue nor reduced performance played any part whatsoever in the application of the selection criteria to the claimant. The claimant received full marks for attendance, a mark which is only compatible with his disability related absence having been discounted. The claimant received full marks for disciplinary record. The less good (but still creditable) marks the claimant received for work performance and skills were based on an assessment period prior to the claimant's accident. It must logically follow that no consideration of fatigue or reduced performance arising out of the claimant's hip replacement could have been taken into account when the marks for knowledges and skills were being derived.

134. It was the claimant's own case that his depression did not impair his work throughout the period of his employment. Any fatigue arising out of depression could therefore not have been taken into account when any of the selection matrix marks were awarded to the claimant. It follows that the second of the two causative links in section 15 EQA identified in Pnaiser is not satisfied with the effect that the requirements of section 15 EQA are not met.

135. In the circumstances, the claimant's claim for disability discrimination contrary to section 15 EQA is not well-founded and therefore fails.

Failure to make reasonable adjustments contrary to sections 20 and 21 EQA

136. The Tribunal finds that the duty to make adjustments did not arise before the claimant was dismissed for reasons unrelated to disabilities. The duty to make adjustments is not analogous to a claim for failure to consult. An employer normally needs to be able to identify what a disabled employee can or can't do before it becomes reasonable for the employer to make any particular adjustments. On the facts of this particular case, Ms MacGill started the process of identifying the baseline from which adjustments could be considered in a meeting with the claimant on 10 March 2020. The claimant had a fit note until 1 April 2020. The claimant agreed to go on furlough with effect from 2 April 2020 from which date he was precluded from carrying out any duties for the respondent.

137. The practical reality is that the process of identifying adjustments was overtaken by the very significant impact on the respondent's business of the Covid-19 pandemic and the national lockdown. The Tribunal heard much about the meeting of 10 March 2020, but we cannot find fault with how Ms MacGill went about her task of starting a dialogue with the claimant about potential adjustments. It was sensible of her to enquire of the claimant what he could do

so that she could start to consider adjustments. It was also sensible of her to re-set expectations which had been inaccurately raised in the Occupational Health Report and which were predicated on the false assumption that the Business Centre role was a purely administrative and free-standing job. The Tribunal accepted the evidence of the respondent that it was neither of these things. The Tribunal also finds that the claimant has misunderstood the significance of the provision in the furlough agreement that he could be required to come back to work on 24 hours' notice. That was a provision common to all furlough agreements and we accept Ms MacGill's evidence that had the claimant been retained after the redundancy exercise further discussion and a further Occupational Health Report were needed to inform a further discussion with the claimant about potential adjustments.

138. The Tribunal has nevertheless gone on to consider the other elements of the duty to make reasonable adjustments. The respondent conceded that working at pace and moderate and heavy duty tasks are PCPs. Those PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's physical disabilities. The Tribunal finds that the respondent would have gone on to consider varying the claimant's duties; providing rest periods; and getting assistance from team members, but that matters didn't get that far because furlough and the redundancy exercise intervened.

139. The Tribunal also accepts the respondent's submission that given the claimant's condition and his own evidence about his post-operative restricted physical abilities, it would even with the benefit of another Occupational Health Report have been difficult if not impossible to adjust the role of Food and Beverage Assistant in a way that could have accommodated the claimant. Indeed, it was the claimant's own evidence that he could not do this role, a position he made clear both to the occupational health advisor and to the respondent during the meeting on 10 March 2020. The Tribunal also notes that that Ms MacGill was prepared to offer the claimant a trial acting as a food and beverage assistant assigned predominantly to the Business Centre but that the claimant, for reasons which he did not explain, declined that opportunity.

140. The Tribunal does not find that the respondent had a PCP of expecting the claimant to do the Food and Beverage Assistant role "as is". On the contrary, the respondent's position, which we accept, was that it was both open-minded about adjustments and concerned for the claimant's welfare were he to go straight back into his Food and Beverage Assistant position.

141. Finally, the Tribunal considered the PCP, and proposed adjustments regarding the redundancy selection process. The proposed step that two people should have scored the claimant in the redundancy selection process cannot succeed because two people did in fact score him: Ms Wilkinson and Mr Cavanagh.

142. Likewise, the proposed step to consider all the claimant's annual reviews cannot succeed because the claimant only had one annual review in 2018 and that was considered at the point of the application of the selection criteria matrix to the claimant by Ms Wilkinson and Mr Cavanagh. The last step of failing to provide the selection matrix before the 1:1 consultant meeting would not in the Tribunal's view have avoided any disadvantage had it been provided earlier. It was in any event, not disability related. The claimant was provided with an explanation of the scoring at the hearing which he plainly understood. In any event, we find that there was no failure to take steps on the facts of this case

because the claimant's employment lawfully terminated before the opportunity to properly discuss adjustments had come to pass.

143. In the circumstances the claimant's claim for failure to make adjustments was not well-founded and therefore fails.

144. Furthermore, in relation to the claimant's unfair dismissal claim any unfairness which arose out of the failure by the respondent to provide the selection matrix scores to the claimant before his second consultation meeting and his dismissal is in the Tribunal's view cured by the fact that he had those scores in advance of his appeal hearing. The Tribunal assessed the fairness of the claimant's dismissal up to the date of termination and beyond that to the resolution of the claimant's appeal. In those circumstances, the Tribunal found no unfairness or unreasonableness in the overall procedure.

145. In these circumstances, none of the claimant's claims are well-founded and they are all dismissed accordingly.

Employment Judge Loy

Date 26 October 2022

JUDGMENT SENT TO THE PARTIES ON

27th October 2022

Mrs. T. Hussain
FOR THE TRIBUNAL OFFICE