EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105531/2020

Hearing via CVP Monday 12, Tuesday 13 and Wednesday 14 December 2021

Employment Judge: R McPherson
J Chalmers
S Singh

Mr David Daly	**Claimant** **Represented by:** **J Colledge -** **Solicitor**
Robinsons Scotland Ltd	**Respondent** **Represented by:** **K Reece -** **Employment Advisor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that;

1. The claimant's claim for unfair dismissal does not succeed and is dismissed.

2. The claimant's claims in terms of s13 of the Equality Act 2010 (EA 2010) direct discrimination because of protected characteristic disability do not succeed.

3. The claimant's claims in terms of s15 of the Equality Act 2010 (EA 2010) discrimination arising because of protected characteristic disability do not succeed.

4. The claimant's claims in terms of s20 and s21 of the Equality Act 2010 (EA 2010) reasonable adjustment (in connection with protected characteristic disability) do not succeed.

REASONS

Introduction

Preliminary Procedure

1. The claimant's ET1 was presented **Thursday 15 October 2020** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Wednesday 26 August 2020** and issue of the ACAS Certificate on **Thursday 3 September 2020**) against the respondent following upon the termination of the claimant's employment as a **Finance Controller** (ET1 and ET3) with the respondents on **Friday 31 July 2020,** the respondent argues by reasons of redundancy, and following upon which the respondent paid contractual redundancy pay.

2. ET3 was presented timeously for the respondent by **Wednesday 18 November 2020.**

3. On **Tuesday 15 December 2020** the respondent provided a draft list of issues to the claimant.

4. On **Friday 18 December 2020** parties attended case management Preliminary Hearing, the PH Note from which was issued **Friday 29 January 2021 (the Jan 2021 CM Note)**, and identified that:

    1. the claimant brought complaints of unfair dismissal, disability discrimination and entitlement to a redundancy payment.

    2. The discrimination claims being:

        i) **s13** (Direct Disability Discrimination) EA 2010, the claimant relying upon (only) Mr David Welch the respondent's (former) Finance Manager as specific (rather than hypothetical)

comparator, the respondent arguing in terms of s23 EA 2010 that the circumstances were materially different

ii) **s15** (Discrimination Arising from Disability) EA 2010, the unfavourable treatment complained by the claimant being respondent's dismissal of the claimant and employment of someone else to perform his role. The "*something"* arising was said to be the respondent's requirement to work in the respondent's office (rather than at home). For the respondent, it was denied that such a requirement existed, but if it was found to exist, the treatment was a proportionate means of achieving a legitimate aim: and

iii) s20,21 (**Reasonable adjustments**) EA 2010, the Provision Criterion or Practice (PCP) for the claimant being asserted as the requirement to work in the office and reasonable adjustments argued for, were for the claimant to be allowed to continue to work from home and to move the claimant's work area to the ground floor of the respondent's office.

5. For the claimant, it was acknowledged that the claimant had received statutory redundancy payment, as such, that claim was no longer insisted upon.

6. For the respondent, it was accepted that the claimant was disabled at the relevant times within the meaning of s6 (1) EA 2010.

7. A draft list of issues had been provided for the respondent, which the claimant's representative had revised in advance of this case management Preliminary Hearing inserting answers to questions posed. Parties were ultimately directed to provide an agreed list of issues no later than **Friday 29 January 2021.**

8. For the claimant, a request was made for orders for production and disclosure of:-

1. What finance-related jobs (whether full-time or part-time and whether permanent or temporary) were advertised by the respondent since Monday 23 March 2020, and when were they filled?

2. What were the principal duties of those appointed?

3. On what dates were interviews for those positions held?

the respondent confirmed that the respondent "*would provide this information on a voluntary basis"* and they were directed to do so no later than **Friday 29 January 2021**.

9. It was directed that if the hearing was able to be listed before Monday 29 March 2021, it would be in person but if listed after that date it would be open to parties to request a hearing by CVP.

10. For the claimant it was identified that the witnesses would be the claimant, his daughter Ms Daly and Ms Shepherd a family friend. For the respondent, it was intimated that witnesses would be Mr Robinsons a respondent HR Representative, the respondent's Finance Manager and the respondent's Finance Director. It was not suggested by either side that Ms Lorraine Cairnie would be a relevant witness.

11. It was directed that, if CVP was to be used witness statements would be used.

12. Parties were directed that not later than 28 days before the final hearing parties should exchange all documents relied upon and the claimant representative should provide the Joint bundle not later than 14 days before the Final Hearing.

13. It was not intimated that a claim was insisted upon in terms of the Fixed Term Employees (Prevention of Less Favourable Treatment Regulations 2002, in terms of which the Tribunal would require to determine whether the claimant and identified comparators were engaged on the same or in broadly similar work and if so determine whether the less favourable treatment was on the ground that the claimant was a fixed-term employee.

14. On **Tuesday 8 June 2021,** parties were advised that the Tribunal directed that the hearing should take place over 3 days via CVP and parties were subsequently advised on **Wednesday 4 August 2021** that the Final Hearing was scheduled to commence **Monday 11 October 2021,** the hearing, however, did not progress on those dates.

15. On **Thursday 30 September 2021** the claimant representative intimated that they would be able to exchange witness statements on **Wednesday 6 October 2021**. The respondent representative intimated to the claimant's representative that they would be in a position to exchange witness statements on Monday 4 or Tuesday 5 October 2021.

16. Witness statements for the claimant were provided **Wednesday 6 October 2021**: being

    1. the claimant's witness statement signed and dated Tuesday 5 October 2021, and

    2. Ms. Donna Daly, daughter of the claimant which although undated was signed, and

    3. Ms. Christine Shepherd, signed and dated 4 October 2021 family friend of the claimant, and

    4. Mrs. Linda Daly, the claimant's wife signed and dated Monday 4 October 2021.

17. The respondent representative did not exchange witness statements at this time.

18. On **Monday 8 November 2021** the Tribunal confirmed that the Final Hearing via CVP would take place on **Monday 13, Tuesday 14** and **Wednesday 15 December 2021.**

19. On **Wednesday 10 November 2021,** in response to a request from the claimant's representative for an Unless Order, the respondent representative apologised for delay in the issue of respondent witness statements, setting

out that *"we also take this opportunity to apologise to the claimants representative for the fact that statements were not provided before the original hearing date which we accept was in breach of the tribunal's order. Unfortunately events partly beyond the writers control… meant that time was lacking at that time. … We are liaising today with our client to finalise the respondent statements and will ensure that they are sent to the claimant representative without delay…we also take this opportunity to confirm again to the tribunal and the claimant representative that the respondent nor ourselves have opened or read the claimant witness statement nor will we do so until, the claimant have received that respondent statement until therefore agreed for us to do so."*

20. On **Monday 22 November 2021,** on request of the claimant representative, the Tribunal issued an Unless Order requiring the respondent to provide to the claimant agent Witness Statements for Mr Ryan Brown and Ms Jane McDade by **Monday 29 November 2021**.

21. On **Monday 29 November 2021,** undated and unsigned witness statements for the respondent were provided for

    1. Mr Ryan Brown respondent Director and

    2. Ms. Jane McDade respondent HR Manager.

The respondent representative's covering communication offered the respondent agent's apology for the delay, describing that the delay was not due to any inaction on the part of the respondent and set out "*We confirm that we have not opened or considered the claimant's statements nor have we forwarded the email to the client*"

22. On **Monday 29 November 2021,** additional documents were provided for the respondent, for addition to the Joint Bundle being:

    1. email from Ryan Brown to Jane McDade **Tuesday 15 December 2020;** and

2. extract WhatsApp messages said to be from Mr Ryan Brown with dates in March /May; and

3. respondent advert for the role of Finance Manager

23. On **Thursday 9 December 2021,** the claimant's representative provided Joint Bundle and witness statements.

24. On **Friday 10 December 2021** at **3.30 pm** the respondent provided by email documents including was described as notes of telephone conversion by witness Mr Ryan Brown, which was said to reflect his recall of telephone discussion with:

1. The respondent's Bank which is said to have occurred in **August-Sept 2019**, which Note was dated Tuesday 26 January 2021 (the January 2021 Ryan Brown Note of Telephone Discussion with Bank from August/September 2019); and

2. Ms. Daly (the claimant's daughter) around **May 2020**, which Note was dated Monday 25 January 2021 (The January 2021 Ryan Brown Note of Telephone Discussion with Ms Daly from May 2020); and

3. 9 documents which were said be extract job vacancy adverts.

It was intimated that the claimant representative had declined to include these in the Joint Bundle. In addition, the respondent intimated in that email that the claimant representative had confirmed that there "*will be no mitigation evidence presented… The Respondent will wish to rely upon mitigation job vacancies should the need for remedy to be determined arise. We attach those documents".*

25. On **Monday 13 December 2021 via email at 10.03 am,** the respondent provided what were intimated as corrected versions of witness statements for Mr Ryan Brown, Ms Jane McDonald enclosed in Joint Bundle. In addition, what was described as a witness statement for Mr Murray Falconer was provided which was undated and unsigned. It was intimated that what was described as the Murray Falconer statement, although previously disclosed

to the claimant representative, had been omitted from the Joint Bundle. Mr Murray Falconer was not called as a witness.

26. Each of the witnesses who attended confirmed their written witness statement at the Final Hearing with limited supplementary oral evidence being given and were then subject to cross-examination and re-examination.

27. At the outset there was no specific agreed list of issues, beyond that available at the Preliminary Hearing above.

28. On **day 1** of the Final Hearing on **Monday 11 December 2021**, at the outset hearing an application was made on behalf of the respondent:

    1. to be permitted to add documents to the Bundle, being the document listed at 15.1, 15.2 and 15.3 above.

    2. The addition of 15.1 and 15.2 was opposed for the claimant.

    3. The panel adjourned to consider respective parties' positions. The Tribunal concluded that it would permit the addition of all documents. The Tribunal concluded that the opposed documents were in effect supplemental to the existing written statement for Ryan Brown, this was the start of the hearing, any matters arising from same could be raised with the claimant witnesses (as would have been the case had both documents been included in the written individual statement which was indicated to be by Mr Ryan Brown would be able to speak to both and would thereafter be subject to cross-examination in the usual way) .

29. On **Monday 12 December 2021,** in advance of recommencing after mid-day break, for the claimant a payslip dated **Thursday 30 April 2020** was introduced and added to the Joint Bundle, there was no opposition to same.

30. On **Tuesday 13 December 2021**, in advance of Ms Donna Daly giving her evidence, the claimant representative circulated a copy of Ms Daly's signed though undated written witness statement. The claimant having included

other witness statements along with the Joint Bundle, it having been intimated by the respondent representative that she did not have a copy of the same.

31. At the outset of **day 3** of the Final Hearing, **Wednesday 15 December 2021** (after the conclusion of the claimant witness evidence the preceding day, evidence for respondent Mr Ryan Brown having commenced the preceding afternoon) application was made for the claimant to be permitted to add new documents to the bundle. The application had been intimated for the claimant by email at 9.54 am that morning, to be permitted to add the Bundle

    1. a 6-page unsigned Annual Performance Appraisal form May 2019 which was said to be that of the claimant (**May 2019 Appraisal Form**); and

    2. a 1-page workload document dated Monday 8 June 2020 which was said to have been completed by the claimant **(the June 2020 Workload document**).

For the claimant it was argued that the claimant should be permitted the same latitude as the respondent had been at the outset in respect of documents 15.1, 15.2 and 15.3 above, the claimant had already spoken to the amount of time he had spent working and what the claimant described as a request by David Welch (who was not listed as a witness) to produce the workload document within a period of 48 hours.

Addition of the documents was opposed for the respondent, in essence, it was observed that the evidential element of the claimant's claim had concluded around the mid part of the preceding day and that Mr Ryan Brown for the respondent had commenced his evidence in chief (around 2 pm the preceding day).

After adjourning to consider parties respective positions, the Tribunal recognised there had been delays in the provision of documents in the advance of the hearing, it would be possible for the documents to be put to Mr Ryan Brown as the claimant's manager. The Tribunal permitted the addition of that document subject to re-interposing the claimant to permit him

a limited opportunity to confirm those document in evidence in chief, providing the respondent with an opportunity to cross on same and thereafter reverting to the respondent evidence including on these two documents.

32. Following the conclusion of the evidential element of the Final Hearing on Wednesday 14 December 2021, unanimous directions were issued on **Friday 17 December 2021** to the parties, permitting the parties to exchange draft written submissions by **4 pm Monday 10 January 2022** in respect of the claimant's claim of unfair dismissal, s13 Equality Act 2020 (EA 2010), s15 EA 2010 and s20 and s21 EA 2010 (reasonable adjustments) and parties were permitted to provide same to the Tribunal by **4pm Monday 17 January 2022**.

33. Thereafter the claimant, only, provided final written submissions to the Tribunal on Monday 17 January 2022.

34. No submissions were timeously provided for the respondent, despite the Tribunal issuing a request for the respondent representative to comment on their omission having been issued, to which no reply was received.

35. The Tribunal's private deliberation took place at Members' Meeting on **Friday 11 February 2022** this being the earliest mutually available date for the full panel of the Tribunal. During that Members Meeting, the panel was made aware that an email had been issued by the respondent's representative at 10:**27 am** setting out that they sincerely apologised for the delay and asked *"if the possible the brief attached submission can be referred to"*. The panel considered the matter and concluded that it would not consider the contents of the respondent submissions given the terms of the Direction issued at the conclusion of the Final Hearing, reminder having been issued, absence of an explanation for the delay and the claimant not having been provided with an opportunity to respond as directed above.

36. There being no agreed list of issues beyond that available at the December 2020 case management preliminary hearing, issues identified for the Tribunal included:

Time Limits

37. It was for the Tribunal to consider whether any or all the claimant's existing complaints presented were within the time limits as set out in Sections 123(1)(a) & (b) of EA 2010.

a) Dealing with this issue may involve consideration of subsidiary issues, including whether there was an act and/or conduct extending over a period and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

b) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **Wednesday 8 July 2020**, was potentially brought out of time so that the Tribunal may not have jurisdiction to deal with it.

c) Some claims may be argued to have been lodged out with 3 months less one-day time limit (allowing for the operation of ACAS early conciliation). The provisions of section **207B of ERA 1996**, since 2014, provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect, initiating early conciliation "*stops the clock"* until the ACAS certificate is issued. If a claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present his claim.

38. Issues in relation to unfair dismissal/redundancy would include whether a dismissal was wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of the particular kind the claimant was employed in, in the place where the employee was employed by the employer had ceased or diminished.

39. Issues in relation to discrimination claims.

1. It was identified that the claimant brings a claim in terms of s13 EA 2010 **Direct Discrimination** because of (admitted) disability.

2. Issues in respect of the s13 EA 2010 claims included:

   (i) Was that treatment "*less favourable treatment*," i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

   (ii) Does the claimant rely on hypothetical or actual comparators, as above the claimant relied upon as an actual comparator.

   (iii) If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally

40. In respect that the claimant brings a claim in terms of s15 EA 2010 **Discrimination arising** because of (admitted) disability, issues included:

1. Did the respondent treat the claimant unfavourably in a specific manner (no comparator is needed), the January 2021 CM Note at point 5 sets this out as being the respondent's dismissal of the claimant and their employment of someone else to perform his role.

2. What did the claimant rely upon as the thing(s) arising in consequence of the claimant's disability, as set out in the January 2021 CM Note this was the requirement for the claimant to work in the respondent's office, rather than home.

3. Did the respondent treat the claimant unfavourably e.g. Did the respondent dismiss the claimant because of something arising in consequence of the claimant's disability that something in the January 2021 CM Note being the requirement for the claimant to work in the respondent's office rather than at home.

4. If so, has the respondent shown that the unfavourable treatment *(which is alleged and has been found by the Tribunal to have occurred)* was a proportionate means of achieving a legitimate aim? The respondent again in the January 2021 CM Note asserts that, if

found, such treatment (requiring the claimant to work in the respondent's office rather than at home) was a proportionate means of achieving a legitimate aim.

5. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability at the material time.

41. It was identified that the claimant brings a claim in terms of s20, 21 EA 2010 **Reasonable Adjustments** because of (admitted) disability.

1. Did the respondent know, or could it reasonably have been expected to know the claimant was a person with a disability?

2. A "PCP" is a "provision, criterion or practice" generally applied by the respondent to its employees. The claimant (by reference to the January 2021 CM Note) say the PCP was the requirement for the claimant to work in the office. That would give rise to the question of whether the respondent have / or apply the asserted PCP(s) as a general policy?

3. Did any PCP asserted by the claimant put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, and in what way?

4. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

5. If so, were there steps that were not taken that could have been taken by the respondent to avoid the disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and these are said to be (by reference to the January 2021 CM Note) to have

i) allowed the claimant to continue to work from home and

ii) to move the claimant's work area to the ground floor of the office

6. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Findings in Fact

42. The respondent is a family-owned company operating since around 2005 providing steel frame construction for buildings including taking them to site with around 60% of its customers being in agriculture and the balance being small industrial customers. In or around June 2018 the respondent employed around 106 employees with around 40 employees at its principal site in Lockerbie.

43. The claimant has considerable experience in areas of finance and his employment history prior to being engaged by the respondent included a temporary audit control role in Geneva, with banking projects in the Hague, London and treasury manager roles in Gatwick although the claimant is not a qualified accountant and does not hold a qualification in accountancy. He is a conscientious employee with extensive work experience in the areas of accountancy and payroll. There were no issues with his daily tasks.

44. Prior to the respondent making the offer of engagement, the respondent's Accounts Team element of the respondent business comprised an **Accounts Assistant** and **Accounts Manager** both reporting to and overseen by Mr Ryan Brown respondent Director**.** The respondent's future plans included bringing the production of monthly accounts (otherwise referred to as MI information) in-house from their external accountants Lamont Pridmore. The effect of doing so would reduce the monthly cost of hiring external accountants for that process.

45. On or about **Thursday 7 June 2018,** Mr Ryan Brown director for the respondent contacted the claimant's daughter via a professional social media site Linked In. Mr Brown made it known that he was looking for someone to

run the respondent's Accounts Team, preparing what was described as MI (being Management Information). The claimant was available to be recruited having been made redundant from his previous employment.

46. The claimant was not, after interview, recruited to run the respondent's Account Team. He was provided with a written contract (**the claimant July 2018 contact**), the terms of which he understood but did not sign. The contract appointed the claimant to a new role titled as **Financial Controller** broadly under Mr Ryan Brown as his line manager for a Fixed Term. The claimant did not discuss his work arrangements including the terms of the contract with his family until he received notification of termination of employment on Monday 27 July 2020. The role allocated to the claimant was a new and separate higher-paid, more senior role than the Accounts Assistant. The claimant was not, however, appointed to run the Accounts Team.

47. The July 2018 contract, identified the commencement date as being Monday 25 June 2018 at clause 5 provided:

5. Fixed Term contract

i. This contract will be for a fixed term on the date of commencement of date above, continuing until 25 June 2020. Unless renewed by the Company, this contract and your employment with the Company will terminate upon the fixed date.

ii. Its is a condition of your contract that you agree that your Contract of Employment will terminate on this date."

his contract expressly set out that it was for a Fixed Term in particular.

48. It was the claimant's hope that the fixed-term contract would result in a permanent (that is non-fixed term) post, however, no undertaking had been provided at that time that any such extension would be provided. The July 2018 contract was the first such fixed contract provided by the company to an employee. While it defined the claimant's job as Financial Controller there was

no accompanying job description. The claimant had, what he considered was an understanding that the position would be reviewed after two years with the claimant's intention being that he not planning to retire at that time. It was his preference to continue working beyond the period set in the fixed term contract.

49. The claimant's tasks were envisaged as including cash flow projections, bank payment, reconciliation and VAT returns and providing support to the Accounts Manager.

50. The claimant's employment with the respondent commenced **Monday 25 June 2018**, as the claimant lives some distance away from the respondent, he was reliant on work a work colleague providing him with a lift to work. That had the effect of the claimant arriving and departing from work for a time beyond his contracted hours.

51. While Ms Donna Daly, his daughter became a chartered accountant she did not discuss the claimant's actual work with him as both of them regarded the matters to be sensitive in nature and she did not have any occasion to visit him at the respondent's premises. Ms Donna Daly has been a Finance Director since 2018 and was previously a Financial Manager. It was her view that whilst her father did not have a formal qualification, he was able to do all matters that a Financial Director and Financial Manager could do other than file end of year accounts.

52. On **Tuesday 31 July 2018,** the respondent's then Account Manager resigned from her post, and the respondent agreed with its existing employee Ms Lorraine Cairnie (who had been employed since **Saturday 8 July 2017**) in the accounts Department as Accounts Assistant that there would be development opportunities for Ms Carnie. It was not suggested by the claimant that he was engaged in the same or in broadly similar work to that of Ms Lorraine Cairnie the respondent's Accounts Assistant.

53. On **Thursday 23 May 2019** the claimant completed the self-assessment element of the respondent Annual Performance Appraisal form (the **May 2019 Annual Appraisal**), which recorded the claimant's view

    a. that "*it has been a good tough year but I am still not at that Master level*" he considered he usually achieved in a previous financial role. The claimant attributed that, to what he described as the "*sheer volume of data that passes through the accounts department, and where I need to pass down some of the daily tasks I get involved with so as to concentrate more of the"* profit and loss analysis and forecasting.

    b. In relation to most important tasks, the most important aims and tasks in the next year were "*Firstly to completely master the MI workbook analysis so that can lead onto meaningful Budget numbers being produced, which can be efficient analysed through the year, by easily identifying the problems areas"*.

    c. Actions which could be taken to improve his performance were described as *"to attend some management meeting to be able to better forecast when the job is going to impact the cash flow. To attend Lamont Pridmore meetings when the monthly results are being discussed*"

    d. In relation to Delegation Skills the claimant described that he needed *"to delegate more but difficult with such a small team"*

    e. In relation to Attendance and Timekeeping the claimant described that he did more "*hours than is required by contract including Saturday morning and is happy doing this."*

54. The 2019 Annual Appraisal was not completed by Mr Ryan Brown the claimant's Line Manager.

55. In **August 2019** Mr Ryan Brown decided to recruit more people to the respondent's Accounts Team and around **October 2019** the respondent

appointed **Derek Bell** as **Financial Director** with oversight of the Accounts Department. Mr Bell was qualified in Management Accounts and an Associate of CIMA (Chartered Institute of Management Accounts). In appointing Mr Derek Bell as Financial Controller the respondent anticipated that Mr Bell, as a qualified accountant would be in a position to achieve the respondent's aim of bringing monthly (although not annual) accounts in-house.

56. On or about **Friday 31 January 2020** the respondent's then Financial Director Mr Derek Bell left.

57. From 31 January 2020 Mr Ryan Brown as Director reverted to oversight of the Accounts Department along with his other responsibilities. Following the departure of Mr Derek Bell, the claimant did not take over the running of the Accounts Department in place of Mr Derek Bell.

58. Around mid-March 2020 the respondent agreed with the claimant that the claimant could work from home, the claimant was already set up to work from home at that time. The respondent put in place a number of practical arrangements including arranging for files to be transported via a colleague from the respondent's premises in Lockerbie and working with remote computer access.

59. On **Monday 23 March 2020** what has become known as the UK lockdown was announced, it had the effect that most workers were required to stay at home, with formal regulations coming in on **Thursday 26 March 2020.**

60. On **Saturday 27 March 2020** Mr Ryan Brown wrote to the claimant saying the claimant was not furloughed (then a new concept in UK employment law) and the claimant would receive full pay and he was "*expected to continue to work from home".*

61. The respondent sustained a significant downturn in business following the onset of the Covid pandemic.

62. On **Thursday 7 May 2020** the claimant had been admitted to hospital for a medical procedure, which had not been successful and in consequence was

to undergo a below the knee amputation. The claimant had planned to tell Mr Ryan Brown directly, however, it was agreed that his daughter Ms Donna Daly would do so. Ms Donna Daly contacted Mr Ryan Brown by telephone. Mr Ryan Brown, while knowing broadly that the claimant had been unwell was shocked by the serious nature of what he was being told in that phone call and responded she had nothing to worry about "*there would always be a position for"* her father and he was well-liked. Mr Brown genuinely, but mistakenly, does not recall the use of that phrase, it was his recollection that he had said words the effect off *do not worry, family life comes first and do not rush back*. His comment was made to the claimant's daughter in the context of being advised of what was shocking news by the claimant's daughter.

63. On **Sunday 10 May 2020** Mr Ryan Brown approached a recruitment consultant, seeking a Finance Manager, through that contact the respondent approached David Welch around **Thursday 14 May 2020** to take on the role broadly equivalent to that formerly held by Mr David Bell, and who was subsequently invited for interview and was engaged as Finance Manager from early **June 2020.** The approach to David Welch was unrelated to the information Mr Ryan Brown had received from the claimant's daughter regarding the claimant's condition.

64. On **Wednesday 12 May 2020,** the claimant underwent the below the right knee amputation.

65. On **Wednesday 19 May 2020** the claimant was discharged from the hospital and started working from home including completing a filing deadline for **Saturday 22 May 2020.**

66. The claimant's view that the finances of the respondent in June 2020 were fairly good, although cash flow was an issue, was not shared by Mr Ryan Brown as Director. In particular Mr Ryan Brown as Director had concerns regarding the impact of the Covid 19 pandemic on construction including the respondent's business. Those concerns culminated in the respondent utilising

Government-backed loans and reducing its workforce in 2020 following the subsequent termination of the claimant's employment.

67. At the start of **June 2020,** the respondent recruited **Finance Manager David Welch**, as a replacement for David Bell who had left the role of **Finance Director** in **January 2020** having been appointed in **August 2019**. David Welch was qualified in Management Accounts and an Associate of the CIMA (Chartered Institute of Management Accountants). The claimant's view was that while Mr Welch was recruited at a salary of around more £10,000 than himself, this pay differential only reflected Mr Welch being qualified and the role was otherwise identical. The claimant's perception while genuine was in error, and Tribunal concludes arose through lack of clear communication within the respondent including the absence of job description.

68. The respondent had engaged **Mr David Welch** who had accountancy qualifications, as Finance Manager with a view to him taking on the monthly MI accounts from the external auditor and in substitution for Mr David Bell. Mr David Welch worked from home.

69. By **Monday 8 June 2020** the claimant prepared, within a period of 24 hours as requested by David Welch, the respondent's then Finance Manager a Workload report (the June 2020 claimant Workload Report). The June 2020 claimant Workload Report provided a list of the tasks the claimant considered that he was undertaking, the frequency (whether daily, monthly annually or ad hoc), details of the task undertaken and supplier of information for same). The June 2020 claimant Workload Report listed around 34 separate tasks undertaken from Cash Book, which was listed as a daily task, to Balance sheets accounts which were described as "*reviewed regularly"* and in relation to the frequency of same the claimant described "*try to do notes December & June CWP & Robinsons"*.

70. In the June 2020 claimant Workload Report, the claimant described (for what he listed as P&I Monthly accounts) "*Aim has always been to take over the monthly accounts review from LP. Never having stable staff levels has mean review has always remained with LP".* The claimant had not fully completed

any monthly MI account review. He had been permitted to attempt to do so but had not been successful. The claimant's Workload Report did not describe that he considered there was any respondent expectation that the claimant personally would carry out preparation of the Monthly Profit and Loss accounts or prepare such monthly Management Information. No such expectation existed. While the June 2020 claimant Workload Report had a number of tasks many were part of the daily cash flow and while he described budget as a task (which the claimant identified as *Not done – staff levels*) the claimant was not expected to complete a budget.

71. The June 2020 claimant Workload Report did not describe that the claimant was managing the team.

72. In late June 2020 the claimant advised the respondent's that he would be provided with a prosthetic leg, which would enable the claimant to attend at work.

73. On or about **Wednesday 24 June 2020,** the claimant received a letter from Mr Ryan Brown headed "**Re: Letter offering to extend fixed term employment**" (the June 2020 extension letter). The June 2020 extension letter set out that Mr Ryan Brown was:

> "*writing to you regarding your fixed-term employment.*
>
> *You were made aware at the outset of your employment with us that your fixed term is due to end on 25th June 2020.*
>
> *The current circumstances mean that we have a continuing need for the performance of your role because of the current COVID-19 business pressures placed on us with regard to our financial report and forecasts are current and up to date. As a result, I can confirm that we are in a position to extend your fixed-term employment for a further period of 3 months. We expect that this need will extend until 30th September and consequently this is the new expected date of termination of this fixed-term contract.*

We have, to the best of our current knowledge, set out the approximate end date to your fixed-term contract. However, we reserve the right to terminate this contract earlier than any date set out above. In these circumstances, you will be given notice of termination in line with your contract of employment.

Once this fixed-term contract has concluded, we may consider offering our continued employment if any becomes available, or renew your current fixed terms contract, however, we are unable to make any guarantees at this stage.

Please do not hesitate to contact me if you have any queries regarding this appointment."

74. On **Wednesday 1 July 2020**, the claimant was upset by the suggestion of a 3-month extension and raised a query by telephone with his line manager **Mr Ryan Brown** (Wednesday 1 July 2020) on why it had only been extended for 3 months. In response, Mr Ryan Brown responded explaining the effect that the pandemic had on the business and when the claimant commented that he was disappointed to receive a 3-month extension, Mr Ryan Brown commented that working from home was difficult for him. At that time the claimant had been working from home since around early March 2020.

75. On **Tuesday 27 July 2020** the claimant received an email from Ms Jane McDade as the respondent HR. That email enclosed a letter dated **Tuesday 27 July 2020** from Mr Ryan Brown headed **Re: Letter confirming end of a fixed term contract Termination of your employment** (the July 2020 termination letter).

76. The July 2020 termination letter set out

"I write further to my letter to you dated 24 June 2020, extending your fixed terms contract. As stated in the letter, the company reserves the right to terminate the fixed term earlier than the extension date stated.

Unfortunately, I am writing to inform you that due to ongoing financial pressures the company has had to look at restricting your department and the company as a whole. This means bringing your fixed term contract to an end sooner than anticipated on your extension letter.

We are unable to find a way to continue to your current work or find another suitable role with the company, at the time."

77. The July 2020 termination set out that the claimant was provided with 2 weeks' notice as set out in the company policy, he was not required to work all of his notice and his last date of employment would be **Friday 31 July 2020.**

78. The respondent did not engage another person to perform the claimant's role. The workload of tasks formerly allocated to the claimant, had reduced through the downturn in the business and were able to be reallocated to his colleague Lorraine Cairnie, in addition to her existing duties as Accounts Assistant.

79. The reallocation of work and dismissal reflected a reduction in the respondent's business and the need for the claimant to carry out that work. The respondent did not subsequently engage a person to carry out the work of the claimant.

80. The reallocation of work and dismissal of the claimant did not arise in consequence of a requirement to work in the claimant's Lockerbie office. The reallocation of work and dismissal of the claimant was not related to the claimant's disability.

81. On **Saturday 30 July 2020** the claimant issued a written appeal to the respondent Chairman, Jim Brown (the claimant's July 2020 appeal) which .

a. set out that it appeared, to the claimant, that he had been made redundant and raised questions around the selection pool; and

b. asked who would be taking over the claimant's role; and

c. *what the new employee that you appointed does within the team, and how many members the team has, as if no one else has been selected for redundancy, it will not have contracted or created financial savings"*

d. that he considered that his contract had not, as described in the July 2020 termination letter, been terminated due to '*financial pressures'* but as a direct result of having his lower leg amputated on 12 May 2020.

e. Described that he had phoned Mr Ryan Brown who told him "*that it just isn't working you not being able to come into the office. This issue was never raised during lockdown."*

f. Set out that there had been no discussions about how to adapt to his "*disability which palpably doesn't affect my role within the company*". The claimant observed that he would be fitted with a "*prosthesis shortly".*

g. "*Whilst I understand that I am on a fixed term contract I have above two years' service and am therefore entitled to both a fair reason and fair process of dismissal. Additionally I should not be discriminated against due to a disability, which I unfortunately believe has occurred"*

82. The claimant summarised his position in the claimant's July 2020 appeal:

a. I believe you have made me redundancy without following any due process or selection

b. There has been no reference to any redundancy pay

c. I believe the company has failed to implement treasonable adjustment following my amputation"

83. In **August 2020** the respondent had recruited **Murray Falconer** in a role titled **Finance Director** on an advisory capacity working across 5.5 days per month, Mr Falconer subsequently departed unexpectedly.

84. On **Friday 6 August 2020** the respondent issued a letter headed "**Invitation to meeting – allegations of discrimination"** (the July 2020 discrimination investigation meeting letter) describing that before the respondent could proceed with the appeal "*we first need to investigate further your complaint relating to discrimination regarding your recent disability. I refer to you having your lower leg amputated on 12th May 2020*." The claimant was invited to attend a meeting **Monday 10 August 2020** (the meeting to consider disability discrimination allegations) *"if this venue is not suitable, please inform us of your preferred time or location, and we will proceed on this basis."*

85. On **Saturday 8 August 2020** the claimant intimated that he wished to *"defer Monday's meeting for a week or so"* explaining that he had planned to bring his daughter as his representative, and she had recently had a baby.

86. *On* **Monday 10 August 2020.** Ms Jane McDade as HR manager for the respondent, proposed that the claimant attend the meeting to consider disability discrimination allegations with "*your family friend"* at some point that week, intimating that the respondent would thereafter arrange the Appeal Hearing in 2 weeks with the claimant's daughter.

87. On **Thursday 13 August 2020** the duly claimant attended the postponed meeting to consider disability discrimination allegations, accompanied by family friend Ms Christian Shepherd. The claimant was invited to set out his position.

88. The Tribunal notes that Note of Meeting on **Thursday 13 August 2020** (the **partial August 2020 Minute Note**) provided in the Joint Bundle did not include the claimant's response on his reasons for considering that (what was set out) as his recent disability was the reason for the termination of his employment. It recorded that the respondent would pay the redundancy payment.

89. On **Monday 17 August 2020** the respondent issued its response to the meeting describing the critical question raised was whether the termination was because of the claimant's disability or for some other reason, that is to

cut costs. The respondent set out that they made the decision to extend the fixed term contract. They accepted that a redundancy payment was due. They set out that there have been no issues with the claimant's performance but that due to the current climate around the covid-19 pandemic they had to make cuts across the company as a whole. It was indicated that if the claimant wished to proceed with an appeal hearing he should notify the Chairman of the company.

90. Around **Thursday 27 August 2020** a Financial Controller post was advertised for a manufacturing company in the Scottish Borders. It was not with the respondent. The claimant did not intimate that he had sought to apply for same.

91. On **Thursday 3 September 2020** the claimant attended the appeal meeting (the September 2020 appeal) remotely chaired by Mr Jim Brown as Chairman of the respondent. The claimant was accompanied by family friend Ms Shepherd. The minutes confirmed that the respondent accepted that the claimant would be entitled to a redundancy payment, in relation to the size of the department it was described that there were now 3 full time and 1 part-time staff "*you and one other admin staff has since been terminated"* and while a member of staff was going on maternity leave there were no plans to replace her in the interim. The minutes recorded that Mr Jim Brown inaccurately described that Mr Falconer had been brought in to bring the monthly accounts in inhouse. That inaccuracy arose from miscommunication between Mr Ryan Brown and his father Mr Jim Brown. Mr Falconer had been brought in, on an advisory capacity. It was confirmed in relation to the decision to terminate the claimant's employment that was taken by Mr Ryan Brown. The claimant asked how many in the company had been made redundant and was advised that it was less than 20.

92. On **Friday 11 September 2020** the respondent issued letter to the claimant **(the Sept 2020 Appeal Outcome letter**) setting out that Mr Jim Brown had accepted certain elements of the appeal. It, however, set out that the decision to dismiss was a redundancy situation and that

- *We uphold that the original decision to dismiss was in fact a redundancy situation.*

- *Accordingly, we uphold that that company failed to uphold a fair redundancy procedure. However, we can confirm that had a fair consultation process been followed the outcome would have been the same due to the fact that there are currently no alternatives roles.*

- *During your appeal you raised the role of Murray Falconer, Finance Director however we confirm that this role requires that candidate to be a chartered qualified accountant unfortunately you do not have the qualification*

- *As described above this was a genuine redundancy situation due to the impact the pandemic had on the company and its financial stance"*

The respondent further described that the company would make a redundancy payment which it would pay into the claimant's account on Wednesday 30 September 2020. Further, it would pay a further 2 weeks net salary, as loss of earnings compensation, for the period (the respondent) considered that it would have taken to follow a fair redundancy procedure.

93. On **Saturday 19 September 2020** the respondent issued a recruitment advert for a **Project & Sales Administrator** reporting to their Finance Manager. It described that the role was a new position, and the successful candidate would join the respondent's Accounts Team in Lockerbie and key duties included administrative duties and data entry of financial information, checking and resolving variances, discrepancies. Required experience included previous working experience of a sales ledger administration role or credit control role and previous experience of accounting for costs in a project costing environment was described as advantageous. That was a new administrative role although reporting to the Finance Manager and one which the respondent had not anticipated in July 2020. The Tribunal is satisfied that this role was not available as at the date of termination nor during the appeal.

94. In addition, also on **Monday 19 September 2020** the respondent posted a recruitment notice which, inaccurately described that the company was in a 5 -year expansion plan. It was not. The respondent had faced a significant downturn in business and reduced its overall workforce from 159 to 146 and thereafter down to 94, a loss of in excess of 60 employees.

95. On **Tuesday 29 September 2020** the respondent issued payment of the claimant's statutory redundancy pay of £1,846.14 (non-taxable pay) together with loss of earnings compensatory pay in the sum of £1,230.76.

96. On **Tuesday 3 November 2020** the respondent placed a recruitment advert to replace **Murray Falconer** after he subsequently departed unexpectedly.

97. In **November 2020** the respondent placed a recruitment advert for an Assistant Account, described as a permanent (that is non-fixed term) role. While the advert extract provided is difficult to read it described that the duties included assisting the respondent's Finance Manager in the preparation of the company management accounts. It was not in dispute that the advert required applications to be submitted by **Friday 27 November 2020.** The respondent placed this advert following the intimation of planned departure by Ms Lorraine Carnie (who had been employed since **Saturday 8 July 2017**) and who had taken over the majority of the claimant's tasks following the termination of his employment and whose departure followed that that of **Mr David Welch** who also unexpectedly departed around **November 2020.**

98. Following Mr David Welch's departure in November 2020, the respondent arranged for a recruitment advert for the role of Finance Manager a role which was described as reporting to the Financial Director being Mr Ryan Brown. It identified that qualifications and experience required were a "*Recognised professional accounting qualification".* The respondent provided a copy of the terms fuller version of the advertisement placed with a recruitment manager.

99. The respondent has not recruited a new Financial Controller**.**

100. In December 2020 a recruitment agency published an advert for a Financial Controller post in Lockerbie. That was not working with the respondent. The claimant did not suggest that he had applied for same.

101. Subsequent to the termination of the claimant's employment, the claimant made efforts to seek alternative employment by registering with an employment agency and has updated his CV. The claimant has not received any response from roles he has applied for online. The claimant describes that he continues to recover from amputation. The claimant has not secured alternate employment. While the Tribunal was taken to advertisements which had been placed by the respondent and by other companies (in August and December 2020) no evidence was placed before the Tribunal of efforts made by the claimant to secure alternate employment.

102. It is agreed that the claimant is disabled within the meaning of s6 of the Equality Act 2010.

Submissions

103. Both parties were provided with direction for the exchange and subsequent issue of written submission. However. written submissions were only provided for the claimant within the time period directed. No consideration was given to the respondent submissions received late, with an apology but without explanation, on the day of the Members Meeting, while the Tribunal was aware of the terms of the respondent email offering apology, the Tribunal did not read or consider the respondent submissions.

Submissions for Mr Daly

104. The Tribunal does not consider it necessary to set out the full details of the 11 -page written submissions for Mr Daly, other than summarising that it was argued that the claimant's claims in terms of s13, s 15 and ss20 & 21 of the EA 2010 (in relation to the PCP relied upon) and dismissal should succeed. Reference to relevant elements of the claimant submissions are included in the discussions below.

105. It was observed that the evidence identified how hard the claimant worked for the claimant and the Tribunal was invited to accept the claimant's evidence including that he was effectively running the accounts department, further criticism was made of Mr Ryan's Brown's evidence to the effect his supplement note what was intended to record his recall of a telephone call with the Bank described that the *"the Finance Team needs to be suitably qualified"* while in his evidence he described that on one member of the team required to be qualified. The evidence of Ms McDade was criticised in that she accepted she had seen a witness statement of Mr Ryan Brown. It was also observed (in the second paragraph of heading 9. Termination of Employment) that the evidence from Ms Jane McDade was to the effect that Ms Lorraine Cairnie was attending at work while Mr Welch was working from home.

106. In relation to the termination for the claimant it was argued that there was no other explanation for the termination other than discrimination.

107. In addition, for the claimant reference was made to the Fixed Term Employees (Prevention of Less Favourable Treatment Regulations 2002 (the 2002 Regulations) intimating that the claimant had been treated less favourably than either Mr David Welch, Lorraine Cairnie and/or both. It was not suggested that either were engaged in the same or in broadly similar work to that of the claimant entitling the Tribunal to determine whether the less favourable treatment was on the ground that the claimant was a fixed-term employee. It was not suggested that notice of a claim for detriment in terms of the 2002 Regulations notice had been made.

108. It was argued that an award of compensation should be made as set out in the Joint Bundle.

109. Further it was argued that an award of expenses (referred to as costs) should be made against the respondent, reference was made to Rule 76 (although no specific reference was made to Rule 75 (Cost- in Scotland expenses) or Rule 80 (Wasted Costs)) it being argued that the respondent has been unreasonable for 7 listed reasons concluding that *"the Respondent, of its*

agent, or both of them have acted unreasonably, caused additional expenses and that should be marked by an award of costs against the Respondent"

110. No specific reference to case authority was made although a copy of **Chief Constable of West Yorkshire v Vento** [2002] EWCA Civ 1871**(Vento No 2**) was provided, which decision identified the 3 bands of levels of compensation for injury to feelings.

Conclusions on witness evidence

111. The Tribunal heard evidence from the claimant Mr Daly, his wife Linda Daly, his daughter Donna Daly and the family friend Ms. Shepherd each of whom provided a witness statement supplemented with oral evidence. Witness evidence on behalf of the respondent was also provided via witness statements, each of which was taken as read for Mr Ryan Brown and Ms Jane McDade. Each of the following witnesses confirmed their witness statement at the Final Hearing and were thereafter subject to cross-examination and re-examination. The Tribunal concludes that each of the claimant witnesses were straightforward and honest in their recollection of matters within their knowledge, subject to the qualification that the Tribunal concludes that the claimant was mistaken that he ran the Accounts/Finance Department. He did not. The Tribunal found the evidence of Ms. Jade McDade straightforward and while she confirmed that she had seen witness statement for Mr Ryan Brown the Tribunal concludes that her evidence was that of her own, Mr McDade as respondent HR manager did not, in the view of the Tribunal offer a view of the day-to-day operation of the respondent Account Department and accepted that she did not have direct knowledge of same.

112. Mr Ryan Brown broadly gave honest evidence, specific areas the Tribunal concludes that Mr Brown was mistaken that is in relation to the telephone conversation with the claimant's daughter Ms. Donna Daly on **Thursday 7 May 2020,** however, preferred the evidence of Ms. Donna Daly, the Tribunal considers that against the shocking nature of the news he received it is understandable that his recollection of what he said in response is inaccurate.

113. In relation to the document, which was said to be a statement of Mr Falconer, he was not called for the respondent as a witness to confirm the terms of that document and was therefore not subject to cross-examination. The Tribunal concluded that it was not in a position to give weight to such a statement where the author did not attend to confirm its contents and was not subject to cross-examination.

Written Notice of Case

114. Parties are entitled to fair notice of the position adopted by the other party. The Tribunal has regard to the ET1, ET3 and so far, as relevant in identifying the issues in respect of which notice was given, the January 2021 CM Note.

Time

115. Issues in the present claim include the question of whether claims were presented in time, in particular, the ET3 argued (Paper Apart 4) that if the claims relate to matters three months or more *from 30 October* they were out of time.

116. Were the claimant's complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 (EA 2010) / Sections 23(2) to (4), 48(3)(a) & (b) and 111(2)(a) & (b) of the Employment Rights Act 1996 (ERA 1996)?

117. Dealing with this issue may involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

118. Given the date the claim form was presented and the dates of early conciliation any complaint about something that happened before **Wednesday 8 July 2020** is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

119. That is to say some claims may be argued to have been lodged out with 3 months less one day time limit (allowing for the operation of ACAS early conciliation). The provisions of section **207B of ERA 1996**, since 2014, provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect initiating early conciliation "*stops the clock"* until the ACAS certificate is issued, and if a claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present his claim.

Discussion and decision: Time

120. While, as above the ET3 argued (Paper Apart 4) that those claims were out of time, the Tribunal is satisfied that all relevant pled claims were in time. In particular, the Tribunal was satisfied that it was just and equitable to extend the time to encompass relevant events in relation to alleged acts of discrimination that predated Wednesday 8 July 2020. In so far as relevant to other potential heads of claim other matters including the respondent statement on Thursday 7 May 2020 were considered to (potentially) amount to conduct extending over a period.

Statement made on Thursday 7 May 2020: Discussion and Decision

121. The claimant's submission Point 7 is headed "*The promise of Continued Employment*". The following paragraph asks the Tribunal to make (as it has done) a finding that Ms. Donna Daly's recollection is correct. The Tribunal has considered, given the terms of the claimant submission heading whether it should regard that as amounting to a "*promise of"* continued employment. That would, given the findings amount to a variation of the contract, altering the Fixed Term contract.

122. It is the Tribunal's conclusion, that the comments by Mr Brown on Thursday 7 May 2020 to the claimant's daughter were intended to be simply one of support rather than apt to create any contractually binding arrangement.

123. On an objective basis, the comments of Mr Ryan Brown were made in the context of being told shocking news and was not intended to, and did not

have, the effect of altering the existing fixed-term contractual arrangements for the claimant's specific post.

Unfair Dismissal/Redundancy

Issues for Tribunal are the Final Hearing include:

124. What was the principal reason for the selection and dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) (c) of the Employment Rights Act 1996 (ERA 1996)?

125. The Tribunal has reminded itself of the terms of s98 ERA 1996 which sets out:

s98 General

(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.

(2) A reason falls within this subsection if it—

(c) is that the employee was redundant

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

(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."

126. The Tribunal reminded itself of the terms of s139 of the Employment Rights Act 1996 (ERA 1996) which sets out.

Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

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

(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.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

.. .

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason"

127. The Tribunal has reminded itself that the correct approach in relation to redundancy (s139(1)(b)(i) of ERA 1996) remains, as set out in similar worded Northern Irish legislation considered by the House of Lords in **Murray v Foyle Meats** [2000] 1 AC 51 (**Murray)**, namely the legislation should be interpreted simply, the focus is on the employer's requirement for employees, and whether that has diminished, it being then a factual question whether that situation was what caused the dismissal.

128. In **Murray** the House of Lords emphasised the importance of following the statutory wording, Lord Irvine said that two questions had to be addressed:

"*The first is whether one or other of the various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation."*

129. Issues for the Tribunal where redundancy is relied upon, may include whether a dismissal wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of the particular kind the claimant was employed in, in the place where the employee was employed by the employer had ceased or diminished.

Redundancy/Unfair Dismissal: Discussion and Decision

130. The respondent contends that the claimant was dismissed for the reason of redundancy. The claimant had set out that his dismissal amounted to less favourable treatment as a result of disability**.** In the alternative, the claimant is understood to argue that in all the circumstances of the case the redundancy consultation and procedure were unfair.

131. The position of the claimant was unique within the business. The Tribunal concludes that there the dismissal of the claimant was wholly or mainly

attributable to the fact that the requirements of that business for employees to carry out work of the particular kind the claimant was employed in, had diminished. In consequence of the impact of the pandemic on the respondent business and consequential diminution of the work the claimant was employed in, the Tribunal accepts that the respondent identified that it was able to reallocate the claimant's tasks to a more junior colleague additional to her existing tasks.

132. The Tribunal concludes that the respondent, ultimately acted reasonably in treating this diminution as sufficient reason for dismissing the claimant by reason of redundancy in all the circumstances. In the circumstances, there was a pool of one. The position of the claimant was unique within the business.

133. The Tribunal does not accept, on the facts that the respondent consulted adequately with the claimant, there was no consultation.

134. The respondent did not acknowledge that the termination of the claimant amounted to a redundancy until the September 2020 Appeal as recognised in the September 2020 Appeal Outcome letter. That was clear from the language deployed in the notice of termination letter. As set out in the September 2020 Appeal Outcome letter, the respondent conceded that it was required to make an additional payment to the claimant equivalent to 2 weeks pay reflecting the period during which a reasonable redundancy process would have taken place. The Tribunal accepts that 2-week estimation for the respondent to have a followed a fair redundancy procedure from the outset as being a reasonable estimation in all the circumstances.

135. Taking the process as a whole including the appeal, the Tribunal accepts that the respondent had ultimately fairly and reasonably applied selection criteria to determine that the claimant would be made redundant.

136. At the date of termination and to the date of issue of the outcome of the appeal there were no suitable alternative roles. The Tribunal has considered the proximity of the Project & Sales Administrator Role, advertised on Saturday

19 September 2020, to the outcome of the claimant's appeal notified by letter dated 11 September 2020 the Tribunal concludes, on the evidence before it, that role was not available before the outcome of the appeal.

137. In all the circumstances in relation to the question of whether the dismissal of the claimant fell within the range of reasonable responses, the Tribunal is conscious to avoid substituting it's view for that of the employer and accepts that decision of the respondent fell within the range of reasonable responses.

138. In relation to the question of a fair procedure, in the initial stages there was no procedure at all. That cannot be regarded as fair. However, the respondent allowed an appeal and made a payment of the correct statutory redundancy payment and further paid 2 weeks pay to reflect the period during which a fair redundancy process would have taken place.

139. In the circumstances the claimant did not suffer a financial loss. It is not just an equitable to make any award.

140. The question of whether, the Tribunal is satisfied that the claimant acted reasonably to mitigate his loss, in the circumstances does not arise, nor does any question of whether there ought to be any reduction in the compensation payable on the basis that the claimant would have been dismissed in any event.

141. In conclusion the Tribunal accepts that the claimant was dismissed, further that the requirements of the employer's business for the claimant to carry out work of the particular kind he was engaged to do had diminished and the dismissal of the claimant was caused wholly or mainly by that diminution.

142. The principal reason for the selection and dismissal was a potentially fair one, namely redundancy, in accordance with Sections 98(1) and (2) (c) of the Employment Rights Act 1996 (ERA 1996).

143. The Tribunal concludes that in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably in

treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA 1996).

144. The Tribunal has reminded itself that applying s98(4) ERA 1996 the Tribunal, must not substitute its own view for the matter for that of the employer but should apply an objective test of whether the dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

145. When considering whether the circumstances of the claimant's dismissal fell within the range of reasonable responses open to a reasonable employer the Tribunal should consider whether the respondent's choice of any selection criteria fell within a range of reasonable responses available to a reasonable employer in all the circumstances. The Tribunal has considered the respondent's initial failure to recognise that there was a redundancy situation. Notwithstanding that failure the Tribunal, on the available evidence concludes that it is unable to interfere with the effective choice of pool (of one), the respondents concludes that the respondent had genuinely applied its mind to the pool by the conclusion of the appeal. The Tribunal considers that in all the circumstances that choice of the pool was within the range of reasonable responses available to a reasonable employer in the circumstances.

146. The Tribunal concludes that the dismissal of the claimant was wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of the particular kind the claimant was employed in had diminished. The claimant was dismissed due to redundancy.

Burden of Proof Discrimination Claims

147. s**136 (1) to (3)** of **EA 2010 (the burden of proof provisions)** set out:.

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*

(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) But subsection (2) does not apply if A shows that A did not contravene the provision. "

148. In **Madarassy v Nomura International plc** [2007] IRLR (**Madarassy**) Mummery LJ held at [57] that '*could conclude'* [The EA 2010 uses the words '*could decide'*, but the meaning is the same] meant: *'[…] that "a reasonable Tribunal could properly conclude" from all the evidence before it.'*

149. However, a simple difference of treatment is not enough to shift the burden of proof, something more is required: **Madarassy** per Mummery LJ at para 56: *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'*

EHRC Code of Practice

The Statutory provisions

150. s15 (4) of Equality Act 2006 provides that, the EHRC 2011 Statutory Code of Practice of, shall be taken into account, wherever it appears relevant to the Tribunal to do so. The Tribunal has taken into the account the EHRC 2011 of practice where it appears relevant to do so.

151. The Tribunal notes that the content of the former s.18B DDA1995 is now largely replicated by paragraph 6.23 onwards of EHRC Code of Practice:

- Extent to which taking the step would prevent the effect in relation to which the duty is imposed
- Extent to which it is practicable for the employer to take the step

- The financial and other costs which would be incurred by the employer in taking the step and the extent to which it would disrupt any of his activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance with respect to taking the step
- The nature of the employer's activities and the size of his undertaking.

Disability Discrimination Claims; Discussion and Decision

152. The Tribunal has considered each of the separate heads of claim in relation to alleged disability discrimination.

153. The Tribunal has considered the claimant's claim in terms of s13 of EA 2010: direct discrimination because of a protected characteristic of disability.

a. The treatment relied upon was the termination of employment.

b. The Tribunal has considered whether the respondent treated the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

c. The claimant in the January 2021 CM Note is said to rely upon Mr David Welch the respondent's former Finance Manager as an actual comparator. The Tribunal concludes that Mr Welch as a qualified accountant was materially different from the claimant under s 23 EA 2010 (there must be no material difference between the circumstances relating to each case s23 EA 2010)

d. The Tribunal concludes that the treatment complained of, was not due to the claimant's disability and/or because of the protected characteristic of disability more generally. in particular the treatment complained of, namely the termination of employment was due to

redundancy as set out about above, the requirements of that business for employees to carry out work of the particular kind the claimant was employed in had diminished. The claimant's claim in terms of s13 EA 2010 does not succeed.

154. The Tribunal has considered the claim in relation to s15 of the EA 2010: discrimination arising from asserted disability

a. In relation to the question of whether the respondent treated the claimant unfavourably (no comparator is needed), the January 2021 CM Note at point 5 sets this out as being the respondent's dismissal of the claimant and their employment of someone else to perform his role. The treatment of the claimant was due to redundancy. The respondent did not employ someone else to perform the claimant's role, his tasks were reallocated within the then-existing team.

b. In so far as it is argued that a requirement to work from the office rather than at home arose in consequence of the claimant's disability, the Tribunal has considered the comments of Mr Ryan Brown, the respondent had made arrangements for the claimant to operate from home including through the provision of files and further notes David Welch worked from home.

c. It is the conclusion of Tribunal that the respondent did not dismiss the claimant because of a requirement for the claimant to work in the respondent's office rather than at home. There was no such requirement.

d. The termination of employment was due to redundancy as set out above, the requirements of that business for employees to carry out work of the particular kind the claimant was employed in had diminished, the claimant's claim in terms of s 15 EA 2010 does not succeed.

155. The Tribunal has considered the claimant's claim in terms ss 20 and 21 EA 2010 Reasonable Adjustments for Disability

a. So far as relevant the Tribunal concludes that the respondent knew the claimant was a person with a disability at the relevant time.

b. The Tribunal notes that Mr David Welch worked from home. The Tribunal concludes that there was no "*provision, criterion or practice"* generally applied by the respondent to its employees whereby its employees were required to work in the office.

c. In the circumstances there was no PCP, as asserted, which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.

d. The Tribunal concludes that the claimant's claim in terms of ss 20 and 21 EA 2010 does not succeed.

156. As raised in the claimant's submissions the Tribunal has considered the relevance of the Fixed Term Employees (Prevention of Less Favourable Treatment Regulations 2002 Reg 3 Less Favourable Treatment of Fixed Term Employees.

157. The claimant argues, in submissions, that the claimant had been treated less favourably than either Lorraine Cairnie, David Welch or indeed both.

158. No notice was given of this claim in the ET1, and none was identified in the List of issues. There was no application to amend.

159. The Tribunal notes that Ms Cairnie, a comparator relied upon in submission, had not been identified as a witness. The Tribunal notes that issues which would fall to have been considered, and in relation to which evidence would be required, would include whether the claimant and the respondent were engaged on the same or broadly similar work, thereafter whether the less favourable treatment was on ground that the claimant was a fixed term employee and thereafter whether the treatment was no justified on objective grounds. In all the circumstances, the Tribunal does not consider that it is just and equitable to extend time to permit such a claim after the conclusion of the evidential element of the Final Hearing.

Expenses application for the claimant.

160. The Tribunal notes the claimant's submission section 13. Costs.

161. The Tribunal has reminded itself of the terms of Rule 76 of the 2013 Rules.

162. **Rule 76(1**) of the 2013 Rules provides

76.(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

163. **Rule 77(1**) of the 2013 Rules provides;

"Procedure

77. *A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."*

164. Rule 78 of the 2013 Rules provides

78 (1) A costs order may

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of

detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles ...

(3) for the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

165 Further Rule 80 of the 2013 Rules provides.

Rule 80. (1) A Tribunal may make a wasted costs order against a representative of any party where that party has incurred costs – (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative…

166 **Rule 84** of the 2013 Rules provides

"Ability to pay

84. *In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."*

167 The claimant has made an application for expenses in terms of (Rule 76(1)(a)) on the basis, it is understood that it is argued that there was unreasonable conduct, it being suggested that the respondent's representative has acted unreasonably in the way that she had conducted the proceedings, including in relation to delays in the provision of witness statements (Rule 76(1)(a)) and there was no respondent written submission (submitted timeously).

168 The Tribunal recognises that expenses cases are very much fact dependent, and that it is a fact-sensitive exercise.

169 The Tribunal has reminded itself of the guidance set out in **Abaya v Leeds Teaching Hospital NHS Trust** [2017] UKEAT 0258/16 (**Abaya).**

170 In **Abaya**, Mr Justice Singh, at paragraphs 14 to 16, identifies that there are, in essence, three stages in the exercise involved when an Employment Tribunal considers a costs (in Scotland, expenses) application:

> *"14 ….The first stage is to ask whether the precondition for making a Costs Order has been established. For example, in the present case, whether the claim or part of the claim had no reasonable prospect of success. However, that precondition is merely a necessary condition; it is not a sufficient condition for an award of costs.*
>
> *This is because the second stage of the exercise that has to be performed is that the Tribunal must consider whether to exercise its discretion to make an award of costs.*
>
> *15. The position was summarised by HHJ Eady QC in the **Ayoola** case at paragraphs 17 and 18. As she said at paragraph 17, at the second stage of the exercise:*
>
> *"17. …The Tribunal must then specifically address the question as to whether it is appropriate to exercise its discretion to award costs. Simply because the Tribunal's costs jurisdiction is engaged, costs will not automatically follow the event. The Employment Tribunal would still have to be satisfied that it would be appropriate to make such an order …"*
>
> *16. The third stage of the exercise only arises if the Tribunal decides that it is appropriate to make an award of costs. The third stage is to assess the quantum of that award of costs…."*

171 In **Abaya**, Mr Justice Singh emphasises, at paragraph 20, that all cases are fact-sensitive, that the assessment of whether to award expenses will depend on the particular circumstances of each case, and that "*the discretion under the 2004 Tribunal Rules is very broad [and I would say the same of the 2013 Rules]".*

172 In the exercise of the discretion broadly, the Tribunal note that it is generally recognised by Tribunals that for conduct to be regarded as "*vexatious"*, there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive **ET Marler v Robertson** [1974] ICR 72 **(Marler)**.

173 The Court of Appeal, in **Scott v Russell** [2013] EWCA Civ 1432 **(Scott)**, cited with approval, the definition of vexatious given by Lord Bingham in the Divisional Court in **Attorney General v Barker** [2000] 2 WLUK 602 **(Barker),** that the hallmark of a vexatious proceeding is that it has little or no basis in law (or at least no discernible basis), and that whatever the intention of the proceedings may be, its effect is to subject the other side to inconvenience, harassment and expense out of all proportion to any gain likely to accrue, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.

174 In respect of **wasted costs (expenses against the respondent representative),** the Tribunal has reminded itself that a rigorous examination of the conduct in question would be required as set out by the EAT in **Wentworth-Wood v Maritime Transport Ltd** [2018] EAT/0184/17 (**Maritime**) in which the EAT set aside a wasted cost order where a firm of solicitors had conceded that aspects of preparation had not been ideal but the Tribunal had failed to identify how the firm had breached its duty and set aside the order. The tribunal had not identified the conduct which was said to amount to behaviour that no reasonably informed and competent representative would indulge in. Rule 80(1) requires identification of the improper, unreasonable or negligent acts or omissions. Mere allegations do not suffice, the Tribunal had not considered the relevant 3-stage test;

a. to recognise that wasted costs is an exceptional jurisdiction to be exercised with great care adopting a staged approach, and requiring consideration of what specific conduct is said to be improper, unreasonable or negligent;

b. to consider whether the particular conduct caused the opposing party unnecessary costs;

c. to consider whether in all the circumstances it is just to order the legal representative to compensate the receiving party for the whole or any part of those cost

Expenses application Discussion and Decision

175. The Tribunal has fully considered the terms of Para 13 of the claimant's written submissions.

176. It is noted that the claimant (at para 13 of the claimant's written submissions) argues the ET3 was received though late. Although the suggestion was not commented upon in the January 2021 CM Note the Tribunal notes that the respondent had been advised to respond to the ET1 by Wednesday 18 November 2020, it did so.

177. The Tribunal further notes here were unexplained delays in the production of witness statements in respect of which an apology was offered together with assurances that their witness had not read the claimant's provided witness statement and those delays had prompted an application for an Unless Order (which was granted); and

178. Further the Tribunal notes that respondent did not provide all the documentation which it indicated it would voluntarily provide as set out in the January 2021 CM Note, in respect of which no specific Order was subsequently issued: and

179. The respondent representative had not provided submissions as directed.

180. It is considered that taking matters as a whole, the Tribunal is not prepared to exercise its discretion to grant an award. In particular, the Tribunal while noting delays recognises that by the outset of the Final Hearing both parties had prepared their respective positions, while additional documents were provided in the course of the hearing causing a degree of inconvenience, the actions of the respondents and their representative do not, in the view of the

Tribunal amount to vexatious proceeding in that the respondents' position had little or no basis in law (or at least no discernible basis), and that whatever the intention of the proceedings may be, did not subject the other side to inconvenience, harassment and expense out of all proportion to any gain likely to accrue. While there were delays these did not amount to an abuse of the process of the Tribunal.

181. Taking matters as a whole and while the application for Unless order in respect of respondent witness statement may be regarded as resulting in unnecessary cost, the Tribunal does not, consider that it is just to order the respondent's representative (or indeed the respondent) to compensate receiving party for the whole of any part of the costs incurred.

Conclusion

182. None of the claimant's claims succeed.

183. The claimant's claim for unfair dismissal, does not succeed for the reasons set out above.

184. The claimants claim in terms of s13 EA 2010 (Direct Disability Discrimination), s15 EA 2010 (Discrimination Arising from Disability) and ss20, 21 EA 2010 (Duty to Make Reasonable Adjustments) do not succeed; and

185. The Tribunal in reaching these conclusions has been minded to avoiding a fragmented approach, being conscious of the diminishing the cumulative effect of primary facts and the inferences which may be drawn and considered the totality of the evidence.

186. In coming to this view the Tribunal have applied the relevant case law.

Employment Judge: **R McPherson**
Date of Judgment: **18 February 2022**
Entered in register: **22 February 2022**
and copied to parties