



EMPLOYMENT TRIBUNALS

Claimant: Mr J Beeley
Respondent: Outokumpu Stainless Ltd
Heard by Hybrid hearing (Sheffield) **On:** 7, 8, 9, 10 and 11 June 2021
16 June 2021 (in chambers)

Before: Employment Judge Brain
Members: Mr Q Shah
Mr L Priestley

Representation

Claimant: Dr M Ahmad, Counsel
Respondent: Ms A Palmer, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. Upon the claimant's complaint of unfair dismissal:
 - 1.1. The claimant was dismissed by the respondent by reason of redundancy.
 - 1.2. The respondent did not unfairly dismiss the claimant and accordingly his unfair dismissal complaint stands dismissed.
2. Upon the claimant's complaints brought under the Equality Act 2010:
 - 2.1. The claimant's complaint that he was unfavourably treated for something arising in consequence of disability under section 15 of the 2010 Act fails and stands dismissed.
 - 2.2. The claimant's complaint that the respondent failed to comply with the duty to make reasonable adjustments brought under sections 20 and 21 of the 2010 Act fails and stands dismissed.

REASONS

Introduction

1. The Tribunal received evidence in this case over four days between 7 and 10 June 2021 inclusive. The Tribunal then received helpful written and oral submissions from counsel on 11 June 2021. We reserved our judgment. We now give reasons for the Judgment that we have reached.
2. This matter has benefited from two case management preliminary hearings. The first came before Employment Judge Deeley on 30 June 2020. The minutes of that hearing are in the bundle at pages 61 to 63. The second preliminary hearing came before Employment Judge Little on 2 September 2020 (at pages 70AA to 70DD).
3. Appended to Employment Judge Deeley's minute was a draft list of issues. This was subsequently revised. The updated and final list of issues is at pages 68 to 70. We shall consider the list of issues in more detail subsequently.
4. At this stage it suffices to say that the claimant pursues complaints of unfair dismissal (under the Employment Rights Act 1996) and disability discrimination (under the Equality Act 2010). It is not in dispute that the claimant was a disabled person for the purposes of section 6 of the 2010 Act at all material times because of the mental impairment of anxiety and depression.
5. We shall firstly make our findings of fact. We shall then go on to look at the issues in the case and the relevant law. Finally, we shall set out the conclusions that we have reached by application of the relevant law to the factual findings that we have made in order to arrive at a determination upon the issues in the case.
6. The Tribunal heard evidence from the claimant. We also heard live evidence called on his behalf from:
 - David Brooks. He is a current employee of the respondent. He works for the respondent as a technical manager of the Sheffield melting shop. (This is known within the respondent as 'SMACC' which stands for '*stainless melting and continuous casting*').
 - Jonathan Holmwood. He worked in SMACC from 2013 in the capacity of an engineer and then chief engineer. He was appointed interim general manager of SMACC with effect from 1 January 2018.
7. Mr Brooks and Mr Holmwood both attended to give evidence before the Employment Tribunal pursuant to witness orders. They had not provided witness statements in advance and their evidence in chief was elicited from them by Mr Ahmad at the hearing.
8. On behalf of the claimant, written witness statements were received from:
 - Ian Wallace. He held the position of SMACC raw materials manager and worked alongside the claimant during the time that the claimant

held the position of general manager of SMACC between 2009 and the end of 2017.

- David Hall. He is a current employee of the respondent.
 - Michael Marcanio. He is employed as the quality manager of Outokumpu Stainless Bar in the United States of America.
 - Pekka Eerkkila. He is now retired. He worked alongside the claimant between 2002 and 2016 during the time that Mr Eerkkila held several positions as a member of the respondent's executive committee.
 - David Scaife. He is employed by the respondent as a 'vice president – business area controller, BA long products.'
9. In addition to these witness statements, the Tribunal was presented with a letter signed by six members of the SMACC trade union committee.
10. All of the written witness statements referred to in paragraphs 8 and 9 were agreed. Accordingly, none of those individuals were cross-examined by Ms Palmer.
11. On behalf of the respondent, the Tribunal heard evidence from the following:
- Martin Pinder. He is now retired. He held the position of vice president of human resources for the United Kingdom between 2001 and 2018.
 - Alistair McCubbin. He is employed by the respondent as the head of health and safety.
 - Johann Steiner. He is employed by Outokumpu Holding Germany GmbH as executive vice president – HR and organisation and development. He has held this role since February 2013. (Mr Steiner gave evidence by way of video link from his home in Germany).
 - Philip Rodrigo. He holds the position of European head of human resources.

Findings of fact

12. The claimant has had a very long career with the respondent and its predecessors. He started work for the respondent on 1 September 1975. As has been said, he was appointed general manager of SMACC in 2009. In circumstances to which we shall come, he became 'general manager, health and safety, long products' on 1 January 2018. It was the latter role which he held when he was dismissed because of redundancy with effect from 17 January 2020.
13. The essence of the evidence given by Mr Brooks and Mr Holmwood and of the agreed witness statements was to the effect that the claimant was a very able and competent employee, particularly in his role as general manager of SMACC. This was not disputed by the respondent.
14. However, performance issues did arise during the claimant's final year or so working as general manager of SMACC. These performance issues, as we shall see, resulted in the claimant's move to a new role as 'general manager, health and safety, long products' with effect from 1 January 2018.

It was the claimant's performance in this new role which ultimately lay at the heart of the respondent's decision to select the claimant for dismissal by reason of redundancy.

15. It is helpful, we think, at this stage to give some general history about the respondent. Mr Rodrigo, in his written witness statement, tells us about the history of Outokumpu and its current structure. He says this:

“(6) When I joined Outokumpu [31 years ago] it was called British Steel Stainless which had recently been formed following the privatisation of the British Steel Corporation. In 1991 this entity merged with a Swedish stainless steel company called Avesta to form Avesta Sheffield. British Steel was still a shareholder in the company. In 2001, Avesta Sheffield merged as part of a joint venture with the divested Stainless Steel division of Outokumpu to form one of the largest stainless steel producing companies in the world at the time. The business was called AvestaPolarit and was jointly owned by Outokumpu and what had previously been British Steel. British Steel had also merged to form the Corus Group and subsequently the Tarta Steel Group. In 2004, Outokumpu bought out the British Steel share of AvestaPolarit and we became a subsidiary company of Outokumpu Oyj.

(7) At the time the Outokumpu Group included other businesses including mining operations, copper production, brass production and technology development. A decision was made in 2005 to divest all other businesses and for Outokumpu to focus purely on stainless steel. The divestments continued up to 2008. In 2013, Outokumpu acquired the Stainless Steel division of ThyssenKrupp – one of its largest competitors based in Germany, Italy, China, USA and Mexico. It has subsequently divested a number of its businesses in Italy and China and some business areas for competitiveness reasons and to become more streamlined.

(8) In the past an executive committee of Outokumpu led the company. More recently this has become an “organisational leadership team” (OLT). Each member of the OLT has responsibility for part of the strategic portfolio of the group including finance, human resources and IT. In 2006 Roeland Baan, was appointed CEO and reorganised the business into four key business areas (Coil America, Coil Europe, Long Products and Ferrochrome) with central “group” functions (eg HR, IT, finance, communications, CEO function etc) serving these business areas. Prior to this, the business had been separated into two divisions called Speciality Stainless and General Stainless. Long Products, where John [the claimant] was based was a significantly smaller business unit than the other business areas, however it operated as a distinct business unit.

(9) Each of the four business areas are set up in such a way to track business performance. Whilst they are not separate legal entities and do not therefore have separate profit/loss balance sheets, there are clear separate reporting lines to keep operational control. Each business area had a dedicated business head. From 2015 onwards the president of business area Long Products was Kari Tuutti who was from Finland. Turnover wise, Long Products was significantly smaller than the other business areas. It consisted of a melting shop in Sheffield (abbreviated to SMACC), a rod and bar mill in Sheffield (abbreviated to ASR), a newly

created operation called Sheffield Stainless Bar (SSB), a hot rolling mill called Degerfors Stainless in Sweden and a bar company in the USA based in South Carolina (OS bar). In 2018 Long Products purchased a rod producer in Sweden (Fagersta Stainless).

(10) Reporting to Kari Tuutti were general managers at each of the Long Products sites. John was general manager of SMACC from approximately 2009 to 2017. Over the course of a couple of years following Roeland Baan's appointment, there was a move towards functionalisation of the sites – therefore they no longer would have full delegated responsibility for the running of their sites. This meant that various aspects such as supply chain, finance and HR were run functionally from the central business. The functionalisation was limited within Long Products. All the main major business areas of Outokumpu had also functionalised operations so the "general manager" position no longer existed outside of the Long Products business area".

16. Mr Pinder also assists with the general background. He says in paragraph 6 that when, *"John was selected for his role as general manager of SMACC in 2009 and I was one of the people who recommended that John should be considered for the role. I was also part of the interview panel during the selection process, along with Tommy Grahn, president of Long Products and another manager. Once John was recruited he was line managed by Tommy Grahn for a number of years. Kari Tuutti, president of Long Products, took over from Tommy in 2014 and then became John's line manager"*.
17. Mr Pinder goes on to say in paragraph 7 of his witness statement that, *"In 2009 when John was appointed to the general manager of SMACC role, the extent of Outokumpu's operations in Sheffield, and indeed in the UK as a whole, had shrunk considerably so that there was only the SMACC melting shop, the ASR rod mill and the distribution facility remaining. SMACC and ASR formed Outokumpu's Long Products business area in the UK, which consists of a broad range of bars, wire rod, rebar and semi-finished products in a broad range of tailored grades covering all stainless steels and some other alloys. Long Products was the smallest business area within Outokumpu. At this point there were around 450 to 500 employees within the Long Products business area in the UK"*.
18. In paragraph 9, Mr Pinder says that, *"I understand that up to and until 2017 John had generally performed well as general manager of SMACC."* Mr Pinder says that he noted the change in the claimant's demeanour during 2017 because of circumstances which we shall shortly relate. Mr Pinder's evidence accords with that of Mr Brooks who told us that he became aware of health issues besetting the claimant during 2017. Mr Holmwood gave a similar account.
19. Mr Brooks and Mr Holmwood both said that they had noticed a behavioural change in the claimant prior to 2017. Mr Holmwood said that he noticed the claimant *"behaving more erratically"* during 2016. Under cross-examination, Mr Holmwood said that the claimant was always *"a bit erratic"* but became more erratic during 2016.
20. The claimant attributes the decline in his health and performance during 2016 and 2017 to the line management of Mr Tuutti. In paragraph 19 of his

witness statement, Mr Pinder acknowledges the attribution by the claimant of his health issues to Mr Tuutti. However, Mr Pinder takes issue with the claimant's assessment. Mr Pinder says, *"I consider that from 2014 to early 2017, John and Kari had a good working relationship"*. Mr Pinder then goes on to detail three instances (summarised in paragraph 21) where Mr Tuutti acted to the claimant's benefit.

21. The unchallenged evidence of Mr Pinder was that Mr Tuutti procured an increase in the claimant's salary, was instrumental in the claimant's participation in a corporate level long term incentive scheme and acted in the claimant's interest in connection with pension issues. Mr Pinder also points to Mr Tuutti giving the claimant favourable performance reviews in 2015 and 2016. The relevant reviews are at pages 686 to 693 of the bundle.
22. It is clear from the evidence before the Tribunal (in particular, given by the claimant during cross-examination) that he has strong feelings about Mr Tuutti. We shall see the extensive references to this perception within the medical evidence contained in the bundle in due course.
23. It is no part of the Tribunal's function to determine whether or not the claimant was being bullied by Mr Tuutti. What is significant is the claimant's perception that this was the case, the impact upon his mental health and the respondent's reaction to that impact.
24. As testament to his abilities, the claimant prayed in aid an approach to him from Mr Baan about an available post of chief safety officer for the group. The claimant refers to this in paragraph 9.4 of his first written witness statement. He says that in a personal telephone call in October 2016, Mr Baan urged the claimant to put himself forward for the role. The claimant invited Mr Baan's comments about this in emails sent on 6 April and 11 May 2020 (pages 624 and 625). Mr Baan replied on 13 May 2020 (page 624). Mr Baan confirmed that contact was made during the third quarter of 2016 *"as we were looking for a replacement chief safety officer for the group, a role that reported to me"*. Mr Baan went on to say that, *"The departing chief safety officer provided a short list of names to be considered that included yours. During my discussion with you, I aimed to canvas your interest in the role and better understand your experience. You expressed your desire to remain in a local operational role and we agreed that you would not be a shortlisted candidate for the recruitment process. At no point did I offer the position to you or say you would be ideal for the role"*. Mr Baan went on to say, *"In any event I would also point out that our call pre-dated subsequent significant concerns about your performance in particular through Q4 2016 and early 2017."*
25. The job description for the chief safety officer role (entitled 'vice president of environment, health and safety') is at page 72A of the bundle. Several of the attributes there set out were put to Mr Steiner who accepted that the claimant met them. These attributes were an expectation that the successful candidate would be *"open, positive and solution focused"*, *"self-driven, enthusiastic and results orientated"* with an *"ability to work under time pressure"*. Mr Steiner qualified his answer by saying that were it the case that the claimant did not have these attributes then he would not have achieved his position within the respondent.

26. Mr Baan's assessment in the email at pages 624 and 625 is consistent with the evidence of witnesses called by both parties to the effect that the claimant performed well up to 2016 but that there was an unfortunate deterioration in performance thereafter. Mr Baan's email therefore corroborates the evidence referred to in paragraphs 18 and 19.
27. Mr McCubbin took up his role of vice president health and safety and environment with effect from 1 January 2017. As Mr McCubbin says in paragraph 4 of his witness statement, *"This is a global role. I report directly to the CEO of the group. Outside of my direct employment with Outokumpu, I am also a member of the International Stainless Steel forum and I am chairman of the health and safety committee for the World Steel Association."* He describes in paragraph 3 his long career in health and safety.
28. Mr McCubbin had some dealings with the claimant during 2017 as described in paragraphs 7 and 8 of Mr McCubbin's witness statement. In particular, he had dealings with him at a SMACC site safety audit conducted by Mr McCubbin in 2017 (pages 96A to N).
29. Mr Pinder says in paragraph 10 of his witness statement that from around the beginning of 2017 he started to have more frequent interactions with the claimant. Mr Pinder recounts in the same paragraph that, *"John had an epileptic fit in the beginning of 2017 and was off work as a result for a period of approximately two weeks. This was a very serious incident where John collapsed in work during a meeting and paramedics were called to site. I was called by somebody present at the meeting and told that I needed to attend immediately as John was very ill. When I arrived John had come round from temporary unconsciousness and the paramedics were present. They had John's shirt open and appeared as though they had been preparing to resuscitate him if needed"*.
30. In paragraph 11, Mr Pinder says that the claimant wished to carry on working. However, he was prevailed upon by Mr Pinder and another manager to go to hospital with the paramedics. Mr Pinder says that the claimant discharged himself from hospital that afternoon but unfortunately suffered another epileptic attack the same evening and had to be rushed back to hospital.
31. Mr Pinder says in paragraph 12 of his witness statement that the claimant had remarked to him that he felt under a lot of pressure in his role *"due to intense work pressure and target setting"*. Mr Pinder communicated this message to Mr Tuutti in an email of 6 January 2017 (page 77).
32. Mr Pinder then recounts (in paragraphs 16 to 18 of his witness statement) that he observed a change in the claimant's demeanour. This was evidence consistent with that called on behalf of the claimant from Mr Brooks and Mr Holmwood about the claimant's demeanour during 2017. Mr Pinder says that, *"By April 2017, it was clear that John's behaviour in work was being impacted by his epilepsy. I therefore referred John to occupational health in April of that year to confirm that he was fit to work and to see whether any adjustments to his role were required to prevent risks or hazards to his future health prospects. Email correspondence relating to this is on pages 83 to 84 of the bundle."* Mr Pinder said that there was no suggestion from the claimant that he was impacted by mental health issues at this stage.

33. The next significant event occurred on 29 March 2017. Mr Steiner takes up the story in paragraph 7 of his witness statement. He says that, *“I was present in Sheffield when the group’s European works council held its annual meeting at SMACC in March 2017. This was an event that took place each year, in different locations across the Outokumpu global group, whereby the 30 to 40 employee representatives met to discuss various topics. Roeland Baan, the CEO who had been appointed the year before, attended the meeting and participated. As part of the event, John showed Roeland, myself and a number of others around the site. I believe that this was the first time that Roeland had visited the SMACC site”*. Mr Steiner goes on to say in paragraph 8 of his witness statement that, *“Having been given the tour around the site by John, Roeland was visibly upset. He felt that the level of safety, housekeeping and cleanliness was well below expectations. Roeland reacted strongly to the condition of the site and I recall him saying that it was not an operation that is running as it should be. I had a number of discussions with Roeland after this visit and Roeland was clear that there had to be a change in the leadership of SMACC. Roeland said that he could not allow the condition of SMACC to continue the way it was. He therefore put pressure on Kari, as president of Long Products, to find a replacement for John as site manager. I stress this was Roeland’s initiative not Kari’s. An email from Kari to Roeland discussing potential options for SMACC leadership succession is on page 85 of the bundle.”*
34. Mr Steiner speculates in paragraph 9 of his witness statement that, *“I believed that this is where John’s dislike of Kari began. In reality, it was Roeland who had made the decision that John’s performance was not sufficient and that a leadership change was required. Roeland simply tasked Kari with implementing this as Kari was John’s line manager.”*
35. The email at page 85 was described by Mr Ahmad in his closing submissions (in paragraph 4(b)) as *“the key smoking gun email”*.
36. Mr Ahmad took Mr Pinder to the email at page 85. Mr Pinder denied knowledge of it until he saw it in the bundle prepared for the Employment Tribunal hearing. Mr Pinder fairly acknowledged that he was aware that Mr Baan wanted a change in the SMACC management and that by the end of 2017 he was clear that Mr Baan did not consider the claimant suitable to continue as general manager of SMACC.
37. Mr Ahmad also took Mr McCubbin to page 85. Mr McCubbin denied that Mr Baan gave him any instructions about the claimant or that Mr McCubbin was party to Mr Baan’s succession planning. Mr Ahmad also asked Mr Steiner about page 85. Mr Steiner said that he was aware of performance issues concerning the claimant and Mr Baan’s comments at the time.
38. Mr Pinder was also present at the site visit of 29 March 2017. Mr Pinder says in paragraph 30 of his witness statement that, *“2016/17 was a difficult time for SMACC and for the wider business performance wise. There had been pressure on the business units to cut costs and to increase profitability. When Roeland visited SMACC in March 2017 John had been focusing on cutting costs but in doing so he had let the cleanliness and the appearance of the plant decline.”* Mr Pinder went on in paragraph 31 to say that, *“John had defended the condition of the plant by stating to Roeland that he had told him to save money. However, I think there had been a fundamental*

misunderstanding of Roeland's message by John. Whilst Roeland did want to cut costs, this was not to be at the expense of Outokumpu's standards. John had clearly badly misjudged the message from management and had let the condition of the plant deteriorate. This aroused big concerns for Roeland as he felt that sloppiness in housekeeping could also mean sloppiness in some of the more key areas such as health and safety. I think from that point onwards Roeland's opinion concerning Johns ability to lead SMACC in the way that Roeland wished was severely diminished".

39. Mr Pinder also fairly acknowledges that Mr Tuutti's "*satisfaction with [the claimant's] performance*" started to deteriorate after Mr Baan's visit (as Mr Pinder says in paragraph 32 of his witness statement).
40. On 25 April 2017, a meeting took place between the claimant and Mr Tuutti. The Tribunal did not have the benefit of hearing from Mr Tuutti (who is no longer employed by the respondent). Mr Pinder explains, in paragraph 34 of his witness statement, that he tried to dissuade Mr Tuutti from having the meeting with the claimant. However, Mr Pinder says that, "*I can now see that Roeland had decided that John was not the right person to be general manager of SMACC any longer and Kari was acting upon Roeland's instructions [to have the meeting].*" The claimant told Mr Pinder at a subsequent meeting that Mr Tuutti had told him (the claimant) that Mr Tuutti and Mr Baan had lost confidence in him (the claimant) as general manager of SMACC.
41. In paragraph 35 of his witness statement, Mr Pinder says that there was some talk of negotiating an exit package but the following day the claimant told Mr Pinder that he "*was going to fight any attempt to remove him as general manager of SMACC*". Mr Pinder confessed that, "*I do not know the reason for this change in position.*"
42. Mr Pinder, Mr Tuutti and the claimant then held a series of Skype conversations throughout April and May 2017. Mr Pinder says that Mr Tuutti explained that the proposal was to move the claimant to another role in July 2017. Mr Tuutti and Mr Baan then (according to Mr Pinder in paragraph 38 of his witness statement) said that, "*it was decided that John would be set a Performance Improvement Plan up until September 2017 and that if performance did not improve, Kari would consider a series of warnings which could result ultimately in John's removal as general manager. It was agreed that John would not be removed from the role immediately but that he would have the chance to meet agreed performance roles. Following our final meeting on 8 May 2017, Kari sent to John a letter inviting him to a disciplinary hearing on 18 May 2017. The purpose behind this meeting was to investigate whether Kari considered that formal action was required in light of John's poor performance. A copy of the letter from Kari to John is on page 92 of the bundle.*"
43. The course of action agreed upon as recounted by Mr Pinder in paragraph 38 of his witness statement followed a series of meetings between the claimant and Mr Tuutti which Mr Pinder attended. The meetings took place by Skype on 28 April, 5 May and 8 May 2017. The notes are at pages 86 to 89 of the bundle.
44. On 4 May 2017, Dr Oliver, occupational health physician, sent a report to Mr Pinder following the occupational health referral made by him. This is at

pages 91A to 91C. Dr Oliver reported that the claimant was “*currently well and managing to carry out his duties.*” He said that a consultant neurologist had diagnosed him with temporal lobe epilepsy. Dr Oliver opined that the claimant is likely to have a qualifying disability under the 2010 Act because of the physical impairment of epilepsy and that the claimant was fit to continue carrying out his duties as general manager of SMACC. Several adjustments were recommended by him primarily involving avoiding driving, working at height and working around unguarded machinery. There was no mention by Dr Oliver of any mental impairment or the relevant mental impairment with which the Tribunal is concerned in this matter.

45. In the event, the disciplinary hearing scheduled for 18 May 2017 did not take place. It was postponed indefinitely. In her helpful chronology, Ms Palmer summarises Mr Pinder’s evidence about this (in paragraphs 39 and 40 of his witness statement) that it was determined that disciplinary action was not an appropriate way to deal with performance issues.
46. A number of attempts were then made to try to agree the performance improvement plan. On 21 May 2017 Mr Pinder sent an email to Mr Tuutti and Mr Steiner (page 93) in which he said that, “*John’s performance improvement plan (PIP) should be finalised and John has two issues which are currently stopping him signing the proposed PIP – cashflow and forecasting. I would propose that these KPIs remain as part of John’s KPIs but are removed from the PIP. This should mean that he signs the PIP which contains many other KPIs which are sufficient to make the PIP meaningful.*” Mr Pinder says that there was then something of an impasse about the performance improvement plan. In the event, this was agreed on or around 1 September 2017 (pages 104 and 105). Contrasting that plan with the one that was created on 8 May 2017 (at pages 100 and 101) we can see that forecasting was removed but cashflow remained. Mr Pinder’s proposals therefore were only partially accepted by Mr Tuutti.
47. On 24 August 2017, Dr Oliver prepared a fresh report (pages 97 and 98). He did this following receipt of a report from the claimant’s general practitioner Dr Ludlow dated 9 August 2017. By a background, Dr Oliver said that the claimant “*subsequently admitted [following the assessment of 3 May 2017 and report of 4 May 2017] that he was under some stress so a report was requested from his GP prior to his appointment today.*” Dr Oliver said that the claimant was fit for work despite suffering from stress. He noted that Dr Ludlow had referred the claimant to a counsellor whereupon Dr Ludlow was to prepare a second report for the benefit of occupational health. Dr Oliver therefore said that he should review the claimant after Dr Ludlow’s second report has been received.
48. Mr Pinder says in paragraph 41 of his witness statement that, “*We received Dr Oliver’s report on 24 August 2017 which, for the first time, mentioned that John was suffering with stress in addition to his epilepsy.*” Mr Pinder’s evidence is that the claimant “*did not permit the company to see a copy of Dr Ludlow’s report [of 10 August 2017] as he did not agree with the cause of the stress that Dr Ludlow had stated.*” There was no mention of depression or anxiety within Dr Oliver’s report.
49. There being no challenge to Mr Pinder’s evidence, the Tribunal accepts that the claimant withheld consent for Dr Ludlow’s report to be seen by the

respondent. That said, Dr Ludlow's report of 10 August 2017 is in the bundle at page 728A to 728B. Dr Ludlow attributes the causation of stress to workplace issues *"with high, often unreasonable targets to achieve and also targets that include work that is not necessarily within his remit."* Dr Ludlow also attributed stress to non-work family issues.

50. Dr Oliver prepared a third occupational health report on 14 September 2017 (pages 110 to 111). By way of background, Dr Oliver said that, *"Mr Beeley was referred to me today because of concerns about the contribution of work to his stress and in particular the effect that participation in formal performance reviews and target monitoring meetings might have on his health."* Dr Oliver opined that the claimant was experiencing stress but was fit for work as the SMACC general manager. Dr Oliver said that the claimant was *"not stressed by his duties and responsibilities at work per se but he is stressed by the thought of participating in formal performance reviews and target monitoring meetings"*. Dr Oliver said that, *"with effective psychotherapy the stress he is experiencing outside of work is likely to diminish and become more manageable such that he should be better able to deal with the additional stress of participating in formal performance reviews and target monitoring meetings in the future."* Dr Oliver therefore recommended that the formal performance review and target monitoring meetings be postponed.
51. It is clear from an email sent by Mr Tuutti to the claimant and Mr Pinder on 10 September 2017 (page 106) that Mr Tuutti was having difficulties understanding how the claimant could be fit for work on the one hand and yet unable to participate in performance reviews and monitoring on the other. Following receipt of Dr Oliver's report, a further meeting was held between Mr Tuutti and the claimant on 4 October 2017 at which the performance improvement plan dated 1 September 2017 to which we have already referred was finally agreed. Confirmation of the position may be found in the letter addressed to the claimant by Mr Tuutti at pages 112 and 113.
52. On 20 October 2017 the claimant emailed Mr Steiner (pages 114 and 115). A copy of it was sent to Mr Baan, Mr McCubbin and Mr Rodrigo. He said that Mr Tuutti's *"leadership style and behaviours have troubled me and some of my colleagues for a long time. I now realise that his way of treating people has sometimes crossed the line into more serious areas and I believe that my own health and well-being have been affected for over a year. Back in November 2015, I also raised my concerns for members of the Long Product finance team. Before I make the very difficult decision whether to blow the whistle at this stage, please could I ask about protection from harm to my career and the careers of any colleagues who might be willing to corroborate the above"*.
53. Mr Rodrigo says in paragraph 17 of his witness statement that, *"I replied to John's email of 20 October 2017 stating that he had the right to raise his grievance under the company's code of conduct. I assured him that any complaints would be taken very seriously by the company and I explained the process that would be followed. I then emailed Martin [Pinder] asking him to escalate a stress risk assessment for John and explained my recommended approach. A copy of this email correspondence is on pages*

114 to 115 of the bundle.” Mr Rodrigo said to Mr Pinder (in an email of 20 October 2017) that, *“doing nothing is not an option now”*.

54. Mr Pinder says, in paragraph 49 of his witness statement, that *“It was decided that John’s complaint would be dealt with as a formal grievance and that it would be investigated by Sonja Hoeijmakers (SVP HR business partner sales and service centres and SCM). It was then decided that Johann [Steiner] would hear John’s grievance”*.
55. On 27 October 2017 Mr Steiner met with the claimant. Mr Pinder was also in attendance. Mr Steiner says in paragraph 17 of his witness statement that, *“During the meeting I asked John to explain his concerns. John explained that he felt Kari’s behaviour was inappropriate and that other members of the team were suffering from this too. I explained to John the procedure that would take place in light of John raising a grievance. I explained that there would be an independent investigation carried out by ... Sonja Hoeijmakers ... I explained that once the investigation had concluded I would hold a further meeting with John to consider the outcomes arising from the report. This was in line with normal process.”* Mr Steiner went on to say that he *“instructed John to take sickness absence commencing on 30 October 2017. A copy of the letter that I sent to John after this meeting is on pages 116 to 117 of the bundle.”* The claimant therefore was absent from work upon sick leave for the remainder of 2017.
56. On 1 November 2017, Dr Ludlow wrote to Dr Oliver (page 728C). Dr Ludlow said that the claimant has undergone counselling and, *“After a number of counselling sessions [the counsellor] has concluded that the main cause of his stress is the behaviour of his line manager towards him. He perceives the behaviour to be controlling and intimidating. He says he doesn’t know where he is with him and finds him unsupportive and impatient. He feels disempowered and confused at his line manager’s inconsistency and is not being valued. He describes being harassed by his line manager. Mr Beeley remains extremely anxious, this is affecting his sleep.”*
57. Dr Oliver then prepared a fourth occupational health report dated 9 November 2017 (pages 118 and 119). Dr Oliver commented upon Dr Ludlow’s report of 1 November 2017. He said that the claimant was *“not feeling as stressed as he was earlier this year. Mr Beeley told me that the stress therapy has now finished. Mr Beeley is confident that the therapy has equipped him to deal with stress more effectively and as a result of the therapy he feels well enough to be able to cope with both his duties as general manager in SMACC and with the difficulties he perceives in his line manager’s behaviour towards him.”* Dr Oliver said that the claimant was fit for work. He opined that he did not think that the claimant would require a further occupational health review *“depending on the outcome of the management investigation and whether it is possible to achieve a collaborative and mutually satisfactory solution to the difficulties Mr Beeley describes; however, if Mr Beeley continues to be unwell, review in occupational health would be advisable.”*
58. Sonjia Hoeijmakers’ report is dated 21 November 2017. It is at pages 122 to 132. She cites article 4 of the respondent’s code of conduct which says that *“Respect is important: all Outokumpu employees shall treat each other*

with respect and fairness at all times. All forms of abusive, harassing or offensive conduct are totally unacceptable.”

59. She concluded that Mr Tuutti was not in breach of article 4. However, in paragraph 3 she said that there were concerns about his leadership style. She then went on to list seven issues which arose in the course of her investigation. She recommended that they be addressed with him.
60. Sonjia Hoeijmakers interviewed the claimant and eight other employees (all of whom were anonymised in her report). She did not interview Mr Tuutti.
61. Mr Ahmad put to Mr Pinder and Mr Steiner that Ms Hoeijmakers' conclusion that Mr Tuutti was not in breach of article 4 of the code of contract was incorrect and that the instances cited by her in paragraph 3 of her summary (on page 122) were in breach of the requirement for employees to treat one another with respect and fairness at all times. Mr Pinder and Mr Steiner both accepted there to be merit in Mr Ahmad's point. Mr Steiner saw nothing improper in Ms Hoeijmakers' failure to interview Mr Tuutti.
62. Mr Pinder and Mr Steiner met with the claimant on 22 November 2017 to discuss the report. Mr Pinder says in paragraph 52 of his witness statement that, *“Johann indicated that one of the potential outcomes may be for John not to continue in his current role but to perhaps agree with John a suitable alternative position that would be more suitable for John moving forwards. During the meeting, John was provided with Sonja's report summary. Johann explained that the findings of the report were that there was evidence for room for improvement in Kari's leadership style and that this had been discussed with Roeland Baan as CEO and as a result, training would be arranged with Kari. However, there was no evidence of any code of conduct breach or bullying as John had alleged. Johann also explained to John that as a senior manager it was part of his role to take instructions and have difficult conversations with his boss. The meeting was ultimately adjourned for John to read the report and to consider his thoughts prior to another meeting.”*
63. In paragraph 22 of his witness statement, Mr Steiner says that, *“Sonja presented the report to myself and Roeland Baan to consider ahead of my meeting with John. Roeland and I discussed the findings. It was clear that there were aspects of Kari's leadership style that had room for improvement, but it was equally clear that there had been no instances of bullying found and no case to answer here. Roeland and I met with Kari and explained that there was no case to answer with regards to bullying but that there were clearly lessons to be learnt in terms of Kari's direct leadership style and that would be fed into Kari's performance management process.*
64. In paragraph 23 of his witness statement, Mr Steiner gives evidence corroborative of that of Mr Pinder about the meeting that took place on 22 November 2017 with the claimant. Mr Steiner adds in the same paragraph that he had *“real concerns that it was not practicably possible for John and Kari to continue working together and that I would need to consider whether it would be better for John to continue in a different role. I told him I would come to a decision prior to our next meeting.”* The meeting minutes are at pages 133 and 134 with the emails confirming the position at pages 136 to 138.

65. It was suggested to Mr Steiner by Mr Ahmad that the meetings that were held amongst the respondent's management prior to that with the claimant held on 22 November 2017 was part of an agenda or process to remove the claimant. This Mr Steiner denied. He said that *"Mr Baan's agenda was to improve the performance of SMACC. It's a performance improvement agenda."* He denied encouraging Sonja Hoeijmakers to find information to be used against the claimant. He denied interfering with her enquiries. He also refuted the suggestion that Mr Baan had an agenda against the claimant and that Sonja Hoeijmakers' report was in fulfilment of the succession planning agenda intimidated by Mr Baan in the document at page 85.
66. On 27 November 2017 the claimant wrote to Mr Steiner (pages 139 to 142). As recorded in the chronology (in an entry inserted by Mr Ahmad) the claimant in this letter mentioned mental health and mental illness for the first time. (Hitherto, the mental health references had been to stress). In particular, the claimant mentioned undergoing therapy with the Sheffield NHS Mental Health Team. The claimant said towards the end of the letter that, *"my recent medical report has passed me fit for work and I must emphatically state that I am once again completely capable of returning to my job of leading SMACC."*
67. The claimant's daughter is a solicitor and on his behalf she sent a letter to Mr Steiner on 28 November 2017 (pages 143 to 145). She said that the claimant *"believes that the opportunity for Mr Tuutti and John to work together in a positive and successful way is entirely achievable"* and that *"it is John's position that he believes that he and Mr Tuutti should be given an appropriate opportunity to re-establish a successful and harmonious working relationship and that in consequence thereof with appropriate support, mentoring and advice being provided to both parties by the company, the achievement of SMACC unit KPIs should improve."*
68. A further meeting took place on 28 November 2017. The claimant, Mr Pinder and Mr Steiner were present. The meeting took place by video. (Mr Steiner was in the United States at the time). The claimant said that he was *"recovered fully and is fit for work"*. The letter from the claimant's daughter had been received and was the subject of discussion during the meeting. Mr Steiner said (towards the end of the meeting, the notes for which are at pages 146 to 149) that he *"was not surprised at the passion in which [the claimant] had presented his case and that no one was trying to destroy [the claimant's] track record over many years, but the issue comes down to the fundamental requirement for constructive collaboration between leaders."* The meeting concluded with Mr Steiner saying that the decision as to how to proceed would be one for him and Mr Baan.
69. On 30 November 2017, Mr Steiner wrote to the claimant (pages 151 to 154). Mr Steiner recounted the history of matters and concluded that, *"it is not in the best interests of the business and is neither practical, nor reasonable for you to continue as head of SMACC reporting to the head of BALP [Mr Tuutti]."* Mr Steiner went on to say that, *"We wish to offer you an alternative role based in Sheffield on your current terms and conditions of employment, at the same level in the organisation (ie one level below the OLT, reporting to a senior manager who in turn reports to a CEO). The role*

will be head of safety for BALP, reporting to the global head of safety.” Mr Steiner invited the claimant to respond by 6 December 2017.

70. The global head of safety to whom the claimant was to report is Mr McCubbin. The reference to ‘BALP’ in the letter of 30 November 2017 is to the long products business area. About this, Mr McCubbin says in paragraph 7 of his witness statement that, *“Within Outokumpu, Europe is by far the biggest business area, with Americas and Ferrochrome also a substantial size. Long Products is by some way the smallest business area of the group.”*
71. Mr McCubbin says in paragraph 9 of his witness statement that, *“In December 2017 at an informal meeting in Helsinki, Johann Steiner (European vice president, human resources and organisation development) told me that I was going to have a new member of my team. He explained that John would be moving into a new role as general manager, health and safety of Long Products which would report to me. I was aware that there had been some concerns as to John’s performance in his role as general manager of SMACC, although I was not involved in any performance management for John in 2017. I was not consulted about this change of role for John and I was not involved in any recruitment process. I got the impression the business wished to create a role in which they felt John could provide value.”*
72. The general manager, health and safety for BALP was a job created by the respondent for the claimant. That said, Mr McCubbin said in evidence given under cross-examination that, *“I could see the justification for the role because the business area was performing badly”*. Mr McCubbin denied that he had told the claimant that the role was a waste of time and had no value.
73. Mr McCubbin says in paragraph 10 of his witness statement that Mr Steiner had *“explained to me that John had performed some health and safety aspects of the role as general manager and so it appeared that John had some experience in the field. I did have some reservations about John being in the role, as health and safety is a specialist area requiring years of experience. John did have a NEBOSH qualification but this in itself was not necessarily sufficient to qualify him as a senior safety manager. I tend not to judge on qualifications alone but rather on what people practically know and do. There are other employees for example on site who have the NEBOSH qualification as well but are not capable of being safety managers. I was willing to see what John practically knew about health and safety and whether he could draw on his experience to succeed in the role”*.
74. Mr McCubbin already knew the claimant. As we have said, he came across him during his (Mr McCubbin’s) first year in role. In paragraph 19 of his witness statement Mr McCubbin acknowledged that he was aware from early March 2018 that the claimant was suffering from stress and anxiety developing into symptoms of depression.
75. On 20 December 2017 it was announced that Mr Holmwood would act up as interim general manager of SMACC (in place of the claimant) pending the appointment of a new permanent manager. Mr Tuutti’s internal announcement to this effect is at page 168. He mentioned that the claimant had decided to accept an alternative role within the respondent. The

claimant took up his new role of head of safety for BALP with effect from 1 January 2018.

76. The claimant lodged an appeal against Sonja Hoeijmakers' findings. No date for the appeal was given in the chronology of events. The Tribunal was unable to locate the appeal document. At all events, it is not in dispute that the claimant lodged an appeal. The grounds for it are in the email of 14 December 2017 addressed to Mr Baan (page 157A).
77. The claimant met with Mr Baan to discuss the appeal on 15 December 2017. The notes are at pages 159 to 164.
78. Mr Baan confirmed Mr Steiner's decision that there had been a fundamental breakdown in trust between Mr Tuutti and the claimant such that the claimant could not continue in his role as general manager of SMACC. The appeal outcome letter is at pages 166 and 167.
79. Dr Ahmad suggested to Mr Pinder and Mr Steiner that it was inappropriate for Mr Baan to be involved in the appeal process. This was upon the basis of the claimant's belief that there was an agenda (evidenced by the succession plan at page 85) for Mr Baan to be rid of the claimant. Mr Steiner asked rhetorically who else could have dealt with the appeal. He plainly saw nothing improper in Mr Baan conducting it. Mr Steiner said that Mr Baan *"has a SMACC performance improvement ambition. We have 10,000 employees. He is thinking about performance improvement and the claimant's claims against Mr Tuutti."* He denied there to be an agenda or that Mr Baan was acting in fulfilment of his succession plan.
80. On 16 January 2018 Mr Pinder published an announcement that the claimant was to commence work in the health, safety and environment function (of which Mr McCubbin was global head) as general manager of health and safety of Long Products.
81. Mr McCubbin prepared an expectations and objectives document (pages 174 to 175). This was sent to the claimant on 12 January 2018 (page 189). This was followed up by Mr Pinder on 2 February 2018. The same expectations and objectives document were sent to the claimant by Mr Pinder that day (pages 182 and 183).
82. Mr Pinder says in paragraph 62 of his witness statement that, *"We agreed not to complete a performance review for John for 2017 as we had already managed John's performance significantly in 2017 and I felt that this would open up an old wound if we tried to do an end of year review when John had just moved into a new role"*.
83. On 7 March 2018, the claimant's general practitioner Dr Broadbent wrote to the respondent's occupational health department (page 195). Dr Broadbent said that the claimant *"has gone on to develop low mood and has now been diagnosed with depression"*. This led to him being signed off as unfit for work for a period of around two weeks between 29 March and 9 April 2018.
84. As we have said, Mr McCubbin was aware of the claimant's absence and diagnosis at around this time. On 30 April 2018, Dr Oliver prepared a further occupational health report (pages 203 and 204). Dr Oliver made reference to Dr Broadbent's diagnosis of low mood and depression. He said that the claimant *"has been suffering with moderately severe to severe symptoms"*

of depression which he is managing with the techniques that he learned from counselling alone". Despite his depression, Dr Oliver opined that the claimant is fit for work. As an adjustment, Dr Oliver recommended that the claimant be permitted to work from home following periods of significant business travel. He also recommended that the claimant be permitted to work on site as much as possible *"because incidental social contact with his former colleagues is important for his well-being"*. No issue was taken by the claimant that Mr McCubbin facilitated the adjustments recommended by Dr Oliver. Mr Pinder's unchallenged evidence was that this was the first occasion upon which occupational health had mentioned depression.

85. Mr McCubbin explains in paragraph 11 of his witness statement that the claimant's new role of general manager, health and safety, long products would still entail contact with Mr Tuutti *"although this did not need any day to day or significant contact"*. In paragraph 28, he says that the claimant and Mr Tuutti arranged monthly meetings to discuss safety progress within long products.
86. Mr McCubbin says that Mr Pinder called and asked him to sit in on a meeting scheduled for July 2018 after the claimant had expressed concerns to Mr Pinder about being required to attend a one to one Skype meeting with Mr Tuutti. Mr Pinder says in paragraph 68 of his witness statement that, *"I did not really think it was necessary for someone to sit in on the meeting but I asked Alistair if he wouldn't mind doing so to help John feel more comfortable."* Mr Pinder refers to the email correspondence about this at pages 213 to 218.
87. Mr McCubbin says that he was aware of the difficult working relationship between the claimant and Mr Tuutti. At paragraph 27, Mr McCubbin says that *"During John's time in my team, John consistently made spiteful comments about Kari. It was clear that John did not respect him. I had also found that John tried to raise the topic of Kari in every meeting that I had with him ... I felt that John was becoming fixated on his working relationship with Kari rather than focusing on his role."* Mr McCubbin's evidence upon this is credible. When he gave evidence before the Tribunal, the claimant exhibited the very behaviours described here by Mr McCubbin. The claimant candidly accepted before the Tribunal that he had become angry and obsessive about Mr Tuutti.
88. Mr McCubbin then came to conduct the claimant's mid-year review in July 2018. At paragraph 31 of his witness statement, Mr McCubbin says, *"I conducted John's mid-year review in July 2018. As noted above, I had allowed John time to settle into the role in the first half of the year. However, by July 2018 I did have concerns about John's performance. I highlighted some of these areas for improvement to John during our meeting, which included two main points, first that the overall accident rate wasn't improving by much and second that he wasn't impacting the site based issues. I could in fact have been more critical of John in this meeting but as John had only been in the role for six months and he had been suffering from some health issues, I did not want to knock his confidence. In response to the point I was making, John came back and argued with every point that I raised and would not accept any of the points of improvement."*

89. Mr McCubbin says in paragraph 33 of his witness statement that the claimant did not mention *“anything to do with his illness or mental health or suggest this was affecting him at all”*.
90. The performance review for 2018 is at pages 701 to 714. This appears to have been signed for or on behalf of the claimant on 3 April 2019 and by Mr McCubbin the same day. It covers the entire year. However, Mr McCubbin and the claimant’s comments for July 2018 are incorporated within the document. A number of performance concerns were noted by Mr McCubbin in July 2018.
91. Mr McCubbin says that between July 2018 and December 2018 the claimant and he did not have a great deal of contact. He says that the claimant spent a lot of time in Sweden at the Long Products Degerfors site. Mr McCubbin said that *“whilst this was fine it seemed to me this was an ‘easy win’ for John rather than trying to influence some of the areas where real improvement was needed, for example in the UK.”*
92. At paragraph 37 of his witness statement, Mr Rodrigo talks about the *‘Organisational Blueprint Project.’* This was a significant development which ultimately impacted greatly upon the claimant. Mr Rodrigo says that, *“In 2018 a significant review of business functions across the group had been undertaken at the request of the OLT. The proposals across the business arose from the implementation of an enterprise wide IT platform along with defined common processes, which allowed us to be able to look at our organisational structures and make changes to the existing structure aimed at greater efficiency. Having a common IT platform was also a step in our move away from localised site by site resource to a centralised system. The “Organisational Blueprint Project” covered six key areas: sales, supply chain, finance, procurement, IT and human resources. The proposals were presented to the leadership team in September 2018, with a view of saving 15 million euros across the business. The outline proposals were approved. A copy of the presentation that was delivered to the OLT is on pages 221 to 272 of the bundle.”* Mr Rodrigo goes on to say in paragraph 38 that, *“I was the project manager of the Organisational Blueprint Project, so I was heavily involved in its planning and implementation.”* He goes on to say in the same paragraph that as a result of the blueprint, *“it was planned that there would be around 200 to 250 reduction in head count.”*
93. Mr Rodrigo says in paragraph 39 of his witness statement that, *“Further efficiency opportunities were considered. This is where the environment, health and safety (“EHS”) team came up, as there was a concern (primarily raised by the business area president for Europe at the time) that the EHS team was not as effective as it could be, particularly the environmental team. This caused us to meet with two key managers for EHS, namely Alistair McCubbin and Juha Yimanu (VP – environment and sustainability) to discuss a blueprint for the EHS team. In November/December 2018 Alistair and Juha made some initial presentations regarding their proposals to the safety steering group (which included the CEO). A copy of this presentation is on pages 295 to 313 of the bundle.”*
94. Mr Rodrigo says in paragraph 40 of his witness statement that, *“The overall blueprint proposal for EHS was signed off and Alistair discussed his*

proposals with me. In particular, he felt that he needed a new role which would focus on the new IT systems available to help to bring additional technology into the EHS team (in line with the overall focus on bringing in new platforms and technology). Alistair also felt that the role of general manager, health and safety, Long Products was no longer required as it was a small business area that did not warrant having one person completely dedicated to it when no other business area had this.”

95. Mr McCubbin’s evidence about the Organisational Blueprint Project and the proposed restructure of the EHS team commences at paragraph 59 of his witness statement. He gives evidence corroborative of that of Mr Rodrigo to the effect that there was a review of the roles required in the EHS team and that he reviewed the current structure and put together a project plan which is at pages 295 to 313.
96. In paragraph 60 of his witness statement, Mr McCubbin says that, *“The structure of the department prior to the restructure was me as vice president of environment health and safety, with five direct reports, specifically:*
- *Juha Yimanu – vice president – environment and sustainability;*
 - *Maarit Hiiakivi – security and fire prevention manager;*
 - *Kevin Davis – senior manager health and safety;*
 - *Maarit Koivupalo – health and safety manager;*
 - *John Beeley – general manager – health and safety – Long Products*

With the exception of John’s roles, all of the roles involved total coverage across all of the business areas. John’s role was the only one which focused on a specific business area (Long Products). A copy of the pre-existing structure of the department is on page 296 of the bundle.”

97. In paragraph 62 of his witness statement, Mr McCubbin says that, *“It was very clear to me that there was no requirement for a general manager, health and safety, Long Products role and that this was not an efficient use of resource at all. The Long Products role covered five small sites within a much broader business. Long Products is a small business area within Outokumpu. We did not have dedicated health and safety managers within any of the other business areas and all other roles within my team worked across all sites. Having a dedicated health and safety manager within Long Products was not viable. I felt it was important to bring Long Products within the rest of the business to create a streamlined approach to health and safety.”*
98. Mr McCubbin identified there to be a need for a new ‘*safety projects and development manager*’ role. He says this in paragraph 61 of his witness statement. A breakdown of the safety projects and develop manager role may be found at page 302 of the bundle. This envisages that the role was to cover the following:
- *Projects;*
 - *Intelex;*
 - *Process safety management;*
 - *Digitalisation;*

- *Contract and management;*
 - *Ergonomics;*
 - *Health and well-being;*
 - *Best practice*
99. At paragraph 63 of his witness statement Mr McCubbin says that his proposal for the new structure from 2019 onwards included the roles of senior safety manager, safety manager, security and fire protection manager and safety projects and development manager. This is four roles in all. He says, *“Three of the roles from the old structure almost identically mapped across to the first three roles that I have listed in the new structure. These were the roles currently being carried out successfully by Kevin Davis, Maarit Hiiakivi and Maarit Koivupalo. A copy of the revised structure is on pages 301 to 302 of the bundle.”*
100. In summary, therefore, the claimant’s role of general manager, health and safety, long products was no longer required under the new structure. Although the job titles were slightly different, the roles currently being carried out by Mr Davis and the two Maarits were going to continue. A new role of safety projects and development manager was being created. The Tribunal received no evidence of the differences (if any) between the roles being carried out by Mr Davis and the two Maarits in their substantive roles on the one hand against their roles in the new structure. Mr McCubbin says in paragraph 63 of his witness statement that the roles were almost identical. Plainly however there was a significant difference between the claimant’s substantive role of general manager, health and safety, long products on the one hand and the proposed new role of safety projects and development manager on the other. Primarily, this was because the focus of the former was upon a specific business area whereas the latter (and indeed all the roles in the new structure) involved *“total coverage across all of the business areas”* (as it was put by Mr McCubbin).
101. Towards the latter end of 2018, at the same time as Mr McCubbin was building up his proposals, the claimant resurrected his allegations against Mr Tuutti. On 9 November 2018 he wrote to Mr Baan (with a copy to Mr McCubbin). This is at pages 280 and 281. The claimant said that, *“As soon as my doctor and psychotherapist agree that my health has improved enough to cope with a period of potential stressful challenges, it is my intention to take the following action:*
- *A detailed submission to the Outokumpu board via the chairman;*
 - *Legal steps in the UK including court action if necessary”.*
102. Mr McCubbin says, in paragraph 35 of his witness statement, that *“I felt the email was particularly strange and it took me by complete surprise.”* He noted that it included a picture of a battlefield with the insinuation that *“he would keep on fighting until Kari left the company.”* In paragraph 36 he expressed that he was *“shocked that John had bypassed me as his line manager and had gone above my head to the CEO (who was my line manager). The content of the email was remarkable. Part of the key elements for John to be successful in his new role were an ability to establish credibility and influence people. This required a large element of*

self-awareness, sometimes humility but also being able to “read the room”. John’s email showed a complete and utter lack of either of these requirements and a significant lack of judgement.”

103. Mr McCubbin invited the claimant to a meeting which took place on 10 December 2018. Mr McCubbin (in paragraphs 41 and 42) and Mr Pinder (in paragraphs 73 and 74) give corroborative accounts of what was discussed at the meeting. In essence, the points of discussion were:
- That the claimant was to be referred to occupational health for an up to date assessment of the claimant’s fitness for work.
 - That if the claimant was fit to work and perform his duties as general manager, health and safety of long products, Mr McCubbin’s expectation was that the claimant would *“deepen his involvement in the safety related matters which adversely affected the safety performance of Long Products in 2018.”* Mr McCubbin observes that when this issue was raised the claimant *“persisted to go on at length about Kari Tuutti and the bullying allegations during the meeting.”* This account is credible for the reasons that we gave earlier.
 - That the claimant wished to pursue the issues that he had with Mr Tuutti.
 - Mr McCubbin said that the claimant should not write emails to the chief executive office such as that of 9 November 2018. Such issues should be raised with him as line manager.
104. On 12 December 2018, just two days after the meeting of 10 December, the claimant sent an email to Mr Baan. Both Mr Pinder and Mr McCubbin expressed frustration in their witness statements about the claimant’s conduct. The email is at pages 320 and 321. The claimant expressed the opinion that *“the root cause [of poor safety performance] ... is poor and cosmetic safety leadership from Kari Tuutti.”*
105. Mr McCubbin says in paragraph 45 of his witness statement that, *“I felt that John had completely undermined my position. He had again leap frogged me as his line manager and had reached out to the CEO of the company despite a clear instruction not to. It was clear that John did not recognise or have respect for me as his manager.”* Mr McCubbin wrote to the claimant in these terms on 17 December 2018 (page 324). He says in paragraph 47 of his witness statement that, *“In all my career as a health and safety manager I have never had to warn someone in the senior manager role that if they didn’t stop behaving in a certain way then I would have to discipline them. I certainly did not expect such behaviour from a senior employee such as John. I was amazed that we had got to this point.”* A telephone call to discuss the matter was arranged for 18 December 2018. However, this was postponed at the claimant’s request. The proposed discussion in fact never took place.
106. Mr McCubbin’s proposals for the new structure within the environment, health and safety section as described earlier was approved by Mr Baan. A copy of the final document containing Mr McCubbin’s proposals may be seen at pages 356 to 381.

107. Mr Rodrigo says in paragraph 41 of his witness statement that, *“The Blueprint Project was initially due to be implemented in the EHS team towards the end of January and beginning of February. However, around this time John commenced a period of long term sickness absence (which ultimately continued until he was made redundant in January 2020).”* The claimant in fact was signed off sick for four weeks with stress on 28 January 2019. He never returned to work. There was a later diagnosis during this sickness absence period of severe anxiety.
108. Just before the claimant went on long term sick leave, he had met with Mr McCubbin for his annual performance review. This meeting took place on 17 January 2019. The notes are at page 333.
109. Mr McCubbin expressed concerns about the claimant’s health. He said in paragraph 49 of his witness statement that, *“John looked ill when we met.”* He says that the claimant attributed this to lack of sleep due to health issues affecting members of his family. Mr McCubbin offered to postpone the meeting, but the claimant said that he wished to proceed with it. Mr McCubbin told the claimant that *“his performance in 2018 had not been good.”* Mr McCubbin also told the claimant that his trust in him had been undermined by his two letters to the CEO sent in December 2018. Mr McCubbin expressed concerns about having been undermined in front of the CEO. Mr McCubbin told the claimant that his performance of safety in Long Products was *“well under par”*. The recordable accident rate was significantly above that of the wider business.
110. The claimant said that others would vouch for his abilities. Mr McCubbin said (as evidenced in paragraph 52 of his witness statement) that that had not been his finding and that feedback from three other general managers with whom the claimant had been asked to build a relationship was not supportive of the claimant’s view. Mr McCubbin also recorded that the claimant raised the issue of Mr Tuutti several times. Mr McCubbin shut down such discussions as they were not the object of the performance review meeting. This was not an easy meeting. Mr McCubbin recorded that the claimant commented that he had been given *“a bit of a beating”*.
111. It is plain from the note at pages 333 and 334 and from Mr McCubbin’s witness statement that Mr McCubbin had concerns about the claimant’s performance in his new role. Mr McCubbin says in paragraph 54 of his witness statement that, *“As we had covered quite a lot of ground related to John’s performance during the meeting, we arranged to have a second meeting to discuss John’s objectives for 2019 in further detail.”* This was arranged for 29 January 2019 but in the event did not take place. In anticipation of the meeting Mr McCubbin sent to the claimant his objectives for 2019 (the email of 18 January 2019 is at pages 335 and 336). Plainly, as at January and February 2019, the parties were not to know for how long the claimant would be absent from work.
112. Mr McCubbin then worked upon a job description for the new safety projects and development manager role within the re-organised structure. This was sent to Mr Rodrigo on 25 February 2019 (pages 382 and 383).
113. Following the claimant’s referral back to occupational health, a further report was prepared. This is dated 19 March 2019. The author is Dr Basu, consultant occupational physician (pages 392 to 394). Dr Basu opined that

the claimant *“is emotionally unwell for reasons that are consistent with his reported work difficulties. The timing of the onset of his epilepsy would also be consistent with a stress related origin, although direct causation cannot be proved. I do not believe his family difficulties are a significant consideration in his occupational management, aside from convenience, should he return to work in a different role.”* Dr Basu said that the claimant was *“potentially at risk of being exposed to the same stressors should he return to his current role and given the depth of concern he has over the aforementioned individual [Mr Tuutti] a role without any overlap in their responsibilities seem advisable. I would strongly advise against implementing such a change however until he has completed step one.”* ‘Step one’ concerned neuropsychological models to enable the claimant to interpret relevant thought processes.

114. Dr Basu also recommended *“a further support mechanism ... in the form of tailored anxiety support.”* No occupational health follow-up was recommended.
115. Upon receipt of the medical report from Dr Basu, Mr Rodrigo contacted the claimant. A meeting was arranged for 10 April 2019. However, this was postponed at the claimant’s request. The claimant indicated that he would shortly be commencing therapy but hoped to be in a position to return to work following that. Mr Rodrigo and the claimant arranged to meet in an informal setting on 9 May 2019. Mr Rodrigo and the claimant discussed the claimant’s medical condition and the organisational changes that were proposed. Mr Rodrigo said (in paragraph 36 of his witness statement) that the claimant spoke at length about Mr Tuutti. This is credible evidence for the reasons that we have already given. Further, the day after the meeting the claimant emailed Mr Rodrigo on 10 May 2019 (pages 398 and 399). Again, he referred to Mr Tuutti’s treatment of him.
116. In paragraph 42 of his witness statement, Mr Rodrigo says that, *“It became apparent that John was not going to return to work in the near future and as the [organisational blueprint project] process had already been delayed significantly, we decided to push ahead with the proposals around June 2019. I had arranged a follow up meeting with John following our meeting in May 2019, and so Alistair and I decided that this would be an appropriate time to explain the proposals to John. ... I had already briefly mentioned the organisational blueprint work that was taking place in our meeting in May and I said to John that we would discuss this further in our meeting.”*
117. The claimant and Mr Rodrigo met on 20 June 2019. Mr Rodrigo followed the meeting with a letter dated 9 July 2019 to confirm what had been discussed. The letter is at page 410.
118. Mr Rodrigo confirmed in this letter that, *“the safety team within the EHS function of which you are a part will be re-organised with four main roles. (a) senior safety manager; (b) safety manager; (c) security and fire protection manager; (d) safety projects and development manager. As you will see your current role will not exist in the proposed new structure and this means there is a potential redundancy situation. Alistair will provide you with more information about each role, its scope and requirements and ask for your preference as to which of the roles you would wish to be considered for. Based on the feedback from all of the team members we*

will undertake a selection exercise and look to appoint into the above positions. The process will start from 11 July and continue for a minimum of 30 days to enable full and proper consultation requirements to be met.”

119. Mr McCubbin says in paragraph 70 of his witness statement that following the claimant’s meeting with Mr Rodrigo he (Mr McCubbin), *“then approach each of the individuals within the team to explain the proposals and to explain the roles to them. I then asked for their initial view on the roles that they would like to be considered for within the new structure. Kevin confirmed that he wished to be considered for the safety senior manager role within the new structure, which was very similar to his current role. Maarit Hiiakivi confirmed that she would wish to be considered for the security and fire protection role and Maarit Koivupalo confirmed that she wished to be considered for the safety manager role. These roles were all almost identical to the roles that these individuals were already performing successfully. Maarit Koivupalo initially said that she also wished to be considered for the new safety projects and development manager role and I said that she could apply. She later changed her mind and only applied for the safety manager role.”*
120. Mr McCubbin goes on to say in paragraph 71 of his witness statement that, *“On 12 July 2019 I spoke to John and we had a discussion about the proposals and the proposed new structure of the health and safety scheme. I explained the various roles to John and asked for his thoughts on which roles he felt he would like to apply for. John initially stated he felt that he was more than capable of doing all four of the roles. I explained that I didn’t think that he would be suited to the security and fire protection role as he did not have any experience in this file at all so far as I was aware, and having discussed this further, John agreed that these were not roles that he wanted to pursue. I explained the other roles in more detail and asked John to confirm which roles he intended to apply for by way of email in due course. Following our meeting, I sent John the outline of the four roles as I had agreed to do during our call. A copy of this email is on page 413 and the attached summary is on pages 414 to 415 of the bundle.”*
121. On 18 July 2019 the claimant expressed interest in the senior safety manager role and the new safety projects and development manager role. However, out of respect for Kevin Davis who had been performing the senior safety manager role, the claimant then said that he wished to be considered only for the new safety projects and development manager role. The relevant emails are at pages 418 to 420. Mr McCubbin then suggested a telephone call to discuss the criteria for the role in which he expressed an interest. (These email exchanges took place between 16 July and 12 August 2019).
122. On 15 August 2019 Mr McCubbin and the claimant discussed the criteria for the safety projects and development manager role. In an email to Mr Rodrigo sent later the same day, Mr McCubbin said, *“as you can imagine he believes he has all of these [criteria] well covered and is the best person for the role.”*

123. Mr McCubbin then proceeded to score the claimant against the criteria. The criteria are set out on page 423. These are:

- *Ability to influence and inspire;*
- *Interpersonal and communication skills to influence up, down and across the organisation;*
- *Build credibility;*
- *Build trusting relationships;*
- *Work collaboratively;*
- *Results drive;*
- *Manage projects to completion and delivery;*
- *Enthusiastic and self-driven approach;*
- *Take concepts and come up with ideas and solutions.*

124. It was possible to score a maximum of 36 points as for each criterion a score of between 1 and 4 was to be applied. Mr McCubbin scored the claimant as below expectations (attracting one point) on all the criteria except the fourth, seventh and ninth listed in paragraph 123. For those three, the claimant was given a score of two (that he met the expectation). The total score was therefore 12 out of 36.

125. In paragraph 76 of his witness statement, Mr McCubbin justifies each of his scores against the nine criteria. He says in paragraph 78 of his witness statement that, *“Based upon the scoring above, John did not meet the minimum requirements for the safety manager, projects and development role. This would be a project-based role that was founded upon building credibility and trusted relationships across all of the business areas. John had failed to do this when focusing on just Long Products and I did not feel that he was capable of performing the role even with training and support.”*

126. Mr McCubbin gave very straightforward and direct evidence before the Tribunal that in undertaking the scoring he had:

- Taken no account of the claimant’s performance in his role as general manager of SMACC.
- Taken no account of the claimant’s disability.
- Not consulted with the claimant about the organisational change in health and safety environment.
- Not consulted with the claimant about the abolition of his new role as general manager, health and safety, long products.
- Not sought to calibrate his scores by seeking the opinions of others. *“These are my personal rankings. I don’t ask others what they think”* was how Mr McCubbin put it.

127. The Tribunal is in no position to undertake a marking exercise of the kind carried out by Mr McCubbin nor is it the Tribunal’s function so to do. The Tribunal does note what appears to be a slight contradiction between the scoring for the third and fourth criteria. Mr McCubbin said that he scored the claimant as below expectations for building credibility upon the basis

that he was unable to find any managers who wanted the claimant's help or support. However, he scored the claimant as meeting expectations for the fourth criterion which is building trusting relationships. This was upon the basis that the claimant had completed a project with the manager of Degerfors and had built up a good relationship with him. That said, Mr McCubbin said that his personal trust in the claimant had been damaged because of the emails sent in November and December 2018 to Mr Baan and the claimant had not replicated the relationship with the manager of Degerfors with other long products general managers. There is corroboration for Mr McCubbin's evidence in the contemporaneous note at page 333 (of the meeting of 17 January 2019).

128. Mr McCubbin also scored the other three candidates. Those scorings are at page 424. Mr Davis was given a total of 21 points, Ms Koivupalo scored 19 points and Ms Hiiakivi 22 points. Mr McCubbins' evidence that he is not a generous marker is borne out by these scores.
129. On 28 August 2019 Mr McCubbin emailed the claimant (page 426). He invited the claimant *"to raise any more points or ask any further questions around the criteria for the role of safety manager/projects and development"*. The criteria were then set out again for the benefit of the claimant. The claimant replied on 2 September 2019 to say that he was *"currently putting together a reply to last week's email and finding it challenging and upsetting."*
130. On 6 September 2019 Mr McCubbin told the claimant in a telephone call that he did not meet the minimum requirements for the safety projects and development manager role within the new organisation. Mr McCubbin says in paragraph 79 of his witness statement that, *"I had considered also if there were any other roles available for John and as far as I was aware there were no suitable alternative vacancies."* Mr McCubbin told the claimant that the role would now be advertised externally but that if he was successful in an appeal the external recruitment process would be halted. (We refer to paragraph 9.4 of the claimant's unfair dismissal witness statement).
131. On 9 September 2019, the claimant told Mr McCubbin that he wished to appeal against his decision. The appeal was to be heard by Mr Rodrigo.
132. Mr Rodrigo asked the claimant to self-assess his scores. Mr Rodrigo's email to this effect is at page 430 (dated 30 September 2019). Unfortunately, the claimant emailed Mr Rodrigo the same day to say that he found himself unable to open the document for fear of seeing some *"devastating opinions"* about him.
133. On 2 October 2019, Mr Rodrigo emailed the claimant (page 433). Mr Rodrigo said that he would be *"happy for you to be accompanied by a medical professional or a family member to support you during the appeal process. ... for avoidance of doubt your supporting person will be monitoring your well-being and not participating in the discussion about your performance evaluation."* Mr Rodrigo told the claimant that he was now at risk of redundancy as no other appropriate role was available. The appeal was scheduled for 25 October 2019. Ahead of the appeal, Mr Rodrigo reminded the claimant to complete his self-assessment rating (page 440).

134. The claimant replied on 11 October 2019 (page 439) to the effect that his poor mental health has affected all of the job criteria to some extent. He observed that, *“I’ve no idea how far the medical report will be specific enough to address each score in each category.”* He also said that his performance had been affected by his working relationship with Mr Tuutti. The claimant said that he was in the process of preparing an affidavit in support of his case that he did the best job he could *“under this fundamental handicap”*.
135. On 14 October 2019 the claimant emailed Mr Baan. He attached a draft of the affidavit. Amongst other things, he sought acknowledgement from Mr Baan that his *“long term and disabling illness and its damaging effects have been due to work-related stress”*. That email was passed to Mr Rodrigo who assured the claimant that the respondent *“takes complaints like this seriously”*. Mr Rodrigo proposed a number of actions *“in line with our code of conduct”*. Mr Rodrigo’s letter to the claimant to this effect is dated 18 October 2019 (pages 460 and 461). Mr Rodrigo said that he would look into the claimant’s complaints about Mr Tuutti from 2018 onwards detailed in the affidavit. Mr Rodrigo acknowledged that the claimant was drawing a link between the complaints in the affidavit on the one hand about the impact upon his health and Mr McCubbin’s decision that the claimant was not fit for the safety projects and development manager role on the other.
136. On 22 October 2019 Mr Rodrigo discussed the matter with the claimant. Mr Rodrigo told the claimant that he would focus upon his complaints about Mr Tuutti ostracising him in the general manager, health and safety, long products role. Mr Rodrigo again asked the claimant to complete his self-evaluation and sought medical evidence from the claimant.
137. Mr Rodrigo followed up this conversation in an email sent the following day (23 October 2019). Mr Rodrigo attached to the email a document commissioned by him from Mr McCubbin giving the latter’s reasoning for the scores. Annotations (in red font) have been made by Mr McCubbin to the criteria as well as to the reasoning for the scoring. Mr McCubbin denied that the criteria had been changed by the annotations. His position in evidence was that the annotations were by way of explanation of the criteria and the reasoning for the scores which he had given to the claimant.
138. The claimant swore the affidavit before a solicitor on 23 October 2019. The affidavit was in fact appended to the claimant’s claim form when his case was presented to the Tribunal.
139. The claimant notified Mr Rodrigo on 24 October 2019 that he did not feel mentally well enough to proceed with the appeal the following day. The claimant said (at page 474) that he was seeking urgent medical advice and had informed James Farmer of SOHAS (Sheffield Occupational Health Advisory Service) (who was going to accompany the claimant) that his attendance at the appeal the next day was no longer required. Mr Rodrigo replied the same day seeking the claimant’s medical report by return. The claimant replied on 26 October 2019 to the effect that he would pass the report on as soon as he could. The relevant emails are at pages 473 and 474 of the bundle.
140. On 25 October 2019 the claimant’s general practitioner Dr Joshi prepared a report dated 25 October 2019 (page 476). Dr Joshi said that the

claimant's *"mental health is very poor and he felt that this would be harmful to him to attend the appeal and that he wouldn't be able to fully represent himself, which I support. Mentally he is feeling a lot worse than he has done and to attend a meeting today would have been a significant setback to him. I am reviewing him at the end of next week to see how things are but appreciate your delaying the appeal meeting from today."*

141. On 26 October 2019 Mr Rodrigo asked the claimant for his grounds of appeal, his own evaluation of the selection criteria and any mitigating factors arising from his medical condition where possible. Mr Rodrigo asked for this information by 4 November 2019. He repeated his request for the claimant to send to him his medical report upon which he sought to rely in support of his case. Mr Rodrigo said that he was prepared to conduct the appeal based upon written submissions and would inform the claimant of the outcome of the appeal by 11 November 2019.
142. On 29 October 2019 the claimant replied (pages 477 and 478). He attached the letter from Dr Joshi at page 476. The claimant made it clear that the GP's report was distinct from the medical report upon which he sought to rely. The claimant said that the latter should be available *"next week"*. The claimant expressed reluctance to score himself against the criteria fearing that such an exercise would lack objectivity. The claimant also said that he wished to have an appeal hearing. He said that he wished to have a neutral person hear the appeal and *"for an external person to be allowed to represent me"*.
143. On 1 November 2019, a report was sent to Mr Rodrigo by Mr Farmer (pages 482 and 483). He opined that the claimant was likely to be a disabled person within the meaning of the 2010 Act. He suggested several adjustments to ensure that the claimant's disability *"does not unfairly influence the current redundancy selection process."* Mr Farmer suggested:
 - Flexibility concerning the issue of representation of the claimant at the appeal hearing;
 - A *"collection of suitable and fair assessments of John's performance from other managers and former managers that he has worked for prior to becoming ill"*;
 - Ensuring all medical evidence supplied by medical professionals is taken into account in relation to the effect that his mental health has had on his performance against the selection criteria.
144. Mr Farmer was also concerned that Mr Rodrigo had implored the claimant to desist from making defamatory remarks about Mr Tuutti. Mr Farmer said that this was inhibiting the claimant's ability to put his case effectively. The claimant was concerned that Mr Rodrigo intended to rule out *"implied criticisms of Kari Tuutti's behaviour"*.
145. On 7 November 2019 Mr Rodrigo attended the monthly 'labour market call.' Mr Rodrigo says in paragraph 59 of his witness statement that, *"This is a meeting in which we review our talent management picture and high potential performers within the group on a monthly basis. During this particular meeting on 7 November 2019 it was explained by Johann Steiner that there was still a significant need for costs savings and thus a number of further reductions in head count. In this meeting it was decided that all*

corporate positions that were open at the time across the business (including the safety projects and development manager role that John had applied for) would be closed. The role had been advertised internally and once it had not been filled, we had not recruited externally because we were awaiting the outcome of John's appeal. The decision to close all existing vacancies was made across the group. This meant that there were only to be three safety roles in Alistair's new blueprint for the EHS team instead of four."

146. On 11 November 2019 the claimant sent an email to Mr Rodrigo (pages 492 and 493). The claimant said that he would not be attending the appeal meeting schedule for that day. The claimant said that he was not able to attend because Mr Farmer was unable to represent him that day.
147. Mr Rodrigo replied the same day (page 492) to the effect that the appeal had been considered. However, before concluding it, he offered the claimant an opportunity for him and Mr Farmer to attend a meeting during the course of the week. Mr Rodrigo said that he aimed to conclude the appeal by 15 November at the latest. The claimant replied on 13 November 2019 (page 491) to say that Mr Farmer was not available until 22 November at the earliest. In the event, the appeal hearing was scheduled for 25 November 2019 to accommodate Mr Farmer.
148. Mr Rodrigo arranged an initial meeting (or a 'pre-meeting' as it became known) to take place on 15 November 2019. Mr Rodrigo arranged for David Scaife, vice president for supply chain controlling, to accompany the claimant.
149. The notes of the meeting are at pages 504 to 510. Ahead of the meeting, Mr Rodrigo had sent a letter to the claimant containing an agenda (page 502). Mr Rodrigo was seeking the following information from the claimant at the pre-meeting:
 - 125.1. The grounds for the claimant's appeal.
 - 125.2. An understanding of the claimant's medical condition and how it impacted upon performance during 2018.
 - 125.3. A list of senior managers who could provide further information relating to the claimant's past performance of a reasonable time frame.
 - 125.4. Confirmation that the claimant wished to be considered for any of the available roles in the H&S team.
150. Towards the end of the meeting, Mr Rodrigo told the claimant that the safety projects and development manager role was now no longer available. Mr Rodrigo confirmed that the consequence of this was that there were now four individuals affected by the EHS restructure and only three available positions.
151. On 18 November 2019, the claimant informed Mr Rodrigo that Peter Holes, currently employed by the respondent as a pension trustee, would be representing him at the appeal hearing and that Mr Scaife would attend for emotional support. On 20 November 2019 the claimant provided a list of managers whom he said would provide supportive feedback about the claimant's abilities. One of these was Mr Holes who provided positive

feedback upon the claimant for the period 1997 to 2006. This is at pages 516 to 518. He said that the task of assessing the claimant was *“nigh on impossible”* given the length of time that had elapsed since he worked with the claimant (page 523).

152. The claimant’s grounds for appeal are set out in the document dated 21 November 2019 (pages 529 to 542).
153. In summary, the claimant took issue with Mr McCubbin’s scoring against the nine criteria for the safety projects and development manager role. He considered that Mr Tuutti had had a strong influence on Mr McCubbin’s scoring (a contention which Mr McCubbin rejected in evidence). The claimant said that his *“history of mental ill health”* had been caused by workplace stress and was affecting his performance. He made reference to the affidavit which he had sworn complaining about Mr Tuutti’s behaviour. The claimant did not expressly address the issue of whether he was prepared to be considered for any of the three roles which were now available consequent upon the EHS reorganisation.
154. The appeal hearing went ahead on 25 November 2019. The claimant was in attendance accompanied by Mr Scaife and Mr Holes. Mr Rodrigo attended with HR support from Della Hatfield. The respondent’s notes are at pages 572 to 578. Mr Scaife’s notes are at pages 543 to 561. In the event, Mr Farmer did not attend.
155. We can see from the respondent’s notes that the claimant acknowledged the flexibility shown to him by the respondent upon the issues of representation and support. The issue of the discontinuance of recruitment for the safety projects and development manager role featured early in the appeal. Mr Holes clarified that the position now was that there were three jobs open for application. Mr Rodrigo confirmed this to be the case and that *“only within the team, criteria used for all roles was the same, process is that they can’t assume they have a job until we have been through this process.”*
156. Mr Holes said that the claimant believes Mr McCubbin’s scoring to be flawed because he had only worked alongside him over a limited period and that there was no consideration *“to health and [he was] influenced by others”*. The latter is plainly a reference to Mr Tuutti. Mr Rodrigo said that the purpose of the appeal panel was to review Mr McCubbin’s scores. The claimant said that his mental health issue had affected his performance. Mr Scaife’s notes are very much in the same vein as those of the respondent.
157. Mr Rodrigo complains, in paragraph 67 of his witness statement, that he found it very difficult to understand the claimant’s case about the impact of his health conditions upon the scores given to him by Mr McCubbin. Mr Rodrigo said that the claimant did not set out with any clarity how he felt Mr McCubbin’s scorings were harsh or wrong and spent a lot of the meeting referring back to Mr Tuutti.
158. Mr Rodrigo said that, *“We had earmarked six hours for the [appeal] meeting so we could have the necessary time needed for breaks and recesses and to allow for adequate time for discussion, to be thorough”*. The claimant did not, before the appeal, protest at the length of time afforded for the appeal meeting. Mr Rodrigo also gave unchallenged evidence (in paragraph 67 of

his witness statement) that a number of breaks were taken throughout the day.

159. On 29 November 2019, Mr Rodrigo sent to the claimant his findings upon the code of conduct investigation. The email of 29 November 2019 is at page 563 and the investigation findings may be found at pages 564 to 567. Mr Rodrigo's conclusion was that Mr Tuutti had not breached the code of conduct as alleged.
160. On 6 December 2019 the claimant contacted Mr Rodrigo. He said that he had been unable to bring himself to open Mr Rodrigo's report, assumed the claim had been rejected and said that he wished to appeal. Mr Rodrigo allowed the claimant to appeal notwithstanding that the time for doing so had expired.
161. On 9 January 2020 Mr Rodrigo emailed those named by the claimant in his email of 20 November 2019 as able to give supporting evidence for responses. Not all of those named by the claimant felt willing or able to provide supporting testimonials for him.
162. Mr Rodrigo then undertook the scoring exercise himself. This is at page 601A. He felt able to credit the claimant with an additional four points bringing up his total to 16 out of 36. However, this meant that he was the lowest scoring of the four individuals involved in the exercise.
163. In paragraph 75 of his witness statement, Mr Rodrigo comments that performance ratings had hitherto been more generous within the respondent's organisation. However, he explained that *"by 2019 it was very difficult to get an 'above expectations' or 'exceeds expectations' rating as the 'meet expectations' had become the expected level for those performing well."* Mr Rodrigo did not score the other three candidates for the three available posts. Mr Rodrigo's opinion was that he could not *"see any situation where John would have outscored the incumbents in the three other posts"*.
164. Mr Rodrigo said that he had taken into account the claimant's performance prior to 1 January 2018. He said that he had gone back and undertaken a five years' analysis using the performance reviews from 2014. However, Mr Rodrigo said (as had Mr McCubbin) that the issue was about filling the criteria for the role (set out at page 601A).
165. On 13 January 2020, Mr Rodrigo wrote to the claimant (pages 602 to 604). He confirmed his decision that the scores of the three other members of the EHS team were higher than the claimant had achieved. The claimant's employment was terminated with effect from 17 January 2020 by reason of redundancy. The claimant was paid compensation in lieu of notice.
166. It was put to Mr Rodrigo by Mr Ahmad that the claimant was afforded no right of appeal against his dismissal. Mr Rodrigo said that the respondent had gone through an appeal process upon the issue of the scoring exercise undertaken by Mr McCubbin. The claimant raised his right to a further appeal as an issue on 17 January 2020 (page 605).
167. A further meeting was held on 17 January 2020 (pages 608-612) attended by the claimant, Mr Scaife, Mr Rodrigo and Della Hatfield (HR business

partner operations). (Mr Rodrigo had in fact undertaken the scoring exercise at pages 601A in conjunction with Ms Hatfield).

168. The meeting confirmed that the claimant had exhausted his rights of appeal. He was informed that no further appeal would be afforded to him. The claimant confirmed his wish to appeal Mr Rodrigo's decision upon the code of conduct issue.
169. In paragraph 92 of his witness statement, Mr McCubbin says that Maarit Hilakivi had in fact left the respondent on 17 January 2020. He says in paragraph 92 of his witness statement that, "*We were in the process of recruiting to fulfil her role but a recruitment freeze was put in place during early 2020 meaning that we have not filled her role. Subsequently Maarit Koivupalo left the team on 3 September 2020 and due to financial constraints I have not replaced her. The health and safety team therefore now consists of just me as head of health and safety and Kevin Davis as senior safety manager at a senior level. We are also in the process of making further redundancies across Outokumpu due to a need to make significant costs savings. Thus even if both Maarit Hilakivi and Maarit Koivupalo had stayed with us until now, it is highly likely I would be having to make at least one and possibly two of the team redundant now. It is therefore in my opinion highly unlikely that even if John had not been made redundant in January 2020 he would still be employed now*".
170. Mr Steiner heard the appeal from the claimant concerning Mr Rodrigo's decision upon the code of conduct investigation into Mr Tuutti's treatment of the claimant from 1 January 2018. Mr Steiner wrote to the claimant on 21 February 2020 with confirmation of the rejection of his appeal. This is at page 623.

The issues in the case

171. Against this factual background, we now turn to a consideration of the issues. These are now set out:

Unfair dismissal (section 98 Employment Rights Act 1996)

- (1) *Was the claimant dismissed for a potentially fair reason pursuant to section 98(2)(b) of the ERA, namely redundancy?*
- (2) *Was it reasonable in all the circumstances of the case for the respondent to dismiss the claimant for that reason?*
- (3) *Did the respondent follow a fair procedure in terminating the claimant's employment?*
- (4) *If the claimant was unfairly dismissed on procedural grounds, would he have been fairly dismissed in any event and should there therefore be a Polkey reduction to any award of compensation?*

Disability discrimination (Equality Act 2010 ("EQA"))

Discrimination arising from disability (section 15 EQA)

- (1) *Did the following thing(s) arise in consequence of the claimant's disability?*
 - (a) *An adverse impact on the claimant's performance and behaviours in his role (eg poor concentration, poor memory, procrastination of*

distressing tasks and obsessive thoughts) from the end of 2017 onwards;

- (b) Difficulties in dealing with the redundancy process (including the claimant's ability to contribute to redundancy consultation meetings); and*
 - (c) The claimant's sickness absences from October 2017 to January 2018 and from January 2019 onwards.*
- (2) Did the respondent subject the claimant to the alleged treatment set out below by:*
- (a) Scoring him against its redundancy criteria in August 2019 without taking account of his performance and behaviours prior to 2017 (ie when the claimant's anxiety and depression started);*
 - (b) Failing to adjust his score to take into account the impact of his disability on his performance and behaviours and the prognosis of the claimant's condition. (The claimant states that the scoring adjustments made by the respondent in 2019 were inadequate);*
 - (c) Failing to adjust its redundancy process meetings to enable the claimant to participate properly in those meetings, including a six hour meeting in November 2019; and*
 - (d) Taking the decision to dismiss the claimant and failing to uphold his appeals; and*
 - (e) Dismissing the claimant on 17 January 2020 after his appeals were rejected?*
- (3) If so, was such treatment unfavourable?*
- (4) If so, was such treatment because of something arising from the claimant's disability (as identified at paragraph (1) above)?*
- (5) If so, has the respondent shown that the unfavourable treatment and/or the claimant's dismissal was a proportionate means of achieving a legitimate aim?*
- (6) Alternatively has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?*

Reasonable adjustments

- (7) Did the respondent not know and could it not reasonably have been expected to know that the claimant was a disabled person at the relevant time?*
- (8) The respondent accepts that it applied a provision, criterion or practice ("PCP") to the claimant when it:*
- (a) Scored the claimant against its redundancy criteria; and*
 - (b) Consulted with the claimant during its redundancy process in 2019.*
- (9) Did any such PCP put the claimant at a substantive disadvantage in relation to a relevant matter in comparison with persons who are not disabled? In particular, was the claimant put at the following disadvantages:*

- (a) *The claimant's performance and behaviours were affected adversely by his disability for the period from 2017 to 2019 against which he was scored under the respondent's redundancy criteria; and*
- (b) *The claimant was unable to participate properly in the redundancy consultation process due to the impact of his disability.*
- (10) *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?*
- (11) *If so, were there steps that were taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant. However, the claimant alleges that the following steps should have been taken in relation to his condition:*
- (a) *The claimant's redundancy scores should have reflected his performance and behaviours prior to the start of his anxiety and depression in 2017;*
- (b) *The claimant's redundancy scores should have been adjusted, to take into account the impact of his anxiety and depression on his performance and behaviours from 2017 onwards;*
- (c) *The respondent should have adjusted its redundancy consultation process to enable the claimant to participate properly in the process;*
- (d) *The respondent should have sought medical advice on the claimant's condition and prognosis and taken this into account during the redundancy process.*
- (12) *If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?*
172. The legitimate aims were set out by the respondent in an email sent to the Tribunal by the respondent's solicitors on 31 October 2020. This is at page 70AAA. The legitimate aims on which the respondent intends to rely are as follows:
- To organise its business in the most efficient and most effective way to meet the new business plan introduced by blueprint and the commercial challenges facing the business (both internally and externally);
 - To recruit the person with the most relevant skill set to the available roles who would deliver the required work to the highest standard;
 - To ensure a streamlined and effective workforce and achieve efficiency in delivery;
 - To achieve cost savings and efficiency across its business;
 - To use criteria designed to select the employee most likely to make a success of the role in question;
 - To achieve a fair method of selecting employees for relevant roles;
 - To select the correct number of employees required for the roles available;

- To achieve an overall fair process in scoring taking into account relevant factors and trying to achieve a fair balance when scoring the individuals;
- To conduct the redundancy process within a reasonable time frame having regard to the interests of all employees.

The relevant law and conclusions

173. We shall now turn to the relevant law and our conclusions. These have been reached by the Tribunal following our findings of fact and by application of the findings of fact to the relevant issues.
174. We shall start with the complaint of unfair dismissal. The first question that arises is whether the claimant was dismissed for a potentially fair reason, namely redundancy. There is, of course, no dispute that the claimant was dismissed and that he has the right to complain that he was unfairly dismissed.
175. It is for the respondent to establish one of the permitted reasons for dismissal. The relevant permitted reason in this case is redundancy.
176. Redundancy is defined in section 139(1) of the 1996 Act. The definition applies both to claims for redundancy payments (which does not arise in this case) and to unfair dismissal. The statutory words are familiar to the parties and shall not be repeated here. In essence, redundancy covers the following situations:
- Closure of the business;
 - Closure of the employee's workplace;
 - A diminution or cessation of need for employees to do the available work.
177. It is the last of these three situations with which we are concerned. While these basic descriptions are convenient for ease of reference, it is always important to have regard to the exact wording of section 139(1), as the dismissal is not a redundancy unless it falls within that section.
178. What is relevant for our purpose therefore is a determination of whether the requirements of the business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, had ceased or diminished or were expected to cease or diminish.
179. A diminishing need for employees covers three separate situations:
- Where work of a particular kind has diminished, so that employees have become surplus to requirements;
 - Where work has not diminished, but fewer employees are needed to do it, either because the employees have been replaced (by an automated system or such like) or because of a re-organisation which results in a more efficient use of labour. If fewer employees are needed to do the work of a particular kind there is a redundancy situation. In **Safeway Stores Plc v Burrell** [1997] ICR 523 EAT,

HHJ Peter Clarke set out a three-stage test. The Tribunal must decide:

- (1) Was the employee dismissed?
- (2) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
- (3) If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

The only question to be asked when determining the second stage of the three-stage test is whether there was a diminution in the employer's requirements for employees (rather than the individual claimant) to carry out work of a particular kind.

The **Burrell** test was endorsed by the House of Lords in **Murray and Others v Foyle Meats Limited** [1999] ICR 827, HL. There, Lord Irvine held that the key word in section 139 was "*attributable*" (in that the dismissal must be attributable to one of the three redundancy situations set out in the section as summarised in paragraph 176). The Tribunal must therefore identify whether there exists one of the various states of economic affairs mentioned in the section. The second question is one of causation – whether the dismissal is wholly or mainly attributable to that state of affairs.

180. In the Tribunal's judgment, the respondent has established there to be a redundancy situation. Because of the re-organisation brought about by the Organisational Blueprint Project, changes were made to the EHS ('environment, health and safety') section of the respondent. Work of a particular kind had ceased or diminished or was expected to cease or diminish. The work of a particular kind in question was the general management of health and safety, Long Products. As Mr McCubbin put it in paragraph 62 of his witness statement, "*Having a dedicated health and safety manager within Long Products was not viable. I felt it was important to bring Long Products within the rest of the business to create a streamlined approach to health and safety.*" Therefore, there was a diminution or cessation (or expected diminution or cessation) of a health and safety manager dedicated to a particular part of the business (in this case, long products).
181. An unusual feature of this case is that the employer made an announcement to those affected that going forward there were to be four roles covering all of the business areas and four employees for those roles. This was described by Mr McCubbin in paragraph 60 of his witness statement. Then, during the course of the consultation exercise, one of those four roles was not proceeded with and discontinued. This happened before the reorganisation in fact came in to being.
182. A point may therefore be said to arise as to whether there was a cessation or diminution (or expected cessation or diminution) of work as a safety projects and development manager in circumstances where the post was created but was abolished or aborted before anyone had occupied it. How can it be said that work of that particular kind ceased or diminished in circumstances where it in fact never took place at all?

183. However, our finding is that as a matter of causation the claimant's dismissal was mainly (if not wholly) attributable to the anticipated diminution or cessation of work of the kind that he was carrying out in his substantive role of general manager, health and safety, long products. If we are wrong on that, then as a matter of causation the anticipated cessation of work in his substantive role was a material reason for his dismissal as was the anticipated cessation of work in the new safety, projects and development manager role. Either way, the claimant was dismissed by reason of redundancy caused by the cessation of his substantive role and the respondent has succeeded in establishing that redundancy was the reason for dismissal.
184. A redundancy dismissal may, of course, still be unreasonable and therefore unfair under the general unfair dismissal provisions contained in section 98(4) of the 1996 Act. This states that *"The determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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 the equity and the substantial merits of the case".*

While there is a burden upon the respondent to establish a permitted reason for dismissal, there is no burden (or, as it is sometimes said, there is a neutral burden) upon the question of reasonableness. It is not enough to show that it was reasonable to dismiss an employee: the Tribunal must be satisfied that it was reasonable to dismiss the employee in question.

185. Mr Ahmad, at paragraph 8 of his submissions, says that, *"In redundancy cases, it is well established law that the Tribunal does not make what are relevant commercial and business decisions of the employer. Those remain strategic, operational and managerial business decisions and prerogative of the employer, not the Tribunal. Likewise, the tribunal does not make a decision on what it would have done, in the circumstances facing the employer, but comes to a decision that is one step removed in terms of whether a reasonable employer would have come to the decision that this employer came to"*.
186. In a similar vein, Ms Palmer says (at paragraph 24 of her submissions) that there is a need for the Tribunal to avoid substitution. She referred the Tribunal to the well-known *dicta* in **Iceland Frozen Foods v Jones** [1982] IRLR 439 in which the Employment Appeal Tribunal gave the following guidance to tribunals on the approach to considering fairness under section 98(4) of the 1996 Act:
- "(1) The starting point should always be the words of section 98(4) themselves;*
 - (2) In applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) considered the dismissal to be fair;*

- (3) *In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what the right course to adopt was for that of the employer;*
- (4) *In many (though not all) cases there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view, another quite reasonably take another;*
- (5) *The function of the Employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."*

187. At the heart of many unfair dismissal complaints is the question of consultation. Mr Ahmad recognises very fairly that the commercial and business decisions taken by the employer are not matters for the Tribunal. Authority for the proposition that the merits of a re-organisation are not a matter for consultation (other than in the context of a collective consultation exercise) may be found in **Samsung Electronics (UK) Limited v Monte-D'Cruz** (UK EAT/0039/11). Like the case before us, this case arose out of a re-organisation (of the employer's print division). In paragraph 20 HHJ Underhill (President) said that, *"the merits of the re-organisation as such were not a matter for consultation. What the claimant was entitled to be consulted about was how it affected him"*. (That the position is different in a collective consultation case is confirmed by **R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and Others** [1994] IRLR 72, Div Ct. There, Lord Justice Glidewell said that fair consultation means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond and conscientious consideration by any authority of the response).

188. In **Williams and others v Compair Maxam Limited** [1982] ICR, 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stressed however that in determining the question of reasonableness it was not for the Employment Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether *"the dismissal lay within the range of conduct which a reasonable employer could have adopted"*. The factors suggested by the EAT that a reasonable employer might be expected to consider were:

- Whether the selection criteria were objectively chosen and fairly applied;
- Whether employees were warned and consulted about the redundancy;
- Whether, if there was a union, the union's views were sought; and
- Whether any alternative work was available

189. In **Morgan v Welsh Rugby Union** [2011] IRLR 376 the EAT (HHJ Richardson) held that the factors set out by **Williams** in respect of redundancy selection are not principles of law but standards of behaviour.

“A failure to have regard to one of those factors would not, by itself, constitute a misdirection by the Tribunal.” Moreover, the **Williams** factors are applicable to the selection of employees who are to be made redundant from within an existing group. *“There are some redundancy cases where redundancy arises in consequence of re-organisation and there are new, different, roles to be filled. The factors set out in Williams do not seek to address the process by which such roles are to be filled. Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer’s decision must of necessity be forward looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Whereas Williams-type selection will involve consultation and a meeting, appointment to a new role is likely to involve something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion.”*

190. It was held in **Morgan** that a Tribunal is entitled to consider as part of its deliberations how far an interview process was objective, *“but it should keep carefully in mind that an employer’s assessment of which candidates will best perform in a new role is likely to involve a substantial element of judgment. A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment and whether they were fair. A Tribunal is entitled to consider whether an appointment was made capriciously, or out of favouritism or on personal grounds.”*
191. In **Samsung Electronics** the Tribunal found as a fact that the employer was furnished with information about the re-organisation and its impact upon him. The employer told the claimant what was happening and why and that he may apply for new roles within the revised organisation.
192. The Employment Tribunal in **Samsung Electronics** was critical that the claimant was not told of the selection criteria to be used at interview. The EAT held that the phrase *“selection criteria”* is *“not quite the right language”*. The EAT said (in paragraph 20(a)) that this was a situation where the claimant’s job was being abolished but he was being offered the chance to apply for a different job. The EAT said that, *“The real question is whether it was unfair that the claimant was not told in advance of the interview what scoring method would be used in assessing him against any other candidate. We cannot see that it was, and the Tribunal does not explain why it should be. The claimant himself did not, either at the time or in his evidence to the Tribunal, complain of any unfairness in this regard.”*
193. The Tribunal was also critical of the use by the employer in **Samsung Electronics** of subjective criteria. The EAT held that (in paragraph 27) that, *“the fact that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement and certainly not in the context of an interview for alternative employment.”*
194. The issue of an assessment of the employee’s suitability for the new role by reference to past performance in a different role was also considered in

Samsung Electronics. The EAT observed that the assessment tools to use in an interview of this kind is *prima facie* a matter for the discretion of the employer. We refer to paragraph 38 of the report of the decision. The EAT tentatively suggested that if the Employment Tribunal meant to say that the employer ought to have taken into account past performance appraisals then they were at risk of falling into the trap of substitution.

195. The EAT found that the employer in **Samsung Electronics** acted within the range of reasonable responses by choosing to interview the employee for the new role “*on a forward-looking basis (cf. the observations of Judge Richardson in Morgan)*.” In paragraph 39, the EAT said that, “*good faith assessments of an employee’s qualities are not normally liable to be second guessed by an Employment Tribunal*”. It is no part of the Tribunal’s function to subject redundancy selection criteria or the employer’s application of them to undue and microscopic scrutiny.
196. The employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of the employer. Authority for this proposition may be found in **British Aerospace Plc v Green and Others** [1995] ICR 1006, CA. All the employer has to show is that the method of selection was fair in general terms and that it was reasonably applied to the employee concerned.
197. The principle that Tribunals should not subject redundancy selection criteria or the employee’s application of them to undue scrutiny applies even where two groups of employees are scored separately and no system of moderation is used. In **First Scottish Searching Services Limited v McDine and another** (EAT) 0051/10, the EAT said that the Tribunal had been wrong to find that identification of a risk in the system meant that the dismissals were unfair. The Tribunal had substituted its view for that of a reasonable employer in deciding that there was a need for moderation. That said, where there is clear evidence of unfair and inconsistent scoring, any subsequent dismissals are likely to be unfair. Unexplained quirks in scoring may form the basis of an unfair dismissal complaint.
198. On the facts of this case, the claimant was provided with information about the proposed Organisational Blueprint project. He was given this information by Mr Rodrigo on 20 June 2019. He was told that the consultation process was to commence on 1 July 2019.
199. Upon the authority of **Samsung Electronics**, the respondent’s action was within the range of reasonable responses of the reasonable employer. The giving of information is the first stage in any consultation.
200. After that, the claimant was notified of the roles which were available for him to apply for. At that stage, there were, of course, four. The claimant replied to say that he identified two posts in which he was interested. Shortly after that, he withdrew his interest in one of them in deference to Mr Davis but said that he was still interested in the safety project and development manager role. Following that expression of interest, Mr McCubbin took the claimant through the criteria for the role. The claimant was aware that he would be assessed by Mr McCubbin against the criteria. Mr Rodrigo had made it clear that a selection exercise was to be undertaken with a view to appointing into the four available positions. There was dialogue between

Mr McCubbin and the claimant. Mr McCubbin talked the claimant through the criteria on 15 August 2019 and invited questions about the criteria in his email of 28 August 2019.

201. There was no consultation with the claimant or any of the other affected employees upon the criteria themselves. However, this was a forward-looking exercise as described in **Morgan**. The employer was seeking to appoint to new roles during a re-organisation. A similar criticism of the employer was raised in **Samsung Electronics**. HHJ Underhill (as he then was) could see nothing unfair in the employee in that case not being told in advance of the interview scoring method. The authorities are clear that in a '**Morgan** – type' redundancy (as opposed to a '**Williams** – type' redundancy) the employer's decision is of necessity forward looking and that the employer's assessment of which candidates will best perform in a new role will involve a substantial element of judgement and that it is for the employer to devise the best method of making that assessment.
202. Therefore, while we can accept that some employers may have consulted with the affected employees upon the criteria for the new roles within the re-organised EHS section, it cannot be said that a failure to do so falls outside the range of reasonable managerial prerogative. In our judgment, up to the point of Mr McCubbin undertaking his scoring exercise, the respondent's conduct fell within the range of reasonable responses to the situation in which management found itself.
203. In our judgment, Mr McCubbin's scorings did not take the process outside the band of reasonableness. Again, it would certainly fall within the band of reasonableness to have involved some kind of moderation by having more than one assessment of the employees' suitability for the new roles. However, a failure to do so cannot take the process outside the band of reasonableness. The Tribunal was left in no doubt that Mr McCubbin was uninfluenced (and unlikely to be influenced) by any external factors (such as Mr Tuutti or Mr Baan). It also fell within the range of reasonable responses for Mr McCubbin to leave out of account the claimant's performance in his role as general manager of SMACC. The claimant's considerable attributes in that role were not relevant to an assessment of his suitability for the new role of safety projects and development manager. The claimant's performance in the substantive role under the line management of Mr McCubbin was reasonably considered by the respondent to be all that mattered. Again, some employers would have taken into account past performance in different roles. That this employer did not do so does not take matters outside the band of reasonableness.
204. There was no evidence that Mr McCubbin behaved capriciously or unfairly towards the claimant. The Tribunal is satisfied that Mr McCubbin is possessed of such strength of character as to be uninfluenced by others. Further, it is not credible that Mr McCubbin participated in some kind of conspiracy to manage the claimant out of the business. We accept that Mr Baan wished to remove the claimant from his role as general manager of SMACC. That is plain from page 85. However, that is a different thing from a wish to remove the claimant from the business altogether. Had that been the respondent's intention, it is an odd thing to do for them to have created a new role for the claimant following his removal from his position within SMACC. As Mr Rodrigo said, had the respondent been so motivated

he may possibly have been fairly dismissed upon capability grounds towards the end of 2017. Additionally, the indulgence given by the respondent to the claimant in deferring the implementation of Operation Blueprint within Mr McCubbin's department sits oddly with an allegation that the respondent was determined to manage the claimant out and was conspiring against him.

205. It is our judgment, therefore, that Mr McCubbin acted fairly and reasonably when undertaking the scoring of the four affected employees. There is simply insufficient evidence that this was undertaken capriciously, unfairly or unreasonably. There was simply no evidence that he did so. Mr McCubbin's decision that the claimant did not meet the essential criteria for the new role of safety projects and development manager is a reasonable one which fell within the range of reasonable responses and which followed the undertaking by the respondent of a reasonable process.
206. The claimant was also afforded a right of appeal against Mr McCubbin's decision. Ms Palmer is right to draw to the Tribunal's attention that the ACAS Code on Disciplinary and Grievance Procedures expressly provides that it does not apply to redundancy dismissals. There is no code for redundancy dismissals. ACAS do provide advice to employees as to their rights in a redundancy situation. She is right to submit that there is no right of appeal in the circumstances.
207. Case law has established that a failure by the employer to consult an employee before dismissal can be cured at an appeal hearing after that date. So long as the appeal hearing is sufficiently thorough to cure earlier procedural shortcomings, unfairness may be rectified. Authority for this proposition may be found in **Taylor v OCS Group Limited** [2006] ICR 1602, CA. The Northern Ireland Court of Appeal held in **Robinson v Ulster Carpet Mills Ltd** [199] IRLR 348 that there is no general requirement for the employer to provide an employee selected for redundancy with an appeal. It is all a question of fairness by application of the range of reasonable responses test.
208. Notwithstanding the absence of a right of appeal, therefore, the respondent nonetheless afforded the claimant the opportunity so to do upon Mr McCubbin's decision. In our judgment, the claimant was afforded every opportunity to advance his case. There was, of course, no obstruction of the claimant's right to be represented by a work colleague. Mr Rodrigo said that Mr Farmer may attend the appeal hearing in a supportive capacity. (In the event, of course, Mr Farmer did not attend).
209. During the course of the pre-appeal meeting, Mr Rodrigo informed the claimant of a significant change of circumstance. The safety projects and development manager role was now not proceeding. This did put a different complexion upon matters as hitherto the claimant was rightly proceeding upon the basis that there were four affected employees and four available positions.
210. The evidence is that none of the other three affected employees had been confirmed in their new roles pending the outcome of their appeals. That said, it is plain from the evidence (particularly that of Mr McCubbin) that the other three were considered something of a shoe-in. The phrase used by Mr McCubbin in paragraph 63 of his witness statement is that three of the

roles from the old structure were “*almost identically mapped across to the first three roles that I have listed in the new structure*”. Mr McCubbin also uses the word “*new*” to describe the safety projects and development manager role in which the claimant expressed interest. He does not use the same adjective to describe the other three roles.

211. The claimant may therefore have reasonably taken the view that there was something of an inevitability in the outcome that he was scored the lowest of the four affected employees now vying for three positions.
212. That said, Mr Rodrigo did all that may reasonably be expected of him. On 15 November 2019 he asked the claimant for confirmation that he wished to be considered for any of the other three available roles. The claimant’s response of 25 November 2019 (by way of the grounds of appeal commencing at page 529) is somewhat opaque upon this issue. As far as we can see, the claimant does not expressly say that he wished to be considered for the other three roles. At any rate, we were not taken to the section of the notes where he gives that unequivocal confirmation. Nevertheless, Mr Rodrigo proceeded upon the basis that the claimant was seeking selection for one of the three available roles. He was scored accordingly.
213. Mr Rodrigo decided to take into account to some degree the claimant’s performance in his substantive role in SMACC. That he did so does not render Mr McCubbin’s approach one that falls outside the band of reasonableness for the reasons as we have explained.
214. Again, Mr Rodrigo was scoring the claimant upon a forward-looking basis considering his suitability for the claimant to fill one of the available roles. The claimant was of course competing against three others all of whom, according to Mr McCubbin, occupied substantive roles identically matched to the new roles. Mr Rodrigo denied that he was heavily reliant upon Mr McCubbin. The Tribunal cannot accept that evidence. Apart from anything else, Mr Rodrigo did not score the other three candidates when he undertook his exercise and must therefore have relied on Mr McCubbin’s assessment. In the final analysis however the Tribunal’s task is to assess the reasonableness of the approach to the exercise as a whole. This was inevitably a forward-looking exercise. It was Mr McCubbin who knew the attributes being sought for the incumbents of roles in the reorganised EHS section. Mr Rodrigo did consider the claimant’s past performance. There was no suggestion or basis upon which to find that Mr Rodrigo approached the task capriciously or in bad faith. On the contrary, it was clear that Mr Rodrigo had a high regard and respect for the claimant.
215. Although no mention was made in the termination letter by Mr Rodrigo of alternative employment, the Tribunal is satisfied that Mr Rodrigo did consider that question (as did Mr McCubbin). We find credible Mr Rodrigo’s account that nothing was available. This is consistent with a significant reduction in head count and a need to find significant costs savings and Mr McCubbin’s evidence towards the end of his witness statement (around paragraph 92) about a further reduction in the number of employees.
216. We find that it was within the range of reasonable responses not to permit the claimant a further appeal following the decision by Mr Rodrigo to terminate the contract of employment. In reality, the claimant’s appeal

would have been around the alleged unfair scoring and selection of him. That exercise had been gone through by Mr Rodrigo in the appeal against Mr McCubbins' decision which he conducted in the latter part of 2019. The claimant does not have a right to appeal against dismissal for redundancy. As we said, this is all a question of reasonableness. Had there been no right of appeal against Mr McCubbin's scoring, then we would have found in the claimant's favour upon this point. However, such an appeal was afforded and was taken up by the claimant. It would simply have been to re-visit old ground to permit the claimant what would effectively have been a second appeal covering much the same territory.

217. Therefore, in all the circumstances, the Tribunal finds that the claimant's dismissal was fair. It was reasonable to dismiss an employee by reason of redundancy and it was reasonable to dismiss the claimant (as opposed to any of the other three) for the reasons which we have given. The unfair dismissal complaint stands dismissed accordingly.
218. We now turn to the complaint of disability discrimination. We shall start with the consideration of a complaint brought under section 15 of the 2010 Act. It is unlawful for an employer to treat a disabled person unfavourably not because of the disability itself (which would of course amount to direct discrimination) but because of something arising from, or in consequence of a person's disability. An employer has a defence and can justify unfavourable treatment upon the basis that it is a proportionate means of achieving a legitimate aim. In order to be liable, the employer must know or be reasonably expected to have known that the disabled person has a disability.
219. The initial burden of making out a *prima facie* case of discrimination related to disability rests with the claimant. If he succeeds in so doing, then the burden will shift to the respondent to prove that the matters complained of are in no way tainted by discrimination.
220. Upon the consideration of unfavourable treatment, there is no need to compare a disabled person's treatment with that of another person. Unfavourable treatment means in this context putting the employee at a disadvantage. The consequences of the disability which give rise to the disadvantage includes anything which is the result, effect or outcome of a disabled person's disability.
221. An act or omission can occur because of something arising from the disability as long as that operates upon the mind of the putative discriminator consciously or subconsciously to a significant extent. The starting point is to identify the individual responsible for the act or omission in question. Then, it is necessary to consider what their thought processes, conscious or subconscious were. The focus should be on whether the putative discriminator was consciously or subconsciously influenced by the "*something*" which in fact arises in consequence of the disability. The disability may not be the sole cause of the treatment. It is enough that it has a significant influence.
222. A Tribunal must then determine whether "*the something*" arises in consequence of the claimant's disability. The expression "*arising in consequence of*" can describe a range of causal links. Whether the "*something*" does arise in consequence of the disability is a question of fact

- to be assessed robustly. Unlike when assessing whether the “*something*” was the reason for the unfavourable treatment this stage of the causation test (whether the “*something*” arose in consequence of the claimant’s disability) is an objective question that does not depend on the thought processes of the alleged discriminator. It requires consideration of whether objectively there is a causal link between the disability and the “*something*”.
223. It is not therefore a requirement that the putative discriminator knows that the “*something*” arose in consequence of the claimant’s disability. For the purposes of the section 15 claim, the employer will have a defence of lack of knowledge: that the employer did not know and could not reasonably be expected to know of the disability. Lack of knowledge that the “*something*” arose in consequence of the claimant’s disability will not afford a defence.
224. Authority for the propositions just set out may be found in the cases of **Pnaiser v NHS England** (UK EAT) 0137/15 and **City of York Council v Grosset** [2018] EWCA Civ 1105.
225. In this case, Ms Palmer confirmed that for the purposes of the section 15 claim, no issue is taken by the respondent of lack of knowledge. However, the respondent seeks to defend the section 15 claim upon the basis that, were the Tribunal to find there to be unfavourable treatment for something arising in consequence of disability, that unfavourable treatment is justified as a proportionate means of achieving a legitimate aim.
226. The legitimate aim in question must be legal and must not be discriminatory in itself. The legitimate aims relied upon by the respondent are set out in paragraph 172 above. These must present a real and objective consideration.
227. To be proportionate, the measure has to be both an appropriate means of achieving the aim and reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. This is an objective test. It is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. The Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirement. It is necessary to consider the particular treatment of the employee in question in order to consider whether that treatment was a proportionate means of achieving a legitimate aim.
228. There is no issue that the matters set out in 1(a) and (c) in paragraph 171 arise in consequence of the claimant’s disability. That is to say, the respondent concedes that arising from the claimant’s disability were an adverse impact upon his performance and behaviours in his role from the end of 2017 onwards and his sickness absences between October 2017 and January 2018 and from January 2019 onwards.
229. Issue is taken by the respondent with the issue in 1(b), that being the claimant’s contention that difficulties in dealing with the redundancy process (including the claimant’s ability to contribute to redundancy consultation meetings) arose in consequence of disability in the ways identified in .
230. The Tribunal finds as a fact that the claimant experienced difficulties in dealing with the process and that those difficulties were for something

arising in consequence of disability. There is little doubt that the claimant found the process stressful. The claimant found it challenging and upsetting to engage with Mr McCubbin (see for example the email of 2 September 2019 at page 425) and the difficulty which the claimant experienced in engaging with Mr Rodrigo's request to score himself against the criteria. There were a number of postponements of the appeal hearing before Mr Rodrigo on account of the claimant's mental health and the need to accommodate Mr Farmer's availability as the claimant's supporter. The claimant's general practitioner confirmed in the letter of 25 October 2019 the claimant's mental health was very poor and that it would be harmful for him to attend the appeal. In the circumstances, the Tribunal has little hesitation in finding that the claimant's ability to engage with redundancy process was adversely impacted in consequence of his disability.

231. The next question that arises, therefore, is whether the respondent subjected the claimant to unfavourable treatment in the five ways set out in sub-paragraph 2 of paragraph 177 above. Dealing with each in turn:

(a) We find that Mr McCubbin did not score him against the redundancy criteria in August 2019 by reference to past performance prior to 2017 but Mr Rodrigo did so.

(b) We find that Mr McCubbin failed to adjust his scores to take into account the impact of the claimant's disability upon his performance and behaviours but that Mr Rodrigo did so. The issues in sub-paragraphs (a) and (b) here really run together and really amount to different ways of saying the same thing. This is because the claimant's performance, certainly prior to 2017, was unaffected by disability and Mr Rodrigo uplifting the scores to take account of pre-2017 performance would necessarily have the effect of taking into account the impact of disability upon it. That said, we accept Mr Rodrigo's observations in paragraph 82 of his witness statement that it was difficult to separate out the impact of disability from performance. In conclusion therefore, there was unfavourable treatment of the claimant in respect of these two matters, particularly by Mr McCubbin.

(c) The alleged failure to adjust the redundancy process meetings to enable the claimant to participate fails upon the facts. The only meeting cited was that of 25 November 2019. We find that the claimant did not object to time allocation given to it beforehand and that regular breaks were permitted during it. Thus, there was no unfavourable treatment of the claimant in respect of this item.

(d) (e) It is convenient to take these together. Mr Rodrigo's decision to dismiss the claimant and to fail to uphold his appeals were unfavourable treatment.

232. In summary, therefore, the respondent subjected the claimant to the following unfavourable treatment:

232.1 Scoring him against the redundancy criteria in August 2019 and failing to adjust his scores at that time without taking into account the impact of his disability on his performance.

232.2. Dismissing the claimant and dismissing his appeal against selection for redundancy.

233. The next issue is one of causation. Did the unfavourable treatment identified in paragraphs 231 and 232 arise in consequence of the disability in the ways identified in paragraphs 229 and 230?
234. The Tribunal has little hesitation in finding that the claimant's disability impacted upon his performance such that he was found wanting towards the latter end of the period in which he held the SMACC general manager role and during the entirety of the period when he held the position of general manager, health and safety, long products. The poor performance was attributable to disability and sickness absence caused by it.
235. Whatever the cause of the disability (and causation of disability is not a matter for the Tribunal) the deterioration in the claimant's performance was noted by longstanding colleagues. The mental impairment was therefore a material reason for the claimant's performance as general manager, health and safety, long products being found wanting by Mr McCubbin and resulted at least in part in the low scores which the claimant achieved. Another way of putting the same thing is that the failure to adjust the scores to compensate for the impact of disability upon the claimant was unfavourable treatment for something arising in consequence of disability. Mr McCubbin's decision, therefore, not to select the claimant for the new role was something which arose in consequence of disability. The disability played a more than minor or trivial part in the poor performance which led to Mr McCubbin's decision that the claimant should not be appointed to the new role.
236. Mr Rodrigo sought to compensate the claimant by uplifting the scores. Mr Rodrigo did his best, we find, to credit the claimant with his generally good or excellent pre-2017 performance and to effectively remove from account the impact of the disability upon the claimant. From that perspective, therefore, Mr Rodrigo's conduct was not unfavourable treatment for something arising in consequence of disability. In fact, it was the opposite. Mr Rodrigo sought to make a compensating adjustment to the claimant's scores. Therefore, the dismissal of the claimant's appeal and Mr Rodrigo's decision to dismiss the claimant from employment were not unfavourable treatment for something arising in consequence of disability but rather Mr Rodrigo's assessment that the claimant was not suitable for one of the three roles that were available after he became involved in the matter. Mr Rodrigo treated the claimant unfavourably by dismissing him and dismissing his appeal, but that was because of his assessment of the claimant's abilities effectively ignoring the impact of the disability and was thus not unfavourable treatment for something arising in consequence of it.
237. Even if we are wrong upon this, we hold that Mr Rodrigo's treatment of the claimant in dismissing the claimant from employment and dismissing the claimant's appeal against Mr McCubbin's decision about the claimant's application for the new role were a proportionate means of achieving the legitimate aims.
238. There was no suggestion by Mr Ahmad that any of the legitimate aims pleaded by the respondent at page 70AAA were not lawful or real objective considerations. Plainly, all of them are.
239. There was a real need for the respondent to employ those with the most relevant skill set for the new positions within the restructured organisation.

Mr McCubbin was upfront about this when he said that the other three employees within the affected group could be almost identically mapped across. This was unfortunate for the claimant. However, it is of course within the respondent's prerogative to re-organise its business as it sees fit and it is legitimate to map across into new roles candidates who have proven their work in their old substantive roles.

240. In our judgment, it was proportionate to achieve the legitimate aims to embark upon a selection exercise such as that undertaken by the respondent. For the reasons that we have given in the unfair dismissal complaint, there is little to be criticised in the respondent's approach to matters. An assessment of some kind had to be undertaken. Mr McCubbin is an individual possessed of great experience in health and safety matters. He was very well positioned to make an assessment of those candidates best able to fulfil the roles in the new organisation which he had devised.
241. It is very unfortunate for the claimant that the fourth (new) role was aborted or abolished before it came on stream. In any case, of course, Mr McCubbin had assessed the claimant as not matching the essential skill set for it. Again, Mr McCubbin's conduct represents a real and objective consideration of filling the available roles with the best able candidates.
242. Again, it is unfortunate for the claimant that no other alternatives were available. That is an unfortunate consequence of the economic circumstances in which the respondent found itself. The Tribunal has to balance as objectively as possible the needs of the employer on the one hand against those of the employee on the other. The impact upon this employee was of course highly significant as it entailed the loss of his job and an end to a career spanning over four decades. That is not, of course, to be taken lightly. However, the employer is not obliged to create a position for the employee. The respondent's actions were, in the circumstances proportionate given that a careful selection exercise was carried out and the consideration of alternative positions was undertaken against a background of economic stricture.
243. We now turn to the reasonable adjustments claim. Again, it is for the claimant to show a *prima facie* case of discrimination by way of failure to make reasonable adjustments.
244. The Tribunal must firstly, upon such a complaint, identify a provision, criterion or practice applied for or on behalf of the employer, the identity of non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. This process enables the Tribunal to judge whether any proposed adjustments are reasonable to prevent the provision, criterion or practice from placing the disabled person concerned at a substantial disadvantage by reason of the disability.
245. There must be some evidence of some apparently reasonable adjustments that could be made. The duty to make reasonable adjustments only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person by application of the provision criterion or practice. The test of reasonableness in this context is an objective one. It is ultimately the Tribunal's view of what is reasonable that matters.

246. It is unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person. The focus of the Tribunal must be on whether the adjustment would be effective by removing or reducing the disadvantage the claimant is experiencing at work as a result of his disability and not whether it would advantage the claimant generally.
247. A significant change brought about the 2010 Act is the omission of specific factors to be considered when determining reasonableness. The Disability Discrimination Act 1995 (when it was in force) stipulated that in determining whether it was reasonable for an employer to have to take a particular step in order to comply with the duty, regard should be had to a number of factors. Those factors are not mentioned in the 2010 Act. However, paragraph 6.28 of the Equality and Human Rights Commission's *Employment Code* gives examples of matters that a Tribunal might take into account. The Code stipulates that what is a reasonable step for an employer to take will depend on all of the circumstances of each individual case. The factors to have in mind include for example the extent to which taking the step prevents the effect in relation to which the duty was imposed, the practicality of such step, the cost that would be incurred by the employer in taking that step and the extent to which it would disrupt any of its activities. Other factors that need to be taken into account include the extent of the employer's financial and other resources, the nature of the employer's activities and the size of its undertaking.
248. The duty to make reasonable adjustments only arises where the employer knows or ought to know that the employee is disabled and that the employee would be placed at a substantial disadvantage by reason of the application to the employee of the PCP in question. The issue therefore is whether the employee knew or ought to have known both of the disability and the likelihood of the disability placing the employee at a disadvantage by reason of the application of the PCP. The question therefore is what objectively the employer could reasonably have known following reasonable enquiry. There is however no remit for a requirement for employers to make every possible enquiry where there is little or no basis for doing so.
249. In this case, no issue is taken by the respondent that they had actual knowledge of the claimant's disability. However, the respondent puts in issue the second limb of the test upon a reasonable adjustments claim: that is to say, whether they knew or ought reasonably to have known of the disadvantage contended for by the claimant because of the application to him of the relevant PCP.
250. The respondent accepts that it applied a PCP to the claimant when it:
- (a) Scored the claimant against its redundancy criteria; and
 - (b) Consulted with the claimant during its redundancy process in 2019.

We agree with Mr Ahmad that both of these are capable of being PCPs. As he says in paragraph 15 of his helpful submissions (on page 22), the Court of Appeal in **Ishola v Transport for London** [2020] EWCA Civ 112 has confirmed that the words "*provision, criterion or practice carry the connotation of a state of affairs indicating how similar cases are generally*

treated or how a similar case will be treated if it occurred again.” The respondent’s concession upon this issue was therefore quite correct.

251. The question that arises therefore is whether the application to the claimant of the PCPs put him at a substantial disadvantage in comparison with persons who are not disabled.
252. For the same reasons as with the section 15 claim, we find that Mr McCubbin’s assessment of the claimant’s performance and behaviours disadvantaged the claimant. This is because but for the claimant’s mental impairment there is a significant chance that his performance in his new substantive role of general manager, health and safety, long products would have been significantly better than it was. Therefore, a comparator non-disabled employee is likely to have scored higher in comparable circumstances to the claimant.
253. We also hold that the claimant was disadvantaged by the respondent’s requirement for the claimant to participate in the redundancy process carried out in 2019. For the same reasons as with the section 15 claim, we find that the claimant experienced challenges in engaging with the process. A comparator non-disabled employee would not have found the process as challenging as did the claimant.
254. We find that the respondent did have knowledge of the disadvantage caused to the claimant by reason of his disability because of the application to him of those PCPs. We go so far with Ms Palmer that this knowledge does not extend to the issues around the meeting of 25 November 2019. We accept her submission to be well founded when she says that the claimant raised no objection about the format of the meeting either beforehand or during it and that regular breaks were offered. Upon that basis, we find the respondent could not reasonably have been expected to know that the 25 November 2019 meeting disadvantaged the claimant as alleged.
255. However, Mr Rodrigo was well aware of the difficulties being experienced by the claimant in engaging with the process. Indeed, Mr Rodrigo engaged with the claimant upon those issues affording him time to produce medical evidence and for emotional support. Again, to avoid unnecessary repetition, we repeat our findings upon a section 15 claim. We also hold that the respondent had knowledge that the claimant’s performance was affected by his mental health issues for the same reason. Indeed, the claimant expressly made this point both to Mr McCubbin and Mr Rodrigo.
256. The real issue, therefore, upon the reasonable adjustments complaint is the question of whether there were steps which the respondent could reasonably have taken which came with a prospect of alleviating the substantial disadvantage. The adjustments contended for by the claimant were as follows:
 - The claimant’s redundancy scores should have reflected his performance and behaviours prior to the start of his anxiety and depression in 2017;
 - The claimant’s redundancy scores should have been adjusted, to take into account the impact of his anxiety and depression on his performance and behaviours from 2017 onwards;

- The respondent should have adjusted its redundancy consultation process to enable the claimant to participate properly in the process;
 - The respondent should have sought medical advice on the claimant's condition and prognosis and taken this into account during the redundancy process.
257. If any of those steps ought to have been taken, the question then arises as to whether it was reasonable for the respondent to have to take those steps at the relevant time.
258. There is much in Ms Palmer's point that the reasonable adjustments complaint is in reality a re-framing of the section 15 claim. As she says in paragraph 67 of her submissions, *"There is no defence of justification, but any adjustments have to be steps it is reasonable for the employer to have to take to ameliorate the disadvantage, and lack of knowledge of the disadvantage may be a defence"*.
259. We find that the respondent did make reasonable adjustments to the redundancy scores. Again, to avoid needless repetition, we refer to our findings upon the section 15 claim. Although Mr McCubbin did not make such an adjustment, Mr Rodrigo did so. We also find that Mr Rodrigo made adjustments to the redundancy consultation process to enable the claimant to properly participate. Again, our findings upon the section 15 complaint are germane.
260. We find that objectively it was not reasonable for Mr McCubbin to adjust the scores. That Mr Rodrigo did so does not make it objectively unreasonable for Mr McCubbin to have failed so to do. In the final analysis, Mr McCubbin, a man of great experience, was seeking to recruit an individual capable of fulfilling the safety manager projects and development role. Upon reasonable grounds, he found the claimant wanting. Whatever the cause of the claimant's disability, it would not have been reasonable for Mr McCubbin to have adjusted the scores so as to put the claimant into a post that he was not, regrettably, capable of fulfilling. Even with the adjustments made by Mr Rodrigo, the claimant still fell short and scored the lowest of the four affected employees. It would not have been a reasonable adjustment to displace a better qualified candidate from one of the three available posts (at the time of Mr Rodrigo's dealings with the matter) to make way for the claimant or for the respondent to create a position for him.
261. For the same reasons as upon the section 15 claim, we find that the respondent did not fail to make reasonable adjustments upon the redundancy process. The impugned failure around the November 2019 meeting fails on the facts for the reasons already given. Adjustments were made during the meeting in any case by the provision of breaks. Mr Rodrigo afforded the claimant time to commission his medical evidence, prepare for the meetings and allowed a supporter to accompany him for emotional support.
262. The final reasonable adjustment contended for is that the respondent should have sought medical advice on the claimant's condition and prognosis and taken this into account during the redundancy process. Criticism was made of Mr Ahmad of the respondent's failure to commission medical evidence. We agree with Mr Ahmad that the respondent had the

resources so to do. They had a dedicated occupational health facility of which the respondent availed itself throughout the process on a number of occasions. However, the claimant said to the respondent that he would present medical evidence in support of his case so as to enable the respondent to gauge the impact of his disability upon him. This is an objective consideration and in the Tribunal's judgment in those circumstances there was no failure by the respondent to seek medical advice. The medical picture presented by the claimant was a complex one and in our judgment the respondent reasonably took the view that the commissioning of medical evidence was better left to the claimant and medical attendants who knew the claimant best. In those circumstances, we agree with Ms Palmer that it would not have been reasonable for the respondent to have to take that step. This is particularly the case in circumstances where there had been a significant delay in progressing with Operation Blueprint mainly due to delays in dealing with the claimant and which other people were now involved.

263. In all the circumstances, the claimant's complaints under the Equality Act 2010 fail and stand dismissed.

Employment Judge Brain

Date: 22 July 2021