



EMPLOYMENT TRIBUNALS

Claimant: Mr C Jackson

Respondent: WM Morrison Supermarkets PLC

Heard at: Manchester (by CVP)

On: 1-4 March 2021
29 March 2021
(in Chambers)

Before: Employment Judge Phil Allen
Ms A Jackson
Ms E Cadbury

REPRESENTATION:

Claimant: Ms S Johnson, Counsel

Respondent: Ms R Thomas, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent did not unlawfully discriminate against the claimant in breach of section 15 of the Equality Act 2010. The claim for discrimination arising from disability is dismissed.
2. The respondent did not unlawfully discriminate against the claimant in breach of section 19 of the Equality Act 2010. The claim for indirect discrimination is dismissed.
3. The respondent did not fail to comply with the duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010. The claim for failure to comply with the duty to make reasonable adjustments is dismissed.
4. The claimant was unfairly dismissed. His unfair dismissal claim is well-founded and succeeds.

5. The claimant would have been fairly dismissed in any event and therefore the decision made no difference to the eventual outcome and any compensatory award should be reduced by 100% as a result (*Polkey*).

6. The claimant was dismissed by the respondent by reason of redundancy and the claimant is entitled to a statutory redundancy payment.

REASONS

Introduction

1. The claimant was employed by the respondent at its store in Kendal from 23 November 1998 until his dismissal on 16 November 2018. From 2012 the claimant worked in the respondent's café. The claimant has diabetes and diabetic retinopathy. The claimant is registered blind – partially sighted.

2. The claimant alleged that his dismissal was unfair, discrimination arising from disability, indirect disability discrimination and arose from a failure by the respondent to make (or maintain) reasonable adjustments. The respondent denies discrimination and contends that the dismissal was fair by reason of capability.

Claims and Issues

3. Two preliminary hearings have been conducted in the claim: by Employment Judge Slater on 27 June 2019; and by Employment Judge Horne on 20 April 2020. At the first preliminary hearing the Tribunal identified 22 issues which would need to be determined at the final hearing. On 11 October 2019 the claimant applied to amend his claim and that application was successful. By the second preliminary hearing an agreed List of Issues had been prepared by the parties and the Tribunal left that list un-amended (whilst noting that some of the new allegations appeared to introduce unnecessary complexity).

4. At the start of this hearing the respondent's representative provided the Tribunal with a List of Issues, which it was understood was the list which had been agreed by the parties prior to the previous hearing. That list recorded 43 issues (including remedy) which needed to be determined. That list reflected the list contained in the Case Management Order from the first preliminary hearing, expanded to include the amended claims. The claimant's representative did not demur from this list containing the issues that the Tribunal needed to determine.

5. At the start of the hearing it was confirmed with the parties that the Tribunal would determine issues of liability first, leaving remedy issues to be determined later, only if the claimant succeeded in his claim. It was also confirmed with the parties that issues arising from *Polkey* would be determined at the same time as the liability issues (and in fact issue 10 in the list reflected this in any event).

6. The issues identified were as follows:

Unfair Dismissal

1. Was the claimant unfairly dismissed?
2. Was the claimant dismissed for a potentially fair reason (in particular, the respondent alleges capability) under section 98(1) & (2) Employment Rights Act 1996?
3. What was the reason for the dismissal? Namely, was it for capability or redundancy?
4. Was the claimant's dismissal fair having regard to the principles set out in section 98(4) ERA?
5. If the dismissal is deemed to be on capability grounds, in considering the fairness of the dismissal –
6. Did the respondent have a reasonable belief that the claimant was incapable of performing his role?
7. Did the respondent consider and offer reasonable adjustments to the claimant before dismissing him?
8. Was dismissal a fair outcome when taking into account the circumstances and the size and administrative resources of the respondent?
9. If the respondent is found to have unfairly dismissed the claimant, what if any compensation should be awarded?
10. If the respondent is found to have unfairly dismissed the claimant on procedural grounds, should any award made by the Tribunal be reduced in light of the fact that any such procedural flaws would not have made any difference to the eventual outcome and that the claimant, would, therefore, have been dismissed in any event?
11. Is the claimant entitled to a redundancy payment?

Reasonable Adjustments

12. Has the respondent failed in its duty to make reasonable adjustments?
13. Did the respondent adopt a PCP of requiring colleagues who work in the café to carry out the majority of the 9 key skill areas?
14. Did the PCP put the claimant at a substantial disadvantage in comparison with persons who were not disabled? The alleged substantial disadvantage is that because the claimant is partially sighted he could only carry out one key skill in the role of 'pot wash' and required

adjustments. The respondent alleges that the claimant could not carry out any key skill in its entirety and to the required standard.

15. Would allowing the claimant to work in the role of 'pot wash' only, have avoided the disadvantage suffered?
16. Would this have been a reasonable adjustment in the circumstances?
17. Did the respondent adopt a PCP of removing previously agreed adjustments from colleagues without their agreement?
18. If it removed an adjustment, did the PCP of removing an adjustment, put the claimant at a substantial disadvantage in comparison with persons who were not disabled because of the claimant's inability to carry out 9 key skills?
19. Could the respondent have reasonably continued with the previous adjustment, at no additional cost or disadvantage to itself?
20. If so, would the claimant have remained in employment and would the disadvantage to him have been removed?
21. Did the respondent adopt a PCP of not requiring medical evidence to support dismissal decisions in disability cases?
22. Did the PCP put the claimant at a substantial disadvantage because of the claimant's inability to carry out 9 key skills?
23. Would it have been reasonable or necessary for the respondent to seek medical evidence prior to taking any decision to dismiss or was the evidence available sufficient?
24. Would the disadvantage (i.e. dismissal) to the claimant have been removed if further medical evidence was obtained?
25. Would any of the above have been reasonable in the circumstances?
26. Were the adjustments and other adjustments offered to the claimant to any extent?

Discrimination arising from Disability

27. Was the claimant treated unfavorably by being dismissed on the grounds of capability?
28. If so, was this unfavourable treatment because of something arising in consequence of his disability?

29. The something arising is alleged by the claimant to be an inability to carry out all of the 9 key skills and or the need for adjustments. Did this arise as a consequence of the claimant's disability?
30. Was dismissal a proportionate means of achieving a legitimate aim? The respondent alleges that this was to ensure the hygiene/cleanliness standards and acceptable level of service to customers/meeting business and operational needs.

Indirect Discrimination

31. Did the respondent adopt a PCP of requiring colleagues who work in the café to carry out the majority of the 9 key skill areas?
32. Did this put or would it put partially sighted disabled colleagues at a particular disadvantage compared with non-disabled colleagues, because they would be less likely to be able to carry out the majority of the key skill areas?
33. Was the claimant put at this disadvantage?
34. Can the respondent show that they had a proportionate means of achieving a legitimate aim?
35. Did the respondent adopt a PCP of removing previously agreed adjustments from colleagues without their consent?
36. If the respondent did remove an adjustment, did this put or would it put partially sighted disabled colleagues at a particular disadvantage compared with non-disabled colleagues because they would be less likely to be able to carry out the majority of the key skill areas?
37. Was the claimant put at this disadvantage?
38. Can the respondent show that they had a proportionate means of achieving a legitimate aim?
39. Did the respondent adopt a PCP of not requiring medical evidence to support dismissal decisions in disability cases?
40. Did this put or would it put partially sighted disabled colleagues at a particular disadvantage compared with non-disabled colleagues because they would be less likely to be able to carry out the majority of the key skill areas and may need medical evidence in support of adjustments?
41. Was the claimant put at this disadvantage?
42. Can the respondent show that they had a proportionate means of achieving a legitimate aim?

7. In its response, the respondent had accepted that it did adopt a provision, criterion or practice of requiring colleagues who worked in the café to carry out the majority of the nine key skill areas and therefore issues 13 and 31 were conceded by the respondent.

8. During her submissions, the claimant's representative accepted that the legitimate aims confirmed in issue 30 were legitimate aims for the respondent, albeit that the proportionality of the respondent's response remained in dispute.

Procedure

9. The claimant was represented at the hearing by Ms Johnson, counsel. Ms Thomas, counsel, represented the respondent.

10. The hearing was conducted by CVP remote video technology. Both representatives and all witnesses attended remotely and evidence was heard over CVP. Members of the public were able to attend the hearing remotely if they wished to do so.

11. As a result of the claimant's disability, he was assisted in connecting to the hearing by his mother, who attended the hearing with him remotely by CVP. When the claimant was questioned, the respondent's representative ensured that she read to him extracts from the relevant documents whilst asking him questions. The Tribunal made adjustments to the timing of the hearing, taking the lunch break at an earlier time in order to assist the claimant.

12. Whilst there were technical issues on occasion for both parties and the Tribunal itself during the hearing, the hearing was ultimately able to be fully and fairly heard by remote CVP technology. The Tribunal emphasised to those attending that it would not take into account at all, in considering any witness' evidence, any technical issues which arose (and it has not done so).

13. An agreed bundle of documents was prepared in advance of the hearing. The last page of the bundle was numbered page 270, but in fact the bundle ran to 303 pages. The Tribunal read only the pages in the bundle to which it was referred either in a witness statement or by one of the parties during the hearing. The Tribunal also reviewed the photographs which had been helpfully included in the bundle, which showed the respondent's café and kitchen. Where numbers are included in brackets in this Judgment, they refer to the page numbers in the bundle.

14. On the morning of the first day of the hearing, the respondent's representative provided a brief opening note which appended a chronology and list of key people. It was noted that the chronology and the list was not agreed.

15. The Tribunal was provided with witness statements for: the claimant; Mr Nathan Battle, the respondent's Regional People Manager for Eastern Scotland, and formerly the People Manager at the Kendal store; Ms Jane Halliday, the respondent's Store Manager for the Barrow Store and formerly the Customer Service Manager at the Kendal store; and Mr Kevin Hayes, the respondent's Store Manager for one of its Darlington stores. The Tribunal read each of the witness statements at the start of the hearing, together with the documents referred to in them.

16. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal. Each of the respondent's witnesses then confirmed their evidence to the Tribunal before being cross examined and asked questions.

17. After the evidence was heard, each of the parties made their submissions. Written submission documents were prepared by each of the representatives and provided to each other and the Tribunal before the start of the hearing on the fourth day (that is whilst the evidence of the respondent's final witness was still being heard). The Tribunal read each of the submission documents after evidence had been completed and, with their agreement, each of the representatives was given no more than 30 minutes to make their oral submissions (in addition to the written submission document).

18. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

19. The Tribunal was grateful to both of the representatives for the manner in which the hearing was conducted, which was entirely appropriate.

Findings of Fact

20. It was not in dispute that the claimant was an individual with a disability as defined by section 6 of the Equality Act 2010. The claimant suffers from diabetes which has an effect on his eyesight, and he suffers from diabetic retinopathy. The claimant's representative explained in her submissions that he was registered blind – partially sighted. The claimant was unable to visually read the documents included in the bundle and could not see the detail in the photographs provided.

21. At the commencement of the claimant's employment with the respondent he made clear that he had health issues, and a document from November 1998 (81) recorded the claimant as being partially sighted and not being able to read normal sized text unless he could use equipment. The claimant's eyesight had clearly deteriorated during the period when he was employed by the respondent, albeit there was some dispute about whether (and to what extent) his eyesight deteriorated at the very end of his employment.

22. The claimant was initially employed by the respondent as a Sales Assistant – FFPP Frozen (82). That is, he worked in the Fresh Food Prepacked Frozen Department. The only document provided to the Tribunal which detailed his terms and conditions of employment, or which formally confirmed the claimant's job title/role, was his initial letter of engagement/offer letter (82).

23. In 2002 the claimant began to suffer with frozen fingers from working in the cold fridge area and as a result he moved into the Produce Department. In 2012 a refit led to the claimant's role at the time ceasing to exist.

24. The claimant's witness statement described that in 2012 he moved to work as a Café Assistant, but as a reasonable adjustment he was employed as a "pot wash" assistant only. The respondent denied that the claimant's role was necessarily defined or limited in this way. Indeed, the respondent contended that the claimant

was employed as a Customer Assistant, in common with all of the respondent's other store employees at the same grade.

25. The only document provided to the Tribunal which recorded the claimant's role at the time was a one-to-one interview sheet which recorded that the claimant had asked for a move to the café and recorded the alternative as "*Café – pot wash*". That document, dated 23 July 2012, had been signed by the claimant (85).

26. A memo on 4 September 2012 (88) recorded that the claimant had been spoken to "*regarding his move into café as a 39 hr sales asst main duties to be pot wash, due to Chris having a partial sight problem his duties will be limited*".

27. Between 2012 and 2016, the claimant's role involved him taking dirty crockery items from the trays on the counter, putting them in the dishwasher or sink, scrubbing and washing the crockery, polishing the cutlery, and putting the clean crockery items back on the counter. The claimant also helped clear the tables in the café. The claimant's evidence was that he did so on a voluntary basis. The respondent's case was that this was part of his duties and it rejected that any such work was undertaken voluntarily. None of the witnesses from whom the Tribunal heard on behalf of the respondent were in fact employed in the Kendal store prior to the summer of 2018 and therefore the only evidence heard in-person about the arrangements and decisions which preceded mid-2018 was from the claimant.

28. The Tribunal was provided with a letter from the claimant's GP dated 4 October 2012 (89). This described the claimant as "*significantly visually impaired*". The focus of the GP's report was to ask the respondent to consider not asking the claimant to work after 6.00pm, for reasons related to diabetic control. However, the GP also observed in the letter that with dishwashing it could be difficult for the claimant to maintain adequate standards due to his visual difficulties, and the GP did say that the respondent should seriously reconsider if the dishwashing task was appropriate for the claimant with his visual disability. It was not in dispute that the respondent did accommodate the request regarding the claimant's hours. Contrary to his GP's view, the claimant successfully continued to work in the café undertaking predominantly dishwashing for six years after the report.

29. Documents also showed that a health and safety risk assessment and an Access to Work assessment were also undertaken in 2012. The health and safety assessment (92) recorded that the claimant was able to undertake the dishwasher related tasks without difficulty. It also recorded that the claimant had been redeployed "*as an assistant in the Customer Café. He works exclusively in the pot wash area*".

30. The claimant's evidence was that a People Manager at the time discussed with him whether he could see if the plates were fully washed while carrying out his role. It was the claimant's evidence that that People Manager had suggested that, on occasion when he could not see whether the plates were clean, he swiped over the plates with his clean hands in order to check that they were clean (and he could wash the plates again if needed). The Tribunal did not hear from the relevant People Manager, albeit the respondent disputed that the claimant had been told what he said.

31. The Tribunal was shown a record of an informal meeting from 26 July 2013 (119). This recorded that concerns had been raised with the claimant about the dishwasher area and the responsibilities of the claimant's role. It recorded that another employee had agreed to deep clean the dishwasher area, but the claimant had agreed to keep up the cleaning as specified on the cleaning rota.

32. In March 2016 the respondent carried out a refit of the Customer Café. The new colour of the café and its tables and chairs made it difficult for the claimant to recognise the edges of the tables. As a result of a risk assessment (125), it was agreed that the claimant would stay in the kitchen during his working time, to carry out tasks in an area he could safely navigate. The Tribunal's understanding is that, after this change in 2016, the claimant stopped collecting dirty crockery from the café area and instead other colleagues would bring dirty items into the kitchen. The claimant would operate the dishwasher and place clean items to one side ready to return to the café. The claimant emphasised in his evidence that he could access one trolley which was located just inside the kitchen, but other colleagues would need to clear the tables and move the dirty items into the kitchen for the claimant to wash.

33. On 3 June 2016 the claimant requested that he reduce his working week by one day and asked to work from Wednesday to Saturday to enable him to receive training on computer skills. That was accommodated by the respondent (126).

34. An Occupational Health report was provided dated 18 July 2016 (128). This followed a telephone assessment. The report recorded the claimant as working as a Café Assistant. In describing that the claimant had advised the Occupational Health adviser that he could now only work in the pot wash area, the report recorded that this was due to *"his eyesight which is deteriorating"*.

35. On 28 February 2017 the claimant wrote to the respondent asking if he could continue working Wednesday to Saturday (130). In that letter the claimant himself recorded *"as my eyesight has got worse in the last 2 years, I am finding the job more difficult, the only job I can manage is the pot wash"*.

36. On 1 April 2017 a record of improvement form was signed by the claimant and a manager (131). This recorded that the manager had spoken to the claimant about the teapots, that they were not clean, and customers had complained. It also recorded the issue of the claimant leaving his station unmanned. The report referred to the possibility of disciplinary action if improvements were not made. It is not in dispute that no disciplinary action was ever taken. There was no other documentation whatsoever which recorded issues being raised with the claimant about his cleaning of the pots and crockery. The Tribunal was shown a number of health and safety audits and other documents which had been undertaken in the store, some of which raised issues relating to the café. The only issue identified throughout any of these documents which could relate to the claimant were references to pinking in the dishwasher, albeit even with that issue there was no evidence that it had been the claimant who was working at the time that such issues were identified.

37. Mr Battle's evidence (as People Manager) was that the respondent nationally introduced nine key skills for all café workers in 2016. These key skills were: order

point; pay till; front of house opening; front of house closedown; tray service; dishwasher; plate up; food preparation and cooking; and kitchen closedown. The basic concept behind the key skills was that the respondent would be able to ask any Customer Assistant working in the café to move to undertake any of the required tasks at busy periods. This was intended to enhance customer service and to assist the respondent in meeting demand at peak times. There was no evidence that the introduction of these key skills had been explained to the claimant (prior to mid-2018), nor that they had any impact upon the Kendal café prior to the summer of 2018. The claimant's evidence was that at one time there had been 13 employees in the café, but it had reduced to as few as five by the time his employment ended. The respondent's evidence was that the staffing of the café for any specific shift was dictated by receipts for the café, together with some flexibility being expected of Customer Assistants across the store to cover busy periods. Mr Battle's own evidence was that approximately once a week he would work in the café at busy times.

38. It is clear that there were a number of changes to the management and operation of the Kendal café in the summer of 2018. The Tribunal was informed that the previous manager had stepped down and it appears that there may have been something of a lacuna in management for a period. Mr Battle was appointed the People Manager in the Kendal store in or around September 2018 (each store having one People Manager). Ms Doherty was appointed as the café manager at about that time. Ms Bickle was appointed as Café Specialist at about the same time. The Tribunal did not hear evidence from Ms Doherty or Ms Bickle.

39. The Tribunal heard evidence about a competitor who had opened in or around 2018. It was clear that this had raised issues for the respondent with the café. Mr Battle's evidence was that there had been a competitor impact defence. This had resulted in a further refit in the café.

40. On 19 September 2018 the claimant was called into the training room by Mr Battle, without any prior warning. The claimant described this meeting as a bolt out of the blue, something which Mr Battle accepted could have been the case for the claimant. Mr Battle's evidence was that this was an informal meeting. The claimant was not offered the opportunity to be accompanied nor was he given the reason for the meeting in advance. The Tribunal was provided with some very brief notes prepared by Mr Battle (158) which recorded the meeting as lasting from 12.10pm until 12.30pm and described the meeting (by ticking the relevant boxes) as: a welfare meeting; and an informal capability chat.

41. The handwritten notes referred to the previous adjustments made and recounted what had been put in place. They recorded that Mr Battle and the claimant discussed the respondent's Occupational Health provider, and "*agreed a referral would be beneficial*". The notes also recorded:

"Are there are more adjustments we could make? Explored all options reasonably practicable already. Chris agrees – nothing more we could do for him."

42. The note went on to say that they discussed the "*labour model*" and that there were not 24 hours (presumably per week) required for a dishwasher and it had an

impact on the team and service. The note recorded that the hours were not required on pot wash. The note also recorded that Mr Battle and the claimant talked about capability, and records *"incapable to fulfil remit of role, even with adjustments"*.

43. As part of the twenty minute conversation, Mr Battle's evidence was that he also completed a customer café skills tracker or evaluation document (141). That is a detailed proforma document which outlined the nine key Café skills and broke each of them down into a number of detailed tasks which an employee was required to be able to complete. The document, completed for the claimant, recorded that he could not undertake eight of the key skills, something which was not in dispute.

44. For the key skill of dishwasher, the sheet for the claimant recorded him as being able to undertake the majority of the tasks required. For the task *"colleague checks dining area for full clearance trolleys"* it recorded that the claimant could not do this and that someone had to bring trolleys for the claimant (which was not in dispute). It also recorded that the claimant could not change the dishwasher water and could not clean the dishwasher, something which was also not in dispute. In terms of turning the dishwasher on and off, it said that the claimant could operate the dishwasher but could not switch it on and off.

45. The one entry in dispute was that Mr Battle recorded that the claimant was not able to change the chemical drums as he could not wear goggles. The claimant disputed this and in the subsequent capability meeting the claimant and his trade union representative went away to test the goggles during an adjournment, before returning and confirming that he was able to wear them.

46. Mr Battle's conclusion was that the claimant could only undertake 70% of the dishwasher skills, something which he worked out statistically based upon the boxes ticked.

47. Mr Battle's evidence was that, prior to this meeting, Ms Bickle had raised with him that the claimant was struggling to tell if the dishes had been washed properly. She had explained to Mr Battle that the claimant was testing whether the crockery had been cleaned by wiping his hands across the face of the crockery. There was no documentation whatsoever that recorded Ms Bickle raising this with the claimant or Mr Battle, nor was this specifically recorded on the skills evaluation document. Nonetheless the claimant did not dispute that this was what was happening. The claimant's explanation in evidence was that this was what he had been told to do and what he had continued doing. The claimant's evidence to the Tribunal was: that he could not see stains on the crockery; he accepted that the only way someone could see whether the items were clean was by looking at them; and that was not something which the claimant was (at least by mid-2018) able to do. In answers to questioning, the claimant said that his eyesight had deteriorated slightly. His representative submitted and emphasised that the deterioration recorded in the documents occurred prior to 2017, and not immediately prior to the assessment in 2018.

48. On 26 September 2018 the claimant was referred to Occupational Health. The Occupational Health referral document was completed by Mr Battle (161). The claimant's representative was very critical of the content of the Occupational Health referral. The referral recorded that the reason for it was *"incapability to undertake*

current role". The form stated, of the claimant, that *"his eyesight has deteriorated over time"*. It also recorded that the claimant was unable to complete even one of the nine key skills in the Customer Café. It also said that the claimant *"cannot and will not work anywhere else in store"*, albeit Mr Battle accepted that what it meant was "could not" rather than "would not". In answer to a specific question about change in behaviour, Mr Battle recorded on the form that the claimant sometimes lost his temper, which was not something for which there was any evidence either before the Tribunal or in any document. The referral attached the key skills evaluation. Mr Battle concluded (165):

"We have made all reasonable adjustments possible to facilitate Chris in his work, however, he now cannot complete any role in its entirety and this is affecting the level of service we now give to our customers...As there are no more adjustments we feel we could make for Chris, we would consider your support for capability dismissal, unless you feel there are reasonably practicable adjustments we could make to allow Chris to complete more of the Key Skills."

49. When he was asked in the Tribunal hearing about his belief that the claimant's eyesight was deteriorating, Mr Battle referred to a meeting he had attended with the claimant and the Guide Dog Association about how the respondent could support the claimant in getting a guide dog. There was no documentation in the bundle which recorded this meeting, no date for it was provided, and none of the statements of the witnesses referred to it. Mr Battle's verbal evidence was that he understood that the claimant was considered for a guide dog because his eyesight had deteriorated.

50. Based upon the content of the referral and the way that it is worded, the Tribunal finds that Mr Battle personally had clearly determined by 26 September 2018 that the claimant could not possibly remain in his role and/or in employment with the respondent (unless the occupational health advisor identified any specific adjustments).

51. The Occupational Health report provided in response was dated 29 October 2018 (178). That recorded the claimant as being a Customer Assistant. It is clear that the majority of the report was based on what the claimant had told the Occupational Health adviser. The report recorded that the claimant stated that he had been managing in his adjusted role and he did not identify any further issues, or that there had been any deterioration in the way that he worked. The report recorded that management would have to decide whether they could continue to accommodate his adjustments, however the claimant was stated to be currently fit for work. The report, in answer to a question, concluded that no further adjustments were required, but management would need to decide whether they could continue to accommodate the claimant in his current role with his current adjustments. It did not specifically address whether there was any way in which the claimant could identify whether the crockery and pots which came out of the dishwasher were clean – rather it focused upon the adjustments that had already been put in place. The report did not record the extent to which the claimant could see whether any dirt or debris had been left on plates or pots.

52. In terms of whether the claimant's condition was deteriorating, the report did not expressly state whether or not that was the case. It did say that the claimant *"did have treatment after he was diagnosed with diabetic retinopathy 30 years ago, which saved the sight that he had. However, he has been told that the blood is now not getting through to the nerve endings, although there is no further treatment that they can give him"*.

53. Following receipt of the Occupational Health report, Mr Battle met with the claimant again on 1 November 2018. There were some limited notes of this meeting recorded on a document headed *"Capability Meeting Checklist"* (181). That document, completed by Mr Battle, recorded that: there were no more adjustments that could be put in place over and above those that had already been made; the claimant did not want to work anywhere else; and there was no further treatment, or possible treatment, available.

54. The claimant was invited to a formal capability meeting. He was sent an invite letter dated 1 November 2018 (185). The letter was from Ms Halliday, the Customer Service Manager. The letter recounted the claimant's previous discussion with Mr Battle on 19 September. It provided details of the arrangements for the forthcoming meeting on 16 November. It recorded that the purpose of the meeting was to *"fully review your work to date and your capability level; review all reasonable adjustments that have been considered; and make a decision regarding your continued employment which may result in termination of your employment due to incapability"*. The letter confirmed the claimant's right to be accompanied by a work colleague or trade union representative. The claimant's evidence was that letters such as this were read to him by his mother. The claimant responded in writing on 2 November (187), referred to having spoken to his trade union representative, and asked for a copy of the notes from the 1 November meeting.

55. The formal capability meeting took place on 16 November 2018. The notes recorded the meeting as having lasted from 2.00pm until 4.34pm. The meeting was conducted by Ms Halliday. Ms Halliday had taken up her role at about the same time as Mr Battle, and she had not been involved in any previous personnel decisions involving the claimant. In her role, she was ultimately responsible for delivering the customer service culture in the store, which included responsibility for the café. In advance of the meeting Ms Halliday read the various documents to which the Tribunal has referred and looked at the claimant's personnel file. The meeting was also attended by the claimant, his trade union representative, and Mr Battle.

56. Included in the Tribunal bundle (224) was a three-page document written by Mr Battle headed *"Points to Cover"*. It included: *"You've told us you cannot and will not work in any other department. Trolleys is not an option due to the health and safety risk to yourself and customers. You feel you cannot work anywhere on the shop floor. Confirm the above"*. The document also referred to hygiene concerns and the risk of cross-contamination in the claimant using his hands to wipe the clean plates to check if they were clean or dirty. Later in the note it referred to *"the role of a 'pot washer' no longer exists within the café. Colleagues complete the nine key skills so resource can shift around to meet the needs of the customer"*.

57. The notes of the meeting were taken by Mr Battle (212). In answer to a question from Ms Halliday *“talk me through your pot wash role, how do you manage to operate and what’s your capacity to know what you’re doing?”* the claimant was recorded as having replied *“I scrub the plates, rinse them and put them through dishwasher, I then put them through again to make sure”*. Later in the meeting Ms Halliday asked, *“It’s known that you wipe the clean plates with your hands, what’s that for?”* to which the claimant replied, *“to check if there’s any egg on them”*. He then confirmed that the plates then went on the racking. Shortly before the adjournment, the notes record Ms Halliday as saying, *“when we look at capability, we look at the impact on the business, and ultimately our customers. We need to look at all reasonably practicable adjustments we have and could make. When the café operates there are fluctuations in trade patterns which mean we need to adjust how we operate for the customer. How we react to changes situations. For example, a large rush of orders, we may need to ask the person on pots and tables to support cooking or plating up for 15 minutes to serve our customer correctly. At the moment you can’t do that can you, Chris?”*. In answer, the claimant confirmed that was the truth. As recorded above, after one adjournment, the claimant and his representative returned to say that he could wear goggles.

58. A page of the hand-written notes provided was described as adjournment notes (223). The evidence given to the Tribunal was that Mr Battle had written some of the content based upon what Ms Halliday had said to him during the adjournment. Ms Halliday herself had then recorded points at the bottom of the page. The last of Ms Halliday’s points was the following: *“Food retail constantly changes and is very competitive. We have to react to these changes and do the best for our customer”*.

59. In her witness statement, Ms Halliday stated that during the meeting the claimant had explained that he would wipe his hand over the dishes to check if he could feel for any dirt or debris, which she felt meant that he could not see whether the dishes were properly clean or not. When questioned about the fact that all colleagues would handle crockery and cutlery, her evidence was that she felt that the opportunity for cross contamination was increased as the claimant was wiping his hand over the whole of the eating surface of the plates and then racking them ready for use, rather than just handling the edges where necessary. The Tribunal finds that there is a significant difference between: a colleague handling the edge of a plate to move it, or placing the cutlery in the racks using their handles; and the claimant actively wiping his hand across the face of the crockery in order to identify whether it was clean.

60. In her witness statement Ms Halliday said that, although the respondent had adjusted the claimant’s role so that he was only required to carry out the dishwasher skill and was not required to carry out the remainder of the key skills, her view was that: the claimant’s condition had deteriorated; he could no longer carry out the dishwasher role in its entirety; and he was no longer able to carry out even the sole task of washing the dishes, as he could not properly determine whether the dishes were clean or contained debris.

61. Ms Halliday’s evidence was that she conducted the meeting and she was the decision maker, something which Mr Battle corroborated. Mr Battle attended as an HR adviser and, during the adjournment, she spoke to him about the decision she

was proposing to reach. Ms Halliday had significant experience herself of HR issues, having been a People Manager for the respondent for a number of years. The claimant's representative contended that Mr Battle was in fact the person who made the decision or was behind it. The Tribunal accepts Ms Halliday's evidence and finds that she was the decision maker. In the Tribunal hearing, the claimant's representative was very critical of Mr Battle's attendance at the meeting and his involvement in the process, however neither the claimant nor his trade union representative at the capability hearing objected to Mr Battle's attendance.

62. After the final adjournment, the meeting reconvened and Ms Halliday explained that the claimant was to be dismissed on the grounds of ill health capability. She stated that she believed that the respondent had done everything reasonably practicable as a business and explored all reasonable adjustments. It was confirmed that the claimant would be paid in lieu of notice.

63. The dismissal and the reasons for it were confirmed in a letter of 17 November 2018 from Ms Halliday (227). The letter is relatively lengthy. It initially reproduced what had been included in the invite letter about the previous meeting on 19 November, before running through the issues.

64. The letter contained a detailed account of having explored other roles with the claimant, in which it listed the other parts of the store and why the claimant could not work in the roles in those areas (228). This was prefaced by reference to taking account of the advice of occupational health. The Tribunal found that part of the letter difficult to fit into the framework of the advice which had been provided and the claimant's evidence. The Tribunal finds that what was written in that part of the letter was not entirely accurate, when compared with what the occupational health report said and what the Tribunal found was discussed in the meeting. It was suggested that the list of roles in the store reproduced a discussion in the meeting. The Tribunal does not accept that the detailed conversation recorded in the letter occurred in the capability meeting, as no record of such a detailed discussion was contained in the notes prepared by Mr Battle. There was clearly some discussion about whether the claimant could work in other areas of the store, but the Tribunal finds that the discussion was not as detailed as is recorded in the decision letter. The Tribunal finds that the sentence in the letter "*We talked about exploring other job roles within the store to which you informed us you could not complete any other role*" was accurate, but the discussion which occurred was limited in that way.

65. A criticism raised in the Tribunal hearing by the claimant's representative, was that the respondent did not provide the claimant with information about actual vacancies in the store at the time, so that he could consider whether he could fulfil any of those roles. There appeared to be no dispute between the parties that the claimant could not work in any other area in the store, or at least the claimant's representative did not at any time identify any other role which the claimant could have undertaken even with adjustments. The Tribunal finds that the claimant could not have worked in any other area of the store and accepts the reasons explained in the decision letter for why he could not do so. The respondent submitted that the approach of discussing with an employee, with twenty years' service in the store, whether there were areas of the store in which he could work, was preferable and more likely to identify any possibilities, than discussing only actual vacancies (which

would be more restricted). The Tribunal accepts the respondent's submission and finds that it would not have assisted the claimant to have addressed actual vacancies (which would simply have highlighted to him the things he could not do).

66. The letter repeated some of what had been discussed in the meeting, including the following (228/9):

"We discussed the role profile of the Customer Café, and the requirement of our colleagues to complete the 9 key skills in order to ensure we serve our customers right. We agreed that as a reasonable adjustment, we would allow a colleague to work in the Café on less key skills where reasonably practicable, however, you are unable to complete 1 key skill in its entirety. This means that in busy trading periods and influxes of large orders, we are unable to utilise you in any other area of the Café. Ordinarily, we would ask our colleagues to move to a different key skill ...As you are unable to complete the majority of the key skills within the café, you are unable to support in any other capacity and this negatively impacts on how we serve our customers, such as increased wait times, dirty dining areas and large queues. As the business changes, and new processes and technologies are used it is important that the hours used within the Customer Café are used effectively so we serve our customers right first time"

67. The letter said (including an element in which the Tribunal has placed the text in bold, for emphasis) (230):

*"As you are unable to complete the majority of key skills within the café, you are unable to support in any other capacity and this negatively impacts on how we serve our customers, such as increased wait times, dirty dining areas and large queues. As the business changes, and new processes and technologies are used it is important that the hours used within the Customer Café are used effectively so we serve our customers right first time. **You also acknowledged that you understand there is no specific 'pot wash' role in the Customer Café anymore, and it forms part of the key skills all colleagues are expected to undertake to serve our customers right, and that allowing only number 1 key skill is not a reasonably practicable adjustment. We are unable to create a vacancy for a colleague that does not exist within our structure.**"*

68. In terms of the cross contamination issue the letter stated (229):

"I have concerns over your current working practices and the impact on Food Safety within the Customer Café, notably, the method by which you test the cleanliness of crockery and cutlery – Thus posing a potential risk of bacterial cross contamination to our customers – The touching of dirty cutlery/crockery to ready to use cutlery/crockery. You told us that you cannot see if the cutlery/crockery is clean you feel for food residue and put all items through the dishwasher twice".

69. The conclusion of the letter was:

“Based on these findings I then advised you that I had regretfully reached a decision to terminate your employment on the grounds of incapability due to ill health”.

70. The claimant's representative in the Tribunal hearing was critical of this terminology, suggesting that the reason for the termination was not ill health as such but rather was disability. The Tribunal can understand the point being made, but nonetheless accepts that Ms Halliday was explaining that her given reason for terminating the claimant's employment was capability, which was based upon what he was (and was not) able to do – that being as a result of his health condition.

71. The respondent had an attendance management policy (41) which included a section on capability process and termination (50). That confirmed that, for dismissal, the decision lay with the manager. It emphasised that the manager should fully involve their local people representative in their decision making. The documented process was focussed on those with long-term absence, which of course did not apply to the claimant, but the Tribunal did not identify any particular failure by the respondent to follow the procedure outlined. During the hearing, some time was spent focussing on the paragraph of the process which addressed occupational health and advice. That concluded by saying *“if the report suggests there is no foreseeable return to work, then you should arrange a meeting where the potential outcome could be an ill health termination”*. In this case there was no report from the occupational health provider which suggested there was no foreseeable return to work, and the words ill health termination were not used.

72. In the course of the Tribunal hearing the panel did ask the witnesses questions about the staffing of the café. In Mr Battle's answers to questions he confirmed that the claimant, when employed, did not count towards the number of people working on shift when staffing levels were determined. In answer to subsequent questions about whether the claimant was replaced, the answers were less clear as Mr Battle made reference to overtime and the need for assistance to cover other roles, albeit that the claimant's role was not advertised for a replacement. What was clear was that the respondent did not actively recruit to replace the claimant or to find someone to fulfil his working hours in his role after he left.

73. In the course of the Tribunal hearing the claimant's representative did raise things that she said the respondent had not considered or adjustments which had not been made. One possibility was the claimant wearing gloves to ascertain whether the plates were clean. The respondent's witnesses rejected this suggestion when asked about it, on the basis that the gloves themselves would cross contaminate, and the respondent does not as standard use gloves for hygiene purposes (but instead focuses on frequent handwashing). In any event, the evidence of the respondent was that the claimant would have been unable to identify whether there was dirt on the plates if he was wearing gloves. It was also suggested that a colleague could have been used to check the plates after the claimant had cleaned them. The respondent emphasised that the plates were stacked before being returned to the café and therefore such checking would have been particularly onerous.

74. The claimant's representative also referred to the possibility of referring the claimant to Occupational Health again or to involving Access to Work to see if they could identify any other resolution. Neither of these steps was undertaken by Ms Halliday prior to dismissal. Whilst it clearly would have been open to the respondent to do either of these things prior to dismissing the claimant, the Tribunal notes that the claimant's representative was not herself able to identify a resolution (save for those described in the previous paragraph) to the fundamental problem that if the claimant could not see whether the plates and pots were clean when they came out of the dishwasher, he was unable to know whether they needed to be cleaned again. The Tribunal accepts that the practice of the claimant wiping his hands across the face of the plates prior to them being put out for use by customers, was one that carried a high risk of cross contamination, and it was entirely appropriate for the respondent to seek to stop it occurring for health and safety reasons.

75. The claimant appealed in a letter of 24 November 2018 (232). The appeal was acknowledged on 29 November 2018 by Ms Butterworth, People Manager (233). Mr Hayes' evidence was that appeals against dismissal were dealt with by the respondent centrally and then allocated out to an entirely independent store manager. Mr Hayes did not know the claimant and had no involvement with the North West or with the Kendal store. Ms Butterworth was the People Manager at the store at which Mr Hayes worked.

76. A letter of 17 December 2018 provided details to the claimant of the appeal hearing (234). It was noted in the course of the hearing that this letter, whilst sent from Mr Hayes, was pp'd by Mr Battle. This is something the Tribunal found to be poor practice. Mr Hayes could offer no explanation for it.

77. The appeal hearing took place on 7 January 2019 in the Kendal store. It was attended by the claimant, who was accompanied by his trade union representative. Mr Hayes attended together with Ms Butterworth. Mr Hayes had been provided with the claimant's personnel file and the notes relating to his dismissal, which he read prior to the hearing. The Tribunal was not provided with any notes of the appeal hearing. Mr Hayes' evidence was that the notes had been lost, something of which he had only become aware when dealing with the Tribunal proceedings.

78. After conducting the appeal hearing, Mr Hayes then met with each of (separately) Mr Battle, Ms Halliday, and Ms Doherty (the café manager), following the meeting on 7 January. He also took a tour of the café with Ms Doherty. No notes whatsoever were provided for those meetings, nor was the claimant ever provided with any details of what Mr Hayes was told at those meetings.

79. The appeal hearing reconvened on 8 February 2019, and was attended by the same people. No notes whatsoever were provided of that meeting. That meeting involved Mr Hayes informing the claimant that his appeal had not been successful and outlining why that was.

80. Mr Hayes did not uphold the claimant's appeal. The outcome was provided in an undated letter (236). Mr Hayes was unable to confirm when this letter was written or when it was sent to the claimant. From the content of the letter it appears that it must have been written after 8 February. The letter did contain reference to Mr Hayes having met with both Ms Halliday and Ms Doherty following the first day of the

appeal hearing. It contained no mention whatsoever that Mr Hayes had met with Mr Battle.

81. Mr Hayes addressed the appeal on the basis that it had been raised on four grounds. In summary the grounds and the outcome were as follows:

- (1) The claimant complained that the first meeting with Mr Battle (that is the meeting on 19 September) had been called when he was unaware what it was about and without the right to accompaniment. Mr Hayes' conclusion was that the purpose of the meeting was to review the nine key skills assessment and, as it was not a formal meeting, no formal advance notice or action was required;
- (2) That the claimant had been moved into the café in 2012 and had worked on the pot wash, as this was the only position he could manage, after further refits had taken place. Mr Hayes rejected that as a ground for appeal, focussing on the adjustments that had been made. In his witness statement Mr Hayes highlighted that the physical washing of pots was having to be checked by colleagues and there was an increasing concern that required standards of cleanliness were not being met;
- (3) The claimant referred to his financial loss as a result of his dismissal. This was something that Mr Hayes accepted, but did not uphold his appeal on that basis; and
- (4) That there had been no complaints in relation to his work in the past and that he felt he had been discriminated against having worked for the company for 20 years. In the section of the letter responding to this issue, Mr Hayes recounted to the claimant what he had been informed by Ms Halliday and Ms Doherty, including raising a number of complaints from Ms Doherty which had neither been addressed with the claimant nor recorded in any document.

82. The Tribunal found Mr Hayes' decision letter somewhat difficult to follow. It was clear, however, that his conclusion was that the appeal was rejected. At the end of his letter he stated (241):

"it was evident that you were not fulfilling the reasonable adjustment that had been put into place, alternative roles had been considered but ultimately you agreed that there was no job that you would be able to carry out and no further reasonable adjustments could be made from the store...My concerns going forward is that you would potentially miss dirt and debris in the café after the cleaning process and harmful bacteria may be transferred from crockery and cutlery posing possible cross contamination in the café and that due to sight being impaired with no improvement ongoing colleagues would be assisting you to complete your role in the department therefore you would be unable to complete the role agreed as part of the reasonable adjustment the store had put in place".

The Law

83. Both parties' representatives agreed that the law in relation to this case was not controversial and there were no particularly novel issues which needed to be addressed or case law which needed to be considered.

Unfair dismissal

84. Section 98 of the Employment Rights Act 1996 provides:

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —*
 - (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it—*
 - (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
 - (b) *...*
 - (c) *is that the employee was redundant, or*
 - (d) *...*
- (3) *In subsection (2)(a) —*
 - (a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, ...*
- (4) *[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
 - (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
 - (b) *shall be determined in accordance with equity and the*

substantial merits of the case.

85. The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and, so far as material, it reads as follows:

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

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

(i) for employees to carry out work of a particular kind ... have ceased or diminished or are expected to cease or diminish”.

86. Neither party provided the Tribunal with any authority which addressed whether the reason for dismissal was to be considered as redundancy or capability, where the reason for dismissal was the cessation of a long-standing light-duty role (which had been adjusted for an employee). The Tribunal has noted and reminded itself that it is for the Tribunal to determine whether the respondent has shown what the reason was for dismissal, the burden being on the respondent under section 98(1) of the Employment Rights Act 1996. Even where there is a redundancy situation, the Tribunal still needs to decide whether the respondent has shown what the reason was (**Timex Corporation v Thomson [1981] IRLR 522**). It is open to a respondent to rely on a different reason before the Tribunal than that given at the time of dismissal (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

87. The proper application of the general test of fairness in section 98(4) is well documented and addressed in a number of cases. The Employment Tribunal must not substitute its own decision for that of the employer. The question is rather whether the employer’s conduct fell within the “band of reasonable responses”: **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley; HSBC Bank PLC v Madden [2000] IRLR 827**.

88. In terms of redundancy, the respondent’s representative confirmed in submissions that, if the Tribunal were to conclude that the dismissal was by reason of redundancy, it would still contend that the dismissal was fair.

89. Whilst neither party expressly referred to it in their submission documents, the Tribunal has also considered the guidance given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

90. The test of the band or range of reasonable responses applies to the question of the “pool” of employees put at risk of redundancy.

91. The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

“It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body with whom he is consulting. I would respectfully adopt the test proposed by Hodgson J in R v Gwent County Council ex parte Bryant ... when he said:

‘Fair consultation means:

- (a) consultation when the proposals are still at a formative stage;*
- (b) adequate information on which to respond;*
- (c) adequate time in which to respond;*
- (d) conscientious consideration by an authority of the response to consultation”.*

92. On the issue of consultation **Mugford v Midland Bank [1997] IRLR 208** says:

“It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.”

93. An employer is required to take reasonable steps to find the employee alternative employment. The Employment Appeal Tribunal in **Lionel Leventhal Limited v North [EAT 0265/04]** said that *“it can be unfair not to give consideration to alternative employment within a company for a redundant employee even in the absence of a vacancy”*. It held that whether it is unfair or not to dismiss for redundancy without considering alternative and subordinate employment is a matter of fact for the Tribunal.

94. The claimant relied upon the decision of the Employment Appeal Tribunal in **Mylott v Tameside NHS Hospital Trust [2011] UKEAT/0352/09** and in particular paragraphs 35 and 36 of that Judgment. That was a case which the Tribunal mentioned in the context of a discussion about the respondent’s policy (50). That decision is authority that considering an alternative approach to termination cannot be a reasonable adjustment – reasonable adjustments being focussed on retaining an employee in employment. However, as the claimant correctly highlighted, it also

showed that a failure to follow something which the respondent has committed to consider (such as ill health retirement) can be a factor in considering the fairness of a dismissal. In her submissions, the respondent's representative highlighted the facts of the **Mylott** case and the significant differences between those circumstances and those of the claimant in this case.

Polkey

95. In **Polkey** the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by the Tribunal) *may* be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee *may* have been dismissed properly in any event, if a proper procedure had been carried out, the Tribunal should normally make a *percentage assessment* of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction the Tribunal may have to speculate on uncertainties to a significant degree. Issue 10 in the list of issues addresses the need for the Tribunal to consider **Polkey**.

96. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274** the Employment Appeal Tribunal explained *Polkey* as follows:

"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) ... The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

97. That Judgment emphasised that the issue is what the respondent would have done and not what a hypothetical reasonable employer would have done in the circumstances. A Tribunal may decide that although the dismissal would have occurred in any event, it would have been delayed had fair procedures been followed. In those circumstances the compensatory award ought to reflect the additional period for which the claimant would have been employed had the dismissal been fair. The **Polkey** principle may be applied where the Tribunal is satisfied that the claimant would or could have been fairly dismissed for a different reason than that for which they were dismissed.

98. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the claimant. The mere fact that an element of speculation is involved is not a

reason for refusing to have regard to the evidence (**Software 2000 Ltd v Andrews [2007] IRLR 568**).

The right to a redundancy payment

99. The right to a redundancy payment is contained in Part XI of the Employment Rights Act 1996. Section 135 provides that an employer shall pay to an employee a redundancy payment, if the employee is dismissed by the employer by reason of redundancy. Section 139 defines redundancy, as explained above. Sections 163 and 164 detail references to an Employment Tribunal and claims for a redundancy payment.

Discrimination arising from disability

100. Section 15 of the Equality Act 2010 provides:

- (1) *A person (A) discriminates against a disabled person (B) if —*
 - (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*
 - (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

101. The respondent emphasised the Guidance in relation to objective justification contained in paras 4.25-4.32 of the EHRC Code of Practice on Employment 2011, which the Tribunal took into account. The respondent emphasised that treatment will be proportionate if it is 'an appropriate and necessary' means of achieving a legitimate aim. Necessary does not mean that it is the only possible way of achieving the legitimate aim.

102. In terms of discrimination arising from disability, the claimant's representative in her submissions referred to: **Basildon & Thurrock NHS Foundation Trust [2016] ICR 305**; **City of York Council v Grosset [2018] IRLR 746**; **Sheikholeslami v University of Edinburgh [2018] IRLR 1090**; **Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893**; **Pnaiser v NHS England [2016] IRLR 170**; and **Robinson v Department of Work and Pensions [2020] IRLR 884**.

Indirect discrimination

103. S19 Equality Act 2010 provides:

- (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is*

discriminatory in relation to a relevant protected characteristic of B's if:

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

104. When considering a claim of indirect discrimination it is necessary to consider the statutory test in stages:

- a. The first stage is to establish whether there is a PCP;
- b. If the Tribunal is satisfied that the PCP contended for has been or would be applied, the next step is the analysis of whether there is a particular disadvantage for those with the relevant protected characteristic when compared to those that do not share the protected characteristic. The comparative exercise must be in accordance with section 23(1) of the Equality Act 2010. In relation to disability it is therefore necessary to consider those with the individual's particular disability. The Code gives the example of someone with an equivalent level of visual impairment.
- c. If the group disadvantage is established, then it must be shown that it did or would put the individual at that disadvantage.

105. The burden of proving those elements is on the claimant – the respondent relied upon **Dziedziak v Future Electronics Ltd EAT0271/11** as authority for this point.

The duty to make reasonable adjustments

106. Section 20 of the Equality Act 2010 provides:

- (1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) *The duty comprises the following three requirements.*
- (3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in*

relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) – (7) ...

(8) *A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.*

(9) – (13) ...

107. The respondent relied upon **Environment Agency v Rowan [2008] IRLR 20** as authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments were:

- a. the provision, criterion or practice applied by or on behalf of an employer;
- b. the identity of non disabled comparators (where appropriate); and
- c. the nature and extent of the substantial disadvantage suffered by the claimant.

108. In her submissions, the claimant's representative referred to the following cases regarding reasonable adjustments: **Moores v Wiltshire County Council [1998] IRLR 352**; **HM Land Registry v Wakefield [2009] All ER D205**; **Rideout v TC Group [1998] IRLR 628**; and **Williams v J Walter Thompson Group Ltd [2005] EWCA Civ 233**. She quite rightly highlighted that the focus for the Tribunal is to determine objectively whether there were reasonable adjustments which should have been made. However, the Tribunal does not agree with the submission which was made in reliance on the last of these authorities. **Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664** is authority for the fact that the steps which consider or investigate adjustments, such as obtaining occupational health advice, are not (at least in most cases) a potential reasonable adjustment themselves – the focus for the Tribunal is to determine whether there were reasonable adjustments which could have been made (here to the role and duties) not whether there were further steps which the respondent could have undertaken to consider adjustments. Whilst there may be cases where investigations or adjustments themselves are the adjustment to be considered – that was not the position on the facts of this case.

109. When considering reasonable adjustments, the Tribunal took into account the EHRC Code of Practice on Employment. This included the section on what is meant by reasonable steps at 6.23 to 6.29 and, in particular, the list of some of the factors which can be taken into account at 6.28. They include: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; and the type and size of the employer. The Tribunal also considered the section on reasonable adjustments in practice at 6.33-6.34 and, in particular, the examples given in respect to: employing a support worker; and taking a combination of steps.

Conclusion – Applying the Law to the Facts

110. The Tribunal when considering its decision, did not address the issues in the order in which they had been recorded in the list agreed by the parties. The Tribunal instead focussed first on discrimination arising from disability, before addressing: indirect discrimination; reasonable adjustments; and, finally, the fairness of the dismissal. As the Tribunal considered the issues in that order, this Judgment reproduces them in the same order that the decision was reached.

Discrimination arising from disability

111. The first question asked (issue 27) was whether the claimant was treated unfavourably by being dismissed on the grounds of capability? The answer to that question is yes. Being dismissed is, of course, being treated unfavourably.

112. The second question (issue 28) was whether this unfavourable treatment was because of something arising in consequence of the claimant's disability? The "something arising" was alleged by the claimant to be an inability to carry out all of the nine key skills and/or the need for adjustments to those key skills. The List of Issues asked whether this arose as a consequence of the claimant's disability (issue 29)? As a result of the claimant's disability, he was unable to undertake eight of the key skills in the café and was unable to undertake a portion of the skills in relation to the ninth key skill of dishwashing. The Tribunal finds that this was clearly "something arising" which was a consequence of the claimant's disability. That was the reason for the claimant's dismissal.

113. In terms of legitimate aims, as confirmed above, the respondent alleged that the legitimate aims were to ensure: the hygiene/cleanliness standards were met; and acceptable levels of service to customers/meeting business and operational needs. These were both legitimate aims, as accepted by the claimant's representative.

114. As a result of these conclusions, the key question in relation to the claim for discrimination arising from disability, was whether the dismissal of the claimant was a proportionate means of achieving one, or both, of those legitimate aims? The Tribunal approached this question by considering the two legitimate aims relied upon separately.

115. The second of the legitimate aims relied upon, that is the acceptable level of service to customers/meeting business and operational needs, is not one which the Tribunal finds that dismissing the claimant (an employee of almost twenty years' service) was a proportionate means of achieving. The claimant had worked in the respondent's café for six years primarily undertaking only the dishwashing role, and for the last two years he had undertaken entirely only the dishwashing role (without collecting items from the café). Whilst the Tribunal accepts and understands the respondent's wish to be able to move around its café staff at busy times, which would be optimised by all café staff being able to undertake all of the tasks, dismissing the claimant was not a proportionate means of meeting the aims identified. The claimant had fulfilled one role for six years (later with some support from his colleagues in terms of moving crockery and cutlery to a place where he could access it). In the view of the Tribunal, dismissal of a long-serving employee

fulfilling one of the roles required in the café kitchen (or at least the predominant part of one role), was a disproportionate means of achieving the aim.

116. However, in terms of the legitimate aim of meeting hygiene and cleanliness standards, the Tribunal's finding is that the dismissal was clearly a proportionate means of meeting those aims. At the time of his dismissal, the claimant was operating a dishwasher throughout the day but could not see whether there was any accumulation of dirt or debris, nor could he see whether the items he had washed were clean. Running his bare hands across the face of the items of crockery and cutlery was not a suitable way to attempt to ascertain cleanliness. The contamination risks were significant and it was a practice which the respondent was able to require be discontinued. Washing everything twice was inefficient and wasteful, but in any event did not avoid the risk that the claimant could still miss dirt or debris. The claimant and his representative did not genuinely identify any alternative option which ensured that crockery was clean, the contamination risk was removed, and the claimant was able to remain in employment fulfilling the remaining key café skill which he had previously undertaken. On that basis and for those reasons, the Tribunal finds that the dismissal of the claimant was a proportionate means of meeting that legitimate aim.

Indirect Discrimination

117. The issues and the outcome for the claims of indirect disability discrimination reflect the outcome explained for discrimination arising from disability.

118. The first question (issue 31) was whether the respondent adopted a provision, criterion or practice of requiring colleagues working in the café to carry out the majority of the nine key skill areas. The respondent accepted in its pleadings that it did.

119. That PCP did place employees with diabetic retinopathy at a disadvantage compared with colleagues who did not have that disability (issue 32). The reason why the claimant could not meet eight of the key skill areas, and had a reduced capacity to meet the ninth, was because of his diabetic retinopathy. This is something he would have shared with anyone else with the same condition. Others without visual impairments would have been able to carry out the nine key skills, or at least would have been significantly more likely to be able to do so.

120. Clearly the claimant was put at this disadvantage (issue 33), because he could not undertake the majority of the key skill areas (or indeed arguably any of them in their entirety).

121. As with the issue of discrimination arising from disability, the crucial question was (issue 34) whether the respondent could show that the dismissal was a proportionate means of achieving the legitimate aims. The legitimate aims relied upon were the same as those outlined above, and which were accepted as being legitimate by the claimant's representative.

122. For the same reasons as explained in relation to discrimination arising from disability, the Tribunal finds that dismissal of the claimant was a proportionate means of achieving the legitimate aim of ensuring the respondent met the hygiene and

cleanliness standards. It would not have found this was a proportionate means of achieving the legitimate aim of acceptable level of service to customers, or meeting business and operational needs.

123. Issue 35 was whether the respondent adopted a PCP of removing previously agreed adjustments from colleagues without their consent. The Tribunal heard no evidence that the respondent applied such a provision, criterion or practice to other employees, whether within the café or elsewhere. Whilst the Tribunal understands the claimant's submission that the respondent removed previously agreed adjustments from him, nevertheless even if that was the case that does not mean that it was a PCP applied by the respondent. The respondent considered the claimant's own personal circumstances. This was not a PCP the respondent adopted. As a result of the conclusion that the respondent did not adopt such a PCP, the Tribunal does not need to go on to consider issues 36-38 which only need to be determined if the respondent had applied such a PCP.

124. Issue 39 was whether the respondent adopted a provision, criterion or practice of not requiring medical advice to support dismissal decisions in disability cases. In this case, the respondent sought and obtained an Occupational Health report on 29 October 2018, which was considered at the dismissal meeting on 16 November 2018. That is, there was a short period of time between the Occupational Health report being obtained and the decision being reached. It is understood that the claimant's representative's criticism of the report obtained was more technical, being a contention that it was not a report on the proposal to dismiss as opposed to upon the matters raised in the referral. It also did not recommend dismissal or advise that the claimant was unable to fulfil his duties. The Tribunal does accept that a further report might have actually addressed the central issue of what the claimant could and could not see when the crockery came out of the dishwasher (or that might at least have been achieved by asking more focussed questions), however there is no evidence that there was a practice of not obtaining a further, or more specific, report. The Tribunal has heard no evidence that there was ever a practice of not obtaining medical evidence, and in any event what the Tribunal has concluded is that the respondent did obtain medical evidence before the decision was made. As a result, the respondent did not adopt the PCP alleged, which also meant that issues 40-42 did not need to be determined, as those issues would only arise if such a PCP had been established.

Reasonable Adjustments

125. The issues relating to the duty to make reasonable adjustments, were issues 12-26. Issue 12 was essentially a summary of what needed to be determined. For the reasons explained below, the Tribunal has found that the respondent has not failed in its duty to make reasonable adjustments.

126. Issue 13 was whether the respondent adopted a provision, criterion or practice of requiring colleagues who worked in the café to carry out the majority of the nine key skill areas. The respondent accepted it was a PCP which it adopted.

127. Issue 14 asked whether the PCP put the claimant at a substantial disadvantage in comparison with persons who were not disabled? The Tribunal has no hesitation in concluding that the claimant was placed at a substantial

disadvantage by that PCP, because the reason he could not undertake eight of the key skill areas, and indeed some of the ninth, was because of his diabetic retinopathy. Someone without that condition and/or who was not partially sighted would have been able to complete the key skill areas (or at least would have been significantly more likely to be able to do so) and therefore it did place the claimant at a substantial disadvantage.

128. Issue 15 asked whether allowing the claimant to work in the role of pot wash only would have avoided the disadvantage suffered? The straightforward answer to that question is yes, at least in as much as an adapted dishwasher/pot wash only role had enabled the claimant to continue to fulfil a job with the respondent in the café for approximately six years, even though the claimant could not carry out the other eight key skill areas. For the reasons explained in more detail in answering issue 16 below, by mid-2018 it was not however the case that the claimant was able to carry out the role of dishwasher/pot wash even as it had been adjusted previously (without cross-contamination and health and safety risks).

129. Issue 16 raises the key question. Was allowing the claimant to continue to work in the role of dishwasher/pot washer only, a reasonable adjustment in the circumstances? The Tribunal would observe that this is not an easy or straightforward issue in the circumstances of this case.

130. The claimant had fulfilled the role of undertaking entirely dishwashing only for two years prior to his dismissal. He had fulfilled a role of predominantly undertaking dishwashing only for six years and, throughout that time, the work he had done had been limited to the one key skill area for employees working in the customer café. It is often a significant indicator that an adjustment is reasonable, where an individual has been able to have an adjustment made for them for that length of time.

131. Had the question of the reasonableness of the proposed adjustment only needed to have been considered in relation to staff arrangements, logistics, and the flexibility of staff for organisational-purposes, the Tribunal would have found that continuing the arrangement by which the claimant undertook only dishwashing/pot washing would have been a reasonable one (and therefore it would have found that adjustment something which the respondent had a duty to make).

132. However, what makes this case far more complicated, is that part of the reason for the respondent's decision related not only to the wish to have more flexible and interchangeable staff working in the café, but also to the conclusion that the claimant was, in/by mid-2018, unable to undertake the parts of the dishwashing/pot washing role he had fulfilled, effectively and in accordance with health and safety without cross contamination risk. It is not entirely clear when the claimant's sight had deteriorated to the point where this was the case. The evidence was that the claimant's condition had deteriorated up to at least 2017 – see paragraphs 34 and 35 above – even if it had not deteriorated further in 2018. However, when management changes had taken place and the new people responsible for the customer café had taken up their roles in 2018, what was identified was that the claimant could not see whether the items which had been through the dishwasher were clean, and the only way of identifying whether they were clean was by looking at them to see (something the claimant was unable to do

– see paragraph 47). Accordingly, the claimant was not only unable to fulfil the other eight key skills for an employee in the customer café, but he was also unable to fulfil the key skills required for dishwashing (even those elements of that skill which he had previously been able to fulfil).

133. Factors which are taken into account in determining whether a particular step/adjustment is reasonable, include the practicability of the step and the effectiveness of it. Where the reasonable adjustment sought, that is the claimant remaining employed whilst only undertaking most of one key skill in the customer café, did not in fact enable the claimant to successfully carry out that skill or the dishwashing effectively, the Tribunal finds that it was not a reasonable adjustment (or it had ceased to be a reasonable adjustment which the respondent was under a duty to make).

134. The Tribunal has considered whether the adjustment would have been reasonable if other steps were also taken alongside it, that is what the EHRC code of practice describes as a combination of steps. Whilst the claimant's representative suggested that checking the cleanliness of the plates would have been possible wearing gloves, the Tribunal finds that wearing gloves would not enable the claimant to identify whether the plates were clean, and would themselves have created a cross-contamination risk unless replaced continuously. It would have been a possibility that another employee could have checked each and every item washed by the claimant to establish whether it was clean, but the Tribunal finds that would not have been practicable, as the plates were stacked (see paragraph 73), it would have been a very onerous requirement, and that person would also have needed to handle the cutlery and crockery after the claimant had done so. The Tribunal also does not find that allowing the claimant to continue to check the cleanliness of the items he had washed by rubbing his hand across the surface of each item, was a reasonable adjustment for the reasons already addressed.

135. As a result, in answer to the question asked at issue 16, and taking account of what the claimant could see by mid-2018, the Tribunal does not find that allowing the claimant to continue to work in the role of dishwasher/pot washer only, was a reasonable adjustment in the circumstances.

136. Issue 17 asked whether the respondent adopted a PCP of removing previously agreed adjustments from colleagues without their agreement? As has been addressed in relation to indirect discrimination for issue 35 above, the Tribunal does not find that the respondent did adopt such a PCP. There has been no evidence provided to the Tribunal which would enable it to conclude that such a provision, criterion or practice was in place. Issues 18-20 therefore do not need to be further addressed, as they rely upon such a PCP having been applied. In reviewing this issue, the Tribunal would add that it cannot see why this allegation added anything to the claimant's central argument about reasonable adjustments, as addressed for issues 12-16.

137. For issue 21, as outlined in relation to issues 39-42 above, the Tribunal does not find that the respondent adopted a PCP of not requiring medical evidence to support dismissal decisions in disability cases. Issues 22-25 do not need to be determined. In any event, the obtaining of medical evidence was not the reasonable

adjustment sought. In this case, obtaining medical advice/evidence was not an adjustment sought, but a potential source of further advice about whether adjustments could be made (see **Tarbuck v Sainsbury's Supermarkets**). In any event, this issue did not arise for determination because the Tribunal has concluded that such a PCP was not applied.

138. In the List of Issues, issue 26 asked whether the adjustments and other adjustments were offered to the claimant to any extent? The Tribunal does not believe that this is an issue that it needs to determine in order to reach a decision in the claimant's reasonable adjustment claim. As addressed above, the focus in a reasonable adjustments claim is whether the Tribunal objectively concluded that reasonable adjustments were not made and therefore the duty not complied with. The focus was not on whether reasonable adjustments were offered to, or explored with, the claimant. As confirmed above, the Tribunal did find that there were no roles within the store which the claimant could fulfil (even with adjustments). That was explored with the claimant. The approach of discussing with a long-serving employee whether there were other parts of the supermarket in which he could have worked or any other roles, was an entirely appropriate one, and that did occur. The Tribunal would observe, from having heard evidence from the claimant, that he may not be someone who would naturally be forthcoming about the possibility of fulfilling other roles. Nonetheless, in the absence of the claimant's representative at the Tribunal hearing identifying any specific role which the claimant could have filled (even with reasonable adjustments), and the Tribunal having determined that there were no reasonable adjustments which should have been made, whether or not those adjustments were explored with the claimant would not alter the Tribunal's decision.

Unfair Dismissal

139. The first question which the Tribunal needed to determine in the unfair dismissal claim, was what was the principal reason for the claimant's dismissal? There were two inter-related reasons which were considered by the respondent throughout the process undertaken with the claimant: the respondent's wish to have generic customer assistants in the customer café able to undertake all of the key skills; and that the claimant was not capable of undertaking the role of dishwasher/pot washer in accordance with health and safety requirements and without risking cross-contamination. These reasons raise two reasons for dismissal which were potentially fair: redundancy; and capability. The Tribunal has concluded that for the employees of the respondent there was some confusion between the two practical and legal reasons.

140. In looking at the reason for dismissal, an important question is what was the work of a particular kind which the claimant was employed to undertake? What was his role or job title? Had the claimant been provided with an up to date statement of employment particulars, this exercise might have been more straightforward as that would have spelt out the title of the job which the claimant was employed to do or provided a brief description of the work for which he was employed. No formal document was given to the claimant which described this (after his role changed in 2002). The Tribunal finds that the claimant was employed as a dishwasher or pot washer and that was the work for which he was employed from 2012, for the following reasons:

- a. That is what was described in the documents available from around the time he took up the role in 2012 (see paragraphs 25, 26 and 29 above) (85, 88 and 92);
- b. The length of time for which he had filled the role and the permanence of it when it was established (there was no suggestion that it was a temporary light-duties role);
- c. The limited duties were described in the risk assessment in March 2016 (see paragraph 32) (125);
- d. Mr Battle's note of the points to cover in the meeting on 16 November 2018 recorded that the role of pot washer "*no longer exists*" (226), suggesting that it had previously existed; and
- e. In two places in her letter of 17 November informing the claimant he was dismissed, Ms Halliday refers to the fact that the pot wash role did not exist "*anymore*" (229, 230), a word which means that it must have once existed.

141. For those reasons, the Tribunal finds that the claimant was not employed as a generic Customer Assistant, as the respondent asserted. There was no documentation provided to the Tribunal which recorded that as being the claimant's job title or which recorded the claimant as being required (after 2012) to undertake duties other than those of dishwasher/pot washer in the kitchen (save for collecting dirty crockery from the café until 2016).

142. In determining the principal reason for the claimant's dismissal, the Tribunal has particularly taken account of the following:

- a. The 2018 process commenced with Mr Battle's meeting with the claimant on 26 September 2018 in which he explored with the claimant whether he could undertake all of the nine key skills. That was a meeting about whether the claimant could undertake the interchangeable multi-skilled café role and there was discussion about the labour model (see paragraph 42) (158), it was not focussed upon concerns about the claimant's method of checking whether plates were clean;
- b. The occupational health referral made by Mr Battle (165) emphasised that he felt the claimant could not fulfil the full remit of his role, that every café colleague was expected to complete all nine key skills, and that the claimant's restrictions were affecting the level of service given to customers;
- c. The emphasis placed by Mr Battle in the points to cover at the 16 November meeting, on colleagues completing the nine key skills so resource can shift around to meet the needs of the customer (see paragraph 56) (224);

- d. When writing her own reasons to be delivered to the claimant on 16 September (see paragraph 58) (223), Ms Halliday noted that part of her reason for dismissal was because food retail was changing constantly, was very competitive, and the respondent had to react to those changes to do the best for customers;
- e. On two occasions in the decision letter of 17 November (see paragraphs 66 and 67 above) (229, 230) Ms Halliday emphasised the respondent's need for interchangeable employees in the café able to support each other in other tasks at busy times. She stated that the respondent was unable to create a vacancy for a colleague that did not exist within the structure; and
- f. The claimant was not replaced by the respondent, and after he left its employment there was no one fulfilling the role of dishwasher/pot washer thereafter (albeit, of course, customer assistants would have undertaken some dishwashing or pot washing as part of their roles).

143. The Tribunal finds that, based on the matters outlined in the previous paragraph (with factors d-f being the most important, d-e evidencing the reasons of the decision-maker herself), that the principal reason for the claimant's dismissal was redundancy. The claimant was employed as a pot washer/dishwasher in the customer café. The respondent determined that it no longer wished to employ someone to undertake that unique role. The requirements of the respondent's business for employees to carry out only pot washing/dishwashing, had ceased. The respondent wished to employ in the café only employees who were able to undertake the variety of skills required, it no longer wished to employ someone fulfilling only one (or the majority of one) of the skills. That was the principal reason for Ms Halliday's decision to dismiss the claimant, as explained by her in her decision letter and as had been explained by her when the claimant was informed of the outcome (as she noted for herself when preparing to explain the dismissal to him). It is the case that the claimant's capability played a part in the decision to dismiss, but for the reasons explained the Tribunal does not find that to be the principal reason for dismissal.

144. As the reason for dismissal has been found to be redundancy, that is a potentially fair reason. The Tribunal is then required to go on and consider whether the dismissal was fair in accordance with section 98(4) of the Employment Rights Act 1996 and equity and the substantial merits of the case. The dismissal can be fair even though the respondent relied upon a different reason and even though redundancy was not actually mentioned to the claimant. The Tribunal can take into account the significant size of the respondent and that it is a national employer with significant resources (and it has done so).

145. The claimant was effectively in a pool of one for potential redundancy, as he was the only person employed as a dishwasher/pot washer. His selection was fair. The respondent did seek to see whether, instead of dismissing him, it could offer him alternative employment.

146. However, in all the circumstances of this case and, in particular, considering the case law on redundancy consultation as explained in the law section above, the

Tribunal does not find the claimant's dismissal to be fair. The meetings held with the claimant were not genuine full and fair redundancy consultation. What was effectively the first redundancy consultation meeting with the claimant, on 19 September 2018, came as a bolt out of the blue, without warning or information. In that meeting, the claimant was assessed on the nine key skills of the (alternative) role without advance notice or genuine consultation about the outcome. The final meeting was not genuinely conducted as a consultation meeting providing the claimant with the opportunity to respond to a proposed redundancy. Indeed no one on behalf of the respondent treated the process as one of redundancy consultation and the process followed was (as explained) confused and involved a number of different issues. Had the respondent explained to the claimant that he was at risk of redundancy and had the claimant had the opportunity to respond in the context of consultation about potential redundancy, the process would have been a very different one for the claimant, and it could have enabled genuine consultation. The Tribunal finds that the dismissal was unfair as a result of the failure to genuinely consult about redundancy, particularly taking into account the respondent's size and administrative resources.

147. An additional factor which has also been taken into account in determining that the dismissal was unfair in the circumstances, was the conduct of the claimant's appeal. Mr Hayes conducted his own investigation after he heard the claimant's appeal. He spoke to three individuals and undertook his own café tour with the claimant's manager. In the course of those meetings, Mr Hayes was informed of other things which he took into account in his appeal decision. The claimant was not present for any of those interviews. He was not provided with any record of those interviews or of what was said. He was not given an opportunity to respond prior to a decision being reached. He was not even informed about Mr Hayes meeting with Mr Battle, that is someone who had determined that the claimant could not remain in employment (unless an alternative was identified by occupational health) since 26 September 2018. The appeal decision in practice was not at the heart of the evidence heard by the Tribunal nor was it a key part of the Tribunal's decision, but the failings in the appeal process were nonetheless a further factor which contributed to the finding that the dismissal was unfair.

Polkey

148. Could the respondent have fairly dismissed the claimant if a fair procedure had been followed and, if so, what were the chances that the employer would have done so? The Tribunal has no doubt that had this employer undertaken a fair procedure, the claimant would still have been dismissed. The claimant's role did cease to exist. As determined in relation to the discrimination claims, there were no reasonable adjustments which could have been made to reasonably retain the claimant in employment (without significant health and safety, or cross-contamination, risks). Even had the claimant adjusted the role to require the claimant to undertake only the dishwashing/pot washing parts of the role, the claimant was not able to do so safely for the reasons already explained. The Tribunal accordingly finds that, under the **Polkey** principles, the chances that the claimant would have been dismissed in any event are 100% and the compensatory award should be reduced by 100% accordingly. Dismissal would, in any event, have occurred at the same date.

Redundancy payment

149. In terms of the claim for a statutory redundancy payment and for the reasons already explained, the claimant was dismissed by reason of redundancy. As a result, the claimant did have the right to be paid a redundancy payment calculated in accordance with section 162 of the Employment Rights Act 1996

Summary

150. For the reasons explained above, the Tribunal has not found that the respondent discriminated against the claimant in any of the ways alleged. The Tribunal has found the dismissal was unfair. The Tribunal finds that the claimant would have been dismissed had a fair procedure been followed, so any compensatory award should be reduced by 100%. The claimant was dismissed by reason of redundancy and does have the right to be paid a redundancy payment.

Employment Judge Phil Allen

Date: 29 March 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

31 March 2021

FOR THE TRIBUNAL OFFICE

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