EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr W Adams		**Power X Equipment Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED DECISION)

HELD AT Birmingham **ON** 7 – 11 March 2022

EMPLOYMENT JUDGE GASKELL **MEMBER: Mr D Faulconbridge**

Representation
For the Claimant: **In Person**
For the Respondent: **Ms S Garner (Counsel)**

NOTE: *When the hearing commenced on Monday 7 March 2022,* ***Mr RW White*** *was the third member of the panel. On day four of the hearing, Thursday 10 March 2022, Mr White was unable to attend; he was unwell. The hearing was abandoned for the day. On day 5, Friday 11 March 20022, Mr White was still unwell. Both parties wished the hearing to continue on that day. Pursuant to Section 4(1)(b) of the Employment Tribunals Act 1996, the parties consented to hearing continuing before a panel comprising only Employment Judge Gaskell and Mr D Faulconbridge. The hearing concluded on that day with the decision reserved. Judge Gaskell and Mr Faulconbridge have deliberated and reached the decision set out below. Mr White took no part in the proceedings after Wednesday 9 March 2022 and has not been party to this decision.*

JUDGMENT

The Judgement of the tribunal is that:

1 The claimant's complaint pursuant to Section 48(1) of the Employment Rights Act 1996 that he has been subjected to detriment contrary to Section 44 of that Act is not well-founded and is dismissed.

2 The claimant's complaint pursuant to Section 48(1A) of the Employment Rights Act 1996 that he has been subjected to detriment contrary to Section 47B of that Act is not well-founded and is dismissed.

3 The claimant was not, at any time material to this claim as disabled person as defined in Section 6 and Schedule 1 of the Equality Act

2010. His claim for a failure to make adjustments is accordingly dismissed.

4 The claimant was fairly dismissed by the respondent by reason of redundancy. His claim for unfair dismissal is not well-founded and is dismissed.

5 The claimant's claim for unlawful deduction from wages is not well-founded and id dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Wayne Adams who was employed by the respondent, Power X Equipment Limited, as an Administrator - Spare Parts & Service Division from 4 January 2018 until 31 October 2020 when he was dismissed. The reason given by the respondent at the time of the claimant's dismissal was redundancy.

2 By a claim form presented to the tribunal on 6 October 2020 (whilst the claimant was still employed by the respondent) (Claim Number 1309512/2020) the claimant brings claims for unpaid wages and having suffered detriment contrary to the provisions of Section 44 of the Employment Rights Act 1996 (ERA) (Health & Safety). By a second claim form presented to the tribunal on 4 January 2021 (Claim Number 1300013/2021), the claimant brings claims for unfair dismissal, unpaid wages, and unspecified other payments.

3 At a preliminary hearing conducted by Employment Judge Jennifer Jones on 26 March 2021, the claimant was permitted to amend his claim to include a claim for disability discrimination (failure to make adjustments) and for detriment for having made protected disclosures pursuant to Section 47B ERA. Judge Jones set out in detail the issues to be determined by the tribunal which can be summarised as follows: -

Time limits

(a) Were the discrimination and detriment complaints made within the time limits in Section 123 of the Equality Act 2010 (EqA) and Section 48 ERA respectively?

Unfair dismissal

(b) What was the reason or principal reason for dismissal? The respondent says the reason was redundancy or some other substantial reason.
(c) If the reason was redundancy or some other substantial reason, did the

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

(d) Did the respondent properly consult with the claimant?

(e) Did the respondent follow a fair procedure?

Protected disclosure detriment (ERA section 47B)

(f) Did the claimant make one or more qualifying disclosures as defined in Section 43B ERA

Health and safety detriment (ERA1996 section 44)

(g) In circumstances of danger which the claimant reasonably believed to be serious and imminent did he refuse to return to his place of work or any dangerous part of it and/or take appropriate steps to protect himself or others from the danger?

(h) The claimant alleges that the "serious and imminent danger" was being in proximity to a member of staff with symptoms of the coronavirus in an office with flawed air conditioning with a work station that was not capable of providing the claimant with the ability to socially distance from colleagues.

Alleged Detriments

(i) In relation to Paragraphs (f) – (h) above, if the answer is yes, did the respondent subject the claimant to any or all of the following detriments because of a protected and qualifying disclosure and/or because of the claimant's said actions:

  (i) Being placed on furlough with its concomitant pay reduction.
  (ii) Refusing the claimant's request to be placed on flexible furlough.
  (iii) Placing the claimant at risk of redundancy.
  (iv) The denial of access to training on quarry/mining machinery during furlough leave.
  (v) Being isolated from colleagues because the claimant was told by the Managing Director on or about 14 May 2020 not to contact anyone.
  (vi) The delay in payment of bonuses due in April and June 2020 for Quarters 1 & 2.
  (vii) Not being provided with a laptop and phone to facilitate working from home.

Disability

(j) Did the claimant have a disability as defined in Section 6 of the Equality Act 2010 at the time of the events the claim is about?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

(k) Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
(l) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs: a particular seating arrangement in the office.
(m) Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was unable to socially distance from colleagues in accordance with government guidelines and that created an increased risk to him of contracting Covid-19 with a potentially poor outcome due to asthma?
(n) Did a physical feature, namely the layout of the office put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was unable to socially distance from colleagues in accordance with government guidelines and that created an increased risk to him of contracting Covid-19 with a potentially poor outcome due to asthma?
(o) Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
(p) What steps could have been taken to avoid the disadvantage? The claimant suggests: The provision of an alternative workstation located so as to enable the claimant to socially distance.
(q) Was it reasonable for the respondent to have to take those steps [and when]?
(r) Did the respondent fail to take those steps?

The Evidence

4 The claimant presented his case first and gave evidence on his own account but did not call any additional witnesses. The claimant had provided an unsigned statement purporting to come from a former colleague, Mr Stephen Bradley. Mr Bradley did not attend the hearing. Mr Bradley's witness statement and that of the claimant were in almost identical terms. The respondent objected to Mr Bradley's evidence being received unless Mr Bradley attended for cross-examination. The tribunal offered to issue a witness summons requiring Mr Bradley's attendance. The claimant chose not to rely on his evidence.

5 The claimant produced an additional 30 pages of documentary evidence which had not been included in the bundle. Having considered the same, the respondent did not object to that evidence being adduced.

6 More controversially, the claimant wish to rely on seven audio recordings which he had made covertly. The recordings had been provided to the respondent but no transcripts had been made despite the claimant having been advised that transcripts would be required if the recordings were to be relied upon. Overnight on the first/second day of the trial, the claimant produced transcripts of those parts of the recordings which he considered important to his case. The respondent was given the opportunity to consider them and ultimately did not object to the transcripts being adduced. It was unnecessary for the tribunal to listen to the recordings themselves.

7 The respondent relied on the evidence of three witnesses: Mr Luke Talbot - Managing Director; Miss Aysha Tyson - former Sales Administrator; and Mrs Louise Orme - Finance Director.

8 We were provided with an agreed trial bundle which, with the additional pages supplied by the claimant at the outset, run to in excess of 900 pages. We have considered those documents from within the bundle to which we were referred by the parties during the course of the hearing.

Medical Evidence & Evidence of Disability

9 The evidence provided by the claimant in support of his claim to be a disabled person was a brief disability impact statement; a history of various medication which has been prescribed for him for asthma; and 11 pages of printouts showing his medication and changes thereto.

10 We found the evidence of Mr Talbot, Miss Tyson and Mrs Orme to be clear, compelling and consistent. The evidence remained internally consistent during cross examination; it was consistent with contemporaneous documents; and the evidence given by each witness was consistent with that given by the others.

11 We found the evidence of the claimant to be far less clear and compelling and in certain respects highly inconsistent. Examples of his inconsistency include:

(a) It is the claimant’s case that it was a detriment for him to be placed on furlough in May 2020. But there is clear evidence in the bundle that he requested that he be placed on furlough.

(b) The claimant further claims detriment by reason of the respondent's failure to provide him with a laptop to facilitate homeworking. But, in May 2020, whilst contending that he should be permitted to work from home rather than required to attend the respondent's premises or be placed on furlough, the claimant maintained that he had all of the equipment he needed to perform his duties effectively from home.

12 Where there is a factual disagreement between the claimant and the respondent's witnesses, we prefer the evidence of the respondent's witnesses and have made our findings of fact accordingly.

The Facts

13 The respondent was initially part of an international engineering group Duo Group Holdings Limited (Duo). The group comprised five companies. Mr Talbot and his co-director Mr Alex Moss were original shareholders and directors in Duo, but in 2018 they sold the business to a group of investors. Mr Talbot and Mr Moss remained as managers of the business for a period of two years pursuant to the sale agreement. In early 2020, they were coming to the end of that two-year period.

14 The new investors did not wish to retain the whole of the business, and, in early 2020, Mr Talbot and Mr Moss purchased three of its constituent companies: Duo Equipment Limited; Duo Africa Limited and Duo International Limited. The main business of Duo remained with the new investors and they retained the ownership and use of the Duo brand. Under the 2020 agreement, those companies purchased by Mr Talbot and Mr Moss were required to rebrand within a period of three months. (Duo Equipment Limited became Power X Equipment Limited), they had to find new premises, and there were instances of a need to recruit new staff to perform duties which previously would have been performed by others on a group-wide basis. At all times material to this claim, the respondent had around 15 employees: of those, five were placed on furlough at some point; and only two, the claimant and Mr Bradley, were ultimately dismissed as redundant.

15 On 4 January 2018, the claimant commenced employment with Duo as a Parts & Warranty Coordinator. Following the break-up of the group, in January 2020, his employment transferred to the respondent. The claimant's line manager was Mr David Gage the third member of the Spares Department team was Mr Bradley.

16 The claimant's evidence, which we accept, is that he has suffered from Asthma throughout his life. The Asthma is controlled by medication and, over the years, there have been numerous changes to his medication. In terms of the

effects of his condition on his ability to carry out normal day-to-day activities, the claimant's evidence is simply that is Asthma caused "*reduced*" mobility as he sometimes got out of breath quickly; and likewise, a "*reduced*" ability to communicate with his breathing issues sometimes affecting his speech. As an Asthma sufferer, the claimant was inevitably concerned as to his vulnerability during the COVID-19 pandemic. But he was not officially classified as "clinically vulnerable" and did not receive any NHS guidance requiring him to shield. Until the events are with which this claim is concerned, there is no evidence of the claimant having informed the respondent of his Asthma nor of them otherwise being aware of it.

17 The claimant is allergic to dairy products. There is no evidence that he ever informed the respondent of this prior to an incident which occurred in January 2020. (The claimant relies simply on an email he sent to a colleague on 10 December 2018 when the colleague was organising the menu for a work related social event.)

18 The claimant also informed us that he suffers from Arachnophobia. Again, there is no evidence of the claimant ever having informed the respondent of this.

19 There were two incidents in January 2020. The first, where milk stored on the top shelf of the staff fridge leaked from its container and contaminated the claimant's lunch on the shelf below. The claimant became aware of the spill before attempting to eat his lunch; he was allowed to go home to refresh his lunch; and no harm was done. The claimant is adamant that this was deliberate sabotage of his lunch by David Gage. There is no evidence to support this suggestion; no evidence to connect Mr Gage to what happened. When the claimant later complained, Mr Talbot issued an instruction that the top shelf of the fridge should be reserved for the claimant's lunch and products belonging to other members of staff including cartons of milk should be stored lower down so as to prevent such an incident in the future.

20 The second incident was where the claimant alleges that someone left fake spiders in the toilets causing him considerable distress. Again, without any evidence, he is adamant that Mr Gage was responsible.

21 On 15 January 2020, there was a dispute between the claimant and Mr Gage with regard to the allocation of tasks within the department. The claimant felt that he was being allocated a disproportionate number of routine administrative tasks. Mr Gage's response was the tasks were being allocated fairly and administrative duties were within the claimant's job description. The claimant made it very clear that he was dissatisfied with Mr Gage's response.

22 On 28 January 2020, the claimant wrote to Mr Talbot complaining about a number of issues including the distribution of administrative tasks; the issue with regard to the milk spillage; a complaint that he had been denied a Quarry Training Course; and concerns which he had with regard to the prompt payment of bonuses each quarter. Mr Talbot responded by organising meetings this with Mr Gage, Mr Bradley, and the claimant at which all of the issues were aired; the action referred to at Paragraph 19 above was implemented with regard to the fridge; and Mr Talbot took ownership of the difficulties which were arising with the payment of the claimant's bonusses. Mr Talbot believed that the issues were resolved. No further issues were raised for several weeks. In evidence before us, the claimant confirmed that he did not agree with how Mr Gage ran the Department and he would like to have seen him dismissed from the company.

23 On 18 March 2020, the claimant emailed Mr Gage explaining that he would be working from home that day as it was his understanding that a colleague, Mr David Evans, who had Covid symptoms had been permitted to come into the workplace. Thus, the claimant was concerned that the office was contaminated. Mr Gage acknowledged the email and confirmed that he would pass it on to Mr Talbot. Neither Mr Gage nor Mr Talbot insisted that the claimant should attend the workplace that day. On enquiry, Mr Talbot was satisfied that Mr Evans was not displaying Covid symptoms when he attended the office. (In the event, Mr Evans died shortly after this incident. Again, on enquiry, Mr Talbot established as best he could that the death was not Covid related.) On 18 March 2020, the claimant confirmed that he was able to use his own laptop and mobile phone to carry out his duties from home.

24 Shortly after this, and in line with government announcements, the respondent arranged for all staff to work remotely. The claimant had confirmed that he had the necessary equipment available to work from home. Only one member of the respondent's staff was provided with additional equipment: this was the receptionist who was provided with a mobile phone. She continued to take calls which were diverted from the respondents office telephone. Working from home arrangements continued until early May 2020 when government restrictions were relaxed.

25 On 2 May 2020, in a conference call, Mr Talbot expressed concern that working from home had created a clear lack of efficiency in the operation of the spares department. Later that day, the claimant emailed Mr Talbot apologising for what was perceived as his bad attitude at the meeting and explaining his frustrations with Mr Gage's management of the department.

26 On or around 11 May 2020, with government restrictions easing, Mr Talbot decided that working from home should cease. He explained that employees were required to return to the office and that appropriate social distancing

measures had been put in place. The following day the claimant sent a message to the effect that he would not be returning to work at the office. This was due to his Asthma and because they were vulnerable people in his household. The claimant stated that if full-time working from home was not an option then he wished to be furloughed. Over the next couple of days there was a terse exchange of emails: the claimant insisting that it was possible for him to work from home; Mr Talbot equally clear that it was not; the claimant making clear that he did not regard the office as a safe environment and would not attend. In part, it is clear that the claimant was unwilling to attend because of his outstanding concerns about Mr Gage. (Indeed, in evidence but unsupported by any contemporaneous document, the claimant stated that he had indicated a willingness to return to the workplace if Mr Gage was not there.) Ultimately, the claimant (and Mr Bradley) were placed on furlough with effect from 14 May 2020.

27 On 15 May 2020, the claimant emailed Mr Gage regarding unpaid bonus. On 5 June 2020, the claimant raised a formal grievance regarding this. Mr Talbot replied stating that he would investigate and deal with this grievance. On 24 June 2020, Mr Talbot wrote to the claimant explaining that the two quarterly payments which were overdue would be paid that month. During the process of dealing with the bonus issue Mr Talbot made it clear to the claimant that it was no longer acceptable for him to contact Mr Gage about this or anyone from the finance department; he should deal only with Mr Talbot who had undertaken to resolve the issue. This was the only circumstances in which the claimant was told he should not contact colleagues.

28 On 22 June 2020, the claimant emailed Mr Moss complaining at the fact that he had been forced to accept furlough because social distancing in the office was not possible and he could not trust Mr Gage to keep him safe. The claimant specifically refers to this as a concern raised pursuant to Section 44 ERA. On 6 July 2020, the claimant wrote to both Mr Talbot and Mr Moss requesting confirmation that he would in due course be placed on flexible furlough. He repeated his view that he was being punished for having raised a health and safety complaint.

29 On 6 August 2020, there was a Grievance Meeting chaired by Mr Talbot to discuss the claimant’s concerns. The claimant raised the following issues:

(a) That he felt targeted by Mr Gage (no quarry passport training).
(b) Mr Gage had told him and Mr Bradley off for speaking in the office.
(c) The milk spill on his sandwich.
(d) The fake spiders.
(d) Mr Gage passing him demeaning tasks.

30 On 7 September 2020, Mr Talbot responded to the claimant's grievances with an outcome letter. The grievances were not upheld. The claimant appealed against the outcome. The grievance appeal was heard by Mrs Orme on 14 September 2020. The appeal was unsuccessful and an outcome letter to this effect was sent to the claimant on 24 September 2020. The claimant responded to the outcome letter in strident terms. Prior to the appeal meeting, the claimant had objected to Mrs Orme being the appeal officer because she was a director of comparable authority to Mr Talbot - the claimant believes that the appeal should have been heard by Mr Moss who he believes had greater authority than Mr Talbot. We are satisfied on the evidence of Mrs Orme that she had full authority to deal with the appeal she saw fit, and was sufficiently independently minded to have allowed the appeal if it had been appropriate to do so.

31 In the meantime, on 19 August 2020, the claimant emailed Mr Talbot complaining that others appeared to be doing his work whilst he was on furlough. This was no doubt the case: at that time, Mr Talbot would have much preferred the claimant to have been in the office doing the work himself.

32 In common with many businesses, the COVID-19 Pandemic and the first lockdown had a profound effect on the respondent's financial position and future viability. Turnover had reduced from £27 million in the last complete financial year to a projected £16 million. It became clear to the directors that the company would require restructuring and needed to make costs savings. The position was announced to the workforce by a written Business Announcement on 7 September 2020. The claimant, Mr Bradley and Mr Gage will all placed at risk of redundancy and a period of individual consultation commenced. The claimant attended three individual consultation meetings held on 30 September 2020; 8 October 2020; and 14 October 2020.

33 Throughout the redundancy consultation meetings, the claimant insisted on further pursuing his grievances including the difficulties he had experienced with bonus payments; the milk contamination in the fridge; the fake spiders; his complaint about the allocation of duties; and his concern about Mr Evans attending the workplace in March 2020. We accept Mr Talbot's evidence that the claimant's insistence on the continuous rehashing of these grievances made it difficult to get the claimant to focus on the issues to be considered during the consultation.

34 The work of the spares department had been hardest hit by the respondents financial pressures. The directors were satisfied that they only needed one person in the department rather than three. All three members of the team were considered for redundancy. The selection criteria were simple and were explained to the claimant: it was necessary to have the range of skills and experience to run the department single-handed. Mr Gage, with 25 years' experience, was clearly the most suitable employee to continue managing the

department. Accordingly, the claimant and Mr Bradley were selected for redundancy.

35 During the consultation, the claimant expressed concern that new employees have recently been retained which in his view was inconsistent with the need to make redundancies. We accept Mr Talbot's evidence that this recruitment was essential to provide the full range of skills and experience which the respondent required as it could no longer rely on experience within the larger group. This recruitment was not at all inconsistent with the need for redundancies in the spares department.

36 The claimant maintained that others should have been considered for redundancy including for example the receptionist on the basis that he was capable of undertaking the receptionist's role. Mr Talbot's view was that it was inappropriate to pool with the spares department staff employees undertaking quite different roles and his roles were not at risk of redundancy. In any event, Mr Talbot did not believe the claimant had the skills to carry out the receptionist role. Alternative roles were considered: the claimant believed he was competent to perform the role of Operations Manager for which the respondent had recently recruited. Mr Talbot was quite satisfied that the claimant did not have the range of skills or experience for that role which was a more senior position. There was a Sales Manager role available for which the claimant could have been considered but this would have involved relocating to the North of England which the claimant indicated he was unwilling to do.

37 The only compulsory redundancies were from within the spares department. But we accept Mr Talbot's evidence that there would have been redundancies in the finance department but for employees leaving of their own accord who were not replaced.

38 At the final consultation meeting on 14 October 2020, the claimant was advised that he had been selected for redundancy. This was confirmed to the claimant in writing by letter dated 21 October 2020. The effective date of termination of the claimant's employment was 30 October 2020.

39 The claimant appealed against his dismissal. The appeal was heard on 3 November 2020 by Mr Moss. The appeal was not upheld and on 6 November 2020, Mr Moss wrote to the claimant dealing with each point of appeal and explaining his decision.

THE LAW

40 **The Equality Act 2010 (EqA)**

Section 4: The protected characteristics

The following characteristics are protected characteristics
age;
disability;
gender reassignment;
marriage and civil partnership;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

Section 6: Disability

(1) A person (P) has a disability if—

(*a*) P has a physical or mental impairment, and
(*b*) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Section 20: Duty to make adjustments

(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) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(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.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

Section 21: Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(*a*) as to B's terms of employment.
(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service.
(*c*) by dismissing B.
(*d*) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 123: Time limits

(1) [Subject to section 140A] proceedings on a complaint within section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period.
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(*a*) when P does an act inconsistent with doing it, or
(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

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

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

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

Schedule 1: Disability Supplementary Provision

Part 1: Determination of Disability

5 **Effect of medical treatment**

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

. **Schedule 8 – Part 3: Limitations of the Duty [to make adjustments]**
Paragraph 20: Lack of knowledge of disability etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

41 **The Employment Rights Act 1996 (ERA)**

Section 43A: Meaning of 'protected disclosure'

In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.

Section 43B: Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(*a*) that a criminal offence has been committed, is being committed or is likely to be committed,
(*b*) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(*c*) that a miscarriage of justice has occurred, is occurring or is likely to occur,
*(*d*)* that the health or safety of any individual has been, is being or is likely to be endangered,
(*e*) that the environment has been, is being or is likely to be damaged, or
(*f*) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Section 43C: Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure,

(*a*) to his employer.

Section 44: Health & Safety Cases
(*These provisions have been set out as they applied in May 2020*)

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(d) In circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) In circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

Section 47B: Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

Section 48: Complaints to Employment Tribunals

(1A) A worker may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of Section 47B.

(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

Section 94: The Right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(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) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

Section 139: Redundancy

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

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

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

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

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

42 **Decided Cases**

Kapadia –v- London Borough of Lambeth **[2000] IRLR 699 (CA)**

The burden of showing disability lies squarely on the claimant. Disability is an issue of fact to be determined by the tribunal on the balance of probability.

Vicary –v- British Telecommunications Plc **[1999] IRLR 680 (EAT)**
Leonard –v- Southern Derbyshire Chamber of Commerce **[2001] IRLR 19 (EAT)**
Ahmed –v- Metroline Travel Limited **[2011] EqLR 464 (EAT)**
Aderemi –v- London and South East Railway **UKEAT/0316/12 (EAT)**

Substantial adverse effect means an effect which is more than minor or trivial; it is a relatively low standard. The focus should be on what an employee *cannot* do, or can only do with difficulty; and not on what they *can* do easily. A tribunal should look at the whole picture; but it is not a question of balancing what an employee can do against what they cannot do. If the employee is substantially impaired in carrying out any normal day-to-day activities - then the employees disabled notwithstanding their ability in a range of other activities. However, where there is a factual dispute as to what a claimant is asserting that he/she cannot do findings of fact as to what claimant actually can do may throw significant light on the disputed question of what he/she cannot do. The fact that an employee is able to mitigate the effects of an impairment does not prevent there being a disability.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the

unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Laing –v- Manchester City Council **[2006] IRLR 748 (EAT)**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Oudahar v Esporta Group Limited **[2011] IRLR 730 (EAT)**

This was a case of automatic unfair dismissal pursuant to Section100(1)(e)) ERA. The following points fall for consideration (adapted to encompass s.44(1)(d) and (e)):

(a) Were there circumstances of danger which the employee reasonably believed to be serious and imminent?
(b) Did the employee take or propose to take appropriate steps to protect himself or other persons from the danger and/or – in circumstances where he could not reasonably avert the danger – leave or propose to leave his place of work? and if so
(c) Where there has been a proven detriment, did the actions of the employee amount to a material part of the employer's reasons for carrying out the acts of detriment?

Blackbay Ventures Ltd t/a Chemistree v Gahir **[2014] IRLR 416 (EAT)**

This case provides guidance on the issue of the findings that a tribunal should make when determining whether a qualifying disclosure (as defined by section 43B) has been made in accordance with any of sections 43C to 43H

(a) Identify each disclosure by reference to date and content.
(b) Identify the alleged failure or likely failure to comply with a legal obligation, or health and safety matter.
(c) Identify the basis on which it is alleged each disclosure is qualifying and protected.
(d) Identify the source of the legal obligation relied upon by reference to statute or regulations (save in obvious cases).
(e) Determine whether the claimant had a reasonable belief that his disclosure was made the public interest.
(f) In relation to the alleged detriments, identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant.

Chesterton Global Ltd v Numohamed **[2015] IRLR 614 (EAT)**

The issue is whether the disclosing employee had a reasonable belief that their disclosure was in the public interest, not whether the disclosure was infact in the public interest.

Korashi v. Abertawe Bro Morgannwg University Local Health Board **[2012] IRLR 4 (CA)**

In relation to both the belief in s.44 and s.47B a claimant should be able to demonstrate not only that they in fact held a belief that the information tended to show there was a relevant failure, but that it was reasonable for them to have held that belief. The requirement is to demonstrate that the belief was objectively reasonable.

Kilraine v London Borough of Wandsworth **[2018] ICR 1850 (CA)**

The definition of 'information' in s.43B can include statements which might also be characterised as allegations. 'Information' and 'allegation' are not mutually exclusive categories of communication, and that the key principle is that the disclosure must convey *information* as to facts if it is to be found to amount to a disclosure of information under s.43B. It is noted that the information does not need to conclusively show that there was a relevant failure, but that it 'tended to show' such a failure.

Cavendish Munro –v- Geduld **[2010] IRLR 38 (EAT)**
Smith –v- London Metropolitan University **[2011] IRLR 884 (EAT)**
Goode –v- Marks & Spencer Plc **UKEAT/0442/09**

The making of a protected disclosure must involve the disclosure of **information**; this involves the communication of **facts**. It is not sufficient merely to make allegations, to raise grievances about working conditions or simply to state an opinion.

Morse –v- Wiltshire County Council **[1999] IRLR 352 (EAT)**

A tribunal hearing an allegation failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of [EqA] impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

Smith –v- Churchills Stairlifts plc **[2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case". What matters is the employment tribunal's view of what is reasonable.

Tarbuck –v- Sainsbury's Supermarkets Limited **[2006] IRLR 664 (EAT)**

There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments might be made. The only question is objectively whether the employer has complied with his obligations or not. If the employer does what is required of him than the fact that he failed to consult about it, or did not appreciate that the obligation even existed, is irrelevant. It may be entirely fortuitous and unconsidered compliance but that is enough. Conversely if he fails to do what is reasonably required it avails him nothing that he has consulted the employee.

Project Management Institute –v- Latif **[2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

Environment Agency –v- Rowan **[2008] IRLR 20 (EAT)**

An Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

(a) The provision criterion or practice apply by or on behalf of the employer, or
(b) The physical feature of the premises occupied by the employer, and
(c) The identity of non-disabled comparators, and
(d) The nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

DWP –v- Alam **[2010] ICR 665 (EAT)**
Wilcox –v- Birmingham CAB Services Limited **[2011] EqLR 810 (EAT)**

The duty to make adjustments is not engaged unless the employer knows (or ought to know) of both the disability and the substantial disadvantage.

Royal Bank of Scotland –v- Ashton **[2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was substantial viewed in comparison with persons who are not disabled. In this case an attendance policy which applied equally to all employees but which provided for a degree of *"flexing"* in the case of an employee who was disabled or suffered from a chronic or long-term underlying condition could not be said of itself to be a provision criterion or practice which placed the disabled person at a substantial disadvantage.

Cavendish Munro –v- Geduld **[2010] IRLR 38 (EAT)**
Smith –v- London Metropolitan University **[2011] IRLR 884 (EAT)**
Goode –v- Marks & Spencer Plc **UKEAT/0442/09**

The making of a protected disclosure must involve the disclosure of **information**; this involves the communication of **facts**. It is not sufficient merely to make allegations, to raise grievances about working conditions or simply to state an opinion.

Darnton –v- University of Surrey **[2003] IRLR 133 (EAT)**
Babula -v- Waltham Forest College **[2007] IRLR 346 (CA)**
Korashi –v- Abertawe Bro Morgannwg University Local Health Board **[2012] IRLR 4 (EAT)**

In order to bring a claim in respect of a protected disclosure it is sufficient that the employee reasonably believes that the matter he relies upon amounts to a relevant failure even if it turns out that this belief is wrong. What is important is the employee's reasonable belief in the factual basis for the disclosure. There are both objective and subjective elements to the question of whether a belief is reasonable. An uninformed lay person may reasonably believe that a set of circumstances suggest a relevant failure; whereas an expert may realise that further information would be required before such a conclusion was reasonably available.

Harrow London Borough Council v Knight **[2003] IRLR 140 (EAT)**

In order for liability to be established, the tribunal had to find that the applicant had made a protected disclosure; that he had suffered some identifiable detriment; that the employers had "done" an act or omission by which he had been "subjected to" that detriment; and that that act or omission had been done by the employers "on the ground that" he had made the identified protected disclosure. The "ground" on which an employer acted in such cases requires an analysis of the mental processes (conscious or unconscious) which caused him so to act. It is necessary in a claim under Section 47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not to act) in the way complained of. Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough.

Orr –v- Milton Keynes Council **[2011] ICR 705 (CA)**

The tribunal is concerned with what is in the mind of the manager who actually makes the decision complained of.

Fecitt & Others v NHS Manchester **[2012] IRLR 64 (CA)**

With regard to the causal link between making a protected disclosure and suffering detriment or dismissal, Section 47B or Section 103A ERA will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower.

Wilson –v- Post Office **[2000] IRLR 834 (CA)**

Categorisation of the true reason for a dismissal under Section 98(1) and (2) ERA is a question of legal analysis the and a matter for the tribunal to determine.

Taymech Limited –v- Ryan **EAT 633/94**
Thomas and Betts Limited –v- Harding **[1980] IRLR 255 (CA)**
Hendy Banks City Print Limited –v- Fairbrother **EAT 0691/04**

In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from whom those who are to be made redundant will be drawn. In assessing the fairness of a dismissal, a tribunal must look to the pool from which the selection was made since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool the dismissal is likely to be unfair.

Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances.

Williams and Others –v- Compair Maxam Limited **[1982] IRLR 83 (EAT)**
Polkey –v- AE Dayton Services Limited **[1987] IRLR 503 (HL)**
R –v- British Coal Corporation and anr ex parte Price **[1994] IRLR 72**
King and Others –v- Eaton Limited **[1996] IRLR 199 (CS)**
Graham –v- ABF Limited **[1986] IRLR 90 (EAT)**
Rolls-Royce Motor Cars Limited –v- Price **[1993] IRLR 203 (EAT)**

In a case of redundancy in the employer will not normally act reasonably, unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment.
The employment tribunal must be satisfied that it was reasonable to dismiss the individual claimants on grounds of redundancy. It is not enough to show that it was reasonable for the employer to dismiss *an* employee. It is still necessary to consider the means whereby the claimant was selected to be the employee to be dismissed.
Fair consultation means (a) consultation when the proposal is still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond, (d) conscientious consideration by the employer of any response.

If vague and subjective criteria are adopted for the redundancy selection there is a powerful need for the employee to be given an opportunity of personal consultation before he is judged by it.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

The Claimant's Case

43 It is the claimant's case that by reason of suffering from Asthma he was at all material times a disabled person as defined by Section 6 and Schedule1 EqA.

44 the relevant PCP, the disadvantage leave proposed adjustments contended for by the claimant are set out at Paragraph 3(k) – (r) above.

45 It is the claimant's case that the following amounted to disclosures qualifying for protection pursuant to Section 43B ERA:

(a) His email dated 18 March 2020 explaining that he would not be attending work that day because of his understanding that Mr Evans had been on site whilst displaying COVID-19 symptoms.
(b) Information to be gleaned from exchanges of emails in May 2020 when the claimant expresses unwillingness to return to office-based working.

46 It is the claimant's case that he took the following steps entitling him to protection pursuant to Section 44(1)(d) & (e) ERA.

(a) His refusal to attend the workplace on 18 March 2020.
(b) His refusal to return to office-based working in May 2020.

47 By reason of the matters set out at Paragraphs 44 and 45 above, it is the claimant's case that he was subjected to the detriments set out at Paragraph 3(i) above.

48 It is the claimant's case that his dismissal was unfair for the following reasons:

(a) He does not accept that there was a genuine redundancy situation.
(b) He does not accept that there was an appropriate pool for selection.
(c) He disagrees with the selection criteria.
(d) He does not accept that there was a genuine consultation process.
(e) He argues that the respondent did not follow a fair process.
(f) He contends that alternative roles were available for which he should have been considered. And, if necessary, others should have been displaced.

49 The claimant does not contend that his dismissal was automatically unfair pursuant to any of the provision of Sections 100(1)(d) or (e) or 103A ERA.

50 The claim for unpaid wages appears to relate to the fact that whilst on furlough the claimant was paid at 80% of his normal salary. He claims that the furlough was a detriment and seeks to recover the additional 20%.

The Respondent's Case

51 The respondent submits that the claimant has not discharged the burden which is upon him to establish that at any material time he was a disabled person.

52 It is the respondent's case that the claims for detriment arising before 18 May 2020 are out of time.

53 The respondent denies that the claimant made any disclosures qualifying for protection or took action qualifying for protection on health and safety grounds; and, in any event, denies any causative link between the alleged disclosures/action and the alleged detriments.

54 The respondent's cases that the sole reason for the claimant's dismissal was redundancy. Redundancy is a potentially fair reason pursuant to Section 98 ERA and that the dismissal was fair.

55 So far as the unpaid wages claim is concerned, the respondent's case is that furlough is a matter of agreement. The claimant agreed to be placed on furlough with the consequent reduction in pay. In any event, any claim in respect of the additional 20% would form part of his remedy in the event that his detriment claim was successful. This claim is not properly characterised as unpaid wages.

Discussion & Conclusions

Disability

56 The very limited evidence adduced by the claimant relating to alleged disability confirmed nothing more than that he had suffered from asthma for many years; that he took medication for that condition; and that the medication was regularly reviewed. In his impact statement (but not in any medical evidence), there was evidence of some seriously distressing incidents in the past. There was no evidence as to what the effects would have been if the claimant was not using his medication. And no evidence to suggest a substantial adverse effect on his ability to carry out normal day-to-day activities during the period of his employment with the respondent.

57 The claimant's primary concern was of potential vulnerability caused by his asthmatic condition during the COVID-19 pandemic. However, he confirmed that he had not been advised to shield and he had not been categorised as clinically vulnerable.

58 In the circumstances, our judgement is that the claimant has not discharged the burden of proof which is upon him to show that at any material time he was a disabled person as defined in Section 6 and Schedule 1 EqA.

59 Accordingly, the claim for disability discrimination (failure to make adjustments) is dismissed.

60 In any event, we accept the evidence given by Mr Talbot to the effect that, once the claimant was requested to return to office-based work in May 2020, proper social distancing measures were in place. Absent any clinical vulnerability, there is no evidence that the claimant was at any disadvantage by the requirement for office-based working.

Protected Disclosures

61 We accept that on 18 March 2020, when the claimant emailed Mr Talbot regarding his belief that Mr Evans had been permitted to enter the workplace despite displaying COVID-19 symptoms, this was a disclosure of information qualifying for protection.

62 However, in our judgement, there was no such protected disclosure in May 2020 when effectively the claimant refused to return to office-based working. Here, there was simply a disagreement between the claimant and Mr Talbot as to whether effective social distancing measures were in place. (We accept Mr Talbot's evidence: and the claimant did not visit the workplace to make an informed assessment.) The claimant admitted in evidence that he would have returned to work in May 2020 if Mr Gage had not been there. Without any

justification, the claimant simply did not trust Mr Gage to adhere to social distancing measures.

Health and Safety

63 We accept that the claimant's refusal to attend the workplace on 18 March 2020 was an action qualifying for protection under Section 44 ERA. He believed that Mr Evans may have contaminated the office rendering it unsafe for him to go to work.

64 But again we do not accept that the claimant's refusal to attend the office in May 2020 qualifies for protection under Section 44 ERA. There was no reasonable basis to suspect serious and imminent danger bearing in mind that social distancing measures were in place. Any danger perceived by the claimant could have been averted by attending the workplace and making suggestions for further adjustments.

Detriments

65 There were no consequences visited upon the claimant for his failure to attend work on 18 March 2020. The position was accepted by the respondent without question.

66 As to the remaining alleged detriments:

(a) Contrary to what is asserted by the claimant, he was not required to attend work in May 2020 in breach of Government Guidelines. The Guidelines provided that individuals should work from home where possible. The decision about whether homeworking was possible was clearly not one for each employee to take unilaterally. In this case, the respondent had concluded that homeworking simply was not practical and hence it required the claimant to attend work. When he refused, there were no detriments or punishments but a constructive engagement which led to him being placed on furlough by agreement as an alternative to any form of disciplinary action. Far from being a detriment, placing the claimant on furlough was to his advantage.
(b) As the respondent had determined that homeworking was not possible for the claimant, it must follow that flexible furlough was not an option. The claimant was unwilling to attend the workplace. What the claimant sought to achieve by requesting flexible furlough was to attend the workplace on his own terms: namely, when Mr Gage was not present. Those were not decisions for him to take.
(c) The claimant was placed at risk of redundancy along with Mr Bradley and Mr Gage - the entirety of the Spare Parts & Service Division. This was done because of the financial performance of the Division following

lockdown. It was not in any way detriment visited upon the claimant because of his email or his actions of 18 March 2020.

(d) We accept Mr Talbot's evidence that there was simply no point in placing the claimant on training for quarry/mining machinery whilst he was on furlough. Such training would have been of no advantage to the claimant or to the respondent. This decision was not in any way linked to the claimant's email or actions of 18 March 2020.

(e) We do not accept the claimant's evidence that, on 14 May 2020, he was told not to contact anyone and was thus isolated. The instruction he was given was in relation to his ongoing complaints about unpaid bonuses. Mr Talbot made clear that he was dealing with that issue and the claimant should not contact any other colleagues about it. The issue was resolved.

(f) The problem that the claimant had had in the payments of bonuses had been ongoing since well before the events of March 2020. The fact that it continued after March 2020 does not provide any link to the claimant's email or actions on 18 March 2020. Again, this was not linked to the protected disclosure or the health and safety action.

(g) The suggestion that the claimant was not provided with a laptop or phone to facilitate working from home and that this was a detriment is nonsense. The whole point is that the respondent did not consider that the claimant's job could be satisfactorily done from home - and that was a matter for their judgement. Further, when contending that he ought to be allowed to work from home the claimant stated in an email that he had all necessary equipment available. No employees other than the receptionist were provided with such equipment.

67 Accordingly, in our judgement, there is no question of the claimant having suffered detriment by reason of his qualifying disclosure or qualifying action of 18 March 2020. The detriment claims are dismissed.

Unfair Dismissal

68 We are satisfied that the sole reason for the claimant's dismissal was redundancy. The dismissal was unrelated to his protected disclosure of protected health and safety action. The respondent was concerned at the lack of activity in the Department and could not justify maintaining three employees for the work of one. Redundancy is a potentially fair reason pursuant to Section 98 ERA.

69 The respondent made a conscientious decision to pool the three employees of the Department. In our judgement this was a genuine and objectively reasonable pooling arrangement. There was no basis to include others in the pool as their departments were unaffected.

70 In our judgement, there was an extensive consultation process. The claimant knew exactly what the respondent's concerns were. The claimant did

not engage constructively in the process preferring instead to argue with the respondent's decisions.

71 Objective criteria were set and the employees were measured against these. We accept that by reference to such criteria it was always likely that Mr Gage would be selected for retention and the claimant and Mr Bradley would be dismissed.

72 Even on the claimant's own account, proper consideration was given to alternative roles which may have been available. The only role identified would have involved the claimant relocating to the north of England which he indicated he was unwilling to do.

73 In our judgement, the respondent followed a conspicuously fair procedure which fully complied with ACAS guidelines.

74 Accordingly, we find that the claimant was fairly dismissed: his claim for unfair dismissal is not well-founded and is dismissed.

Unpaid Wages

75 The claim for unpaid wages is misconceived the claimant agreed to be placed on furlough and was only therefore entitled to receive 80% of normal salary. If he had been placed on furlough as an unlawful detriment then the differential in wages would have been recoverable as part of his remedy.

Time Issues

76 As we have found that there is no viable claim for detriment on the facts, it has been unnecessary for us to consider the time issues. But certainly, it would appear that some of the detriment claims were out of time. Likewise, the claim for reasonable adjustments which appears to have crystallised in early May 2020. But again, we have dismissed this claim on its merits without the necessity for detailed consideration of the time issue.

Employment Judge
14 June 2022
Judgment sent to Parties on
16 June 2022
For the Tribunal Office