THE INDUSTRIAL TRIBUNALS

CASE REF: 8160/20

CLAIMANT: **Seamus Burton**

RESPONDENT: **Doosan Babcock Limited**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant was not unfairly dismissed and not directly discriminated against contrary to the Disability Discrimination Act 1995.

The claimant's claims are dismissed in their entirety.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Orr**

Members: **Mr A Kerr**
Mrs M McReynolds

APPEARANCES:

The claimant was represented by Ms Graham, Barrister-at-Law, instructed by Millar McCall Wylie Solicitors.

The respondent was represented by Mr K Duffy, Solicitor, Scottish Engineering.

CLAIMS

1. The claimant claims unfair dismissal and direct disability discrimination by association. The claimant alleges direct discrimination on the grounds that he has been treated less favourably because of his wife's disability.

2. The respondent accepts that the claimant's wife is disabled pursuant to the Disability Discrimination Act 1995.

ISSUES

3. The issues to be determined by the tribunal were as follows:

   (1) Was the claimant's dismissal an act of direct associative disability discrimination?

(2) Was the claimant unfairly dismissed contrary to the Employment Rights (Northern Ireland) Order 1996?

4. The written submissions on behalf of the claimant contained submissions in respect of a claim for failure to make reasonable adjustments and indirect disability discrimination. The respondent's representative objected to these submissions as neither claims were pleaded in the claim form, the agreed legal issues or identified in the Record of Proceedings dated 6 January 2021. Furthermore, he provided the tribunal with copy email correspondence between the representatives in which the claimant's solicitor confirmed:

> *"This claim relates to associative disability discrimination of less favourable treatment due to the claimant's disabled wife".*

5. The tribunal referred the claimant's representative to the 'Meaning of Discrimination' in Section 3(A) of the Disability Discrimination Act 1995 and noted that indirect discrimination is not included under the definition of discrimination. The tribunal also referred the claimant's representative to the Supreme Court Decision in ***Hainsworth v Ministry of Defence – UKSC 2014/0164*** which confirmed that employees cannot bring a claim against an employer for failure to make reasonable adjustments in relation to a disabled person for whom that employee cares and that reasonable adjustment claims are restricted to employees and applicants.

6. The tribunal is satisfied that no claims of 'indirect disability discrimination' or failure to make reasonable adjustments are contained in the claimant's claim form, in the pleadings or advanced in evidence to the tribunal. The claimant's representative confirmed to the tribunal at hearing that she was not making any application to amend the claimant's claim.

SOURCES OF EVIDENCE

7. The tribunal heard evidence on behalf of the claimant from the claimant himself, Mr Darryl Gorman, Mr John Logan and Mr Brendan Laverty.

8. The tribunal heard evidence on behalf of the respondent from Mr Paul Temple (Head of Maintenance, Repair and Overhaul Operations) and Mr Scott Anderson (Service Management Director – Thermal).

9. The tribunal also considered the claim form, response form, all documents in the agreed trial bundle to which it was referred to by the representatives during the hearing and the written and oral submissions of the representatives.

RELEVANT LAW

Unfair Dismissal

10. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides insofar as is relevant to these proceedings;-

> *"130(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 is either a reason falling within paragraph (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 (tribunal emphasis).

(2) A reason falls within this paragraph if it –

…

(4) Where the employer has fulfilled the requirements of paragraph (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."

11. The Northern Ireland Court of Appeal in ***Connolly v Western Health and Social Care Trust [2017] (NICA) 61*** held as follows:

"[10] The wording of Article 130(4) which reflects earlier legislation in this jurisdiction and in England and Wales might appear to leave open to the Industrial Tribunal a very wide discretion. However this was narrowed by a decision of the Employment Appeals Tribunal, per Browne-Wilkinson J, as he then was, in ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17*** *cited by the Tribunal in its judgment at paragraph 56. Having reviewed the authorities the Judge concluded as follows:*

"We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by Section 57(3) of the Act 1978 is as follows:

(1) the starting point should always be the words of Section 57(3) themselves;

(2) in applying the Section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the Industrial Tribunal, as an Industrial Jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

[12] Section 57 sub-section (3) of the Employment Protection (Consolidation) Act 1978 is equivalent to our Article 130 although not in exactly the same terms.

57.-(3) Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question whether the dismissal was, fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee.

… … … …

[40] The interpretation of what, in this jurisdiction, is Article 130(4) (a) of the 1996 Order has been fixed by a series of Appellate Courts over the years, ie, that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the tribunal would make. That test, expressed in various ways, is too long established to be altered by this Court, and in any event has persuasive arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in Article 130(4)(b), ie, that that decision 'shall be determined in accordance with equity and the substantial merits of the case' …".

12. ***Harvey on Industrial Relations and Employment Law Division D1*** paragraphs [1901-1913] and [1938] sets out the applicable legal principles on the fairness of a dismissal in circumstances where the dismissal it is at the 'behest of third parties':-

*"[1901] Exceptionally an employer may be requested or required to dismiss an employee by a third party. In these circumstances the dismissal may be fair even though the employer is reluctant to dismiss and does not agree with the decision. For example, if an employee upsets a major customer who then insists on that employee's dismissal, this may be fair (**Scott Packing and Warehousing Company Limited v Paterson [1978] IRLR 166 EAT**)* However, as the EAT made clear in ***Grootcon (UK) Limited v Keld [1984]***

IRLR 302, *if the employer wishes to rely upon the defence he must lead sufficient evidence to discharge the onus resting on him. Consequently where in that case the employer alleged that they had dismissed an employee who worked in their oil rig at the behest of BP, but failed to indicate how the instruction was given or what consultations there had been with BP prior to dismissal, the employers failed to discharge the burden.*

…

[1938] When seeking to determine whether or not a dismissal at the behest of a third party is fair in all the circumstances, an important factor for an employment tribunal to consider is whether the employer has taken into account the potential injustice suffered by the employee. This was the clear view of the Court of Appeal in the case of ***Dobie v Burns International Security Services (UK) Limited [1984] 3 all ER333, CA****, where a Security Officer at Liverpool Airport was dismissed at the behest of the Merseyside County Council after friction arose between him and the Security Officer, who was an employee of the Council. The tribunal, in considering the fairness of the dismissal, held that it had to consider solely the conduct of the employer and ignore the question of whether the employee had suffered an injustice. The EAT held that this was a misdirection, and the Court of Appeal unanimously agreed with them. Sir John Donaldson MR put the position as follows:-*

> *'In deciding whether the employer acted reasonably or unreasonably, a very important factor of which he has to take account, on the facts known to him at that time, is whether there will or will not be injustice to the employee and the extent of that injustice. For example, he will clearly have to take account of the length of time during which the employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may face the employee in obtaining other employment, and matters of that sort. None of these is decisive, but they are all matters of which he as to take account and they are all matters which affect the justice or injustice to the employee of being dismissed'.*

However, although these are admirable sentiments, some care may be needed because (as the Judge says) this is not a decisive factor and ultimately the emphasis in ERA 1996 Section 98(4) remains of the reasonableness of the employer's reaction to the predicament."

13. In ***Henderson v Connect (South Tyneside) Limited [2010] IRLR 463*** Underhill P stated as follows:- (Paragraph 16)

> *"Cases of this kind are not very comfortable for an employment tribunal. Nevertheless, it has long been recognised that the fact that the client who procures, directly or indirectly, the dismissal of an employee may have acted unfairly, and that the employee has thus suffered an injustice, does not mean that the dismissal is unfair within the meaning of the statute. That is because the focus of Section 98 of the Employment Rights Act 1996, and its statutory predecessors, is squarely on the question whether it was reasonable <u>for the employer</u> to dismiss (tribunal emphasis) ……..*

…

It must follow from the language of S.98(4) that if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair; the outcome may remain unjust, but that is not the result of any unreasonableness on the part of the employer. That may seem a harsh conclusion; but it would of course be equally harsh for an employer to have to bear the consequences of the client's behaviour; and Parliament has not chosen to create any kind of mechanism for imposing vicarious liability or third party responsibility for unfair dismissal."

Associative Discrimination

14. The Disability Discrimination Act 1995 provides, so far as is relevant to these proceedings:

"3A Meaning of "discrimination"

……..

……..

(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person."

15. The Northern Ireland Court of Appeal in ***Frank McCorry and Others v Maria McKeith [2016] NICA 47*** summarised the legal principles on associative discrimination as follows:

"Associative Discrimination

34. The Disability Discrimination Act 1995 did not on its face apply to associative discrimination so that, when a legal secretary, working for a firm of solicitors and being the principal carer for her disabled son, claimed that she had to resign because of unlawful discrimination by her employer on account of her son''s disability, the issue was referred to the European Court of Justice. The issue was whether the relevant EU Directive, Council Directive 2000/78/EC known as the ""Framework Directive"" applied to associative discrimination. On 17 July 2008 in Coleman v Attridge Law [2008] ICR 1128 the Court of Justice held that associative discrimination did fall within the terms of the Directive. The claim then made its way to the Employment Appeal Tribunal on the issue of whether the 1995 Act could be read in a manner that applied

to associative discrimination. It was held that the 1995 Act could be so interpreted, as reported in EBR Attridge LLP v Coleman [2010] ICR 242. The proceedings were remitted to a Tribunal to consider the merits of the substantive claim.

The Shifting Burden of Proof

35. *While Ms McKeith did not advance a claim for disability related discrimination in relation to the period before the dismissal decision, her background treatment in the preceding months did inform the approach of the Tribunal in relation to the dismissal decision. The background included the requirement that Ms McKeith remain absent from work for periods to look after her disabled daughter. Had it arisen for decision, the Tribunal would have concluded that the previous treatment of Ms McKeith amounted to disability related discrimination (paragraph 132).*

36. *On taking into account that background and the evidence in relation to the dismissal of Ms McKeith, the Tribunal stated that ""the shifting burden of proof is going to be crucial"" (paragraph 136).*

37. *The Burden of Proof Directive (EEC) 97/80 was extended to the United Kingdom in 1998 and Article 4(1) provided –*

    ""Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them have established, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.""

38. *Section 17A(1B) of the 1995 Act provides –*

    ""Where, on the hearing of a complaint under sub-section (1), the complainant proves facts from which the tribunal could, apart from this sub-section, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act.""

39. *The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in Wong v Igen Ltd [2005] EWCA Civ 142. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the Tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.*

40. The issue was revisited by the Court of Appeal in England and Wales in Madarassy v Nomura International plc [2007] EWCA Civ 33 which set out the position as follows (italics added) –

""56. The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent `could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal `could conclude" that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57. `Could conclude" [in the Act] must mean that `a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.""

RELEVANT FINDINGS OF FACT

16. The tribunal found the following facts as proved on the balance of probabilities after consideration of all the evidence both oral and documentary and the submissions of the parties.

17. The respondent company is one of a number of subsidiary companies within the Doosan Group. It provides engineering technologies and skills to the oil, gas and petrochemical industries.

18. AES Group Kilroot Generating Limited (AES) is a client of the respondent and operates the Kilroot and Ballylumford Power Stations. AES is now known as 'EPUKI' - however for ease of reference throughout this judgement the tribunal

makes reference to 'AES' as this was the name of the company during the relevant timeframe.

19. The claimant had been employed by CB&I Shaws Group UK Limited as a coded welder from 7 February 2008. The claimant's contract of employment transferred to the respondent on 1 August 2016 by reason of a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006. The claimant had worked as a coded welder on both the Ballylumford and Kilroot sites prior to the respondent company being awarded the contract on 1 August 2016.

20. The claimant's wife suffers from Relapsing Remitting Multiple Sclerosis. She is employed as a Bank Manager. The respondent accepts that the claimant's wife is a disabled person under the Disability Discrimination Act 1995 and that the claimant is the sole carer for his wife.

21. It is common case that the claimant regularly worked week day overtime. The issue in this case was the claimant's availability to work overtime at the weekend.

22. There is no dispute between the parties that the respondent had a requirement for its employees to work overtime to ensure compliance with its contractual obligations under its contract with AES.

23. The unchallenged evidence of Mr Anderson was that there had previously been issues with the claimant's lack of overtime working during his employment with CB&I Shaws. This had resulted in his suspension from site in November 2015. As a consequence an agreement had been reached between the claimant, CB&I Shaws and AES, with the assistance of the claimant's union representative, to allow him to carry out his overtime obligations under his contract of employment - *"within the limitations of his personal life, with regard to his responsibility to care for his disabled wife"*. The agreement was summarised in an email dated 11 November 2015, from the HR Manager in CB&I Shaws to AES as follows:

> *"It has been agreed that Seamus can work up to 10 hour shifts during the week, and up to 10 hour shifts at the weekend. The weekend working will require some notice as Seamus needs to arrange care for his disabled wife. Seamus can work at both Ballylumford and Kilroot power stations"*.

24. The tribunal is satisfied from all the evidence, that the respondent was fully aware of this agreement and specifically the need to ensure the claimant had sufficient notice to permit care arrangements to be put in place for his wife when undertaking weekend overtime. The tribunal finds from the evidence adduced by the parties that both the respondent's staff and AES staff were fully aware of his wife's illness.

25. At the Ballylumford Power Station an 'outage' had been planned from the end of June 2019 until the end of August 2019. An outage is a shutdown of the power station for a limited period to allow for essential maintenance or works to be undertaken within a stipulated time period. By necessity this required all resources to ensure that works were completed within the shutdown timeframe.

26. It is common case that throughout the months of June, July and August 2019 (during the Ballylumford outage) the claimant worked overtime on week days

without issue and that the last date the claimant worked a weekend overtime shift was the weekend of Sunday 9 June 2019.

27. There is no dispute that the claimant did not work overtime during the following weekends. The respondent's overtime tracker records as follows:-

    (1) Monday 25 June – Monday 15 July sick leave.

    (2) Sunday 21 July – declined.

    (3) Sunday 28 July 2019 – declined.

    (4) Sunday 4 August – declined.

    (5) Sunday 11 August – declined.

    (6) Saturday 17 August – unavailable.

    (7) Sunday 18 August – unavailable.

    (8) Saturday 24 August – declined.

    (9) Sunday 25 August – declined.

28. The claimant takes issue with the word 'declined' in the overtime tracker records. It is the claimant's case that he did not decline weekend overtime, nor did he refuse weekend overtime, his evidence to the tribunal is that his "*ability to commit to overtime"* was affected by his caring responsibilities for his wife.

29. The tribunal accepts the evidence of the claimant's witnesses and the respondent's witnesses that the word 'unavailable' refers to an employee who confirmed the reason for their unavailability, for example holiday commitments and that the use of the word 'declined' records when employees indicated they were unavailable without providing an explanation. The tribunal finds from the evidence adduced by both parties that weekend overtime was normally arranged on the Wednesday or Thursday preceding the weekend and at this point employees confirmed their availability for the weekend overtime requirements.

30. It is the claimant's case is that he could not commit to overtime at the weekend because of his caring responsibilities for his wife. He gave evidence that his wife's condition was fluctuating in nature and "*that there is no predicting how severe her symptoms will be on any given day"*.

31. The tribunal accepts the unchallenged evidence of Mr Anderson that he had been advised by the site manager Mr McAulay that two welders, the claimant and a Mr Lavery had been "*making noises about potentially refusing to carry out grinding work at Ballylumford outage*". As a result, Mr McAulay (Site Manager) was instructed to read out a *"Standards and Expectations"* notice on Monday 24 June 2019. This outlined the requirements for employees to undertake flexible working and the expectation that welders had to carry out grinding work. This notice was then placed on the notice board.

32. It is common case that on 9 August 2019 a 'Management Intervention Meeting' took place with the claimant and a fellow employee Mr Darryl Gorman in relation to their low level of overtime working. The meeting was conducted by Mr McAulay (site manager) and Mr Mark Fergie. There was no dispute that following this meeting Mr Gorman undertook weekend overtime but the claimant did not. The claimant accepted in cross examination that by early August he was fully aware that AES were unhappy with his lack of weekend overtime working.

33. On 29 August 2019 Mr Anderson received an email from Mr William Hill (Senior Engineer) of AES which stated the following:-

> *"There has been however one reoccurring issue and I understand that Benny has been in dialogue with you regarding our concerns with Seamus Burton and his unavailability to work overtime during the weekend throughout the outage. I understand that Benny has made you aware that Seamus has not made himself available to work a single weekend during the outage, despite Benny having a discussion with him a few weeks ago outlining what we as the client expect for the outage duration. This reluctance to assist in the execution of the outage over the weekend is not providing the level of cover that I would expect from a core member of the team and it can at times have a negative impact on the morale of the guys as they have to step up and take the slack.*
>
> *I would have hoped that the chat Benny had with Seamus a few weeks ago would have had the desired impact and I would not have to write this email but nothing seems to have changed. This was further compounded yesterday when Seamus was made aware that the Kilroot welding resource will be required at Ballylumford again soon when a 14" HP main steam NRV [non return valve] is returned to site and we will require 24hr working to weld it back into position ASAP to bring unit 21 back online. The response the supervisor got from Seamus was 'that you can count me out of that job'.*
>
> *Can you advise what steps Doosan are taking an order to rectify this issue. Flexibility with working time is something that is expected of both employees of EP and their contract staff especially during times of plant unavailability, this individual is not contributing satisfactorily."*

34. The claimant was invited to a disciplinary hearing on 4 September 2019 by letter dated 2 September 2019. The letter was entitled *"Invite to Disciplinary Hearing - Failure to Work Overtime".* The letter stated:-

> *"It has become apparent during the outage at Ballylumford that you have not met your contractual obligations to work the required overtime during this project.*
>
> *You are employed under a NAECI contract and NAECI 7.4(a) states:*
> ***Obligation to Work Overtime***
> ***It is an obligation of employment under the NAECI to work overtime required by management to meet the needs of the job.***
>
> *For the Ballylumford outage, the hours required by the client and by management to meet the needs of the job were clearly communicated, and*

were in line with the hours historically worked on outages. Your poor response to working the required overtime has previously been discussed with you, but your response to working overtime has shown no signs of improvement.

You were off work for a period at the start of the Ballylumford outage, but on your return the records show the following for weekend working;

Sundays requested to work = 6
You refused to work = 5
You were unavailable = 1
Total Sundays worked = 0

You were asked to work on a Saturday on 2 occasions. 1 of these you refused and the other one you were not available. You worked zero Saturdays during this outage.

You also refused to work mid-week overtime on three occasions on 8, 13 and 19 August".

35. Before the disciplinary hearing had taken place, Mr David Watson (Engineering Manager of AES) emailed Mr Scott Anderson on 9 September 2019 as follows*;*

Scott,

Please see communication below re the performance of Seamus Burton in respect to supporting our requirement for out of hours working at the weekend.

My understanding is that under the Contractor's General Obligations there is a requirement to (o) procure that the Contractors personnel work such hrs in excess of Normal Working Hours as either AES Kilroot or AES Ballylumford as relevant may reasonably request for time to time. (sic)

It is our assessment that Seamus Burton has not met this requirement over an extended period (and most recently this weekend) and this has had a material impact on our business. As such I request that Seamus Burton is removed from site immediate and replaced with suitable replacement as soon as possible.

Please ask your site management to meet with Will Hill and David Robinson to agree the process for this action.

Regards and thanks.

David".

36. It is common case that on 9 September 2019 the claimant was escorted off the Kilroot site and his access pass was revoked by AES for both the Kilroot and Ballylumford sites.

37. The claimant attended disciplinary meetings on 10 September, 16 September and on 24 October 2019.

10 September 2019 Meeting

38. This meeting was attended by Mr McAuley and its purpose was to consider the issue of the claimant's overtime and the withdrawal of the claimant's access pass by AES. At this meeting the claimant was accompanied by his union representative, Mr Macklin. The tribunal noted from the minutes of the meeting that the claimant accepted that he always received sufficient notice in respect of any request for weekend overtime working and that he had not had to inform his manager that he had been unable to attend work by reason of his caring responsibilities. The minutes of the meeting record that it was agreed that the respondent would look at alternatives for the claimant. The claimant did not mention at this meeting any 'significant relapse' in his wife's condition at the meeting on 10 September 2019. At this meeting the claimant acknowledged that due to his circumstances he *"can't go anywhere other than here"*.

16 September 2019 Meeting

39. The meeting on 16 September 2019 was a continuation of the disciplinary meeting held on 10 September 2019. At this meeting the claimant's union representative Mr Macklin confirmed that he had been in contact with Mr David Watson of AES and had explained the reasons for the claimant not being able to work overtime. It was made clear to the claimant at this meeting that if AES did not change their mind the respondent would have to look at alternative roles for the claimant. The outcome of this meeting was that the claimant's representative, Mr Macklin, would contact AES and that Ms McLackland (HR) would ascertain if training, as an alternative role, was available for the claimant in Belfast as there was no alternative roles available for the claimant in Northern Ireland.

24 October 2019 Meeting

40. A final disciplinary meeting took place on 24 October 2019 at which the claimant was accompanied by his union representative Mr Macklin. The purpose of the meeting was to consider the withdrawal of the claimant's pass by AES and its impact on the claimant's employment. In the invite to this meeting, the claimant was informed that a potential outcome could be his dismissal. At this meeting the claimant stated that his personal situation was well known by everyone and he did not think that he needed to explain why he could not work overtime. He also confirmed that *"in most instances the team were advised either on the Wednesday or the Thursday that weekend working would be required"*. The minutes of this meeting record as follows:-

    (1) That several contacts had been made with AES to request they reconsider their decision and these had been declined.

    (2) That the respondent had offered the claimant alternative employment in the UK mainland however this was not suitable to the claimant.

(3) There were no training facilities in Northern Ireland and any training would take place at Tipton – but the claimant could not avail of this as his wife could not travel.

(4) That the claimant would revisit the terms under which he could work overtime and confirm these to Mr Anderson and Mr Davey and these would submitted to AES to seek a change of their position.

41. By email dated 28 October 2019 the claimant confirmed to the respondent the extent of his commitments to overtime. The tribunal finds that these were, essentially, the same as the agreement that had been in place since November 2015.

42. On 1 November 2019, Mr Anderson emailed Mr Watson of AES requesting that the company reconsider reinstating the claimant's pass to allow his continued employment. This was refused by Mr Watson by email dated 1 November 2019.

43. It is common case that by letter dated 20 November 2019 the claimant's contract of employment was terminated by reason of AES's '*reaffirmed position that they will not permit you to work on their sites*'. The letter confirmed that the respondent had no redeployment opportunities in Northern Ireland and that it had no alternative but to terminate the claimant's employment. There is no dispute between the parties that the claimant could not be transferred to any other site or location in Northern Ireland as none existed. It was confirmed to the claimant that the reason he was dismissed was for 'some other substantial reason'.

44. The claimant was offered the right of appeal. The claimant appealed by letter dated 21 November 2019 citing that having a family member with a disability had cost him his job.

45. The appeal hearing took place on Monday 13 January 2020 and was chaired by Mr Paul Temple. The claimant attended accompanied by his trade union representative Mr Macklin.

46. Following the appeal hearing, Mr Temple emailed Mr Watson of AES on 16 January 2020 requesting a meeting to try and "*reach a resolution that would result in the claimant's re-admittance to the Kilroot and Ballylumford sites working for Doosan Babcock under the contract"*.

47. Mr Watson by email dated 22 January 2020 refused a meeting and specifically stated as follows:-

> *"Thanks for your email. EPUKI has no wish to become involved in your internal HR processes or discussions with Mr Burton. The consideration and outcome of his appeal is entirely a matter for you/Doosan and it would be inappropriate for us to comment further. Our position on the matter has previously been made clear to Doosan and reflects the contractual position.*
>
> *Regards and thanks David."*

48. The outcome of the appeal was communicated to the claimant by letter dated 30 January 2020 and specifically addressed the claimant's three grounds of appeal as follows:-

"(1) Your personal circumstances had not been conveyed to the team at Ballylumford.

David Watson manages both the Ballylumford and Kilroot sites and was aware of the arrangement to allow you additional flexibility in order to support your wife. This flexibility included not working more than ten hours per day and having notice to work weekends. Unfortunately, you were unable to meet the terms of the arrangement during the Ballylumford outage which ultimately led to David making the decision to remove your pass. I therefore do not uphold this point.

(3) The reason that you were unable to do overtime, due to your wife's health condition, was not put forward to the client properly.

Having looked into this point, I am satisfied that the client was well aware of your wife's health condition and that this was put forward not only by Shaws, but also by Doosan Babcock. In respect of specific incidences when you advised that you were not available for overtime my understanding is that you did not communicate to the Doosan Babcock supervisory team on these occasions that this was because of your wife's circumstances. As there was a specific agreement in place as to what overtime you would ordinarily work I would have expected deviation from that agreement to be explained. In a call with David Watson on 15 October Scott Alex Anderson requested additional flexibility from EPUKI due to your wife's condition and again on 1 November this was reiterated in a request to David Watson to reinstate your pass. In this last request the reasons for your unavailability on specific occasions, discussed in your meeting with Stewart Davie and Scott Anderson on 24 October, were communicated to EPUKI, this request was rejected. I therefore do not uphold this point.

(4) You advised that you wished to have a meeting with Doosan Babcock and EPUKI to try and agree a way forward.

Following our meeting, I issued a request to David Watson to participate in a tri-party meeting with a view to reaching a mutually acceptable resolution that would permit your re-admittance to site. Unfortunately, David has declined and advised that EPUKI do not wish to be involved and confirmed that the EPUKI position was previously made clear to Doosan and reflects the contractual position".

49. In his claim the claimant alleged that his wife suffered '*a significant relapse in July 2019 and mid-August 2019*' affecting his ability to do overtime. The tribunal rejects the claimant's case that his wife suffered a 'significant relapse at this time' for the following reasons:-

(1) There was no medical evidence to support this. The tribunal was provided with a Consultant Neurologist's letter dated 4 November 2019. This letter confirmed the claimant's wife's diagnosis, the challenges this presents to her

and her need to have support. It specifically made reference to the claimant's employment – *"I hope that these issues are taken into account when considering issues around her husband's employment"* but significantly (in the tribunal's view) made no reference of a 'significant relapse' in July 2019 or August 2019.

(2) The Consultant Neurologist provided a further medical report dated 31 January 2021; this report made no reference to a 'significant relapse' in July/August 2019 or to any relapse in the claimant's condition.

(3) The claimant did not inform either his employer or any staff of AES of his wife's alleged 'significant relapse' at the meeting on 9 August 2019, at the disciplinary hearings on 10 September 2019, 16 September 2019, 24 October 2019 or in his grievance to AES on 24 September 2019.

(4) The tribunal concludes that had the claimant's wife suffered a 'significant relapse' as he alleges, this is something the claimant would have raised at the time, especially in circumstances where it allegedly impacted on his ability to work overtime and at a time when he was fully aware that his lack of overtime was an issue for AES.

(5) At no time does the claimant allege that any 'significant relapse' impacted on the claimant's ability to undertake overtime during the week.

50. The tribunal rejects the claimant's case that he was unable to commit to overtime at the weekend by reason of his caring responsibilities. There was no evidence before the tribunal that the claimant's wife's condition on any occasion affected his ability to undertake overtime during the week and there was no evidence of any occasion when the claimant had committed to overtime and was unable to fulfil that commitment by reason of his caring responsibilities or the alleged unpredictable nature of his wife's symptoms. The tribunal unanimously concludes that the claimant refused to commit to overtime working when requested. His evidence to the tribunal that at any time his wife could have suffered a relapse was entirely unsupported by evidence. On the claimant's own case his caring responsibilities were constant and consistent, both during the week and at the weekends. Furthermore the tribunal was not provided with any evidence of any occasion when the claimant arranged or organised carers to allow him to commit to overtime either on week days or at the weekend.

51. The claimant had submitted a written grievance to AES on 24 September 2019 in which he stated he wished to raise a formal grievance in respect of his treatment by Mr David Watson of AES. The claimant alleged that Mr Watson's actions amounted to discrimination by association. AES responded in writing that as he was not an employee of AES its grievance procedure did not apply to him and it rejected that there was any unlawful discrimination. AES confirmed that the request to remove him from the contract was based on "*the Company's requirement for weekend working and not on the basis that you are carer*". The claimant did not raise a grievance alleging associative discrimination with the respondent - his employer.

CONCLUSION

Unfair Dismissal

52. The tribunal is satisfied that the respondent's decision to dismiss the claimant for 'some other substantial reason' pursuant to Article 130(1)(b) of the Employment Rights (Northern Ireland) Order 1996 was genuine and based on its client's decision to revoke the claimant's pass and refuse him entry to its sites. The respondent conducted a reasonable investigation in the specific circumstances of this case holding a number of meetings with the claimant in respect of the revocation of his pass and acted reasonably in treating this as the reason for dismissing the employee.

53. The tribunal finds that the decision to dismiss the claimant is within the band of reasonable responses for the following reasons:

    (1) This is a classic case of 'dismissal at the behest of a third party'. AES revoked the claimant's security pass, removed him from site and refused to allow him back on site.

    (2) The tribunal rejects the claimant's case that weekend overtime could not be undertaken by reason of his wife's condition as this was not supported by any evidence. The claimant had no difficulty undertaking overtime during the week and the claimant provided the tribunal with no explanation as to why his wife's condition had no impact on his ability to undertake weekday overtime at short notice yet prevented him from undertaking weekend overtime with notice. It is the tribunal's conclusion, based on the findings of fact set out above, that the claimant voluntarily chose not to make himself available for overtime during the Ballylumford outage from June 2019 until August 2019 in the knowledge that he was required to undertake overtime as per his contract and this resulted in AES revoking his pass.

    (3) The tribunal accepts the respondent's case that the claimant '*had been on AES's radar'* for some time in respect of the issue of weekend working; the claimant had been spoken to about this at a meeting on 9 August 2019 along with his colleague Mr Gorman and the claimant was fully aware of his contractual obligations to undertake overtime.

    (4) The claimant's ability to undertake overtime had previously been an issue in November 2015 when his pass had been revoked and an agreement had been reached that the claimant would undertake overtime at the weekend with sufficient notice.

    (5) The tribunal finds that the respondent throughout the entirety of the disciplinary process, did everything it could to avoid or mitigate the impact of its client's decision to remove the claimant from its sites including offering training in the UK and going to considerable efforts to persuade AES to change its mind, both verbally and in writing, without success.

    (6) AES was the respondent's only client in Northern Ireland at the time. It is common case that redeployment to another role in Northern Ireland was non-existent and the claimant was unable to undertake any positions outside

Northern Ireland by reason of his wife's health condition. The tribunal accepts the respondent's position that, in all the circumstances of this case it had no other options available to it.

Associative Disability Discrimination

54. As per the findings of facts and conclusions set out above, the tribunal concludes that the reason the claimant was dismissed was a third party request from a client to remove him from their sites.

55. The claimant identified "his colleagues" and Mr Gorman as comparators in his claim of associative disability discrimination. It is common case that Mr Gorman was warned along with the claimant on 9 August 2019 in relation to his low level of overtime; thereafter Mr Gorman undertook overtime, however the claimant did not. The law requires that a comparators circumstances not be *"materially different"* from those of the claimant. Mr Gorman clearly made himself available for overtime and his pass was not revoked, the claimant did not make himself available for overtime therefore he was not in the same circumstances as his comparator.

56. There was no evidence adduced by the claimant as to the relevant circumstances of any other colleagues and accordingly, in the face of insufficient evidence it is not possible for the tribunal to determine less favourable treatment. In any event, the tribunal determines, from all the evidence presented that had another employee without a disabled dependent failed to make themselves available for overtime during the Ballylumford outage and had had their pass revoked by AES, their employment would have been terminated on the same grounds for the same reasons.

57. It is the tribunal's unanimous conclusion that the claimant has not discharged the burden of proof and proved facts upon which the tribunal could conclude that the claimant was directly discriminated against by reason of his wife's disability, furthermore, as set out above, the tribunal concludes that the reason for the dismissal was the request of the respondent's client to remove the claimant from its sites, for lack of overtime working and not because the claimant's wife had a disability.

58. The claimant's claims of unfair dismissal and disability discrimination are therefore dismissed.

Employment Judge:

Date and place of hearing: 22-26 November 2020, Belfast.

This judgment was entered in the register and issued to the parties on: