EMPLOYMENT TRIBUNALS

Claimant: **Mr W McBride**

Respondent: **Alan Dick Communications Limited**

Heard at: **Hull**
On: **14-16 August and (deliberations only) 17 August 2018**

Before: **Employment Judge Maidment**
Members: **Mr N Pearse**
Mr GD Wareing

Representation
Claimant: **Miss A Smith, Counsel**
Respondent: **Mr J Anderson, Counsel**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded and succeeds.

2. The Claimant's dismissal was an act of unfavourable treatment pursuant to Section 15 of the Equality Act 2010.

3. The Claimant's complaint of direct disability discrimination pursuant to Section 13 of the Act fails and is dismissed.

4. The Claimant's complaint alleging a failure by the Respondent to comply with its duty to make reasonable adjustments fails and is dismissed.

REASONS

Issues

1. The Claimant brings a complaint of unfair dismissal arising out of the termination of his employment which was accepted to be by reason of redundancy. The Claimant maintains that his dismissal was unreasonable in circumstances where the Respondent did not instead reduce agency staff, did not place the Claimant in a wider pool of selection, did not act reasonably in seeking alternative employment for him and, fundamentally, in a contention that the Respondent was

unreasonably predisposed towards dismissing the Claimant for redundancy because of his disability and/or his disability-related absences and/or occupational abilities and/or the need for the Respondent to make reasonable adjustments.

2. Indeed, the Claimant additionally brings complaints of disability discrimination. The Claimant maintains that he was at all material times a disabled person by reason of him suffering from fibromyalgia. The Respondent accepts that the Claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010. The Claimant's primary contention is that his dismissal amounted to unfavourable treatment pursuant to Section 15 of the Act in that it arose out of his absences, the Respondent's need to make adjustments and the Claimant's occupational limitations. Whilst not freestanding additional complaints, the Claimant points to a number of matters as evidencing the Respondent's discriminatory motivation including a lack of provision of specialist tooling despite an occupational health assessment, remarks made by Ms Warburton at a meeting on 9 March 2017, a refusal to provide disabled parking facilities in July 2017 and comments made by Mr Butler on 24 October 2017. In the alternative, the Claimant maintains that his dismissal was less favourable treatment because of his disability pursuant to Section 13 of the Act.

3. Finally, the Claimant brings a freestanding complaint alleging a failure on the Respondent's part to comply with its duty to make reasonable adjustments pursuant to Section 20 of the Act. This relates to an alleged failure to provide an auxiliary aid – a battery operated crimping tool for the Claimant's use in wiring work.

Evidence

4. The Tribunal had before it an agreed bundle of documents numbering some 271 pages. During the hearing the Claimant sought to admit into evidence a number of timesheets he had retained which he said indicated the type of work he was carrying out. Given that there was a conflict in evidence as to the actual tasks the Claimant was performing and this was of material relevance to the determination of the complaints, the Tribunal agreed to accept such late disclosure in circumstances where the documents were in fact documents in the Respondent's possession already, where the timesheets are been signed off by the Respondent's managers and where the Respondent's witnesses could where appropriate be recalled to explain them. The Tribunal allowed Mr Anderson any time required to take instructions regarding these documents.

5. Having identified the issues with the parties, the Tribunal took some time to privately read into the witness statements and relevant documentation. As a consequence, each witness was able to confirm the contents of his/her witness statement and, subject to brief supplementary questions, then be open to be cross-examined on its contents.

6. The Tribunal heard firstly from Mr Bartholomew Daly, the Claimant's union representative. It then heard evidence on behalf of the

Respondent from Miss Gemma Burke, HR Business Partner, Mr Nick Lyne, Health, Safety and Environmental Officer Mr Paul Drury, formerly employed by the Respondent as a Project, Production and Facilities Manager and Mr Trevor Butler, Operations Manager. The Tribunal allowed Mr Drury and then Mr Butler to be recalled to provide additional evidence. The Tribunal also accepted in evidence a signed written statement prepared by Mr Carl Pocknell, Director of Engineering and Operations on the basis that less weight could be attached to his evidence in circumstances where he was not present to be cross-examined. Finally, the tribunal heard from the Claimant himself.

7. Having considered all relevant evidence, the Tribunal made the following findings of fact.

Facts

8. The Respondent specialises in providing electronic communication services, particularly in the rail industry and to train operators. At the time of the Claimant's redundancy, it employed around 120 members of staff. It has an annual turnover of around £17 million. The Claimant is an electrician who was employed by the Respondent from June 2008 as a Senior Installer. He was subsequently promoted to the position of Production and Maintenance Engineer.

9. The Claimant suffers from fibromyalgia with symptoms of chronic pain and associated symptoms of anxiety. His health deteriorated after being involved in a road traffic accident in 2010.

10. At a meeting with Ms Burke, HR Business Partner, and Mr Lyne, Health, Safety and Environmental Officer on 4 March 2015 the Claimant explained that he needed a new specialised chair for his workstation. He also said that he was struggling with his hand/grip and taking painkillers. This resulted in a referral of the Claimant to occupational health who produced a report on 30 March 2015 stating that the Claimant should perform no heavy lifting and should be limited to weights of 15 kg. It also said that the Claimant should limit his use of ladders to transit only and should not work off ladders or steps. The Claimant was said to be likely to be a disabled person under the equality legislation. This led to a further meeting with the Claimant on 31 March where it was agreed that there would be an analysis of the Claimant's duties to consider which might require reasonable adjustments.

11. The Claimant was absent due to sickness from 29 April 2015 to 5 July 2015 and on his return it was agreed that he could carry out light duties on a phased basis to ease him back into work.

12. In July, Ms Burke worked with Mr Paul Drury, Project, Production and Facilities Manager, and Mr Lyne to compile a list of amended duties for the Claimant which was sent to occupational health on 10 August 2015. Occupational health suggested that the Claimant carried out those duties for a month and was then reviewed further.

13. On 23 August 2015 a further medical report recommended modifications to the Claimant's chair and workbench. It also recommended the avoidance of repetitive tasks and said that the use of electric wire crimpers would assist the Claimant. The Tribunal has been told that the use of any particular tooling needed to be approved by the Respondent's train operator clients, if it was to be used on a particular project. Mr Lyne said that a request was made of Great Anglia, the relevant train operator, but they said that they would not verify any new tooling. The Tribunal has not seen any relevant correspondence, but accepts Mr Lyne's evidence. It does not, however, appear that the Respondent referred to the reason for the request being to make an adjustment for a disabled employee. The use of hand crimpers was a general task carried out in the production area to bind wires together of a range of thicknesses and not limited to any one project. Mr Lyne had already for himself identified that the use of hand crimpers risked repetitive strain injury to any employee carrying out that work, hence the crimping tasks were rotated amongst the workforce.

14. On 22 September 2015, Ms Burke emailed the Claimant explaining that, on a review of the medical report, the Respondent had taken the decision to take out the maintenance aspects of the Claimant's role. She provided an alternative job description for a role with the job title of Production Training Engineer. The new job description reflects that the Claimant continued to undertake production tasks, but with the removal of specific responsibilities relating to maintenance. In the Claimant's Production and Maintenance Engineer role he had already a responsibility to train employees and this was carried over into the new job description – there was added a responsibility to mentor and audit all new personnel identified as requiring training and support. The Claimant agreed to this revised role. The training element effectively involved on the job instruction and demonstration to 3 agency workers relatively recently engaged in the production area and who continued working there until shortly before the Claimant's redundancy.

15. The only material change in the written job description was the removal of maintenance tasks. The Claimant's separate task list identified adverse impacts on health of certain job functions. As regards SP222 cables, it was recorded that the weight of the cables could be a problem, but the Claimant could work on them if assistance was provided with the cables lifted on and off the benches for him. He could carry out tests on the workbench on these cables. Mr Drury said that he still worked on these cables, but not on their manufacture. This latter point was disputed by the Claimant. It was recorded that the Claimant could still work on SP531 blocks and SP202 Couplers but that "*tooling being looked at*" – a reference to electric rather than hand tools. The Claimant could still build circuits but with a warning regarding the effect of pain killers which it was recognised might affect the Claimant's concentration such that he ought to be kept off safety critical work. However, the major concern in terms of safety critical work within the Respondent related to trackside installations which were carried out by separate teams and not the production department.

16. The Claimant could still work on REB build ('Alan Dick work') which involved cabling in prefabricated buildings housing communications equipment for the railways – although this was work the Claimant should not do alone and was to be confined to demonstrations and as part of the Claimant's training role.

17. Early on in the Claimant's new training orientated role, a significant amount of his time was indeed taken up in training others as the agency workers on site had been effectively recruited "*off the street"* and had no background experience in electrical installation. However, as those workers became more experienced the amount of training they required diminished. The timesheets shown to the Tribunal reflected 9 days spent on internal training over 13 weeks which Mr Butler said was probably indicative of the amount of time the Claimant spent on training. He said it was *"not too far off … as time goes on there are no so many or so much need to train."*

18. The Tribunal accepts that the Respondent intended to keep the Claimant off crimping work. However, the Claimant was at liberty to take on tasks if he felt able to do so. Mr Drury recognised that Dr Guest had advised that the Claimant's condition fluctuated such that there were times when the Claimant might judge for himself what type of work he was comfortable in carrying out. The Claimant says that he carried on performing a range of production tasks as and when required and the evidence supports his contention.

19. It is noted that the Claimant was consistent throughout as to the type of tasks he was undertaking. The Tribunal has again seen a number of timesheets completed by the Claimant and signed off by his managers, including Mr Butler. The purpose of these sheets was to allocate the work carried out by the Claimant to the appropriate cost centres. Within these the Claimant used the code ROCOST to show work he had carried out manufacturing cables. As already referred to, the amount of time the Claimant carried out training had diminished by 2017. When not training, the Tribunal accepts that the Claimant was certainly not doing nothing else. The Tribunal rejects the assertion that a significant amount of his time was spent in preparing documentation and manuals. The Claimant was clear that if he was involved in such work he used a specific code to that effect on the timesheets he completed. That is not evident from the timesheets the Tribunal has seen.

20. At a meeting (referred to below) with Ms Burke on 11 July 2017, the Claimant listed a number of tasks he was performing. The Claimant raised that he was carrying out other duties of a supervisory nature, complaining that he was having to do work which ought to have been carried out by Martin Rhymes, the Production Supervisor – the Claimant had previously been the supervisor and had trained Mr Rhymes and his deputy in how to do their jobs. He also said that he was involved in manufacturing cables. Ms Burke's note of the meeting reflected that there would always be additional tasks to pick up, but that the Claimant should not do so to the detriment of his health. This reflected that again the Claimant was to an extent left to make his own judgment as to which production tasks he could undertake. It reflected

a recognition indeed based on medical evidence that the Claimant's condition would wax and wane.

21. The Tribunal accepts that the Claimant was still doing some production tasks and supervising others for a significant part of his working time. Even when training, he needed to demonstrate how the work was to be carried out which included a need also to go up ladders. This was in the context of the Respondent's work being largely project based – the type and amount of work fluctuated. In the 3 months before the Claimant's redundancy he carried out no training as there was no one left within the production area who required to be trained. There was also no need for supervision, with the department consisting then only of a supervisor, deputy supervisor and the Claimant.

22. An organisation known as Posturite visited the Respondent's premises shortly after the September 2015 medical report to assess changes that needed to be made to the Claimant's work area. They produced a report and some adjustments were made to the Claimant's workbench although the timing is disputed. The height of the bench was raised certainly at latest by September 2016. Dr Guest in his 11 October 2016 report refers to the bench "*having not noticeably improved things*".

23. The Claimant was not provided with a specialist chair immediately after the report as, on Ms Burke's evidence, they could not get sign off from a financial perspective from Jason Pearce, the Respondents Managing Director who told Ms Burke that the Respondent couldn't afford the chair. The quotation from Posturite confirms a cost for a specialist chair to be the VAT inclusive sum of £651.

24. The Claimant was again absent from work due to ill-health from 27 January to 7 March 2016. Ms Burke met with the Claimant on 9 March explaining that the chair had not yet been provided due to the expense. Subsequently, approval was given to purchase the chair which was acquired in July 2016.

25. A further medical report was produced dated 27 July which confirmed a possible diagnosis of fibromyalgia and that the majority of the Claimant's symptoms would continue into the future. It said that absences from work had been associated with these problems and it was suspected that this would be an ongoing issue in the future. The Claimant had a further week of sickness absence at the end of September.

26. Mr Drury and Dawn Brown, who had been brought in whilst Ms Burke was absent on maternity leave as cover for her, but subsequently took on a group HR role, met with the Claimant on 4 October. They decided that the Claimant should be referred to occupational health. After 10 days absence in October, Ms Brown met with the Claimant on 21 October to discuss the further occupational health report produced on 11 October. This report referred to the Claimant's levels of pain waxing and waning and that there might be times when the medication he took to control the levels of pain experienced may impair his decision-making. The Claimant should therefore at these times not perform any safety critical work. This again was a reference to the installation of

equipment and cabling on site and trackside which was undertaken by other employees within the Respondent and was not in any event part of the Claimant's ordinary role. The report went on to comment on other tasks, taken by the Respondent from the Claimant's job description (and hence not detailing any specific production tasks). The Claimant was able to train employees new to product assembly providing he avoided the more physical aspects. There was no issue with him keeping necessary documentation and test records. He was able to carry out testing procedures on manufactured products subject to the possibility of the Claimant's condition fluctuating and affecting his ability to do so and was able to carry out quality audits. There was no issue regarding him being able to identify any non-compliances and recommend corrective action. Similarly, he was able to mentor and audit new personnel identified as requiring training and support. Ms Brown took on board the comments made by occupational health and the Claimant was to focus on the aspects of his role in the next month identified by occupational health as ones that he could do without any repercussions in terms of his health.

27. At the beginning of December 2016, the Claimant asked for the car parking space he preferred to park his car in to be converted to a disabled parking space. A newly recruited HR assistant, Kayleigh Warburton, who now effectively acted as Ms Burke's maternity cover, emailed the Claimant on 5 December saying that there was already an allocated space for disabled parking which he was entitled to use. That was not a helpful response in circumstances where there was already another disabled employee within the workplace who was accustomed to use that designated space at times when the Claimant would wish to have access to it. The Claimant was keen that the particular space he was already using was effectively designated for his use as it was next to a pathway which enabled the Claimant to open the car door wide and more easily get in and out of his vehicle. However, Mr Lyne carried out an assessment of the space the Claimant was using and deemed it unsuitable in accordance with government guidelines for it to be converted into a disabled space. It was deemed not safe for disabled persons due to the proximity to the pathway. Subsequently, two further disabled parking spaces were created by the Respondent, but they were not considered suitable by the Claimant because they tended to become slippy and, more fundamentally, they did not allow him to have additional space away from a neighbouring vehicle to help him get in and out.

28. The Claimant was invited to attend an absence management hearing on 9 March 2017 due to his absence record in the previous year. The Claimant was accompanied by Mr Daly. The Claimant and Mr Daly contended that during this meeting Ms Warburton asked (and repeated a number of times) if the Claimant thought he was special because he was disabled. Mr Drury does not recollect that being said. However, Ms Warburton's own notes of the meeting refer to her saying: *"the company had been more than fair to Will's situation and that it was starting to seem unfair that he was treated differently to other employees."* Ms Burke in her evidence said that she considered that to have been an inappropriate comment in itself. Mr Drury before the Tribunal, when asked for his views as to whether the Claimant ought to

have been given special treatment as a disabled person, said that everyone was special.

29. Following the meeting there was a further occupational health report produced. This said that the Claimant would not benefit from reduced working hours. Dr Guest noted that he previously advised that the Claimant be provided with specialist tools. The reference to specialist equipment was to the battery operated crimping tool for the handling and binding together of wires and which would avoid the Claimant needing to manually squeeze the tool together which was causing him pain and swelling in his joints. He expressed surprise that Mr Drury had also said that the Claimant was required to produce a disability certificate to access such assistance. He noted that certification of disability had been removed by the introduction of the Disability Discrimination Act 1995. When asked if the Claimant would be covered by the disability legislation, Dr Guest described the Claimant's condition as chronic and long lasting with a substantial effect on his daily activities.

30. An outcome of the absence review meeting was produced by letter from Ms Warburton of 3 April. She directed the Claimant to apply for a grant through Access to Work in order to assist in the provision of specialised tooling, saying that the Respondent would help him with the completion of the necessary forms. No reference was made to any need for train operator approval or any other difficulty. The Claimant was told that his attendance would remain under review and that, if he failed to meet the required standards, he might be subject to a stage I hearing. It was noted that the Claimant had had four occurrences of absence in the previous year thus hitting a trigger point which had invoked a stage I formal absence process in a number of other cases.

31. Ms Burke's evidence was that there was a need still to obtain client approval for the use of a crimping tool but she could not say what steps had been taken by the business to get that approval. Her understanding was that in June 2017 the client project requiring the crimping tool ceased but that the Respondent subsequently received permission from the client in respect of another project to use it and it was ordered in April 2018, albeit after the Claimant had been made redundant.

32. The Claimant was invited to a further attendance management hearing on 29 June by Ms Burke who had now returned from maternity leave. She was accompanied by Mr Drury. The Claimant had had absences from work on 1, 12 and 16 June 2017. The Claimant said that he had experienced stomach cramps and dizzy spells. The Claimant was asked to provide an update when he had had his next medical appointment. The Claimant maintained that he was *"running around"* carrying out the supervisor role which was meant to be undertaken by Mr Rhymes as well as his training tasks. He said that if he was given more money he would act as supervisor himself. Subsequent to the meeting Ms Burke wrote stating that the Respondent did not want him to carry out extra responsibilities which would have an adverse effect on his health. He was again referred to Access to Work if he wished to apply for access to funds which would help the Respondent in providing specialised work equipment. She went on that the Respondent had

made reasonable adjustments to his role and had sought specialised equipment such as a chair and bench. She didn't feel that a further occupational health report was required at this time. The Claimant was told that his attendance remained under review and that a failure to meet the required standards might result in a stage I absence management hearing.

33. The Claimant had complained that Ms Warburton had been abrupt and discriminatory towards him. This was not questioned or investigated by Ms Burke.

34. Ms Burke met with the Claimant again on 11 July with Mr Drury to discuss his current job role. The Claimant described that he was doing additional tasks including organising containers and kits, raising and chasing shortages, manufacturing cables and supporting the deputy supervisor. The Claimant raised some issues regarding Mr Rhymes conduct as supervisor. It was said that, as with any role there would always be additional tasks to pick up but the Claimant was not to do so if that would impact detrimentally on his health and future attendance.

35. Around this time the Claimant had raised the issue of a build-up of moss in the additional designated disabled parking space he was using and asked again for his previous preferred space to be reserved for him. Ms Burke responded on 18 July that the Respondent was unable to reserve a specific space for any employee and that the Claimant's preferred space was not suitable to be designated as a disabled parking space. She referred to the Respondent now having three designated spaces which was deemed to be sufficient. In her evidence before the Tribunal Ms Burke said there was no reason why the Claimant's preferred space could not have been reserved for his use and said that there was no particular pressure at the Respondent's site on parking spaces. The Claimant in practice ensured he arrived early so that he always got the space.

36. It is accepted that from July to September the Claimant had no further sickness absences from work. In July 2017, the 3 production operatives engaged on an agency basis, Jordan Needham, Chris Newark and Ben Lock as well, as a permanent production operative, Eddie Doherty, were moved out of the production department due to a lack of work and a number of projects coming to an end. They were all transferred to a separate business within the Respondent known as "Core" which involved the packing of telephone handsets and cables. The Respondent took a decision not to release the agency workers as it was foreseen and hoped that there would be further orders in the early part of 2018 and, given that the agency workers had become more skilled in production tasks, the Respondent did not wish to lose their skills from the business. The Claimant at this time remained working in the production area alongside only the production supervisor and deputy production supervisor.

37. On 7 September 2017 Mr Pearce issued a staff announcement stating that a loss for the previous financial year had been reported and that there was a slowdown in sales in the current year. As a result, there was need to restructure the business which would result in a reduction

in permanent headcount by a factor of 10%. More information was to be issued to staff by 15 September at which point the Respondent would consider applications for voluntary redundancy and use the Respondent's customary selection criteria to retain the right level of skills and experience in the business to ensure future success.

38. The evidence before the Tribunal, particularly from Ms Burke, is that the decision-making in terms of the restructuring was taken at senior management team level and the Tribunal has not had the benefit of hearing from any witness involved. Ms Burke accepted that herself and Mr Trevor Butler were not the decision makers in the Claimant's redundancy, but were charged with delivering the redundancy process for the benefit of the business. Ultimately the decisions were taken by Mr Pearce in consultation with the Head of Human Resources, Ms Dawn Brown. Prior to the further announcement on 15 September, Ms Burke met with Mr Pearce and Ms Brown who briefed her on the proposed redundancies. She was told that the Claimant's role together with a supervisory facilities role had been identified as at risk of redundancy in the production area. [This was Mr Drury's role – he had handed in his notice before the redundancies were announced and a handyman who worked under him subsequently volunteered for redundancy. A facilities operative (a new position) was later added to a list of vacancies although the Claimant did not see this second version. An agency worker, Mr Lock took up this role on a part-time basis.] Ms Burke understood that it was Dawn Brown's decision to treat the Claimant as being in a unique position and not to be placed in a pool with other production employees. Essentially, her understanding was that it had been decided that the Respondent did not need a trainer given the fall in workload and projects to be undertaken. The need was for operatives to carry out the available work.

39. She said that there was a brief discussion as to whether the Claimant could do a production operative or production supervisory roles but it was concluded that he couldn't because of medical reasons. She said there was reference to whether or not the Respondent could put the Claimant in a selection pool with them and if so how they would then score him - it had never been said that he was not competent to do the jobs, she told the Tribunal, but how would they then score him with the medical issues he had? Hence that consideration was dismissed. She said that Mr Pearce was aware of the Claimant's medical issues from what she had told him in updates over the preceding months, but she had not shown him any medical report or other documentation.

40. Ms Burke's evidence was therefore to the effect that the Claimant was assessed as a trainer but in a pool of one partly because of his disability limitations, with a recognition that people in production had similar competencies and, if fit, the Claimant could have been put by the Respondent into a pool of comparison.

41. Mr Butler described the Claimant as good at his job, with long service and very experienced. He said "*he would have scored highly … it was just whether he could have done all of the jobs*." The Tribunal notes at this point that Mr Daly alleged that he had overheard Mr Butler telling a member of office staff that they would be okay in the redundancy

process as the Respondent was getting rid of the deadwood. Mr Butler denied ever saying this and the Tribunal was unable to accept Mr Daly's evidence on the point in circumstances where it was not credible that he had not thought to include it in his witness statement. If the comment was made it was not in any event, as described, directly about the Claimant.

42. The staff announcement then issued on 15 September confirmed that 19 roles had been identified as at risk of redundancy across various business functions. Roles to be lost were identified in the production area but without being specifically named. Where appropriate, a selection process was to be conducted by 22 September. The Respondent said it would consider applications for voluntary redundancy. Finally, a number of potential new roles in the business were listed.

43. The Claimant was handed a letter by Ms Burke dated 18 September notifying him that he was potentially at risk and stating that a provisional selection would be carried out based upon a selection matrix which was enclosed. In fact, the letter went to those already identified as redundant according to Ms Burke's evidence – it did not go to all those in relevant selection pools across the business. It was said that the Respondent would also try to identify ways in which redundancies might be avoided and discuss any alternative positions. A pro-forma letter was enclosed by which an application for voluntary redundancy could be made.

44. Ms Burke wrote further to the Claimant on 22 September saying that with regret he had been identified as at risk of redundancy following a review of roles at risk. It was said to be a provisional decision only and that the Respondent wished to consult with the Claimant and would try to identify any alternative positions within the wider business. A meeting was arranged with the Claimant to discuss the situation in more detail for 26 September 2017. The letter enclosed a list of vacancies.

45. That meeting indeed went ahead chaired by Ms Burke who was accompanied by Mr Butler. The Claimant was accompanied by his wife who also worked at the Respondent. Only very brief notes were kept of that meeting and they reflect effectively a standard checklist which was to be gone through with each employee identified as potentially at risk. It was recorded that the Claimant had received all relevant paperwork. The Claimant made representations that he should have been scored against Martin Rhymes referring to the fact that he had taught all those in the production area their role and he thought he had more to offer. Ms Burke recorded that the Claimant had not been scored as the Respondent saw him as a "*singular role*" commenting further that the Claimant shouldn't have been climbing up ladders and working on specific tools, the Claimant saying that he had been requested to do more work than fell within his ordinary job description. It was noted that the Claimant was absent from work due to stress at the time of this meeting. It was noted that the question had been raised whether the

Claimant was being made redundant because of his capability and that it was confirmed that *"it is redundancy due to lack of work and no longer require role. However, we would look at capability as cannot redeploy him."*

46. Mr Butler maintains that the possibility of the Claimant working in the Core area as an operative was raised, but that the Claimant by his facial expression expressed a disinterest in transferring to work there. That evidence was not in his witness statement and can not be accepted in the face of the Claimant's denial. Ms Burke's evidence was that the Claimant did not enquire so she didn't ask. The issue of working in Core was not, on her evidence, therefore explored. Ms Burke did not, the Tribunal finds, encourage the Claimant immediately before the meeting (as he maintains) to raise supervisor vacancies. She would not have done so as there were no vacancies. The Claimant raised these positions without being prompted to do so.

47. A second consultation meeting took place on 5 October. The Claimant said that he felt he could do the supervisory role and would just need to apply for the grant to obtain different tooling to help him in day-to-day tasks. It was recorded in the notes of the meeting: *"As the area changes the requirement for a deputy will no longer be there and a production lead role will be formed. The role will not be much different to the current production supervisor role however the requirement will be more to be hands-on carrying more operative tasks out daily. If this role does get advertised out then Will could potentially apply if this goes external. However, we would need to look at tooling etcetera and the grant that Will needs to apply for."*

48. The Respondent, therefore, recognised that this more hands on role (if it were ever introduced into the production department structure) might be a suitable job for the Claimant. There was, however, no such vacant position available or decided upon prior to the Claimant's dismissal.

49. After the meeting Ms Burke wrote to the Claimant by letter of 5 October confirming his dismissal by reason of redundancy with effect from 31 October and giving the Claimant a right to appeal. The Claimant exercised this right of appeal and was invited to a meeting chaired by Mr Carl Pocknell, who was new to the business and had no knowledge of the Claimant. The Claimant said that he believed he should have been scored as he was the most qualified person in the Department. Whilst he had been put in a pool of one, he said he should have been scored against others as his role covered many areas. He also said that he had spoken to the Respondent about it providing some adapted workplace tools but had never got them. Ms Brown, who accompanied Mr Pocknell, asked if he had ever applied for funding and the Claimant said that he hadn't because of family issues.

50. Mr Pocknell then arranged a further meeting for 24 October at which he confirmed his decision not to uphold the Claimant's appeal. He said that redundancies had been carried out based on the requirements for the Claimant's position within the business going forward and the role of Production and Training Engineer was no longer required. He explained that he had reviewed whether the Claimant had the required

skills, competencies and flexibility going forward and that he had not identified an alternative role which would keep the Claimant in the business.

Applicable law

51. Section 98(4) of the Employment Rights Act 1996 (‘the ERA’) provides:

“(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.”

52. The Tribunal in a redundancy case will be concerned with reasonableness in the advance warning of redundancy, in the quality of individual consultation, the method of selection for redundancy and in the employer’s efforts to identify alternative employment. How this test ought to be applied in redundancy situations has been the subject of many judicial decisions over the years but some generally accepted principles have emerged including those set out in the case of **Williams –v- Compair Maxam Ltd 1982 IRLR 83** where the employees were represented by an independent union. In the Williams case it was stated:

“1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be

objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

53. The Tribunal was also referred on behalf of the Respondent to the case of **Capita Hartshead Limited v Byard [2012] IRLR 814** where Silber J said as follows:

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:-

a) 'It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: The question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted' (per Browne – Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18]);

b) '[9]… The courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn' (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother [2005] All ER(D) 142(May));

c) 'There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It will be difficult for the employer to challenge it where the employer has genuinely applied his mind [to] the problem' per Mummery J in Taymech Limited v Ryan [1994] EAT 663/94, 15 November 1994, unreported):-

d) The employment tribunal is entitled if not obliged to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

e) *Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible for an employee to challenge it.".*

54. If there is a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

55. *"Disability"* is one of the protected characteristics listed in Section 4 of the Equality Act 2010. Whether someone is a disabled person is defined in Section 6 of the Act.

56. The duty to make reasonable adjustments arises under Section 20 of the Equality Act 2010 which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(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….*
> *(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."*

57. The Tribunal must identify the provision, criterion or practice applied/auxiliary aid, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial.

58. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

59. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which, as well as the employer's size and resources, will include the extent to which the taking of the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

60. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

61. It is not permissible for the Tribunal to seek to come up with its own solution in terms of a reasonable adjustment without giving the parties an opportunity to deal with the matter (**Newcastle City Council –v- Spires 2011 EAT**).

62. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP/lack of auxiliary aid creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

63. The Claimant also complains of direct discrimination. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

64. Section 23 provides that on a comparison of cases for the purpose of Section 13 *"there must be no material difference between the circumstances relating to each case".*

65. The Act deals with the burden of proof at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".*

66. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

67. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

68. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. More recently the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

69. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability,and*
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

70. No comparator is required. Again, there can be no liability if A shows that A did not know and could not reasonably be expected to know that B had the disability.

71. Section 123 of the Equality Act 2010 provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the expiry of the period in which the

person might reasonably have been expected to implement the adjustment. The Tribunal has an ability to extend time if it is just and equitable to do so.

72. Applying its findings of facts to the legal principles, the Tribunal reaches the following conclusions.

Conclusions

73. It was submitted on behalf of the Claimant that the decision to terminate the Claimant's employment was made by Mr Pearce and in the context of a complaint of unlawful discrimination it was shocking that he was not present as a witness in circumstances where the Tribunal would need to consider his conscious and unconscious thought process.

74. The Tribunal notes that, when identifying the issues, it was said on behalf of the Respondent that the decision to terminate the Claimant's employment was a joint decision between Ms Burke and Mr Butler. However, Ms Burke has given evidence to the effect that she had not been involved in the decision making process which identified the Claimant as at risk and nor had Mr Butler. The Respondent's position in submissions is that in reality Ms Burke and Mr Butler were the relevant decision makers as they effectively confirmed the decision to terminate the Claimant's employment in circumstances where, if something had arisen in the consultation with the Claimant which might have questioned the appropriateness of the Claimant being selected for redundancy, they would have taken this back to the senior management team and the decision might then have been different as regards the Claimant being dismissed or potentially retained within the business. This might have occurred, but it did not in fact.

75. In terms of factual findings from which the Tribunal could potentially draw an adverse inference as to the reason for the Claimant's selection for redundancy, Miss Smith refers to Ms Warburton's remark regarding needing to be fair to all in any adjustments issue and Mr Drury's evidence before the Tribunal that effectively everyone could be a special case, noting the need to treat staff consistently – not recognising the possibility of preferential treatment of a disabled person. She highlights a lack of understanding of the equality legislation, not least in Mr Drury's belief that a disability certificate was a prerequisite to making adjustments and Ms Warburton not appearing to correct his belief. Ms Burke is said to have ignored the Claimant's complaint that he felt he had suffered discrimination arising out of comments Ms Warburton had made to him. Mr Anderson points out that Ms Warburton certainly and also, he would say, Mr Drury had no impact on any redundancy selection decision making.

76. The Respondent's attitude to the Claimant's request for assistance with parking, the length of time it took for him to be provided with a specialist chair and the delay also in respect of acquiring an electric crimper is

also said to be suggestive of an employer ill-disposed to an individual with disability related needs.

77. On the other hand, Mr Anderson points to the Claimant having his disability-related absence discounted from his absence record during the attendance management process and to the redundancy selection criteria providing for a disregard of disability absence when scoring employees. Ms Burke was certainly more sympathetic to the Claimant as a disabled person and did not shirk away from recognising that comments made by Ms Warburton were inappropriate.

78. The Tribunal does not, however, need to rely on such (competing) factors in seeking to understand what they might indicate in terms of the Respondent's (Mr Pearce and Ms Brown's) conscious or unconscious motivations. It can rely on Ms Burke's evidence before the Tribunal. That was to the effect that Mr Pearce had determined that the Claimant's role of Production Training Engineer was no longer required. That was based on the Claimant's job title and the conclusion that there was no current training need. It was without any thought being given to any other tasks they Claimant might have performed or been capable of performing. It was in circumstances where Ms Brown had advised that the Claimant could be treated as being in a pool of 1 for redundancy selection purposes.

79. However, that was not the complete explanation for the Claimant being selected for redundancy. There was a discussion when Mr Pearce, Ms Brown and Ms Burke met as to whether the Claimant could carry out the roles of production operative or production supervisor. The conclusion reached was that he could not because of medical reasons. Their discussion, however, was not straightforwardly in the context of alternative available employment but also, on Ms Burke's evidence, arose out of the rationale given for the decision not to put the Claimant in the same pool as production operatives or production supervisors in the first place, because of Respondent not understanding how the Claimant might be scored in circumstances where it could not be said that he was not competent or did not have the relevant skills to carry out those jobs, but rather how (they rhetorically questioned) could he be scored against the others in the pool given his medical issues i.e. the limitations on what he could do.

80. The Respondent did turn its mind to whether the Claimant should be treated as an individual in a unique role or pooled with others but the determination that he could not be put in a pool with others and assessed against them arose out of the Respondent not feeling able to assess the Claimant against others because of the medical issues i.e. the limitations he had in terms of the tasks he could perform because of his suffering from fibromyalgia. The decision not to put the Claimant in a pool for selection and therefore, it must follow, the decision to ultimately terminate his employment by reason of redundancy amounted to unfavourable treatment – the Claimant lost an opportunity to compete with others to be retained within the business on the basis of his skills and capabilities. He was made redundant. The removal for the Claimant of that opportunity was because the Respondent

considered that he was limited in what he could do. Those limitations arose out of his disability.

81. The Respondent seeks to justify that treatment of the Claimant. Certainly, its seeking to retain those staff most suited and flexible in terms of future business needs can be accepted as a legitimate aim. Did the Respondent act proportionately however in treating the Claimant as in a singular role rather than assessing him against other colleagues? The Tribunal's conclusion is that it did not. The Claimant was, on the Tribunal's findings, doing a significant number of production operative tasks. The Claimant was not simply a trainer. When the agency workers in production commenced providing services to the Respondent, the Claimant no doubt spent a more significant amount of time demonstrating tasks to them and supervising their work. However, the training element of his role would and did decrease over time as those operatives became more experienced. Indeed, the operatives were moved into the Core area rather than dispensed with in July 2017 in circumstances where the Respondent recognised that they had obtained skills and ought to be retained within the business for that reason. Certainly from July 2017, the Claimant had not been training at all. He had not, however, being doing nothing during this period prior to the redundancy exercise and had indeed been continuing to carry out production operative tasks. These were limited to some extent by his physical capacities, but on the Tribunal's findings he was still carrying out a range of tasks which included at times direct involvement in the manufacturing of cables and the production and testing of parts for use in the rail industry.

82. From July 2017 the Claimant had been working in production the Claimant, together only with the production supervisor and his deputy supervisor, both of whom had previously in fact been trained by the Claimant. They were not carrying out any supervisory tasks at this time – they had no one other than each other to supervise. The facts are such that the Claimant himself had carried out an element of supervisory work, not just in respect of those he trained but in respect of the 'Alan Dick' work where the Claimant had complained that he was having to do some tasks which would ordinarily have fallen to those employed to supervise. There was and always had been a significant element of crossover and duplication of duties within production and indeed during the current consultation process it had appeared to be being mooted by the Respondent a more fundamental review as to how supervision might be carried out going forward.

83. Furthermore, the Claimant's inability to carry out some of the necessary production tasks was judged without, on the evidence, any examination as to what the Claimant was actually doing and what he might be capable of doing. The Claimant was not asked - certainly not until after consultation regarding his prospective redundancy had commenced and even then only in the context of the Claimant raising that he ought to have been scored against others. No occupational health advice was taken and no consideration was given to the fact that it had been identified that the Claimant would benefit from the use of an electric crimper which would alleviate pain he might otherwise suffer in his hands and give him a greater capacity to carry out crimping work.

84. The Tribunal cannot accept as a justification for treating the Claimant as a singular employee, the Respondent's suggested inability to score the Claimant fairly in terms of the role going forward. The Tribunal has seen the selection criteria ordinarily used by the Respondent in redundancy exercises. This allows for a scoring of skills and competencies, but the Tribunal does not consider that the Respondent was unable to score skills and competencies on the basis of what employees could actually do rather than what, for instance, the Claimant might theoretically have been able to do had he been fit. A duty to make reasonable adjustments would perhaps have arisen at this stage, but fundamentally the situation might have existed were certain skills were fundamentally necessary within a continuing workforce and where the Claimant could not be retained in circumstances where he did not have them or the ability to demonstrate them. Disabled employees are not immune from selection for redundancy and there is no requirement for their retention in circumstances where they cannot carry out the tasks required of them with sufficient efficiency/capability to make their retention economic.

85. The Claimant's complaint that his dismissal was an act of unlawful discrimination pursuant to Section 15 of the Equality Act 2010 is well-founded and succeeds.

86. Whilst the Claimant had alternatively brought his complaint of a discriminatory dismissal as one of direct discrimination, that was not a claim positively advanced by Miss Smith in her oral submissions nor directly put to the Respondent's witnesses. The focus has (rightly) been on the treatment of the Claimant arising from his limitations rather than because of his status as a disabled person. There has been no attempt to construct a hypothetical comparator and to seek to suggest that an employee in materially the same position as the Claimant in terms of his or her abilities would have been treated by the Respondent any differently. The Claimant's complaint pursuant to Section 13 fails and is dismissed.

87. On the Tribunal's findings, the Claimant's complaint of unfair dismissal is also well-founded and succeeds. The Tribunal appreciates its own limitations in terms of criticising an employer's response to the question of identifying an appropriate pool of selection. In an unfair dismissal context, it is generally sufficient for the Respondent to have applied its mind to the question. The Respondent's difficulty is, however, that in applying its mind to the question in this case it determined that the Claimant could not be assessed against other employees because of the limitations arising out of his disabling condition. It's decision-making as regards the Claimant being treated as a singular employee, therefore at risk of redundancy, was an act of unlawful discrimination. Its approach falls outside the band of reasonable responses.

88. The Respondent also acted unreasonably in viewing the Claimant and his production colleagues' roles (in terms of their actual duties) being defined by their job titles – the Respondent unreasonably failed to recognise that they all carried out a range of duties with a degree of overlap and variance over time. This was a group of employees with

similar skills and capabilities as well as a broad similarity of duties. At the time of the redundancy exercise there were 3 employees remaining within production. A supervisor with only a deputy to supervise, a deputy supervisor with no one to supervise and a trainer with no one to train. In reality they were 3 individuals carrying out a range of production tasks. The particular skills and competencies required within the business going forward should reasonably have been identified and these employees assessed against those competencies. Again, it was not within a range of reasonable responses for the Claimant to have been treated as in a singular position at risk of redundancy in essence arising out of his particular job title.

89. The Respondent envisaged that there would be new work coming back into production at some future point. That does not in itself render any redundancy terminations as at September 2017 unfair, but the Respondent had determined that there would also be a future training requirement. The supervisor and deputy supervisor would be the individuals to carry that out in the future. There was no consideration of the Claimant.

90. There was a process of consultation with the Claimant and the Claimant had and took an opportunity to challenge his being placed in a standalone pool of self-selection. The Claimant having been determined to be in a singular position prior to consultation does not render any subsequent process of consultation meaningless in the sense that the Claimant did and took his opportunity to challenge the Respondent's decision making.

91. There was, however, no reasonable consideration of the Claimant's potential for continued employment. The Respondent held a closed view in terms of the Claimant's inability to carry out any other roles. The Claimant was provided with a list of alternative available vacancies and the Tribunal can accept that in many cases an employer would satisfy the test of reasonableness simply by giving an employee an opportunity to put him or herself forward for any alternative. However, the context in this case was of the Claimant being told that he was regarded as an individual without the ability to carry out alternative duties. There was not an open process of seeking to identify what duties might lie within the Claimant's capabilities and what assistance the Respondent might be able to give him to enable him to carry out any particular duties. Ms Burke's evidence was that since the Claimant did not enquire about any possible alternative she did not raise any. The evidence is that the Claimant could potentially have been retained in employment working in the Core department. The treatment of the Claimant contrasts sharply with that of the agency production operatives who were effectively transferred by the Respondent into Core deliberately to preserve their employment in circumstances where the Respondent wished to retain their skills within the business in anticipation of new work coming back into the production department, even though the timing/amount of that work coming back was unknown and uncertain. The Claimant's treatment in this regard is inconsistent with that earlier afforded to Mr Doherty and the three agency workers and points again to a difference in treatment related to the view taken of the Claimant's capabilities arising out of his health impairments.

92. The Tribunal has invited and heard submissions on assessing the chance of a fair dismissal pursuant to the principles to be derived from the case of **Polkey**. It is, however, too speculative an exercise for the Tribunal to undertake to assess the chances of the Claimant having been made redundant in any event had he been scored in a production department pool of selection. The evidence of Mr Butler was in fact that the Claimant would have scored highly in a skills/competency assessment. Otherwise, an assessment of how long the Claimant would have been likely to remain with the Respondent in the context of his health issues, both in terms of future absence management and ability to carry out his duties, will require further consideration at any remedy stage.

93. Finally, the Tribunal turns to the separate individual complaint alleging a failure to make reasonable adjustments arising out of the failure to provide the Claimant with electronic crimpers. The Tribunal has no doubt that the duty to make reasonable adjustments potentially arose. The Claimant was required together with his colleagues to carry out wire crimping using a handheld and hand operated tool. This caused a risk of pain and repetitive strain injury to anyone using it, particularly for prolonged periods of time and repetitively, but it did put the Claimant at a substantial disadvantage when compared to non-disabled colleagues. The Claimant by reason of his disability was particularly prone to swelling of his hands and pain because of his fibromyalgia and indeed suffered such occurrences of pain and swelling. Other employees might have suffered similar pain and effects, but they were far more likely if not almost inevitable in the Claimant's case. There thus arose an obligation on the part of the Respondent take such steps as were reasonable to alleviate the disadvantage and to provide an ancillary aid which would have that effect. The relevant ancillary aid was identified as an electric crimper. This, however, carried with it a significant cost of around £3000 such that it was not unreasonable for the Respondent to then seek to ascertain whether the Claimant could obtain Access to Work funding which might have paid for or contributed to the cost of an electric crimper.

94. Whilst the duty to make reasonable adjustments in respect of the crimper may have arisen at an earlier stage it certainly arose again on 4 April 2017 when a medical report specifically addressed the issue. The Respondent then asked the Claimant to pursue an application through Access to Work and offered him assistance in so doing. The Claimant, for understandable family reasons, did not take the matter forward. However, there was further discussion of this at an absence management meeting on 29 June and the outcome letter of 6 July again asks the Claimant to pursue an application for a grant through Access to Work. The Claimant did not take any steps to advance this and within just over a couple of months from that date the redundancy situation arose and unsurprisingly, given the Claimant's situation, no further steps were taken as regards the sourcing of the tool for or by him. There was, therefore, in the circumstances no refusal by the Respondent to provide the electric crimper but indeed the reasonable pursuance of the provision of the crimper with the aid of Access to Work funding and a delay in progressing this, some of which can certainly

legitimately be put down to the Claimant, but which in any event is not such as to lead to a finding that the Respondent failed to comply with its duty.

95. Alternatively, if it had not been reasonable for the Respondent to ask the Claimant to pursue an application to Access to Work and if the delay had been such as to render the Respondent in breach of its duty, then the duty must have arisen to provide the electronic crimper by or shortly after the 6 July 2017 attendance meeting outcome. In those circumstances, the Claimant's complaint alleging a failure to make reasonable adjustments is significantly out of time in the context of his Tribunal complaint having been lodged with the Employment Tribunal only on 22 March 2018. The Claimant has not sought to provide any explanation for not bringing a claim alleging a failure to make reasonable adjustments at an early stage and in the absence of any explanation it would not have been just and equitable to extend time. The Claimant's freestanding complaint regarding a failure to make reasonable adjustments therefore must fail and is dismissed.

Employment Judge Maidment

Date: 21 September 2018