EMPLOYMENT TRIBUNALS

Claimant: **Mr Dermot Kiely**

Respondent: **Malden Marine Ltd**

Heard at: **East London Hearing Centre**

On: **15 and 16 October 2020**
and (in chambers) 26 November 2020

Before: **Employment Judge Jones**
Members: **Ms V Nikolaidou**
Mr S Woodhouse

Representation
Claimant: Mr Kenealy, Solicitor
Respondent: Mr Williams, Solicitor

JUDGMENT

Liability

1. **The Claimant was not a disabled person for the purposes of the Equality Act 2010 at the time of the treatment about which he complains.**

2. **The Claimant was unfairly dismissed.**

The Claimant would have been fairly dismissed two weeks after the date of dismissal.

3. **The Claimant is entitled to the following remedy:**

Remedy

Loss of wages (£415.00 X 2)	**=£830.00**
Loss of statutory rights	**=£350.00**

The Respondent is ordered to pay the Claimant the sum of £1,180.00.

REASONS

1. The Claimant complained of unfair dismissal and disability discrimination. The Respondent resisted the claim.

2. This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was V: (CVP) Cloud Video Platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The Tribunal was referred documents in the agreed bundle of documents and to witness statements. Those documents are referred to below.

List of Issues

3. At the start of the hearing the parties confirmed that the issues for the Tribunal were those set out at page 26 of the bundle of documents. Those were as follows:

Disability

4. Was the Claimant a disabled person for the purposes of the Equality Act 2010 at the material time?

5. Discrimination arising from disability (s15 Equality Act 2010)

6. Was the Claimant only been scored 5/15 for standard and speed of work in the respondent's redundancy procedure, which contributed to the Claimant's selection for redundancy, unfavourable treatment?

7. Was the Claimant's need to take breaks during the day and his slower pace of work a consequence of his disability/disabilities?

8. Was the Claimant therefore treated unfavourably because of something arising as a consequence of his disability?

9. Was the Claimant only been scored 10/15 for timekeeping, reliability and it discipline in the Respondent's redundancy procedure, which contributed to the claimant's selection for redundancy, unfavourable treatment?

10. Was the Claimant's need to attend medical appointments a consequence of his disability?

11. Was the Claimant therefore treated unfavourably because something arising as a consequence of his disability?

Unfair dismissal

12. Did the Respondent carry out a fair redundancy procedure?

13. Namely, did it:

a. Properly take into consideration the Claimant's disability?

b. Adjust the scoring process to take account of the Claimant's disability?

c. Hold an appeal hearing?

Remedy

14. Should the Claimant be successful with any of his claims, how much compensation should be awarded?

Evidence

15. The Tribunal heard from the Claimant in live evidence. We also heard from Malcolm Fawkes and Bob Fawkes, brothers and co-directors of the Respondent, Douglas Fleet, chargehand and the Claimant's direct line manager; Mark Wiggins, Production Manager and Rachel Brice, the Respondent's wages and accounts clerk. The Tribunal had witness statements from all the witnesses. There was also an agreed bundle of documents and a few additional documents submitted during the hearing.

16. The Tribunal made the following findings of fact from the evidence in the hearing. We have not made findings on all matters but only on the evidence necessary to assist us in deliberating on the issues in the case. We have set out the findings on the disability issue separately from the findings on the dismissal.

Findings of fact

Disability

17. The Claimant was employed by the Respondent as a metal fabricator from July 2015. The letter of appointment in the bundle referred to him as an advanced craftsman.

18. In the induction form that he completed when he started work, he was asked whether he had any medical conditions, to which he answered '*no'*. The only note on the form was that he was taking statins for cholesterol. The Claimant was inducted into the workplace and no medical conditions were flagged up during that process.

19. We considered the Claimant's copy medical records that were in the bundle. The first mention of the condition osteopenia which the Claimant told us was the precursor condition for osteoarthritis, was in April 2016. The Claimant went for a scan which showed gross osteopenia. He was prescribed vitamin D tablets and other medication and discussed calcium supplementation with the clinical practitioner. We did not have evidence as to if or how this condition affected his ability to carry out day to day activities in 2016.

20. On 16 May 2016, the Claimant attended the GP surgery complaining of acute pain which was worse on waking in the morning. This was diagnosed as muscle strain and he was prescribed Co-codamol. There were entries showing that the prescription for Co-codamol was repeated over the following months.

The next set of entries that referred to the Claimant's back were in July 2017 when he was referred for an MRI and a cervical spine X-ray where age-related spondylitic change was noted in parts of his spine while other parts were reported to be normal. In the same month it was noted that he got morning stiffness, pain in his right hand and had a stiff spine but that he refused a referral to a spinal surgeon. He had shooting pain over his right arm and forearm. Later in the year, in August it was noted that he was continuing to complain about pain and that he was losing firmness of grip of welding probe in his right hand.

21. In 2018 the Claimant discussed with his GP the need to have the carpal tunnel steroid injections for his right arm. That year he had two steroid injections. In November of 2018 there is a note of moderately severe and intrusive symptoms, worsening cervical spine changes, frequent nocturnal waking, pain, numbness and clumsiness. It was also noted that he was living with chronic alcoholism. The Claimant confirmed that he used to have a longstanding problem with drinking alcohol. Alcohol dependence was noted on his medical reports as recently as 2015. The Respondent submitted that some of his issues may be related to that rather than to his any issues with his back.

22. The next relevant entry in his medical records was in June 2019 when he reported to the GP that he had pain in his neck and back, mainly on his left side. It was noted that he was known to have spondylosis and that he had experienced no improvement in pain even though his medication had been increased. He was prescribed pain patches. It was noted that he informed the GP that the pain eased when he was active and at the same time, that he experienced pain mainly in his left shoulder when resting.

23. On 4 October the Claimant was referred for a bone density scan. The entry on 9 December 2019 stated that the Claimant had low back pain on and off for 2 years, that he was known to have scoliosis and had been found to have osteoporosis on the recent scan. By this time the Claimant was no longer employed by the Respondent. The GP noted that he was advised to get a sick note in relation to his job search as he would not be able to do heavy lifting with his current back issues.

24. We also had a record of the Claimant's absences from work. The Claimant was responsible for completing his own back to work forms after sick absence from work. Doug Fleet, his manager, was not comfortable with reading and writing so he usually asked the Claimant to complete the return to work forms himself after a brief return to work discussion. It is unlikely that Mr Fleet read them in any depth. It is more likely that he skimmed them to see if there was any issue about the Claimant not being able to work and then gave them to the admin office.

25. A review of the completed return to work forms and the GP sick notes show the following: In December 2015 the Claimant reportedly fell and broke his ankle. As a result, he was absent from work from 21 December 2015 to 23 February 2016. Between 2016 and the end of his employment he was absent for a day or a few days at a time because of one of the following: tonsillitis, hay fever, tooth infection and a chest infection. He was absent on 3 August 2018 because he had a reaction to a steroid jab. He noted that he had not seen his GP about this reaction. His next absence from work was from 21 – 22

September 2018 which was again reported as being a reaction to the steroid jab. We referred above to the note in the GP records around the same time, which confirms that the Claimant had two steroid injections.

26. The Claimant was absent from work on 24 and 26 November 2018 because a hospital appointment overran. Although the return to work form asked whether he had seen a doctor and for details of any medication prescribed, the Claimant did not provide any details on the form. It is likely that he did not want the Respondent to know the extent of the pain or the medication that he was on. On 4 December 2018, he produced a medical certificate for the period 4 – 22 December, during which the Claimant would be unable to work due to carpal tunnel surgery. He reported that he was on pain killers.

27. The Claimant's absences for back pain were a day each on 4 March and 1 April; from 30 April to 2 May and from 10 June to 12 June 2019, which he ascribed to a trapped nerve.

28. We find that the Claimant never informed the Respondent about his diagnosis of scoliosis or osteoporosis. He confirmed in evidence that he never mentioned the names of those conditions to the Respondent. He also did not inform the Respondent of the painkillers and other forms of pain management he was prescribed by his GP, such as patches.

29. The Respondent would have been aware that the Claimant was experiencing back pain and that his spine was bending or at least that he was not standing up straight, to his full height. He referred to back pain in conversations with his managers but he did not inform them of the medication he had been prescribed by his doctors. The Respondent was clear in the hearing that if it had been aware of details of the Claimant's medication, it would have been considered that there was a health and safety issue in relation to him working with and around heavy machinery and dangerous tools. As it was, the Respondent believed that he had been prescribed ordinary painkillers on the occasions when he was off sick because of back pain. It was not put to Bob Fawkes during the hearing that he had been aware of the Claimant's bone density test in December 2016.

30. The Respondent's evidence was that recurring back pain is an issue experienced by most people who have worked in this industry for years as they are frequently working with heavy bits of equipment. It is not uncommon. Because of that, when the Respondent became aware that the Claimant was off sick with back pain, it did not alert his managers to any more chronic health issues. Mr Wiggins recalled that the Claimant had had issues with his shoulder or arm and that he had been in hospital having steroid injections.

31. In addition to the return to work forms, the Claimant sometimes gave his sick certificates to Mr Fleet. On other occasions they would go straight up to the admin staff. It is unlikely that Mr Fleet read most of them. He checked to see if there was any recommendation that the Claimant was not fit to attend work after which, they were simply filed with the admin team. The admin team produced a spreadsheet on a weekly basis which showed who was on sickness absence, on leave or otherwise absent. That spreadsheet would be sent to the managers so that they could monitor absence within the business. The Claimant's case was

that he took his letters of appointment at the hospital to work and put them on Mr Wiggins' desk. He did not discuss them with anyone. It is likely that they were filed. We were not told what those letters would have said. All the Respondent's witnesses confirmed that although the Claimant was good at his job he had been a slow worker from the start of his employment.

32. Mr Fleet confirmed that the Claimant would park his car approximately 200 metres away from the workplace and walk into the workshop. He recalled the Claimant mentioned to him that he was having injections for carpal tunnel syndrome. The Claimant confirmed in evidence that he could lift 10 kg once but that he would struggle on the second or third time.

33. In his ET1 claim form, the Claimant stated that he suffered from osteoporosis and scoliosis and submitted that they were both physical impairments. He gave details of what we find is likely to have been the situation with his health at the time he issued the claim. We say this because although the Grounds of Claim state that the Claimant could not carry heavy objects such as shopping, had to limit the amount of exertion during the day and had limited walking range, we found that those points were contradicted by the evidence from the Claimant's medical notes, as set out above where it stated that his pain eased when he was active. In the grounds of claim, the Claimant stated that he could not run, that he found it difficult to stand up after kneeling down and that he struggled to walk upstairs. We were not told when the Claimant suffered these symptoms. The Claimant was not observed to have any mobility difficulties at work. This If these were the symptoms that he experienced while working for the Respondent, we were surprised that he was able to go to work and perform his work duties. The only assistance the Respondent gave him was help with lifting heavy objects which they believed that he needed because of his small frame and because he was not considered to be a strong person. The Respondent was not aware of him having difficulties walking, using stairs or having a limited walking range. The Respondent's witnesses were not asked whether he had difficulty walking around the work space.

34. The Respondent engaged Haven Occupational Health Services Ltd to visit the workplace once every two years to carry out a health review for all its staff. This included a hearing test as the work involved using equipment that made a lot of noise, a lung function test and other tests related to vision, respiratory function and skin. The reviews were normally done by an occupational health nurse. At the conclusion of her work with each individual member of staff she would complete a form entitled *'Advice to Employer'* on which she would record the outcome of the tests and indicate by ticking a box, whether the individual was fit for work, action required, fit for unrestricted or restricted work and in what way. There was a box for the nurse to make comments and for her to suggest particular action points. The forms were signed by the employee and by the occupational health nurse.

35. The Respondent's wages/accounts clerk, Rachel Brice would normally arrange the appointments for the OH review and once it was done, the forms would be left for her in an envelope on her desk. Ms Brice did not assess the contents of those forms. We find it likely that the Respondent's Directors checked the forms to see whether any action was recommended in relation to an employee or if an employee was assessed as not fit for unrestricted work. It is

unlikely that the forms were studied any further. They were then placed in the respective worker's personnel files.

36. There were 3 assessments in the bundle of documents. The first was dated 6 July 2017. In it the Claimant was described as fit for unrestricted employment, with normal respiratory function and category B mild hearing loss. The second was a paper assessment undertaken on 14 October 2017 at which the Claimant was again certified as fit for unrestricted employment. The last was done on 10 July 2019. Again, the Claimant was certified as fit for unrestricted employment. After he was dismissed, the Claimant contacted the workplace to ask Ms Brice for the full report produced by the OH assessor in July 2019. Ms Brice told him that the Respondent did not have it. The Claimant agreed in evidence that it was likely that the Respondent did not have the full report in its files. Ms Brice asked Haven but they stated that as it was personal to the Claimant, they could not give it to the Respondent. The Claimant was able to obtain a copy of the full form direct from Haven. The form was added to the bundle on the first day of the hearing. The full report had not been disclosed to the Respondent beforehand but we adjourned to give Mr Williams sufficient time to seek instructions on the document.

37. Ms Brice's evidence was that the Respondent had never received a document of 11 pages from Haven and that it was usually one sheet of paper, the '*Advice to Employer*' section referred to above. She confirmed that the Respondent conducted these tests to ensure that all employees were fit to carry on working and that was likely the focus when the Directors checked the form. It was not her responsibility to do so.

38. We find it unlikely that the Respondent had been given the full form (11 pages) at the time the test was completed. It is likely that Haven's practice is to only give the Respondent the first page of the form and retain the rest in its files. We say this because it is highly likely that the Respondent would have conducted further investigations if it had seen the handwritten comment on the additional sheets. On the front sheet for the 2019 assessment, which the Respondent did have in its files, the OH nurse had written that the Claimant had only done the respiratory questionnaire '*due to U/L conditions'*. U/L was agreed to be '*underlying'* conditions. She gave no details of what those underlying conditions were. She also ticked the box to say that the Claimant was fit for unrestricted employment. That was all the information that the Respondent had from this assessment.

39. In the additional 10 sheets produced to us in the hearing, there was a page of advice to the employee about the tests and pages of detailed tests in relation to various organ functions. In answer to the question *'have you ever had a serious disease'*, the Claimant had ticked *'no'* and in answer to the question *'are you on any long-term medication or treatment?'* He had also ticked '*no'*. This would be the answer is the Claimant gave to the occupational health nurse.

40. At the end of the form, on the back of the last sheet, the OH nurse/assessor made some handwritten notes from her conversation with the Claimant. She wrote:

a. *'Scoliosis. Gabapentin 300 arrow 600 mgs. Cocodamol. 2 lots into back. 1 in wrist – CT release. Was in both wrists. Done 1 not too bad. Pain clinic monthly. Manages ok. (*Unclear *needs or receives) help all the time'.*

41. Ms Brice and both directors denied ever seeing these handwritten notes before they were shown to them at the hearing. We find that it is likely that if they had seen them, they would have asked further questions regarding the medication and its effect on the Claimant, given that he had to handle welding equipment, heavy presses and other dangerous equipment at work.

Unfair Dismissal

42. The Claimant had extensive experience as a fabricator/welder. This had been his area of expertise throughout his working life. His evidence was that he trained as a metal fabricator/welder on leaving school and had worked in that field for his whole working life.

43. The Respondent considered that the Claimant was good at his job but that because of his slight frame, it made it difficult for him to lift and move heavy pieces of steel, which he was required to do. Doug Fleet noticed that the Claimant was slower and that he was struggling to lift and suggested to him that the Respondent could move him to lighter duties to assist him. The Claimant had the biggest area to work in and his slowness was affecting his production line. Mr Fleet's evidence was that he spoke to the Claimant about this on a few occasions. The Claimant resisted the suggestion that he move to work with lighter pieces of metal. Mr Fleet's recollection was that the Claimant was hostile to the idea and seemed to take it as a personal attack. Doug Fleet's evidence was that the Claimant was regularly holding up the production process because he was slow. He put the Claimant's slowness down to his slight build and lack of physical strength as opposed to anything else.

44. Mr Fleet's evidence was that he was aware that the Claimant was on painkillers for his back pain but was not aware of the extent of the Claimant's problems. The Claimant did not discuss his attendance at the pain clinic with him. Sometime in 2019 the Claimant indicated that he wanted to take up the offer of lighter duties. This meant that he would on a bench doing fabrication of lighter sections.

45. Although the Claimant's evidence was that he sometimes walked with a stick due to the condition of his back, the Respondent's witnesses all confirmed that they had never seen him walking with a stick or with any difficulty.

46. The Claimant frequently did overtime whenever the opportunity to do so came up. He often came in to work on weekends to do additional work.

47. The Respondent had about 25 members of staff. Malcom Fawkes was present on site less frequently than the other director, his brother Robert Fawkes. Robert Fawkes worked in the office upstairs while the Claimant worked on the workshop floor. They both saw the Claimant a couple of times a week as they walked through the workshop. They would hold production meetings with Doug Fleet and Mark Wiggins in which they would discuss all employees, any relevant

Health and Safety issues, any problems holding up or slowing down production and possible solutions, what was working well, what work they had on and how to generate more work. The directors were aware that the Claimant was considered a slow worker and that he had been offered the opportunity to transfer to a different bench but had declined that offer. They were also made aware when he approached Doug Fleet and stated that he would be prepared to move work areas. None of the Respondent's witnesses could recall when that happened but it is likely that it was around April 2019, when he had a few days off for back pain.

48. We find that Mr Fleet allowed the Claimant to complete his own appraisal forms. We had a copy of one of those in the bundle at page 79. In it, the Claimant marked himself as 'consistently exceeding expectations' on all points of the appraisal form. We find that Mr Fleet described the Claimant as a good problem solver and a good fabricator.

49. The Respondent wrote to the Claimant and other staff on 23 September 2019 to inform them that because of low trading for the first half of the year and the low value of the order book for the second half of the year, it was going to conduct a review of operations which was likely to result in some redundancies. Staff were invited to a meeting on 25 September at the main company site where the directors proposed to explain the situation and how they intended to conduct the review and reorganisation.

50. All but one or two staff members attended the meeting. Bob Fawkes explained the situation and informed the meeting that as the company was not getting enough new orders in, they were going to make redundancies across the company. The minutes of the meeting show that the expectation was that there would be redundancies in Management, Admin and the Workshop. Staff were told that they could volunteer for redundancy, although there was no guarantee that this would be accepted. Some ideas were put forward in the meeting to avoid the need to make redundancies. The meeting was also told that the Respondent would use a points system to decide who to make redundant based on criteria to include standard of works, disciplinary records, attendance and attitude to work. The directors stated that they would help place staff made redundant elsewhere.

51. The employees were told that they would be individually consulted about redundancy.

52. The scoring was done by Bob Fawkes and Mark Wiggins. Mr Fawkes devised the criteria and scoring sheets. They did their scoring independently from each other and right at the start of the process, before anyone volunteered for redundancy. This would help the Respondent to decide which offers to take voluntary redundancy they would accept. After conducting the scoring process, Mr Wiggins and Mr Fawkes met to compare their scores. The scores did not completely match up but overall, they came to the same result.

53. The scores were plotted on to a sheet for comparison. We had that document in the bundle with the scores adjusted after the meeting. We did not have the individual score sheets. The Respondent scored for standard and speed of work, whether skilled, proficient or limited in the use of different types of

machinery; and in relation to timekeeping, reliability and discipline – whether these were an issue, never an issue or occasionally an issue with each individual worker. The Respondent had records of training certificates for all its workers. Mr Fawkes confirmed that he looked at the certificates when doing the scoring and that he was able see which members of staff had certificates for welding and for how many types of welding. Also, some members of staff could drive or operate certain types of machinery while others were not certified to do so. He did not have a licence to drive a forklift while others had. Although, driving a forklift was not part of the Claimant's job, the Respondent was trying to look at retaining members of staff who had a variety of skills so that they could continue to operate with a smaller staff group but still covering all the tasks that needed to be done. The Claimant's quality of work was good, Mr Fawkes described it as a 'a good sensible standard' but he was not as versatile as some others.

54. The term 'standard of work' was judged by the difficulty of work someone could take on, the quality of work they do and the time it took for them to complete the work.

55. The Respondent was downsizing which meant that they wanted to retain a workforce that was more versatile. They wanted to retain people who had a good standard of work and were able to do a variety of things. Versatility was not one of the criteria described but taken altogether, the Respondent concluded that if a member of staff was able to score highly on the majority of headings, that meant they were versatile and it was more likely that they would be retained as part of the team.

56. Mr Fawkes confirmed that he considered attendance records to see who was frequently late, who had time off without asking for it and who had an unusual amount of time off. The Claimant was rarely absent apart from sickness and he was not scored down for his sick absence. He scored 10/15 for the composite factor of timekeeping, attendance at work and discipline. It is likely that he may have been score down for tardiness as he had not had any discipline issues.

57. In relation to the Claimant scores, it was noted that the Claimant was given 5/15 for standard and speed of work, which included use of machinery. Under this heading the Respondent listed the types of machinery it considered; forklift, overhead crane, angle grinders, pillar drill, polishing equipment, sawing machines, rolls, stick welders among others. The Claimant was marked down because of his slowness which was a factor that had been evident since he started work for the business and also, because he only had the Philip welding certificate. It was the Claimant's evidence during the hearing that he could also do Butt welding but he accepted that he did not have up-to-date certification for that. Several of his colleagues had both qualifications. Although the Claimant had been spoken to by Mr Fleet about his slowness, the Respondent had not taken any formal action against him for it because it was not considered to be a disciplinary matter and overall, he met the objective of the job. However, the speed at which he worked had to be fed into the quotes the Respondent was able to put forward for jobs. The time it would take to do the job could eventually affect the Respondent's profit margins. Also, the Claimant did not have a licence for driving a forklift truck, could not operate most of the other machinery listed on the scoring sheet and did not have the card that would give him authority to go on

site, if required. He was therefore marked as limited in what machinery he could use. Although the individual scores were different, both Mr Fawkes and Mr Wiggins scored the Claimant at a total of 25 out of a possible maximum of 45 marks.

58. In comparison to the Claimant, another fabricator (AT) who scored similar points of the Claimant, was retained by the Respondent in post. At the time, AT had not been employed by the Respondent two years. The Respondent confirmed in hearing that he had had a period of bad timekeeping and taking time off work, which resulted in disciplinary action. After that disciplinary action, AT improved his attendance at work and started to apply himself to the job. The Respondent's evidence was that he proved to be a willing, hard-working, versatile member of the team so that although he scored the same number of points as the Claimant, it was felt that there was more potential with him for learning and improving whereas with the Claimant, although he been moved to lighter duties, his speed of work had not improved and his ability to do other tasks within the workshop, had not also not changed. The Respondent could not see potential for the Claimant whereas they could with AT. Mr Fawkes' evidence was that this has proved to be the case as AT is doing well in the business.

59. If the Claimant's slowness was down to his health, the Respondent was not aware of it at the time the scoring was done.

60. As both AT and the Claimant scored 25 marks each, there was discussion between Mr Fawkes and Mr Wiggins as to how to choose between them as they both had scored the lowest points out of the team. They considered that AT had slightly more flexibility than the Claimant on driving. They discussed the training they have both had, certificates and ability to be flexible in terms of the number of tasks they could both take on. Mr Wiggins also spoke to Mr Fleet about the Claimant as he was his direct line manager. AT worked in the other workshop so Mr Fleet could not speak about him. Mr Fleet remembered giving Mr Wiggins his general thoughts about the Claimant, including that he was a slow worker. Apart from that conversation, Mr Fleet did not take part in the scoring or decision-making process.

61. There were 4 people volunteered for redundancy. Mr Fleet was one of those who volunteered. The Respondent rejected his offer. Another member of staff (DR) volunteered for redundancy but then changed his mind. Another fabricator called AF volunteered for redundancy but the Respondent considered him a particularly versatile fabricator as he was confident and able working on both structural steel and architecturally. The Respondent wanted to hold onto him as he could use his skills for a variety of pieces of work. His offer to be made redundant was refused. The Respondent accepted offers to be made redundant from KG and NN.

62. The Respondent wanted to retain team who had a good standard of work, were versatile in that they could do a variety of jobs and would be skilled in using most of the machinery on-site.

63. The Claimant was unhappy that the Respondent had included metal fabricators, lorry drivers, at general assistants, retired and semi-retired workers and trainees all in the same pool. He felt that that had made the process unfair to

him. He felt that he had been unfairly judged for speed, in comparison to the members of staff in the other workshop as he considered that the type of work they were doing was more suitable for working fast. The Claimant agreed that he had been slow at work and that it is likely that he was marked down fairly for this factor.

64. On 22 October, the Claimant met with Bob Fawkes who told him that the Respondent was considering redundancy for him and one other person. The Claimant asked for details as to how the Respondent come to that conclusion and Mr Fawkes went through the criteria with him after printing of the selection criteria from his computer. The Claimant was given a copy. The letter dated 22 October informed of the Claimant that the Respondent was proposing to terminate his employment on the grounds of redundancy because of the downturn in work. The Claimant was informed that his termination date will be 19 November and that he would receive redundancy pay, holiday pay and any other pay owing to him by 22 November 2019.

65. The letter gave the Claimant details of his statutory redundancy pay and how that was calculated. The Claimant was advised that the had the right to appeal against a decision to make him redundant and that he should submit any appeal within five days. He was told that he should address the appeal to Malcolm Fawkes.

66. The Claimant decided to appeal and wrote to Malcolm Fawkes on 28 October. In the letter he stated that he wanted to complain about the process, that he disagreed with the selection criteria, that he felt the process was flawed and that the process was biased towards selecting a group of individuals, including himself that had already been predetermined. The Claimant stated that he felt that his disability with regard to his back had not been considered. The Claimant suggested that his line managers had been aware of his back issues and had agreed that he should move benches because of it but was now using it as an excuse to move him to the top of the list for redundancy. This was the first time the Claimant had mentioned the word '*disability'* to the Respondent.

67. Malcolm Fawkes had not been involved in the redundancy process as he had been away from work while it was going on. On receipt of the Claimant's letter, Malcolm Fawkes went on to the shop floor to speak to the Claimant about it. He told the Claimant that the process had been carried out fairly and then asked him whether he wanted to appeal. When confronted in this way, the Claimant said '*no'* that he did not want to appeal. Malcolm Fawkes told the Claimant that he thought this was a complaint about how the process had been carried out and that he was going to treat it as a complaint.

68. Malcolm Fawkes spoke to Robert Fawkes about how he had devised the selection criteria and the process the Respondent followed in coming to the decision that the Claimant should be made redundant. He treated it as a complaint about process rather than as an appeal. He did not offer the Claimant a hearing or meeting to discuss why he considered the decision to make him redundant to be unfair. He also did not look at the scores for other members of staff although he did look at the Claimant's scores. He did ask for any further details or make any enquiries into the Claimant's use of the word '*disability'* in his letter.

69. Mr Malcolm Fawkes concluded that the redundancy process had been conducted fairly. He decided that Robert Fawkes had followed a fair process, having used the ACAS website and the information contained in it as his guide and that he had consulted with those worked closely with the Claimant and others in the workshop, i.e. Mr Fleet and Mr Wiggins.

70. On 4 November 2019, Malcolm Fawkes wrote the Claimant to confirm the outcome of the process that he had conducted. In the letter he outlined the process that Bob Fawkes told him that he followed. He referred to Bob Fawkes' decision to seek advice from the SAGE HR advisors about the fairness of the Respondent's process. He reminded the Claimant that in the past, the Respondent had kept people on in lean times, on full pay but that the downturn in business on this occasion was proving unsustainable for the company without making substantial cost savings. He concluded by saying that as a Claimant did not want to appeal, this was the end of the Respondent's internal process.

71. After the Claimant's post was made redundant, the Respondent passed the Claimant's details to another company in Burnham on Trent who were looking for fabricators. The company called the Claimant but he was still upset about his termination by the Respondent and was suspicious of this job offer. He declined any possibility of employment with this new company. There was no written offer of employment but the Claimant remembered being telephoned approximately five times in one day to ask if he was interested in working for them. The Claimant did eventually speak to someone at the new company and informed them that Bob Fawkes should not have told them that he was available for work because he was not in a position to take up the offer of employment. The Claimant confirmed in live evidence that he believed that there was a job there but he had decided that he did not want to do it.

72. On 6 November, the Respondent provided the Claimant with a written reference, addressed to 'to whom it may concern'. The letter stated that the Claimant had been employed as an advanced fabricator for four years. It confirmed that he was a reliable and honest employee, with excellent job knowledge.

73. The Claimant went to the Job Centre to search for new employment. After he discussed his work experience and the possibility of him seeking new employment in his field, he was advised to obtain a note from his GP to confirm that although he was fit for work, he was not fit for anything involving heavy lifting. The Claimant obtained such a certificate. Shortly after, the Claimant decided that he would not look for heavy duty work because of the condition of his back. The entry in his GP notes for 9 December 2019 states that the Claimant was known to have scoliosis and that he had been found to have osteoporosis on the most recent scan. It confirmed that the Job Centre had advised the Claimant to get a medical certificate which stated that for the time being he is unable to do any heavy lifting with his current back issues. The certificate stated that the diagnosis was lower back pain. He was recommended to take physio therapy.

74. A new medical certificate was issued on 12 March 2020 which stated that the Claimant was not fit for work. The Claimant's evidence was that this was in relation to coronavirus and the need to self-isolate because of having had

pneumonia in the past and a low immune system which makes him a vulnerable person in relation to catching the coronavirus. However, he agreed with the Respondent's counsel in the hearing that there were no concerns about coronavirus between October 2019 and March 2020 so it could not have affected his efforts to find alternative employment then. His evidence was that during that time he had made some efforts to find work by telephoning ex-work colleagues in places where he had previously worked to find out whether they had any jobs that he could do. He then had some time off. Working for the Respondent had been a passion for him.

Law

75. The Tribunal applied the following law in determining whether the Claimant had a disability as defined in the Equality Act 2010.

76. The Claimant relied on the conditions of osteoporosis and scoliosis. The Respondent disputed that the Claimant's condition amounted to this disability. The Respondent also disputed that it knew or ought to have known that the Claimant had a disability.

Disability

77. Section 6(1) of the EA defines disability in this way. When a person (P) has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. In the case of *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591, Langstaff P stated that when assessing whether the effect of the impairment is substantial the tribunal has to bear in mind the words of section 212(1) of the Act which confirm that it means more than minor or trivial. The Act does not create a spectrum running smoothly from those matters that are clearly of substantial effect to those matters that are clearly trivial. 'Unless a matter can be classed as within the heading "trivial" or "insubstantial" it must be treated as substantial. 'There is little room for any form of sliding scale between one and the other'.

78. If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the measures in question (Equality Act Schedule 1, para 5). In the House of Lords case *SCA Packaging v Boyle* [2009] IRLR 746 Baroness Hale stated 'a blind person who can get about with a guide dog is still disabled. A person with Parkinson's disease whose disabling symptoms are controlled by medication is still disabled. An amputee with an artificial limb is still disabled'. Where someone has had or is having medical treatment, the question for the tribunal is whether the actual or deduced effects on the claimant's abilities to carry out normal day-to-day activities are clearly more than trivial.

79. The Claimant submitted that the tribunal should consider his condition without his painkillers.

80. In the case of *Sussex Partnership NHS Foundation Trust v Norris* UKEAT/0031/12 the court pointed out that even though the Equality Act requires a causal link between the impairment and a substantial adverse effect on ability to carry out normal day-to-day activities, it is not material that there is an

intermediate step between the impairment and its effects provided that there is a causal link between the two. The tribunal must ask itself whether the deduced effect of the Claimant's impairment would have had a substantial adverse effect on his ability to carry out normal day-to-day activities.

81. The Tribunal considered the *Guidance on Matters To Be Taken Into Account In Determining Questions Relating To The Definition Of Disability (2011).* This states that whether a person satisfies the definition of a disabled person the purposes of the Act will depend upon the full circumstances of the case. That is, when the adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long-term. Section B to states that the time taken by a person with an impairment to carry out a normal day-to-day activity to be considered when assessing whether the effect that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

82. Section B6 states that a person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairment impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities. The cumulative effect of more than one impairment should also be taken into account when determining whether the fact is long-term.

83. At section B12, the guidance states that where impairment is subject to treatment or correction, the impairment is to be treated as having a substantially adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be treated as having the fact that it would have without the measures in question. The treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid. Medical treatment would include things like counselling, the need to follow a particular diet, and therapies, in addition to treatment with drugs.

84. The Claimant also referred to a paragraph in the guidance which stated that if agent of the Respondent such as an occupational health advisor becomes aware of a disability, the Respondent should be imputed without knowledge.

Knowledge of disability

85. There was a dispute about when the Respondent knew about the Claimant's scoliosis or osteoporosis. The Respondent's case is that it did not. In 2019, it became aware that the Claimant had some back pain in addition to other matters that caused him to be absent from work on occasion. It had no knowledge of the medication that he was on, the extent of his pain or his hospital tests and their results. It was the Claimant's case that they should have known that he was disabled from his return to work forms, the occupational health tests and report and from conversations that he had with managers. Under the Equality Act 2010 Schedule 8 Part 3, para 20 it states that *'A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know….(b) that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirement'*.

86. What is meant by the phrase '*reasonably be expected to know*'? In the case of *Gallop v Neport City Council* [2014] IRLR 211 the Court of Appeal held that it was essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment. The employer should not rely solely on unreasoned advice from its OH provider, for example. The EHRC's Statutory Code of Practice on Employment states that if an employee's agent or employee (such as an occupational health adviser or an HR officer) knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they do of know of it. The tribunal is aware that this is only guidance. The claim in *Gallop* ultimately failed as the decision maker did not in fact have knowledge of the disability. Although there is no complaint of a failure to make reasonable adjustments in this case, this law also goes to assessment of the Respondent's knowledge.

87. In the case of *Jennings v Barts and The London NHS Trust* UKEAT/0056/12 the EAT stated that the question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal.

Discrimination Arising from Disability

88. Section 15 of the Equality Act states that 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 the treatment is a proportionate means of achieving a legitimate aim.

89. The Tribunal considered the case of *Basildon & Thurrock NHS Foundation Trust v Weerasingh* UKEAT/0397/14(19 May 2015, unreported) in which it was confirmed that there are two stages to the process that a tribunal has to go through in assessing a complaint under this section. Firstly, it has to focus on the words "because of something" and therefore had to identify "something"; and secondly, upon the fact that that "something" must be "something arising in consequence of B's disability" which constitutes a second causative link. If a tribunal gets to this point, the employer would be able to defend the complaint if it was able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

90. Generally, as with all discrimination complaints the Tribunal is aware that the burden of proving discrimination complaint rests on the employee bringing the complaint. As this will sometimes rest on the drawing of inferences from the evidence the courts have developed the concept of the reversal of the burden of proof in discrimination cases. This is discussed in a number of cases and is set out in section 136 of the Equality Act which states that "if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. If A is able to show that it did not contravene the provision then this would not apply.

91. It was dealt with most authoritatively in the case of *Igen v Wong [2005] IRLR* and confirmed in subsequent cases including *Madarassay v Nomura International Plc [2007] IRLR 246.* Essentially, this is a two stage process. In the first place, the complainant must prove facts from which the Tribunal could

conclude in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. In *Madarassay* the Court of Appeal stated that 'could conclude' must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This means that the Claimant has to set up a prima facie case. Also in *Madarassay* it was stated that a difference in status and a difference in treatment was not sufficient to reverse the burden of proof automatically.

92. In the case of *Laing v Manchester City Council [2006] IRLR* tribunals were cautioned against taking a mechanistic approach to the burden of proof provisions. The focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer discrimination and sometimes it will be possible on the facts found to exist for the tribunal to reach a conclusion that the protected characteristic was not the explanation – without formally going through the two-stage process.

93. In every case the Tribunal has to determine the reason why the Claimant was treated as s/he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572* "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reasons. It is sufficient that it is significant in the sense of being more than trivial.

94. In assessing the facts in this case, the Tribunal is also aware of the comments made in the case of *Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865* that an employer does not have to establish that he acted reasonably or fairly in order to avoid a finding of discrimination. He only has to establish that the true reason was not discriminatory. Obviously, if unreasonable conduct occurs alongside other factors which suggest that there is or might be discrimination, then this could be the something more which leads the tribunal to conclude that the Claimant had made a prima facie case and shift the burden on to the Respondent to show that its treatment of the Claimant had nothing to do with the Claimant's disability.

Unfair Dismissal

95. Section 98 of the Employment Rights Act 1996 (ERA) sets out the law on unfair dismissals. As there is no dispute that the Claimant was dismissed, the Tribunal is concerned with determining the real reason for the dismissal and whether it was fair and reasonable in the circumstances or whether it was for the prohibited reason put forward by the Claimant or for redundancy as was the Respondent's case.

96. The burden is on the Respondent as the employer to prove the principal reason for dismissal and that it is for one of the potentially valid reasons. Redundancy is one of those and the Tribunal has to consider whether the Respondent as the employer acted reasonably as treating redundancy as a sufficient ground for dismissing the Claimant.

97. In deciding whether a redundancy situation existed at the Respondent, the Tribunal is guided for by section 139 ERA in which it is stated that there are 4 ways in which a dismissal could be said to be by reason of redundancy. Those are that the employer has ceased or intends to cease to carry on business for the purposes of which the employee was engage or to carry on business in the place where that employee was working; or that the requirements of the business for employees to carry out work of a particular kind or to carry out that work in the place where the employee was employed; had ceased or diminished or were expected to cease or to diminish. The Claimant accepted in evidence that there was a genuine redundancy situation at the Respondent.

98. The Claimant's case is that the selection criteria was unfavourably applied to him as it did not take into account his disability. He makes the same complaint about the scoring. The Claimant also complains about not been given an appeal.

99. The Tribunal would need to consider whether the dismissal is unfair under section 98(4) ERA. In the case of *Williams v Compare Maxam Ltd* [1982] IRLR 83 the EAT set out the standards that should guide tribunals in determining whether a dismissal for redundancy is fair under section 98(4). They can be summarised as follows: a tribunal needs to consider whether:

a. the employee was given as much warning as possible to enable her to take steps to inform herself of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment;

b. the employer consulted the union, if applicable, and sought to agree with them of if not, the employees, the criteria to be applied in selecting employees to be made redundant;

c. the employer sought to establish criteria that does not depend solely on the opinion of the person making the selection but which can be objectively checked i.e. on attendance records, experience or length of service;

d. the employer sought to ensure that the selection was made fairly in accordance with these criteria and considered representations made to it;

e. the employer sought to see whether instead of dismissing an employee he could offer him alternative employment.

100. Although these were not principles of law but guidelines and standards of behaviour which may alter over the course of time, the courts have confirmed that they are a measure of the fairness of the employer's decision. As has been stated in the case of *Polkey v A E Dayton Services* [1987] IRLR 503 "…in the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation".

Decision

Disability

101. The first issue for the Tribunal is whether the Claimant was a disabled person for the purposes of the Equality Act 2010 at the material time.

102. In our judgment, the material time is 2019 as the decision to make staff redundant was taken in September 2019. There were no complaints about any treatment prior to the decision to make the Claimant redundant.

103. Did the Claimant have a physical/mental impairment in 2019? Although the evidence was unclear it is likely that the Claimant had osteopenia from sometime in 2016 although we did not have any evidence as to how that condition affected his ability to carry out day-to-day activities at that time. As he was only prescribed painkillers and refused a referral to a specialist, it is likely that it did not have a substantial adverse effect.

104. It is also likely that the Claimant had scoliosis for over a year at the time of his dismissal as he informed the occupational health nurse about it in July 2019. Osteoporosis was diagnosed in October 2019, just at the time that the Respondent made its decision to terminate his employment. The tribunal had to consider what was the cumulative and separate effect of these 2 conditions on the Claimant's ability to carry out day-to-day activities.

105. It was difficult for the Tribunal to be able to draw any conclusions from the evidence that we had about the effect of these conditions, singularly or cumulatively, on the Claimant's ability to carry out day-to-day activities at the time of the redundancy process. Where the Claimant's evidence to us was that he could not walk long distances, had difficulty getting out of bed, was immobile or had difficulty walking and required a stick to do so; the evidence was that he parked his car 200m away from work and walked into the workshop and that he did not display any signs of any difficulties in the presence of his colleagues and managers. The Claimant's evidence was also that his pain eased when he was active. The Claimant was on strong painkillers for some time. The Claimant had pain in his left shoulder, in his hands and in his back. It was therefore difficult for the tribunal to decipher to what extent painkillers were prescribed for the pain in his back as opposed to the pain in other parts of his body.

106. We considered what the deduced effect of the Claimant's conditions would be without painkillers. We did not have sufficient evidence to enable us to conclude whether the claimant's ability to carry out day-to-day activities would be substantially adversely affected by scoliosis and osteoporosis, around the time of the redundancy, if he was not taking painkillers. It is likely that those conditions have become more severe since claimant's dismissal and that is reflected in in his decision not to seek alternative employment and his GP's decision to give him a certificate stating that he was not fit for work. Until then, the Claimant was only absent from work for back pain for a few days between March and May 2019. Prior to that time, he was able to attend work without any absences and to work while there. We did not have sufficient evidence on how the condition of his back would affect his ability to get up, get dressed, shop, cook and/or carry objects of moderate weight, if he were not taking any pain medication.

107. In the circumstances, it is this tribunal's judgment that the Claimant has proved that he was diagnosed with osteopenia 2016, scoliosis in 2018 and osteoporosis in October 2019. However, the Claimant has failed to prove that these conditions either on their own or cumulatively had a substantial adverse effect on his ability to carry out day-to-day activities around the time of the redundancy process and his dismissal.

108. We considered separately whether the Respondent knew that the Claimant had these physical impairments and their effects on him. The Claimant carefully managed the information that he gave the Respondent about his health. He refused the initial offers of a transfer to work at a bench where he would be given lighter duties. When he did speak to Doug Fleet to say that he was willing to move benches, he did not say why. He failed to put any information on the return to work forms, in answer to the questions; or in the sickness absence forms which asked him for information about medication, doctor's advice or conditions. All his forms referred to 'back pain' and nothing more. On one of the forms he referred to being prescribed 'painkillers' but gave no further information. We accepted the Respondent's case that the offer of lighter duties was due to production issues rather than because of his sickness absence of his back pain. The Claimant agreed that he had always been slow and that the offer of moving to the other bench had been made on more than one occasion before he accepted it. The evidence before the Tribunal was that this had been an issue for a while before he had a few days off in 2019 for back pain.

109. Although the Claimant knew the name of his conditions, he was careful not to mention those names to his managers. As everyone spoke about backache at work, the Claimant was more comfortable speaking occasionally about an aching back. In contrast, he talked in detail with managers about his carpal tunnel syndrome and his attendance at the hospital to receive steroid injections.

110. Although the occupational health nurse was aware that the Claimant had scoliosis she was not aware the extent of it or of its effects on his ability to carry out day-to-day activities. All she would have been aware of at the end of their conversation in July 2019 was that the Claimant had a condition called scoliosis for which he took prescription painkillers. She confirmed on the form that he was fit for unrestricted employment.

111. If the Respondent had been aware that the Claimant was on prescription only painkillers and pain patches for control of the combined effect of the pain in his back and shoulders, it is likely that they would have conducted an in-depth investigation or at least made further enquiries into the effects of the medication on him and whether it made him drowsy because of the heavy equipment that he had to handle at work. It would have been a health and safety issue for the Respondent. The reason why the Respondent did not do so was because it did not know the extent of the Claimant's pain from his back, the strength of the medication that he was prescribed and that he was suffering from the likely degenerative conditions of osteoporosis and scoliosis. In our judgment, the Respondent took health and safety seriously. That is why they arrange for the occupational health nurse to visit on a regular basis and carry out tests on everyone in the workshop to monitor the physical effects of the work on them and to have everyone certified fit to work.

112. In conclusion, it is this Tribunal's judgment that the Claimant has failed to prove that he was disabled at the time of the redundancy process and his dismissal. The Claimant has also failed to prove that at that time, the Respondent knew or ought to have known that he was a disabled person for the purposes of the Equality Act 2010.

113. As the Tribunal's judgment is that the Claimant is not a disabled person, the complaint of discrimination arising from disability, at items 2 – 7 (paragraphs 4 – 11 above and page 26 of the agreed bundle of documents) of the list of issues are no longer applicable.

Unfair dismissal

114. Item 8 of the listed issues is whether the Respondent carried out a fair redundancy process.

115. The Claimant accepted in live evidence that there had been a true redundancy situation at the Respondent. He did not dispute that the Respondent had properly concluded that it was appropriate to make redundancies because of a reduction in orders and the need to cut overheads.

116. As the Claimant was not a disabled person at the time of the redundancy process, we did not consider whether the Respondent had adjusted the process to take into account his disability. Also, we did not have evidence about him having to take lots of breaks while working.

117. The Claimant took issue with the selection criteria and scoring process applied by the Respondent and the pool to which it was applied.

118. In this Tribunal's judgment, the selection criteria were formulated by Bob Fawkes who was not aware that the Claimant was a disabled person the purposes of the Equality Act 2010. It was appropriate for the Respondent to consider whether the staff it was going to retain at the end of the redundancy process would be able to cover all the jobs that needed to be covered. All of the factors which the Respondent marked as part of the selection criteria, such as standard and speed of work, were relevant factors in the business. The Respondent began the consultation process by informing staff that everyone would be considered in the process. It did not operate a last in/first out policy and it was not obliged to do so. Instead, it carried out a much more considered process by deciding what skills it needed to retain and looking at matching skills of those in its staff team.

119. The Claimant had been a slow worker since he started at the Respondent. He confirmed that in evidence and both Mr Fleet and Mr Wiggins confirmed it. He was marked down for his slowness. There was no evidence that his slowness was as a result of the condition of his back as opposed to that of his shoulders or hands. The Respondent adjusted the Claimant's work by putting him on the lighter bench in or around April 2019. That had not caused him to work any faster but that had not been an issue for the Respondent. However, when it came to scoring the Claimant as part of a redundancy exercise, when the Respondent is looking to retain the most skilled, versatile and productive

employees, it was appropriate to score him accordingly and for his slowness to feature in the scoring.

120. The Respondent had a transparent and fair redundancy procedure which was applied to the Claimant and his colleagues to determine who would be retained in employment and who would be considered for redundancy, whether they offered to take voluntary redundancy. The scoring took place before people offered to take voluntary redundancy. It was not suggested to the Respondent that they should have rescored everyone once they considered who had volunteered to be made redundant. The reasons why the Respondent did not accept AT's offer to take voluntary redundancy were reasonable and not capricious. Whether or not other members of staff from the other workshop or who worked in other areas of the business were included in the scoring, the fact is that the Claimant scored 25 points out of a possible total of 45. Those were the lowest marks along with AT. The Respondent had to choose between them. The Respondent's reasons for doing so were within the band of reasonable responses. AT had been scored down because of his past disciplinary issue which was no longer an issue for him and he had changed his conduct since the disciplinary sanction. On the other hand, following his move to the lighter bench, the Claimant's slow pace of working had not improved. It was not unreasonable to retain AT instead of the Claimant.

121. The Respondent gave the Claimant a right of appeal. The Claimant submitted what was effectively an appeal although he did not call it an appeal because he was a layperson and did not, at the time, have any legal or other assistance. When Mr Malcolm Fawkes talked to him about it, it is our judgment that he intimated to the Claimant that he should not be appealing the decision. The Claimant backed down and agreed with him that he was not seeking to appeal. From the wording of the letter dated 24th of October is clear that the Claimant was seeking to challenge the decision. The point of an appeal is to challenge a decision so that the decision can be looked at again by someone different and either be confirmed or changed.

122. It is our judgment that the Respondent failed to give the Claimant an appeal hearing. Also, the Respondent failed to consider the Claimant's appeal. The Respondent failed to consider the Claimant's complaint about disability or to investigate whether or how the Claimant's health conditions had been considered during the redundancy process. Although we have now done that investigation, the Claimant was entitled to have that investigation done at the time that he submitted his appeal. He was not given that opportunity. By treating this as a complaint, Malcolm Fawkes simply confirmed the process that Bob Fawkes had taken.

123. It is this Tribunal's judgment that the Claimant was dismissed because of redundancy but that he was entitled to appeal hearing which he did not have.

124. The Claimant's dismissal was unfair for the because of the Respondent's failure to give him an appeal hearing.

Remedy

125. Item 10 on the list of issues stated as follows: Should the Claimant be

successful with any of his claims, how much compensation should he be awarded?

126. In our judgment, it is likely that it would have taken the Respondent a maximum of two further weeks to arrange an appeal hearing, conduct the appeal and notify the Claimant of the decision. We judge that the likelihood of the Claimant's dismissal on the ground of redundancy being confirmed on appeal as 99%. We were not told of anything that was likely to change the Respondent's mind that the Claimant should be made redundant. It is highly likely that at the end of that process, the Claimant's dismissal would have been confirmed.

127. Using the figures in the schedule of loss and counter schedule of loss, we judge that the Claimant's net weekly wage was approximately £415 per week. Two weeks loss of wages = £415 x 2 = £830. The Claimant is also entitled to a sum for loss of statutory rights. We award him £350 for that item. The Claimant is entitled to a total of £1,180.00.

128. The Respondent is ordered to pay the Claimant the sum of £1,180.00 forthwith.

Employment Judge Jones
Date: 4 February 2021