EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4114284/2019

Held in Glasgow on 9 December 2020

Employment Judge: D Hoey

Mr G Docherty	**Claimant** **In Person** **[Assisted by** **Ms Ducie – Partner]**
Royal Mail Group Ltd	**Respondent** **Represented by:** **Dr Gibson -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claim of unfair dismissal was brought outwith the time period required by section 101(1) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be have been lodged within the time limit. The claim is dismissed.

2. The claims of disability discrimination were lodged outwith the statutory time limit set out in section 123 of the Equality Act 2010 but were brought within such a period that is just and equitable but the claimant failed to establish that he was a disabled person in terms of section 6 of the Equality Act 2010. The disability claims are also dismissed.

3. Each of the claims is therefore dismissed.

REASONS

1. In a claim form presented on 10 December 2019 the claimant claimed unfair dismissal and disability discrimination. Early conciliation had commenced on 28 November 2019 with the ACAS early conciliation certificate issued on 2 December 2019.

2. There had been a preliminary hearing at which the claimant was asked to clarify the basis of his claims. In the Note following that hearing the claimant was given extensive detail as to the legislation underpinning the claims and relevant preliminary issues that had been raised by the respondent, including the law as to time bar and disability status.

3. At a previous case management preliminary hearing (on 4 May 2020) the Employment Judge had spent a considerable amount of time going over the definition of disability and setting out what the claimant needed to prove by way of evidence. The Note that was issued (at pages 3 to 6) set out the legal definition and comment. The Note recorded that the preliminary issue with regard to disability was likely to focus on the impact of the claimant's impairments given the respondent's position and the claimant was ordered to provide an impact statement showing clearly what the impact his impairments had upon his day to day activities with particular focus on what the claimant was not able to do, rather than focussing on what he could. The Note emphasised that the claimant might wish to differentiate between the effects when the impairment flares up and when it does not.

4. The claimant had not provided further details and at a further preliminary hearing, held on 26 August 2020, the claimant was urged to read the terms of the earlier Note carefully and ensure that he fully understands the legal definition of disability and what he needs to establish by way of evidence. The Employment Judge suggested that legal advice might assist the claimant given the issues arising. The Employment Judge reiterated the questions which the claimant must answer with regard to disability and set these out in an order.

5. The parties had agreed at the hearing that an open preliminary hearing be fixed to deal with 2 preliminary issues, namely time bar and disability status.

These had been discussed at previous case management preliminary hearings and the rules with regard to these issues had been set out and conveyed to the claimant.

6. In reply to the order from the preliminary hearing, the claimant stated he claims he is a disabled person as he has a physical impairment which has a substantial and long term effect on his ability to carry out day to day activities. As such he received PIP payments for his illness.

7. In response to the question as to the impairments on which he relies, he stated: "I suffer from reactive arthritis and rheumatoid arthritis. Reactive arthritis is an inflammatory arthritis. I was struck down with this illness and hospitalised for several weeks while employed by the respondent. I was informed that my age and strength is what kept me alive at that time. Reactive and rheumatoid arthritis causes my joints to swell and be inflamed causing pain and restriction of movement. The illness is a life long illness which I have to take several medications daily. These medications result in me having to get regular blood tests as they can cause long term damage."

8. In response to being asked "please specify in what way this impairment has a substantial and long term adverse effect upon your ability to carry out normal day to activities" (and then giving examples of day to day activities), the claimant answered simply by saying "mobility and continence".

9. The order asked the claimant to provide detail as to any medical evidence in support of the contention that he was a disabled person. The claimant answered that he was seeking a report from his specialist which he would submit to the Tribunal as he would a report from his GP.

10. The order also stated that "please provide copies of your GP medical records showing when you were diagnosed as suffering from your condition and demonstrating its effect upon you in the material period of your employment with the respondent." The claimant answered by saying "Dr Wright my GP was who I visited and gave me advice and a work sick line at the time my employer deemed me dishonest."

11. At a short case management preliminary hearing prior to the in person preliminary hearing I had suggested to the claimant that he seek legal advice to ensure he brings all relevant evidence to the Tribunal. In particular I noted that in disability status cases, often medical evidence can be important and he should consider this. I also suggested that the claimant could, if he wished, set out his evidence in a written statement to ensure the pressure of giving evidence and attending a Tribunal did not result in him forgetting relevant matters and to ensure he gave the Tribunal all evidence on which he intended to rely.

12. The parties had also been asked to agree a joint bundle of productions but when the case called this had not been done and commencement of the hearing was delayed to allow both parties to agree one bundle of documents, thereby avoiding unnecessary duplication and delay.

13. When the hearing commenced, the claimant indicated that he was representing himself with the assistance of his partner. The respondent was legally represented. I began by going over the terms of the overriding objective as set out in the Employment Tribunal (Constitution and Procedure) Rules 2013 such that all decisions made must be just and fair and that the parties, so far as possible, should be on an equal footing and that matters progress expeditiously. Both parties worked together to achieve the overriding objective. I sought to assist the claimant where I could to ensure he provided the Tribunal with relevant evidence to determine the issues.

14. We discussed the facts that were agreed, which I set out below, together with my findings following the evidence that was led.

15. The claimant confirmed that he was raising 2 different types of claims, unfair dismissal and disability discrimination. In relation to the discrimination complaint, he alleged that his dismissal was a breach of section 15 of the Equality Act 2010 and that the disciplinary process had amounted to unlawful disability harassment.

Issues

16. We then discussed the 2 preliminary issues that required to be determined.

17. Firstly the claimant accepted that his claim had been raised outwith the statutory limitation period. He was arguing that it was not reasonably practicable to lodge his unfair dismissal claim within the time limit fixed by law and he raised his claim within such further period as was reasonable and that his discrimination claims were raised within such period as was just and equitable. It was agreed that the claimant would give evidence in relation to those issues.

18. Secondly the claimant argued that he was a disabled person in terms of section 6 of the Equality Act 2010 at the material times (during the disciplinary process that led to and included his dismissal). He had decided not to bring any medical evidence in support of that position but would instead give evidence himself and refer to some correspondence from medical practitioners he had received. He believed that would establish the relevant requirements such that he was a disabled person by law from that information.

Other matters arising

19. We also discussed burden of proof and the legal basis for each of the issues to be determined. The claimant understood that the onus was on him to bring forth sufficient evidence from which findings of fact could be made to satisfy the Tribunal that the legal tests were satisfied.

20. The parties had agreed a bundle of 127 pages and the claimant gave evidence.

21. The claimant confirmed at the conclusion of the hearing that he had presented the Tribunal with all the evidence that he wished to present.

22. Following the hearing I considered matters and asked the parties provide me with submissions on whether or not the claimant had a progressive condition in terms of Schedule 1 paragraph 8 of the Equality Act 2010. I considered it to be consistent with the overriding objective that the claimant and respondent be given the opportunity to consider the evidence that had been led and the legal position and state their position in light of the authorities in this area.

23. The delay in issuing this judgment was due to the parties' responses having only recently been provided to the Employment Judge which was due to pressures affecting the Tribunal system, for which I apologise. I also required to carefully consider the points the parties had made in light of the evidence and submissions and I have taken great care to do so.

24. Given the 2 preliminary issues are different I have separated out the facts and law and decision in relation to each issue.

Facts in relation to time bar

25. I am able to make the following findings of fact which I do from the evidence presented to the Tribunal. I only make findings that are relevant to the issues to be determined in relation to the time bar issue.

26. The claimant was summarily dismissed by letter dated 21 August 2019 which he received on 22 August 2019 which was when he first learned of his dismissal.

27. The claimant was a member of a trade union, the CWU. That union had assisted the claimant during the disciplinary process. The union had a helpline the claimant could use if he needed legal advice. He did not use that facility but he was aware of it.

28. At the investigation meeting on 7 August 2019 he was accompanied by Mr Hayley, local delivery office trade union representative.

29. At the disciplinary meeting on 16 August 2019 he was accompanied by Mr Davidson, area representative of the union.

30. At the appeal meeting on 18 September 2019 the claimant was accompanied by Mr Lafferty, district representative.

31. The claimant believed, and his advisers confirmed his belief, that his dismissal was unfair and that his appeal would be successful and he would be reinstated. He had been told by his union representatives that he could go to a Tribunal to argue that his dismissal was unfair if he did not secure his job back internally.

32. Following the claimant's dismissal the claimant had lodged an appeal and spoke with his union representative and met with him. The claimant had a family and financial commitments and required to earn an income. His focus was on finding another job but he believed his appeal would be successful.

33. The claimant knew of Employment Tribunals (and of the right to claim unfair dismissal) but did not consider any issue of time limits nor make any enquiries to ascertain what, if any, time limits applied. He had been told (by his union representative or representatives) about the ability to proceed to Tribunal some time following his dismissal and, at the latest, around the date of his appeal hearing, on 18 September 2019 (when his claim would still have been in time). The claimant took no further action with regard to checking the position until the outcome of his appeal was communicated to him.

34. The claimant had been employed for over 7 years. He had not required to go to an Employment Tribunal before but he knew of their existence and of the right to claim unfair dismissal.

35. The claimant learned that his appeal had been unsuccessful on 26 November 2019.

36. The claimant had a discussion with his trade union representative to discuss what his next steps were on or around 26 November 2019. He was told that he could take the matter to a Tribunal. He arranged to meet a trade union official in the office on 27 November 2019 and handed over the papers of his case.

37. He met the trade union representative, Mr McKechnie on 27 November 2019 and was told that he had checked the position with the union's lawyers but the lawyer would not take the case on. The claimant was told to raise matters with ACAS. He was given a hard copy of the ET1 and a compliments slip from the trade union.

38. The claimant telephoned ACAS on 28 November 2019 and commenced early conciliation. He was told by ACAS that there could be a time limit issue.

39. On 2 December 2019 the claimant was issued with an early conciliation certificate.

40. The claimant tried to secure legal representation but as a result of the time bar issue the lawyer would not take the case on. The claimant decided that he would have to lodge the claim himself.

41. The claimant and his partner completed the ET1 and hand delivered it to the Employment Tribunal office, together with associated papers and the union's compliment slip which was stamped as hand delivered to the Tribunal on 10 December 2019.

42. In June 2020 the claimed tried to secure the services of a lawyer through legal expenses insurance he had but that was to no avail.

43. In response to request for further information in connection with the issues arising with his claim which had been discussed at the preliminary hearing on 26 August 2020 the claimant (with his partner) produced a document entitled "answers from preliminary hearing". under the heading "time bar issue" the claimant stated that "Once I received the appeal decision I made an application to the Tribunal service as soon as possible but due to the time taken over the appeal I was left with next to no time which I feel was a conscious act on behalf of Royal Mail."

Observation on the evidence

44. One of the disputes in the evidence was whether the claimant knew of time limits. It was suggested to him that the union must have discussed this with the claimant. While the claimant denied it, the respondent argued that the fact the union lawyer did not take the case suggested that there had been previous discussions and the respondent's agent said he would be "astounded" if time limits had not been discussed.

45. I considered that the claimant did not specifically know about time limits. I heard no evidence from those who assisted the claimant as to what specifically was discussed. The claimant accepted he knew of Tribunals and of the right to claim unfair dismissal. The issue of time limits was not

something about which he was concerned since his focus was in getting his job back, which he saw as something an appeal would secure for him. Even if he was told about time limits, and there was no evidence as such to make such a finding, the claimant did not focus on that aspect, instead focussing on securing another job and trying to win his job back on appeal.

46. From the evidence before the Tribunal, I was not able to make a finding that the claimant had been told about time limits but he was aware of the right to claim unfair dismissal (and discrimination) and candidly accepted that he had made no further enquiries as to what the time limits were.

Law

47. Section 101(1) of the Employment Rights Act 1996 gives employees the right to pursue a claim of unfair dismissal in the Employment Tribunal. Subsection (2) reads: "(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal - (a) before the end of the period of three months beginning with the effective date of termination, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

48. In **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 (and at paragraph 12) the Court set out some useful key principles to consider when dealing with time bar cases. These are summarised as follows:

(1) The test should be given "a liberal interpretation in favour of the employee (**Marks and Spencer plc v Williams-Ryan** [2005] EWCA Civ 470, [2005] ICR 1293

(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see **Palmer and**

Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 but is not limited to physical impracticability.

(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time (see **Wall's Meat Co Ltd v Khan** [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

(4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee.

(5) The test of reasonable practicability is one of fact and not of law.

49. In assessing whether ignorance of a right is reasonable, as Lord Scarman commented in **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA the Tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?' The Court of Appeal in **Porter v Bandridge Ltd** 1978 ICR 943, having referred to Lord Scarman's comments ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. The Court upheld a tribunal decision that a claimant who took 11 months to present an unfair dismissal claim ought to have known of his rights earlier, even if in fact he did not.

50. Where a claimant is generally aware of his rights, ignorance of the time limit is rarely acceptable as a reason for delay because a claimant who is aware of his rights will generally be taken to have been put on inquiry as to the time limit. In **Trevelyans (Birmingham) Ltd v Norton** 1991 ICR 488, the

Employment Appeal Tribunal held that when a claimant knows of his or her right to complain of unfair dismissal, he is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the tribunal to reject the claim.

51. In **Reed in Partnership Ltd v Fraine** EAT 0520/10 the claimant presented his unfair dismissal claim one day late, wrongly believing that the three-month time limit ran from the day after the date of dismissal. The Employment Appeal Tribunal overturned the employment judge's decision to accept the claim. The claimant was not reasonably ignorant of the start date for the limitation period since he knew of his right to bring a claim, as well as the three-month time limit and he was not misled by the employer or any other adviser. He made no enquiries through solicitors, the Citizens Advice Bureau or the Employment Tribunals website. The claimant had simply proceeded on a false assumption for which he had no basis

52. The Tribunal should assess on the facts what the claimant knew or did not know and whether it was reasonable not to make further enquiries. In **Marks and Spencer plc v Williams-Ryan** 2005 ICR 1293, the claimant believed that she had to exhaust the internal appeal procedure before she could bring an unfair dismissal claim. That belief was supported by the Citizens Advice Bureau. Her employer had provided her with material about an unfair dismissal claim but did not mention the time limit. The Employment Judge allowed the claimant's claim to proceed which was upheld by the Court of Appeal which said that the findings were generous but not outside the ambit of conclusions that a tribunal could properly reach on all the facts before them.'

53. Even if it was not reasonably practicable to have lodged the claim in time, the claimant must still show that the claim was raised within such further period as was reasonable.

54. The time limit for Equality Act claims appears in section 123 as follows: "(1) Proceedings on a complaint within section 120 may not be brought after the end of – the period of three months starting with the date of the act to which

the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable".

55. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of British Coal Corporation v Keeble 1997 IRLR 336 which is as follows:

    a. The Tribunal should have regard to the prejudice to each party.

    b. The Tribunal should have regard to all the circumstances of the case which would include:

        (1) Length and reason for any delay

        (2) The extent to which cogency of evidence is likely to be affected

        (3) The cooperation of the respondent in the provision of information requested

        (4) The promptness with which the claimant acted once he knew of facts giving rise to the cause of action

        (5) Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

56. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1), but that it was often useful to do so. The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account.

57. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

58. That has to be tempered with the comments of the Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

59. Where delay in presenting a claim is because a claimant was awaiting the outcome of an internal appeal, that, by itself, does not necessarily mean the threshold for allowing the claim to proceed has been met since all relevant factors need to be taken into account, with the weight being attached to such factors being a matter for the Tribunal (see **Apeologun-Gabrielas v Lambeth London Borough Council** 2002 ICR 713).

60. If the delay was caused by incorrect advice, it may be just and equitable to allow the claim to proceed if justified from the facts. In **Wright v Wolverhampton City Council** EAT 0117/08, for example, the Employment Appeal Tribunal held that incorrect advice received from a trade union official before and after the claimant submitted out-of-time discrimination claims should not be ascribed to the claimant and that an extension of time should be granted.

61. If the claimant relied on incorrect advice, for that to be relevant, the claimant must have relied on that advice such that it was a reason for the delay. In **Hunwicks v Royal Mail Group plc** EAT 0003/07 the claimant sought to excuse her late claim on the ground that her trade union representative incorrectly advised her that she had to exhaust the employer's internal grievance procedure before bringing a tribunal claim. The Employment Appeal Tribunal, upheld the Tribunal's decision to reject that application. Mr Justice Underhill, then President, noted that the authorities clearly establish that where a claimant has missed a relevant time limit as a result of relying on

bad advice from a skilled adviser, including a trade union, that is a relevant factor which the Tribunal should consider in deciding whether it is just and equitable to extend time. Whether it is a decisive factor will depend on all the circumstances of the case. In that case the adviser's advice played no role in the decision as to whether the claim should be allowed to proceed. This was because the time limit had already expired before any question of her being misled by the union representative arose.

Respondent's submissions as to time bar

62. The respondent's agent noted that it was not in dispute that the claims were time barred. The claimant learned of his dismissal on 22 August 2019. He had until 21 November 2019 to raise his claim and only did so on 10 December 2019.

63. It was submitted that it was reasonably practicable to have lodged his claim in time. The burden is on the claimant and he has failed to discharge the burden.

64. The claimant waited until the appeal outcome was known before notifying ACAS. He was informed his appeal would not be upheld on 25 November. While it is a common error to think internal appeals should be exhausted before going to Tribunal, that did not mean it was not reasonably practicable.

65. It was submitted that the claimant had not given clear evidence that he was ignorant of his legal rights. He contradicted himself in evidence in chief and cross examination when he conceded that he had been told of his right to go to Tribunal between the date of dismissal and the date of his appeal hearing. The claimant was not ignorant of legal rights entirely prior to his claim time barring.

66. It was argued that it was reasonably practicable to inform himself of legal rights. Wrong advice on the part of a lay representative is not a sufficient reason to find it was not reasonably practicable.

67. In **Potter v Bainbridge** it was held that even although a claimant did not know of the right to bring a claim, the claimant ought to have known of it and so it

was reasonably practicable to submit the claim in time. The claimant should have made enquiries. Even although the claimant was labouring under a misapprehension as to the conclusion of the appeal process, the claimant ought to have known the time started from the date of dismissal. It was reasonably practicable to make efforts to obtain information.

68. The respondent's agent said he would be "astounded" if 3 different trade union representatives had given the claimant wrong advice. By the date of the appeal meeting the claim was still in time and the claimant must have known about time limits.

69. It was not credible to find the claimant was not told. The claimant admitted he had an appointment with the union who told him there was a problem with the lawyer. Why would the union say that if they hadn't already approached the lawyer.

70. In **Reid and Partnership v Frane** the claimant presented his claim 1 day late wrongfully believing the time limit ran from the date after dismissal. The judge allowed the claim but was overturned by the Employment Appeal Tribunal which found that the claimant's ignorance was not reasonable. He knew of the right to bring a claim and of the existence of a 3 month time limit. The respondent's agent drew parallels with this case since the claimant in this case, like that one, had not been misled, had not made enquiries of solicitors or the union advice line and simply proceeded on the false assumption for which he had no basis.

71. The claimant's agent argued the paperwork lodged within the Tribunal process did not chime with the claimant's evidence since there was a suggestion the claimant knew there was a time limit by referring to running out of time. It was likely that the claimant did know of the time limit probably from the trade union and probably knew some time between dismissal and appeal decision.

72. Waiting 8 days to lodge his claim was not reasonable.

73. With regard to the discrimination claim time limits are applied strictly and there is no presumption in favour of extension. The burden is on the claimant to show it is just and equitable to do so.

74. The respondent's agent argued that the claimant had presented no evidence to reasonably persuade the Tribunal there was a good reason for not lodging the claim in time. There was no valid reason. The length of delay was not that long. There was no good reason for the delay and ignorance is no defence. The only reason given was that the claimant didn't know of the right which is not credible.

75. With regard to the cogency of evidence this was unlikely to be affected. The claimant did not act promptly once he knew of the time limit. The steps taken to obtain advice once the claimant knew of the possibility of taking action are relevant. He ought to have taken further steps and checked with his union.

76. The claimant approached his insurance company in June 2020 to ask for legal advice. Why was it not reasonably practicable to do so when his case was not time barred.

77. The Tribunal was invited to dismiss the claims.

Claimant's submissions on time bar

78. The claimant argued that he did not know about the time limit. He did all that was asked of him. He had no experience of the process and had not been dismissed before. He did not know to ask. He was told to wait the outcome of the appeal and did so. He moved relatively quickly once he learned of the right and did his best.

79. It was argued that the claimant would not put himself through this process if he knew of the right and ignored it. It was around the time of his appeal that he learned of the right and moved quickly to lodge his claim.

80. The claimant argued that he did not know of time bar until after the appeal decision

81. The claimant accepted he made a mistake in relying on his trade union and not checking matters but this was a new process to him. His priority following his dismissal was to get another job and he was not fully focused.

Decision in relation to time bar

Unfair dismissal claim

82. With regard to the unfair dismissal claim the first question is whether it was reasonably practicable for the claimant to have lodged the claim within time.

83. I considered the evidence presented by the claimant carefully. He accepted that his focus was on seeking alternative employment and on trying to secure an income for him and his family. He also accepted that he had assumed that he could raise a claim following his appeal if it was unsuccessful.

84. This is not a case whereby the claimant was given the wrong advice as such. The claimant did not suggest that he sought advice from his union as to his options and carefully planned a strategy going forward. Instead the claimant's position was that he believed his dismissal was unfair and he was going to succeed with his appeal. The union supported him in that belief. He knew that he could go to a Tribunal but assumed such an action would only be necessary if his appeal was unsuccessful.

85. I sympathise with him but the law requires the claim to be lodged within the time limit unless it was not reasonably practicable to have done so. The claimant knew that he could raise a claim. He knew of the Tribunal and of the right to claim unfair dismissal.

86. The decision in **Reed** is relevant to this case where the employee was not reasonably ignorant. I accept that in **Reed** the claimant knew of the 3 month time limit but in this case the claimant did not but he knew of the right to claim unfair dismissal at a time when his claim would have been in time. At the latest he discovered this at his appeal hearing. At that stage the claim would have been in time had he lodged it. He did not do so and relied upon his appeal. He took no steps to check what the time limits were. I did consider the **Marks and Spencer** case which also had similarities but I consider in this case that

the claimant ought to have taken steps to check the position with regard to time limits rather than do nothing.

87. There were a number of options open to the claimant at this time and the reasoning in the case of **Trevelyans** is apposite to this case. When he knew of his right to claim unfair dismissal he could have checked the position with the union, whether with his representatives or via the help line. One of the reasons he had paid his union dues was to ensure he had that support available. He ought to have checked the position with his union and ensured he understood properly what his options were (and any conditions attached to such options, such as time limits). Alternatively the claimant could (and should) have equipped himself with the knowledge of unfair dismissal (and any relevant time limits) by utilising the services of ACAS or other online (or off line) resources. It was not reasonable for the claimant to assume that there was no time limit or to remain ignorant of the position.

88. In the circumstances of this case and having carefully considered the evidence and the authorities, I have concluded that it was reasonably practicable for him to have raised his claim within the statutory timescale. He failed to do so and his claim for unfair dismissal is dismissed.

Discrimination claim

89. With regard to the discrimination claim the question is whether the claim was raised within such other period as was just and equitable. I require to consider the factors set out in **Keeble** and in particular balance the prejudice to the parties.

90. Firstly I consider the issue of prejudice. It is axiomatic that if the discrimination claim is not allowed to proceed the claimant would suffer significant prejudice since his claim would not be heard. That is a greater prejudice than the prejudice to the respondent in having to defend the claim and it is a factor I take into account. Equally I accept that time limits exist for a reason and the onus is on the claimant to satisfy the Tribunal that the claim was lodged within such period as was just and equitable. I shall balance all the circumstances in reaching my conclusion.

91. Secondly I consider the length and reason for any delay. The length of delay was not long in this case and the reason for it was the claimant's ignorance. While the claimant was at fault for not taking steps to equip himself with knowledge of his rights, he, understandably, had a family to support and wanted to secure an income.

92. Thirdly the cogency of evidence is unlikely to be affected and this supports the claimant's position.

93. There was no issue with regard to cooperation of the respondent in the provision of information requested but the respondent argued that there was an issue with regard to the promptness with which the claimant acted once he knew of facts giving rise to the cause of action. The claimant ought to have taken steps to protect his position and did not. Equally the delay in this case was not significant.

94. Finally I consider the steps taken by the claimant to obtain advice once he knew of the possibility of taking action. I accept that the claimant ought to have checked the position. He understood that he could wait until his appeal was concluded and then lodge his claim, which was what he did. He believed that he was following the instructions given to him but he had not checked what the rules were and any time limits. He acted unreasonably in so doing (since he ought to have checked if there were applicable time limits) and that is a factor that I weigh in the balance.

95. Balancing all the factors I have conclude that the claim was lodged within such other period as was just and equitable. While the claimant acted unreasonably in not equipping himself with the knowledge needed to protect his position, his ignorance was, to an extent, understandable. He had other pressures and chose to focus on his appeal and job quest. While it was reasonably practicable for him to have lodged his claim in time, his claim was lodged within such period as was just and equitable.

96. His discrimination claims can therefore proceed, subject to the claimant's establishing disability, to which I now turn.

Findings of fact in relation to disability

97. I now turn to the issue of disability status and make the following findings of fact from the evidence presented to the Tribunal. I limit the findings to those which are necessary to determine the preliminary issue of disability status and make the findings from the evidence to which the Tribunal was referred. The following facts are related to the impact of the impairments at the relevant times for the purposes of his discrimination claims.

98. The claimant has 2 physical impairments: osteoarthritis which mostly affects his left knee and lower back and reactive arthritis.

99. With regard to reactive arthritis, in 2016 the claimant suffered back pain. He then suffered swelling in his knee. He required to be admitted to hospital due to the chronic pain and had to learn how to walk again. The claimant was told he had reactive arthritis which was due to an infection in his body causing flare ups in arthritis. This is an inflammatory condition that affected his joints which required him to receive steroid injections and medication called sulphasalazine to control the joint inflammation. While it was common for reactive arthritis to settle down, that did not happen to the claimant who suffered occasional flare ups for which he takes medication, including anti-inflammatories and sulphasalazine.

100. With regard to osteoarthritis arthritis, the claimant's associate rheumatology specialist stated (in a letter dated 3 and 4 September 2020): "he has a chronic problem with his left knee together with a degenerative meniscal (cartilage) tear [which was first diagnosed in 2014]. This will tend to give him pains when he has been on his feet for a long time, particularly when he loads his joints such as by going up and down stairs or carrying heavy objects. This is not something that will improve with medication and may deteriorate over time".

2017 review

101. In a letter dated 17 May 2017 his specialist in rheumatology stated that: "This gentleman with reactive arthritis had an MSK ultrasound of feet and ankles performed on 3 May. Both ankles were normal. The mid foot on the right was

normal and on the left the proximal head of the 5th metatarsal shows some grade II Doppler signal ie inflammation. He had been on his feet a bit more than usual in the preceding days and was going to try and rest to see if this would improve the situation. If it deteriorates he will get in contact with the department directly."

102. From 2017 the claimant was told that the work of a postman was doing him more harm than good given the day to day impact on his knee. When he was not working, he found an improvement in his condition.

January 2019 review

103. The claimant attended the rheumatology clinic for a review on 9 January 2019. In a letter dated 30 January 2019 the doctor stated that the claimant was doing reasonably well since he had last been to the clinic in May. The doctor stated that the claimant had tried to stop his Etoricoxib "but unfortunately his pain flared up. He found that he got some inflammatory type pain in his knees and his feet. He has restarted it for the last few months and finds that the pain has now settled down."

104. The letter continued that "because we have had to reintroduce Etoricoxib I am not going to reduce his Sulphasalazine as we mentioned in the last letter."

105. The letter concluded that: "He is looking for a new job as he works for quite a few hours per day and this is impacting on his knee osteoarthritis. However, he does now have a van that he can take round to deliver the letters for a couple of hours. I have not made any changes to his treatment and we will see him in 6 months time."

106. The diagnosis in that letter was "reactive arthritis, HLA-B27 positive, osteoarthritis left knee."

107. His medication was stated to be "sulphasalazine 2g daily, etoricoxib, dihydrocodeine."

Medication

108. As a result of the pain the claimant suffers he requires to take medication. He takes pain killers twice a day. That allowed him to do his job as a postman to walk up and down lots of stairs carrying a heavy mailbag. If there was a flare up, the claimant required to increase the pain killers he was taking.

109. The claimant has tried to reduce his medication but the pain returned and on each occasion he required to increase his medication.

110. When the flare ups occurred the claimant was unable to walk up stairs for lengthy periods of time or to lift heavy objects for lengthy periods but the claimant was unable to say what the other effects on his ability to carry out day to day activities were as he would always take his medication to ensure any pain was dealt with. He was able to undertake light exercise even during flare ups. The medication he took usually enabled him to continue to do his job, even during flare ups. There were some periods, however, when the claimant was absent from work and he had submitted fit notes for these periods (which were not seen by the Tribunal).

October 2019 review

111. In a letter dated 22 October 2019 the claimant's consultant rheumatologist stated, following an appointment on 9 October 2019, that "overall he seems to have been doing fairly well but most of the improvement seems to relate to being away from the work place. Dr McGarry had previously suggested he try to look for alternative employment because of the frequency of going up and down stairs was challenging, particularly with regard to his left knee. As you know his left knee was known to be chronically abnormal at December 2016 when there was extensive anterior compartment osteoarthritis with some changes potentially consistent with previous patellofemoral instability or subluxation and a degenerative meniscal tear. There was also mild to moderate OA in the medial and latel compartments. In the fullness of time he may well need to see our orthopaedic colleagues".

112. The letter continued: "he had something of a flare in late July with low back pain and pain at the left knee and left ankle and then some swelling of the left ankle a couple of weeks ago with some discrete skin lesions just proximal to

the malleolus which he was able to show me on his phone. It has all settled again and other than asking him to try to keep his anti-inflammatory use to a minimum I have not suggested ay changes".

113. That letter noted that the diagnosis was "reactive arthritis, HLAB 27 positive, osteoarthritis left knee". Medication was "sulphasalazine 2g daily in divided doses, etoricoxib 30mg, dihydrocodeine 30-60mg up to qds, clenil modulate and salbutamol inhalers, lansoprazole 30mg, paracetamol as required."

Limiting the impact

114. The letter from his physician dated 3 September 2020 stated that: "The general advice for management of osteoarthritis is to avoid excessive weight gain, strengthen the quadriceps muscles to help support the knee and to wear sensible spongy shoes for their shock absorbing capacity."

115. The claimant is unable to say what would happen if he did not take his medication since he has always taken his medication upon medical direction. Other than a belief that he would suffer pain and struggle to do most things, he is unable to be specific as to the consequences of not taking medication. There was no medical evidence that set out what the effect on the claimant would be had his medication not been taken, whether during flare ups or otherwise and the claimant was unable to state what the impact would be in such an event. There were around 6 flare ups over the year.

What the claimant cannot do or can only do with difficulty

116. The claimant struggled going up and down stairs for lengthy periods of time and carrying heavy objects (such as mail bags) for lengthy periods of time. The use of medication allowed the claimant to do so. He was able to walk up and down stairs for short periods of time (without difficulty) and lift heavy objects (for short periods of time) without difficulty. He was also able to drive short distances.

117. During flare ups the claimant was able to do light exercise but he would not be able to walk up and down stairs for any lengthy periods of time nor carry heavy objects for lengthy periods of time.

118. One of the reasons for the claimant's dismissal was that the respondent believed that the claimant had been fit to work when he had alleged he was unfit. The respondent had alleged that there was video footage of the claimant engaging in physical activities which were (allegedly) inconsistent with his suggested impairments.

119. The claimant was the coach of a children's football team. He could drive short distances, including to the football pitch which is 2 minutes or so from his home.

120. The claimant could kick a ball but not strike it with any degree of force. He could stand for around 50 minutes.

121. The claimant denies that he acted in a way inconsistent with his impairments on the day in question. He had taken medication to control his pain and acted in accordance with his GP's advice.

Changes after dismissal

122. Following his dismissal and as a result of no longer having to walk up and down as many stairs or carry as many heavy weights, the pain subsided.

123. The claimant secured alternative employment as a facility assistant with a local authority and he can drive to work. His new role started in January 2020 and he works 37 hours a week. The claimant takes fewer painkillers and in general his movement is better. Things appear to have settled down possibly as a result of his job requiring less heavy lifting and less walking up and down stairs for prolonged periods.

Disability benefits

124. The claimant was in receipt of what was disability living allowance and then became personal independent payments which followed an assessment by a Doctor and self assessment. As a result of the improvement in his condition, his payments reduced.

125. He sees his GP every 6 months or so for check ups.

Observations on the evidence

126. The claimant was candid and clear in his evidence and he did his best to provide the Tribunal with evidence of the impact of his impairment on his ability to carry out day to day activities. He believed that he was a disabled person given the pain he had suffered. The difficulty in this case is the lack of evidence to support his position as the evidence provided by the claimant focussed on his ability to walk up and down stairs for lengthy period of time or carry heavy bags (the work required to do his then role) rather than day to day activities. There was a lack of medical evidence that supported his belief that if he did not take medication he would be in intolerable pain.

127. The medical information was general in nature and did not state what would happen if the claimant did not take his medication nor did it deal with the impact upon the claimant's abilities. While the claimant believed the pain would be present, he was unable to say this for sure. He had tried to reduce his medication and flare ups occurred but that by itself did not allow a finding to be made as to what would happen without medication. There was also very limited evidence before the Tribunal as to the impact upon day to day activities even during flare ups because the claimant took medication to deal with the pain he encountered. The claimant admitted that he could undertake light exercise during such flare ups but was unable in his view (without the benefit of medication) to walk up and down stairs for lengthy periods of time or to lift heavy weights for lengthy periods of time during such flare ups.

128. The evidence before the Tribunal was that the impact on the claimant's ability to do day to day activities was not materially affected by the impairments since the claimant was taking medication. It was not possible to state with any degree of certainty what would happen if he did not take that medication.

Disability

129. Section 6 of the Equality Act 2010 states that: "A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities…A reference to a disabled person is a reference to a person

who has a disability. In relation to the protected characteristic of disability – (i) A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability (ii) A reference to persons who share a protected characteristic is a reference to persons who have the same disability.

130. Paragraph 12 of Schedule 1 of the Act provides that when determining whether a person is disabled, the Tribunal "must take account of such guidance as it thinks is relevant." The "Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability" (May 2011) (the "Guidance") was issued by the Secretary of State pursuant to section 6(5) of the Equality Act 2010.

131. The Guidance suggests (at paragraph B2 on) that the time taken to do an activity, the way it is carried out and the cumulative effects of the impairment should all be considered. Paragraph B7 notes that a Tribunal should consider the extent to which a person can reasonably be expected to modify their behaviour, such as by avoidance.

132. The Employment Appeal Tribunal in **Leonard v Southern Derbyshire Chamber** 2001 IRLR 19 emphasised that the focus is on what the claimant cannot do or can only do with difficulty (rather than on what the claimant can do). Further the fact that a claimant can do their job does not necessarily mean the person is not disabled (see **Law Hospital v Rush** 2001 IRLR 6110 but the impact on the claimant's abilities both at work and outside work should be considered (see **Chief Constable of Dumfries v Adams** 2009 IRLR 612).

133. Where more than one impairment is relied upon, account should be taken of the cumulative effect of the impairments upon the claimant's abilities (**Patel v Oldham MBC** 2010 IRLR 280).

134. Substantial means more than minor or trivial (section 212(1) Equality Act 2010). This reflects the general understanding that disability is a limitation going beyond the normal differences in ability that might exist among people and unless a matter can be classified as "trivial" or "insubstantial", it should

be considered substantial (see **Aderemi v London and South Eastern** 2013 ICR 591).

135. Long term means the impairment has lasted for at least twelve months, is likely to last for at least twelve months, or is likely to last for the rest of the person's life. "Likely" means could well happen.

136. Schedule 1, paragraph 5 of the Equality Act 2010 states that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out day to day activities if (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect. Measures includes medical treatment. This means that if a person is taking medical treatment which might mask or prevent the adverse effect, the Tribunal must consider (from the evidence) what would happen if medical treatment ceased. In this regard a claimant is required to provide clear evidence of the effect if medication ceased, usually (but not necessarily) medical evidence. As the Court of Appeal noted in **Woodrup v Southwark LBC** 2003 IRLR 111 a mere assertion as to what would happen if treatment ceased is unlikely to be sufficient At paragraph 13 of the judgment, the Court stated that "In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under paragraph 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary."

137. In assessing what would happen if the medical treatment ceased, the Tribunal must ask whether it is likely that the substantial adverse effect would resume, in other words it could well happen (see **SCA v Boyle** 2009 IRLR 746).

138. Paragraph 8 to Schedule 1 of the Equality Act 2010 sets out the position in relation to progressive conditions and states that a claimant has a progression condition if "as a result of that condition the claimant has an impairment which has or had an effect on his ability to carry out day to day activities but the effect is not (or was not) a substantial adverse effect. The claimant is to be

taken to have an impairment which has a substantial adverse effect if the condition is likely to result in the claimant having such an impairment".

139. This was considered in **Chief Constable of Norfolk v Coffey** 2010 IRLR 805 where it was noted that the effect of this provision is that provided there is some adverse effect (albeit not substantial), the impairment will be considered a disability if the condition is likely to result in the claimant having such an impairment.

140. In order to benefit from this section, mere diagnosis of a progressive condition is insufficient (see **Mowat-Brown v University of Surrey** 2002 IRLR 235). The claimant must go on to show that it has or has had an effect on his ability to carry out normal day to day activities and it is likely that in some stage in the future there will be a substantial adverse effect on the claimant's ability to carry out day to day activities. Paragraph B19 of the Guidance states that the normal way to establish the likely impact of the condition is by producing medical evidence. The Guidance notes in that paragraph that: "A person who has a progressive condition, will be treated as having an impairment which has a substantial adverse effect from the moment any impairment resulting from that condition first has some adverse effect on his or her ability to carry out normal day-to-day activities, provided that in the future the adverse effect is likely to become substantial."

141. The Guidance gives 2 examples which are worth quoting in full since they demonstrate how this provision operates. The first example is: "A young boy aged 8 has been experiencing muscle cramps and some weakness. The effects are quite minor at present, but he has been diagnosed as having muscular dystrophy. Eventually it is expected that the resulting muscle weakness will cause substantial adverse effects on his ability to walk, run and climb stairs. Although there is no substantial adverse effect at present, muscular dystrophy is a progressive condition, and this child will still be entitled to the protection of the Act under the special provisions in Sch1, Para 8 of the Act if it can be shown that the effects are likely to become substantial."

142. The second examples is: “A woman has been diagnosed with systemic lupus erythematosis (SLE) following complaints to her GP that she is experiencing mild aches and pains in her joints. She has also been feeling generally unwell, with some flu-like symptoms. The initial symptoms do not have a substantial adverse effect on her ability to carry out normal day-to-day activities. However, SLE is a progressive condition, with fluctuating effects. She has been advised that the condition may come and go over many years, and in the future the effects may become substantial, including severe joint pain, inflammation, stiffness, and skin rashes. Providing it can be shown that the effects are likely to become substantial, she will be covered by the special provisions relating to progressive conditions. She will also need to meet the ‘long-term’ condition of the definition in order to be protected by the Act.”

143. In **Taylor v Ladbrokes** 2017 IRLR 312 the Employment Appeal Tribunal stated (at paragraph 34) that “what is at issue is not whether something is likely to occur by reference to any definite percentage or proportion of the population in whom the condition may occur, recur or deteriorate. It is, as explained by the House of Lords, an issue of whether a doctor would consider there is a chance of something happening.” At paragraph 35 the Court stated: “Consistent with the approach of Lord Rodger [In **SCA v Boyle**], it does not seem to me that the way in which a doctor would approach a condition that might deteriorate would be on the basis as to there being just a very small chance of it deteriorating or there being a small chance of it deteriorating but on the basis as to whether in terms of medical science in any given population it was a risk to which that population was exposed and that some proportion of that population would suffer a deterioration.”

Respondent’s submissions on disability

144. The respondent’s agent argued that the issue is whether at the time relevant to the claim, namely in July and August 2019 the claimant was a person with a disability as consequence of physical impairments. It was conceded that the claimant had rheumatoid and reactive arthritis, which both are impairments which have substantial long term adverse effect on normal day to day activities.

145. The day to day activities that were adversely affected were climbing stairs and pain if on his feet for long periods of time but the effect was not substantial.

146. Looking at the medical records, the first symptoms of reactive arthritis were in April 2016 and called severe. By December 2016 the reactive arthritis had settled down but there was some knee pain. Things calmed down and the claimant attended his specialist every 6 months

147. A substantial effect is one that is more than minor or trivial. In **Leonard v South Derbyshire** the focus is on what an employee cannot do or can only do with difficulty. The statutory guidance should not be used too literally and the fact an employee can mitigate the effects of an impairment by carrying things in small quantities does not, of itself, prevent the claimant from having a disability.

148. The adverse effect on the claimant's ability to carry out normal day to day activities was minor even when the focus is on what he cannot do. The extent of the evidence was that he could not attend for work for a 2 week period in 2 years.

149. At time he was driving short distances. He was standing in a football park for an hour. He had been working and doing the physical job of postman

150. The Guidance has an appendix with examples of where it is reasonable to regard someone as having a substantial effect and examples when it is not. The respondent's agent summarised the position.

151. In this case it was argued that in this case the effect was minor mobility issues which restricted his walking long distances and going up down stairs or driving long distances.

152. The impact was, the respondent's agent submitted, exaggerated and not backed up by medical evidence. The claimant was guessing what the effects were without medication. There was no evidence. There is no medical evidence even of the flare ups.

153. In all the circumstances the claimant was not a disabled person and the Tribunal was invited to dismiss the disability discrimination claims.

Respondent's additional submissions on progressive conditions

154. Following the hearing I asked the parties for their submissions in relation to progressive conditions.

155. The respondent submitted that from the evidence before the Tribunal the claimant's condition had improved not deteriorated. The claimant secured new employment and his duties involved working on his feet. The claimant had said that he was experiencing less pain in July and August 2019.

156. It was argued that Dr McGarry's letter of 3 September 2020 makes reference to the claimant having (in addition to his inflammatory arthritis) a chronic problem with his left knee and a degree of osteoarthritis of his left knee and degenerative cartilage tear. The letter stated "this" is not something that will improve with medication and may deteriorate over time. The respondent's agent argued that "this" was not clear since it could be a reference to the osteoarthritis of the left knee, the cartilage tear or both. The claimant was not relying upon the cartilage tear as one of the impairments. The respondent's agent fairly accepted that the letter concluded with reference to long term management of the osteoarthritis which could suggest reference was to that condition as something which may deteriorate but the position was not clear and medical evidence was needed.

157. The respondent's agent argued that the letter of 3 September is not sufficient evidence to find that the claimant's condition is progressive. At its highest the medical position is that either osteoarthritis or the cartilage tear or both may deteriorate over time, not that they will deteriorate over time.

158. Further it was argued that the letter is not evidence that the claimant has a progressive condition which is likely to result in the claimant developing an impairment which will have a substantial adverse effect on the claimant's ability to carry out day to day activities. At its highest the evidence is that a knee replacement may be an issue in future years but it may not be.

159. If a knee replacement is needed in the future, that is not evidence, by itself, that the claimant's impairment is such that it would have a substantial adverse effect on his ability to carry out day to day activities. There is no evidence at all showing how the osteoarthritis may impact upon the claimant's ability to carry out day to day activities in the future. The respondent's agent counselled against an assumption that the possible need for a knee replacement may impact upon the claimant's ability to carry out day to day activities in the future.

160. Taken together with the claimant's evidence that his condition improved in the last 18 months, it was argued the conditions has not been satisfied. The House of Lords in **SCA** interpreted "likely" as meaning "could well happen". "May happen" does not meet the threshold of "could well happen" and there is insufficient evidence before the Tribunal to conclude a deterioration in the claimant's condition could well result in a substantial adverse effect on the claimant's ability to carry out normal day to day activities. The fact treatment in the form of a knee replacement at some point in the future may be needed does not mean it is likely to result in a substantial adverse effect on the claimant's ability to carry out day to day activities.

Claimant's submissions on disability

161. The claimant argued that he had reactive arthritis from 2016. He was only able to carry out his job with medication. For 4.5 hours a day he would go up and down stairs with heavy loads but he complained to his boss as he suffered pain as a result.

162. The claimant believed that if he did not take his painkillers the pain would be so bad he could not get up and go about ordinary activities. Two types medication helped him do his duties. When at work his pain was such he needed stronger medication.

163. The medical evidence showed that he had flare ups and needed to maintain medication. That, it was submitted, allowed an inference to be drawn that if he did not take his medication the pain would increase and it would affect his ability to carry out day to day activities.

164. The claimant argued that had taken around a month a year off work because of his impairment. His time off was because he was certified ill.

165. He was able to drive but only short distances.

166. The Tribunal was invited to find that the claimant was a disabled person.

167. With regard to the issue of progressive condition, the claimant argued that it was progressive because of his osteoarthritis and reactive arthritis. He referred to the evidence which he said showed the impairment affected his ability to carry out day to day activities. He said that he must take regular medication to manage day to day activities.

168. The claimant referred to his evidence and the consultant's letter of 4 September (which was dictated on 3 September), the MRI scan, and letter from doctor dated 1 November 2919 which he said shows his left knee is chronically abnormal.

169. He argued that his impairment is substantial as he suffers constant pain and has difficulty in doing normal things but he also takes medication daily which itself can affect his liver. He submitted that he has suffered from osteoarthritis since 2014 and reactive arthritis since 2016. His conditions have been in place for years.

170. He also argued that the medical letters show the claimant takes medication and attends his specialist every 6 months. He said that although he had always taken his medication, it is clear from the pain he suffers each day that without medication he would be unable to perform simple tasks such as going to the toilet standing climbing stairs or driving.

171. The claimant argued that **Taylor** was applicable in this case since in that case the EAT overturned the Employment Judge who had misunderstood the medical evidence and made his own conclusions in deciding the case. The EAT said that in deciding whether it was "likely" the question is whether a doctor would consider there to be a chance of something happening. If a doctor concludes a condition might have been a small chance of deteriorating

in a population that is enough to make it likely that it might result in the particular individual having such an impairment.

172. The claimant referred to Dr McGarry's letter where she stated that "Often in reactive arthritis, the disease will settle down but unfortunately in Mr Docherty's case he is still subject to occasional flare ups. In addition to his inflammatory arthritis. He has a chronic problem with his left knee and has a degree of osteoarthritis (wear and year) of the left knee as well as a degenerative meniscal (cartilage) tear. This is not something that will improve with medication and may deteriorate over time." The claimant argued that if there is no improvement with medication and avoidance cannot be achieved then the only reasonable conclusion is that his knee would deteriorate such that a replacement would be needed in time.

173. With regard to the respondent's agent's comment that the claimant's impairment had improved, the claimant said that it had not in fact improved. The claimant argued that his evidence was that the level of pain had reduced in comparison (but not completely) since his dismissal since he was not carrying heavy loads and pounding the streets. It was common sense that adding strain and heavy load by working as a postman to his knee and joints would result in more pain if doing a physically less demanding job.

174. The claimant argued that it was clear and accepted that the claimant had reactive arthritis (inflammatory arthritis), osteoarthritis (wear and year) and a degenerative meniscal (cartilage) tear. He receives benefits for those conditions. The claimant noted that the respondent's agent inferred that "may" is not enough to find that the condition could deteriorate but the claimant refers to **Taylor** where it was held that any chance or probability of deterioration within the population should be taken that deteriorating has to be presumed.

175. The claimant also noted that the respondent's agent referred to the word "this" in the letter and argued that the only natural meaning was his osteoarthritis and meniscal tear since the letter said the "the pain I am suffering as a result of my impairment is not something that will improve with medication and may

deteriorate over time and a knee replacement may be an issue in the future". The claimant noted he takes medications to control inflammation and pain for the reactive arthritis. He argued that it makes no difference to what was in the physician's mind when she referred to "this" because in her professional opinion his impairment is progressive and will not improve over time and may require a knee replacement.

176. The reason why the claimant had not received a knee replacement to date was due to his age and life span (which is not something the claimant notes was discussed at the hearing).

177. The claimant argued that the medical letters were impartial and professional and should be accepted. It is clear he said that the letters show he has a deteriorating disability that will not be resolved with medication and may deteriorate through time.

178. He concluded his response by saying that the pain he suffers every day results in him taking daily medication to control the pain and inflammation to allow him to get out bed which in itself is substantial, more than minor or trivial. Having to plan his journeys to use the toilet frequently due to the effect of medication is substantial and having to have regular blood tests given the high risk of damage to his liver by mediation shows that it is substantial. He argued being in constant pain and struggling to do normal every day tasks is a substantial impairment.

Decision on disability

179. I have considered the evidence presented to the Tribunal carefully. The respondent conceded that the claimant had an impairment (or impairments) and that the impairments had a long term and adverse effect upon the claimant's ability to carry out day to day activities. The issue to be determined was whether or not the impact the impairments had was substantial at the relevant time, in the sense of more than minor or trivial upon the claimant's ability to carry out day to day activities. It was accepted in this case that the claimant had a physical impairment or impairments and that they had an impact upon the claimant's ability to carry out day to day activities which had

been long term and adverse but the issue was whether the adverse long term impact was substantial, in the sense of not minor or trivial.

180. This has not been an easy issue to determine from the evidence presented particularly given the lack of clear medical evidence on the issues that require to be determined and the lack of evidence from the claimant on the issues. The earlier preliminary hearings were very clear in setting out for the benefit of the claimant was the legal definition was and that it was for the claimant to ensure he brought sufficient evidence to establish that he met the relevant parts of the definition. In particular the claimant had been ordered to provide specific evidence as to how the impairments had impacted upon the claimant's ability to carry out day to day activities. The claimant had not done so other than to say it was mobility and continence affected. The focus at the hearing was exclusively on his mobility. Further the claimant had been asked to provide specific medical evidence that showed the impairment "demonstrating its effect upon the claimant". Again the claimant had not done so. The claimant had relied upon his beliefs at the Tribunal but there was no evidence to allow a finding of fact to be made.

181. The claimant had done his best at the hearing to explain how he believed his condition had impacted upon him. The claimant candidly accepted that his day to day activities are essentially unimpeded as a result of the medication he takes. Thus he was able to carry out his physically demanding job often spending 4 or 5 hours walking up and down stairs with heavy mail bags and spending around an hour on his feet coaching children's football. There was no evidence of any day to day activities that the claimant could not do or do only with difficulty. Walking up stairs for lengthy periods of time or lifting heavy objects for lengthy periods are not day to day activities. There was no suggestion the claimant could not walk up stairs for short periods of time or carry heavy objects for short periods of time (which would be day to day activities). The issue was the time the claimant was required to carry out such activities and the impact that had upon the claimant. Even the flare ups that the claimant experienced were matters controlled by medication and as such the claimant was unable to say what the impact on his ability to carry out day

to day activities was. At best the evidence was that the claimant suffered pain which he had natural ensured was covered by medication. That allowed him to do his job, and undertake light exercise, even during flare ups.

182. The fact the claimant was able to carry out his tasks and do his job does not, by itself, mean the claimant does not have a disability since I must consider the effect his impairments had upon his ability to carry out day to day activities and in particular what the effect would be if the claimant did not have the benefit of the medication he was taking.

183. There was no evidence that his ability to carry out day to day activities had been substantially affected. This was, the claimant argued, because he had always taken his medication. Unfortunately for the claimant, there was no evidence before the Tribunal to support what the claimant believed the position to be, namely that he would struggle with most activities and perhaps even get out of bed each day if he did not take his medication, whether during flare ups or otherwise.

184. The claimant clearly believed that the medication was helping him and his attempts to reduce it seemed to support his assertion since reducing medication resulted in occasional flare ups which resulted in the medication being increased. Nevertheless there was no evidence to allow a finding to be made that, absent medication, the effects of the impairment on the claimant's activities would be substantial, that is more than minor or trivial. Even the claimant himself could not provide evidence of the effect of not taking medication upon his ability to carry out day to day activities since he had not stopped taking medication for a sufficiently lengthy period that would allow him to say what happened to his ability to carry out day to day activities in such an event. The medical evidence was silent on the impact absent medication.

185. The position is very similar to that which applied in **Woordrup** where at paragraph 22 the Court said: "Once it is appreciated that that is the correct approach, [that the court assumes the treatment is ceased to assess the position] it can be seen that the evidence of the appellant as to what would

have happened if the treatment were stopped is of no real value. That is because she could not possibly know what the answer to the question was. She could have no relevant experience upon which to base her answer. The position might have been different if the treatment had in fact stopped in the period since it began on 17 November 1997, because she would then have had experience upon which to base an answer. Absent such experience, her statement in her particulars, repeated in substance in her statement to the tribunal, that if medical treatment were to be stopped she "would deteriorate and full symptoms would return" was little more than speculation.".

186. I fully accept that the claimant thinks that the effects would be obvious and it may be, to him, but ultimately the onus is on him to establish, by the leading of evidence, that the requirements of the definition of disability are satisfied. Bare assertion or belief is not sufficient and I cannot rely upon speculation. The claimant candidly accepted that he was guessing or assuming what would happen if he did not take his medication.

187. In **Woordup** the court emphasised that a mere assertion as to what would happen if medication as not taken is unlikely to be sufficient. There must be some basis for concluding that absent medication it is likely, in the sense could well happen, that the substantial adverse effect would resume.

188. I carefully considered the medical evidence the claimant presented but this evidence amounted to letters from his associate specialist in rheumatology but none of these letters stated what the effect on the claimant's ability to carry out day to day activities would be if the claimant ceased to take his medication.

189. On that basis the respondent's submissions have merit. The claimant has not shown, the onus being on the claimant, that he has a physical impairment (or impairments) that have a substantial long term and adverse effect on his ability to carry out day to day activities. The impact was not more than minor or trivial from the evidence, and there was no evidence as to what would happen had the claimant not had the benefit of medication during the relevant periods.

190. In reaching this decision I considered the evidence before the Tribunal and the claimant's submissions. I am conscious that in the most recent submissions the claimant makes reference to the potential effects medication could have upon him. The focus of the inquiry in this case, however, was the impact of the relevant impairments (as set out above) in relation to the claimant. Further I carefully considered the evidence led by the claimant which is set out in the findings above. I also took into account that this is a life long condition which undoubtedly affects the claimant and his very clear beliefs and I focussed carefully on the evidence in reaching my decision.

191. I then considered whether or not the claimant had a progressive condition. While this had not been specifically raised by the claimant (or the respondent) at the hearing, the claimant's medical specialist did state that certain pains "may deteriorate over time". I considered whether that could amount to a progressive condition in terms of paragraph 8 of Schedule 1 to the Equality Act 2010. In this regard I asked for written submissions from both parties since it seemed to me to be consistent with the overriding objective to ensure the parties were given a fair opportunity at commenting upon the evidence and position, particularly in light of the fact that the claimant was not legally represented. Both parties provided submissions and had the opportunity to comment upon each other's submissions.

192. The onus is on the claimant to establish by the leading of evidence that the conditions set out in the Act have been satisfied. I must be careful not to infer what is meant by the physicians and instead look carefully at what the physician actually says in the letters given I did not have the benefit of oral evidence from the authors of the letters.

193. The evidence before the Tribunal was (from the specialist in September 2020) that reactive arthritis would normally settle down but in the claimant's case he is still subject to occasional "flare ups". In addition to the inflammatory arthritis, the chronic problems the claimant had with his left knee (which include osteoarthritis and degenerative meniscal tear) will tend to give him pains when he has been on his feet "for a long time" particularly when going up and down stairs or carrying heavy objects. It is that which will not improve "and may

deteriorate over time". A knee replacement may be needed in the future but it may not.

194. In order to amount to a progressive condition, in addition to diagnosis, the claimant must show that it has or has had an effect on his ability to carry out normal day to day activities and it is likely that in some stage in the future there will be a substantial adverse effect on the claimant's ability to carry out day to day activities.

195. In **Taylor v Ladbrokes** 2017 IRLR 312 the Employment Appeal Tribunal emphasised that "Tribunals should start with the statutory language, consider the [statutory] guidance and decide, having looked at both, what the statute means, concentrating primarily on the language of the statutory provision itself." Looking at the statutory provisions the question is whether the condition is likely to result in the claimant having an impairment, whether in terms of medical science in any given population it was a risk of deterioration to which that population was exposed and that some proportion of that population would suffer a deterioration. Even if there is a small possibility of deterioration in a population that is enough to make it likely that it might result in the particular individual having such an impairment. In the present case, there is no evidence as to the general population. The only evidence is essentially the one letter from the medical expert that relates to the claimant only.

196. In **Taylor** the tribunal had extracted from the medical reports what was not to be found in them since it was not the case that absent medication the possibility of a deterioration was a small possibility. It was not clear exactly what the consultant physician was saying about the future. The tribunal had needed a clear view as to the progression of type 2 diabetes. The progressive condition issue had been analysed erroneously in terms of a particular past period of time. In that case the matter had been determined without oral evidence being given and specific questions has been asked of the medical experts with reference to the provisions of the Equality Act. The Employment Appeal Tribunal found that the questions that had been asked had not been framed properly (see paragraphs 39 and 41).

197. In reaching my decision I must consider the information that was brought before the Tribunal. The claimant had the opportunity to lead evidence and chose to restrict his evidence to his own evidence with reference to the information he was given by those treating him. The authors of the medical evidence on which the claimant relied did not give evidence and the Tribunal only has their letters on which to assess the position. The claimant had been told at length at previous case management preliminary hearings as to what the law requires and that ultimately a decision is based on the evidence brought before the Tribunal. In reaching my decision I must be fair to both the claimant and the respondent and apply the overriding objective and ensure that the decision (and approach taken) is fair and just. The claimant had the opportunity to lead evidence from those treating him. I must therefore assess the evidence that was led.

198. The physician in this case says that the current situation (ie the pain the claimant experiences when walking up stairs (having been on his feet for lengthy period of time) and carrying heavy loads) would remain; there would be no improvement. The terms of the letter are clear referring to the pains when the claimant has been on his feet, particularly when going up and down stairs or carrying heavy objects which “may deteriorate over time”. In other words, on a fair reading of that letter, the pains the claimant experienced when walking up stairs over lengthy periods of time or when carrying heavy weights may get worse. This does not provide any evidence as to whether the impact upon the claimant’s ability to carry out day to day activities could be more than minor or trivial in the future.

199. The issue is whether the condition is “likely” to result in the claimant developing an impairment which will have a substantial adverse effect on the claimant’s ability to carry out day to day activities. That is an assessment that I must make from the evidence, not from assumptions. It clearly has some adverse effect on the claimant at the moment (which is long term). The issue is whether the effect is likely to become substantial, in the sense of could well become substantial. There must be an evidential basis to reach such a view.

200. The examples given in the Guidance are helpful since both emphasise that the evidence required is to show that "in future the effects may become substantial". This relates to the impact upon carrying out day to day activities.

201. The evidence before the Tribunal does not show that the effects may become substantial on the claimant's ability to carry out day to day activities since they refer to placing strain on the claimant's ability to walk up stairs for lengthy periods of time or carrying heavy loads. If the evidence had shown that the impact on the claimant's ability to carry out day to day activities could be substantial, the position would be different. There is no evidence at all as to what might happen in the future with regard to the impact on the claimant's ability to carry out any day to day activities.

202. I considered the claimant's argument that it ought to be obvious that if a knee replacement may be needed that would suggest that the impact upon ability to carry out day to day activities was likely to become substantial but I do not consider that to follow from the evidence before the Tribunal. There is no evidence before the Tribunal that shows what might, in the sense could well, happen in the future with regard to the effect on the claimant's ability to carry out day to day activities as a result of the relevant impairments. I do not consider I can make the assumptions the claimant makes since there may well be other reasons why a knee replacement could be considered necessary that do not necessarily mean the ability to carry out day to day activities has been substantially and adversely affected. Without evidence I cannot make that leap in reasoning.

203. I uphold the respondent's submission that there is insufficient evidence before the Tribunal to conclude a deterioration in the claimant's condition could well result in a substantial adverse effect on the claimant's ability to carry out normal day to day activities in the sense required by the legislation. The fact treatment in the form of a knee replacement at some point in the future may be needed does not mean it is likely to result in a substantial adverse effect on the claimant's ability to carry out day to day activities.

204. In deciding this matter I applied the statutory wording and took into account the Guidance together with the authorities (including **Taylor v Ladbrokes**). There needs to be some evidence that fairly allows a conclusion that the impairment is likely have a substantial effect on his ability to carry out day to day activities, in the sense of could well happen. There is no evidence of that in this case.

205. I sympathise with the claimant who clearly considers that such matters are self evident but the decision made by the Tribunal must be based on the evidence. In these matters it is not for the Tribunal to make assumptions from the evidence but must rely on what the evidence says and absent oral evidence from the medical experts I must be careful in making assumptions from the written evidence. Absent any medical (or indeed any) evidence showing that his condition could become substantial in the sense set out in **Taylor**, I find that the claimant has not shown that the condition is a progressive condition.

Conclusion

206. From the evidence presented to the Tribunal, I find that the claimant has not established that he is a disabled person as defined in the Equality Act 2010 and his claims are accordingly dismissed.

207. In all the circumstances each of the claims is dismissed.

Employment Judge: David Hoey
Date of Judgment: 04 February 2021
Entered in register: 18 March 2021
and copied to parties