EMPLOYMENT TRIBUNALS

Claimant: **Mr A Wanis**

Respondent: **Royal Mail Group Ltd**

Heard at Sheffield **On: 4, 5 and 6 May 2021**
15, 16 and 17 December 2021
21 March 2022 (in chambers)

Before: **Employment Judge Brain**
Members: **Mrs K Grace**
Mr K Smith

Representation

Claimant: **In person**
Respondent: **Mr M Foster, Solicitor**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The respondent did not unfairly dismiss the claimant. Accordingly, the complaint of unfair dismissal fails.
2. Upon the claimant's complaints brought under the Equality Act 2010:

    (1) By dismissing him, the respondent treated the claimant unfavourably for something arising out of disability. The respondent has justified the dismissal of the claimant and accordingly his complaint of discrimination arising from disability fails and stands dismissed.

    (2) Upon the claimant's complaints that the respondent was in breach of the duty to make reasonable adjustments:

    a. The Tribunal has no jurisdiction to consider the claimant's complaints upon matters arising prior to 21 June 2016 as the claims were brought outside the limitation period in section 123 of the 2010 Act in circumstances where it is not just and equitable to extend time to vest the Tribunal with jurisdiction to consider them;

    b. In the alternative, the claimant was not a disabled person for the purposes of the 2010 Act prior to July 2016;

c. The claimant's complaints that the respondent breached the duty after 29 November 2016 fails and stands dismissed.

REASONS

Introduction and preliminaries

1. At the conclusion of the hearing upon the afternoon of 17 December 2021, the Tribunal reserved judgment. We now give reasons for the judgment that we have reached following deliberations in chambers on 21 March 2022.

2. The claimant was employed by the respondent as a cleaner at the Sheffield Mail Centre. He was employed in that capacity between 3 August 2009 and 30 April 2018. Throughout the entirety of his employment the claimant worked upon the night shift. His contractual hours were to work between 10pm and 6am.

3. The claimant was dismissed by the respondent because he could not manage to work his contracted hours due to his disability. The claimant is a disabled person for the purposes of section 6 of the 2010 Act by reason of varicose veins and bilateral leg oedema. The respondent concedes that the claimant is a disabled person by reason of this physical impairment for the purposes of the 2010 Act. The respondent also concedes that they had knowledge both of the disability and the disadvantage caused to the claimant because of it. These concessions relate to the period after 28 March 2017.

4. The claimant presented his claim form on 18 June 2018. Before doing so he went through mandatory early conciliation through Acas between 3 May 2018 and 15 June 2018.

5. The matter benefited from a case management preliminary hearing which came before Employment Judge Rostant on 4 January 2019. A copy of the case management summary is at pages 27 to 34 of the hearing bundle. The following claims were identified:

   5.1. That the claimant was unfairly dismissed for the purposes of the Employment Rights Act 1996.

   5.2. That by dismissing him, the respondent treated the claimant unfavourably for something arising in consequence of disability. This is a claim brought under section 15 and section 39(2)(c) of the 2010 Act.

   5.3. That the respondent failed to comply with the duty to make reasonable adjustments. This is a complaint brought under sections 20 and 21 when read with section 39(5) of the 2010 Act.

6. Whereas the unfair dismissal complaint and the complaint brought under section 15 of the 2010 Act arose out of the dismissal, the timescale for the reasonable adjustments complaint is less clear and was an issue that arose several times during the course of the hearing before us.

7. There is no issue that the unfair dismissal claim, and the section 15 claim were presented within the relevant limitation periods. A limitation issue does arise upon the reasonable adjustments claim.

8. Employment Judge Rostant recorded that the relevant requirement (or *"provision, criterion or practice"* to use the language in section 20 of the 2010 Act) was the requirement for the claimant to work his full contractual hours.

This deceptively simple statement hid a number of potential complexities. For how long does the claimant say the respondent applied that disadvantaging requirement? Was it just the contractual hours that presented a substantial disadvantage for the claimant or was it also the job content?

9. As we shall see when we turn to the findings of fact, the claimant had a number of periods of absence because of his disability. The longest period of sickness absence ran from 21 June 2016 to 29 November 2016. Upon his return to work on 29 November 2016 the claimant only worked part time and never returned to full time working.

10. The respondent approached the case upon the basis that the relevant period with which the reasonable adjustments complaint is concerned is from the end of November 2016. We understand it to be upon that basis that the concessions upon disability and knowledge of disability to be made. The difficulty with that is that the claimant expressly pleaded difficulties at work which presented from 2013 and 2014 (in particular, following the construction of a building extension which took place around that time and which he says increased the area to be cleaned and which was to his disadvantage). Furthermore, in his case management summary Employment Judge Rostant observed (in paragraph (3)) that *"The claim form explained that the claimant had had changes made to his workload in 2014 and that his employer did not give him enough help to do his job. The claimant said that these changes caused his medical condition."*

11. When the matter was before the Tribunal in May 2021, attempts were made to explore the time with which the reasonable adjustments complaint was concerned.

12. On 4 May 2021, the claimant said that the reasonable adjustments claim dated *"from 2017 when they refused to reduce my work".* On 16 December 2021 the claimant confirmed that the reasonable adjustments claim was confined to the period following his return to work on 29 November 2016 after the lengthy absence commencing on 21 June 2016.

13. Just prior to the end of the hearing on 16 December 2021, the Tribunal expressed concern that the temporal reach of the claim under consideration (going back only to the end of November 2016) was narrower than that pleaded by the claimant. The Tribunal was troubled by this given that the claimant acted throughout in person and because it appears that English is in fact his fourth language (as he is fluent in Arabic, Hungarian and Russian). He has had the benefit of an Arabic interpreter these proceedings.

14. In **Mervyn v BW Controls Limited** [2020] EWCA, Civ 393, the Court of Appeal was faced with a situation where the appellant argued that the Employment Tribunal had not dealt with a constructive dismissal claim which was present upon her pleadings but rather had dealt with her case as one only of express dismissal. The Employment Tribunal found that she had resigned but failed to go on to consider whether the resignation was a constructive dismissal.

15. The Court of Appeal held that the Employment Tribunal had taken a wrong turn by failing to identify that the list of issues produced following a case management hearing did not reflect the claimant's pleaded case. Bean LJ said (at 43) that, *"It is good practice for an Employment Tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider*

whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the [Employment Tribunal] should consider whether an amendment to the list of issues is necessary in the interests of justice."

16. He went on to say (at 44) that, "*In this case … the pre-reading of the essential material (in particular the ET1 and ET3) which no doubt occurred should have indicated to the Tribunal that it was in truth found more likely than not that the claimant had resigned, and that the real issue between the parties was (or should be) why she did so. In our view, an Employment Tribunal must be cautious before proceeding upon an assumption that the scope of the claim has narrowed from that pleaded. This is particularly the case when faced with an unrepresented party and all the more so where there are concerns about that parties' understanding of the process (due to language difficulties or otherwise)."*

17. Employment Judge Rostant did not say that the claimant's complaint of a failure by the respondent to comply with the duty to make reasonable adjustments was confined to the period from 29 November 2016 only. In fact, paragraph (3) of his case management summary indicates to the contrary.

18. It would, in our judgment, be contrary the interests of justice to confine the reasonable adjustments claim to the period after 29 November 2016. We directed that the claim shall be considered upon the basis of the claim as pleaded. The Tribunal is satisfied that this approach creates no prejudice for the respondent. Firstly the respondent plainly had it in contemplation that the ambit of the claim went back as far as 2014 as they (and for that matter the claimant) were able to produce documents pertaining to events from that time. Secondly, the respondent was able to deal with events from around 2014 by way of evidence. Thirdly, it would have been an error of law for us not to have dealt with the claimant's complaints as pleaded in the claim form. The prejudice to the claimant of not dealing with those matters therefore far outweighed the prejudice to the respondent of dealing with them. Indeed, it would be an error of law for us not to deal with the claimant's claim in its entirety.

Findings of fact

19. We now turn to our findings of fact. The Tribunal heard evidence from the claimant. The respondent called evidence from:

    19.1. Julie Simpson. She is a former employee of the respondent. She left their employment about two years ago. This followed a career with the respondent as the operational/regional manager for *'property and facilities solutions'*, a post which she held for three years and nine months.

    19.2. Julie Fisher. She too is a former employee of the respondent. She left the respondent on 31 March 2019. She held the post of independent caseworker based at the Yorkshire distribution centre.

20. The Tribunal was presented with a hearing bundle of 225 pages. During the course of the hearing, each party produced a number of additional documents. Some of these were added to the bundle. During the course of the December 2021 hearing the claimant produced a number of documents. It was not

practicable to include those within the hearing bundle. A supplemental bundle was created.

21. During the course of the second day of the hearing upon 5 May 2021, the respondent produced a document setting out a detailed specification of the areas to be cleaned within the Sheffield Mail Centre. We can see from the summary of measurements on the final page that the total building area was almost 15000 square metres spread over four floors. The square meterage of the third floor was 730.95. The first page of the document shows that this survey was completed on 17 March 2017. Mrs Simpson is identified as the relevant regional manager. The site supervisor (and direct line manager of the claimant) at the time was noted to be Michelle Marsden. She joined the respondent after Julie Simpson commenced her employment with them. Prior to Michelle Marsden, the claimant's line manager was Lesley Bower.

22. The first page of the specification sheet lists the cleaners engaged by the respondent as at 17 March 2017. We can see from this that the claimant was the only cleaner employed to work the night shift. The others were all employed to work in the morning and, in some cases, into the afternoon. When the claimant commenced his period of long-term sickness absence in June 2016, the respondent engaged an agency cleaner who continued to work following the claimant's return upon part time hours in November 2016.

23. The cleaning specification of 17 March 2017 was produced following the claimant's return to work in November 2016 and at a time when he was working part time. Although he was the only employee on the night shift, the claimant was not on his own after November 2016 as he worked alongside the agency worker. The specification was produced after the extension to the mail centre which plainly increased the surface area to be cleaned.

24. The helpful chronology of events prepared by Mr Foster shows that the claimant had periods of absence from work in 2013 and 2014 attributable to varicose veins. He was absent from work between 5 June and 26 June 2013. He then had a further period of absence between 28 August and 3 September 2013 and then between 7 October and 14 October 2013. There was then a significantly longer period of absence due to varicose veins and cellulitis between 3 February 2014 and 23 April 2014. He was then absent between 7 November 2014 and 6 May 2015 with cellulitis of the left calf.

25. On 5 June 2014 the claimant sent a letter of complaint to Lesley Bower. This complaint was about the claimant's perception of shortcomings in the performance of the afternoon shift. The claimant sent a further letter of complaint to Lesley Bower on 19 September 2014. He complained that there appeared to be no cleaner upon the afternoon shift. These written complaints are not within the hearing bundle. They appear within the claimant's supplemental bundle.

26. On 13 October 2014 the claimant raised a grievance that he had not been referred for occupational health advice notwithstanding that he had agreed to a referral. Again, the relevant grievance form is within the claimant's papers.

27. In paragraph 5 of his witness statement, the claimant says that, *"The building was extended in 2014, leading to extra duties to be done. However, there was a shortfall of staff which led to the company requesting me to work extra hours to cover the extra shift."*

28. The Tribunal accepts that the claimant was expected to cover for the afternoon shift's shortcomings. Firstly, the complaints which the claimant sent to Lesley Bower on 5 June 2014 and 19 September 2014 provide contemporaneous corroboration of the claimant's account that the afternoon shift was understaffed and the claimant was attending to work upon the night shift having more work to do than would otherwise have been the case. Secondly, it is not in dispute that the claimant was working overtime. There is no evidence that there was any contractual obligation upon the claimant to work overtime. It was being done voluntarily. The respondent would not have asked him to work overtime had there been no need for it. We find that the need arose because of the shortcomings of the afternoon shift. Further, Mrs Simpson fairly accepted that during her time with the respondent the afternoon shift was not fully covered. This evidence is corroborated by the spreadsheet to which we have referred which shows that only one cleaner worked significantly into the afternoon. The respondent accepted that fewer cleaners worked the afternoon shift than the morning shift.

29. There is also, of course, no dispute that the building was extended in or around 2014. This was a ground floor extension only. That said, Mrs Simpson accepted that the surface area to be cleaned commensurately increased. She qualified this by commenting that the demands upon the claimant were reduced in that he did not have to do as much work as before as the need for deep cleaning was reduced. In other words, her account was that the quantity of the cleaning increased but the quality (or thoroughness of it) reduced.

30. Pulling all of this together, the Tribunal finds that the claimant was justifiably aggrieved during the course of 2014 about the increased workload which he faced. We accept that the respondent reduced the cleaning requirements but nonetheless accept that overall, there was an increase in the demands upon the claimant hence the need for him to work overtime.

31. In the circumstances, the Tribunal accepts that the claimant was understandably enthusiastic about achieving an occupational health referral. There was a history of sickness absence with varicose veins. Plainly, cleaning is a physically demanding job. The claimant reasonably entertained concerns about the impact of work upon his health hence his wish to see occupational health.

32. On 11 February 2015, the claimant complained (through his trade union) about the delay in making the occupational health referral. The letter of complaint is within the claimant's papers. Mike Chaplin of the CWU rightly acknowledges that part of the delay was attributable to the claimant going to Egypt for a period of around six weeks in the summer of 2014. That said, the claimant's complaint about the delay in referring him to occupational health was entirely justified given that the suggestion had been made about the referral the previous autumn. The claimant's absence contributed only a minor delay.

33. On 11 March 2015, a grievance hearing took place. The notes are (again) amongst the claimant's papers. The complaint was about the delay in referring the claimant for an occupational health appointment. The claimant mentioned that *"the nature of the job and work has totally changed, we have many new people working here now from Hull, Doncaster, agency and casuals."* This was a reference to the fact that the increased size of the mail centre in Sheffield following the ground floor extension coincided with the closure of the Hull and

Doncaster mail centres. Doubtless, this created the need for an extension of the Sheffield mail centre and increased the cleaning needs in Sheffield.

34. The claimant was then seen by occupational health who produced a report dated 2 April 2015. This is within the bundle at pages 75 and 76. Dr Patrick O'Brien, occupational health physician, noted that the claimant had worked as a full time cleaner from 3 August 2009 and that *"the amount of walking expected of him has increased in recent time by about 30%".*

35. Dr O'Brien opined that, *"the disability provisions of the Equality Act 2010 are unlikely to apply in this case, because his varicose veins do not have a substantial adverse effect on his normal day to day activities. No particular form of work is normal day to day activity as defined by the Act. It is open to management to come to a different conclusion."*

36. Dr O'Brien recommended that the claimant should be given the opportunity *"to take a seated break for five minutes every hour".*

37. On 22 March 2017 the claimant presented an appeal against an attendance procedure warning which had been issued to him. Again, this is within the claimant's papers. We mention this letter now as it is of some relevance to our analysis of the chronology of events during 2015.

38. This is because the letter (which was prepared by the claimant with the assistance of the trade union) says that, "*Following Mr Wanis' AXA [viz: occupational health] referral of April 2015 he received help and support in performing his role, this enabled him to attend work for over a year with no absence, helping him to control the pain from his varicose veins and cellulitis."* The relevant passage of the letter of 22 March 2017 also mentions the increased pressure upon the claimant consequent upon the extension of the Sheffield mail centre and the increased number of staff working there.

39. The letter goes on to say that the support was removed in January 2016 when the claimant was asked to cover extra duties. The claimant did so until he went upon long term sick on 21 June 2016. The letter complains that the claimant was working 12 to 14 hours' shifts. The claimant attributed his long working hours to the absence of any afternoon cleaners. For the reasons already given, the Tribunal accepts the claimant's account.

40. The claimant told us, during the course of his closing submissions, that the *"help and support"* referred to in the salient passage of the letter of 22 March 2017 cited in paragraph 38 was to the provision of cleaners to work the afternoon shift.

41. Following the occupational health report of 2 April 2015, the claimant continued to work until 20 May 2015. He was absent for only one week, returning on 27 May 2015. We know from the letter prepared by the claimant with the assistance of the trade union (dated 22 March 2017) that the claimant was then provided with the requisite support following his return to work and that that situation pertained until January 2016.

42. Prior to his sickness absence between 20 May and 27 May 2015, the claimant raised another grievance. This is dated 15 April 2015. Again, it is within the claimant's papers. The claimant sets out his complaint about the afternoon duty having *"lapsed"* or reduced, the increased workload attributable to the ground floor extension at the Sheffield mail centre and the closure of the Hull

and Doncaster mail centres with the resultant increase in the number of employees working in Sheffield. As we know from the letter of 22 March 2017, the claimant's grievance of 15 April 2015 prevailed in that he was provided with the support that he required for the remainder of 2015.

43. After the claimant commenced his long-term sickness absence on 21 June 2016, he was referred again to occupational health. This time, he was seen by Beth Gentle, occupational health advisor. Her report dated 18 August 2016 is in the bundle at pages 80 to 82.

44. She noted that the claimant continued to be troubled with varicose veins and that he "*has been referred to a specialist and in his case surgery is being considered. He has just been asked to make some lifestyle changes prior to surgery to help with his recovery and to avoid further complications. Mr Wanis is signed off work until at least 25 August 2016."*

45. Beth Gentle opined that the claimant was suffering from a substantial physical impairment upon his ability to undertake daily activities, in particular his ability to walk. She anticipated that the claimant would be fit to return to work when his complications had resolved or he had undergone anticipated surgery and in the meantime he should be considered temporarily unfit to work. She recommended that once fit, the claimant should return to work upon a phased return to work basis. She did not recommend his return to work until resolution of his complications.

46. On 12 September 2016, the claimant attended a *"fit for work discussion".* This was undertaken by Michelle Marsden. The notes are at pages 83 to 85. The claimant said that he was awaiting an operation.

47. The parties were keen for the claimant to return to work. Accordingly, it was agreed that he may return with effect from 29 November 2016. The claimant never returned to full time work. He worked three hours per night until 28 December 2016. He maintained part time work until 12 February 2018. Throughout the entire period that he was undertaking part time work the respondent paid him his full salary. The claimant never returned to work either in a full time or part time capacity after 12 February 2018.

48. Mrs Simpson's evidence is that from November 2016, the claimant was only expected to undertake work cleaning the third floor. The other floors were to be covered by the agency worker. She also said that although the claimant was expected to deep clean the third floor, he was not put under the pressure of expectation to deep clean the whole of the third floor area each night.

49. The claimant challenged the area that he was expected to cover following his return to work in November 2016. By reference to the detailed specification produced by the respondent on 5 May 2021 (to which we referred above), the claimant was able to identify areas upon the second floor which was also expected to clean. The claimant's contention was that the area to be cleaned by him was 1055.77 square metres. Mrs Simpson agreed with the claimant's calculations. However, she maintained that he was not expected to deep clean the whole area each night. Upon this basis, we prefer the claimant's account that he was expected to work upon both the second and third floors and that his cleaning area was 1055.77 square metres.

50. On 9 February 2017 a review was carried out by Julie Simpson and Michelle Marsden (page 90). It was noted that the claimant was still awaiting a date for

his operation. A suggestion was made of the claimant working afternoon shifts. The claimant declined this option because of his wife's working commitments.

51. Another review was carried out on 25 March 2017. The claimant was accompanied by a trade union representative. Again, it was conducted by Mrs Simpson and Michelle Marsden. The minutes are at pages 91 and 92. Mrs Simpson expressed concerns about the ability of the respondent to maintain part time working which by this stage had been ongoing for a period of four months following the claimant's return to work at the end of November 2016. The claimant protested that he was unable to reduce his *"contracted hours because I have a family and a mortgage to pay."* Mrs Simpson retorted that the respondent has *"a business and we need to look at this and get things sorted."* The claimant would not agree to a reduction of his contractual hours because of his need to work full time. The claimant went on to complain that there was too much work for one person working the night shift.

52. The claimant was referred again for occupational health advice. He was seen for a second time by Beth Gentle. She said in her report dated 10 April 2017 (pages 96 to 99) that it was her professional opinion that the claimant *"is only fit to work in a limited capacity".* She said that he would be able to return to his normal role once he had recovered from surgery. However, surgery was conditional upon him losing weight. Accordingly, Beth Gentle opined that the time scales for the claimant to return to full time hours remained uncertain.

53. In a follow up letter dated 11 April 2017 (page 100), Beth Gentle said that she had now heard from the claimant's treating surgeons. She found the information received to be less than helpful. The claimant had not been seen by treating surgeons since September 2015. She recommended a continuation of the adjustments (which adjustments included part time working).

54. Julie Simpson and Michelle Marsden met with the claimant on 30 May 2017. The minutes of the meeting are at pages 102 to 105. The claimant was accompanied by a trade union representative. Mr Johnson of the CWU confirmed that there was no funding for the claimant's until he loses weight. Mrs Simpson told the claimant that he could not keep doing reduced hours and be paid full time hours. She therefore raised with him the following options:

    54.1. Returning to work upon a full-time basis.

    54.2. Going back on sick leave.

    54.3. The respondent buying down 17.5 hours per week to enable the claimant to work four days from 6pm until 10pm with a compensation payment of £3764.18.

    54.4. The claimant leaving the business on a settlement. A settlement offer was made to the claimant.

55. Mrs Simpson told the claimant that the respondent was unable *"to continue to pay you for full time hours when you were only working four hours a night. We are in a situation now where we need to resolve this."* She went on to say within the meeting that, "*We have been facilitating reduced hours now for six months and there is no sign of anything moving forward. There is no end to this. There is no date for the operation or signs of this happening soon."*

56. On 14 June 2017 the claimant's consultant vascular surgeon wrote to his general practitioner (page 112). The surgeon ruled out the claimant as *"a candidate for intervention"* largely upon the basis of inability to fulfil the BMI criteria.

57. Another welfare meeting was held on 20 July 2017 (pages 117 and 118). Again, this was attended by Mrs Simpson. The claimant was once more represented by a trade union representative. A plan had been devised by the respondent on 29 June 2017 (pages 115 and 117) for the claimant to increase his working hours. The plan envisaged him returning to full time hours by 18 July 2017. At the meeting of 20 July 2017, the claimant was unable to agree that he was capable of sustaining those hours. Therefore, an agreement was reached for him to work six hours per night from 28 July 2017.

58. At around this time, the respondent recruited a cleaning supervisor named Jamie Sampson. According to an email produced by the respondent on 15 December 2021, Mr Sampson worked between 5 June 2017 and 3 October 2017. The claimant asked for evidence of Mr Sampson's start and end dates. Unfortunately, this was not available. Mrs Simpson said that the dates set out in the email produced by the respondent on 15 December (included within the bundle at page 227) accorded with her recollection. Upon the basis of this evidence, we accept the respondent's account of Mr Sampson's employment history. The claimant understandably had no evidence to gainsay the respondent's account upon this issue.

59. Mr Sampson was critical of the claimant's work. We refer to reports at pages 120 and 121 dated 8 July and 17 July 2017 respectively. The second report acknowledged the claimant's entitlement to take rests of five minutes each hour.

60. The Tribunal did not have the benefit of hearing evidence from Mr Sampson. The quality of the claimant's work does not appear to have been an issue for Mrs Simpson. At any rate, she did not appear to have raised the quality of his work at any of the meetings which she attended nor is there any reference to the claimant's work being sub-optimal in her witness statement. We therefore make no finding adverse to the claimant that his work was not to a reasonable standard. We find that his work was to a reasonable standard.

61. On 25 September 2017, the claimant was seen by Jennifer Barnes of OH Assist (pages 122 and 123). She supported the idea of the claimant increasing his hours to seven per night. She recommended that an allowance be made for the claimant to elevate his legs for 10 to 20 minutes twice a night and for the respondent to accommodate his slightly slower pace of work. She noted that the claimant was awaiting surgery which was dependent upon him losing weight.

62. The claimant was seen by Dr McCarthy, consultant occupational physician, on 27 November 2017 (pages 125 and 126). Dr McCarthy noted that the claimant was experiencing discomfort and symptoms such that he felt unable to work for more than four hours a night. Dr McCarthy said that if the claimant, "*can lose enough weight he may be offered surgery for the varicose veins but there is no indication of when that may take place. (It will be dependent on him achieving weight loss which he has found difficult do thus far). He reports his symptoms have been worsening and there is no indication of a change within any predicted timescale."* Dr McCarthy opined that the claimant was fit for

duties as a cleaner but for no longer than four hours per shift for the foreseeable future.

63. Upon the basis that the claimant was not capable of returning to full time hours in the foreseeable future, Dr McCarthy said that the claimant was a candidate to leave the business due to ill health with a lump sum payment pursuant to the ill health policy within the bundle at pages 59 and 60. This policy provides that where an employee is permanently incapable of carrying out current duties, then the employee may retire with an income benefit. Where the employee is not permanently incapable of carrying out current duties but is so incapable for the foreseeable future, then they may leave the business due to ill health with a lump sum payment. Dr McCarthy's opinion therefore was that the claimant fulfilled the criteria for leaving with a lump sum payment but not leaving with income benefits by way of an immediate pension in payment. Dr McCarthy completed the necessary certification.

64. A further meeting was convened and held on 30 November 2017 (page 127). Again, this was attended by Mrs Simpson. The claimant said that his legs were getting worse and were bleeding, such that he could only do four hours per night. It was agreed therefore that for the foreseeable future he would work between the hours of 10pm and 2am.

65. Mrs Simpson's attention therefore turned to the question of whether the claimant's employment could be maintained. On 22 December 2017 she invited the claimant to attend a meeting to discuss the position (page 128). She said that the matter has *"been going on for 12 months, is untenable and must now be resolved as a matter of urgency."*

66. The letter mistakenly said that the meeting was scheduled for 15 December 2017. Obviously, that pre-dated 22 December 2017. Mrs Simpson meant to give the date of 15 January 2018.

67. Doubtless because of the confusion engendered by the wrong date, the meeting had to be rearranged for 24 January 2018. The claimant failed to attend the meeting notwithstanding his trade union representative's offer to pick him up on route.

68. The meeting was then rearranged for 29 January 2018. However, in a discussion which took place between Mrs Simpson and the claimant on 24 January 2018 the claimant explained that 29 January was inconvenient for him as he was moving house. It was rearranged again for 1 February 2018.

69. Mrs Simpson wrote a letter to the claimant on 25 January 2018 (pages 130 and 131) to confirm the arrangements. It was noted that the claimant's trade union representative was available to attend the meeting. Mrs Simpson said that, *"the purpose of the meeting will be to explore why you are currently not able to attend work, review your occupational health report and to initiate a scoping exercise to ascertain if there are any suitable alternative roles within the area*."

70. The meeting went ahead on 1 February 2018. The notes are at page 133. Attached to those notes is the scoping exercise carried out by Mrs Simpson to seek to identify alternative employment. The claimant maintained that he was able now to return to full time duties and that he would refuse ill health retirement benefits.

71. Mrs Simpson made a note of the claimant's skills, qualifications and experience. It was noted that the claimant does not hold a driving licence but was able to travel for work within the Sheffield area by public transport. Mrs Simpson says in paragraph 35 of her witness statement that the claimant said that he was able to carry out, *"any role in letter sorting as he could sit and stand to do a job. He said he could IT role/communication or call centre work with training. He said he could also use the machines in the mail centre."*

72. Mrs Simpson says that she enquired of business facing HR managers whether there were any suitable jobs available for the claimant. We accept that she did so. Her evidence is corroborated by the email correspondence that we see at pages 143 to 145. She has helpfully compiled a schedule of the responses which she received from the various team members. We refer to the table at page 152. There was one administrator role but unfortunately this required the postholder to have a driving licence. The post was therefore unsuitable for the claimant.

73. A further meeting was held on 8 March 2018. The notes are at pages 158 to 162. The claimant was again accompanied by his trade union representative.

74. Mrs Simpson explained to the claimant that she had carried out the scoping exercise discussed on 1 February 2018. She said that she had approached six managers and had run a job search for opportunities within a 30 kilometres' radius of Sheffield city centre. The six managers had all replied to say that they had no vacancies. Julie Simpson's search of the system revealed the vacancies that we see at pages 153 and 163. There are several cleaner vacancies within these lists. The difficulty for the claimant however was his fitness to work as a cleaner even upon a part time basis.

75. The claimant maintained at the meeting of 8 March 2018 that he was able to work four hours a day. This in fact was consistent with what Dr McCarthy said on 27 November 2017 (in paragraph 62 above).

76. However, the claimant's general practitioner had certified him as unfit for work because of leg ulcers between 4 March and 13 April 2018. In addition, in a telephone conversation between Mrs Simpson and the claimant held on 27 February 2018 (page 155), the claimant had told her that his legs *"are now very bad – ulcerated".*

77. Mrs Simpson said that the respondent was unable to sustain a 10 minutes break per hour during a four hours' shift. She denied that the claimant was required to deep clean the third floor each shift. We have already found as a fact that the claimant's work was not substandard. The minutes of the meeting of 8 March 2018 demonstrate that the respondent's concern was about the amount of work being done as opposed to the quality of work. This corroborates our earlier finding to this effect.

78. The claimant maintained that he was fit to work. He said, *"The health condition now is the best health condition I have had in 10 years now. Every problem is being helped, I'm in best condition to come back now. I will come back full time. Take my word I'm going back to full time, this doctor's note is for four weeks and I think I will have a meeting with my doctor and he will describe to me full time. This is very good news to me because for my family and my kids and I'm in a better position. So I am willing to come back to full time."*

79. Mrs Simpson replied that she was in possession of a medical report saying that he was unfit for work and that he had been signed off work "for quite a while now". She observed (at page 160) with some justification that the claimant was unable to produce any evidence to back up what he was saying about his fitness. She said to the claimant (at page 161) that, "we have been through all the processes, we are getting to a situation where I am looking what the options are and because of the report I am looking at consideration of dismissal under ill health retirement." (She was not correct to say that the medical evidence was that he could not work at all. It did not say that. Dr McCarthy's report said that the claimant was fit for part time work. Mrs Simpson was, we think, meaning to say that the claimant was not fit for full time work).

80. On 9 March 2018, Mrs Simpson wrote to the claimant (pages 164 and 165). She confirmed that the respondent was now giving *"serious consideration"* to the claimant's *"retirement on grounds of ill health".* The claimant was invited to meet with her on 19 March 2018 in order for her "*to give you my decision on this after considering all the information I have gathered."* Amongst the information in Mrs Simpson's possession was a letter from Kevin Doyle of the Sheffield Tissue Viability Clinic. This is at page 156 of the bundle. Mr Doyle said that the claimant's *"current treatment is to rest and elevate the legs as often as possible and to maintain healthy legs in compression hosiery. [The claimant] has agreed to manage his lower leg hypertension in compression hosiery. He will be wearing this most likely for the rest of his life."*

81. Mrs Simpson says in paragraphs 52 and 53 of her witness statement that she, *"considered whether we could reduce Abul's hours to four hours per day on a permanent basis. The duty that Abdul was an eight hour duty and we had been covering this with agency workers. I considered whether the duty could be split into two roles. However, this would mean that the other part of the duty would be from 2am until 6am. We already had a full time post that had been vacant for one year and we were unable to fill it. Therefore it was highly unlikely that a position for half the hours from 2am to 6pm would be attractive to anyone."* She went on to say in paragraph 54 that, *"in any event, even if there had been a four hour duty, which there was not I did not believe that Abdul could carry out a four hour duty."* She observed in paragraph 55 that even when the claimant was carrying out the four hour duty, he was unable to undertake all of the work that was given to him. This reinforces the Tribunal's findings that it was the amount of work carried out by the claimant that was a concern to the respondent as opposed to the quality of his work.

82. On 19 March 2018, the claimant met with the respondent Again he was accompanied by a trade union representative. The notes of the meeting are at pages 166 to 167. The claimant was informed that he was to be dismissed upon the grounds of ill health.

83. Mrs Simpson wrote to the claimant to confirm her decision on 12 April 2018 (pages 171 and 172). The claimant was dismissed upon notice. He was not required to work out his notice period but was given a payment in lieu of his notice entitlement. Mrs Simpson said that she had concluded that the claimant was unable to carry out his current duty and that no alternative roles were available. The claimant was paid a sum in settlement of his notice entitlement together with a lump sum payment pursuant to the policy at pages 60 and 61. His last day of service was 30 April 2018.

84. The claimant exercised his right to appeal against Mrs Simpson's decision. Mrs Simpson received a letter (pages 177 to 178) from Tony Rupa, head of legal services at the CWU, confirming the claimant's wish to appeal against her decision.

85. The appeal was dealt with by Julie Fisher. She wrote to the claimant on 25 July 2018 to inform him that she had made arrangements to hear the appeal on 30 July 2018.

86. On 26 July 2018 the claimant sent back to Julie Fisher the reply slip which she had included with her letter. The claimant declined to attend the meeting due to short notice and the need for him to make arrangements to secure trade union representation.

87. Arrangements were made for the claimant to be seen by occupational health again. He was seen by Dr Milne, consultant occupational physician, on 13 August 2018. This report was included within the bundle at pages 226 and 227. (It was introduced into the bundle in the course of the December hearing).

88. Julie Fisher's evidence was that the claimant had requested sight of Dr Milne's medical report before it was released to the respondent and that he refused to consent to its release. She therefore never saw it at the time that she was dealing with the appeal.

89. The report says that Dr Milne was aware of a letter from the claimant's general practitioner dated 25 May 2018 which says that he was struggling with work and was unable to stand or walk for more than 10 minutes due to his leg trouble. Dr Milne said that the claimant, *"may struggle with prolonged standing/walking because of his leg condition, which could become worse with prolonged standing. Sedentary work (indefinitely) would be better for him. If that is not available, then leaving the business on grounds of ill health with a lump payment would be appropriate".* Dr Milne said that the claimant was not capable of fulfilling his role at the date of dismissal and met the criteria for leaving the respondent on the grounds of ill health with a lump sum. Dr Milne concluded that, *"if suitable alternative (sedentary) work is unavailable for him indefinitely, then he would meet the criteria for ill health retirement with a lump sum payment."*

90. On 11 September 2018, the claimant emailed Julie Fisher (pages 183 to 184). He said that he wished to have a face to face consultation with an occupational health physician. He said that in consultation with Dr Milne he (the claimant) reported that he was in very good health and was happy to go back to work full time. The claimant attributed his difficulties to the extension built in 2014 which he says changed the complexion of the job. He said that his ill health was not permanent and that, *"I'm in full health and I am able to work full duty and I am able to do more and more with my health".*

91. Julie Fisher invited the claimant to attend an appeal hearing on 8 October 2018. The letter of invitation dated 2 October 2018 is at pages 185 and 186.

92. Somewhat confusingly (in view of the contents of the email dated 11 September 2018) the claimant returned the reply slip upon which he wrote that, *"I would like to inform you that I am still not getting better. Health condition problem and I'm still being signed off from my doctor. However I will still have to let you know when I'm better soon."* The claimant said that he would be unable to attend the meeting scheduled for 8 October 2018.

93. On 9 October 2018, Julie Fisher wrote to the claimant (pages 189 and 190). She afforded him the opportunity to provide his appeal points in writing no later than 24 October 2018. She also informed the claimant that by not consenting to the release of Dr Milne's report, she would be left with little option but to make a decision based upon the *"previous medical report".* This was a reference to that from Dr McCarthy of 27 November 2017 (pages 125 and 126).

94. On 16 October 2018, Lesley Sadler from the CWU emailed Julie Fisher (page 192). Lesley Sadler was proceeding upon the assumption that Mrs Fisher would by now have received Dr Milne's report following the consultation of 13 August 2018. Mrs Fisher replied on 18 October 2018 to the effect that the claimant had not agreed to release the report to the respondent. Lesley Sadler replied the following day with the observation that, *"this is a very unusual situation."* She recognised that the respondent was giving the claimant *"every opportunity to exercise his right of appeal under the IHR process."*

95. On 19 October 2018, the claimant emailed Julie Fisher (page 193). He said that he was unwell. He referred to mental health issues. He asked for a deferment of the appeal meeting or the deadline for him to make written submissions.

96. On 26 October 2018 Mrs Fisher wrote to the claimant (pages 195 and 196). She said that she was prepared to allow the claimant an extension of time to either attend a meeting or provide appeal points by 23 November 2018. She reminded him of the need to give consent for the release of Dr Milne's report.

97. Julie Fisher had not heard anything from the claimant in reply to her letter of 26 October 2018. Hence, she wrote again on 19 November 2018 to remind the claimant of the need to take action. The claimant replied on 20 November 2018 to say that he would not be able to attend an appeal meeting on 23 November 2018 nor would he be able to make written representations by that date because of mental health problems. This was accompanied by the letter at page 200 where the claimant asked Mrs Fisher for an extension of time. This was followed by an email the following day (21 November 2018 at page 201) in much the same vein.

98. On 10 December 2018 Lesley Sadler asked Julie Fisher whether the claimant had provided his appeal points (page 203). Mrs Fisher replied to the effect that the claimant had not done so. This led Lesley Sadler to email the claimant on 11 December 2018 (page 206) to the effect that the respondent and the trade union had been attempting to deal with the appeal for some time following his dismissal the previous April and asking him to clarify his intentions.

99. It is worth reminding ourselves that over this period, the claimant was certified by his general practitioner as unfit for work. The relevant fit notes covering the period between 12 February 2018 and 11 February 2019 are at pages 154, 157, 169, 194, 202 and 221.

100. On 11 December 2018, Mrs Fisher reached her decision upon the claimant's appeal. The letter dated 11 December 2018 is at pages 208 and 209. She did not uphold the claimant's appeal. Her reasoning was set out in the appeal decision document at pages 211 to 214. She set out the history of the matter.

She then went on to conclude that based upon the medical evidence available to her the appeal was unsuccessful.

101. The claimant said that he wished to pursue a further appeal. In her letter of 11 December 2018 Julie Fisher advised the claimant that he had the right to request that the case be referred to an independent medical specialist in accordance with the ill health policy. The independent specialist would advise whether the employee was:

    - Able to return to normal or adjusted duties.
    - Able to undertake suitable alternative work in Royal Mail Group.
    - Unable to work on alternative duties within Royal Mail Group for the foreseeable future and therefore be entitled to leave the business due to ill health with a lump sum payment.
    - Permanently incapable of undertaking work in accordance with the definition within the policy and therefore eligible to leave the business due to ill health with income benefit.

102. On 13 December 2018 the claimant wrote to Tony Rupa to say that he was happy to agree to the release of Dr Milne's medical report. This letter appears to have been received by the CWU on 18 December 2018 (page 218). The same day Lesley Sadler wrote to Julie Fisher (page 217). She notified Mrs Fisher that the claimant now gave authority to release his medical report.

103. By that stage, of course, Mrs Fisher had decided upon the appeal with which she was dealing. On 27 December 2018 she wrote to the claimant noting his wish to appeal to an independent specialist (page 219).

104. Mrs Fisher left the respondent on 31 March 2019. Management of the case therefore passed to Cindy Chattaway. Prior to her departure, arrangements had been made for the claimant to be seen by Dr Olufunto Phillips, consultant occupational physician.

105. Dr Phillips' report dated 21 March 2019 is at page 224. Her recommendation was that the appeal should be denied. She recorded that she had considered Dr McCarthy's notes and occupational health report of 27 November 2017. Dr Phillips, it seems, was not in possession of the report from Dr Milne of 13 August 2018. Dr Phillips opined that the claimant was fit to undertake a full-time sedentary role within the Royal Mail. She said that if permanently reduced working hours could not be accommodated or was unacceptable to the claimant and a sedentary role was not available, then leaving the business on grounds of ill health with a lump sum was appropriate.

106. The inference from Dr Phillips' report is that the claimant was fit to undertake the role of cleaner provided that permanently reduced working hours were available. This appears to be at odds with the conclusion of Dr Milne who says that sedentary work would be better for the claimant and if such was unavailable then leaving the business would be appropriate. Dr Milne does not opine that the claimant was fit to undertake the role of cleaner upon the basis of reduced hours. Dr Phillips' report is consistent with that of Dr McCarthy to the effect that the claimant was only capable of doing the cleaner role on reduced hours.

107. Cindy Chattaway wrote to the claimant on 18 April 2019 (page 225). She advised the claimant that his appeal to the independent medical specialist had been unsuccessful. The appeal was dismissed upon the basis that the claimant not capable of undertaking his full role. This concluded the matter as far as the respondent was concerned.

108. This concludes our findings of fact.

The relevant law

109. We now turn to a consideration of the relevant law. We shall start with the law as it relates to the claimant's complaint of unfair dismissal. There is no dispute in this case that the claimant was dismissed by the respondent. That being the case, it falls to the respondent to establish one of the statutory permitted reasons for the dismissal of an employee.

110. The relevant permitted reason in this case is that to be found in section 98(2)(a) of the Employment Rights Act 1996. This is a reason which relates to the capability or qualifications of the employee for performing work of the kind which they were employed by the employer to do.

111. Capability in role encompasses performance issues and sickness issues. It is the latter with which we are concerned in this case.

112. The burden of proof is upon the employer to show a potentially fair reason for the employee's dismissal. They must show that they had a genuine belief that the claimant was incapable of performing the role which he was employed by them to do.

113. Should the respondent discharge this burden, then the role of the Tribunal is to consider whether the employer's decision to dismiss the employee for that reason was a reasonable one. The Tribunal must consider whether the conclusion reached was reasonable based upon the evidence before the employer and was reached following a reasonable procedure.

114. In **East Lindsey District Council v Daubney** [1977] ICR 566, the Employment Appeal Tribunal stated that: *"unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position."*

115. Where the employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait any longer for the employee to return (**Spencer v Paragon Wallpapers Limited** [1976] IRLR 373). A summary of the correct approach can be found in the decision of the Court of Session in **BS v Dundee City Council** [2014] IRLR 131. The main issues in an incapacity case are:

    115.1. Whether it is reasonable to expect the employer to wait any longer for the employee to return to work.

    115.2. There needs to be reasonable consultation with the employee.

    115.3. The employer needs to act reasonably to obtain medical advice on the employee's position, the prognosis and when a return to work is likely.

116. Relevant considerations will be: whether other staff were available to carry out the absent employee's work; the nature of the employee's illness; the likely length of absence; the cost of continuing to employ the employee; the size of the employing organisation; and the unsatisfactory situation of having an employee on very lengthy sick leave.

117. A fair procedure will encompass: consultation with the employee; the obtaining of up to date medical evidence; and a consideration of alternative employment.

118. Mr Foster reminded the Tribunal that it was held in **First West Yorkshire Limited v Haigh** [2008] IRLR 182, EAT that it was unreasonable, and thus unfair, for an employer to dismiss an employee by reason of long-term ill health without first considering whether they were contractually entitled to be medically retired or granted an ill health pension.

119. Ultimately, the question in incapacity cases is whether the employer acted reasonably in concluding in the light of the position of the employee and the medical evidence that they could not wait any longer for the employee to return to work. That essentially answers the question of whether the employer acted within the range of reasonable responses in treating incapacity as a sufficient reason for the dismissal of the employee.

120. The question of whether it was the employer that made the claimant ill in the first place has limited relevance. In such circumstances, there is an expectation that the employer will "*go the extra mile"* in finding alternative employment or putting up with a longer period of sickness absence. However, that the employer caused the incapacity does not mean that they cannot fairly dismiss. The employee may have the remedy of a civil claim for personal injury damages if that happens.

121. We now turn to a consideration of the relevant law as it relates to the claimant's complaints brought under the 2010 Act. The first issue to consider is whether the Tribunal has jurisdiction to consider the claimant's complaints. By section 123 of the 2010 Act, proceedings upon a complaint of workplace discrimination brought under the 2010 Act 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. Conduct extending over a period is to be treated as done at the end of the period.

122. An out of time complaint may still nonetheless be considered where the Tribunal considers it just and equitable to extend time in order to vest the Tribunal with jurisdiction. The Tribunal's discretion in respect of a just and equitable extension is wide. However, in **Robertson v Bexley Community Centre** [2003] EWCA Civ 576, the Court of Appeal noted that time limits are to be exercised strictly in employment cases. There is no presumption that time should be extended upon just and equitable grounds. A Tribunal cannot hear a complaint unless the applicant convinces the Tribunal that it is just equitable to extend time. The exercise of discretion is the exception rather than the rule.

123. The principle to be derived from **Robertson** does not however mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

124. Section 123 of the 2010 Act does not set out any list of factors to which a Tribunal is instructed to have regard in exercising the discretion whether to extend time for just and equitable reasons. In **Adedeji v The University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ IV 23, Underhill LJ held that, "*the factors which are almost always relevant to consider when exercising any discretion whether to extend time are:*

    124.1. The length of, and reasons for the delay; and

    124.2. Whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

125. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 the Court of Appeal rejected the proposition that in the absence of an explanation from the claimant as to why they did not bring the claim in time and an evidential basis for that explanation, the Tribunal could not properly conclude that it was just and equitable to extend time.

126. The Court of Appeal held that the discretion under section 123 of the 2010 Act for a Tribunal to decide what it thinks to be just and equitable is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that where there is an explanation or apparent reason for the delay and the nature of any reason are relevant matters to which the Tribunal ought to have regard. However, there is no requirement for a Tribunal to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time. However, as **Robertson** establishes, there needs to be something to convince the Tribunal that it is just and equitable to extend time.

127. The Tribunal will fall into error when considering whether it is just and equitable to extend time if the focus is simply upon whether the claimant ought to have submitted the claim in time. The Tribunal must weigh up the relative prejudice that extending time would cause to the respondent.

128. It is for the claimant to make out a *prima facie* case that he was subjected to discrimination. Section 136 of the 2010 Act provides that if there are facts from which the Court or Tribunal could decide, in the absence of any other explanation, that a person has contravened the 2010 Act then the Court or Tribunal must hold that the contravention has occurred. Therefore, it is for the claimant to prove on the balance of probabilities that there was a breach by the respondent of the 2010 Act from which the Tribunal could conclude that there was unlawful discrimination. It is insufficient for the claimant to simply make such an assertion. If the claimant makes out his case on the balance probability then the burden moves to the respondent to show they did not contravene the relevant provisions of the 2010 Act. It is only once the complainant proves facts from which the Tribunal could conclude, in the absence of any other explanation, that the employer has committed an act of discrimination, that the Tribunal is obliged to uphold the claim.

129. By section 15 (when read with section 39) of the 2010 Act, it is unlawful for an employer to treat an employee unfavourably for something arising in

consequence of disability. The Equality and Human Rights Commission's *Code of Practice on Employment (2011)* provides (at 5.7) that a person is treated unfavourably if they have been put to a disadvantage. Often, this advantage would be obvious, for example, where an individual is dismissed form their employment.

130. The unfavourable treatment in question must be because of something that arises in consequences of the disability. This means that there must be a connection between whatever led to the unfavourable treatment on the one hand and the disability on the other.

131. Where the unfavourable treatment is because of something arising in consequence of disability, it will be unlawful unless it can be objectively justified by the employer or unless the employer did not know or could not reasonably have been expected to know that the person was disabled.

132. It is open to an employer to seek to justify unfavourable treatment where the treatment is a proportionate means of achieving a legitimate aim. It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.

133. The aim in question must be legitimate. If it is legitimate, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise between the interests of the employer and those of the employee. This is an objective test. (This may be contrasted with the law of unfair dismissal where the Tribunal is assessing the reasonableness of the conduct of the employer and asking whether the employer's decision was within the range of reasonable management responses).

134. The Tribunal may substitute its view for that of the employer when applying the objective test upon a consideration of a claim brought under section 15 of the 2010 Act. However, the Tribunal must not substitute its view when assessing the reasonableness of the employer's conduct in an unfair dismissal claim.

135. That being said, in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737, CA, Underhill LJ considered the test of proportionality under the 2010 Act alongside the reasonableness test for ordinary unfair dismissals in section 98(4) of the 1996 Act. He said that in the case of dismissals for long term sickness absence the two tests should not lead to different results. Underhill LJ was clearly concerned by the prospect of a section 15 complaint in a long term sickness case succeeding on the one hand (by application of the objective proportionality test) but an unfair dismissal claim upon the same facts failing (by application of what is generally perceived to be a less stringent range of reasonable responses test). Underhill LJ was concerned that it would be counter-intuitive in those circumstances for the section 15 claim to succeed but for the unfair dismissal claim to fail.

136. We now turn to a consideration of the principles engaged in the reasonable adjustments complaint. Employers are required to take reasonable steps to avoid a substantial disadvantage where a provision, criterion or practice applied to a disabled employee puts the disabled person at a substantial disadvantage compared to those who are not disabled.

137. The word *"substantial"* in this context means *"more than minor or trivial".*

138. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion or practice disadvantages the disabled person. Accordingly, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances. A comparison can be made with non-disabled people generally.

139. The phrase *"provision, criterion or practice"* is not defined by the 2010 Act. It broadly encompasses requirements placed upon employees by employers. It can extend to formal or informal policies, rules, practices or arrangements.

140. An employer only has a duty to make adjustments if they know or could reasonably be expected to know both that the affected worker is disabled and placed at a substantial disadvantage by application to them of the relevant provision, criterion or practice.

141. The duty to make adjustments requires employers to take such steps as it is reasonable to have to take in order to make adjustments. There is no onus upon the disabled person to suggest what adjustments should be made. However, by the time that the matter comes before the Employment Tribunal, the disabled person ought to be able to identify the adjustments which they say would be of benefit. There is no requirement for the disabled person to show that on balance the adjustment would ameliorate the disadvantage. There merely has to be a prospect that the adjustment may benefit the disabled person.

142. The following are some of the factors which, according to the ECHR *Code of Practice* (paragraph 6.28) might be taken into account when deciding what is a reasonable step for an employer to have to take:

    - Whether taking any particular step would be effective in preventing the substantial disadvantage.
    - The practicability of the step.
    - The financial and the costs of making the adjustment and the extent of any disruption caused.
    - The extent of the employer's financial or other resources.
    - The availability to the employer of financial or other assistance to help make an adjustment.
    - The type and size of the employer.

143. Ultimately, the test of the reasonableness of any step an employer may have to take is an objective one and will depend upon the circumstances of the case. The ECHR Code of Practice gives some examples of reasonable adjustments in practice. These include:

    - Transferring the disabled worker to fill an existing vacancy.
    - Altering the disabled worker's hours of work or training.
    - Assigning the disabled worker to a different place of work or training or arranging homeworking.

Conclusions

144. We now turn to our conclusions. We shall apply the legal principles to the facts which we have found in order to determine the issues in the case.

145. We shall start with the complaint of unfair dismissal. As we have said, there is no dispute that the claimant was dismissed by the respondent. It is therefore for the employer to demonstrate that they had available to them a permitted reason for dismissal.

146. The evidence is overwhelmingly in favour of the respondent upon this point. There is frankly no room for dispute that the respondent held a genuine belief that the claimant was incapable of work when the respondent took the decision to dismiss him from his post on 19 March 2018. At that point, the claimant had been unfit to do any work for a period of two months. The medical opinion of Dr McCarthy of 27 November 2017 was that the claimant was unable to work for longer than four hours each shift. There was no prospect of him returning to full time work in the foreseeable future. It follows therefore that the respondent entertained a genuine belief that the claimant was incapable by reason of ill health of fulfilling the role which he was employed by the respondents to undertake (that is to say, of fulfilling his contractual hours and working full time as a cleaner). The position had not improved by the time of the appeals.

147. The next question that arises therefore is whether the employer reached that belief after carrying out as much investigation into the matter as was reasonable. In particular, did the employer reach their belief after carrying out reasonable consultation with the employee and informing themselves of the up to date medical position?

148. In our judgment, both of these questions may be answered in the affirmative. Mrs Simpson had before her, when she made her decision, a medical report from Dr McCarthy which was four months old at that point. In the meantime (between the date of the report and the date of her decision) the claimant had been certified as unfit to work by his general practitioner. We refer to the fit notes at pages 154 and 157.

149. The respondent had taken steps to inform themselves of the position in consultation with the claimant on 30 November 2017 and 1 February 2018. Regrettably, upon both occasions the claimant was complaining about the condition of his legs. At the welfare meeting on 30 November 2017 he said that they were *"bleeding".* At the welfare meeting held on 27 February 2018 he said his legs were *"very bad – ulcerated".*

150. In our judgment, it fell within the range of reasonable managerial prerogative for Mrs Simpson not to call for further medical evidence. Frankly, there was little sign of any discernible improvement following Dr McCarthy having seen the claimant on 27 November 2017. The claimant said as much himself and his GP had certified him as unfit to work. Mrs Fisher acted within the range of reasonable responses, in our judgment, in concluding that she had sufficient material before her to reach her conclusion.

151. A further ill-health review took place on 8 March 2018. Mrs Simpson was justifiably sceptical of the claimant's claims that he was able to manage even four hours of work a day. We are satisfied that she acted reasonably in rejecting the claimant's contention that he was in the best health that he had

had for 10 years and was in a position to return to work full time. This was plainly contrary to all of the medical evidence before her and what the claimant had said to her about the ulceration . She told the claimant that she was considering dismissing him due to *"ill health retirement".* She notified the claimant that she would announce her decision on 19 March 2018.

152. An issue arose as to whether the phraseology *"ill health retirement*" as opposed to *"dismissal"* was apt. However, in our judgment, the phrases are synonymous. The policy at pages 60 and 61 concerns leaving the respondent's business due to ill health. This was the subject of a policy agreed between the respondent and the trade unions. The policy is to the benefit of workers as a departure from the business due to ill health will result in either an income benefit or a lump sum payment provided the criteria are met. The Tribunal is therefore satisfied that there was no unfairness to the claimant in Julie Simpson's use of the expression *"ill health retirement"* instead of *"dismissal".* In the final analysis, the claimant (who was supported throughout by his trade union) was under no illusions that the respondent was contemplating the dismissal of him upon the grounds of incapacity. The respondent complied with their obligations following **Haigh** to make reasonable enquiries about contractual retirement benefits and treated the claimant reasonably upon this issue.

153. We are satisfied that Julie Fisher made reasonable efforts to seek alternative employment for the claimant. The evidence was that the claimant made little effort himself to find alternative work. Mrs Simpson said that the claimant had applied only for two jobs.

154. We are satisfied that the respondent reached the conclusion that no suitable alternative vacancies were identified. Although there were some cleaning roles discovered by Mrs Fisher during the course of her investigation, she was entitled to take the view that these were unsuitable for the claimant because he was simply unfit to carry out any cleaning role in light of the medical evidence and what the claimant told her about his health. No suitable alternatives were identified by her notwithstanding her reasonable efforts.

155. We are satisfied therefore that the employer acted reasonably in informing themselves of the medical position and consulting with the claimant. We are also satisfied that the respondent could not reasonably be expected to wait any longer for the claimant to return to work. We take into account that the respondent had been paying the claimant his full salary throughout the period that he was only working part time following his return to work in November 2016. The respondent was having to bear the cost of engaging an agency worker as well as the claimant's wage. It was therefore costing the respondent significantly more than it should in order to clean the mail centre. We accept of course that this is a large employer with significant resources. However, those resources are not infinite and must be used sensibly and wisely. There was no realistic prospect of the claimant returning to work in a full time capacity. There was a serious question mark over his ability to return to his cleaning duties even in a part time capacity. The situation was therefore unsustainable and unsatisfactory as far as the respondent was concerned and in our judgment they acted within the range of reasonable responses in reaching that conclusion.

156. Even if the claimant had been fit to return to work upon a part time basis, the respondent would still be faced with the prospect of overmanning upon the night shift. There was little (if not no) prospect of finding somebody with whom the claimant may share the role. It was highly unlikely, based upon the experiences relayed by Mrs Simpson (in paragraph 81 above) that the respondent would find anybody willing to work for four hours a night between the hours of 2am and 6am in order to job share with the claimant. In the absence of any likelihood of the claimant being able to return to full time hours the respondent, in our judgment, acted reasonably in concluding that there was little option but to terminate the claimant's contract of employment in order to resolve the unsatisfactory situation which had prevailed for some time.

157. The Tribunal is in no position to make a judgment upon the claimant's contention that the respondent was responsible for his condition. Even if they were (and we certainly make no findings to that effect) they had in our judgment gone the extra mile in any case in tolerating a significant period of time paying the claimant a full time salary for part time work. They had tolerated significant periods of absence before they moved to dismiss the claimant.

158. The respondent also fulfilled their duties (per the **Haigh** case) to investigate the claimant's entitlement to ill health retirement benefits. The claimant's trade union representative recognised that the respondent had complied with the relevant process (at pages 60 and 61 of the bundle) in her email of 11 December 2018 (at page 206). The claimant was afforded a right of appeal (as to which, see paragraphs 167-169 below).

159. It follows therefore that the claimant's complaint that he was unfairly dismissed by the respondent must fail. We now turn to a consideration of the claims brought under the 2010 Act.

160. We start with a consideration of the claim brought under section 15 of the 2010 Act. The complaint here is that the claimant was unfavourably treated for something arising in consequence of dismissal because he was dismissed. An act of dismissal of an employee may of course constitute discriminatory conduct within the workplace pursuant to section 39(2)(c) of the 2010 Act.

161. We find that the claimant was unfavourably treated for something arising in consequence of disability. The dismissal of him is unfavourable treatment. Plainly, it is the kind of disadvantage constituting unfavourable treatment contemplated by the EHRC.

162. The claimant was dismissed because of his ill health attendance record. That attendance record arose out of his disability. It follows therefore that he was unfavourably treated by being dismissed for something that arose in consequence of his disability.

163. No issue arises here upon the question of the respondent's knowledge of the claimant's disability. They plainly knew of it from the occupational health reports commissioned by them. This is conceded by the respondent in any case.

164. The question that arises therefore is whether the dismissal of the claimant was a proportionate means of achieving a legitimate aim. The aim relied

upon by the respondent is the need for the mail centre to be kept clean for the benefit of employees. There can be little dispute that this is a legitimate aim.

165. The question therefore is one of proportionality. The impact upon the claimant of dismissal was significant. He lost his job. However, that has to be balanced against the employer's needs for the mail centre to be cleaned.

166. This imports similar considerations to that upon the reasonableness of the dismissal for the purposes of the claimant's unfair dismissal claim. It is at least theoretically possible for the Tribunal to conclude that objectively the decision to dismiss the claimant was disproportionate even in circumstances where the Tribunal finds it to be within the range of reasonable responses for the purposes of the unfair dismissal claim. However, such is an unlikely outcome *per* **O'Brien** as is set out above.

167. The dismissal decision encompasses not only that taken by Julie Simpson but also the appeal decision of Julie Fisher. When weighing considerations of proportionality, we must take into account that the claimant was given ample opportunity to satisfy the respondent that he was fit to undertake work after he had been dismissed. The claimant produced no such evidence to the respondent. However, medical evidence was obtained by him. He refused to send it to the respondent. We infer against him that that decision was motivated by the fact that it was against him and in reality it ruled out the prospect of him working as a cleaner in any capacity. Dr Milne's opinion was pessimistic. He concluded that the claimant was fit only for sedentary work otherwise him leaving the respondent upon the grounds of ill health was appropriate. He said that the claimant was not capable of fulfilling his role.

168. Regrettably, we conclude that the claimant was indulging in wishful thinking when he continued to maintain before the respondent that he was likely to be fit to return to his role in the short term. This is completely contrary to the medical evidence from the occupational health physicians and his general practitioner certifying him as unfit to work as a cleaner in a full time and (in the case of Dr Milne) even a part time capacity. The respondent was, unfortunately, faced with an employee who was simply unfit to undertake his substantive role. There was little prospect of any improvement. There was no sign of surgery taking place. The respondent needed the mail centre to be cleaned and to have a cleaner so to do who could provide an efficient and reliable service. Objectively, it follows that the respondent has succeeded in justifying the unfavourable treatment of the claimant.

169. The fact that the respondent permitted the claimant a right of appeal also of course goes to the fairness of the dismissal for the purposes under the 1996 Act. The course of the appeal as we have outlined factually above simply underscores our finding that a reasonable procedure was followed by the respondent in order for them to inform themselves as to the claimant's likely fitness for role. Mrs Fisher acted reasonably in dismissing the claimant's appeal upon the basis of the information that was before her. The respondent is of course blameless for not having sight of Dr Milne's report given that the claimant refused to disclose it to them. We have little doubt that had the claimant so consented, Mrs Fisher's conclusions would not have been different in any case. Further, the claimant was allowed a second tier of

appeal. We find that Dr Phillips' conclusions were reasonable based upon the medical evidence before her.

170. We now turn to the complaint that the respondent was in breach of the duty to make reasonable adjustments. The first period with which we are concerned runs from around 2014 to April 2015. Doing the best we can, we discern from the claimant's account that the difficulties which beset him in his role date from around the time that the mail centre was extended. The first period with which the reasonable adjustments complaint is concerned therefore dates from around that time to April 2015. It was in or around April 2015 that the claimant credited the respondent with providing the support which he required (by way of provision of adequate afternoon staffing) as recognised in the letter of 22 March 2017. That ended the course of conduct which caused an issue for the claimant from 2014.

171. The first difficulty for the claimant upon this issue is that it had been presented to the Tribunal outside the time limit provided for by the 2010 Act. We accept that for the period between the completion of the extension of the mail centre and April 2015, there was conduct which extended over a period. In other words, the claimant found himself cleaning an extended area with inadequate support because the afternoon shift was not working effectively. There was therefore a double whammy of the claimant facing cleaning a greater surface area in the first place and that the area went uncleaned for a longer period of time than should have been the case had the afternoon shift been adequately staffed. The issue caused by this situation was only ameliorated by the provision of support in April 2015.

172. The claimant did not commence Acas mandatory early conciliation until 3 May 2018. This was some three years after the end of the course of conduct to which this aspect of the reasonable adjustments complaint relates. The delay is therefore lengthy. The respondent has suffered from forensic prejudice because Lesley Bower is unavailable to give evidence for them. Further, the claimant has had the support of the trade union throughout.

173. There was nothing from the claimant (by way of evidence or submission) as to why time should be extended. There needs to be something from the claimant to convince the Tribunal that it is just and equitable to extend time. Here, regrettably, he advanced nothing.

174. The Tribunal therefore has no jurisdiction to consider a complaint of a failure reasonable adjustments covering the period between 2014 and April 2015. However, even if we are wrong not to extend time to enable the Tribunal to consider the matter, there is a further difficulty for the claimant. This is that upon the evidence available to the Tribunal, he was not in any case a disabled person over this period. The claimant has adduced no evidence in support of his case that the physical impairment had a substantial and long term adverse effect upon day to day activities between 2014 and April 2015. The only evidence before the Tribunal which touches upon this issue is the medical report of Dr O'Brien (at pages 75 and 76) who says that the claimant is unlikely to be a disabled person because there is no substantial adverse effect upon normal day to day activities.

175. Therefore, the Tribunal has no jurisdiction to consider the first part of the reasonable adjustments claim. In any event, the claimant was not a disabled

person at the material time and therefore no reasonable adjustments claim can be made in any case.

176. The second period of time with which we are concerned upon the reasonable adjustments claim is between January 2016 and June 2016. It was over this period that the claimant again found himself unsupported because of the shortcomings of the afternoon shift. Again, we are satisfied that there was a course of conduct ending in June 2016. That being the case, the claimant's commencement of the early conciliation process was getting on for two years out of time.

177. For the same reasons as with the earlier period, we find that the claim was presented out of time and that it is not just and equitable to extend time to enable the Tribunal to consider it. There is also no evidence from the claimant to support his case that he was a disabled person at the material time with which this complaint is concerned. It is of course for the claimant to demonstrate that he was disabled at the material time and he has adduced no evidence in support.

178. We therefore turn to the complaint that there was a failure to make reasonable adjustments from November 2016 onwards. Although we have considered the claimant's treatment during early periods from the perspective of reasonable adjustments complaint, given how the claimant pleaded his case as noted by Employment Judge Rostant on 4 January 2019, it seems to us that the heart of the claimant's reasonable adjustments complaint is based upon his treatment towards the end of his employment with the respondent. For the purposes of the period from the end of November 2016 onwards the following do not arise as issues:

    178.1. That the claimant was a disabled person at all material times by reason of the physical impairment of varicose veins.

    178.2. That the Tribunal has jurisdiction to consider the matter given that the complaint was brought in time and concerns a continuing act or a series of linked acts from the end of November 2016 to the date of his dismissal.

    178.3. That the respondent had knowledge both of the claimant's disability and that he was substantially disadvantaged because of it by reason of the respondent's requirement of him to undertake the full time role of a cleaner.

179. The requirement for him to work as a full-time cleaner plainly put the claimant at a substantial disadvantage from the end of November 2016. He could not work in that role in a full time capacity. A comparator without a disability would have been able so to do as they would have been fit enough to undertake the work. The relevant requirement therefore substantially disadvantaged the claimant. The disadvantage was more than minor or trivial. It came about because of the disability. He was simply unable to devote full time hours to his work because of the physical impairment.

180. It follows therefore that the duty upon the respondent to make reasonable adjustments with a prospect of alleviating the substantial disadvantage was engaged. What steps, therefore, did the respondent undertake to return and keep the claimant in work?

181. The first step was to allow the claimant to work upon a part time basis. This is one of the practical examples of reasonable adjustments given in the ECHR's Code of Practice. Not only that, the respondent permitted the claimant so to do while continuing to receive a salary based upon full time work. On any view, this was a reasonable adjustment which alleviated the substantial disadvantage during the periods that the claimant was able to work part time.

182. The object of the duty to make reasonable adjustments is to require employers to take positive steps to ensure that disabled people can access and progress in employment. If the employee is unfit to work, then it may be a reasonable adjustment to allow the disabled worker to be absent for rehabilitation, assessment or treatment. However, such an adjustment must be with the aim of the employee returning to the workplace.

183. In **O'Hanlon v The HM Revenue and Customs** [2007] EWCA Civ 283, the Court of Appeal observed that the purpose of the reasonable adjustments legislation is to aid disabled employees to play a full role in the world of work and not to treat them as objects of charity. Therefore, it will not be a reasonable adjustment to increase a disabled employee's sick pay allocation which may be a disincentive for them to return to work.

184. In our judgment therefore the respondent complied with the duty to make reasonable adjustments by allowing the claimant to work part time, by paying him a full-time salary for so doing and allowing him a reasonable period of time for recuperation. However, there came a point where there was in reality little prospect of the claimant effectively returning to work as a cleaner even in a part time capacity. The late disclosed report of Dr Milne makes that plain as does the GP's certification of the claimant as unfit to work at all after February 2018. There can therefore be no failure to make reasonable adjustments by continuing to pay the claimant a full salary in circumstances where he was at best only able to work part time and at worst (towards the end of employment) simply incapacitated from doing even that.

185. The other adjustment made by the respondent in this case was a significant reduction in the surface area to be cleaned by the claimant, accompanied by the engagement of an agency worker to assist him. Again, these are examples of reasonable adjustments in practice in the EHRC's Code of Practice. We find in favour of the claimant that the surface area to be cleaned was greater than that simply of the third floor which was the respondent's position. However, even then, there was a significant reduction in the surface area to be cleaned by the claimant which went down from around 15000 square metres to 1000 square metres. The rest of the work was picked up by the agency worker which was a step put in place of assistance to the claimant.

186. When he was given the smaller area to clean from November 2016, the claimant was not placed under any pressure. We accept Julie Simpson's account that although expected to deep clean the areas within his purview, the claimant was not expected to do so each evening. The criticism made of the claimant by Jamie Sampson was therefore unjustified. Furthermore, the claimant was permitted to take breaks of around five minutes per hour during the time that he was cleaning. Apart from the time that Jamie Sampson was there (a period of around four months or so) the claimant was working

unsupervised. There was therefore nothing to prevent him from taking short breaks during the course of his working hours.

187. Unfortunately for the claimant, there came a point from the early part of 2018 onwards when he was simply unfit to work as a cleaner even upon part time hours. There were no adjustments which the respondent could reasonably make which came with a prospect of alleviating the substantial disadvantage caused to him by the requirement to clean full time. There is of course no obligation upon the respondent to create a vacancy for the claimant. The respondent made reasonable efforts to find an alternative for him but to no avail. It lies beyond the scope of the duty to make reasonable adjustments to require the respondents to continue to engage the claimant where there is no or little reasonable prospect of the claimant providing an efficient and effective service.

188. It follows therefore, in our judgment, that the complaint that the respondent failed to comply with the duty to make reasonable adjustments must fail and stand dismissed as must the complaints of unfair dismissal and unfavourable treatment for something arising in consequence of disability.

Employment Judge Brain

Date: 4 April 2022