EMPLOYMENT TRIBUNALS

Claimant: Mr D Smith

Respondent: Warrens Warehousing & Distribution (Midlands) Limited

Heard at: Manchester **On**: 11, 12, 13 and 14 July 2022
31 August 2022 (in chambers)

Before: Employment Judge Dunlop
Mrs A Jarvis
Ms C Doyle

REPRESENTATION:

Claimant: Mr M Smith (Claimant's brother)
Respondent: Mr D Brown (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal (including his claim of unfair dismissal on the grounds of having asserted a statutory right) is not well-founded. This means it fails.

2. The claimant was a disabled person within the meaning of s.6 Equality Act 2010 at all material times for the purposes of his claim.

3. The claimant's claim of failure to make reasonable adjustments under ss.20-21 Equality Act 2010 is not well-founded. This means it fails.

4. The claimant's claim of discrimination arising from disability under s.15 Equality Act 2010 is not well-founded. This means it fails.

5. The claimant's claims are dismissed.

REASONS

Introduction

1. This is a capability dismissal case, arising from long-term sickness absence. Mr Smith was a driver with the respondent company, he was off work from (approximately) the end of 2018 due to an ankle and wrist injury which he asserts he sustained at work. He was dismissed in December 2020 and brings claims arising out of that dismissal.

2. Mr Smith was represented by his brother, Michael. To avoid confusion, the representative is referred to as “Mr Michael Smith” in this Judgment.

The Hearing

3. The final hearing in this case took place over four days on 11, 12, 13 and 14 July 2022. The Tribunal panel met in chambers on 31 August 2022 to further deliberate on our decision.

4. The parties had prepared an agreed bundle of documents which extended to some 1,569 pages across four lever arch files. We therefore took an extended amount of time on the first day to read the witness statements, the documents referred to in the witness statements and the documents referred to in a chronology of key events and documents prepared by the respondent.

5. We resumed at 3.00pm on the first day and discussed with the representatives the issues in the case. The representatives agreed that the claims remained as set out in a List of Issues prepared by Employment Judge Leach following a case management hearing that he had held on 28 May 2021. The Employment Judge considered that it would be helpful to expand the List of Issues to reflect some of the matters that the Tribunal would consider in relation to each of these claims. This was primarily to assist Mr Smith and Mr Michael Smith in ensuring that their questions and submissions were directed towards the relevant points the Tribunal would be considering. The Employment Judge talked through these formulations with the parties.

6. The Employment Judge also identified that Mr Smith appeared to be putting forward an argument that the reasonable adjustments the respondent should have made to his role including providing a buddy or co-driver (at least initially on his return to work) and providing gloves and a steering aid. The List of Issues was further updated to reflect this, with the agreement of the respondent.

7. The Employment Judge asked the respondent to confirm what legitimate aims it was relying on for the purposes of the claim under section 15 of the Equality Act 2010, and Mr Brown was able to confirm the wording that the respondent was seeking to use for those aims. This has also been incorporated into the updated List of Issues.

8. This expanded version of the List of Issues, reflecting these changes, appears as an Annex to this judgment.

9. The case was listed for liability and remedy. The Employment Judge explained the **Polkey** principle as it relates to remedy, and confirmed with the parties that any cross-examination and submissions in relation to **Polkey** would be dealt with as part of the liability portion of the hearing, and the Tribunal would go on to consider other remedy issues (if needed) once it had given its decision on liability. Both parties were content with this approach.

10. For the benefit of the parties, the Employment Judge outlined the procedure that the hearing would follow, and we discussed timetabling.

11. The Tribunal heard evidence from Mr Smith first. Mr Smith had prepared a statement for the proceedings which we had read and admitted into evidence. We also admitted into evidence an impact statement prepared earlier on in the proceedings. Unfortunately, this impact statement dealt with what Mr Smith said to be the impact of the discrimination and the dismissal that he had experienced. That was not what had been envisaged by Employment Judge Leach in ordering the provision of an impact statement. It was explained to Mr Smith that, as the Tribunal had to determine whether he was a disabled person within the meaning of section 6 of the Equality Act 2010 ("EqA"), we needed to hear evidence about the impact of his physical impairments on his ability to carry out day-to-day activities. Neither of the statements prepared addressed this issue.

12. With the agreement of both parties, we resolved this by reference to an item of correspondence which appeared in the bundle. This had been prepared by Mr Michael Smith and set out (with reference to the test in the EqA) several areas where Mr Smith said that he struggled with day-to-day activities. The Employment Judge therefore took Mr Smith through these areas and invited him to confirm whether he did experience the difficulties described, with particular regard to the time around the dismissal. Mr Smith was permitted to elaborate on the points in the list to provide further detail and context. In this way, he gave evidence on each of these areas. He was invited to add any other areas that he wished to but was satisfied that that covered the effect of his impairments on day-to-day activities.

13. At the end of his evidence in chief Mr Smith was cross examined by Mr Brown at some length. There followed some questions from the Tribunal. At the start of cross-examination it became clear that Mr Smith was having some difficulty handling the (very large) files of documents. The Tribunal was able to provide a member of staff to assist Mr Smith in locating documents in the bundle. The panel was satisfied that this was an appropriate adjustment. We did not take account of this difficulty in assessing whether he had satisfied us that he was a disabled person as we recognise that (for various reasons) a person's performance and presentation at the Tribunal does not necessarily reflect the usual level of their abilities.

14. Mr Michael Smith then had the opportunity to re-examine the claimant. It is not unusual in cases where a non-legally qualified representative is appearing for there to be some confusion around what is permitted in re-examination. As re-examination commenced it became clear that Mr Michael Smith was effectively attempting to lead fresh evidence on the question of the effect of Mr Smith's alleged disability. Further, Mr Michael Smith was introducing questions in a way which was leading Mr Smith, for example questions starting "would you say that….". Mr Brown unsurprisingly objected to such questions.

15. The Employment Judge attempted to assist Mr Michael Smith in formulating questions on those points he wished to raise which were appropriate for re-examination. The Tribunal then adjourned overnight to enable Mr Smith to attempt to prepare questions for re-examination, which then took place the following morning.

16. On the third day we heard from the respondent's witnesses who were: Mr Daniel Muller, the General Manager of Transport Operations for the respondent and Mr Steve Candelin, who is the General Manager for the respondent. Those witnesses were cross examined by Mr Michael Smith and again the Tribunal asked questions and there was some limited re-examination.

17. On the morning of the fourth day of the hearing the Tribunal heard legal submissions from both sides. It was apparent that we would be unable to conclude our deliberations and deliver judgment during the remaining time. We set a provisional date for a remedy hearing with the parties in order to avoid any difficulty in obtaining a date later. We also set a date for the panel to reconvene in chambers to continue our deliberations, which we have duly done.

Findings of Fact

Background and accident

18. The respondent is a logistics company which specialises in the distribution of baked goods. It is a sizeable business on its own account, running around 190 vehicles and 320 trailers from three main sites and two smaller satellite sites across the country. It is a family company which, until 2018, was run entirely from its head office in Sidcup.

19. In 2018 the respondent entered into an arrangement with the Culina Group, a very large logistics business. It was not necessary for us to go into the precise details of the legal relationship. The respondent remains a live trading company and remains the relevant employer and respondent to this case. However, from 2018 the senior management of the company became more closely integrated with the Culina Group. This resulted in some changes across the business including an attempt to introduce a more modern and professional HR function to the business. The absence of such provision had been identified as a problem as senior management within the group became more familiar with the respondent's business.

20. Mr Smith was employed by the respondent as a full-time LGV driver operating from its Bolton site.[1]

21. Mr Smith had worked for the respondent since September 2014, although there may have been a gap in employment at some point. His work involved lone driving taking deliveries on long distance routes from Chorley to, for example, Bellshill and Falkirk in Scotland. The role therefore involved: driving a heavy vehicle for a sustained period of time; physically accessing and exiting the vehicle (including accessing and exiting the storage part of the vehicle through large barn-style doors); manoeuvring the vehicle and coupling and uncoupling the trailer from the cabin.

[1] It was clarified in the case that the term 'LGV' is used to refer to a 'Large Good Vehicle' and is interchangeable with the term 'HGV' (Heavy Good Vehicle). It is not, as initially supposed by the Tribunal, a 'Light Goods Vehicle'. Both the terms LGV and HGV appeared in the documents and evidence, and this is reflected in this judgment.

Some runs would also involve loading and unloading the vehicle using pallets; on other runs this task would be completed by workers at the site Mr Smith was making the delivery to.

22. Mr Smith asserts that he had an accident at work at some point in late November 2018. He says that he was unloading pallets and slipped on a wet floor, spraining his wrist and ankle. The respondent does not admit that any accident took place at work. We are content that that is not something that we need to make any findings on for the purpose of determining these proceedings. All parties have proceeded on the basis that Mr Smith did sustain some sort of injury around this time.

23. Following the injury, Mr Smith made a claim against an insurance policy he held. This resulted in him receiving some compensation for loss of income, and also in some medical referrals and reports being generated. It was not always clear to us where medical evidence had been generated as a result of Mr Smith's medical care, and where it had been generated in relation to this claim. Mr Smith told us, and we accept, that the insurance covered loss of earnings for one year and then expired. We mention this because it was striking that the medical evidence in this case was exceptionally voluminous, difficult to follow and sometimes contradictory.

24. A few days after the date of the alleged accident Mr Smith attended his GP complaining about a fall at work. The GP notes record that Mr Smith had landed on his right hand and right ankle; he had pain in his hand. They also record the doctor's impressions on examination and note that "*the patient is wanting a sick note*". The plan is recorded as being "*continue over the counter painkillers*".

25. Mr Smith was issued with a MED3 sickness certificate for seven days.

26. The next medical record is from 12 December 2018. It records Mr Smith was reporting that his right wrist and ankle were still sore from the sprain. Mr Smith was advised that his sick note still ran for another two days, and to go back to work and see from there.

27. It appears that Mr Smith did go back to work, although the details around this are somewhat unclear. Mr Smith gave evidence in his witness statement that he had felt fine to drive and to continue his duties on returning to work on 20 December but that halfway through his shift on 23 December the pain had become excruciating and he realised the tablets were not working anymore and he could not continue driving. He said that he was pressurised into doing the next shift and the vibration of the vehicle kept bringing the injury back. We accept his account which was not challenged.

28. The next medical record dates from 24 December 2018 in which it is recorded that Mr Smith went to see the doctor again about the sprain; he informed the doctor it was still painful and was encouraged to rest. A new medical certificate was issued saying that he was not fit for work, this time for two weeks.

Long-term absence and medical progress

29. As it turned out, Mr Smith was never to return to his job as a driver. He continued to submit MED3 sick notes throughout 2019.

30. On 19 February 2019 Mr Smith attended for an orthopaedic examination. The outcome of that examination is noted in the medical records. That report can be summarised as showing that there was little measurable sign of injury. It also records that Mr Smith reported his sleep to be "*normal*" and reported that his hobbies included going to the gym where he does light weights which he was still able to do, although this was limited by pain. It also records that he was able to hop and jump normally. In his evidence to us Mr Smith vehemently argued that this report was mistaken: he insisted that he had been in excruciating pain and barely able to walk on his right leg. He said the specialist only tested his left (uninjured) leg. Given that the record specifically referred to the right leg, and that Mr Smith would presumably have corrected a doctor who set about examining the wrong leg, we did not find this evidence to be credible.

31. The conclusion of the 19 February examination was that if there was no change in 4-6 weeks Mr Smith was to return to the clinic for review for a physio referral. In fact, Mr Smith had accessed physiotherapy at an earlier point, initially privately and then via (we understand) his insurers. A note on 4 March 2019 records that "*he has some exercises which he is now doing regularly*".

32. A further orthopaedic examination took place on 16 April 2019. Again, that records that Mr Smith can hop and jump normally with no pain and no problems. He accepts that this was correct as at 16 April 2019, and attributes that to the physiotherapy. That assertion, however, conflicts with other evidence that Mr Smith gave about his health condition at various points.

33. It is worth observing now that the evidence Mr Smith gave about his condition, its development over time, and the treatment received, was very difficult to follow and to understand. We accept that Mr Smith was trying to give evidence to the best of his recollection, but he appeared to have very little concept of the different time periods in the case. We had no confidence that, even when a question was very clearly addressed to a particular time period, that his answer took that into account. Mr Smith gave conflicting evidence in his oral accounts before the Tribunal of the effect of both his wrist and ankle injuries at various points in time, and the accounts given in the Tribunal were themselves in conflict with what he would appear to have reported to various medical professionals. In these circumstances, even although we were satisfied that he was attempting to give honest answers, we were forced to regard his evidence as largely unreliable in many respects.

34. Returning to the orthopaedic examination of 16 April 2019, this can be summarised as recording that Mr Smith is experiencing pain but there is little external sign of injury. He reports a normal sleeping pattern. He reports being able to access his hobbies of gym and swimming. He appears to report full range of movement in both the wrist and in the ankle. The notes record that Mr Smith did not feel there was a need to engage with physio at this time and he would return in 4-6 weeks for a further review, with a physio referral potentially following on from that. We note that Mr Smith may not have felt the need to access further physiotherapy as he (if we understand correctly) he was already receiving private physiotherapy at this point. Again, it was unsatisfactory that neither Mr Smith nor his (extensive) medical records could provide us with a clear answer to an apparently simple point such as what physiotherapy Mr Smith received and when.

35. The medical records throughout April and May show Mr Smith chasing matters which appear to be related to his insurance claim. There is an entry on 14 May 2019. This notes that Mr Smith is "*increasingly stressed and depressed as his rent has not been paid for the past six months according to a dispute he has with his medical protection insurance who are refusing to pay out for his claim for his sprain symptoms, not eating, not sleeping. After a phone from his [redacted] he had some fleeting thoughts of self [redacted] but only in response to stress. Feels very depressed and he now has an eviction notice from his [redacted]. Feels needs medication. Offered counselling and given contact for th*is."

36. Mr Smith was given a new MED3 certificate with the diagnosis of depressive disorder and remarks of sprained right ankle/hand – Repetitive Strain Injury.

37. There are further regular reviews throughout 2019 where generally Mr Smith reports no progress, up until 12 August 2019 where there is a record that Mr Smith feels he "*should be back at work in the next four weeks. Having physio now but needs sick note for now*".

38. We pause to note that during this time the respondent completely failed to engage in any welfare meetings or any other form of keeping in touch of the type that we would normally expect to see from a large employer with an employee who is on long-term sick leave. Nor did the respondent seek to instigate or undertake any medical investigations. This is despite the existence of a detailed long-term sickness policy which indicated that the employer would, in appropriate circumstances, seek access to medical records and arrange medical examinations, as well as taking other steps to promote a return to work.

39. There are reports from the Bolton Physiotherapy Clinic dated 12 June 2019 and 17 June 2019. Those reports appear to rely mainly on Mr Smith 's reported symptoms. They note (in contrast to the orthopaedic report) that by this stage Mr Smith is saying that he is struggling with sleep due to pain. They further note struggling to pick up a kettle and a cup of tea due to sharp shooting pain in his wrist, finding it difficult to take type and to do any activity that requires grip. Finally, they report that in driving to the gym and back (a journey which Mr Smith told us was in the region of 20 minutes) he experiences symptoms in both his wrist and ankle. Under the heading "Plan" on 17 June report it is noted, "*Physiotherapy: heat treatment was applied and advice given but this gentleman's main aim was to receive a report from us for his insurance company*".

40. There is a letter dated 23 July 2019 from Mr Smith 's GP to LV insurance company. This includes the following:

> "*He reports the pain has continued. X-rays taken in January 2019 have been normal. There is no explanation as to why he is still feeling pain.*
>
> *I am unable to say how his current symptoms impact on his daily life or give a prognosis on his returning back to work as this is a very subjective matter*."

41. The bundle contains a detailed functional capacity evaluation report compiled by a company called Innovate Healthcare. The report relies on an assessment which took place on 10 July 2019 and the report itself is dated 24 July 2019. We were not told the purpose for which this report was obtained, although it was not

commissioned by the respondent which was taking no steps to address Mr Smith's absence at this time. The report contains the following statement:

> "*Taking into consideration the results of this evaluation, and the general physical guidelines required to perform the role of HGV driver, it is our opinion that Mr Smith does not currently have the physical capacity to perform this role in a full-time or part-time capacity. This is due to the results of objective tests completed not matching the demands of the role. However, it was the opinion of the assessor that with engagement in physiotherapy treatment aimed at reducing his pain levels and improving his strength, a return to work would be achievable in the long-term.*"

42. This report also noted that Mr Smith was suffering from depression. The opinion of assessor is that added stressors (including those related to his housing problems) would have a negative impact on ability to manage pain levels. Later emails indicated that the report was, at some stage, supplied to the respondent, although we were given no evidence as to when or how this happened.

43. Despite Mr Smith's evidence (supported to some extent in the documents) about having previously accessed physiotherapy, the report observes that he has had "minimal" physiotherapy input. On this basis, it was considered that he had developed fear avoidance behaviours and that his pain levels were not being managed adequately. It was considered he would benefit from education regarding his injury and guidance regarding rehabilitation. It went on to say:

> "*Innovate would recommend monitoring Mr Smith's progress with treatment via our return to work function programme (standard) for an anticipated timeframe of five months to monitor any treatment and also to liaise with his employer regarding a return to work. At an appropriate time Innovate would recommend arranging a Work Site Assessment (WSA) to determine the physical demands of his pre-injury job role and develop a phased return if appropriate."*

44. Under the heading "Additional Information" the report includes some comments about Mr Smith's ability to perform various tasks. It records that he was able to perform tasks such as vacuuming and cleaning his home and would predominantly use his left hand for these tasks and pace his activities. (Mr Smith's left hand is the unaffected hand and also his non-dominant hand so not the one that would be used in preference.) The report goes on to state:

> "*He stated he would utilise a rucksack for food shopping and to avoid carrying tasks and would attend the supermarket fortnightly*."

45. This conflicts somewhat with evidence that we were given which was that Mr Smith attended the supermarket monthly and did not use a vacuum cleaner. There was a lengthy discussion about during which Mr Smith eventually told us that he did not have a vacuum cleaner at all and had never had one, which was why he did not vacuum, although he considered he would be able to do so if required to. Mr Smith is of the view that a stiff brush performs the task more effectively than a vacuum cleaner in any event, a point which he made repeatedly. Confusion such as this in Mr Smith's evidence made it very difficult for the Tribunal to establish facts from his evidence.

46. The Innovate report also states that Mr Smith was able to prepare meals independently and was able to complete tasks (such as peeling potatoes) using his right hand, however he tended to favour ready meals. Again, this was in conflict with Mr Smith's evidence to us, which was that he could not peel potatoes with his right hand and preferred fresh produce but used ready meals due to the effects of his injury.

47. Helpfully, the Innovate report contained a detailed account of the demands of Mr Smith's role, which both parties agreed with and which we have drawn on in this judgment. Under the "*Rehabilitation and return to work recommendations*" the first bullet point stated: "*At the time of the Innovate assessment Mr Smith did not demonstrate the capacity to perform his pre-injury role in a full-time or part-time capacity*". In subsequent bullet points the report expands on Innovate's proposal for Mr Smith to participate in their return to work and function programme for five months. This would have various aspects to is but, in particular, would involve Innovate liaising with Mr Smith's employer to discuss return to work options and establish the possibility of him returning to lighter duties if available.

> "*This will allow us to drive his return to work alongside any approved physiotherapy treatment to enable an optimal return to full duties in the workplace in a timely but sustainable manner*."

48. It was the opinion of the assessor that would be imperative to rebuild the working relationship between Mr Smith and his employer in order to assist with the return to work.

49. Innovate were not subsequently engaged to carry out the work that they had proposed in relation to Mr Smith. Mr Smith continued to provide fit notes from his GP through August and September 2019. It appears that there may have been some gaps in the periods covered by fit notes but there is no suggestion by either party that Mr Smith 's position materially changed.

50. The bundle also contains a report from a Professor Patrick A Nee dated 28 February 2020 which is headed as a report to the court. Like much of the documentation in this case, this appears to have been prepared for the purposes of litigation rather than as part of Mr Smith's treatment. The report is brief and suggests that Mr Smith should have an MRI scan of the right wrist upon which Professor Nee will report again. That does not appear to have taken place. It also suggests physiotherapy for the right ankle and suggests the present problem refers to the recurrent sprains due to the loss of proprioception. At least a dozen treatments of physiotherapy are required and with the appropriate treatment the recurrent sprain problem should resolve within six months of the start of the treatment.

51. Of course, as noted above, there is evidence that Mr Smith had already had some physiotherapy, but there was no clear account in his evidence or the medical records of what treatment had been accessed and when.

Contact from respondent resumes

52. The first evidence of any contact by the respondent in attempting to manage Mr Smith's sickness absence came on 5 May 2020, that is approximately 16 months after his absence commenced. This was an email from Julie Kenyon, who was the

Operations Manager based at the respondent's Bolton site, and it appears to have been prompted by emails from Mr Smith and also from Michelle Foster at Innovate who is involved in supporting him at this time. Those emails concerned the regulatory requirements for Mr Smith to work as an HGV driver. In particular we understand that the professional development CPC regime required drivers to undertake around seven hours of training per year, and presumably to report the same. In addition to this Mr Smith's driving licence would need to be renewed every five years, including successful completion of a medical.

53. As well as Mr Smith's emails, we also note that this timing coincided with Culina Group taking a more active role in oversight at the respondent, including establishing a more effective HR function. Mr Muller had been seconded to the respondent in a general senior management role in March 2020 and Danielle Bannister (who did not give evidence) was recruited as an HR business partner for the respondent in around May.

54. We infer from the email trail that Mr Smith was seeking to take steps to maintain his licence and ability to drive, notwithstanding his ongoing ill health. The email from Ms Kenyon on 5 May noted that, "*It looks like you may now be near a position of returning to work in some capacity (hopefully as an HGV driver ultimately)*" and proposed a referral to Occupational Health advisers to conduct a telephone consultation.

55. The Tribunal finds it somewhat surprising that Ms Kenyon proposed an Occupational Health referral before having any sort of welfare meeting with Mr Smith. Nonetheless Mr Smith gave his consent, and an Occupational Health report was duly prepared.

56. Although both parties seem to agree that Occupational Health was at some point sent Mr Smith 's medical records, it is not clear to the panel whether this happened before the conversation that led to this report. In any event, a telephone appointment took place between Mr Smith and Lorraine Roberts, Occupational Health adviser, on or around 2 June 2020.

57. Mr Smith introduced into evidence a document which purported to be a transcript of the conversation on 2 June 2020 and also of a later conversation on 14 July 2020. However, it was not clear from the lengthy transcript document whether this was actually one conversation or two conversations, as there was no clear point where the first conversation appeared to end. Subject to this uncertainty around to which date any particular comment should be attributed, the respondent did not dispute the evidence introduced by the transcript.

58. We make the following observations about this conversation. Firstly, that Mr Smith is very pre-occupied, as he was during this hearing, with the precise diagnosis of his wrist injury, and in particular with his insistence that the proper diagnosis was of a repetitive strain injury. The Occupational Health adviser considered (given the history of which she was aware) that she was dealing with a traumatic injury rather than a repetitive injury, and this debate occupied much time in the conversation. The depression diagnosis is also alluded to.

59. Mr Smith also appears to have been very preoccupied with the CPC qualification and his lack of other qualifications to do roles in the warehouse. It is

also notable that Mr Smith seems unable to give a straight answer to questions about his current health condition and his symptoms. For example, he is recorded as saying that his wrist and ankle are "*aching at the moment*" but in response to the question of "*Is your pain and your disability any better now than it was six months ago?*" he first gives the answer "*well*". When pressed for a yes or no answer he says "*I know what you are asking me, yeah I could say no and the fact is though the answer could be yes*". He then goes on to say that "*it hurts like hell at night but during the daytime just relaxing it is not so bad, but I do have to get up*". Asked for the sixth time if the pain is the same or better than six months ago Mr Smith 's response is "*it is the same to be honest in my opinion*".

60. The respondent submitted that Mr Smith was somebody who was concerned to ensure that his answers best served his current position, whether that be in relation to a personal injury claim, an insurance claim or potentially returning to work than giving honest and straightforward answers about the symptoms he was experiencing. We have some sympathy with this submission. However, we find that Mr Smith was genuinely confused and had little grip on the complexity of the medical evidence. We also find it likely that his responses to the respondent at this time were influenced by the fact that he was struggling with poor mental health.

61. The final important part of this conversation related to an exchange about the GP medical certificates. Ms Roberts on several occasions suggested that Mr Smith could come back to work whilst still being covered by an "unfit to work" MED3 certificate. She stated during the conversation that in appropriate cases she could override the sick note.

62. Ms Roberts produced a short report for the business dated 2 June 2020 in the form of a letter. It included the following (<u>emphasis added</u>):

> "*As I am sure you are aware, even with quite severe tendon or ligament damage the healing time is usually anything between six and 12 weeks. His absence has clearly been a lot longer than that and I have been unable to establish why that is the case today. Indeed he is not even covered by a MED3 cert at this time.*
>
> *He says he is still having treatment and has had to see a professor regarding the injury but there are no further treatments due and he has not been very specific about why he is not back at work. In fact he has said he would be happy to go back if you can arrange some adjusted duties for him and <u>I would suggest in the first instance you carry out a driver assessment with him.</u>*
>
> *I suspect that some of the problem is that he has had no contact from anyone at work and I believe he has a claim against the company so his legal team will not be encouraging an early return. My guidance suggests that the treatment and recovery of injuries can be complicated by litigation and it is noteworthy that lengthy legal proceedings and repeated examinations for the same are often unhelpful and impede recovery. I have spoken to him at length today and I went over the same question several times and I have been unable to establish why he is not back at work. He has no further treatments, tests or investigations due and does not take medication for any pain although he was insisting that he is not recovered.*

> *I have therefore advised him that you will be inviting him on site to discuss his options. He is highly likely to afford the protection of the Equality Act and if you manage to get a start date agreed with him, I will only review him if he claims to have issues with what you are asking him to do.*"

Welfare Meetings

63. Ms Kenyon duly wrote to Mr Smith on 5 June 2020 to invite him to attend a meeting at the depot on 12 June 2020 to discuss the Occupational Health reports and a possible return to work. The meeting was later rescheduled for 18 June 2020.

64. There were brief bullet point notes of this meeting. The notes record that Mr Smith opened the meeting by asking if he could record it, and this was declined. Then Ms Kenyon asked him how he was feeling, and Mr Smith refused to comment and said he was "*only here to discuss facts*". The notes go on to record that Mr Smith did not understand why Ms Kenyon thought he might be fit to return to work as he was not able to return to work. There was then a lengthy discussion about whether Mr Smith could access the accident report or accident book.

65. This was an issue which might have been relevant to the ongoing personal injury litigation/potential litigation, but was not relevant to the purpose of this meeting or any potential return to work. We find that it was a common feature of Mr Smith's discussions with his employer than the idea of a return to work does not generally seem to have been top of the agenda, and that Mr Smith was invariably focussing on other matters. It appears there was a brief discussion about warehouse work and Mr Smith suggested that he was not able to use his wrist without pain or stand for too long. The notes record that Mr Smith was advised by Ms Kenyon to speak to his appointed professor and physio provider as she did not want to offer alternative employment that may worsen his injuries and not aid his recovery: "*This would assist us in understanding what Mr Smith was able to do and any recommended adjustments*".

66. There was a letter sent on 24 June 2020 following up from that meeting. Mr Smith was invited to a further meeting on 29 June, again described as a welfare meeting, at which Danielle Bannister would also attend.

67. The meeting on 29 June 2020 opened with a discussion of Mr Smith 's fitness. Mr Smith said that his wrist and ankle were still causing him an issue and that he was not able to return at the moment and to expect another note from the GP. There was also a discussion about Mr Smith requiring confirmation from his physiotherapist that he is fit to return.

68. In a follow-up letter dated 10 July 2020 the respondent, through Ms Bannister, proposed another referral to Occupational Health. She also provided a copy of the sickness absence policy which was, as we understand it, a new Culina sickness absence policy which Mr Smith would not previously have had access to. The letter notes that Mr Smith 's sick pay entitlement had run between 13 January and 14 July 2019, so at this point his sick pay had been exhausted for almost exactly one year. The letter concludes:

> "*Once you have spoken again to the Occupational Health team I will arrange another meeting to discuss your anticipated return to work. If there is no*

> *anticipated return to work within a reasonable timeframe and no reasonable adjustments we are able to make then we will need to discuss the next steps with you given that your absence has now spanned over 18 months*."

69. A further report was produced by Ms Roberts on 14 July 2020. This followed a further conversation with Mr Smith. As we have said earlier, we understand that that conversation is reflected in the amalgamated transcript from 2 June and 14 July which was prepared by Mr Smith. The letter notes:

> "*We spoke at length today and I can tell you when he gave me a single answer he contradicted that with another one five minutes later*."

70. There is little added to the previous letter in terms of discussion of symptoms or diagnosis. We do note the following comment (emphasis added):

> "*I asked him why he could not attend work before the physiotherapy is finished and he said he wanted to get the approval of his physio and his GP before he came back. They will of course only be guided by what he is telling them and as I do not think he is at all motivated to get back to work you should expect continuing MED3 certs. You will note I have advised Danny that I can overrule a MED3 cert if I thought it was appropriate and safe to do so.*
>
> *That being said I still believe he is fit for some work and he did actually say he was happy to give anything a go, though you should appreciate he has very limited skills apart from driving and he is actively trying to get his CPC reinstated so he can do that.*"

71. Given what comes later in this narrative, it is significant that the idea of Mr Smith seeking the approval or agreement of his medical practitioners for him to return to work is something that was being discussed at this stage in proceedings.

72. On 27 July 2020 Mr Michael Smith sent a letter to Ms Bannister. There is sometimes a disparity in what appears to have been the tone and content of Mr Smith's discussions with his employer and then the tone and content of correspondence coming from Mr Michael Smith. The former being more positive and conciliatory (if sometimes very confused) and the letter being often negative and tending towards being obstructive.

73. The email of 27 July 2020 is around three pages long and sets out what purports to be 19 points of clarification. The first two of these supports the contention that Mr Smith should receive backpay (which was not an argument advanced in the proceedings before the Tribunal), and the third raises concerns about the qualifications/professionalism of the Occupational Health adviser. The text is discursive, and it is not easy to understand the points being made in relation to each of the matters Michael Smith raises. Eventually, at points 12, 13, 14 and 15 various suggestions are made for reasonable adjustments. These are that:

- Occupational Health should obtain a particular type of shoe to assist with the ankle injury whilst driving.
- Similarly, that special gloves should be obtained.

- A co-driver should remove and load the pallets.

- Finally, "*as a start, local deliveries are kept short, recommended for Danny.*"

74. Ms Bannister responded to this email on 30 July 2020. The pertinent paragraph is as follows:

> "*The rest of this email relates to Danny's return to work – which in our last meeting, myself and Julie both asked Danny about considering alternatives, reasonable adjustments etc. However, as I'm sure you will remember at that point Danny said he was not in a position to return to work in any capacity as he was still in a lot of pain and was being guided by his physio and GP, still had a sick note and was unsure on a return to work date. If this has now changed in light of your email below we can happily discuss things again. Therefore the next steps will be to write to Danny to arrange a further meeting to progress this matter."*

75. The medical notes indicate that Mr Smith had a telephone appointment with his GP on 7 August 2020. The record includes the following note:

> "*Called PT to update him. He states solicitors are no longer pursuing his case and have dropped the case. He was referred to Professor Patrick by his solicitors. Feels needs a scan to figure you what is wrong with ankle/wrist. Explains cannot request scan directly. Would need to be clinically indicated and usually done by ortho. As injury was so long ago any fractures would have healed by now and initial x-rays were normal."*

76. In giving evidence in response to questions from the Tribunal Mr Smith confirmed that he had had a personal injury claim against the respondent and that the claim had been discontinued around this date. During final submissions, however, the parties put forward a joint statement confirming that a personal injury claim form had actually been issued on 25 November 2021 relating to injuries allegedly sustained to his right wrist and ankle at an accident at work on 29 November 2018.

77. We do not make any findings that Mr Smith intended to mislead the Tribunal about this (as the respondent suggested we should). It is evident from the medical records that there was a great deal of communication throughout this period in relation to claims being made. We know that Mr Smith made a claim against a personal ill health insurance policy that he had and was paid for loss of earnings resulting from his injury. It may also be the case that personal injury litigation was contemplated at an earlier point and legal advice was sought. Although it is evident that there was much activity, it is equally evident to us that Mr Smith has little recollection of the distinction between these various claims (in both the legal and insurance sense) and has little grasp on the chronology of events.

78. On 18 August 2020 Mr Smith wrote to Ms Bannister. The email included the following statement:

> "*The pain in both wrist and ankle, is a bane, unable to go swimming, to exercise."*

> *"Have you thought about another role that I can do in the company? Unfortunately litigation will be followed imminently, unless an in-house agreement can be found, one will be disappointed if that is the only recourse*."

79. On the same date Mr Smith submitted a further sick note citing wrist and ankle pain. This certified him as unfit for work for a further month until 19 September 2020.

80. Ms Bannister replied by a letter dated 28 August 2020 which summarised the chronology of events to date and proposed that the respondent would now seek a report from Mr Smith's GP in order that they could further understand his condition. Consent to write to Mr Smith 's GP was obtained and a letter was prepared. It sought the GP's opinion on the following issues:

> *(1) The diagnosis and particularly the prognosis of his condition given that it is a lengthy absence for a sprain injury.*
>
> *(2) The nature of any treatment planned.*
>
> *(3) The timescales likely to be involved for his full recovery.*
>
> *(4) Whether or not there are likely to be any permanent implications for his health.*
>
> (5) *The nature of any restrictions his employers may need to consider*.

81. By a letter dated 3 September 2020 Ms Bannister invited Mr Smith to a further welfare meeting on 10 September 2020. This meeting was delayed due to COVID restrictions and a new date was not immediately set. A further MED3 was produced on 21 September 2020 indicating that Mr Smith remained unfit for work until 19 October 2020.

82. A GP report responding to the respondent's letter was produced on 1 October 2020 signed by Dr Nakhuda. The report gives a brief history of the injury. It is stated that Mr Smith reported attending private physiotherapy on a weekly basis for the last 18 months organised by his solicitor. The report also references the report of Professor Patrick Nee mentioned earlier and records that Professor Nee had recommended an MRI scan of the wrist. It further records that Mr Smith had been referred for an MRI scan on 21 September 2020.

83. We note that it appears that the recommendation for an MRI scan made by Professor Nee was not actioned around the time of that report, and the realisation of that may explain the difference in approach between 7 August (when a scan was said not to be clinically indicated) and the decision in September to order the scan, although these matters are opaque from the medical records and that Mr Smith's evidence was of no assistance in understanding the course of investigations and treatment that he had received.

84. We also note that that the clinical records for this period consistently reflect that Mr Smith was reporting pain, for example:

> *7 August 2020: "Constant pain since accident. Using ice packs".*

17 August 2020: "Ongoing wrist pain". "Ongoing ankle pain".

85. The final paragraph of Dr Nakhuda's report stated:

> "*I am unable to comment further regarding timescale to full recovery, permanent implications to his health and restrictions his employer may need to consider. However Professor Nee felt the ankle should recover with a dozen treatments of physiotherapy within six months and there shouldn't be any long-term implications of the ankle injury. The prognosis and management of the wrist injury would be dependent on the MRI scan of the wrist."*

86. Although the GP report was dated 1 October 2020 it appears it was not sent to the respondent's Occupational Health department until around 4 November 2020 as Dr Nakhuda was awaiting confirmation from Mr Smith that he was content for it to be sent.

87. In the meantime, contact between the parties continued with a letter dated 6 October 2020 from Ms Bannister to Mr Smith. This referenced the fact that Mr Smith had successfully updated his CPC qualification and the respondent at his request provided details of a GP who could do the required medical assessment for the renewal of Mr Smith 's HGV driving licence. That medical assessment was ultimately successfully completed. However, we accept the respondent's evidence (which largely accorded with that of Mr Smith) that this assessment deals with matters such as eyesight and blood pressure and would not assess Mr Smith 's fitness to drive a vehicle in terms of any orthopaedic injury that he may be carrying.

88. This letter also contains a reference to Ms Bannister being contacted by "Michelle" at Innovate. This reference was something of a surprise to the Tribunal as there is little other evidence of Innovate still being involved following the production of the report by that company mentioned earlier.

89. The Tribunal considered it very unfortunate that Ms Bannister (and indeed Ms Kenyon) was not called to give evidence as part of these proceedings, despite hearing in evidence that they both still work for the organisation. In a claim involving a capability dismissal for long-term ill health the management of that ill-health absence over a period of time is likely to be significant as that is the background against which the final decision to dismiss must be set. There were questions which Mr Smith would have wished to ask in relation to that process and, indeed, which the Tribunal would have wished to ask in relation to that process had Ms Bannister been here. Although Mr Muller (who was the dismissing officer) did his best to address some of the points, and of course much of the chronology appears from the correspondence, there were matters (such as this reference to Innovate) which Mr Muller through no fault of his own was simply unable to assist on. It is likely that our findings of fact could have been more concise had we had witness evidence on these matters (much of which may have been undisputed) rather than having to piece the narrative together from the documents.

90. There was a welfare call between Ms Bannister and Mr Smith on 9 October 2020. The notes indicate that Mr Smith *"spoke about constant throbbing and couldn't forget the pain but had been trying to do some walking*". There is also reference to a

CAT scan (not an MRI scan) due to take place in November. Mr Smith told Ms Bannister he was waiting to hear about that.

91. A further GP fit note was produced on 21 October 2020 certifying Mr Smith as unfit for work until 2 November 2020.

92. On 2 November 2020 Dr Nakhuda completed (at Mr Smith's request) a disabled students' allowances disability evidence form on behalf of Mr Smith. We are told that this was in circumstances where Mr Smith had decided to commence a course of study in law. There is no other evidence in relation to this course of study or the level at which Mr Smith was studying. The form asks whether the student has a physical, sensory or mental disability which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, including education. The footnotes to that question indicate that the definitions used for the section 6 EqA test apply. There is a "yes" and "no" tick box and the doctor has crossed one large cross through both boxes, seemingly indicating an inability to confirm one way or the other. He then records "*right sided wrist pain and ankle pain since November 2018 following an accident/slip at work. Unable to comment on affect/ability to carry out activities*". It is not suggested that the respondent had sight of this document prior to the litigation, however it is a document which we may take into account in considering whether Mr Smith was disabled at this time, which is the key time for the purposes of this claim.

93. A further GP fit note was submitted on 6 November 2020 indicating that Mr Smith would be unfit for work until 28 December 2020. The diagnosis given in this certificate is "wrist pain".

94. A letter from Royal Bolton Hospital typed on 24 November 2020 records that Mr Smith had a telephone appointment with the Orthopaedic Interface Service on 7 November 2020. We infer that that was in relation to booking a scan. The letter records that Mr Smith had failed to answer on several attempts and he had therefore been discharged from the service.

95. On 7 November 2020, having received the GP report, Ms Roberts, the Occupational Health adviser, produced an updated report for the respondent. This report outlines that the GP report confirms an ankle injury and a wrist injury dating from 2018. It reiterates some of the history set out in the GP report and also refers to Professor Nee's report and the recommendation for the MRI scan of the wrist. It contains the following key paragraphs:

> "*What is clear is that Danny appears to be quite symptomatic from his injury still and continues to claim that he unable to work because of those. Indeed the GP is unable to give any timescales for a full recovery, advise on whether or not there will be any permanent implications for his health, nor whether or not he could make his return to work with adjustments in place.*
>
> *He has noted that the professor thought Danny might be able to make his return to work as far as the ankle is concerned within six months and perhaps with a dozen physiotherapy sessions. As far as the wrist is concerned that would depend on the MRI results which are available but is likely to mean even more physiotherapy.*

> *It is therefore my opinion that on the balanced of probability, given the amount of time he has had off work already and his ongoing 'chronic' symptoms, Danny is unable to be able to make his return to work in any capacity for the foreseeable future.*"

96. A further welfare call took place on 11 November 2020. The notes in the bundle record that Mr Smith stated he was still in some pain. Ms Bannister in that call raised the possibility of a capability meeting which might result in a termination of employment with notice on grounds of medical capability.

Dismissal process

97. Subsequently on 16 November 2020 Mr Smith was invited to such a meeting to take place on 23 November 2020 to be chaired by Daniel Muller, Area Transport Manager. The invitation letter details a number of enclosures that were provided to Mr Smith. Mr Muller in his evidence confirmed that these enclosures reflected the material that he had before him at the capability meeting.

98. The first enclosure was the sickness absence policy. This had been provided to Mr Smith in July, but not earlier in his absence. The enclosures also included a current vacancy list, the Occupational Health reports dated 2 June, 14 July and 7 November 2020, and the welfare meeting notes we have referred to above.

99. We note that no underlying medical evidence was provided to Mr Muller. This included the GP report and Professor Nee's report, despite the fact that both of these were referred to in the latest Occupational Health letter. Nor was the Innovate report included as one of the enclosures.

100. The meeting duly took place on 23 November 2020 at 9.05am. Handwritten notes were taken by Ms Bannister who was in attendance along with Mr Smith and Mr Muller. Mr Smith was not accompanied and there is a note at the start indicating that he was happy to proceed in that way.

101. Towards the start of the meeting Mr Smith raised the subject of a PET scan (not a CAT scan or an MRI scan). He states:

> "*If you can organise this I could come back, start working the weekend in short-term, review it after 3-6 months, see how I'm doing, repetitive strain will show on scan*."

102. Mr Smith repeated more than once in this meeting that he wished the company to pay for him to have a private PET scan.

103. As we have noted, Mr Smith was and continues to be very preoccupied by his desire to demonstrate that his injury was a repetitive strain injury as opposed to a traumatic injury resulting from a single accident. The Tribunal is at something of a loss to understand the significance of this distinction.

104. We also failed to establish why at this point Mr Smith was seeking a PET scan given the other types of scan that had been discussed with his clinicians, or why he believed that the results of the PET scan would have a bearing on his ability to return to work. It appeared from questions put by Michael Smith and comments he made,

as well as from some of Mr Smith's evidence, that it may have been Michael Smith's belief that seeking a PET scan was the medically appropriate way forward at this point. Again, we fail to understand how or why he reached this conclusion, but for whatever reason it was a matter that Mr Smith was putting front and centre of his concerns and points he wished to make at the capability hearing with Mr Muller.

105. Mr Muller responded that the company would not arrange a private scan as that was not a usual process nor reasonable. He observed that the company could not influence how the NHS operates. Mr Muller attempted to move the discussion on to the Occupational Health report of 7 November 2020, pointing out that the conclusion that it seemed unlikely that Mr Smith would be able to come back to work in any capacity. Mr Muller gave his own view that there was "*an overriding safety issue around this, we need to be sure that you're safe*".

106. Mr Muller expanded on this point somewhat in his evidence before the Tribunal. He explained in some detail (and again this largely accorded with Mr Smith's own evidence in response to questions) the physical demands of a driving job such as the one held by Mr Smith. Our findings on this are summarised at paragraph 21 above. In short, everyone agrees it is a very physically demanding job. Mr Muller emphasised the damage that could be caused by Mr Smith being struck by pain and therefore not fully in control of a vehicle that potentially weighs up to 28 tonnes when fully laden and can travel at up to 56 miles an hour. He was concerned both about the safety of Mr Smith and other road users in the event of an accident, but separately about the safety of Mr Smith in terms of the physical demands of the role potentially causing further damage to his injured wrist and/or ankle, even absent any road traffic accident. We consider that both aspects of this concern were entirely justified and legitimate.

107. There was some limited discussion in the meeting about possible alternative roles in the warehouse. Essentially, Mr Muller's position was that this would avoid the potential for a catastrophic road traffic incident, but there remained risks to health and safety both to Mr Smith and also potentially to others due to the physical nature of work in the warehouse and the use of machinery and so on. It is also fair to say that Mr Smith at no point seems to have pursued the question of alternative roles with any enthusiasm. He referred several times to being a driver and to his love of driving. It appears clear to us (as it appeared clear to Mr Muller) that, if there was to be a return, Mr Smith's real wish was to return to the role that he had previously held.

108. Mr Smith raised the possibility of working one day a week, to which Mr Muller's response was that this was not generally a working pattern available at Warrens but "*we can look at options*". There was a similar discussion around particular runs that Mr Smith might be better suited to doing and to the use of a co-driver. Again, Mr Muller did indicate that they could look at options but made no attempt to engage in the specifics of what an adjusted role might involve.

109. Mr Muller does appear to have been quite negative in the meeting about the possibility of allocating a co-driver to work with Mr Smith . This is unsurprising in circumstances where this was a role that used a single driver and therefore to allocate a co-driver would effectively be a 100% duplication of the manpower required.

110. There was a dispute between the parties in evidence about the request for a co-driver. Mr Michael Smith suggested vigorously (and Mr Smith supported this in his evidence) that what had been asked for was a one-off driving assessment with a co-driver present and potentially that would take place either on a single day or over a period of time, but in any event the request for the co-driver was time limited. Mr Muller's understanding of the request was that it was on a medium to long-term basis and that that would be the basis for Mr Smith returning to work.

111. We consider that the documents reflect Mr Muller's understanding of this request and we find that the request being made by Mr Smith at that stage was, if not for a permanent co-driver, then at least for a co-driver to assist him on a medium-term basis until he was well established back in the workplace without any fixed end point to that arrangement.

112. Significantly, Mr Muller asked Mr Smith during the meeting whether he was still in pain. The response is recorded as "*yes, it is aggravated*". He was then asked if the pain was in his wrist or ankle and he replied, "*Depends – walking, running, bicycle, going into the bottom of the ankle still hurts*". There then followed a discussion about wrist and ankle supports which Mr Smith said he had but that they did not really help.

113. The key discussion came at the end of the meeting and is recorded as follows. Ms Bannister noted that the GP had signed Mr Smith off until 28 December and had not mentioned any return or adjustments. She suggested to Mr Smith that that indicated he is not fit to return. Mr Smith responded that his idea was to start on one day a week. Ms Bannister asked if he had talked to his GP about this. Mr Smith's response was, "*He only does calls. I'm due to see face to face. If I'm happy they're happy*". Mr Muller then commented "*that needs to be on the sick note. Current sick note: refrain from work at the moment, needs to state you're fit/adjustments*". Mr Smith then said, "*I could do one day a week. I'm sure he would overturn the medical if I talk to them*". Mr Muller responded, "*We would need that in front of us one day a week*", and then slightly later on, "*get in touch with your GP today, revert back*".

114. There is further discussion in which Mr Muller made it clear that it is Mr Smith's responsibility to go to his GP and that the respondent will need to see a certificate which indicates that Mr Smith is fit to return to work, potentially with adjustments. Mr Muller notes, "*We can't do any more until we hear differently from your GP*".

115. Mr Smith throughout this exchange continued to attempt to turn the conversation back to the question of the PET scan.

116. At the end of the meeting Ms Bannister raised an issue in relation to timescales for talking to the GP. Mr Smith indicated "*I will call them now*". The notes record that the meeting closed at 9.48am. The note goes on to say that Mr Smith was to update Ms Bannister with further information once he had spoken to the GP in the morning. Mr Smith confirmed he could send the information that day but it was likely to be in the evening, and Mr Muller confirmed that was acceptable.

117. A further note, appended to the meeting note, records that Mr Smith called Ms Bannister at 12.47pm. He advised he was speaking to his GP at 8.00am on 24

November 2020 i.e. the following day. The note records that Ms Bannister and Mr Smith agreed that Mr Smith would update after he had spoken to his GP and also send through his other information. Mr Smith said "*that might be this evening*" if not he would send it altogether with the GP information on the morning of 24 November 2020.

118. There is nothing in the GP records to show that Mr Smith spoke with any clinician at the surgery on the morning of 24 November 2020. Mr Smith's evidence under questioning to the Tribunal is that he had tried to get through to the surgery on the day but had been unable to get an answer. That may well be consistent with the difficulty in accessing NHS appointments due to high demand bearing in mind the very significant pressure COVID was creating at that time. However, the respondent had been left with the impression that Mr Smith had called the day before and had made an appointment for 8.00am. Further, we find that Mr Smith did not tell the respondent at any point that he had been unable to get through. That statement was only put forward as part of his evidence in this case.

119. Ms Bannister sent an email to Mr Smith at 14:13 on 24 November 2020. The email states:

> "*We adjourned the meeting as you had cited you wished imminently to return to work and were going to provide us with further evidence to support this, which you were going to submit to us yesterday. In your subsequent call to me later that day you advised you would be speaking to your GP first thing on 24 November 2020 and would then update us. So far we have not received any additional information from you.*"

120. After summarising some of the chronology and medical information received to date Ms Bannister goes on to say:

> "*Please note if we do not hear back from you by 3.00pm today then Dan Muller will review the case and make a decision on the outcome based on the information available to him at the time*."

121. The Tribunal notes therefore that this chasing email gave Mr Smith only 45 minutes to provide the information it had been agreed he would obtain from his GP in a meeting two days before, failing which a decision would be made in its absence.

122. Nothing was provided by 3.00pm. However, by an email timed at 4.04pm Mr Smith attached a letter which had been prepared by his brother for the attention of Mr Muller. The letter extended over four pages and was broken down into three points. The first was a reiteration that the company should pay for a PET scan. It is stated that if this is refused then "*I will place it before an Employment Tribunal for the tribunal chairperson to decide on the PET scan*." The second issue was around a complaint that Mr Smith did not have a copy of his employment contract. This was an on-going issue, which we understand had been complicated by the company attempting to re-issue contracts following the start of the joint venture with Culina. Again, Employment Tribunal proceedings are threatened if a satisfactory answer is not received. The third issue is "Employment back into work" which the letter states is "relatively straightforward". Various adjustments are mentioned, including wrist and ankle supports and the use of a co-driver, as well as payment by the employer for medical treatment and physio. There was no mention in this letter of the agreement

in the meeting that Mr Smith would speak to his GP about getting signed fit to return to work, and that he would update his employer about this.

123. Mr Muller duly went ahead and made a decision. He terminated Mr Smith's employment by letter dated 26 November 2020. Although this was a dismissal with immediate effect, Mr Smith was paid in lieu of his notice period, as set out in the letter. The letter runs to three pages, it gives a history of Mr Smith's illness and of the capability process which the business had followed in the preceding months. The letter records that the business would not pay for a PET scan and, in any event, Mr Muller did not understand how obtaining such a scan would be likely to assist in facilitating a return to work. It notes the adjustments requested by Mr Smith and raises some potential difficulties with providing these (particularly the co-driver proposal). Mr Muller reiterated the conversation about obtaining GP approval for a return to work and noted that Mr Smith had not done so. He therefore states "*I must base my decision on the information available to me, namely the most recent Occupational Health report and your current sick note"* before reaching the conclusion that "*there is little prospect for you to return to work, in any capacity, within a reasonable time frame".* On this basis, Mr Muller explained in the letter that he had taken the decision to dismiss on grounds of capability.

124. Mr Muller was questioned about his decision-making process and about the adjustments proposed. There was some dispute around whether potential adjustments that had been touched on in the letter would be reasonable or not. Mr Muller's oral evidence was that he was willing to discuss the adjustments and to consider whether they would be appropriate, effective and reasonable. However, on Mr Muller's evidence the discussions never reached that point as he considered that he could not authorise Mr Smith's return without an indication from Mr Smith's GP that he was fit to return. Mr Muller envisaged that such a fit note might contain restrictions about the basis for the return to work, which the company would seek to accommodate, but without medical confirmation that some return was medically advisable, he felt he could not take the risk of allowing Mr Smith any sort of trial or phased return. Mr Muller described this as a doorway – potential adjustments such as supports, or co-driver assistance, lay on the other side of the doorway to be discussed, but until that medical confirmation was received, the door was shut and any discussions about those adjustments were just theoretical theoretical.

125. We accepted Mr Muller's evidence on how he had reached his decision and find that the evidence outlined above accurately reflects the approach that he took in his decision making.

126. The letter was sent by recorded delivery and received on 27 November 2020. On 30 November Mr Smith emailed Mr Muller and Ms Bannister stating that he disagreed with the decision to dismiss and asking for it to be reconsidered. The letter also contained the somewhat cryptic comment: "*With regards to speaking to my doctor, this on reflection was wrong*". It was suggested in cross-examination to Mr Smith that this was an indication that he had changed his mind about asking his doctor to sign him as fit to work between the meeting on the 24th and writing this email. Mr Smith was unable to answer the question and said the email was the responsibility of his representative (i.e. Mr Michael Smith) and that he (Danny Smith) had been depressed at the time.

127. The 30 November 2020 email was treated as an appeal against dismissal by the respondent and an appeal hearing was duly arranged for 9 December 2020. This was chaired by Steve Candelin, General Manager, who also gave evidence to the Tribunal. During the appeal hearing, Mr Smith informed Mr Candelin that he was due to have a PET scan that afternoon. Mr Smith had not obtained any 'fit note' or any indication from his GP that a return to work was appropriate. He raised three grounds of appeal. The first related to the accident book and the reporting of the original incident. Whilst that might have been relevant to a personal injury claim we do not consider it was relevant to the question of whether Mr Smith should be dismissed on grounds of capability two years later. The second point related to having a 'buddy' or a co-driver. Mr Smith asserted that Mr Muller had promised to look into this but had not done so. The third point was an assertion that there had been "miscommunication" between Mr Smith, Ms Bannister and Occupational Health about reasonable adjustments. However, it is not really clear to the Tribunal what the supposed miscommunication was.

128. Mr Candelin did not make a decision in the meeting, but communicated it in a letter dated 15 December 2020. The appeal was not upheld. In the letter Mr Candelin addressed the three points outlined above. Essentially, he supported Mr Muller's conclusions for the same reasons as Mr Muller had given. The key point was that in view of the continued sick note, no medical indication of fitness to return and Mr Smith's own reporting of on-going pain, it appeared that Mr Smith was not fit to return to his role and that to allow or encourage him to do so would create an unacceptable health and safety risk.

129. For completeness, we note that Mr Smith's GP records in the period late November-December 2020 include several references to a medical report being prepared for LV insurance company. There is no reference to Mr Smith having any conversation with his GP about a possible return to work. There is a note on the 10 December 2020 indicating that the "orthopaedics team" were trying to contact Mr Smith but were unable to get through and he has therefore been discharged with the advice that if he is "still having problems with your hand" he should book in for an appointment with a doctor. There are a number of letters round this time from the Orthopaedic Department of the Royal Bolton Hospital referencing on-going investigations in relation to Mr Smith's condition, including one which references an x-ray which took place on 9 December 2020. The x-ray revealed a small cist but not other abnormal features, no degenerative changes and no evidence of previous fractures.

130. There are later references to the persistence of an injury (predominantly, it would seem, the wrist injury) e.g on 11 May 2021 it is noted that "*he is a driver by trade and feels he cannot work due to his symptoms*". A letter from the Orthopaedic Department of the Royal Bolton Hospital dated 9 June 2021 indicates that Mr Smith was still suffering from pain at that point and an injection was administered to try to address this.

Relevant Legal Principles

Disability Status

131. Section 6 of the Equality Act 2010 deals with the question of 'disability status' i.e. when a person will be considered to be a disabled person for the purposes of the Act. It provides (as relevant) as follows:

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

132. The word "substantial" is defined in s.212(1) Equality Act 2010 as meaning "more than minor or trivial".

133. S. 6 is supplemented by Schedule 1 of the Act and by statutory guidance (Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)). We had regard to these, and to the EHRC's Code of Practice on Employment, particularly Appendix 1 which deals with the meaning of disability.

134. It is now well-established that a Tribunal making a determination of disability status must focus on what a person cannot do, or can do only with difficulty, rather than on the things he can do easily. As noted in the Code, it is relevant to consider whether an impairment means that a particular activity causes pain and fatigue, even if it does not prevent the claimant from undertaking it entirely.

Reasonable Adjustments

135. Where an employee is disabled within the meaning of s.6 EqA, their employer may come under a legal duty to make reasonable adjustments. This duty is set out in ss.20-21 EqA, which provide as follows:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) […]

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take Such steps as it is reasonable to have to take to provide the auxiliary aid.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) […]

136. Again, there is further guidance provided by the 2011 Code, to which we have had regard.

137. The Code defines an "auxiliary aid" as "*something which provides support or assistance to a disabled person. It can include provision of a specialist piece of equipment such as an adapted keyboard or text to speech software*." The Code also indicates that the employment of a support worker may be a reasonable adjustment in certain circumstances.

138. It is important to note (and often overlooked by parties, and even experienced representatives) that where the adjustment sought is the provision of an auxiliary aid, it is not necessary to identify a provision, criterion or practice ("PCP") giving rise to disadvantage.

139. The scope of the duty to make reasonable adjustments may extend to steps taken to rehabilitate and employee back into the workplace after long-term sickness absence. This will often include a phased return to work, but there may be other rehabilitative steps which are appropriate in different cases.

140. In this case, there is a question as to when such a duty to make arrangements for rehabilitation arises. The cases of **NCH Scotland v McHugh UKEATS0010/06** and **Doran v Department for Work and Pensions UKEATS0017/14** are authority for the proposition that a duty to make such adjustments will (at least usually) not be triggered until the claimant has indicated an intention to return to work.

Assertion of a statutory right

Section 15 – Discrimination arising from disability

141. Section 15 Equality Act 2010 ("EqA") provides:

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

142. The elements of discrimination arising from disability can be broken down as follows:

(a) unfavourable treatment causing a detriment;

(b) because of "something";

(c) which arises in consequence of the claimant's disability.

143. The respondent will have a defence if it can show:

(a) The unfavourable treatment is a proportionate means of achieving a legitimate aim – "objective justification"; or

(b) It did not know and could not reasonably have been expected to know that the claimant had the disability – the "knowledge defence".

144. In this case the respondent accepts that the dismissal was unfavourable treatment that arose from the claimant's long-term absence which itself arose in consequence of his disability (assuming disability status is proven). There was no reliance on the knowledge defence, therefore the only issue which falls to be determined was whether the dismissal was justified. This being the case we have not set out the relevant law relating to the other parts of the test.

145. The respondent will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This is the same test as for indirect discrimination and for direct discrimination on the grounds of age. Although there is limited legal authority on justification in the context of s.15 claims, principles developed from the application of the test in those other jurisdictions will be highly relevant.

146. The burden of proof in establishing both elements of the justification test lies with the respondent. In many cases the aim may be agreed to be legitimate but the argument will be about proportionality. This will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant as tests established in the context of indirect discrimination in **Hampson v Department of Education and Science [1989] ICR 179 CA**.

147. We had regard to paragraph 5.12 of the Code:

> *"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."*

148. In conducting this balancing exercise any failure to comply with the duty to make reasonable adjustments will be relevant. Paragraph 5.21 of the Code states:

> "*If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified*."

149. Where ill-health absence results from an injury sustained at work, or for which the employer is in some way to blame, there may be an obligation on the employer to "go the extra mile" before dismissal (**RBS plc v McAdie [2008] ICR 1087**).

150. Cost alone will not provide a justification for discriminatory treatment (**Woodcock v Cumbria Primary Care trust [2012] ICR 1126 CA**).

151. For the purposes of objective justification there is no rule that justification has to be limited to what was consciously and contemporaneously taken into account in the decision-making process (see **Cadman v Health and Safety Executive [2004] EWCA Civ 1317**).

152. The relationship between the test of objective justification and the band of reasonable responses test (applied in unfair dismissal claims) has proved to be a problematic issue. It is not necessarily an error of law for a tribunal to find that a claimant succeeds in a section 15 claim but fails in the unfair dismissal that runs alongside it (see **City of York Council v Grossett [2018] IRLR 746 CA**).

153. However, the Court of Appeal in **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547** had this to say about such cases where they arise from long-term sickness absence:

> "53. *However the basic point being made by the tribunal was that its finding that the dismissal of the appellant was disproportionate for the purpose of s.15 meant also that it was not reasonable for the purpose of s.98(4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and 'non-dismissal' are reasonable responses does not reduce the task of the tribunal under s.98(4) to one of 'quasi-*Wednesbury*' review… Thus in this context I very much doubt whether the two tests should lead to different results.*

154. We take from this both a caution - that we must afford the proper "substantial degree of respect" to the respondent's judgment in taking the steps that it considered to be proportionate in furtherance of its aim - and also an indication that it is likely in long-term absence situations that the same result should be reached whether the dismissal is viewed through the lens of justification or the lens of reasonableness.

155. Finally, we had regard to various other authorities which the parties referred to as being relevant to how we should apply the test of justification, including **Hardys & Hansons PLC v Lax [2005] IRLR 726 CA**,

Unfair dismissal

156. The claimant seeks to argue that this is a case of 'automatic' unfair dismissal under s104 ERA, in that the reason for dismissal was that he had asserted a relevant statutory right. The right relied on is the right to make a flexible working request under s80F ERA.

157. Section 80F ERA provides as follows:

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—

(a)the change relates to—

(i)the hours he is required to work,

(ii)the times when he is required to work,

(iii)where, as between his home and a place of business of his employer, he is required to work, or

(iv)such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations,…

(2) An application under this section must—

(a)state that it is such an application,

(b)specify the change applied for and the date on which it is proposed the change should become effective, and

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with,…

158. S.104 ERA provides as follows:

Assertion of statutory right.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a)whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

(b)-(e) [omitted]…

159. If the Tribunal does not accept the claimant's case of 'automatic' unfair dismissal, the claimant alternatively claims that this is a case of 'ordinary' unfair dismissal under s.98 ERA. S.98 requires the respondent to show that the dismissal

is for a potentially fair reason. In this case, the potentially fair reason relied on relates to the claimant's capability to perform the work that he was employed to do.

160. Subject to what we have said above about the inter-relation of the test under s.15 EqA and s.98 ERA, in a claim of unfair dismissal involving an ill-health capability dismissal we must determine, in accordance with equity and the substantial merits of the case, whether the employer acted reasonably in treating the absence as a sufficient reason for the dismissal of the employee. The essential framework for such an enquiry was described as follows by Eady J in **Monmouthshire County Council v Harris EAT 0332/2014** as follows:

> *'Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'.*

161. Similar guidance emerges from the case of **BS v Dundee City Council [2014] IRLR CSIH**:

> *"First… it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult with the employee and take his views into account… Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."* (Paragraph 29)

162. In **Lynock v Cereal Packaging Ltd [1988] ICR 670** there are various matters set out which might weigh one way or the other when considering whether dismissal was appropriate. Although that was a case of intermittent (rather than long-term) absence, we consider that this portion of Wood J's judgment remains of considerable value in a case such as this:

> *"The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment — sympathy, understanding and compassion… every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following: the nature of the illness; the likelihood of it recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching." (page 675, B-E).*

Submissions

163. Both parties prepared detailed written submissions, for which we are grateful. We read the submissions before we heard oral submissions. The oral submissions were relatively brief, as both representatives considered that they had made the key points in their written documents. They did take the opportunity to address points raised in each others' written documents and respond to them.

164. The claimant's submissions drew on the 2011 Code as well as on the relevant statutory provisions and some case law. Sometimes, this covered areas which were

not contested by the respondent. We make no criticism for this, but mention it because if we have not discussed a particular point in detail in this judgment it may well be because it was not in dispute. Michael Smith also referred to some first-instance case law that he wanted the Tribunal to consider. These cases were Tribunal-level cases which do not set out principles of law in the way that the higher-level cases above do. We need to consider this case on its own facts, in line with those principles.

165. The submissions emphasised that the respondent had (in the claimant's view) breached its legal obligations and its own policy. Strong emphasis was also placed on the argument that a capability assessment should have been carried out, and that this would have supported the claimant's case for particular adjustments to be made, as well as enabling him to return to work. Michael Smith stressed the severe impact this course of events had had on the claimant.

166. Mr Brown's submissions for the respondent summarised the factual background to the case, emphasising the respondent's position that the claimant's evidence was unreliable. Mr Brown then set out the relevant legal principles, this included references to various authorities, but only in respect of the unfair dismissal and s.15 claims. There were no authorities cited in relation to the question of disability status or on the reasonable adjustment claim.

167. Mr Brown went on to make submissions in relation to the matters set out in the list of issues. In respect of s.6, the respondent contended that the claimant had not shown that his impairments had a substantial adverse effect on his ability to carry out day to day activities.

168. In respect of the dismissal, Mr Brown acknowledged that the respondent had been at fault up to May/June 2019 but noted that there was no suggestion that the claimant would have been fit to return before that point. From then on, he contended the respondent acted properly, and certainly within the band of reasonable responses. In particular, it is submitted that it was reasonable of the respondent to require the claimant to provide evidence from his GP that he was fit to return with adjustments. Further, the decision to dismiss was justified/reasonable given the length of the absence, the lack of any clear prognosis and the fact that the claimant was still suffering from pain.

169. In relation to failure to make reasonable adjustments the respondent argued that the PCP in the list of issues had not been applied and, in any event, the duty to make adjustments did not arise which the claimant was certified as unfit for work. If the claimant's GP had indicated that he was fit to return, then, it was said, the respondent would have made adjustments as appropriate. The respondent finally submitted that the medical evidence from the post-dismissal period demonstrated that the claimant remained unfit to work, and that any compensation should be reduced to zero to reflect the fact that he would inevitably have been subject to a fair and non-discriminatory dismissal even if the Tribunal found fault with the process which the respondent had followed.

170. Further reference to specific submissions made by each side is made below, where we set out our conclusions on each issue.

Discussion and conclusions

171. We conducted our discussions with close reference to the List of Issues, relevant parts of which are reproduced below. We considered the claims in a slightly different order to the order in which they appeared in the List of Issues.

Disability status

Physical or mental impairment

172. The respondent did not dispute that the claimant had physical impairments, being pain in his right wrist and ankle. We are satisfied that this initial part of the test is met. As noted in the updated List of Issues, we make no determination as to whether either of the claimant's injuries are properly described as 'repetitive strain injuries' and it is not necessary for us to make such a determination for the purposes of this case.

Would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

173. The respondent's challenge to the claimant's assertion that he was disabled was focussed on this part of the test. The medical evidence suggested that the claimant's use of pain relief was minimal, so we were able to consider the evidence of his condition as it appeared from his evidence and the contemporaneous medical evidence, without considering the "deduced effect" of the impairment without treatment.

174. We unanimously concluded that the claimant's wrist injury *did* have a substantial adverse effect on his ability to carry out day to activities. The following factors were key to that decision:

174.1 There was a great deal of medical evidence from the claimants GP, from physiotherapists and from orthopaedic specialists which broadly recognised on-going, unresolved pain in his wrist. There was no suggestion from any of these clinicians (nor from the respondent) that the claimant's reports of pain were not genuine.

174.2 Although the claimant's evidence was confused, and he had difficulty giving clear answers (particularly to questions involving any changing position over time or questions with a hypothetical element - such as whether he would be capable of using a vacuum cleaner, as opposed to whether he was actually in the habit of using a vacuum cleaner), we did not find him to be a dishonest witness.

174.3 Following from this, we accepted his evidence in relation to certain examples given. In particular, we accepted that he had adjusted his life to accommodate the reduced functionality in his wrist. A particular example was that he was unable to undertake certain cooking tasks easily, such as peeling potatoes and vegetables. He therefore was in the habit of cooking ready meals (despite struggling to open the

packaging) whereas he would prefer to eat homecooked meals. We consider that basic food preparation activities are everyday activities and that the impact described is more than minor or trivial.

174.4 The respondent had submitted that this evidence was at odds with the effects reported in the Innovate report, and there is some force in that submission. However, other medical reports do reference difficulties experienced by the claimant and we consider that the divergence is most likely explained by miscommunication by the claimant. We heard the claimant explain his symptoms directly and we consider that we are entitled to prefer his evidence.

174.5 We also heard evidence that driving his car caused pain and stiffness and that he had had a ball joint fitted onto the steering wheel to make gripping and turning the wheel easier for him. We consider that driving an (unadapted) car is an everyday activity and that the fact that the claimant considered it necessary to make such adaptations indicates that his impairment had an adverse impact upon his ability to carry out that activity.

174.6 We considered that there was less convincing evidence about the impact of the claimant's ankle injury at the material time. There are few, if any, references to that injury in the medical records after around June 2020. Overall, however, we consider that the wrist injury had sufficient adverse impact on its own to satisfy the test, and that the ankle injury contributed something further to the overall impairment, albeit that it may have been minimal if taken alone.

Were the effects of the impairment long-term?

175. The medical evidence showed that the impairment dated from the incident in late 2018. Whilst the exact symptoms may have ebbed and flowed to a degree, we are satisfied that there was the requisite effect over a period of longer than 12 months by the time of the events with which we were concerned. The respondent did not argue otherwise.

Conclusions

176. For these reasons, we were satisfied that Mr Smith was a disabled person within the meaning of s.6 EqA at all relevant times.

Automatic unfair dismissal

Did the claimant assert a statutory right? The claimant claims that he asserted a statutory right to request contract variation in accordance with section 80F ERA

177. We are entirely satisfied that the claimant never made a statutory request for flexible working. As discussed with Mr Smith and Mr Michael Smith during the hearing, the s80F regime is very prescriptive, requiring an employee to make a request which states that it is an application under that

section and complies with other formalities. It is common ground that Mr Smith never did this.

178. In his submissions, Mr Michael Smith suggested that a "wide exemption" from these should be given to Mr Smith, for various reasons which were then set out. However, this Tribunal must apply the law set out in statute, the only discretion we have is that given by the law, and there is no such discretion here. There is nothing to prevent Mr Smith (or any other worker) making a request for flexible working which does not comply with the s.80F requirements, but such a request cannot support the claim made by Mr Smith, which specifically relies on the inter-relation between s.80F and s.104.

What was the principal reason the claimant was dismissed, and was it that he had asserted a statutory right?

179. Strictly speaking, we don't need to determine this as we have found that the statutory right relied on was not engaged in this case. For completeness, however, we are entirely satisfied that Mr Smith was not dismissed because of any requests or suggestions he made about returning to work on a part time or flexible basis. He was dismissed because of his lengthy absence and because the respondent did not consider him capable to return to work.

Failure to make reasonable adjustments

180. The claim about failure to make reasonable adjustments as set out in the List of Issues did not reflect the width of the matters which the claimant wanted to raise. We are aware that legally defining the issues (particularly the identification of a 'PCP') in a reasonable adjustments claim can be very difficult for non-legally qualified representatives to grapple with. We considered at the outset that we could add the two additional adjustments raised by the claimant which were not reflected in the list without causing prejudice to the respondent.

181. The respondent's position in evidence in respect of each of the adjustments contended for was that they were matters that could be 'on the table' if a return to work was imminent, but that that point was never reached due to the claimant's failure to obtain medical confirmation that he was (or would be at a given date) fit to return to work (including fit to return with adjustments).

PCP

182. The first issue, as set out in the list of issues, was whether the respondent had a provision, criterion or practice of requiring its drivers to engage in full-time or near full-time hours. The claimant accepted in evidence that there was no such requirement and, in the respondent's submission, that was the end of the matter.

183. We considered that a more apt PCP formulation in rehabilitation to work claims might be "a requirement that employees are capable of performing the requirements of the role", to include matters such as those set out at

paragraph 21 above. We are satisfied that the imposition of a PCP couched in these terms would place Mr Smith at a disadvantage.

184. It is, in certain circumstances, open to Tribunals to depart from the way in which matters have been formulated in a List of Issues, particularly where one party is unrepresented and may suffer prejudice if the Tribunal adheres slavishly to a List of Issues which that party may have agreed to without fully understanding. Ultimately, however we were satisfied that even if we did decide the case with reference to a more apt PCP, the claim in respect of reasonable adjustments would still fail, for the reasons set out below.

Could reasonable steps be taken to alleviate the disadvantage?

185. We consider that all of the steps proposed by the claimant *might* have been reasonable. In some cases, there was a dispute about what was proposed. For example, the respondent understood that Mr Smith wanted to drive with a 'buddy' on a long-term basis, whereas Mr Smith told us in evidence that he considered he would only need a buddy for a short period, and possible only during an initial assessment, until he satisfied himself that he could manage the driving himself. Ultimately, however, we find that the issue does not arise for determination because the duty was not triggered.

186. We had some sympathy for Mr Smith's argument that there was an impasse (described by him as a "Mexican stand off") over return to work. Another approach which the employer might have taken would be to work with Mr Smith to outline a specific plan for his return to work, including the exact hours and runs that he would undertake over an initial period, and any assessment that would take place, including assessment to determine what appropriate auxiliary aids might appropriately be provided, on the basis that Mr Smith could then take the plan to his GP with a view to be signed off as fit to work under it. Mr Smith's expectation that his employer could have acted more proactively in this respect is supported by some of the comments from the respondent's occupational health provider, specifically the reference to a "driver assessment" being an appropriate first step, and the reference to occupational health being able to "override" medical certificates.

187. Ultimately, however, in line with the ***Doran*** line of authorities, we are satisfied that the duty to make reasonable adjustments was not triggered in the circumstances of this case, and therefore that the employer did not breach its obligation by failing to act as suggested, or in some similar way. The key reasons for this are:

187.1 Mr Smith was in a safety-critical role. His physical impairment had the potential to impact his safety as a driver, with, potentially, critical consequences for other road users.

187.2 Further, it was his own position that performing this physical role had caused and/or exacerbated the impairment. The respondent was legitimately concerned about the risk of recurrence/further exacerbation.

187.3 Against that background, there was no medical evidence stating that, having been unfit to work for almost two years, Mr Smith was now

fit to work. This remained the case, even although the respondent (through its occupational health provider) had specifically asked the claimant's GP for a medical report to cover fitness to return to work, as part of the process leading up to dismissal.

187.4 Further, there was no unequivocal statement from Mr Smith that he considered himself to be fit for work. Rather there were contradictory statements about wanting to try to return, alongside being unsure that he was able to and still being in pain.

187.5 Mr Smith's suggestions about what would resolve this uncertainy – primarily a PET scan paid for by the respondent – were not supported by medical evidence or explanation. The position was also obscured by other matters (such as the provision of contractual documentation, or the argument about backpay) being given more focus in meetings and in litigious correspondence drafted by Michael Smith.

188. In those circumstances we consider that Mr Muller's approach of asking Mr Smith to obtain a medical certificate confirming that he was (or shortly would be) medically fit to return, and declining to consider the details of any reasonable adjustments until that was provided, was legitimate. There was therefore no failure to make reasonable adjustments because the duty to do so had not been triggered.

Auxiliary aid

189. In line with the (revised) list of issues, a slightly different test applies when considering whether the respondent breached its obligation to make reasonable adjustments by failing to provide auxiliary aids (i.e. a steering aid and gloves). There is no need to identify a PCP, instead we have to consider whether the absence of those items placed Mr Smith at a disadvantage and, if so, whether it would have been reasonable for the respondent to provide them.

190. Although the respondent accepted the change to the list of issues at the start of the case, the evidence about this matter from both parties was sparse. We don't know, for example, know whether steering aids affixed to steering wheels are permitted to be installed on LGVs under the relevant regulation. Such considerations would be highly relevant, perhaps determinative, of reasonableness. Equally, there is no medical evidence to explain how Mr Smith would have been better able to perform his role with the provision of a steering aid and/or gloves. His own evidence was vague – essentially that it would assist with pain – but he was inconsistent about the level of pain experienced and the impact of this pain on his ability to drive.

191. Ultimately, however, we consider that this part of the claim is also answered by the trigger point argument outlined above. We therefore make no findings on the disadvantage or reasonableness, but instead find that the duty to make this adjustment simply did not arise.

Discrimination arising from disability

192. Having regard to the Judgement in **O'Brien**, referred to above, we considered the dismissal firstly through the lens of s.15 EqA (discrimination arising from disability).

Did the following things arise in consequence of the claimant's disability:

(1) The claimant's absence from work between (approximately) end of December 2018 and November 2020?

193. We find this was something which arose in consequence of Mr Smith's disability; there was no real dispute about that.

Did the respondent treat the claimant unfavourably by dismissing the claimant because of his absence due to sickness?

194. Yes, having rejected the claimant's claim that his dismissal was on the ground that he had asserted a statutory right to request flexible working, we were satisfied that the reason for the dismissal was due to Mr Smith's on-going sickness absence.

The justification defence - has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

195. The respondent's two stated aims were (1) maintaining the health and safety of employees and others (in particular road users) and/or (2) managing sickness absence in order to maintain a workforce that is fit to perform the duties required of it by the Respondent. We accept those are legitimate aims.

196. We went on to consider whether Mr Muller's decision to dismiss represented a proportionate means of achieving those aims. We concluded that it did.

197. In reaching this conclusion we considered that both the aims relied on by the respondent were of significance, but that the first aim was of particular relevance in this case. We noted that the respondent had led no evidence of any particular operational difficulty caused by Mr Smith remaining on sickness absence, or of any pressing need to resolve the situation. Indeed, the fact that the respondent had blithely ignored Mr Smith for around 18 months of sickness absence suggests quite the opposite. We accept that after Mr Muller and Ms Bannister became involved in the organisation there was a move towards better management of HR matters, and that included more active management of Mr Smith's sickness absence. Even an employer such as this one must eventually be entitled to take the view that an absence had continued for long enough. What it cannot say (and did not try to say) is that there is an urgency to move towards dismissal for operational reasons, when any such urgency would be entirely artificial.

198. Instead, in both evidence and closing submissions the respondent emphasised the safety critical nature of the work and the absence of any firm suggestion from either the claimant or any doctor that he was fit to return to that work without increased risk to the public or to himself. We repeat the

matter set out at paragraphs 187-188 above. Essentially, in the circumstances of this case, it was justifiable for Mr Muller to require Mr Smith to obtain medical confirmation that he was fit to return (or shortly would be) and in the absence of this, dismissal was justified.

199. There are two further particular points which are relevant to this conclusion. Firstly, we considered whether the 45-minute deadline for Mr Smith to obtain that confirmation, as set out Ms Bannister's email of 24 November 2020 undermined our conclusion. We find that this deadline betrayed a degree of frustration that the respondent had with Mr Smith by this point. It is poor practice to ask an employee who is absent from work to respond within such a short time frame, especially where his job is at risk. Either it was the right thing to do to give Mr Smith another chance to seek the medical confirmation, in which case a reasonable period should have been given for a response, or else he had already been given sufficient opportunity and Mr Muller was entitled to make a decision without prompting Mr Smith again.

200. We find, firstly, that Mr Muller was entitled to make the decision without prompting Mr Smith again and, therefore, that the email prompting a response and setting the short deadline was surplus to requirements. In reaching this conclusion we remind ourselves that:

200.1 There had been discussion with the claimant as far back as July 2020 about the possibility of him obtaining sign-off from his GP to return to work (see paragraph 70 above).

200.2 The respondent had, properly, sought its own medical confirmation not long before the dismissal meeting via the report requested by occupational health and supplied to the respondent on 4 November 2020.

200.3 Mr Smith was not, himself, saying that he believed he was fit to return to work. Although he mentioned the possibility, he was very difficult to pin down, and was continuing to talk about being in pain and requiring reassurance or confirmation from clinicians that he was fit to return.

200.4 We find the discussion between Mr Smith, Mr Muller and Ms Bannister in the dismissal meeting and in the follow up was very clearly left on the basis that Mr Smith would speak to his doctor, and that he expected to be able to do so within a short period of time.

201. Further, we find that even if the short deadline imposed on 24 November made the dismissal a disproportionate response at the time of the decision, subsequent events showed that the same decision was inevitable. Mr Smith changed his mind, for whatever reason, about seeking confirmation of fitness from his GP. If he had done so in the days following the dismissal decision, or at any time up to the appeal hearing, then matters might be very different. The evidence shows he did not.

202. The second, and different, point concerns alternative employment. We reminded ourselves that a dismissal may not be proportionate if there were viable alternatives to dismissal and that this could include offering the claimant alternative roles. As we have noted in our findings of fact there were

some discussions at an earlier stage about the possibility of Mr Smith taking a warehouse role. We accept Mr Muller's evidence that these roles themselves where physical roles and came with similar safety concerns. We therefore accept that the same difficulty applied, in that Mr Muller (reasonably in our view) felt unable to place Mr Smith into that sort of role without positive medical confirmation of fitness. Further, this was not a point that was pressed by either Mr Smith in his evidence or by Mr Michael Smith in his submissions. That reflects the very limited nature of the discussions Mr Smith had on this subject with the respondent. We find that Mr. Smith viewed himself as a driver and that his focus was on returning to a driving role if he was going to return at all.

203. For all of those reasons, we considered that the decision to dismiss was justified, and that Mr Smith's claim under s.15 EqA therefore fails.

Unfair dismissal

Reason for dismissal

204. We are satisfied that the respondent's reason for dismissal was a reason relating to the claimant's capability, namely his extended sickness absence and the lack of any medical indication that he would be fit to return in the foreseeable future.

Fairness of dismissal

205. We find that the decision to dismiss was within the band of reasonable responses. Essentially this is for the reasons set out at some length in our discussions above relating to reasonable adjustments and the s.15 claim.

206. Turning briefly to the checklist set out as part of the list of issues above, we are satisfied on the evidence that the respondent genuinely believed that Mr. Smith was no longer capable of performing his duties. We are also satisfied that at the time of dismissal the respondent had adequately consulted with Mr. Smith .

207. We do acknowledge that the consultation with Mr Smith prior to May 2020 was, of course, non-existent. No reasonable employer would have handled an extended sickness absence in the way that Mr Smith's absence was handled in its initial stages. If a proper absence management procedure had been undertaken, in line with the respondent's own policy, it may have been that a better level of trust and communication would have been maintained between Mr Smith and the respondent and that may have resulted eventually in a successful return to work in some capacity. Equally, it may have been the case proactive absence management which have led inevitably to much earlier dismissal. We can only speculate as to the impact that the respondent's failures in the first 18 months of Mr Smith's absence have had. However, it is clear to us that even an employer who has neglected its duties to such a sweeping extent must ultimately be entitled to look forward and, following a fair process and reaching a reasonable decision, fairly dismiss an

employee who remains incapable for work. That is what we find happened in this case.

208. We are also satisfied that (coming onto that later part of the process) the respondent conducted a reasonable investigation. Without rehearsing the facts in detail, there was no rush to judgment in this case, notwithstanding the long period of inactivity. The respondent referred the matter to occupational health on more than one occasion and, via its occupational health team, obtained information from the claimant's GP.

209. We considered whether it would have been appropriate for the respondent to await the result of any scans. However, as set out in our findings of fact there was contradictory information about whether a scan was recommended, and what sort of scan was appropriate. More importantly, a scan is an investigative procedure which might potentially shed new light on what was causing Mr Smith's pain to continue beyond the periods when it might be expected that his injuries would have resolved. At best, that could potentially suggest to the clinicians new treatment or management approaches which may or may not be successful an improving the position. In our view this is a very different position from an employee who, for example, has a date for an operation allowing clinicians to have confidence that his impairments will resolve or significantly improve after the standard recovery period for that operation. We do not consider that it is outside the band of reasonable responses for an employer to decline to wait for the outcome of an investigative procedure undergone by an employee suffering long term entrenched pain which has no clear medical diagnosis or treatment pathway.

210. In those circumstances, we do not accept that there was any obligation on the respondent, acting within the band of reasonable responses, to delay the dismissal, nor the appeal. Separately, and for completeness, we find that if they had delayed either decision the ultimate result would inevitably have been the same, having regard to the fact that the later medical records evidenced an on-going incapacity. As Mr Smith was not being paid at the time of his dismissal, any decision to delay would not have benefitted Mr Smith financially.

Conclusion

211. In the circumstances set out above the claimant's claims all fall to be dismissed. The provisional remedy hearing which had been listed to take place on 15 November 2022 is cancelled.

Employment Judge Dunlop

Date: 27 September 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

28 September 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX
UPDATED LIST OF ISSUES

Italicised text does not appear in EJ Leach's List of Issues which was in the bundle but was discussed and agreed with the parties at the outset of the hearing

Unfair Dismissal

1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability.

2. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA, and in particular did the respondent in all respects act within the so-called "band of reasonable responses"?

3. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

i. The respondent genuinely believed the claimant was no longer capable of performing their duties;
ii. The respondent adequately consulted the claimant;
iii. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
iv. The respondent could reasonably be expected to wait longer before dismissing the claimant;
v. Dismissal was within the range of reasonable responses.

*4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much? (the '**Polkey**' issue).*

Automatic Unfair Dismissal

5. Did the claimant assert a statutory right? The claimant claims that he asserted a statutory right to request contract variation in accordance with section 80F ERA.

6. What was the principal reason the claimant was dismissed, and was it that he had asserted a statutory right?

Disability

7. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EqA") at all relevant times because of a repetitive strain in jury condition? *The Tribunal will decide:*

i. Did he have a physical or mental impairment.

ii. Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

iii. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

iv. If so. would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

v. Were the effects of the impairment long-term? The Tribunal will decide:

1. did they last at least 12 months, or were they likely to last at least 12 months?

2. if not, were they likely to recur?

Note: although the List of Issues as it appeared in the Case Management Summary specifically referred to 'repetitive stain injury' the respondent properly acknowledged at the start of the case that we need only consider whether the claimant suffered from an impairment as a result of physical injury to his ankle and/or wrist and that, for the purposes of this claim, it was irrelevant whether that injury is properly classified as a repetitive strain injury or not.

Discrimination arising from disability – section 15 EqA

8. Did the following things arise in consequence of the claimant's disability:

(2) The claimant's absence from work between (approximately) end of December 2018 and November 2020?

9. Did the respondent treat the claimant unfavourably by dismissing the claimant because of his absence due to sickness?

10. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? *The respondent relies on two purported legitimate aims: (1) maintaining the health and safety of employees and others (in particular road users) and/or (2) managing sickness absence in order to maintain a workforce that is fit to perform the duties required of it by the Respondent.*

Reasonable Adjustments – sections 20 and 21 EqA

11. A "PCP" is a provision, criterion or practice. Did the respondent's PCP of requiring its drivers to engage in full-time or near full-time hours?

12. Did this PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that the claimant was unable to work consecutive days and required periods of rest between periods of driving?

13. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at such disadvantage?

14. Were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however

it is helpful to know what steps the claimant alleges should have been taken and he has identified:

(1) Part-time hours, commencing with significantly reduced hours of around one day per week;
(2) Engaging the claimant to drive on short, local routes on a part-time basis;
(3) *Providing the claimant with a "buddy" i.e. a co-driver*

15. *Was the claimant placed at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled by the absence of an auxiliary aid? If so, was it reasonable to provide such an aid? The aids proposed by the claimant were: a steering aid and driving gloves.*

Note: the proposed reasonable adjustments set out at paragraphs 14(3) and 15 above did not appear in the original list of issues. They were, however, matters which Mr Smith had addressed in their evidence and, when the point was raised by the Tribunal at the outset, the respondent confirmed that it had not objection to the Tribunal considering these matters as part of the claim.