Case number: 2603188/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr P Ennis

Respondent: DPD Group UK Limited

Heard: at Nottingham, in public **On:** 22, 23 and 24 March 2023
And in chambers on 19 May 2023

Before: Employment Judge Clark (sitting alone)

Representation
Claimant: Mr Ennis in person
Respondent: Mr Gidney of Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal **fails and is dismissed.**

REASONS

1. Introduction

1.1 This is a single claim of unfair dismissal. The underlying dispute between these parties has a long history in the Employment Tribunal with three separate claims raising various statutory complaints. This claim is the last claim to be determined.

1.2 I am told one of those earlier claims presented complaints in the context of health and safety risks during the time of Covid-19. That claim was unsuccessful and the circumstances have not featured in the case before me to any material extent. However, before then the claimant presented his first claim of disability discrimination. That too failed as the claimant was found not to be disabled. That claim did overlap substantially with the claim before me. Mr Ennis sought to relitigate those earlier disability discrimination complaints in this claim. Those aspects that were repeated in this claim have been struck out by EJ Camp at an earlier hearing as an abuse of process under the doctrine of res judicata leaving this unfair dismissal claim.

2. Background Matters

2.1 That background has given rise to a number of unusual features in this case that warrant summarising at the outset. Central to them all is Mr Ennis's dissatisfaction with those earlier judicial decisions. That has manifested at times in his approach to conducting this claim and in his relations with his employer before that employment ended. Firstly, Mr Ennis continues to argue that he met the definition of disabled, despite a judgment to the contrary. Secondly, he says the respondent should have delayed a decision on his continued employment until his appeal to the EAT had been concluded about the decision on disability status. Thirdly, he says if the respondent had made its own further enquiries of his medical condition, it would have reached its own conclusion that he was disabled. That sense of dissatisfaction is resolute and, at times, fiercely articulated. It has featured in the contemporaneous evidence before me which, at times, showed a confrontational approach.

2.2 The second unusual feature that arose is that Mr Ennis chose not to give any meaningful evidence in these proceedings. I return to the consequences of that and the approach I have taken in seeking to apply the overriding objective in respect of the evidence before me.

2.3 The third unusual feature is that the medical evidence before the employer could be read to show not only that there was no disability in the legal sense but to question the nature and extent of any adverse effect on his ability to do his job at all. That, and the sometimes confrontational nature of exchanges, has at least raised the question whether the reason, or principal reason, for dismissal is properly described capability or Mr Ennis's refusal to do his job. Notwithstanding Mr Ennis's concession that capability was the reason for dismissal, I have had considered that further in my conclusions.

3. Evidence

3.1 For the respondent I have heard from: -

a) Hannah Clifford, People Business Partner. She was involved in supporting the management of Mr Ennis' employment, adjustments, occupational health referrals and the formal stages of the process.

b) Lee Malyan, Distribution Centre Manager. He took over as Distribution Centre Manager in early 2019 and made the decision to dismiss Mr Ennis in June 2020.

c) Mark Edwards, Regional Manager. He undertook the first appeal.

d) Andrew Lee, Head of People. Me Lee undertook the second appeal.

3.2 Mr Ennis did not call anyone other than himself. He has chosen not to advance any meaningful witness evidence and, consequently, was not cross examined. I explored and explained the implications with Mr Ennis at the outset. I was satisfied that this was a considered decision of his and that there was nothing preventing him from setting out a full statement of the facts of his case as he had been ordered to do. He has chosen to use his witness statement as a vehicle to protest about the previous judgments and to accuse the

respondent's solicitor of preventing his documents going into the bundle. I deal with the implications of that latter point below, insofar as it affected the content of the hearing bundle.

3.3 The fact that the claimant has not adduced witness evidence that engages with any of the issues presented a further issue for me to further the overriding objective. Mr Gidney had intimated various grounds on which a strike out might be advanced as a result but, after our initial discussion, did not press the application. He accepted that it would be highly unusual to seek a strike out on the first day of a trial of a claim where the respondent carries the legal burden, in part at least. However, the other part of the test applies a neutral legal burden where each party has no more than an evidential burden to address the test of fairness. Mr Gidney was concerned that the respondent should not face ambush in the way the case was advanced or that evidence be adduced through cross examination. Matters were compounded by the fact that the claimant's ET1 focused on his disability status rather than fairness and did not provide me with an option to using it as a proxy witness statement. Neither party sought a postponement nor, frankly, would that have been an attractive option. I decided justice would be met, and a fair balance would be struck, by taking the following approach: -

a) That Mr Ennis could cross examine the respondent's witness to test and challenge their evidence.

b) In doing so, I explained that Mr Ennis could also advance an alternative factual case. If that case was accepted by the witness, it then became evidence in the case. However, should that alternative case be rejected by the witness, in the absence of any contrary evidence of that assertion to be tested by the respondent, I would be left with only the respondent's evidence on the matter.

c) That I would nevertheless consider the points arising as challenges to fairness, the burden being neutral.

d) That I would seek to discharge my continuing duty to ensure a level playing field. In particular, I would assist Mr Ennis to formulate the points he wished to make into questions of fact for the witnesses and to ensure his case was put to them.

4. The Hearing Bundle

4.1 An issue arose at the start about the content of the hearing bundle. This flowed from Mr Ennis's witness statement and his protest that he had not been able to advance the documents he relied on.

4.2 Having explored this matter fully, I did not accept the respondent has acted improperly in the way the bundle has been compiled. This conflict arose largely because of the claimant's continued assertion he was disabled under the Equality Act 2010. We explored this further at the start of the hearing. It was agreed that the documents omitted related to medical evidence which post-dated the date of dismissal. Mr Ennis sought to rely on **Brightman v TIAA Limited UKEAT/0318/19/AT** to support his contentions. He had not

brought the documents that he wished to include. I indicated that until I could see what had been omitted I could not decide the matter.

4.3 At 9 a.m. on the second day, Mr Ennis sent an email to the Tribunal, but not the respondent. It appeared to be asking the tribunal to print his notes of cross examination of the respondent's witnesses. Although unorthodox, I directed them to be printed to assist Mr Ennis. It also included an authority bundle of 4 cases and an attachment called "My bundle for claim 3". The body of the email, read quickly, seemed to be saying do not print the bundle. In fact, Mr Ennis had intended it to be a request to print 2 copies of the bundle. I raised this with parties. I was told it contained over 100 pages of documents relating to Mr Ennis disability which were the documents he sought to rely on in respect of his disability dated after the decision to dismiss. I directed that the bundle be forwarded to the respondent and I would then consider any application to adduce further documentation.

4.4 After lunch the application was made. I then viewed the unpaginated bundle. There was, in fact, a great deal of duplication with documents that were already in the bundle. Mr Ennis then accepted nothing had been omitted from the hearing bundle that was before the employer when it made its decision and that, consequently, there was nothing of relevance to liability in the claim before me. Mr Ennis's application reduced to seeking to adduce only three documents relating to his disability which he said were relevant to remedy. We spent some time identifying the three documents in the digital bundle and exploring the way in which they might be relevant to remedy. They appear at digital pages 14, 19 and 34 of Mr Ennis supplementary bundle. I was not convinced that the documents did go to remedy or, even if they did, that they necessarily supported Mr Ennis and I can understand why they had not been included in the hearing bundle. Nevertheless, taking a pragmatic approach, Mr Ennis was keen that they were before me and I decided the balance of fairness meant they were put before me.

4.5 Save for that, I had what was otherwise the agreed hearing bundle running to 507 pages.

4.6 Mr Gidney made oral closing submissions supplementing his written submissions. Despite the usual convention, I invited Mr Gidney to make his submissions first as Mr Ennis was representing himself. Mr Ennis made extensive closing submissions rehearsing his account of the facts. I gave Mr Ennis a substantial margin in doing so and sought to use that opportunity to ensure I had properly grasped the potential live issues of challenge to fairness. However, on a number of occasions I had to remind him it was not appropriate for him to begin to adduce completely new matters of fact for the first time or to seek to re-argue the disability status issue.

4.7 As a result of the conduct of the hearing, the case management issues that arose throughout and the need to allow Mr Ennis an extended period to make his closing submissions, there was insufficient time to deliver an oral decision.

5. Issues

5.1 Stated simply, in a single claim for unfair dismissal under section 98 the liability issues are whether the employer has shown the reason for dismissal in fact, whether that reason is a potentially fair reason in law, and for me then to apply the general test of fairness.

5.2 In this case, there is no challenge to the reason for dismissal. Mr Ennis accepted that the reason was his capability but that it was not reasonable for the employer to rely on it in these circumstances. In the circumstances of this case, and for reasons already touched on, I have still considered this as a question for me to answer.

5.3 Whilst the second stage has a neutral legal burden, it is usual for parties to advance their evidential burden identifying what aspects of the decision, and the steps taken to reach it, are said to fall without or, as the case may be, within the range of reasonable responses. Mr Ennis's written case has not helped to identify any particular challenges to that question of fairness. The approach I have taken is to consider fairness in the round and, where I was able to identify particular challenges, to consider those specifically. In that regard, the specific matters identified were:-

a) That Mr Ennis should have been given a smaller van.

b) That Mr Ennis should have been given a ODF Lite round.

c) That the respondent should have maintained the adjustments put in place, assigning a shift supervisor to manually reorganise the six and shape of the parcels and the consequent variation to rounds.

d) That the employer should have waited longer before dismissing. This was not advanced in the conventional way, i.e., that waiting longer would have provided time for the employee to regain his fitness to work. In this case, Mr Ennis's point was that his medical condition would in fact have deteriorated and at some point in the future he would then have met the definition of disability under the Equality Act.

e) That the respondent should have waited until his appeal to the EAT on the disability status was decided.

6. Facts

6.1 It is not my role to resolve each and every last dispute of fact between the parties. My role is to make sufficient findings of fact on the matters necessary to resolve the issues between the parties and to put those facts in a proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

6.2 The claimant was employed by the respondent as a collections and delivery driver. He was taken on as a direct employee after working a spell as an agency driver over one Christmas period. He tells me he was one of a small number of agency drivers offered employment due to his high level of performance and because had been working at full capacity in his role. I find he has worked in this type of role in the past and, as far as I can

tell, is doing so again since this employment ended. As might be expected, I find the essence of the role is to take parcels from the depot to certain addresses on a particular route. The role also requires drivers to make collections of parcels from addresses which are coming back into the depot. In this case the depot is the Nottingham depot. The depot forms part of a network of depots and larger hubs through which the respondent's delivery services are organised nationally and beyond.

6.3 It is not in dispute that Mr Ennis was an employee. The respondent also operates its services through third parties and it became necessary in the context of these claims to understand the different forms of contractor relationship with the respondent. Those legal relationship with those third parties can be described at three different levels of economic independence.

a) Next closest to that of a directly employed driver is an owner driver worker or "ODW". That is an independent person who makes their own arrangements for a vehicle and subcontracts to personally provide the service. Their legal status for the purposes of employment law is agreed by both parties to be that of a "worker". They get a certain rate of remuneration per parcel delivered reflecting the added benefits of holiday and pension etc that entails.

b) One step further away is the owner driver franchisee or "ODF". They are truly independent and have a purely commercial relationship with the respondent and both parties to this agreement accept it attracts no employee or worker rights.

c) The third is a multi-route franchisee or "MRF". This is also a truly commercial arrangement. It is very similar to an ODF save that provides services to more than one route, and thereby the MRF itself has to employ other drivers and make arrangements to provide other vans.

6.4 I find the standard delivery vehicle is a 3.5t sprinter type vehicle, in either long or short wheelbase variation. Above that there are 7.5t and larger vehicles used for specific deliveries and between hubs and depots. One issue in this case is in the availability to employees of smaller vans known as "car derived vans" such as a Berlingo or Partner model. In that regard I make the following findings of fact:-

a) I find the small car derived vans are not available for employed drivers. Employed drivers are provided with 3.5t sprinter type vehicles, in either a long or short wheelbase variation, or larger lorries.

b) Other category of contractors also use the 3.5t and larger vehicles.

c) I have been shown the recruitment literature for ODF's which provides an option, only available to ODF's, for what is called an "ODF-Lite". They do use smaller car derived vans. The materials show this was a campaign to introduce people to the role who might not otherwise have contemplated working as a delivery driver.

d) However, I find that a smaller van does not necessarily mean the ODF lite driver only delivered and collected small sized parcels of light weight. I do accept the general proposition that to make the route cost effective it must be able to deliver a sufficient number of parcels and that the weight and size limit means there is likely to be a greater proportion of smaller or lighter parcels but this is not absolute. The result is I find ODF lite rounds do still carry larger sized parcels and heavy parcels, at least in the sense of being larger or heavier than Mr Ennis was prepared to carry in the circumstances of this case.

e) In or around 2018, the respondent decided to phase out the use of these small diesel car derived vans. At the time it had around 6 of its diesel fleet left available to it all of which eventually came to the end of their working life. By early 2019 there was only one such vehicle left in use, and even then for only a short period thereafter. It was then used as a reserve vehicle for specific problem-solving purposes such as to cover the breakdown of other vehicles or for single deliveries where parcels had been missed. I find it was not, therefore, available for use by drivers on delivery rounds.

f) The reason for phasing out the diesel vans was the respondent's 'green fleet' policy. From 2019, the fleet of car derived vans in use became exclusively electric. I find as a fact that the respondent's policy was built on the back of a government grant scheme to subsidise the installation of charging units at residential premises. I find the respondent did not have charging facilities on site nor was there any commercial equivalent of the residential grant support available to it. For that reason, its policy meant the car derived vans were available only to ODF drivers under their commercial lease arrangements. The reason for that was that, as individuals, they could obtain the grant support for the home charging connection. I also find, and Mr Ennis accepted, that there was no mechanism for employees to reclaim any charging costs from the respondent. For that reason, I find as a fact that the small car derived vans ceased to be available for employees from early 2019.

6.5 In its simplest sense, the delivery system entails movement of parcels from collection points into the depot, then movement in bulk through to hubs where it is redirected back to the appropriate depots and on to final delivery. I have no doubt there are also special systems for international movement and certain types of specialist goods or materials. There were some factual challenges to the technology involved in the sorting process in respect of which I find: -

a) The movement of parcels is substantially digitised involving barcode scans and automated sorting, but only to a point. I find as a fact that not all of the hubs have the ability to measure the weight and size of parcels. About 40% of parcels are unable to be checked and rely on any description provided by the sender, if it was known.

b) The Nottingham depot has no means of automatically checking the weight or size of parcels.

c) The computerised process involves the parcel destination being identified and it being added to a route. A route is built for a certain number of parcels taking into account the distance travelled and the estimated time to make all the deliveries.

d) Parcels are automatically sorted and delivered by conveyor and chute to an area of the depot floor ready for loading into vans. Drivers arrive at a loading bay at an allotted time, called a "wave", to collect their parcels and load them onto their vans.

e) Where the weight or size of parcels has to be checked, as arose in the context of this case, I find there is no way to do this other than for a shift supervisor to take time out of their work to manually do this. I find this is an intensive and grossly inefficient process.

6.6 Mr Ennis has two medical conditions. An umbilical hernia and divarication of the recti. During the course of the chronology in this case two other health related matters arose. First Mr Ennis fractured his wrist on two separate occasions and was absent from work for a period in early 2019. Secondly, the case overlaps with the onset of Covid-19 and the implications that that brought. For a time, there was a connection between Mr Ennis's wrist healing and his ability to perform the duties of his role but neither issue goes to the central dispute and what became the decision to dismiss which focuses on his inability to perform the role due to the hernia and divarication of the recti.

6.7 In March 2017, Mr Ennis was referred for investigations. The referral stated: -

"mid-line bulge - ? Hernia?

6.8 The results of the scans reported: -

"there is no evidence of a (sic) anterior abdominal wall hernia. Divarication of the rectus abdominus muscles are identified.

A tiny umbilical hernia is seen. The defect measures 13mm. Minimal movement of the contents is seen.

Conclusion: -

Divarication of the rectus abdominus

6.9 Mr Ennis suggested, through his questions to witnesses, that he became aware of his hernia diagnosis in 2017 but did not know of the divarication of the recti until 2019. I find that less likely. There is no evidence before me to explain how he learned of the hernia but it is clear that this medical referral in 2017 must have been in respect of that. Both conditions occupy a similar anatomical location. I can infer that this referral was sent to his GP as it says on its face as a result of which it would seem likely that he would have learned of the diagnosis of the umbilical hernia. I struggle to accept that within that process the divarication of the rectus would not also have been communicated to him, especially as it is the only one of the two conditions he relies on which was referred to in the conclusions of the report. However, despite that, the fact Mr Ennis did not refer to that at the time seems to me to indicate either that he did not know of it or that he did not regard it as the cause of any discomfort or restriction he was experiencing.

6.10 The medical evidence before me shows that divarication of the recti is not an illness or the result of an accident and does not require surgical treatment. It is best described as a variation of normal. I accept that this much of the medical condition was not before the employer in its initial enquiries but it did come to light as a result of its further medical enquiries in January 2019.

6.11 Both conditions are congenital. They did not restrict Mr Ennis's ability to perform the original agency role as seen from the extent at which his level of performance in that role secured him an offer of employment. It seems not to have had any effect on his previous delivery and driving roles. Nevertheless, he would describe the effect of these conditions as meaning he could not repeatedly bend, stretch, reach or pick up large or heavy parcels.

6.12 Turning to the unfolding dispute in the workplace, over the first 18 months of his employment Mr Ennis was subject to a series of minor disciplinary sanctions in respect of vehicle damage. The threshold applied by the employer is a "blameworthy accident". Mr Ennis disputed the employer's decisions. In or around July/August 2018, the claimant raised a grievance about this. He set out various counter complaints which he said undermined his trust and confidence. They included a wide range of concerns about rest periods, delivery targets, volume of work, the investigations conducted into his accidents, breaches of the dignity at work policy and working outside of contracted hours. Within this grievance, Mr Ennis alleged that he was being discriminated against because of his age and disability and that reasonable adjustments were necessary. He set out various extracts of European law and stated: -

> ***"In that connection, it as (sic) been relayed to various members of management my inability to lift heavy items unaided due to both age and long term physical impairment in the form of small hernia which I have had since birth".***

6.13 He then set out the financial terms of a settlement he was seeking and the "devasting consequences litigation would have on the company" before concluding: -

> ***"Insofar as the issue of making reasonable adjustments I propose albeit previously rejected by the general manager without objective justification the allocation of a long term route comparable with that of a (sic) ODF light driver."***

6.14 For completeness, I find none of the minor vehicle damage caused, and for which he was subject to minor disciplinary sanction, was in anyway connected to Mr Ennis' physical conditions.

6.15 On 17 August 2018, Hannah Clifford met with the claimant together with Mr Bingham, then the depot manager. They explored the issues raised in his grievance. In particular, they discussed the manual handling issues which included various adjustments and aids including a barrow to assist drivers, the low level of heavy parcels in most rounds, and the positioning of the heavier parcels in the vehicle to ensure their ease of handling. I find the respondent sought to understand the issue further and sought consent from Mr Ennis to obtain an occupational health report. He agreed.

6.16 On the question of consent generally, I find this was sought from Mr Ennis at all necessary stages. At times before me Mr Ennis sought to criticise the contact with Occupational Health or his GP happening when he said it should not have happened, or not happening when it should have. For my part I was not able to identify any material failings on the part of the employer obtaining consent and am satisfied it was conducted appropriately at all stages.

6.17 There is no doubt that the employer's use of its disciplinary policy on vehicle damage appears to have been the catalyst for Mr Ennis' change of attitude towards his work. In any event, Mr Bingham confirmed he was not going to pursue the third disciplinary matter in respect of the blameworthy accident. As to the temporary arrangements available pending receipt of the occupational health input, I find: -

a) Mr Bingham happened to be facing some temporary changes in the workload at the depot involving new postcodes which coincided with changes to ODF lite drivers' routes.

b) Mr Bingham expressed a means of opening up some of that work for Mr Ennis, but not on all days of the week.

c) I find Mr Bingham's explanation of how that would work was that it was intended to be in place over weekdays only, as opposed to weekends. I find that was an operational constraint he could not control.

d) That plan meant Mr Ennis would have access to one of the remaining small diesel vans.

e) I find Mr Bingham intended that to be temporary. It was associated with the steps being taken to establish the underlying health issues. It was clearly in the context of what to do whilst the occupational health report was obtained and was available only for as long as it was capable of being practically maintained.

f) If find that practicability lasted only as long as there was both the new postcode routes available and small diesel vans available.

6.18 On 10 September 2018 the occupational health report was received. It said Mr Ennis did not have any particular serious underlying health conditions but experienced difficulties linked to his physical robustness. It recommended helping him by ensuring adequate manual handling training. It also suggested the claimant could help himself by taking steps to regain his fitness and strength. The medical evidence before the employer was that both conditions were life-long and congenital. That neither would have any effect on his normal activities and that treatment may be available for the hernia to remove a risk of later protrusion.

6.19 From early 2019 the manager of the distribution centre changed to Mr Lee Malyan.

6.20 Before the temporary adjustments came to their natural end, as a result of changes to eth postcode routes or the loss of diesel vans, on 27 January 2019 the claimant commenced a period of sickness absence. This was due to a fracture to his wrist. He was absent until early March. I find during this period, those further changes did occur to the workload and

routes available and the temporary arrangements Mr Bingham had put in place were no longer available. In addition, around this time the small diesel vans would continue to be phased out, leaving only one van.

6.21 Mr Ennis attended a return-to-work meeting on 10th March 2019. I find: -

a) Mr Ennis said he was fit to come back to work as his wrist had healed. However, he said he could not return to any aspects of his duties that required him to do heavier lifting.

b) Mr Ennis wanted a permanent light route and wanted to permanently drive a smaller van. By this time, I find the respondent had already made clear that the new postcodes and routes being serviced meant this could not be accommodated. Mr Ennis was again told it was not a feasible option. In addition, he was told about the changes to the fleet which meant it was no longer possible to allocate a smaller vehicle.

c) Against that background, Mr Ennis said he could not return to work.

6.22 During that meeting Mr Ennis stated he felt his condition amounted to a disability. As a result of that contention, a second occupational health report was commissioned, specifically exploring the possibility of a disability. The respondent's occupational health providers are Maitland Medical Services. It provides a national service and in order to provide the services conveniently to employees across the country they sub-contract the assessments. This particular assessment was subcontracted to a Dr Telling, a Consultant Occupational Health Physician who reported back to Maitland Medical in a letter dated 21 March 2019. She concluded that based on his self-reporting and her clinical assessment, Mr Ennis was fit for work.

6.23 She also reported on his views of his limitations. She said that he believed he could resume work if he had a small van and lighter packages and considered an early return to work would be likely if that were a possibility. She also gave an alternative recommendation on the possibility that his preference could not be accommodated, meaning he would return to his normal role driving a 3.5t van. She recommended a manual handling risk assessment to assess the loads he had difficulty performing and why, i.e., their weight and shape. She suggested that the outcome of the risk assessment could then be used to address how the risks of manual handling could be reduced including restrictions on handling certain items, temporary assistance, adaptations and manual handling training.

6.24 That report was not directly sent to the employer but to its occupational health provider, Maitland Medical. They in turn considered the assessment of the employee against their own knowledge of the employer's workplace and working environment in order to respond to the employer's referral in a practical way. That response was dated 11 April 2019 and is the opinion of another Occupational Health Physician, Dr Brennan. After a further discussion with Mr Ennis, he reported: -

a) that Mr Ennis did not appear to have engaged with his GP after an ultrasound scan around 3 years earlier had diagnosed a small hernia and urged him to engage with his GP.

b) That Mr Ennis's concern was why he could not simply stay on the lighter duties Mr Bingham had put in place.

c) That Mr Ennis did have some simple manual handling restrictions due to the hernia.

d) That Mr Ennis was able to continue as a collection and delivery driver but, for the time being, proposed the employer worked within Mr Ennis's 'self-declared restrictions' on his ability to do his job until he had seen his GP and, potentially, been referred for a consultant opinion.

6.25 I find the essence of the Occupational Health position was that the hernia did not prevent him working in his role but the self-reported limitations with the hernia needed exploring further, particularly against any potential risk of complications. Against that, there was a question as to why Mr Ennis had not gone back to his GP in the 3 years since the diagnosis as the condition may have been capable of being resolved.

6.26 Back in the workplace, I find those reports were discussed with Mr Ennis on 2 May 2019 in a meeting with Miss Clifford and Mr Malyan. Mr Ennis was accompanied by Sean Redgate, his GMB trade union representative. I find: -

a) By this meeting, Mr Ennis had again broken his wrist for a second time and was not fit for work regardless of the medical reports on his hernia or the availability or otherwise of adjustments.

b) Mr Ennis confirmed he had not engaged with his GP despite being asked to do so by the occupational health doctor.

c) The respondent again urged him to do this so that they could consider any recommendations and he agreed he would make an appointment.

d) There was a further discussion about the work that was available at the depot.

e) Mr Ennis was also offered bespoke manual handling training as recommended by occupational health.

6.27 I also find Mr Malyan explored with Mr Ennis the measures that he could put in place in terms of checking routes, checking parcels and providing handling training, but at that stage the claimant did not agree with any of it. I find Mr Malyan also expressed his desire to put something in place for the time being and to revisit the situation after the claimant had reviewed progress with his GP. I find the purpose was to review adjustments. I find the nature of the work was such that Mr Malyan could not realistically control the type or number of parcels. I find he was hoping that input from the claimant's General practitioner would prove helpful towards a solution.

6.28 I do find Mr Ennis displayed what was regarded as a surprising attitude towards the business when the limitations to adjustments were explained. His stance on adjustments was somewhat absolute, without regard to the reasonableness or feasibility. He described the service levels that the business was required to meet as being something he was not concerned about; that “if the parcels got there, they got there”. Despite that, I find Mr Malyan was keen to properly understand the basis for the claimant’s view that he was unable to perform his role. I find the trade union representative, Mr Redgate accepted that the business could not know which parcels would be coming in each day and, perhaps significantly, there was nothing in the medical reports that prevented the claimant from driving a 3.5t tonne vehicle.

6.29 Mr Ennis returned to work in or around May 2019. He drove a 3.5t vehicle and his work was subject to a package of supportive measures drawn from the existing occupational health advice. Over the next 3 weeks a number of issues were raised by Mr Ennis about his ability to perform the duties of his role. I find Mr Ennis was looking for complaints to make and displayed a disingenuous and contrary approach to his work and managers. On 11th June 2019 Miss Clifford and Mr Malyan met with Mr Ennis. I find: -

a) Mr Ennis said he was struggling with the steering wheel and the gears of his vehicle.

b) Mr Ennis asked why he could not use a smaller vehicle, he referred to the last of the smaller vehicles that was still at the depot. I have previously found this vehicle to have been the last of the diesel vans and being used as a reserve in its final stages of useful life. The employer reasonably took the view that was necessary for that purpose and it was not available for allocation to delivery routes. Again, he was told that it was not possible within their operations. Significantly, I find that the point was put back to Mr Ennis who was asked whether, if the respondent could find a way to look into getting a smaller vehicle, would it resolve the issues? His answer was no.

c) Mr Ennis confirmed he had, by then, received the bespoke training on manual handling.

6.30 I find in order to get Mr Ennis back to work, although the only vehicle available for him was a 3.5t van, the supportive measures the respondent had put in place included an exceptional adjustment to the computerised load and route planner. I find the only way to override this was through a labour-intensive process whereby a shift supervisor physically sorted the allocated deliveries to remove those parcels Mr Ennis said would be too heavy or too large. That meant reallocating them to other drivers and sometimes also having to find additional parcels from other rounds for Mr Ennis to deliver on his. That was an extremely costly and inefficient measure and I find was unsustainable. It went further than adjusting the load itself, as the effect was to alter the rounds that Mr Ennis drove. There was also a knock-on effect for other drivers. Any driver who acquired loads originally allocated to Mr Ennis, and any driver who lost parcels to give to Mr Ennis, all had to have their rounds adjusted accordingly. Not only was this unsustainable in respect of the amount of management time spent at the time of loading, but I find it undermined the efficiency of the original computer

modelled routes allocated to the drivers and on which the businesses' cost, and no doubt pricing, model is based. I find manual handling training and specific risk assessments were also undertaken a health and safety specialist to ensure the work could be performed safely. I find although the only van available was a 3.5t van, that was itself considered as part of the risk assessment and, indeed, was considered to be part of the solution, not the problem. The assessor had reached a conclusion that the larger vehicle would actually assist the claimant to reduce the bending and stooping when handling parcels that he had said formed the main issue with his hernia. It was consciously considered to be a better option than a smaller van, even if one had been available. In addition, tote boxes were used to organise the parcels in the van as a means of reducing the potential movement of goods and the need to enter and, if one did have to enter the hold, to stoop and sort multiple parcels.

6.31 Even against that significant input by the employer, I find that in itself became a new source of complaint for Mr Ennis who was now unhappy that the consequence of this adjustment was that he faced a variation to his daily routes and he instead sought a change to a fixed route.

6.32 A third occupational health referral was made on 13 June 2019. The issue now was whether it was safe for Mr Ennis to perform his role without treatment. The reason for the referral was closely connected to the earlier advice that the underlying condition might be capable of fixing but that Mr Ennis had not sought any advice from his own GP on the potential for treatment despite indicating he would. The central purpose was to obtain, with Mr Ennis's consent, the answers directly from his GP. The employer sought advice about treatment and about the risk of strangulation of the hernia. It asked about the available treatment and what adaptations would be needed indefinitely if there is no treatment. The referral notes that Mr Ennis has been resistant to any change or support the employer had sought to make unless it was his preferred option.

6.33 The outcome of that report was delayed and substantially so. The referral to the claimant's GP was sent on 23 July. The substantial delay that then followed was entirely down to the fact that the claimant's GP failed to send out any correspondence until around 6 months later. I find the employer's occupational health provider had repeatedly chased for the information on something like eight occasions. I find it was not until 20 January 2020 that Maitland Medical eventually received a letter from the GP, apparently dated 20 September 2019, which responded to the enquiry in these terms:-

> ***…I have not really seen Mr Ennis myself and cannot really comment on any limitations. He has not been seen at the surgery for some time. The last sick note was issued some time ago. He seems to have been seen in January for a fracture and had another fracture of the same wrist in April. His fracture should have healed. I have a fracture clinic letter after this and include the letter from the casualty. He was last seen in May. There was mention of a tiny umbilical hernia and divarification of recti muscles on a past scan. There have been no referrals. He has not had analgesia from us.***

6.34 The Occupational Health Physician, Dr Brennan, followed this up with a written opinion in a letter to the employer dated 30 January 2020. He wrote: -.

> ***I can only say it is clear that the GP does not raise any particular concerns and re-states that he has not seen his patient for a long time. I think that Mr Ennis may be referencing the lack of surgical options to his condition known as divarication of the recti - this is a variation of normal, it is not an illness or an accident and does not require surgical treatment. The GP does reference, however, the possibility of a "small" true hernia (umbilical). These are normally treated although they are treated usually to prevent any risk of strangulation. This is certainly treatable but in itself does not normally cause symptoms on a day-to-day basis as does not the divarication of the recti and therefore at this stage I am still struggling to see why there should be any impact on a day-to-day basis. We are wholly reliant on Mr Anderson's assessment which is from a medical point of view difficult to understand.***
>
> ***On the balance probabilities, I must stress, once again a legal decision, but I am struggling to see how this gentleman would be considered disabled but once again I must stress that this is something that will be considered fully potentially by a tribunal.***

6.35 Prior to this medical opinion, other matters had moved on in a number of respects. Mr Ennis had been involved in another accident causing damage to his vehicle and faced further minor disciplinary action. He had, by then, commenced Employment Tribunal proceedings alleging disability discrimination. He had discussed matters with Mr Malyan in or around September. I find that discussion included an offer by Mr Ennis that if the employer restored the temporary arrangement previously put in place by Mr Bingham that he would drop the legal claims. I find that in the course of trying to understand exactly what Mr Ennis wanted and did not want on any return to work, Mr Malyan even explored the option of taking on an ODF position, which I find would have given him something close to the working arrangement he wanted albeit not as a direct employee which was not acceptable to him.

6.36 Mr Ennis raised a grievance on 15 November 2019 concerning the employer's treatment of his absences which, whilst separate and distinct to the issues in this case, touched on matters overlapping with it. This followed Mr Ennis being required to attend a stage 3 attendance hearing concerning absences and his 'Bradford factor' score, albeit no sanction was imposed. A hearing took place on 5 December 2019. In an outcome letter dated 19 December 2019, the grievances were dismissed. One aspect of the grievance process was that Mr Ennis demonstrated a particularly confrontational approach to the dispute. Whilst it is not at all unusual for parties in dispute to be direct, Mr Ennis's approach may not have always been to his own best interests in advancing his concerns. The grievance outcome records how the hearing had to be brought to an end as a result of Mr Ennis's conduct during it.

6.37 Around this time in the chronology, the covid-19 pandemic began to take hold. For some sectors, the pandemic had a negative effect on business. For this respondent, and others in the parcel courier sector, the pandemic had an enormous effect on increasing business volumes. This led to a new area of conflict between Mr Ennis and his employer and another reason to be absent from work. On 17 April 2020, he notified his employer that his concern for his partner's health and his own underlying debilitating condition was such that he took the view his role could not be deemed essential. He therefore required to be placed on furlough under the Coronavirus Job Retention Scheme. This was rejected by the respondent after it reviewed the government guidance on shielding, as it applied at that time.

6.38 Mr Ennis then commenced a period of absence for issues related to the pandemic. By June 2020, Ms Clifford and Mr Malyan were seeking to arrange a return to work. The separate Employment Tribunal proceedings had, by then, determined that Mr Ennis was not disabled. I find this only served to further fuel the often confrontational nature of the claimant's communications with his employer, forcefully continuing the assertions that he met the definition of disabled.

6.39 Ms Clifford contacted Mr Ennis. She set out how they needed to move forward based on the information they currently had. She indicated that she would soon invite Mr Ennis to a meeting to discuss his return to his substantive role. Upon his grievance finally being determined, the claimant was told that the employer expected that he returned to work on 15 June 2020 at 10am.

6.40 That was itself the source of a number of lengthy emails from Mr Ennis dealing largely with the covid security arrangements in the workplace. That appeared to be another obstacle to a return to work and, upon reviewing them over the weekend, at 9:26 am on the Monday morning Ms Clifford emailed Mr Ennis to say: -

> ***"it has been made clear to you what has been done to ensure that it is safe for you to return to work. Please only attend the depot today if you are intending to return to work and are prepared to take out your assigned route. If you are not returning to work at 10 am today to undertake your role of C&D driver, then please do not attend the depot.***

6.41 She referred to the new issues he had raised and how they would be dealt with in accordance with internal procedures, and not in a discussion on Monday morning.

6.42 Despite the timing of the email, Mr Ennis had in fact seen it by the time he attended the workplace. Whilst in attendance, he was not in uniform and, I find, not intending to work. A brief meeting took place with Mr Malyan and Ms Clifford joining remotely to determine whether Mr Ennis intended to return to work. This was not productive. I find Mr Ennis refused to engage with the discussion about his return to work, and became confrontational, focusing on the recent employment tribunal outcome. Matters deteriorated to the point where he was asked to leave upon it becoming clear he had not attended with any intention to return to work. Mr Ennis refused to leave and impeded Mr Malyan's own exit from the room until a number of requests for him to leave had been made.

6.43 Mr Ennis ongoing grievance concluded at the third and final stage of the process on 23 June 2020. It appears the tone of that meeting was far more constructive. The grievance was by then focusing on the COVID related safety issues and payments for his previous absences. These were ultimately dismissed but at the conclusion of the meeting, arrangements were made for a future discussion to happen about resolving his return to normal duties.

6.44 That discussion took place as planned the next day, on 24 June 2020 and Ms Clifford wrote to the claimant to confirm what had been discussed. I find: -

a) She confirmed the shift patterns that were available to Mr Ennis and acknowledged his preferences.

b) She set out the respondent's position that, in view of the updated medical evidence, and the decision on his disability status, that he was required to return to his full role as a collection and delivery driver.

c) She set out how the adjustments that had been put in place since the previous year concerning the manual sorting had been extremely onerous to the business and caused it significant operational issues. She stated how it was not sustainable to continue with those adjustments.

d) She confirmed other aspects, specifically the manual handling training, would continue.

e) I accept Ms Clifford's evidenced that the additional work involved in altering the load and route for Mr Clifford was not sustainable long term and that this was particularly so after the pandemic had had such a substantial effect on the respondent's business.

f) Mr Ennis confirmed he was not prepared to return to his substantive role.

6.45 Things having reached the point they had, I find there was no informal route left open to the respondent to resolve the situation. There were no further medical enquiries to make. There were no further adjustments that could be implemented and, consequently, Ms Clifford's letter went on to invite Mr Ennis to a formal hearing to discuss his continued employment. That meeting would be held by Mr Malyan and take place on 30 June 2020. She set out the purpose to review his inability to return to his role and made clear that there were a number of possible outcomes including the termination of his employment on capability grounds.

6.46 On 30th of June 2020 the capability hearing took place as planned. Ms Clifford attended to support Mr Malyan chairing the meeting. Mr Ennis attended with his trade union representative. I find:-

a) Mr Ennis was once again confrontational.

b) When the topic of his capability was explored , Mr Ennis confirmed that he was not capable of fulfilling his role as a Collection & delivery driver. Significantly, his position was that he would not be capable at any point in the future.

c) A separate issue for discussion at this meeting had been the covid measures but only on the basis that additional measures would have to be put in place upon Mr Ennis returning to work. Understandably, Mr Malyan made clear there was no purpose served in discussing separate matters concerning PPE in the workplace if the claimant was not going to come back to his role all.

6.47 I find there were no realistic or feasible alternatives to the role of collection and delivery driver. The temporary adjustments implemented 2 years earlier by Mr Bingham had long since not been available due to the change in the vehicle fleet and even that would have required some management input to manually check the loads. There was no realistic option

of a small van derived vehicle and, in any event, there were reasons why the 3.5t vehicles were positively addressing aspects of Mr Ennis's concerns. The arrangements that had been in place for much of the previous year of a shift manager manually checking loads and adjusting both the claimant's and other driver's routes and loads was simply not sustainable. The limitations of its fleet meant small vans were not available and, to the extent that it might have been prepared to go to lengths to go outside its fleet, discussions about ODF roles and even smaller vans themselves had in the past drawn negative responses. I find the only options available were a return to the collection and delivery role with the continued manual handling support, or termination of employment.

6.48 Mr Malyan decided to dismiss the claimant. His employment was terminated with pay in lieu of notice. This was confirmed in writing in a letter dated 2 July 2020.

6.49 Mr Ennis appealed the decision. Reasons for appeal were said to follow but I cannot see they did.

6.50 Mr Mark Edwards, the regional manager was appointed to hear the appeal and by letter dated 6 July 2023 Mr Ennis was invited to a remote hearing to take place on 16 July 2020..

6.51 By the meeting on 16 July, the reasons for the appeal had not followed but Mr Ennis sought, and was permitted, to rely on his previous points and expand them in the hearing. He was represented again by his GMB representative, Mr Redgate. The points were: -

a) Mr Ennis advanced arguments that the employer had 'jumped on' an unfair Employment Tribunal Judgment and that he wanted reinstating whilst the appeal to the EAT was considered. Mr Edwards concluded that Mr Malyan had based his decision on the medical information and the effect the Employment Tribunal decision had on the employer's duty to make reasonable adjustments. That aside, he noted that even with the remaining adjustments in place Mr Ennis maintained he was not fit to return to his duties. On that basis, he did not consider it appropriate to delay the decision pending an appeal to the EAT.

b) Mr Ennis had provided information concerning the general nature of the physical condition he had which he said had not been taken into account. Mr Edwards concluded this was general information and not specific to Mr Ennis and did not undermine the medical evidence about Mr Ennis that the employer actually had.

c) Mr Ennis sought the continuation of the temporary adjustments implemented by Mr Malyan in 2019. Mr Edwards rejected this as being sustainable and that it was only ever temporary pending the updated medical reports.

6.52 Mr Ennis challenged the independence of Mr Malyan and Ms Clifford. Mr Edwards rejected this point on the basis that they were both best placed to conduct the process and acted professionally, reaching decisions on the factual evidence. In any event, having looked at the evidence himself he would have reached the same decision, particularly as he had

repeatedly stated the only terms on which he would return to work was if all the temporary adjustments remained in place.

6.53 Finally, Mr Ennis challenged the failure to discuss the suggestions arising from the grievance outcome about covid security upon his return to work. Mr Edwards rejected this point on the basis that it required as a starting point some basis on which he might be returning to the workplace.

6.54 Mr Edwards' decision was confirmed in a letter dated 22 July 2020.

6.55 Unusually, this employer provides two levels of appeal. Mr Ennis was entitled to, and did, raise a stage 2 appeal in an email dated 23 July 2020. He largely repeated his earlier grounds and also challenged the distinction in roles for ODF and employees and why alternatives could not be put in place for him.

6.56 This appeal came before Mr Andrew Lee, Head of People, one of two senior managers nominated to hear final appeals. The appeal was heard at a meeting on 13 August 2020. Mr Ennis was again represented. The issues put before him were that he was disabled, that they disagreed with the Employment Tribunal decision and his employment decision should await the EAT appeal. I find the wider issues previously aired were also explored, in the course of which Mr Lee also tested whether the claimant was seeking to take on an ODF Lite role which he said he was not.

6.57 I find the conduct of the meeting was such that Mr Lee was unable to give any decisions on the day and had to set out his decision in a later letter, dated 20 August 2020. The final appeal was rejected for these reasons: -

a) He took the view it was not reasonable to extend the time pending any appeal against the employment tribunal's decision.

b) He did not find the additional medical evidence advanced by the claimant to be helpful in light of the employment tribunals decision; particularly as the employment tribunal had the same medical evidence before it as the employer had when reaching its decision he did not consider referring the claimant back to occupational health would be of assistance given his clear stance that he could not carry out his role but the employer could not operationally sustain the previous adjustments.

c) He rejected other adjustments on the basis that the size of van had never been identified as an issue and in any event larger parcels could still be placed in smaller vans. In any event there were no smaller vans as these had been taken out of commission for employed drivers. It was not possible to assign such a vehicle to the claimant. Any route would involve additional work for management creating a bespoke route for the claimant and in resolving the frequent disputes with the claimant about what should or should not go on his round this was unsustainable particularly in light of the unexpected growth in business from the pandemic and the daily operations were extremely busy as it was.

d) Mr. Lee rejected that the procedure was unfair all that the original decision makers were inappropriate but, in any event, two appeals had arrived at the same conclusion.

7. Law

7.1 In deciding the issues in this case, I start with section 98 of the **Employment Rights Act 1996** ("the 1996 Act") which states, so far as relevant:

> ***"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and***
>
> ***(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***…***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case."***

7.2 I had regard to the guidance on the application of this statutory provision as set out in **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439 and **Post Office v Foley** [2000] IRLR 827.

7.3 The respondent has also taken me to cases dealing with the general propositions arising in ill-health capability dismissals and their application under s.98(4) of the 1996 Act, some of which have greater relevance to this case than others. They were **Linux v Cereal Packaging Limited [1988] IRLR 510** on the matters to review in an absence capability dismissal. To the seminal case on obtaining medical evidence of incapacity of **East Lindsey District Council V Daubney [1977] IRLR 181**. To **International Sports Co limited V Thompson [1980] IRLR 340** on reviewing absences and attendance. To **Spencer v Paragon Wallpapers limited [1976] IRLR 373**, on whether an employer can be expected to wait any longer. To **Garricks (Caterers) Limited v Nolan [1980] IRLR 259** that an employer is not expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out their job to the full extent. And finally, to **Ali V Tillotsons Containers Limited [1975] IRLR 272** on the effect of the absence on other employees.

7.4 Mr Ennis referred me to four EAT cases. **Donelian v Liberate UKEAT/0297/14/JOJ**; **Seccombe v Reed in Partnership Limited EA-2019-000478-OO** and **Scott v Ralli limited EA-2019-000772-VP** all appeared to me to be addressing very specific elements of disability discrimination under the Equality Act 1996 and I did not find them to be of relevance here.

The fourth was **Brightman V TIAA Limited UKEAT/0318/19/AT** which was relied on in respect of the relevance of post dismissal medical evidence.

8. Analysis and Conclusions

8.1 The first issue is the reason for dismissal. As I noted at the outset, Mr Ennis accepted that his capability to perform his role as a driver was the reason why his employer dismissed him. Despite that issue arguably not being in issue, I have nonetheless looked at the evidence of the employer's reasoning as if it was in issue to satisfy myself the respondent has shown the true reason for dismissal.

8.2 Two matters arise for consideration in this respect. One is whether elements of Mr Ennis's conduct in some of the meetings and his attitude to the terms on which he might return to work formed part of the reasoning. I have no doubt that made the process more difficult and on some occasions I have found meetings had to be cut short because it was not possible to make sensible progress. The other aspect is whether the reality is that the reason for dismissal was Mr Ennis's refusal to return to a role he was capable of performing, even with the reduced level of adjustments remaining in place.

8.3 I am satisfied that these two matters are not within the factual reason for dismissal. Central the employer's issue throughout has been to understand Mr Ennis's conditions, to assess his capability to do the role in light of any limitation those conditions placed on him and to explore what adjustments were feasible. I am satisfied that the employer's decisions throughout the process was focused on the acceptance that Mr Ennis had these two physical conditions. It had appropriate medical evidence before it to form a view of the extent of his limitations, albeit the final position was that that level of restriction was limited. Mr Ennis's unambiguous position was that this made him incapable of performing his role as a Collections and Delivery driver. The critical point is Mr Malyan's decision to dismiss was based on this and I am satisfied that is the reason for his decision. That reasoning has not changed through the two appeals that then followed. I am satisfied that the contemporaneous documentation is consistent with this.

8.4 Consequently, even had Mr Ennis not conceded the reason, I would have concluded that his firm position that his physical conditions prevented him from performing his role was the reason that operated on the mind of the employer throughout the dismissal process and that that necessarily satisfies the legal definition of capability as a potentially fair reason for dismissal.

8.5 That takes me to the second issue before me. That is the general test of fairness contained within section 98(4) of the 1996 Act. In other words, whether the employer acted reasonably in relying on that as sufficient to dismiss in the circumstances. I start with the procedure adopted.

8.6 As an overview, there is a clear procedure in place which was followed. It is an unusual procedure in that it allows for two levels of appeals. Every step of the process was organised on notice and Mr Ennis was represented throughout by a local GMB representative. There was challenge to Mr Malyan's independence as a decision maker but I

am satisfied his role as Distribution Centre Manager with knowledge of both Mr Ennis's situation and the extent of working arrangements at the particular depot meant he was an obvious person to make the decision. There is nothing I can see that offends natural justice or made him an inappropriate person to make the decision. Of course, the ultimate question is whether it fell within the range of reasonable responses of a reasonable employer for him to be the decision maker and I am satisfied for those reasons that it did. Nothing in the process adopted appears to me to fall outside of the range of reasonable responses a reasonable employer could have adopted.

8.7 I have scrutinised the timing of the final decision because it might be said to have moved quickly to the consideration of continued employment after the Employment Tribunal made its decision on disability status. I am satisfied that is not actually the case. There had actually been a substantial delay in finalising the medical evidence due to the claimant's GP delay in responding to occupational health which was neither party's fault. Nevertheless, it follows that save for the time Mr Ennis was absent for covid related matters, the employer had maintained a level of alternative working arrangement for Mr Ennis which I have accepted was particularly onerous and far from a sustainable long-term option. It was also entirely appropriate and understandable for the employer to delay any decision whilst the disability status was determined in respect of the first employment tribunal claim. The two notions of making a reasonable adjustment for a disabled employee and considering alternatives to dismissal for capability reasons may cover very similar ground but the lens through which the two tests are viewed is different as are the legal obligations on the employer. It is also clear that there was a further attempt to engage informally with Mr Ennis in the plans for a return to work before the matter became formalised as it did. The failure of that meant the there was nowhere else to go to progress matters and it follows that I am satisfied that the decision to instigate the formal capability process fell within the range of reasonable responses. Additionally, there is no merit in warning an individual in these circumstances and it is often not appropriate in health-related capability cases where, as was the case here, matters had reached a settled position.

8.8 Turning to the more substantive matters, I am satisfied that the employer did have before it up to date medical evidence on which to base its decision. That has in fact played less of a part in this decision than it might usually be seen to do in a capability decision. First, it demonstrates quite a limited restriction on abilities. Secondly, this is not a case where the employee is asking for more time to return to fitness. I did consider whether the delay between the time between the final advice being received on or around 30 January 2020 and the decision on 30 January 2020 meant the medical evidence might have become stale but against the totality of the medical evidence, and particularly Mr Ennis's insistence he was incapable of returning, I am satisfied the reasonable employer would have acted reasonably in relying on that evidence. Indeed, part of Mr Ennis's case now is that his health would have deteriorated meaning the answer to the question whether the employer could reasonably be expected to wait any longer before taking action has to be "no". The reasonable employer would have acted reasonably in confronting the employment decision when this employer did.

8.9 But Mr Ennis's case raises quite a novel argument. It is that the employer should have delayed a decision on his continued employment until an appeal to the EAT had been determined. The underlying premise of this point is that it is unfair to dismiss him in June 2020 when had the employer waited, he would have appealed, succeeded, been found to be disabled at which point the employer would have been under a different, and arguably more onerous legal duty to make adjustments. Implicit in that logic is that he would then have been entitled to a fixed route driving a small van with small and light parcels. As a matter of fact, I am told there was an appeal which was not accepted as it was presented out of time so that never came to be. But that is after the event, I am concerned with assessing the reasonableness of the employer's actions at the time of the decision. I am satisfied that rejecting this point did not fall outside the range of reasonable responses of the reasonable employer. There was no control of the time such an appeal might take and therefore how much longer a decision would have to be deferred. This employer rejected it principally on the basis that it was not bound to wait for an appeal but in any event, it was not reasonable to wait what might have been many months before it was determined. Its time estimate may have been short of reality but I am satisfied that was a decision reasonably open to the reasonable employer.

8.10 The only real issue left is whether there was some alternative to dismissal. There was no alternative work available. Nor was anything sought by Mr Ennis or Mr Redgate of the GMB beyond the previous adjustments to the role. This sits alongside Mr Ennis's own particular view that the only thing he was prepared to contemplate was a return either to a small van and small parcels although it is notable that the focus of that has, over time, moved away from the temporary adjustment put in place in 2018 by Mr Bingham when small vans were available to the temporary measures put in place by Mr Malyan of deploying a shift supervisor to sort and adjust routes every day.

8.11 So far as Mr Ennis's was still seeking a small van, I am satisfied they were not realistically or practicably available for employees. That was due to the change to the green fleet and the inability for employees to charge then on site or even to recover the cost of charging them elsewhere. To the extent that it might have been possible to change the basis of the parties' contractual relationship to something other than that of an employee, that was considered as a means of facilitating a small vehicle through the ODF lite contract. I do not criticise Mr Ennis for rejecting that for obvious reasons, but nor can it be said that the employer acted outside the range of reasonable responses for not simply independently procuring a small diesel van for him as an employee. The reasonable employer is not required to abandon its particular business model and, in this case, its environmental aims albeit they might have to be stretched when viewed against the test of the range of reasonable responses, particularly having regard to the size and administrative resources of this particular employer. That in itself may well have been enough to keep the decision within the range of reasonable responses but it goes further because I have found that even with a small van, and even on an ODF Lite route, there is no practical means to exclude large parcels and heavy parcels and it would still require the additional layer of human supervision of the daily cargo and route that was unsustainable for the employer. In a disability discrimination case, if the adjustment contended for does not achieve its aims of removing or

mitigating the disadvantage, the cost and disruption of making it is likely to render it a reasonable step to take. This is not a claim for disability discrimination but the point applies with even greater force to the reasonableness of alternatives in a claim of capability unfair dismissal.

8.12 Even that was not a decision taken in isolation. The reasonableness of it has to be seen in the context of the other measures that were put in place. The employer was not doing nothing. There had been professional health and safety risk assessments conducted of the work with Mr Ennis's specific condition and clinical input in mind. This employer's conclusion that the 3.5t vehicle actually provided less risk than a small van to the bending and stooping movements that might contribute to discomfort was itself part of what would be expected of the reasonable employer before reaching a decision to dismiss. I am entirely satisfied the cost and disruption to the organisation deploying a shift supervisor to manually re-sort the packages and rounds on each day Mr Ennis worked was not a sustainable option and so far as that forms part of the rationale for the decision to dismiss, not continuing it as an option for his return to work fell within the range of responses of the reasonable employer. There was a continuing basis for additional support in manual handling training which were consistent with the final occupational health advice.

8.13 Looking at things from the other perspective, it was not an unreasonable view for the employer to take that the more limited arrangements to support Mr Ennis would have enabled him to return to his role as a collections and delivery driver. Although Mr Ennis genuinely held a different view, all that does is reinforce that this was a capability dismissal. Though this is a large and well-resourced employer, there was no feasible alternative and I come to the conclusion this was a fair dismissal viewed both as falling within the range of responses of the reasonable employer and having regard to the equity and substantial merits of the case.

Employment Judge R Clark

Date: 02 June 2023