EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106814/2017

Held in Glasgow on 6, 7, 8 and 21 August 2018

Employment Judge: **Ms M Robison**
Members: **Mrs A Middleton**
Mrs F Paton

Mr Adam Fisher — **Claimant**
Represented by
Mrs A Fisher
Claimant's Wife

Royal Mail Group — **Respondent**
Represented by
Dr A Gibson
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

i) the respondent has unlawfully discriminated against the claimant contrary to the provisions of section 15 and section 21 of the Equality Act 2010;

ii) the respondent shall pay to the claimant compensation totalling **FOUR THOUSAND NINE HUNDRED AND FORTY SEVEN POUNDS AND NINE PENCE** (£4,947.09).

The claim for unfair dismissal is dismissed.

E.T. Z4 (WR)

REASONS

Introduction

1. The claimant lodged a claim in the Employment Tribunal claiming unfair dismissal and disability discrimination. The respondent resists the claims. The respondent accepts that the claimant is disabled in terms of section 6 of the Equality Act 2010.
2. At the final hearing, the Tribunal heard evidence from the claimant and from his trade union representative, Mr Tam Dewar. For the respondent, the Tribunal heard evidence from Mr Jamie Downie, the claimant's line manager and the decision-maker, and from Mr Alan Drysdale, who heard the appeal.
3. The Tribunal was referred to documents from a joint file of productions (referred to by page or document number as appropriate).

Findings in Fact

4. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

Background

5. The claimant commenced employment with the respondent on 4 September 2008 as an OPG (postman).
6. He had a good attendance record (page 56) until he was absent for around 6 months in the first half of 2012 as a result of a shoulder injury caused by an accident at work. He was next absent for 113 days between February and June 2014, during which time he had surgery to remove a bone spur in his ankle.
7. The claimant had no further sickness absences until he went on sick leave on 5 August 2016 through to 25 September 2016 due to problems with his ankle (see medical certificates pages 28, 29 and 30). His next absence, again relating to his ankle, commenced on 24 February 2017, and continued until he was dismissed on 9 August 2017.

Relevant extracts from respondent's policies and procedures

8. The respondent reached an agreement with the Communications Workers Union (CWU) and Unite-CMA in respect of an Ill Health Policy (version 2 dated January 2018) (pages 79 – 90). The claimant was dismissed under this policy. The relevant extracts are as follows:

"Scope and general: The agreement applies to all Royal Mail Group…employees…where consideration is being given to: alternative or adjusted duties for an employee due to ill health; termination of an employee's trial on ill health grounds; ill health retirement…

Retirement on ill health grounds with lump sum payment: means the cessation of employment as a result of serious physical or mental ill health (not simply a decline in energy or ability) such that, in the opinion of Royal Mail Group….the employee is, for the foreseeable future, incapable of: carrying out his current duties; carrying out such other duties for the employer as the employer might reasonably expect the member of perform….

Memorandum of understanding…..Where through ill health, an individual is unable to perform their normal duties then Royal Mail Group and Trade Unions agree that suitability and reasonableness will be the prime factors in identifying appropriate alternative duties that the employer might expect the individual to undertake. This will enable Royal Mail Group to effectively discharge its obligations under legislation including the disability provisions of the Equality Act 2010 and the Employment Rights Act 1996.

When assessing suitability and reasonableness, the factors that could be taken into consideration include: job content, skill and aptitude, the person's current status, current pay and future earnings opportunity, hours of work, location and travel arrangements, personal commitments & circumstances, age etc…

Foreseeable future shall mean a period of at least 9 months from the date of the medical opinion….

Access to the process: Employees will enter the first stage of this process on referral to the OHS. This referral may be via a variety of routes which include an event such as a long illness or accident, a personal request…… or from one of the other internal procedures, e.g. Attendance or IPP including employees under notice of dismissal who are appealing for ill health retirement…..

Manager's decision (Stage 2): Following the receipt of the OHS advice, the line manager will consider what action to take, in line with the professional advice. He/she will discuss with the employee the advice received and give the employee the opportunity to respond. The outcome of this review will be either: a) an agreed date for return to work, with a temporary or permanent adjustment

to duties if appropriate; b) a decision to seek alternative work elsewhere in Royal Mail Group and the actions proposed to address this: c) a decision to progress 'Retirement on ill health grounds with lump sum payment' [or] d)….with immediate pension. The responsibility for making the decision based on the advice/recommendation from the OHS rests with Line Management….

Appeals (Stage 2.1) Right of appeal….b)…where the appeal is against termination of employment/retirement, the following provisions apply: ….e) all appeals will be concluded with an interview with the line manager who is due to make the decision based on the OHS advice…

…All appeals will in the first instance be referred via the appropriate Line Manager to the OHS for consideration of any medical evidence furnished by the employee in support of their case. Any medical evidence received under sealed cover from the appellant's medical adviser will be forwarded unopened to the OHS. The OHS will normally communicate directly with the appellant's medical adviser. The OHS may, at their discretion seek a second opinion. The outcome of the appeal based on this additional medical evidence would be further OHS advice to line management on the basis of the alternatives set out in section OHS Referral/Recommendation (Stage 1).

Appeal to an independent specialist in occupational health (Stage 2.2): An employee whose appeal for or against retirement on ill health grounds has been turned down can request that the case be referred to an independent specialist in occupational health….

Adjusted duties or alternative work in Royal Mail Group: where the advice following referral is to offer adjusted duties or suitable alternative work, careful consideration needs to be given to the type of work suggested and the attendance or travel adjustments necessary. This should be discussed by line management with the individual, their TU representative if requested and if necessary the OHS to ensure commonality of understanding on the parameters within which work is being sought. These discussions should take due account of the "Memorandum of Understanding" and ensure the alternative work meets the employee's capability, aptitude and fully complies with the medical advice received. Possible roles should be identified, even if there are currently no open positions. If necessary the OHS should be

consulted on the suitability of such roles prior to investigating placement opportunities. All practical and reasonable measures ought to be exhausted by Line Management to secure a placement opportunity within their own sphere of influence in the first instance, especially where the type of work identified already exists under their control. This should extend to other suitable locations and roles within the Business Unit if necessary.

Where no such roles or opportunities are identified, line management should broaden their efforts to other parts of Royal Mail Group in accordance with any geographical or travel adjustments contained in the OHS advice…."

9. The respondent has an Equality and Fairness Policy (page 90A – 90F).

10. The respondent has a sickness absence policy titled "Royal Mail Letters Attendance Procedure (page 91- 101). The claimant was not dismissed under this policy. However, the following extracts are relevant to the claimant's arguments:

"This procedure…..applies to frequent and/or lengthy absences from work….because of medical conditions which do not justify Medical Retirement. Absences which are incurred by employees who are disabled in accordance with the Equality Act 2010 and which, in the view of OHS are related to their disability, will normally be discounted. However this may not always be the case and the employee's manager should always seek advice from HR Services, Advice & Support and the following should be noted: these absences will still be recorded on the employee's sick absence record; the line manager will still carry out return to work discussions, explain that the relevant absences have been discounted and discuss whether assistance from OHS or RW would help with disability-related attendance problems, including consideration of any reasonable adjustments; Absences which are disability-related may be counted where it is justifiable to do so (and the manager should take advice on this at any stage under the procedure) and in these circumstances the employee should be given advance warning that future absences will no longer be discounted and the reasons recorded in writing….

……Link to long term sickness absence: If at any time, whether or not an employee is subject to a stage within the formal procedure, he/she becomes absent with a condition which is likely to result in a long term absence or an

absence which has become long term he/she may be dealt with under arrangements for dealing with long term absence and rehabilitation (Appendix B)…."

11. The respondent has published an employees' guide to their business standards (page 103 – 146) as well as a Code of Business Standards (pages 147 – 173).

Sickness absence August/September 2016

12. The claimant was not able to continue at work because of the pain in his ankle, and was absent from 5 August 2016, and subsequently signed off sick because of Achilles tendonitis. The claimant's GP had informed him that this was likely due to him overcompensating the way he was walking due to the pain in the front of his ankle caused by the bone spur, which by that time had grown back following the operation in 2014.

13. In or around mid-August 2016, the claimant was referred by his line manager, Mr James Downie, to the respondent's occupational health specialists, OH Assist.

14. Following a telephone consultation with the claimant, Mr Downie was furnished with a report from the occupational health adviser, Ms Brenda McAlpine dated 18 August 2016 (pages 31 – 32). In that report, she referred to the operation to the ankle in 2014 and noted that the claimant had been paying privately for physiotherapy intermittently over the past two years to help him manage the pain and remain in work. She noted that "*he currently experiences increased symptoms if walking and this worsens after 5-10 minutes. He can drive for a few minutes but using the clutch increases the pain. He is on a range of medication to help reduce the symptoms. He has been referred to an orthopaedic surgeon and awaits an appointment but this could be several months"*.

15. She concluded that he was "*unfit for work in any capacity due to his current level of symptoms and his requirement to rest his ankle. It is hoped that the rest then physiotherapy will help resolve this flare up and FRP (Functional Restoration Programme) will help minimise the likelihood of flare ups by providing specific advice and exercises; will help him return to work and resume full duties. This is a flare up of a long-term issue impacting on his*

mobility. If his symptoms settle and the swelling does go down he is likely to be able to return to work on a rehab plan on 29 August and if not then the FRP team will help with a rehab plan thereafter. If pain and swelling is still an issue on return then the following plan should help to reintroduce him to walking activities in a structured way minimising a further flare up…..please be aware however that this return to work plan is for guidance purposes. It should be monitored in a one to one meeting at regular intervals to ensure that the employee is progressing at the expected rate…..Mr Fisher meets the criteria for referral to the FRP. The FRP promotes best practice and offers the most advanced specialist treatment to help employees return to work and to return to their normal duties…."

16. She stated that she was of the view that the claimant would be considered disabled under the Equality Act.

17. By e-mail dated 6 September 2016, Mr Downie was advised that the claimant did not after all meet the criteria for FRP, his case having been considered by a senior consultant. Physiotherapy was recommended (page 32A and 32B).

18. By e-mail dated 16 September 2016, Mr Downie advised OH Assist that they should go ahead with physiotherapy for the claimant. The claimant received three sessions from the physiotherapist who had been treating him privately and who had advised him that he did Royal Mail referrals.

19. Mr Downie received an e-mail dated 29 September 2016 (32F) from OH Assist attaching the initial physiotherapy report dated 28 September (page 32I). This was a report which was prepared by OH Assist with input from the claimant's physiotherapist (Alan Krawczyk). The recommendation stated "*The patient reports that he is returning to work on reduced duties (inside duties). The clinician has recommended he continue this for two weeks and then begins outdoor duties with a reduced load – 50% of normal load initially and progressing steadily with 10% every few days to full duties. The clinician has cautioned against sudden increased in the work load to avoid exacerbating the symptoms in the Achilles tendon".*

20. The claimant returned to work on 26 September 2016 on a phased return based on the recommendations of OH Assist. Although one to one monitoring meetings were recommended, no formal meetings took place, but when he

was in the Troon office, Mr Downie had some informal chats with the claimant regarding his progress.

21. A further report was forwarded to Mr Downie by e-mail dated 1 November 2016 (32K). That report was dated 27 October 2016 (32M) and states "*patient is tolerating being back at work carrying a full load, he reports he has issues with the ankle joint which was not the reason he was initially referred*". Under "*overall level of improvement*" it is stated "*80% (where 100% would be fully recovered)*".

22. On 19 October 2016, the claimant received an invite to an attendance review meeting, in terms of the respondent's absence management policy because his level of absence was a cause for concern having fallen below the respondent's attendance standards (32O). As a result the claimant was issued an "attendance review 1" on 21 October which meant that if he incurred further absences which exceeded the attendance standards, further action could be taken which could lead to dismissal under the formal attendance process (32Q).

23. The claimant was still experiencing issues with his ankle and when asked as usual in the lead up to their busiest time in December what overtime he was available for, he stated that he was available for indoor activities, but not outdoor because at that time they were usually taking 6 hours rather than 5 to do deliveries. He experienced further deterioration during that busy period and expressed concern to Mr Downie at the beginning of 2017 regarding discomfort with his ankle.

24. He remained in work, by doing physiotherapy and putting on straps, until he again went on sick leave on 24 February 2017. This was due to the fact that his Achilles tendon had swollen up again and he understood that this was caused by compensating for the bone spur problem which had recurred following the key hole surgery he had in 2014.

25. Mr Downie completed a business referral form on or around 14 March 2017. This is a standard form template which he completed (not lodged). In that referral he requested inter alia whether ill health retirement was an option. He completed this without any further reference to the claimant.

26. An interim report, completed by a Dr Peter Milne, following a telephone consultation with the claimant, was sent to Mr Downie in a letter dated 24 March 2017, which stated "*Mr Fisher gave a history of ankle/Achilles tendon problems which causes him pain and is affecting his ability to work. He reported that surgery is likely to take place some time in the future, although he did not know whether his ankle will recover/sufficiently for him to return to work (which he hopes to do). I am therefore seeking his written consent to liaise with his specialist to obtain further details".*

27. Consent was obtained from the claimant for OH Assist to contact his consultant, Mr Kenneth David-West, but letters sent to a Mr West did not reach him.

28. OH Assist furnished Mr Downie with a so-called "final report" from Dr Colin Geoghegan dated 12 May 2017 (page 42). This followed a telephone consultation with the claimant that day. It was prepared however without the benefit of a report from Mr David-West.

29. The report stated as follows: *"Mr Fisher remains troubled with problems with his left ankle and left Achilles tendon causing him difficulty undertaking his usual duties at work. He is currently on sick leave. Mr Fisher has been assessed by a hospital specialist and says he is waiting for surgery to be carried out. He says he will be having a bone spur removed from the left ankle and surgery to his Achilles tendon due to long term inflammation of this tendon. Mr Fisher had previous surgery to this ankle three years ago. Mr Fisher says he recently had a hospital pre-surgery assessment and is now waiting for a date for the operation. He says he has informed the hospital that he is available at short notice should a cancellation be available. Mr Fisher remains unfit for his delivery duties due to his limited mobility. While waiting for the operation, Mr Fisher is fit for indoors sedentary type duties if available. Once I have received a reply from the Specialist, further contact will be arranged with Mr Fisher. An additional occupational health report will then be submitted addressing the queries in the Business Referral Document. Mr Fisher is aware of the advice I have provided above…."*

30. A report dated 15 May 2017 from Mr Kenneth David-West was forwarded to OH Assist, which stated as follows:

"*Adam was referred to me by his GP and I saw him for the first time on 26th of October 2016. At that time he was a 51 year old postman with left ankle pain and also pain from his left Achilles Tendon. About 3 years ago in 2013 he had surgery (Cheilectomy) for osteo-arthritis at the Golden Jubilee Hospital by Mr Shah. In the clinic review there was a scar from his previous surgery on his left ankle. His dorsi flexion and plantar flexion of the ankle were slightly reduced and there was also a palpable lump over his Achilles Tendon. This was about 5 cm from the insertion of the Achilles Tendon. An MRI scan was then requested to access his Achilles Tendon.*

He was reviewed again on 7th of February 2017 with the MRI result which showed Achilles Tendinopathy. He also has also (sic) a loose body on the anterior aspect of his ankle joint (loose body is bony fragment). It was then discussed with him that if he continued to have pain, an open Cheilectomy could be performed to remove the loose body and also at the same time he could have decompression of his Achilles Tendon. The plan was to review him again in 3 months' time to assess his progress.

He was reviewed again on the 28th of March 2017 when he had made up his mind that he wanted to proceed with the above procedure. He was consented for this procedure to be carried out as a day case. It was explained to him that post-operatively he will remain weight bearing on special boots which will be given to him.

The result from the Achilles Tendon decompression is very successful but because there is an ongoing process of degenerative changes in the joint, the results from the Cheilectomy are sometimes not as successful as the decompression procedure.

This procedure has not been performed as yet so I cannot comment on the outcome of this until it has been done. He should be able to make a good recovery in order to get him back to his job but this will be assessed post-operatively. He is still on the waiting list and I would be pleased to give you more information regarding this post-operatively".

31. In the meantime, the claimant was delivering sicknotes by hand, on occasion to the Kilmarnock Office, where Mr Downie was often working, and the claimant and Mr Downie would have informal discussions regarding his progress.

During these discussions, Mr Downie raised the issue of ill-health retirement (IHR), and the claimant responded that he did not want to go down that route, and that he thought it was too early to be considering that. Notwithstanding, Mr Downie suggested that it would do no harm to obtain a quote, so that he could discuss that option with his family.

32. On 8 June 2017, Mr Fisher received a telephone call without warning from Dr Muhammad Baig, when he consented to a telephone consultation taking place then. He thought the call related to Mr Downie's proposal for IHR. Following that consultation Dr Baig produced the following report (also labelled final report):

"Based on my assessment, report from his treating specialist and medical evidence gathered by my OH colleagues I can, now provide you with the following report to which the patient has consented. Your employee suffers from chronic problem with his Tendon Achilles, for which he was operated in 2013 and is now awaiting another operation. And there is no guarantee that even with the treatment that he will be able to continue in his role and I therefore advise that on the balance of probability he will remain incapacitated for his normal duty for the foreseeable future. That give rise to an impairment of their capacity for work (sic).

Capacity for employment: The medical conditions mentioned above results in the following functional impairments: He has pain and difficulty in walking. As a consequence the following is the impact on their job role: he has been unable to complete his duty.

Outlook: The evidence suggests the condition has become long-term and there is no foreseeable return date. The employee has completed more than one year's service. As a consequence of that it is my opinion that the criteria for leaving the Business with a Lump Sum are met but that the criteria for Leaving with Immediate Pension are not met in this case. I have completed the necessary certificate hereunder. The reason why Immediate Pension is not met is because he will be capable of a sedentary role. I have considered the medical and other reports concerning this employee, and these together with the results of my own assessment have led me to form the opinion that as a result of serious physical or mental health (not simply a decline in energy or

ability) the employee is for the foreseeable future incapable of: a) carrying out his current duties; b) carrying out such other duties for the employer as the employer might reasonably expect the employee to perform. The grounds for my opinion are: Major Health Problems Achilles Tendonitis: ICD Code: M 76.6. Therefore the individual would meet the criteria for medical retirement with lump sum payment".

33. Dr Baig confirmed that the Equality Act is likely to be met in this case because of the enduring nature of the impairment. He concluded that "*the employee would be capable of an alternative duty with the following adjustments: Mr Fisher will be capable of a sedentary role…"*

34. Mr Downie received the ill health retirement quote by e-mail dated 4 July 2017, with a lump sum quotation, PILON of 9 weeks and a proposed last day of service of 15 July 2017. That e-mail included a link to a "consideration of dismissal letter" (page 48A). Mr Downie discussed the contents of that e-mail with the claimant when the claimant handed in a sick-line on 13 July. The claimant was disappointed and taken aback to have been advised of a proposed last day of service.

35. By letter dated 13 July 2017 (page 49), the claimant was advised that as of 21 July 2017 his entitlement to occupational sick pay would reduce to half pay.

36. During the informal discussions which the claimant had with Mr Downie, the claimant was informed that he had been told that he would send an e-mail round the relevant offices to see if there was any relevant work. Mr Downie believed that the claimant had ruled out the possibility of jobs in the Glasgow mail centre, although the claimant did not recall that discussion. In any event, there were no formal meetings at which it was recorded that these issues were discussed.

37. In or around 18 July 2018, Mr Downie completed a "corporate redeployment matrix" (CRM), stating under the heading "reason for redeployment request", "*following an OP appointment it has been stated that Mr Adam Fisher is unable to return to perform his normal delivery duties within the Troon Delivery Unit. He suffers from chronic Achilles Tendonitis. This issue is likely to continue to trouble him for the long term. Mr Fisher may be fit for indoor sedentary duties. Before I consider this course of action, I need to ascertain availability of suitable*

redeployment within the Royal Mail Group before we can take this case any further. Therefore, could you let me know if you have anything available that could accommodate Mr Fisher?" (page 55).

38. He sent this around 30 managers and acting managers in the Kilmarnock post code area. Only two negative responses were received from Kilmarnock (page 55A) and Saltcoats (page 55D) within minutes of the e-mail having been sent.

39. A consideration of dismissal letter, dated 24 July 2017, was sent to Mr Fisher, which stated *"Following your recent meeting with the Occupational Health Service, OH Assist, and having received advice from them, I am writing to advise you that serious consideration is now being given to your retirement on grounds of ill-health. However before a final decision is taken I am offering you the opportunity to put forward any reasons why this course of action should not be followed."*

40. The claimant was invited to a meeting which took place on 27 July 2017, at which the claimant was represented by his trade union rep, Mr Tam Dewar.

41. In a note of the meeting (page 52 and 53), Mr Downie stated that he "*made reference to the OH Assist Consultant Occupational Physician Report and asked Mr Fisher to comment and to put forward any reasons as to why he should not be retired on grounds of ill health. Mr Fisher stated that Mr Dewar would speak on his behalf. Mr Dewar stated that OP report does not take into account the long term prognosis concerning Mr Fisher's Achilles Tendonitis condition. I explained to Mr Dewar that Dr Muhammad Baig's report in relation to Mr Fisher that 'there is no guarantee that even with the treatment he will be able to continue with his role and I therefore advise that on the balance of probability he will remain incapacitated for his normal duty for the foreseeable future'. Mr Dewar then stated that Mr Fisher is awaiting surgery for a bone spur which had regrown and this is impacting on his Achilles tendon. Mr Dewar further stated that Mr Fisher would be hopeful of a good recovery following surgery. I then explained to Mr Dewar that Mr Fisher had been absent from work on 4 previous occasions totalling 114 calendar days with the same/associated ankle condition. Mr Dewar acknowledged this but then stated that Mr Fisher's overall record excluding his ankle condition was good. Mr Dewar further stated that he would like Mr Fisher to have another referral to*

scope the long term outlook. Mr Fisher then stated that he felt it was too soon to consider ill health retirement and further stated that he had paid for physiotherapy off his own back in an attempt to get back to work. I acknowledged this but stated to Mr Fisher than any decision will be based on the medical evidence available. I asked Mr Fisher if he had any further evidence to support why he should not be retired on the grounds of ill health. Mr Fisher said no. I stated to both Mr Fisher and Mr Dewar I had completed corporate redeployment matrix to ascertain availability of suitable redeployment opportunities within RMG. I further stated that no replies were received indicating that a unit could accommodate Mr Fisher. I discussed with Mr Fisher the ill health retirement offer and asked him to comment. Mr Fisher stated again he felt that it was too early and would not accept the ill health retirement terms at the moment. I asked both gentlemen if they had anything further to add. Mr Dewar stated that he would like to see a further OH referral being completed updating the medical issues and further stated that on medical evidence provided, there was no mention of a bone spur. I informed Mr Fisher that I would process the interview notes speedily and he would be contacted in due course concerning my decision."

42. The claimant was advised of the termination of his employment by letter dated 8 August 2017 (page 61), which set out the sums due and stated, "*Following our recent meeting and having carefully considered the points raised, together with the medical evidence, I have concluded that you are unlikely to resume work in the foreseeable future. Therefore my decision is that you will be retired on ill health grounds with a lump sum payment".*

43. The claimant appealed this decision on 9 August by completing the reply slip (page 63), in which he stated that he did not accept the decision and was appealing on the grounds that "*the decision pre-empts the outcome of my operation to remove a bone spur"*. This was signed by Mr Fisher and also by Mr Dewar who stated that the claimant would be represented at the appeal by the CWU.

44. Appendix A of the letter of termination of employment (page 64) stated that *"if you chose to appeal this must be supported by appropriate medical evidence….types of evidence needed to support an appeal are as follows:*

….the medical evidence must conclude that you are fit to be able to return to work on your normal, adjusted or alternative duty within the foreseeable future and be able to give regular and efficient service. Foreseeable future is understood to mean the next nine months. The report must contain sufficient clinical details about diagnosis, medical management and prognosis to allow a conclusion to be made about your future fitness for employment. Any recommendations on restrictions or adjustments to duties can also be outlined. A simple statement that you are fit to work is not sufficient. The onus is on yourself to provide new medical evidence in support of your appeal, which must come from a registered practitioner….".

45. By letter dated 7 November 2017 (page 65) the claimant was advised that the appeal hearing would take place on 10 November 2017. It was conducted by Mr Alan Drysdale, delivery and collections manager, Inverclyde.

46. Mr Drysdale completed notes of the meeting (page 68). The claimant was not satisfied that these were an accurate reflection of the meeting, and with assistance of his trade union rep, he intimated amendments and corrections which he wished to see (pages 71 – 76).

47. Mr Drysdale noted that Mr Dewar referred to the letter from Mr Kenneth David-West dated 5 May 2015, which he asserted had not been considered at the time of the IHR interview and would like this to be added as the new supporting medical evidence. The notes also state, *"I accepted this however I did ask Mr Fisher on the timescales of his absence how long had he been off since his last absence until he was paid off under IHR. Based on the evidence Mr Fisher confirmed he had been off sick since the 24th February 2017 which has been 6 months".*

48. The claimant had proposed a correction to that entry: "*Letter from NHS A & A stated 'He should be able to make a good recovery in order to get him back to his job but this will be assessed post-operatively'. This evidence had not been considered by the dismissing manager, in conjunction with the OH Assist report of 18/8/16 which stated that 'Mr Fisher was suitable for referral under the functional restoration programme (FRP). Mr Fisher had consented to this since it would enable him to continue working. This would satisfy the requirement under the Equalities (sic) Act. To afford Mr Fisher protection from*

discrimination under the Act. (It should be noted that Mr Drysdale had no knowledge of both letters and had to be given copies)".

49. The notes also state "*I asked Mr Fisher to advise if he had so had (sic) the operation to sort out his ankle issue he stated no. I then reviewed the time since his IHR from the 8th August to date which was a further 3 months with no sign of this operation and a possible 4 month recovery it was fair to come to the conclusion that Mr Fisher's absence could be in excess of 12 months which did not meet the 9 month expected period IHR. Mr Fisher again stated that what was the point and he would just pursue the other option via the industrial tribunal".*

50. The claimant proposed the following addition to that paragraph *"Mr Fisher added that his absence had been lengthened since Royal Mail had not fully complied with the OHS FRP. This had led to Mr Fishers absence being extended. Mr Dewar stated that Mr Fisher had been paying for physiotherapy privately to help him return to work sooner".*

51. The claimant was advised of the outcome of the appeal hearing by letter dated 14 December 2017 (page 77), in which Mr Drysdale stated that:

"After careful deliberation of the facts and subsequent written submissions and additions to the original notes of interview, I have reasonable evidence to support the original decision by your line manager at the time. Based on this your IHR will stand from the original date of issue. The reason for my decision is that during your appeal you did not provide any further medical evidence to support your appeal and failed to provide written documentation from a member of the medical profession that would support a phased return to work within a 9 month time period and based on the fact that you still had not had the operation and no likely date set for this operation and a further 4 month recovery period plus additional rehab and you had been absent for a period of 6 months prior to your IHR and a further 3 months to your appeal then the expectation would be that you could be off for a period of 13 months without rehab which falls well short of the attendance times expected. Royal Mail as a reasonable employer offer a substantial time to heal and recover but in this instance it cannot support such a length of absence and will not accept such breaches in its attendance standards which you have clearly failed to uphold".

52. The claimant had the operation to his ankle on 6 January 2018. This was delayed because Mr Kenneth David-West is the only surgeon in Ayrshire and Arran carrying out such operations, and he himself had been absent for a time on sick-leave. The claimant made a good recovery from the open surgery, which he considered was much quicker than following the keyhole surgery in 2014, and was walking within 11 days and driving within two weeks.

53. Mr Kenneth David-West stated, in a report dated 12 April 2018, that the claimant *"continues to have pain from his Achilles tendon and also a lump. He had surgery (decompression to the Achilles tendon) on the left carried out on the 6th of January 2018. Following this procedure he has made good progress but he was reviewed in the clinic again on 12th of April 2018 and he is still having discomfort over his Achilles tendon but with good flexion and extension (movement of his ankle joint). He had slight pain on extreme dorsi flexion"* (page 174).

54. Following a session with his physiotherapist on 6 June 2018, Mr Krawczyk was of the view that *"by the time the sessions had finished you were back to walking the dog regularly with very little pain and you now have a maintenance programme to manage your condition which should stand you in good stead for avoiding further flare ups"* (page 175).

55. The claimant's GP, in a medical report dated 14 June 2018, stated, *"Since his loss of employment he has been progressing positively with regards to the left ankle problems that were preventing him returning to work. Unfortunately, secondary to the loss of his employment, he has developed both mental and physical health problems. Mr Fisher has been suffering with depression and anxiety. His mood has been low. He has been socially isolating himself, avoiding contact with people and his sleep has been disturbed. He has been suffering with feelings of hopelessness and anxiety. There appears to be no other trigger for this deterioration in his mental health other than his loss of employment. We have tried medicating his mental health problems with an antidepressant and anti-anxiety medication with little benefit. From a physical point of view Mr Fisher does have a diagnosis of fibromyalgia which has not bothered him for some time, decades, but following the loss of his employment his fibromyalgia has also flared. Unfortunately due to his flare of fibromyalgia*

he is suffering with bodily aches and pains which have been poorly controlled with medication. On a daily basis he is in pain and limits what activities he can do".

56. The claimant himself considered that he was fit to return to work by June 2018.

57. By letter dated 16 August 2018, the claimant was advised by NHS Ayrshire and Arran that following interview when he was placed on a reserve list for consideration for future posts, they were in a position to offer him a post for 15 hours per week, subject to satisfaction of appropriate pre-employment checks, which is expected to commence at the beginning of October.

58. The claimant's date of birth is 16 May 2017, and was 52 years old as at the date of dismissal.

Relevant law

Unfair dismissal

59. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Capability is one of the potentially fair reasons for dismissal.

60. Section 98(4) provides that 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 reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

61. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**). The Tribunal must therefore be careful

not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

62. The starting point for analysing the duty of the Tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in **Spencer v Paragon Wallpapers Ltd [1976] IRLR 373**. In that case Phillips J stated that "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?". The relevant factors to scrutinise include: the nature of the illness and the job; the needs and resources of the employer; the effect on other employees; the likely duration of the illness; how the illness was caused; the effect of sick-pay and permanent health insurance schemes; alternative employment; and length of service.

Disability Discrimination

63. Section 15 of the Equality Act states that a person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

64. Section 20 sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled people. This duty broadly arises when a disabled person is placed at a substantial disadvantage by the application of a PCP, by a physical feature, or by the non-provision of an auxiliary aid. A failure to comply with the duty amounts to discrimination under section 21(2). In this case the relevant requirement is to take such steps as is reasonable to avoid the disadvantage where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage.

65. The duty arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person. The test of reasonableness in this context is an objective one (**Smith v Churchill Stairlifts plc 2006 ICR 524 CA**) and the focus is on whether the adjustment itself can be considered reasonable, not whether an employer's process for determining that question was reasonable *(***Royal Bank of Scotland v Ashton 2011 ICR 632 EAT**). An adjustment from which the disabled person does not benefit is unlikely to be a reasonable one *(***Romec Ltd v Rudham EAT/0069/07**). However, there does not have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable *(***Noor v Foreign and Commonwealth Office 2011 ICR 695 EAT**). The question is whether the adjustment would be effective in removing or reducing the disadvantage the claimant is experiencing as a result of their disability, not whether it would advantage the claimant generally. To assess the effectiveness of a proposed adjustment, it is best practice to consult the disabled employee, who is most likely to know whether the adjustment would make a difference. Alternatively, or additionally, expert opinion, such as medical or occupational health advice, could be obtained on the probable effect of any proposed adjustment.

Claimant's submissions

66. Mrs Fisher confirmed that the claimant is pursuing three types of claims, in particular section 15 of the Equality Act, that is discrimination arising from disability, read with Chapter 5 of the Equality and Human Rights Commission Code of Practice; section 21 of the Equality Act, that is the failure to make reasonable adjustments read with Chapter 6 of the Code of Practice, and unfair dismissal under the Employment Rights Act 1996.

67. During the course of submissions, Dr Gibson confirmed that the respondent conceded that the conduct was unfavourable treatment arising in consequence of disability and that the claimant suffered a substantial disadvantage for the purposes of the reasonable adjustments duty.

68. Mrs Fisher summarised the evidence. The claimant had confirmed that he had worked as a postman for 9.5 years until his dismissal. Although the claimant has a number of long term conditions, these have not impacted on his work. Mr Downie confirmed that the claimant was a good worker. Latterly, the claimant has had three absences, the latter two of which were associated with underlying conditions with his ankle, and the claimant was subsequently considered by the occupational health advisers to be disabled for the purposes of the Equality Act.

69. Mr Fisher had regularly attended physiotherapy in order for him to resume his duties. Mr Downie had poor record-keeping. He had made errors in his record-keeping and he had breached the claimant's confidentiality. Mr Dewar was shocked that the decision to call for ill-health retirement had come only three weeks into his absence which he believed was premature. Mr Dewar gave evidence that usually this didn't commence until much later, and suggested adjustments but none of these were explored. The only adjustments which Mr Downie considered where in respect of the corporate redeployment matrix and this was sent to many colleagues who wear acting up and were not managers.

70. Mr Downie admitted that he had dealt with many ill-health retirement issues but he showed little sign that he knew how to treat people fairly. The only adjustments which he put in place were the physiotherapy appointments and a short rehabilitation plan. He said he would have discussed other adjustments with the claimant but he could not be sure and there was no evidence that he had and anyway he did not put in place any other adjustments. There was no evidence beyond what he said that he had the appropriate training and no training records where lodged. He referred the claimant to OH Assist only three weeks into his absence which was a breach of the policy.

71. Mr Drysdale said that this was the first ill-health retirement he had dealt with. It was clear that he had lacked preparation and failed to properly investigate the circumstances. He concentrated solely on the process and didn't look at the gaps in the paperwork or in the correspondence. He also breached confidentiality.

72. With regard to the medical evidence from 5 August to 29 September 2016, Mr Downie received a report that the claimant was disabled under the Equality

Act. He went on sick leave again in February 2017 and was dismissed only four months later. During those four months, Mr Fisher was assessed following only telephone discussions with occupational health advisors, and there was no examination despite the type of condition. Mr Kenneth David-West was the only medical person qualified to make an informed decision and in his report he referred to the fact that the claimant could make a good recovery.

73. With regard to the relevant law, the claimant argues that the claimant has been discriminated against for a reason arising from his disability under section 15 as well as section 21. With regard to the claim under section 20 this is the cornerstone of the Equality Act, which requires employers of all sizes to take positive steps, but here the respondent has failed in its duty to make the necessary reasonable adjustments. Apart from the three physiotherapy appointments and there was the issue of the redeployment matrix in which Mr Downie breached the claimant's confidentiality. He changed the wording from the medical report to state that the claimant may be able to do sedentary duties, rather than will be able to, which shows that he made very little effort to look for alternative duties.

74. The claimant was further disadvantaged by the fact that sedentary duties are few and far between, and by the fact that they were not even clear about what that actually means. Mr Dewar advised that these were reserved for people with long-term service or were disabled under the Equality Act, and that people under the Equality Act should get priority.

75. Mrs Fisher then made reference to proposed reasonable adjustments set out in the EHRC Code which she said were relevant in this case, including: allocating some of the duties of the disability disabled person to another person; transferring to an existing vacancy; altering hours of work; assigning training; allowing more absences; or giving or arranging training. The claimant failed to make these reasonable adjustments and this led to the claimant's unfair dismissal.

76. This was Mrs Fisher also referred the tribunal to three decisions of the Employment Tribunal, (which are of course not binding on this Tribunal), namely **Carrabyne v DWP, ET/2401990/16; Patel v Royal Mail ET/3322856/16 and Charalambous v Haringay CAB ET/3300153/17.**

77. Mrs Fisher lodged an updated schedule of loss which included written submissions.

Respondent's submissions

78. Mr Gibson lodged written submissions which he supplemented with oral submissions. He first set out the issues relevant to the claim and proposed findings in fact.

79. With regard to credibility, he submitted that the claimant's credibility was seriously called into question on two issues when holding it up against the more neutral and balanced evidence of Mr Dewar. These related to his recollection about what was put to him when a last day of service and lump sum were proposed, and his evidence that he had to contact his union in order for a meeting with Mr Downie to be arranged. Dr Gibson submitted that if the claimant has been found out on this there is a question mark over the rest of his evidence which was overstated or downplayed as it suited him. The second issue of credibility was the direct contradiction between the claimant and Mr Dewar as to what exactly it was they were supposedly challenging in the medical report, and differing views as to which of the medical reports claimed were contradictory.

80. Dr Gibson submitted that the reason for dismissal was not in dispute and nor should there be any doubt that the respondent had a genuine belief in the claimant's ill-health, so that the key focus was on the question of whether or not the respondent's belief was based on reasonable grounds.

81. In support of his submission he argued that the respondent had medical reports dated 12 May 2017 and 8 June 2017 which confirmed that the claimant was a disabled person and unable to carry out his ordinary duties as a postman, the latter dealing with the ill health retirement issue and considering the long-term outlook. There was a redeployment search but nothing was available which is not surprising since indoor sedentary positions are rare. The claimant's own specialist was not able to confirm what might happen post operatively, but in any event the key point was that no date had been fixed for the operation.

82. Relying on **Merseyside v Taylor 1975 ICR 185** (that there is no duty on an employer to create a job where none exists) and in the factors highlighted in

BS v Dundee City Council 2013 CSIH 91, Dr Gibson submitted that the respondent had conducted a reasonable investigation and that dismissal was within the range of reasonable responses. He argued that the respondent had taken account of the nature of the employee's illness, the prospects of the employee returning to work, the likelihood of the recurrence of the illness, the need for the employer to have someone doing the work and the effect of the absences on the rest of the workforce, the extent to which the employee was made aware of the position, the employee's length of service and the availability of alternative employment. Further, the claimant had exhausted his entitlement to full sick pay by 21 July 2017 and would have exhausted his right to sick pay prior to what he claims is the date he could have returned to work. While Royal Mail is a large organisation, it has a large customer base, and account should be taken of the cost of sick pay and the cost of covering his role. Relying on these factors, the respondent in this case could not be expected to keep the employee's job open any longer than it did.

83. Dr Gibson submitted that the dismissal was procedurally fair given, as required in the cases of long-term incapacity, the medical position had been ascertained, the claimant had been consulted and the availability of alternative employment had been considered.

84. With regard to the question of the appeal process, Dr Gibson stressed that the IHR policy had been agreed with the unions, and the reason for the focus on new medical evidence is because only a change in the medical position could alter or cast doubt on the decision to dismiss in an ill-health retirement type case. It was open to the claimant, supported by his union, to obtain an up to date medical report as required.

85. Dr Gibson then turned to consider disability discrimination and confirmed that he conceded that dismissal was unfavourable treatment which arose in consequence of the claimant's disability but argued that it was objectively justified as a proportionate means of achieving a legitimate aim, that being the business efficiency of the delivery office and the business as a whole. The delivery office needed all staff to be able to deliver mail and dismissal was proportionate because there were simply no other jobs available which the claimant was fit to be redeployed to. The claimant's role had to be freed up so

that Royal Mail could employ someone who was physically fit to fulfil their legitimate aim.

86. Dr Gibson stated that the respondent concedes that the provision of the respondent that the claimant deliver mail walking long distances each day put him at a substantial disadvantage compared with his disabled colleagues in an identical role. He submitted however that the respondent took such steps as it was reasonable to have taken to avoid the disadvantage, given that the only steps which the respondent could take in this case would be to redeploy the claimant in to an indoor secondary role or wait indefinitely until such time as he might be fit again to undertake his normal duties.

87. This case has been defended on the basis that there are two reasonable adjustments which the claimant is seeking, in respect of the period after February 2017. No other adjustments have been pled and therefore the respondent has had no notice of any other claim regarding a failure to make reasonable adjustments, such as not implementing the FRP in August 2016, or not providing him with other duties between September 2016 and February 2017. If the respondent had had notice of this, then they would have argued that such claims were time barred. It is not open to the tribunal to look back this far and the claimant cannot benefit from lack of specification in his pleadings to introduce any further aspects of a reasonable adjustment claim.

88. With regard to indoor sedentary duty there was simply no work of that type available which the claimant was in a position to do. A search was carried out and discussions took place with the claimant and unfortunately nothing was available. It would not be reasonable to have to expect the respondent to take steps to magic up some work for the claimant that simply was not there or to allow the claimant to attend work in a sham role.

89. With regard to waiting until the claimant recovered, this has to be viewed in the context of what was known to Mr Downie and Mr Drysdale at the time they took their decisions, particularly the medical advice which they had that the claimant would not be fit to work for the foreseeable future (that is nine months from the date of the report), with no date for surgery fixed.

90. Dr Gibson addressed the Tribunal on the schedule of loss.

Tribunal's discussion and decision
Tribunal's observations on the witnesses and the evidence

91. We considered the claimant to be an honest and credible witness, and got no impression that he was anything but genuine in the evidence which he gave. Although he struggled on occasion to answer the questions put, we were of the view that these were put in a way which was, in the Tribunal's view, needlessly aggressive. While there were a number of disputes about the facts in this case, for example in relation to whether the issue of a move to Glasgow had been proposed, we accepted the claimant's evidence and while he may have been mistaken in his recollection, we did not accept that he was lying.

92. We did not therefore accept Dr Gibson's submissions regarding the two issues which he relied on to condemn the claimant's credibility. Dr Gibson appears to have overlooked the fact that there may be another explanation for the claimant's evidence, and that is a mistaken recollection. We were prepared to accept that the claimant, when faced unexpectedly even with a proposed final date of service so close to the date of the discussion, may not have accurately recollected what exactly what was being said to him, and again that he simply did not properly recall the sequence of events regarding the arrangement of the meeting which he had with Mr Downie, which we accepted was arranged by him in accordance with the usual procedure.

93. We considered Tam Dewar to be a credible and reliable witness. He is clearly an experienced and respected trade union official, who gave his evidence in a neutral and balanced way, and was prepared to concede facts which may not have put him in the best light or have been unfavourable to Mr Fisher, without embellishing any evidence. Although often the evidence of trade union officials adds little, in this case we found Mr Dewar's evidence to be helpful.

94. We were of the view that the respondent's witnesses were also credible witnesses. However, we came to the view that they had adhered rather too slavishly to the letter of their policies, and that they had considered the issues in a rather superficial way, and were not prepared to exercise their discretion as might be required in an individual case where the employee is disabled for the purposes of the Equality Act.

95. With regard to Mr Downie, while we accepted that he was a credible witness, he seemed to struggle to recall some of the details of this particular case. We were of the view however that he relied too heavily on the technicalities of the policies, to which he paid lip service, in particular in respect of attempts at redeployment. Indeed, we do not believe that Mr Downie paid any real regard to the respondent's obligations under the Equality Act, or consciously dealt with this case as one where the claimant had a protected characteristic in respect of the way he applied the IHR policy.

96. With regard to Mr Drysdale, we considered him to be a credible witness, but like Mr Downie we found that he approached his task in a rather blinkered and mechanistic way. We did not believe that he gave any real consideration to fact that the claimant had a protected characteristic under the Equality Act and indeed his approach was even more mechanistic in his focus on the letter of the policy relating to appeals.

97. We should say that we did also recognise that both Mr Downie and Mr Drysdale had heavy workloads and were managing a large number of people, and this would impact on the extent to which they would recall the details of this case or could make the time to use their discretion in relation to the application of the respondent's policies.

Tribunal's deliberations and conclusions

99. In this case the claimant claims unfair dismissal and that he has been discriminated against for reasons which relate to his disability, in particular under section 15 and section 21 of the Equality Act. We considered first the unfair dismissal question.

Unfair dismissal - Reason for dismissal

100. The Tribunal readily accepted that the reason for dismissal was capability due to ill-health, and indeed that was not disputed. Further, the Tribunal accepted that the reason for the dismissal was a genuine one, given the medical reports which had been obtained and the length of the claimant's absence. Capability is one of the potentially fair reasons for dismissal.

Reasonableness of dismissal in the circumstances

101. The key question of course is whether in dismissing the claimant for reasons of capability the respondent had acted within the range of reasonable responses. We considered whether the respondent had gathered sufficient evidence, conducted sufficient investigation and whether sufficient time had elapsed to allow them to make an informed and reasonable decision in all the circumstances.

102. We were of course conscious in this case that dismissal was not under the absence management policy, but rather under the ill health retirement policy.

103. Relying on the dictum of Phillips J in **Spencer v Paragon Wallpapers Ltd**, we considered in particular the following factors which are relevant in this case.

104. **The nature of the illness and the job:** in this case, the claimant had a recurring ankle injury which made it difficult for him to walk. It was universally acknowledged that his job as a postman involved a good deal of walking every day (although there were various estimates of how much, from around 6 to around 12 miles per day). He was signed off sick by his doctor who declared him unfit to work. As Dr Gibson submitted, it would be difficult to think of a case where the link between the nature of the illness and the job could be clearer.

105. We noted that the claimant was referred to the respondent's occupational health specialists shortly after he went absent in August 2016, who produced a report dated 18 August. We did not see the referral form. We noted that the claimant was able to return to work and at this time was getting physiotherapy sessions, three of which were paid for by the respondent. The claimant expressed concern at this point about being required to work overtime during the busy December period.

106. Notwithstanding the physiotherapy the claimant again was absent from work from 24 February until he was dismissed on 9 August 2017. Shortly after this absence commenced, Mr Downie referred the claimant to the occupational health specialists. Although we did not see the referral form, we were told by Mr Downie that he had included a request to consider whether ill-health retirement was appropriate. He said he did this because he took account of

previous lengthy absences which had resulted from this condition. We accepted that he was entitled to do this.

107. A "final" report was produced, without the benefit of the claimant's consultant's report, and then another "final" report was produced, this time with the benefit of the claimant's consultant's report.

108. There was a good deal of discussion in this case about the accuracy of that latter report, and the extent to which it had failed to take into account the specifics of Mr David-West's report. In particular, Dr Baig stated that "your employee suffers from chronic problem with his Tendon Achilles, for which he was operated in 2013 and is now awaiting another operation".

109. Mrs Fisher pointed out that this was inaccurate, and that the claimant had not had a previous operation on his Achilles tendon. His position was that he had had keyhole surgery to deal with a bone spur (a cheilectomy), but that the bone spur had grown back and in the meantime the Achilles tendon had develop because of his efforts to compensate. As set out in Mr David- West's report, it was proposed that he had another operation to his foot (this time open surgery) and at the same time to have decompression of his Achilles tendon. He said the latter operation is very successful, and while the results of the cheilectomy operation are not generally as successful, this would not be known in the case of the claimant until he had the operation. Mr Dewar was at pains in the meetings to highlight the fact that there was no reference to the bone spur in the OH reports.

110. Dr Gibson tried to suggest that the fact that Dr Baig refers to having taken into account Mr David-West's report meant that he had taken account of the bone spur, but we did not accept that. We accepted that at the very least that this report was limited, and indeed it suggests that Dr Baig had misunderstood the details of the claimant's condition, and to that extent was inaccurate.

111. However, considering the tests for unfair dismissal in particular, we accepted that the key issue in this case was that the respondent had made efforts to obtain several medical reports from their occupational health specialists, and in such circumstances Mr Downie was entitled to rely on them. In any event, Mr Downie did not have, and would not have, the report from the claimant's consultant because it was sent to OH Assist and was a confidential document.

112. **The likely duration of the illness:** The claimant had been absent for a significant amount of time with his ankle injury. At the time of dismissal, Dr Baig had stated that "on the balance of probability he will remain incapacitated for his normal duty for the foreseeable future".

113. In referring to the foreseeable future, Dr Baig was cross referencing the respondent's IHR policy which sets the foreseeable future at nine months hence. In this case, as at the date of dismissal, the claimant was waiting for an operation. Although he had made it clear that he would take a cancellation, he had no date yet for the operation, and indeed the respondent had no indication of any time scale. (Although the claimant pointed out that the NHS targets are for operations within 12 weeks, Mr Downie not aware of that and in the event the operation was delayed because of the illness of his consultant). It was accepted even then that he would require a recovery period, and on return to work would require a period of rehabilitation.

114. Further and perhaps most importantly, Mr Downie relied on the conclusion of Dr Baig that "there is no guarantee that even with the treatment that he will be able to continue in his role". This conclusion is supported by Mr David-West's views. Mr Fisher emphasised in evidence that the respondent focussed on the negatives, since Mr David-West's report said, although not being able guarantee success of the cheilectomy, that "he should be able to make a good recovery in order to get him back to his job but this will be assessed post-operatively".

115. Nevertheless, by August, the medical evidence supported Dr Baig's conclusion that he was likely to be absent for nine months, at least from the date he went off absent, since he had no date yet for the operation. Indeed, by the time of the appeal, the claimant had been absent already for six months, was still waiting for a date for the operation, and taking account of recovery and rehabilitation, would certainly be absent for nine months (if that is taken from the date the absence commenced). Although account must of course be taken of what the decision-maker knew at the time, as it transpired, the claimant would in fact have been absent for some 16 months, since he was not fit to return to work until June 2018.

116. **the effect of sick-pay and permanent health insurance schemes:** the Inner House also confirmed in **BS v Dundee City Council [2014] IRLR 131** that the fact that the employee has exhausted his sick pay was a relevant factor to consider. In this case, the claimant had exhausted his right to full pay, and that was reduced to half pay on 21 July, that is shortly before his dismissal. His right to half pay would have ended on 21 January 2018.

117. **Alternative employment:** There was a good deal of criticism of Mr Downie's efforts to secure alternative employment, and in particular the fact that the redeployment request was couched in negative terms. We accepted that Mr Downie had believed that the claimant did not wish to be considered for Glasgow roles, but also that the wording of the CRM could have been more positive. However, we did note that Mr Downie had forwarded the e-mail to 30 managers (and we did not accept that it was significant that many were acting managers) and we also accepted that sedentary roles are increasingly limited in Royal Mail.

118. There was a good deal of discussion about what sedentary meant, particularly when used in the Royal Mail, and whether it was a term of art there but were matters which were particularly relevant for the reasonable adjustments question, and are discussed later in this judgment.

119. **Length of service:** in this case the claimant had over nine years' service, which although a reasonable length of time, at Dr Gibson pointed out, it is limited compared with others in the organisation who have been employed for more than 30 years. We did accept that the respondent took account of the claimant's length of service in this case.

120. **The needs and resources of the employer and the effect on other employees:** we accepted notwithstanding the fact that the respondent is a very large employer that the claimant's duties would require either to be absorbed by others or undertaken by additional agency or temporary staff. We accepted that this results in a cost to the respondent, in addition to the administrative costs that might incurred by keeping the employee on the books, including the cost of sick pay.

121. Taking account of the size and administrative resources of the employer's undertaking into account, as well as all these circumstances, we accepted Dr

Gibson's submissions that the claimant having had previous absences for the same condition, the respondent could not be expected to keep the employee's job open for any longer than it did.

122. In the circumstances, although the respondent is a large employer with relatively speaking significant resources, we accepted that to dismiss the claimant in the circumstances in which they did was not one which no reasonable employer would make and therefore could not be said to fall outwith the band of reasonable responses.

Fairness of procedure

123. With regard to procedure, Dr Gibson argued that having ascertained the medical position, consulted with the employee and considered the availability of alternative employment, there was no procedural unfairness such as to render an otherwise fair dismissal unfair.

124. The claimant did refer in evidence to failings in regard to formal consultations. He gave evidence however of what appeared to be relatively frequent informal meetings with Mr Downie, either at Troon or Kilmarnock, when he was handing in his sick notes. It was at one such meeting on 13 July that Mr Downie passed the claimant a copy of an e-mail which he had obtained relating to an ill-health quotation for the claimant, dated 4 July. In accordance with usual procedure, the proposal having been made, and the medical evidence having been obtained, a formal meeting was arranged by Mr Downie at which the claimant was represented by a very experienced trade union official.

125. Mrs Fisher raised the issue of the delay in hearing the appeal, and submitted that the respondent had breached their procedure in respect of the time frame set out in the policies for determining an appeal.

126. Although there was some delay between the claimant submitting the appeal on 9 August 2017, and Mr Drysdale writing out to him on 7 November, Mr Drysdale confirmed that he had issued the letter some two to three days after receiving information about the appeal. We heard no evidence to explain the delay in allocating the appeal to Mr Drysdale. Further, although there was a shorter delay in Mr Drysdale issuing his conclusion, we heard that he had in

between times been absent on sick leave following a spell in hospital and a rehabilitation period.

127. Mr Drysdale had also initially understood that there was a requirement for appeals to be concluded within 12 weeks, but in cross examination he confirmed that the only reference to 12 weeks in the IHR policy is to a requirement for the claimant to appeal within that time. Rather the requirement in the policy is to deal with the appeal as soon as possible, and we accepted that any delay was not unreasonable and therefore that there was no specific breach of the terms of the policy.

128. There was one issue however which gave us cause for concern and that related to the narrow scope of the appeal, and in particular the fact that IHR appeals are apparently limited to considering new medical evidence. In this case there was a dispute about the interpretation of the medical evidence. It seemed to us that there was no scope for this to be fully explored and at least in this case it resulted in Mr Drysdale not dealing fully, if at all, with the point that was being made to him.

129. We accepted Dr Gibson's submission that this issue could be addressed by obtaining another medical report to make the point, which, so long as it was dated after the report in question which had purportedly being considered by OH Assist, would be taken into account. This is something which the claimant's trade union could have advised him to do.

130. Despite our concerns, we could not say that the appeal procedure, having been agreed with the unions, and the process that was undertaken in this particular case, fell outwith the range of reasonable responses open to a respondent.

131. Although the respondent is a large employer, and despite concerns about the appeal procedure, given the length of absence and the fact that the claimant was not able to say when he would return to work, the Tribunal does not accept, given the tests to be applied, that the respondent acted unreasonably in the circumstances.

Disability Discrimination

132. Turning to disability discrimination, it should be emphasised that the legal tests for determining discrimination are different from the test for determining unfair dismissal. While the latter allows an employer a range of reasonable responses, the former is an objective test requiring the Tribunal to consider whether the dismissal could be said to be discriminatory, as Mrs Fisher argued, in breaching the respondent's obligations under the Equality Act.

133. We initially gave consideration to whether it was appropriate to consider section 15 or section 21 first. Although there is no longer a specific provision making a requirement to consider the reasonable adjustments duty first (unlike DDA s3A(6)), where there is a link between the reasonable adjustment required and a claim of discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' (see **Dominique v Toll Global Forwarding Ltd EAT/0308/13**). However, it is unlikely that disadvantage which could be prevented by a reasonable adjustment could be justified (see **Dominique** case and **General Dynamics Information Technology Ltd v Carronza UKEAT/0107/14** as well as the EHRC Code of Practice para 5.21).

134. We therefore considered the reasonable adjustment duty first.

Section 21 Failure to make reasonable adjustments

137. Dr Gibson helpfully conceded that the duty to make reasonable adjustments arose here, and that the requirement to walk long distances each day put the claimant at a substantial disadvantage in comparison with non-disabled colleagues. He argued however that the respondent had taken such steps as it was reasonable to take to avoid the disadvantage, and therefore that there was no failure.

138. There was a dispute about the scope of the claimant's case in respect of what reasonable adjustments the claimant argued should have been made.

139. Dr Gibson submitted that he understood the claimant's claim to relate to the failure to redeploy the claimant after his absence in February 2017 (until his

operation), and the failure of the respondent to delay the decision to dismiss until a further medical report had been obtained.

140. He argued that the claimant had not plead any other claim in relation to the failure to make reasonable adjustments, that he had no fair notice of such a claim, and that otherwise he would have argued time bar. He argued that the claimant cannot benefit from a lack of specification in his pleadings to introduce any further aspects of a reasonable adjustments claim.

141. Mrs Fisher confirmed that she was arguing that the respondent had failed to make reasonable adjustments following his absence in 2016, and that the respondent should have referred him to FRP and should have given him adjusted duties.

142. With regard to Dr Gibson's argument that there were no pleadings to support these claims, we noted that the ET1 claim form was prepared by the claimant himself. Although that does not mean that he can rely on a claim that he has not pled, we considered whether it could be said that there was fair notice of the other claims which the claimant relied on. We noted that he made reference to June 2016 when he said that he had expressed concern to his manager at this stage "however no adjustments or alternative duties were explored". He went on to refer to the period August to November, when he stated that he again expressed concerns to his manager and narrated the situation in December with regard to overtime about which we heard evidence.

143. We therefore accepted Mrs Fisher's submission that the claim included the failure to make reasonable adjustments in respect of the failure to refer the claimant for FRP and during the period from his return to work in September 2016 until February 2017.

144. With regard to Dr Gibson's argument that in any event these were time barred, we heard no argument on the point. However, we accepted that the duty to make reasonable adjustments arose when the respondent was advised by their occupational health specialists that the claimant was likely to qualify as a disabled person under the Equality Act in August 2016, and that any failures thereafter were a continuing act.

145. We gave consideration to six potential adjustments which could be said to be reasonable in fulfilment of the respondent's duty. In so doing, we had in mind the EHRC's Code of Practice at paragraph 6.28 which sets out factors which may be taken into account when deciding what is a reasonable step for an employer to have to take and these include: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruptions caused; the extent of the employer's financial or other resources; the type and size of the employer. We noted, at paragraph 6.29 that ultimately the test of reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

146. It was argued that the failure to allow the claimant to attend FRP was a failure to make a reasonable adjustment. We heard evidence that this was recommended, but that had been countermanded by a more senior consultant, but no evidence as to the reason for that change. We did not accept Dr Gibson's submission that this was a matter purely for occupational health, since the respondent must take responsibility for the agents whom they engage to assist them with their decision-making. Here there was no input at all from the claimant's line manager.

147. Whether this adjustment would have changed things is not known, and at the time that could not have been known given Ms Brenda McAlpine's advice. Further, despite that advice, and the implementation of the rehabilitation plan, there were no formal meetings to discuss progress, and the only other adjustments made at this time were the three physiotherapy sessions, following which reports were produced endorsing the need for adjustments to ensure rehabilitation.

148. This may or may not have reduced subsequent absences, but the fact that this may not have made any difference is not determinative of this being a reasonable adjustment *(Noor v Foreign and Commonwealth Office* 2011 ICR 695 EAT) because there does not have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable.

On the evidence that we heard, we concluded that referral to FRP would have been a reasonable adjustment.

149. The second adjustment which we considered was the claimant's request for reduced outdoor overtime in the busy period leading up to Christmas. We heard evidence that the claimant had set this out in the standard overtime form, but there was no evidence that this was ever considered, and the unchallenged evidence was that the claimant did work overtime doing his usual round, which was necessitated by the fact that he was working along with a partner.

150. We came to the view therefore that there was a failure to deal with this request for adjustments to his duties, and that an adjustment in the circumstances would have been reasonable.

151. Thirdly, we considered whether during this period (between September and going off again in February) there were further adjustments which could have been made. We heard evidence that the claimant had expressed concerns during this period to Mr Downie, and although his memory was vague, he did not dispute that he had, certainly towards February. There was of course no evidence of the claimant (or his union) having made any specific (far less formal) request for adjustments, but again we did not consider that was determinative of whether adjustments would have been reasonable (see **Cosgrove v Caesar & Howie [2001] IRLR 353**).

152. We heard evidence about the kind of adjustments which the respondent could have considered, including suggestions from Mr Dewar that the claimant could have been transferred to a shorter delivery route; he said that there were other jobs with less walking, such as delivering parcels (and the respondent knew that the claimant could drive); working at customer service points as well as office based admin jobs (which it was highlighted were few and far between). There was of course the option of working fewer hours in roles which involved little or no walking. Notwithstanding the limitations of some of these roles for the claimant, it would appear that no consideration was ever given to them as alternative duties.

153. In the circumstances, we concluded that the employer could have looked at limiting duties during this period which may have limited the period of

absence, and that a failure to make any adjustments, or even to give serious consideration to options, was a failure of the duty to make reasonable adjustments.

154. Fourthly, we considered the question of reasonable adjustments in respect of the period during which the claimant was absent on sick leave (from February). Again although he made no formal or specific request for alternative duties, and although, as we understood it, the GP fit notes did not suggest that he was fit for any alternative duties (they were not lodged), the medical reports produced by OH Assist at this time indicated that the claimant could do indoor/sedentary duties while waiting for his operation.

155. There was a good deal of discussion about what "sedentary" meant and whether it was a term of art at the Royal Mail. Although we are well aware that it suggests only seated duties, we did not find that this was how it is used within Royal Mail. In particular, both Mr Downie and Mr Drysdale when first giving evidence on the point described duties as being broader than sitting, and Mr Drysdale said initially that he meant "light duties", and it was only when they reflected on the term that they concluded that it meant seated duties. Mr Dewar's description of the potential alternative duties which could be considered also encompassed more than merely seated roles.

156. In any event, the only attempt to find the claimant alternative duties in line with the medical report was to send out a CRM in which it was suggested that the claimant may be able to do sedentary duties (rather than will). We found that the respondent had played lip service to the requirement to seek alternative duties, and that no real effort was made to find such duties which might result in the claimant retaining his job. Although it is accepted that the claimant made no specific or formal requests during that period, that does not absolve the respondent of the duty to make reasonable adjustments, particularly in light of the evidence which we heard that the claimant was making it clear that he wanted to keep his job and that he thought that it was too early to be considering IHR.

157. While we did not accept that the fact that Mr Downie sent out the e-mail to acting managers was at all significant, and we were prepared to accept that Mr Downie had (in informal discussions) mentioned the option of Glasgow,

we did not accept that what was done to secure alternative employment for a disabled employee was sufficient.

158. We did note that the respondent's procedures suggest that in the first instance a search would be undertaken in the line manager's sphere of influence, (here the KA postcode area), the policy also suggests that a line manager should broaden his efforts if that does not bear fruit. So we considered that even if there had been a discussion about Glasgow, when it became clear that the claimant was otherwise going to lose his job, Mr Downie should have gone back to consult the claimant more formally about the Glasgow mail centre option.

159. Given that background, we concluded that the respondent's failure to seriously consider alternative duties in which the claimant could have engaged while waiting for his operation, was a failure to make reasonable adjustments.

160. Fifthly, we considered whether a reasonable adjustment would have been to obtain another medical report, following a face to face meeting, in light of the concerns raised by claimant's trade union representative at both meetings. We got the impression that neither manager really engaged with this point, and were somewhat blinkered in relying so heavily on the OH Assist report, in light of protestations regarding its accuracy. In the circumstances, we considered that a reasonable adjustment would have been to have instructed a further medical report, including an enquiry regarding the concerns which had been expressed by the claimant and his trade union representative, and that the failure to obtain such a report was a failure to make reasonable adjustments.

161. This links to the question of a sixth reasonable adjustment, and that is whether the failure of the respondent to delay making the decision until after the operation, was a failure to make reasonable adjustment.

162. The claimant was on the waiting list and had said that he would accept a cancellation. His consultant had said that he would only be able to give an accurate prognosis on the success of the operation once it had taken place. While Mr Downie had not had sight of that medical report at the meeting, we do not consider that to be determinative in light of requests from Mr Dewar to

obtain another report. In contrast, we heard that Mr Drysdale was passed a copy of Mr David-West's report which stated in terms that "he should be able to make a good recovery in order to get him back to his job but this will be assessed post-operatively", offering an updated report at that time.

163. Although Mr Drysdale said that he had taken that into account, ultimately he relied on the fact that whenever the operation might occur, it would be well in excess of the "nine months" which is how "foreseeable future" is defined for the purposes of the policy.

164. We heard a lot of evidence and submissions relying on the fact that an agreement had been reached which is reflected in the IHR policy. We noted that this policy purports to fulfil the respondent's obligations under the Equality Act but it seems to us that more direction requires to be given to managers when they are dealing with an individual who is protected under the Equality Act.

165. In particular, there was a discussion about whether this was a "tablet of stone", and Mr Drysdale did suggest that he would have discretion in that regard, to look forward ten or ten and a half months. If this policy is to fulfil the respondent's obligations under the Equality Act, it should be made clear that discretion can be used when assessing this provision and how it applies in the individual circumstances.

166. We came to the conclusion that, in the case of a disabled employee, this was a reasonable adjustment which should have been made, and that particularly given the size of the organisation, the decision should have been delayed until the success or otherwise of the operation was known, rather than take the drastic step of dismissal against the claimant's wishes, in a case where the claimant was making it clear that he was very keen to keep his job.

Section 15 – Discrimination arising in consequence of disability

167. Dr Gibson helpfully conceded that the claimant had been treated unfavourably for a reason arising in consequence of his disability.

168. The focus then is on the question whether the respondent could objectively justify the treatment. As discussed above, in a case where there has been a failure to make reasonable adjustments, it is very unlikely that it could be said

that any unfavourable treatment is objectively justified, and we find no special circumstances here to change that.

169. We accordingly conclude that there has also been a breach of section15 of the Equality Act 2010.

Remedies

170. We then turned to consider remedy. The claimant lodged an up to date schedule of loss taking account of the claimant's offer of a job which we understood was likely to commence in October 2018. Parties agreed that the claimant's gross weekly pay was £319.57, and net weekly play was £277.55.

171. As we have not found that the claimant was unfairly dismissed, no basic award or award for statutory rights comes into play.

172. With regard to past losses, the claimant was dismissed on 9 August 2017. By that time he was on half pay, which had commenced 21 July 2017. The claimant received PILON totalling 9 weeks, paid at full pay.

173. Consequently, his losses do not commence until 11 October 2017. The claimant would thus have received half pay to 21 January 2018, that is 15 weeks at a net rate of £138.77, which totals £2,081.62.

174. From 21 January 2018 to the beginning of June 2018 (when the claimant states that he was physically fit to return to work, supported by medical reports lodged), the claimant would have exhausted all sick pay, and would not have received any payment from the respondent.

175. From June 2018, to the date of the hearing, that is for 11 weeks, the claimant would have been in receipt of full pay, and therefore his losses amount to £3,053.05

176. With regard to future losses, the claimant succeeded in obtaining alternative employment which is expected to commence October 2018. From the date of the hearing until the claimant is expected to start his new job, that is 7 weeks, compensation is £1,942.85.

177. In written submissions, the claimant made reference to the job offer and stated, "As this post is not a comparable salary or number of hours, future loss of earnings is being claimed until the claimant's retirement age of 65 in

May 2030. The claimant does not expect to look for any other type of employment until he retires".

178. Dr Gibson argued that this is overstated, and that this evidences an intention not to seek further additional employment, and therefore a failure to mitigate losses.

179. Although there are cases where an award for "career long loss" may well be appropriate, this not one of them. That is because there is no evidence that the claimant is not capable for medical or any other reasons relating to disability of obtaining employment, and indeed the evidence is quite to the contrary since the claimant has succeeded in obtaining employment. As it happens that is part-time employment, but there is no evidence to support any conclusion that he is only able to work part time or half of his previous hours.

180. Although that employment is for 15 hours per week, in an e-mail dated 7 August, the claimant's new employer indicated that there was an option of 2 additional hours on a weekly basis (which the claimant said he would accept) and additional hours on an ad hoc basis, and the possibility of supplementary hours on a bank post basis. In any event, we consider that loss of earnings for some 14 months from the date of dismissal is appropriate in this case. We consider that future loss should be limited to loss of earnings until the claimant is expected to commence his new job.

181. We had some information regarding pension loss, which would relate to the period from June to September 2018. The claimant will thereafter join a pension scheme which is understood to be the same if not better than the scheme which the claimant was in with the respondent.

182. Dr Gibson was prepared to concede the figures in the e-mail which the claimant had lodged from his financial adviser, that is that the employer would contribute 13.6% of pensionable earnings. Given the type of scheme, and using the simplified method, we calculate that the claimant will have suffered losses of £689.44 in respect of pension.

183. With regard to injury to feelings, the claimant contended that the discrimination falls at the mid-point of the upper Vento band because a) disability was the sole factor in the dismissal; b) this was a long campaign of

discrimination during which the respondent failed to make reasonable adjustments; c) leading to the claimant suffering from anxiety and depression in conjunction with low mood and feelings of worthlessness; d) his GP has been trying to manage this newly developed condition with various types of medications without much success e) due to the stress and anxiety caused by this discrimination he suffered a flare up of his long-term condition of fibromyalgia which he has been able to manage for almost 20 years leading to him suffering daily bodily aches and pains which are challenging to control with pain relief.

184. Dr Gibson in response stated that this claim was grossly exaggerated given that he is now fit to go back to work, which shows that this has had a limited impact on his mental health. Dr Gibson argued that at most the injury to feelings should be set at the midpoint of the lowest band.

185. We have concluded that injury to feelings in this case should be set at the top of the lower band/bottom of the mid band, which has been recently revised to £8,600. We accept that this is not the most serious of cases, and whilst not diminishing the impact which losing his job in such circumstances has had, and accepting the GP's conclusion that the only possible cause of the deterioration of the claimant's mental health was the loss of his job, we have noted that perhaps against his own expectations, the claimant has succeeded in securing alterative employment despite that. Credit is of course due to him for doing so, but this does reflect on the severity of the impact of the discrimination in this case. We have also taken account of the fact that it would appear that the claimant is making a very good recovery from the impairment which resulted in him being categorised as disabled for the purposes of the Equality Act.

Concluding remarks

186. We have explained above why we have concluded in this case that while it could not be said that dismissal in this case is unfair applying the correct legal tests, applying the tests to establish disability discrimination to the same facts has led us to conclude that there has been a breach of the Equality Act.

187. Clearly, we are of the view that in failing to implement reasonable adjustments, there was more that the respondent ought to have done. We were also of the view that the trade union in this case could have done more in the face of the intransigence of the respondent, and in particular should perhaps have realised that further medical evidence may be required. We came to the view however that Mr Dewar had not believed that to be necessary based on past experience and that he believed he could rely on the fact that Mr David-West's report would be treated as "new" medical evidence, although it predated the hearing, because it had not properly been taken into account by Dr Baig.

188. However, we came to the view in this case that one of the reasons for this outcome is because the IHR policy had been designed (by both employer and trade union) from the stand-point of an employee (who may not be disabled) appealing against a decision *not* to grant him or her ill-health retirement. We heard from the witnesses that appeals of the type considered here were rare, and this highlights the fact that more could have been done to seek to retain the claimant in position, particularly in light of the fact that he was categorized as a disabled person for the purposes of the Equality Act.

189. We noted in particular that the IHR purports to fulfil the respondent's obligations under the Equality Act, but it seems to us that more direction and at the same time more discretion requires to be given to managers when dealing with an individual who is protected under the Equality Act.

Compensation table

Head of Loss	Calculation	Sub-total	Totals
From 11.10.17 to 21.1.18	15 x (1/2 of £277.55)	£2,081.62	
From 21.1.18 to 1.6.18	Sick pay exhausted	NIL	
From 1.6.18 to date of hearing	11 x £277.55	£3,053.05	
From date of hearing to 1.10.18	7 x £277.55	£1,942.85	
Pension loss	(11 + 7) x (£277.55 x 13.6%)	£679.44	£7,756.96
Less lump sum		(£11,409.87)	-£3,652.91
Injury to feelings			£8,600
TOTAL			£4,947.09

Employment Judge: Ms M Robison
Date of Judgment: 07 September 2018
Entered in register: 13 September 2018
and copied to parties