Case No: 2500901/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Osborne**

Respondent: **Colas Limited**

Heard at: **North Shields** **On: 5-9 March 2018 inclusive**

Before: **Employment Judge Morris**

Members: **Mr M Brain**
Mr D Morgan

Representation:

Claimant: **Ms J Callan of Counsel**
Respondent: **Mr L Rogers, Solicitor**

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1 The claimant's complaint that the respondent discriminated against him, as a disabled person, by treating him unfavourably because of something arising in consequence of his disability is well-founded, the respondent having actual or constructive knowledge that he had that disability and not showing that the treatment was a proportionate means of achieving a legitimate aim.

2 The claimant's complaint that his dismissal by the respondent was unfair is well-founded.

3 The claimant's complaint that the respondent wrongly calculated the redundancy payment due to him on his dismissal was withdrawn by the claimant and is dismissed.

4 The claimant's complaint that the respondent wrongly calculated the holiday pay due to him at the point of his dismissal was withdrawn by the claimant and is dismissed.

REASONS

Representation & evidence

1 The claimant was represented by Ms J Callan of counsel who called to

give evidence the claimant and Mr C Foster on his behalf.

2 The respondent was represented by Mr L Rogers, solicitor, who called to give evidence on its behalf present or former employees of the respondent as follows: Mr Robert Cummings, Senior Contracts Manager; Mr Barry Cummings, Assistant Contracts Manager; Mr Ross McCartney, Assistant Contracts Manager; Ms Caroline Hayward, HR Business Partner. Messrs Cummings have both left the employment of the respondent since the matters giving rise to these complaints and the above are the titles of the jobs that they previously held with the respondent.

3 The Tribunal had before it an agreed bundle of documents in two lever arch files, the first being general documents that were added to during the course of the hearing, the second being a bundle of medical and related documents. In these Reasons references simply to page numbers are to the first bundle; references to or preceded by a capital letter are to the second bundle.

Complaints

4 The claimant had presented four complaints to the Tribunal two of which were withdrawn leaving the two outstanding complaints as follows:

4.1 a claim that his dismissal by the respondent had been unfair;

4.2 a claim of discrimination arising from disability advanced pursuant to Sections 6, 15 and 39(2)(c) of the Equality Act 2010 ("the 2010 Act")

The issues

5 The issues arising from those complaints that fell for determination by the Tribunal are fully set out in the Case Management Summary arising from a private preliminary hearing held on 31 October 2017 (page 42).

Consideration and Findings of Fact

6 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral) and the submissions made on behalf of the parties at the hearing and in writing subsequently and the relevant statutory and case law (notwithstanding the fact that in, in pursuit of conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

6.1 The respondent is a large company that provides services to the highways and airfield sectors including civil engineering, maintenance and construction. It is a subsidiary of Colas Group. The respondent has six depots nationally and a turnover of some £28ml per annum with some 250 directly employed employees. It has a dedicated Human Resources Department.

6.3 The respondent has a number of divisions such as Surfacing and Structures and, importantly in the context of this case, Traffic Management. Traffic Management is divided into areas one of which is referred to as North and is based in the Newcastle area.

6.4 The claimant commenced employment with the respondent at Newcastle as a Traffic Management Operative (TMO) in October 2007. He was contracted to work 40 hours a week but regularly worked overtime up to 60 hours a week and at weekends for up to 12 hours.

Nothing untoward occurred during the early stages of the claimant's employment. Indeed he was well regarded as a good worker.

6.5 Unfortunately for him, on 10 July 2015 he was involved in a road traffic accident while riding his motorcycle. He suffered a number of injuries including a dislocation of his right ankle. As a result of his injuries he commenced a period of certified sickness absence from work. He maintained contact with the respondent throughout both by informal visits to the depot at which he was based at Swalwell and more formal contact with his manager, Mr Barry Cummings, by telephone when he updated him on his progress, and at meetings with him and Ms Hayward. One such meeting was on 9 September 2015 (page 66) where it was agreed that the claimant would be referred to occupational health.

6.6 A telephone appointment was arranged with Dr Miah, Consultant Occupational Physician, on 28 September 2015. His report is at page 74. Dr Miah records the history of the claimant's accident and present condition and that he is still in a below-the-knee plaster cast, not weight bearing and taking painkillers. In answer to specific questions asked of him he expresses the opinion, amongst other things, that given health and safety implications the claimant would be unable to return to work in any capacity, including in temporary amended duties, until the expiry of his then current sick note, which was mid-October, but it was possible that he could return to work in four weeks in a restricted role and in eight weeks to his normal role; albeit on a phased return up to full duties. The claimant was satisfied with that outcome.

6.7 When the claimant presented his next fit note to Ms Hayward on 12 October 2015 she noted that he was out of his leg cast, putting weight on both feet and making good progress (page 78). This certificate refers to "ankle injury". Up to this point the claimant was under the care of Mr T Beckinsale, Consultant Orthopaedic and Trauma Surgeon. On 5 November he wrote to Dr Collins, the claimant's GP (page 81). In that letter he states, amongst other things, that he is very pleased with the claimant's progress, that he is now fully mobile and is about to commence physio. He records, "I think the likelihood of AVN is extremely high and he may well require a fusion in the future. I am therefore referring him on to the foot and ankle surgeons whilst he continues with physiotherapy for ongoing review and so that he is under the care of the team who could arrange further surgery as and when required". This is an important document as it is the only one that the claimant gave to the respondent regarding his medical condition other than the medical certificates, and which the respondent therefore had other than the two occupational health reports it commissioned. The claimant handed this letter to Ms Hayward and Mr Cummings along with his fit note (page 80) when he met them on 9 November 2015.

6.8 On 4 January 2016 the claimant once more called into the office and gave Ms Hayward a fit note. Her e-mail that day (page 84) records that the claimant told her that he had not "heard yet if he needs another operation" and that his update before Christmas had been that "there was talk of another operation being needed". According to the claimant's evidence, at this stage he was keen to return to work "for financial and mental health reasons". Ms Hayward considered that

before he could return to work a further referral to occupational health was required. She and the claimant agreed that he would obtain a further fit note for two weeks, which would run to the expiry of his SSP on 21 January 2016.

6.9 The claimant called in to the office again on 20 January 2016. Once more, according to Ms Hayward's email of that date (page 95), he was unable to confirm "whether he needs a further operation or not". The claimant spoke to Barry Cummings on 2 March. He told him that he had last been to hospital in January where he had been told that "everything looked OK and they were happy with the healing of his ankle" (page 98).

6.10 Ms Hayward made the agreed referral to occupational health on 14 March 2016 (pages 306 and 101). She attached the medical certificate of 4 March, the claimant's job description, the previous occupational health referral of 28 September 2015 and Dr Miah's report. She referred briefly to the letter of 5 November 2015 from Mr Beckinsale (page 81) but did not attach it.

6.11 The occupational health report is dated 21 March 2016 (page 106). It records, amongst other things, that the claimant had been discharged by his treating specialists before Christmas; he no longer requires pain relief; his mobility is much improved however it is not clear how far he is able to walk as he had not tested that; a proposed phased return to work over five weeks during which the claimant should not work from the TM vehicle; he was fit to drive and work nightshifts. Importantly in answer to question 5 of a number of questions asked of the practitioner she responded as follows:

> "Today, Lee has provided information that 1. The impact is not longstanding, and 2. The impairment does not impact on daily activities of living."

6.12 In respect of the above report an issue arose at the hearing as to whether the advice that the claimant should not work from the TM vehicle was a reference to a temporary basis as he returned to work during the phased return period or was long-term advice given the reference in the report to the internal fixations in the claimant's right ankle. The Tribunal is satisfied that it was the former. It comes to that conclusion for three reasons: first, the way in which the reference to working from the vehicle falls between two sentences each of which deals with the phased return to work; secondly, it is expressly in answer to question 3 of the referral (page 103) which begins "Is a phased RTW plan necessary?"; thirdly, the focus of this paragraph of the report is clear from the fact that it begins with the practitioner advising specifically "on a phased return to work as outlined in this report and would advise that Lee does not work from the TM vehicle but remains on the ground".

6.13 On the basis of the advice in the occupational health report, it was agreed that the claimant would return to work and a meeting was held between him, Mr Barry Cummings and Ms Hayward on 5 April 2016. The phased return was agreed commencing the following week on 11 April (page 110). It was agreed that the claimant would work on days shifts initially and, as advised by the occupational health practitioner, would build up the number of days over four consecutive

working weeks, if he was ok to do so, as follows: week one, two days; week two, three days; week three, three days; week four, four days. In the fifth week the claimant would work a full five days. The claimant then returned to work on 11 April after which he was not absent due to sickness.

6.14 A schedule of the claimant's weekly work is at page 187. It is apparent that the claimant was working normally on an ordinary mix of duties. The only difference compared with his work before his absence was that he was working on dayshifts rather than at night but, after the phased return to work period, that was his option.

6.15 That general mix of work continued until 20 August 2016 when the claimant was allocated to work at the Silverlink site, which is a major road improvement project being undertaken by a company called Sisk Lagan Limited. That company was a new client to the respondent and it was therefore important that the respondent should be seen to perform as required. As the claimant had a good record relating to working generally and also relating to record keeping, and had recently undertaken similar work for the respondent on a project on the trunk road A174, Mr Barry Cummings decided that he should be assigned to this work at Silverlink. The claimant worked there until his employment ended. Typically he worked a six day week but the Tribunal notes that on one occasion that reduced to four days and on three occasions increased to seven days. The work at Silverlink was classified as being "Maintenance" as opposed to the other category of work within the Traffic Management Division, which was classified as "Laying". Although accepting that Maintenance could involve sitting in a vehicle for up to two hours at maximum between specific tasks, the Tribunal is not satisfied, as the claimant suggests, that Maintenance is to be or was regarded as 'light duties'.

6.16 The claimant then undertook the duties to which he had been assigned. The claimant asserts, however, that this was due to the fact that the TMO with whom he worked, principally Mr Steve Peake, did all the heavy work and protected him from work that would otherwise have caused him pain. While it is possible that Mr Peake helped the claimant from time to time, the Tribunal heard no specific evidence that he had done so, especially to the extent suggested by the claimant; he suggesting that Mr Peake undertook some 80-90% of that work. This is borne out by the statement in the claimant's claim form (ET1), "Following his return to work the claimant resumed his old duties without issue".

6.17 In any event the Tribunal is satisfied, first, that the claimant's managers did not know of any such support being provided by Mr Peake and, secondly, that if it was right that Mr Peake undertook some 80-90% of the claimant's work that would have been obvious. The Tribunal is further satisfied that those managers did not know that the claimant was, to use his word, "struggling" at work. The claimant states that he made the managers aware of his difficulties at briefing meetings he had with, initially, Mr Barry Cummings and latterly with Mr McCartney at the McDonald's restaurant adjacent to the Silverlink site but they strongly deny that and there is no evidence that he did. Those managers were very clear that had it been the case (namely the claimant was struggling and Mr Peake was doing all the heavy work)

and had they been aware of that, whether by the claimant telling them or otherwise, they would not have allowed the claimant to continue to work at the Silverlink project (not least because that was a new and prestigious client) and would immediately have referred him to occupational health. The Tribunal accepts that evidence on behalf of the respondent.

6.18 In late 2016 the respondent tendered for a number of contracts but was not successful in respect of work representing some 75% of the traffic management work at Newcastle. Mr Robert Cummings therefore decided that the structure of the Newcastle operation should be reviewed. That led to a proposal to delete one supervisor, five chargehands and 18 TMOs. Formal announcements were made on 6/7 February 2016 to the day and nightshifts and all TMOs were put at risk of redundancy. Confirmation of this was given by Ms Hayward in a letter to all affected employees dated 6 February in which the election of employee representatives was invited for the purposes of collective consultation (page 116). Mr King and Mr Wyard were appointed as representatives of the TMOs.

6.19 The respondent produced a matrix to be used in selecting those to be made redundant (page 128). That was based on two sources: first, a model "Redundancy Selection Scoring Chart" and "Guide to Scoring" within the respondent's Redundancy Policy and Procedure (pages 273 and 274 respectively); secondly, a similar matrix that had been used in relation to a redundancy exercise carried out in the Surfacing Division of the respondent in 2014. The original matrix that was produced for the purposes of the redundancy exercise involving the claimant (page 128) was discussed during the three collective consultation meetings with the elected representatives and amendments were agreed. The final matrix was then agreed for implementation of the process (page 149).

6.20 The selection criteria within the matrix are divided into two parts referred to in evidence as being, respectively, "operational" and "HR". The aim of the matrix was to ensure that the respondent retained the TMOs best suited to meet the future needs of the business and therefore 145 points were available in respect of the operational criteria and 40 points in respect of the HR criteria.

6.21 The claimant did well on all the operational criteria and in respect of the disciplinary record criterion within the HR criteria but was awarded no points at all in respect of his attendance record, which was the other criterion within the HR criteria. It is common ground that but for that the claimant would not have been selected for redundancy and would not have been dismissed. The reason that he was awarded no points was due to his absence from work from 1 January 2016 to 14 March 2016, a total of 51 days.

6.22 As to the attendance record criterion it is provided in the guidance available to the managers who completed the matrix, "do not include serious illness". Ms Hayward states that during consultations with the employee representatives, they enquired what this meant and were told that it meant a life threatening or terminal illness. That definition of "serious illness" had been agreed in discussions between Ms Hayward and the Traffic Management managers, albeit acting on

her advice. The representatives accepted that and the criterion was agreed. That was Ms Hayward's evidence but although notes of the collective consultation meetings are included in the bundle of documents there is no corroborative evidence in those notes or elsewhere to support that such an exchange took place or that that limited definition was agreed. Further, examples of criteria that may be applied are given in the respondent's Redundancy Policy and Procedure (page 269) which include, "attendance (excluding absences due to … disability": that exclusion is not mentioned in the matrix.

6.23 During the consultation meetings, the employee representatives had raised the possibility of the respondent considering employees for voluntary redundancy but the respondent decided not to accept any applications for voluntary redundancy for what the Tribunal accepts are sound business reasons: namely, management was concerned that more highly skilled employees might want voluntary redundancy because they knew they would be more likely to secure work elsewhere and the respondent was keen, as far as possible, to retain its best employees.

6.24 In the above context the claimant was invited to an individual consultation meeting on 11 April 2017 (page 153), the agenda for which is at page 154 and the notes at page 155. Those are notes and are neither minutes nor a verbatim record. At the meeting the claimant queried why he had been scored down on sickness and Ms Hayward explained the respondent's approach including as to the exclusion of "serious illness", which he did not challenge; in particular, he did not suggest that he had a serious condition or that he was a disabled person. The claimant was told that he could appeal his scoring but he did not do so. Additionally in this respect the Tribunal is satisfied, on balance, on the evidence before it that contrary to the claimant's assertions, at an early stage in the redundancy process after the scoring matrix had been circulated but not completed, Mr McCartney did not reassure the claimant that he need not worry about his absence record as that would be classed as serious time off, and the claimant believed him. The claimant did not raise any such reassurance having been given to him at either of the consultation meetings that were held with him.

6.25 The claimant was then invited to a second consultation meeting on 18 April 2017 (page 160). He was informed that the restructure was to proceed and he was shown a vacancy list. Indeed such lists were available generally throughout the redundancy process. The claimant advised that none of the roles were suitable to him; he did not say why. As such, he was informed that his employment would be terminated on grounds of redundancy and that he would be required to work his notice period. He was advised that he had a right of appeal against this decision. The above was confirmed to the claimant by Ms Hayward in her letter of 26 April 2017 when she also provided him with details of his redundancy payment of some £3,000.

6.26 On a specific point, the claimant was informed both at the meeting and in that letter that any appeal had to be submitted in writing to Ms Hayward but would then be considered by a higher level of management than the decision-maker with regard to the dismissal, Mr Newton. The Tribunal does not accept the claimant's evidence that at

the first consultation meeting that was held with him individually, Ms Hayward told him that she would be responsible for the appeal and made it clear to him that she would not be changing her opinion. That the respondent was open to reconsider its decisions in this regard is borne out by the fact another employee, Mr Danny Mann, did challenge successfully the award of points that had been made to him during the redundancy scoring exercise.

6.27 The claimant did not exercise his right to appeal against the decision that he should be dismissed for redundancy. The only aspect in Ms Hayward's letter or the decision generally that the claimant challenged was the calculation of his redundancy payment (page 168) but after investigation Ms Hayward confirmed that that was correct (page 171).

6.28 While the claimant was working his notice he mentioned more than once to Mr McCartney that he believed he had been unfairly selected for redundancy because of his attendance record. Mr McCartney reminded him of his right to appeal and encouraged him to do so. There is a conflict of evidence as to whether the claimant then informed Mr McCartney that he was content to take his redundancy package. Given the weight of evidence to which we return below, the Tribunal is satisfied that the claimant did make that remark to Mr McCartney.

6.29 Matters in respect of the respondent's need for TMOs then developed in two particular respects. First, some TMOs, for example Mr Foster, had resigned from the respondent's employment due to uncertainties with regard to their continued employment. Secondly, Northumberland County Council had awarded the respondent a small additional amount of work. Again there is a conflict of evidence. On the one hand, Mr Robert Cummings states that he contacted the claimant by telephone and told him that his employment could continue on the same terms and conditions but the claimant declined that offer saying that he would accept the redundancy package. Mr Cummings' evidence is that the claimant explained that he was hoping to get a last minute operation on his foot and therefore needed the redundancy money to tide him over. Mr Cummings again explained that his employment could continue but the claimant confirmed his position. Mr Cummings evidence was that he was so shocked at the claimant's response that, having reflected, he telephoned the claimant again and asked if he was sure. The claimant confirmed, once more, that he was whereupon Mr Cummings said that when things had been sorted out the claimant could call him in the future and he would see what he could do. On the other hand, the claimant states that Mr Robert Cummings told him to "take the money, go and we will take you back when you are better". We also return to this conflict of evidence below.

6.30 Further conflict exists between the evidence of the claimant and Mr McCartney. The latter states that at this time he too told the claimant that he could be kept on rather than being made redundant but he responded that he would rather take his redundancy package because he needed a second operation and would only receive SSP, and the redundancy package would see him through his recovery. The claimant confirmed that Mr McCartney did say that he could have his job back but the difference is that the claimant's evidence is that he

then accepted that offer but, on his final day of employment with the respondent, Mr Robert Cummings called him to say that he could not be taken back because another worker (Mr Wylan) would have to be re-employed too. Mr McCartney and Mr Cummings both deny these conversations.

6.31 Such total conflicts of evidence are always difficult for any Tribunal. We have however stepped back and considered all the evidence before us in the round including that of the three witnesses referred to above. The Tribunal is satisfied that the evidence of the respondent's witnesses is supported, to an extent, by two documents. First, by Ms Hayward's record on the occupational health referral of 14 March (page 103) when she states, "His thoughts then were that if he did need another operation rather than RTW and then have to be off sick post another operation recovery, he would rather have the further operation then focus fully on recovery/a later RTW plan". Secondly, by the letter from Dr Torres dated 8 January 2018, at tab F of the medical documents bundle, that at a multi-disciplinary team review meeting on 19 May 2017 four orthopaedic surgeons had agreed a strategy for the claimant involving a two-stage operation to be preceded by a CT scan in August 2017. Thus the Tribunal considers that it is likely that the claimant was aware that the prospect of an operation was in the offing at the time that he spoke to Mr Robert Cummings and Mr McCartney as described above. Having considered the totality of the evidence before it, the Tribunal accepts the evidence given on behalf of the respondent as to the offer of continued employment being made to the claimant, which was forceful and persuasive. It may be, as counsel for the claimant suggests, that that was an irrational decision for the claimant to make (ie. to take his redundancy pay and decline continued employment) but the Tribunal is satisfied, on balance, that that is what he did.

6.32 Thus the claimant's employment ended on 20 June 2017.

Submissions

7 After the evidence had been concluded, the parties' representatives made oral submissions by reference to comprehensive skeleton arguments, which painstakingly addressed in detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the case law referred to, and the parties can be assured that they were all taken into account in coming to our decisions.

The law

8 The principal statutory provisions that are engaged in this case, so far as is relevant the issues, are as follows:

8.1 Unfair dismissal - Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(c) is that the employee was redundant, or

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

8.2 *Disability Discrimination - Equality Act 2010*

6 Disability

(1) A person (P) has a disability if—

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

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

(2) A reference to a disabled person is a reference to a person who has a disability.

(3)In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b)a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

15 Discrimination arising from disability

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

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

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

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

Application of the facts and the law to determine the issues

9. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

Disability

10 We first address the question of the claimant being a disabled person which is central to much of this case. We consider that this question should be addressed with particular reference to two particular periods or dates. The first is between 1 January and 11 April 2016, the second is the date of the alleged discriminatory act, namely the date of the claimant's dismissal.

11 The Tribunal worked through the various elements in the statutory definition of a disabled person as found in section 6 of the 2010 Act. It accepts, as is conceded by the respondent, that the claimant had a physical impairment, namely a serious injury to his ankle. This applies to each of the above times.

12 Secondly, there is the question of whether that impairment had a substantial and long term adverse effect. First, "substantial" has been defined as meaning more than minor or trivial and the Tribunal is satisfied that that low threshold is met in this case, again at both of the times referred to above. The consideration of "long-term" is less straightforward. Schedule 1 of the 2010 Act provides the meaning of "long-term", including, so far as is relevant to this case, that the effect of an impairment is long-term if it has lasted for at least 12 months or it is likely to last for at least 12 months. The claimant suffered his injury on 10 July 2015 so, at the date of his dismissal on 18 April 2017 (which the parties are agreed as the date of the discriminatory act), any effect that there might be would have lasted for at least 12 months. The contrary is the case with regard to the time period between 1 January and 11 April 2016 as any effect had not lasted for 12 months. As to that period, the question therefore becomes whether any effect was likely to last for at least 12 months. On the basis of the letter from Dr Torres on 8 January 2018 (Tab F) in which he summarises, amongst other things, the operational note of 22 December 2016 (B166), especially at page B167, the Tribunal is satisfied that the adverse effect was continuing at least at that date of 22 December 2016 and, given that the consultant arranged a multi-disciplinary team meeting on 19 May 2017 with four consultant orthopaedic foot and ankle surgeons, that any long-term effect is established at that date also; indeed, it would continue beyond that date of 19 May given that the outcome of that meeting was for a two-stage surgical intervention, the first aspect of which was a relatively minor procedure in August of that year.

13 On this basis, the Tribunal is satisfied that any effect was long-term and was so at both of the above times.

14 The more difficult question for the Tribunal is whether such adverse effect is on the claimant's ability to carry out normal day-to-day activities. As to the period 1 January to 11 April (or at least the very minimum of up to 24 January 2016 when the claimant asserts that he was ready and willing to return to work), the respondent concedes that the facts establishing the claimant as a disabled person at that time are satisfied. As to the second date, the date of dismissal, we have on the one hand the claimant's impact statement of 28 September 2017, in which he describes various day-to-day activities, and on the other, that he was working a 12-hour shift, five days a week plus overtime, sometimes up to seven days a week.

15 We are alert to the fact that the effects of medical treatment are to be, in effect, ignored. More precisely, as provided for in paragraph 5 of Schedule 1 to the 2010 Act, "an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if – (a) measures are being taken to treat or corrected, and (b) but for that, it would be likely to have that effect." In this regard the occupational health report of 16 March 2016 states that having spoken to the claimant, he no longer requires pain relief. The claimant's evidence in his witness statement was that when he "first returned to work" he was taking tramadol and gabapentin at least three times a day. These being prescribed drugs he was asked whether he had returned to his doctor. He answered that he had not but that he had some of this medication left over from his treatment. He explained further that he could not take the tramadol but had "a few" gabapentin. When this was pursued with him he said that he had two boxes of gabapentin.

16 On this evidence, notwithstanding that in re-examination the claimant added that he also bought over-the-counter painkillers (which is not mentioned in his witness statement), the Tribunal does not accept his evidence that he was taking the painkilling medication he described, which appeared to be embellished piecemeal as his evidence was given.

17 The Tribunal accepts that in addressing this fourth element of the definition of a disability it must focus on what the claimant cannot do and not on what he can do: see, for example, the decisions in Aderemi v Paterson [2013] ICR 591 and Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763. While it is right that we cannot focus solely on the claimant's performance of his duties at work (as seemed to be the approach of Ms Hayward and other witnesses of the respondent) and must focus on normal day-to-day activities more generally, it is clear from the EHRC Code of Practice on Employment (2011) that, "Normal day-to-day activities also encompass the activities which are relevant to working life." Thus, the claimant's performance at work can be brought into account in assessing normal day-to-day activities. Given what we have already found regarding the claimant's ability to perform the duties that were required of him at work, and in the absence of any corroborative evidence regarding the claimant's claims in his disability impact statement in July 2017, we find the latter not to be a credible reflection of what the claimant could not do, at least of matters as at the date of the alleged discriminatory act.

18 Thus, having considered the four elements in the definition of disability as described above, the Tribunal is satisfied, as to the earlier period of between 1 January and 11 April 2016, on the evidence presented to us (which includes obviously the claimant's absence from work, that being certificated and therefore his not being able to undertake the important day-to-day activities

relating to his work) coupled with the concession in this regard on behalf of the respondent, that the claimant was a disabled person during that period in early 2016.

19 Considering those four elements of the definition as at the dismissal date (which the parties are agreed is the date of the discriminatory act), on the basis of the above analysis alone, the Tribunal would not find the claimant to be a disabled person at that date as we have found that the impact on his normal day-to-day activities was absent at that time. In this connection, however, the Tribunal brings a further matter into its consideration; namely the likelihood of recurrence.

20 Paragraph 2(2) of Schedule 1 to the 2010 Act provides as follows,

> "If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

21 In its decision in Swift v The Chief Constable of Wiltshire Constabulary [2004] IRLR 540, the EAT stated (with some editing to focus upon the issues in the case before this Tribunal) as follows:

> "In considering the application of paragraph 2(2) of Schedule 1 a Tribunal should, in our judgment, ask itself the following questions.
>
> Firstly, was there at some stage an impairment which had a substantial adverse effect on the Applicant's ability to carry out normal day-to-day activities?
>
> Secondly, did the impairment cease to have a substantial adverse effect on the Applicant's ability to carry out normal day-to-day activities, and if so when?
>
> Thirdly, what was the substantial adverse effect?
>
> Fourthly, is that substantial adverse effect likely to recur?
>
> This is the question which must be answered if paragraph 2(2) is to come into play. The Tribunal must be satisfied that the same effect is likely to recur and that it will again amount to a substantial adverse effect on the Applicant's ability to carry out normal day-to-day activities.
>
> In this context a substantial adverse effect is "likely to recur" if it is more probable than not that the effect will recur."

22 In this connection the Tribunal again refers to the medical evidence before it, particularly that in the letter of 5 November 2015 (page 81) in which Mr Beckinsale states as quoted above. The Tribunal is satisfied that his phrase "he may well require a fusion in the future" is the same in substance as the phrase "could well happen" as used in the case of SCA Packaging v Boyle [2009] IRLR 746.

23 Asking itself the questions set out above, therefore, the Tribunal is satisfied as follows:

23.3 As already found above, the claimant had an impairment which

had a substantial adverse effect on his ability to carry out normal day-to-day activities at least from the date of his accident until early 2016 when the claimant declared himself fit for work and, at the latest, 4 March 2016 when his last medical certificate expired; the date of the occupational health consultation when the claimant was assessed as being fit to return to work being 16 March 2016.

23.4 Again as already found above, that impairment ceased to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, and did so cease when he returned to work on 11 April or more probably a short time before that return date.

23.5 The substantial adverse effect was upon the claimant's mobility, primarily, at least in the early stages, his inability to walk unaided.

23.6 That substantial adverse effect was likely to recur in the sense described above that it is more probable than not that the effect will recur.

24 On this basis, therefore, in accordance with paragraph 2(2) of Schedule 1 to the 2010 Act, the claimant's impairment is to be treated as continuing to have a substantial adverse effect on his ability to carry out normal day-to-day activities.

25 Thus, notwithstanding our above finding that the impact on the claimant's normal day-to-day activities at the time of his dismissal is absent, the Tribunal is therefore satisfied that, in addition to being a disabled person in early 2016, given the likelihood of recurrence of a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, he was also disabled as at the date of his dismissal.

Discrimination arising from disability

26 In connection with this aspect of the claimant's claim, the Tribunal adopted the approach as set out in Pnaiser v NHS England and another [2016] IRLR 170 which, so far as is relevant to this case, is as follows:

> "(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, ….
>
> (c) Motives are irrelevant. …..
>
> (d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. …..
>
> (i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way

alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability" and. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

27 Addressing the above points and using the above notation:

(a) The Tribunal is first satisfied that the claimant was treated unfavourably in that he was dismissed and, therefore, the people by whom he was treated unfavourably are the managers of the respondent who made that decision.

(b) The reason for that treatment was the claimant not being awarded any points in relation to the criterion of attendance in the redundancy selection matrix, which resulted from his absence from work due to the injuries he suffered in his motorcycle accident; and at the time of that absence he was disabled.

(d) Finally, it is therefore clear that the reason for the unfavourable treatment (ie. the claimant's dismissal in the above circumstances) was something arising in consequence of his disability.

28 In light of the above findings the Tribunal moved on to consider whether the respondent had knowledge of the claimant's disability. The circumstances include as follows: the claimant was clearly injured, he had certified absence, he was initially in a plaster cast, he was on crutches but progressively improving as borne out by, for example, the removal of his cast and his being weight bearing on both legs by 12 October, his giving away his crutches on or about 24 November and, in the letter referred to above of 5 November, Mr Beckinsale refers to being very pleased by the claimant's progress. Additionally, as to the period between 1 January and 11 April 2016, the claimant was wishing to return to work and, as for the later date of his dismissal, he had returned. The Tribunal accepts that there was the possibility of a second operation but that was not certain and is always referred to in the documentary evidence before us in terms of, for example, "if" required, "may be" required and "talk of" another operation. Even in answer to a question asked of him at the hearing, the claimant stated that his doctors were monitoring his condition "to see whether it got worse or went away, unfortunately it had got worse. Clearly if it went away a second operation would not have been necessary.

29 There were also the two occupational health reports. As to the period between 1 January and 11 April 2016, the first report refers to a possible return to work in eight weeks and the claimant did not challenge any aspect of that report, indeed his evidence is that he was satisfied as to its content. By the time of the second report the claimant was telling the respondent that he would not be getting any further fit notes as both his GP and hospital had said he was fit for work. The second report states that the claimant has advised that the impact is not longstanding and that the impairment does not impact on his daily activities of living.

30 A point of detail in this regard is that on 22 December 2016 the claimant had to undergo exploratory surgery under general anaesthetic. The respondent had previously agreed to the claimant taking time off work for all his

appointments for check-ups and physiotherapy and, indeed, to his being driven to those appointments by his colleague Mr Peake. For some reason, however, on this occasion the claimant simply requested a day's holiday without giving the reason, which Mr McCartney agreed to not knowing the reason. The Tribunal considers that a possible explanation for that is the claimant wanting to conceal from the respondent that all was not well with his ankle. Indeed, more generally, the Tribunal considers that if the claimant was struggling, as he now maintains, for reasons best known to himself he sought to minimize this.

31 On the basis of the above findings, the Tribunal is satisfied that as at the date of the alleged discriminatory act, the date of the dismissal, the respondent did not have actual knowledge that the claimant was a disabled person: ie. referring to section 15(2) of the 2010 Act, it "did not know" that the claimant "had the disability".

32 There is a further element of that subsection, however, that is sometimes referred to as having 'constructive knowledge' of the disability, more particularly, with reference to the above section, that the respondent "could not reasonably have been expected to know" that the claimant had the disability.

33 In this regard, the Tribunal considers the second of the occupational health reports referred to above and the respondent's reliance upon it to be significant. Having considered the guidance in the case of Donelien v Liberata UK Ltd [2018] EWCA Civ 129, the Tribunal is satisfied that no great weight should have been or should be placed on that report given that (utilising words used in that decision) it was not "reasoned" to any great extent and certainly was not "informed". There are two reasons for this finding.

34 First and most importantly, the letter of 5 November 2015 from Mr Beckinsale (page 81) had not been referred to occupational health. It is repeated that that letter is an important document, which the respondent had in its possession and which contains a very relevant paragraph referred to above as follows, "Given that he had a complete dislocation of his talus from all surrounding joints, I think the likelihood of AVN is extremely high and he may well require a fusion in the future. I am therefore referring him on to the foot and ankle surgeons whilst he continues with physiotherapy, for ongoing review and so that he is under the care of a team who could arrange further surgery as and when required." Even accepting the phrase "may well require", upon which much emphasis was placed by the respondent's witnesses, the Tribunal is satisfied that other elements of that paragraph (such as, "a complete dislocation", "the likelihood of AVN is extremely high" and "further surgery as and when required") are key and, had this letter been drawn to the attention of the occupational health consultant, that could have caused her to alter her opinion or request access to the claimant's gave medical records so as to inform that opinion. As such, the Tribunal considers that a reasonable employer acting reasonably would have sent a copy of this letter to occupational health but the respondent did not do so. Instead, there is only a brief reference in the referral to occupational health to the claimant being informed "by delayed letter November 2015 that he may need a further operation on his ankle" (page 101).

35 Secondly, the respondent did not seek, and did not require or even suggest to its occupational health provider that it should seek, access to the claimant's medical records. In the experience of this Tribunal, particularly that of the non-

legal members, such access is very much the norm in cases such as this. The evidence of Ms Hayward was that the respondent had not obtained the claimant's medical records or suggested that they should be obtained because the respondent had outsourced matters of occupational health and, having done so, it was for those employed by the occupational health provider to request access to medical records if they considered it to be appropriate to do so. Although accepting the outsourcing, the Tribunal is not satisfied that that relationship prevented the respondent suggesting to its occupational health provider (there apparently being good working relationships between the employees of the respondent and of that provider) that the claimant's records should be considered. In this regard, the Tribunal did not find satisfactory the evidence of Ms Hayward that the occupational health consultants might have obtained the records but she did not know if they had; it is to be assumed that had they done so reference will be made to those records in the reports. Had the claimant's medical records been requested, a wealth of information would have been made available to the respondent and/or its occupational health consultants. Purely as an indication, the Tribunal had before it a bundle of medical documents containing in excess of 400 pages. Not all of those documents relate to events occurring before the date of the alleged discriminatory act and the Tribunal acknowledges that anything occurring after that date is of little, if any, relevance to the issues before us, but a number do and the Tribunal is satisfied that a reasonable employer would have at least enquired as to the existence of medical records that were relevant to these matters.

36 Thus the Tribunal is satisfied that a reasonable employer would have taken the above steps at the time of the second referral to occupational health on 14 March 2016 and, the respondent not having taken those steps, applying the decision in Donelien, the advice contained in the second occupational health report was ill-informed and the respondent's reliance upon it was flawed: see also the decision in Gallop v Newport City Council [2013] EWCA Civ 1583, which at least in respect of its reference to "relying simply on its unquestioning adoption of OH's unreasoned opinion" remains good law notwithstanding the later clarification in Donelien.

37 Further and perhaps more importantly given the focus that there has to be upon the date discriminatory act, the Tribunal is satisfied that knowing, first, that the claimant had been a disabled person at the time of his absences in 2016 that were brought into account in the course of the scoring of the criteria in the redundancy matrix, secondly, knowing that his consequential absence would lead or had led to him being selected for redundancy and, thirdly, knowing from the letter of 5 November 2015 from Mr Beckinsale that, at the very least, the claimant might well require an operation in the future, a reasonable employer would have again asked at the time of that redundancy exercise and thence the dismissal, the question of whether the claimant was a disabled person for the purposes of 2010 Act. Had that question been asked and well-informed advice had been obtained, the respondent might well have gained knowledge of the claimant's disability. Once more, however, the respondent did not do so and, therefore, did not act reasonably at that time.

38 The Tribunal makes the above findings bringing into account provisions of the EHRC Code of Practice on Employment (2011) including that at paragraph 5.15 it is provided, "An employer must do all they can reasonably be expected to do to find out if a worker has a disability." The Tribunal accepts, as was submitted on behalf of the respondent, that the decision in Donelien makes it

clear that what an employer might be expected to do in such circumstances is not "a counsel of perfection. The test is one of reasonableness". We repeat, however, that we are satisfied that if the respondent had done all that it could reasonably be expected to do to that standard, that at the time of the second occupational health referral, the letter of 5 November 2015 would have been referred to occupational health and it would have been suggested that the claimant's medical records should be obtained; further and more importantly, that the question of whether the claimant was a disabled person should reasonably have been examined again at the time of his dismissal given (at the risk of repetition) that the sole reason for his dismissal was his absences at a time when it was known that he was a disabled person.

39 In summary, considering all the evidence before us in the round we are satisfied as follows:

39.3 as to the period between 1 January and 11 April 2016, the respondent did have actual knowledge of the facts constituting the claimant's disability not least due to his certified absence from work;

39.4 given his return to work and undertaking full-time duties, as already found, the respondent did not have actual knowledge of disability at the date of his dismissal;

39.5 the respondent has not shown that at that date, which is the agreed date of the discriminatory act, it "could not reasonably have been expected to know" that the claimant had the disability: ie. the Tribunal is satisfied that the respondent had constructive knowledge of the facts constituting the employee's disability.

40 There remains the question of whether the unfair treatment, namely the dismissal, can be justified. More particularly was it a proportionate means of achieving a legitimate aim? The respondent submits that the use of the selection matrix to achieve a reduction in employee numbers yet retain those TMOs best suited to meet its future business needs was a legitimate aim. The Tribunal accepts that. The respondent further submits that to include the claimant's absence from 1 January to 11 April 2016 was a proportionate means of achieving that aim. The Tribunal rejects that submission on the basis that it was not proportionate to include absences (or perhaps more correctly not discount absences) that are disability-related. By inference that is conceded by the respondent also in that in its Redundancy Policy and Procedure it is provided that such absences will be excluded and, in evidence, Ms Hayward confirmed that to be the case.

41 Thus given the above findings it follows that the Tribunal is satisfied that, having constructive knowledge of the facts constituting the claimant's disability, the respondent treated the him unfavourably because of something arising in consequence of his disability, and the respondent has failed to satisfy the Tribunal that "the treatment is a proportionate means of achieving a legitimate aim". The claimant's claim that the respondent discriminated against him contrary to Section 15 of the 2010 Act is therefore well-founded.

Unfair dismissal

42 Moving onto the question of unfair dismissal the Tribunal followed the sequential steps in Safeway Stores Plc v Burrell [1997] IRLR 200. First, the claimant was clearly dismissed. Secondly, the Tribunal is satisfied that the statutory definition of redundancy in section 139 of the 1996 Act is made out in that the respondent's requirements for employees to carry out TMO work

had diminished. Thirdly, the Tribunal is satisfied that the dismissal of the claimant was caused by that diminution. Thus the Tribunal is satisfied that the respondent makes out that the reason for the claimant's dismissal was redundancy.

43 As often, therefore, the crucial question becomes whether the respondent acted reasonably as more fully set out in section 98(4) of the 1996 Act there being no burden of proof on either party. By reference to the issues set out in Polkey v AE Dayton Services Ltd [1987] IRLR 503, the Tribunal is satisfied that the respondent did act reasonably in relation to the more general considerations of a fair redundancy dismissal as follows: it warned its employees; elected employee representatives; engaged in three consultation meetings with those representatives; identified the appropriate pool being all TMOs in the North; adopted a fair basis for selection from that pool in the sense that the bare matrix was fair, was discussed with the elected employee representatives and amended as a result; considered and offered alternative vacancies to potentially redundant employees including the claimant. In this regard, the Tribunal is not satisfied, as the claimant has asserted, that the respondent specifically designed the matrix in such a way as to capture certain employees including him not least because, first, at page 273 in respondent's Redundancy Policy and Procedure there is, at least in structural form, a precedent for such a matrix and, secondly, a similar matrix was used in the 2014 redundancy exercise that was conducted by the respondent in respect of its Surfacing Division.

44 The Tribunal finds, however, that the respondent did not act reasonably in its application of the agreed matrix. That matrix provided in respect of sickness absence "do not include serious illness". On advice from Ms Hayward that term was construed narrowly to limit it, first, to illness and exclude other medical conditions and, secondly, to illness that was life threatening or terminal. The Tribunal is alert to the fact that it must not substitute its own opinion for that of the respondent and that the question is whether the respondent's approach to this definition of "serious illness" is one that a reasonable employer acting reasonably could have taken. It notes, however, that there is no such limited definition in the respondent's Redundancy Policy and Procedure and that the definition emerged not from the respondent's head office, as company-wide policy, but as a result of a discussion between Ms Hayward and the Traffic Management Managers when she advised, and they accepted, the application of that definition. Given that extended absences are equally likely to arise from serious illness, serious injury and serious congenital conditions, the Tribunal is not satisfied that a reasonable employer would have applied such a restrictive interpretation of that term and it was not reasonable for the respondent to apply that interpretation in this case. There is no issue between the parties that the claimant's absence, particularly that in 2016 which was relevant for the redundancy scoring exercise, was due to a serious injury. That being so the Tribunal is satisfied that a reasonable employer acting reasonably would have discounted all that absence and that the respondent ought to have done so.

45 Even if the Tribunal is wrong in that finding the respondent's Redundancy Policy and Procedure provides examples of redundancy criteria and, as already set out above, it is stated, "attendance (excluding absences due to … disability)" (page 269). The Tribunal has found the claimant's absence was due to disability and, therefore, applying this approach in the respondent's own Policy, his absence should therefore have been discounted. Had that

occurred the claimant would not have been at risk and would not have been dismissed.

46 Thus by reference to section 98(4) of the 1996 Act the respondent did not act reasonably and therefore the claimant's complaint that his dismissal by the respondent was unfair is well founded.

47 That said the Tribunal has found that the respondent did offer the claimant the opportunity to remain in employment without a break in continuity in the same role and on the same terms and conditions but he rejected that possibility of continued employment.

Remedy hearing

48 As discussed with the parties at the conclusion of the announcement of the above decision orally this case will now be listed for a one-day remedy hearing on 31 May 2018.

Note

49 The Tribunal acknowledges that while the Judgement above reflects that which was announced orally to the parties on 9 March 2018, there are elements of the above Reasons, particularly regarding the respondent's knowledge of the claimant having the disability, that are not quite as was announced orally. It will be recalled that when the Employment Judge was announcing the Tribunal's decision, he lost the thread of his written notes and (while this aspect might have been less obvious) had to resort to a degree of 'ad-libbing' until he again picked up that thread. The parties can rest assured, however, that the above Reasons accurately reflect the decision of the Tribunal in respect of the claimant's complaints.

50 If necessary, this point can be addressed further at the beginning of the remedy hearing referred to above.

EMPLOYMENT JUDGE MORRIS

Date 8 May 2018