EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000236/2023

Held in Glasgow on 26 October 2023

Employment Judge M Kearns

Mr G Allan	**Claimant** **In Person**
Caledonian MacBrayne Crewing (Guernsey) Limited	**Respondent** **Represented by:** **Ms G Todd - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
FOLLOWING PRELIMINARY HEARING

The Judgment of the Employment Tribunal following the Preliminary Hearing is that:

(1) The claimant was disabled as defined in the Equality Act 2010 with effect from mid-January 2023, at the 12 month anniversary of the onset of his bursitis. Claims of disability discrimination in respect of acts or omissions prior to that date are dismissed.

(2) The claimant's employment was terminated by seven weeks' notice for the purposes of section 97(1)(a) Employment Rights Act 1996. The effective date of termination of employment was accordingly 3 March 2023 and the claim of unfair dismissal is in time.

(3) Acts of alleged disability discrimination prior to 25 January 2023 are time barred. Any issues in relation to conduct extending over a period or just and equitable extension of time are reserved for determination at the full hearing if appropriate.

(4) A full hearing of the remaining claims (merits and remedy – if appropriate) will be fixed. Date listing stencils will be sent out to parties for completion and return.

REASONS

1. The claimant was employed by the respondent as a ship's cook from 5 April 2017 until his dismissal for capability (ill health) in early 2023. On 24 April 2023, the claimant notified ACAS of proposed tribunal claims under the early conciliation rules. On 26 April 2023, he received an ACAS early conciliation certificate. On 23 May 2023, the claimant presented an application to the Employment Tribunal in which he claimed unfair dismissal and disability discrimination.

Issues for determination at Preliminary Hearing

2. Today's Preliminary Hearing was listed to determine the following two preliminary issues:

   (i) whether the claimant is, and was at the material time, a person disabled within the meaning of section 6 of the Equality Act 2010; and

   (ii) whether the tribunal has jurisdiction to hear any or all of the claimant 's claims, on the grounds of time bar.

3. At the time of the acts of disability discrimination alleged in this case, the claimant was suffering from bursitis, a condition which affected his right hip. The respondent does not accept that the claimant was disabled as defined in the Equality Act 2010 at the relevant time.

4. It was necessary to establish the dates of the acts complained of. From the ET1, the Note of the PH on 24 July 2023; the claimant's further and better particulars and our discussions at the outset of this hearing, the claimant's case involves the following claims. (The claimant confirmed the approximate dates of those claims in his evidence. For clarity, I have indicated here the result of the above Judgment for each head of claim.):

   (a) Direct discrimination under section 13 Equality Act 2010. The claimant stated that the less favourable treatment complained of was that set out

at paragraph 11 of the Note of the PH on 24 July 2023, namely: (1) at first he was not allowed a phased return to work (August 2022); (2) when a phased return was granted to him, he was deployed on other vessels on which he did not wish to work, which he thought was unfair and due to his disability (14 September to mid-December 2022) and (3) he informed his manager Mr. Smith that though he had a disability he considered himself capable of working (12 January 2023). (This head of claim is affected by the claimant's lack of disability status at the time of the acts complained of. It is therefore dismissed.)

(b) <u>Discrimination arising from disability under section 15 Equality Act 2010.</u> The claimant stated that the 'unfavourable treatment' was:

(i) not being allowed a phased return to work on his own vessel and being required instead to carry out the phased return on other vessels with longer crossings with the result that he was never able to show the respondent he could do his job. (14 September 2022 to end December 2022). (This claim is also affected by the claimant's lack of disability status at the time of the acts complained of and is dismissed.)

(ii) In his ET1, the claimant raises his dismissal for a capability (ill health) reason and the refusal of his appeal on 20 March 2023. (The claimant was dismissed on 7 weeks' notice which expired on 3 March 2023 – see below). The 'something arising in consequence of his disability' appeared to be the restrictions on his ENG1 certificate and his inability to have them lifted and demonstrate to the respondent that he could do his job. (This head of claim falls within the period when the claimant was disabled as defined. The claim is also in time. It can proceed to the full hearing.)

(c) Alleged breach of a duty to make reasonable adjustments contrary to sections 20 and 21 Equality Act 2010. The claimant stated that two PCPs had been applied to him by the respondent: (i) not allowing him to do a phased return on his own vessel with the ENG1 restrictions as adjustments (14 September 2022) (This head of claim is dismissed); and (ii) requiring him to remain in a seafaring role (14 September to 20 March 2023) (This claim will depend upon whether and if so, when any duty to make a reasonable adjustment arose and whether it was after mid-January 2023).

Evidence

5. The parties lodged a joint bundle of documents ("J") and referred to them by page number. The claimant gave evidence on his own behalf. The respondent called Ms Natasha Kerr, HR Business Partner. Both the claimant and Ms Kerr impressed me as honest witnesses, who gave their evidence with care and readily made appropriate concessions. There were no real disputes about the facts of what happened.

Findings in Fact

6. For the purposes of determining the preliminary issues, the following material facts were admitted or found to be proved.

7. The respondent is the employer of the crew-members who work aboard Caledonian MacBrayne ferries on the west coast of Scotland. The claimant was employed by the respondent from 5 April 2017 until early 2023 as a ship's cook. Prior to 23 February 2022, he normally worked as a Chief Cook on the MV Argyle, which sails between Wemyss Bay on the Scottish mainland and Rothesay on the Isle of Bute.

8. In or about mid-January 2022, the claimant began to experience a lot of pain in and around his right hip. He had never experienced this before. The claimant found it hard to sleep due to the pain and discomfort. He could not sit or stand for long periods but had to get up and walk around. If he went for a walk, he would have to stop every two hundred yards and take a rest. He was walking with a limp. On or

about 17 February 2022, the claimant went to his GP, who diagnosed bursitis and told him that he ought to rest for three to four weeks. The GP gave the claimant a cortisone injection and told him it might take around four weeks to work. The claimant eventually found some improvement from the injection. On 23 February 2022 the claimant was signed off by his GP as unfit to work. His GP prescribed Naproxen 250mg (an anti-inflammatory drug) and Tramadol 10mg, which helped with the pain. The claimant is still taking these drugs. The claimant was referred to the respondent's OH provider, who carried out a telephone consultation on 5 April and reported on 8 April 2022 (J74). The report stated that claimant had had a lot of pain in his right hip from bursitis. The report explained: "*The bursa is a small fluid-filled sac which acts like a cushion between tendons and bone, and it is this that is currently inflamed and causing him a lot of pain and discomfort. He is currently struggling to sleep at night, due to discomfort. He is managing to walk short distances and explains that he has a bit of a limp*." The report recorded that the claimant was having steroid injections into his hip which was providing some relief along with weekly physiotherapy input. The report confirmed that the claimant was prescribed anti-inflammatories and oral pain relief medication which he was taking daily. The medical treatment (steroids, anti-inflammatories and pain relief) helped the claimant by relieving pain and reducing inflammation. But for the treatment, the effect of the impairment on the claimant's ability to carry out day to day activities would have been more pronounced over the relevant period in terms of the effect on his ability to sleep, walk and bend down without excessive pain.

9. The claimant remained off sick from 23 February until 14 September 2022. He was assessed by his GP on 8 July 2022 and certified (J68) as able to benefit from a phased return to work with effect from that date. On 15 August 2022, the respondent obtained a further occupational health report on the claimant's condition. The report stated: "*Mr. Allan has been diagnosed with Bursitis of his right hip and is experiencing severe pain in his right gluteal (buttock) muscles. He told me that he can walk however he cannot walk far distances and needs to take frequent rest breaks. He cannot stand for prolonged periods of time and has restricted movement due to the pain. He is currently under the care of his GP and has been prescribed medication to alleviate his symptoms of pain. Mr. Allen is also*

currently attending physiotherapy sessions and is following a home exercise programme. ……. He mentioned that his sleep is often interrupted as he experiences pain whilst lying on his right side." The report stated that the claimant was not fit to return to his role but that management might want to consider temporary redeployment into an adjusted role with lighter duties. The report recommended a phased return. The following further adjustments were recommended: No prolonged standing or sitting tasks; allow regular rest breaks throughout the claimant's shift; No repetitive bending or low floor work tasks; No heavy lifting or strenuous manual handling tasks; He can continue with his master duties; Regular management contact.

10. At a capability review meeting on 18 August 2022 under the respondent's absence policy, the claimant discussed the findings of the OH report with his manager, Mr Smith. The claimant told Mr Smith he wished to try returning to work on a phased basis. Mr Smith told the claimant that he would first need to obtain an ENG1 Seafarer Medical Certificate (issued by the Maritime and Coastguard Agency) confirming he was fit to return. The meeting was adjourned for this purpose. The claimant obtained an ENG1 certificate (J73) covering him for one year. The certificate stated he was fit for seafaring work subject to the following restrictions: No prolonged standing; regular breaks; no heavy lifting.

11. The capability review meeting was reconvened on 8 September 2022 when the ENG1 was discussed. Mr Smith told the claimant that it would not be possible to accommodate many of the suggested OH adjustments in the claimant's role of cook on the MV Argyle. The claimant's phased return instead took place on a larger vessel in the role of senior catering ratings ("SCR"). The claimant had a period of medical suspension from 26 October to 22 November 2022. Otherwise, from 14 September until around mid-December 2022, the claimant undertook a phased return on various vessels.

12. In or around November 2022, the claimant carried out a 4 week phased return on the MV Isle of Lewis. He was reassessed by the ENG1 doctor following this but the restrictions were not removed from his ENG1 certificate. The respondent invited the claimant to a capability review meeting on 12 January 2023. During the

meeting, the claimant stated he wished to return to his role of Chief Cook regardless of the restrictions on his ENG1. Following an adjournment at the end of the meeting, Mr Smith delivered to the claimant the following outcome (J123): "*We will be making a recommendation to Guernsey that your employment is terminated on grounds of capability. You will receive an outcome letter detailing the reasons for the decision. You will have the right to appeal…… Natasha confirmed payment details: 12 weeks pay as compensation for loss of earnings (non-taxable) a week's pay for every year they have been in the business up to a maximum of 12 (taxable) any outstanding AL/call back"*.

13. The following day (13 January 2023) the claimant received a letter signed "Caledonian MacBrayne Crewing (Guernsey) Limited". The letter was headed 'Termination of Employment on Ill Health Grounds" (J124). It stated: "*Further to your meeting on 12 January 2023 with Gordon Smith, Retail Development Manager of CalMac Ferries Limited, and Natasha Kerr, HR Business Partner of David MacBrayne HR (UK) Limited, I now write to confirm our decision to terminate your employment with Caledonian MacBrayne Crewing (Guernsey) Limited on grounds of capability."* The letter did not stipulate - in so many words - the date the termination was effective. It did not say that termination was effective immediately. Towards the end of the letter, after a narration of events, a paragraph stated: "*After careful consideration of the above, the decision has been taken to terminate your employment on the grounds of capability due to your long term incapacity and due to the unlikelihood of your return in the foreseeable future."* There was then a section entitled: "*Outstanding Leave and any other final payments".* The section stated: "*Your final monies will include full pay up until 12 January 2023, any outstanding leave you may have accrued, 12 weeks compensation for loss of earnings (non-taxable) and 7 weeks payment in lieu of notice (taxable). Your final monies will be paid directly into your bank account on 28 January 2023. Your final pay slip and P45 will be sent to you as soon as possible after this date."*

14. The claimant appealed against his dismissal on 21 January 2023. At the end of January 2023, the claimant received his normal salary into his bank account, together with a payslip (J134) showing that he had been paid his month's salary as

normal. There was no payment in lieu of notice, no final compensation payment, nor was he paid his annual leave. The claimant did not receive a P45. The claimant assumed that this was because he was still employed pending the respondent hearing and deciding his appeal. He telephoned his trade union representative and told him he was still getting a monthly wage. His representative said: "*did you not get your 12 weeks?"* The claimant said "*No".* His representative told him: "*Just leave it for now because we're appealing anyway"*.

15. The claimant attended an appeal hearing on 21 February 2023 along with his trade union representative. During the appeal hearing, the claimant said he would be willing to drop down to an SCR grade with the restrictions still on his ENG1 in order to return to work. He was hopeful his appeal would succeed. At the end of February 2023, the claimant again received his pay as normal along with a pay slip for February (J133). He had still not received the monies described in the letter of 13 January, nor had he received a P45. He spoke to his trade union about it and asked whether they should be getting the Employment Tribunal forms. His union told him that if he was still being paid his wages, he could not bring a claim for unfair dismissal. He had to wait until the employment terminated.

16. From the respondent's perspective, what had happened was that when the claimant's employment was terminated on 12 January 2023, the payroll cut off for the month had already passed (on 6 January). The claimant's termination was not therefore processed that month. However, another mistake was also made in that the respondent omitted to action the claimant's leaver form. The result of this was that the claimant's salary continued to be paid to him as normal. However, no one contacted the claimant to inform him that this was a mistake and the claimant assumed that he was still employed pending the outcome of his appeal.

17. The respondent wrote to the claimant on 20 March 2023 informing him that his appeal was not upheld (J129). They did not take the opportunity to explain to the claimant in that letter that a mistake had occurred in relation to his pay. At the end of March, the claimant received a final pay slip (J133). This showed the remainder of his notice pay (described as "cash in lieu") and showed various adjustments. It also paid to the claimant money in respect of annual leave accrued but untaken.

The claimant understood that his employment had terminated on 20 March 2023, when he received the letter from the respondent informing him that his appeal was not upheld. This understanding by the claimant was the effective cause of him notifying ACAS and presenting his claim when he did. The claimant received his P45 one or two weeks after 28 March 2023.

18. When the claimant received the appeal outcome he was on holiday in Majorca. After he got home, around 24 March he telephoned the Employment Tribunal and asked could he take his employer to a tribunal. The person he spoke to asked if he had an ACAS certificate. He said no and they sent him a link.

19. On 24 April, the claimant notified ACAS of proposed tribunal claims under the early conciliation rules. On 26 April 2023, he received an ACAS early conciliation certificate. The claimant drafted his ET1 tribunal claim form himself. He still understood he had 3 months less a day from 20 March to submit his claim. He googled disability discrimination and spoke to his wife about it. (The claimant's wife is a schoolteacher.) The claimant did not find it straightforward to fill in the form and he tried to get advice about it. He talked to his union to see if they could help him. They told him to contact Acas and the employment tribunal and to get the forms and to "make sure he filled them in right". The claimant and his wife filled in the ET1 form together as best they could. They had difficulty with the way some of it was worded and they spent time looking things up. On 23 May 2023, the claimant presented his application to the Employment Tribunal in which he claimed unfair dismissal and disability discrimination. He believed the time limit for his claims was three months less a day from the end of his employment on 20 March 2023. Although he put 13 January 2023 as the end date of his employment on his ET1 form and referred to that date in correspondence, he believed his employment had ended on 20 March 2023 when he lost his appeal, or at least that that was the date when time started to run. Indeed he continued to believe this until he received an email from the respondent's solicitor in July 2023 suggesting that his tribunal claim was time barred.

20. On 21 July 2023, in an email to the Employment Tribunal (J36), responding to the respondent's solicitor's suggestion that the claim was time barred, the claimant stated:

"*I am writing in response to the e-mail from the respondents representative with regards to the ACAS certificate and time constraint. I am presenting special circumstances, those are:*

I put in an appeal to the company on 21st January with regards to my employment being terminated on the 12th Jan. The appeal hearing was not heard until 21st February and I was advised I would hear their decision within 2 to 3 days. I was emailed again on the 1st March apologising about the delay to the response for the appeal and was advised I would have had a decision by the end of the following week. This did not happen, I finally received a response on the 20th March.

During the time the appeal decision was taken I was still on full wages and my employment entitlements from my termination were not received until after the appeal hearing response (20th March).

……...As I was receiving full pay and the time the respondent took with the decision from the appeal, my understanding was that the 20th March was the time I was finally dismissed and I could then start the process for an employment tribunal and contract Acas."

Applicable Law

Disability

21. Section 6(1) of the Equality Act 2010 is in the following terms:

"***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."*

22. Section 6 is supplemented by Schedule 1. Part 1 of that Schedule deals with the determination of disability and provides, so far as relevant as follows:

> ***"2. Long-term effects***
>
> *(1) The effect of an impairment is long-term if –*
>
> (a) *It has lasted for at least 12 months,*
>
> (b) *It is likely to last for at least 12 months, or*
>
> (c) *It is likely to last for the rest of the life of the person affected."*

23. Section 6(5) Equality Act 2010 ("EqA") empowers a Minster of the Crown to issue guidance on matters to take into account in deciding any question under subsection (1). In 2011 the Secretary of State issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability'. The Guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law. However, Schedule 1, paragraph 12 to the Act requires that a tribunal which is determining whether a person is disabled as defined must take into account any aspect of this Guidance which appears to it to be relevant. I therefore take it into account where relevant below.

Time Bar

24. Section 123(3)(a) Equality Act 2010 provides:

> "***123 Time limits***
>
> *(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
>
> (a) *The period of 3 months starting with the date of the act to which the complaint relates, or*
>
> (b) *Such other period as the employment tribunal thinks just and equitable.*
>
> *(2) ….*

(3) For the purposes of this section –

(a) *conduct extending over a period is to be treated as done at the end of the period;*

(b) *failure to do something is to be treated as occurring when the person in question decided on it.*

……..

25. Section 140B Equality Act 2010 provides so far as relevant as follows:

"***140B Extension of time limits to facilitate conciliation before institution of proceedings***

(1) This section applies where a time limit is set by section 123(1)(a)…...

(2) In this section –

(a) *Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

(b) *Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

(3) *In working out when the time limit set by section 123(1)(a)……. expires, the period beginning with the day after Day A and ending with Day B is not to be counted.*

(4) *If the time limit set by section 123(1)(a)…… would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

(5) *The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."*

26. Section 97 of the Employment Rights Act 1996 ("ERA") defines the effective date of termination as follows:

"***97 Effective date of termination***

(1) Subject to the following provisions of this section, in this Part 'the effective date of termination' –

(a) *in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,*

(b) *in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect"*

27. Section 111(2) of the Employment Rights Act 1996 ("ERA") states as follows:

"***Complaints to employment tribunal***

……..

(*2) Subject to subsection (3) an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal –*

(a) *before the end of the period of three months beginning with the effective date of termination, or*

(b) *within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."*

Discussion and Decision

Disability Status

28. The onus is on the claimant to prove that he was disabled as defined in the Equality Act 2010 at the relevant time(s). The definition of disability in Section 6 of the Equality Act 2010 (as supplemented by Schedule 1) raises the following four questions:

    (1) Does the claimant have a physical or mental impairment?

    (2) Does that impairment have an adverse effect on his ability to carry out normal day-to-day activities?

    (3) Is the effect substantial?

    (4) Is the effect long-term?

29. Tribunals and courts are to give a purposive construction to the legislation, which is designed to confer protection rather than restrict it. I address each of these questions in turn.

(1) Does the claimant have a physical or mental impairment?

30. The onus is on the claimant to establish that he was suffering from a physical or mental impairment at the relevant time(s). As noted above, the 'relevant time' in this case differs from one head of claim to another over the period between 14 September 2022 and 20 March 2023. I accept the claimant's evidence, supported by medical letters and OH and doctors' reports that the claimant suffered from bursitis for the whole of the period from 14 September 2022 to 20 March 2023 and that this was a physical impairment.

(2) Did that impairment have an adverse effect on his ability to carry out normal day-to-day activities?

31. Paragraph A7 of the Guidance makes clear that "*What it is important to consider is the effect of an impairment, not its cause."* I accepted the claimant's oral evidence that from mid-January 2022, his impairment had an adverse effect on his ability to

carry out the normal day to day activities of sleeping, walking, sitting and bending down.

32. In considering the effect of an impairment, is important to bear in mind the provisions of Schedule 1, paragraph 5(1) to the Equality Act 2010. This provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that, where a person is receiving treatment, the effect of the impairment on day-to-day activities is to be taken as that which the person would experience without the treatment or correction measures. Harvey on Industrial Relations and Employment Law at paragraph 167.04 describes the Tribunal's task as follows*: "Faced with evidence of medical treatment, the tribunal has to perform a difficult task. It must consider how the claimant's abilities had actually been affected at the material time, whilst being treated, and then to decide the effects which they think there would have been but for the treatment. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities are clearly more than trivial (see Goodwin v The Patent Office [1999] IRLR 4, [1999] ICR 302, per Morison J).*

33. In relation to this issue, Ms Todd cited the case of Woodrup v London Borough of Southwark [2003] IRLR 111 as authority for the proposition that it is not enough for a claimant to assert that he would be badly affected if treatment were to stop. Proof, preferably of an expert medical nature, is necessary. In considering the issue of disability, it is fair to observe that the courts have tended to place more insistence on expert medical evidence in mental impairment cases than in straightforward physical impairment cases like the present one. In Royal Bank of Scotland plc v Morris EAT 0436/10, the EAT observed: "*The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the*

issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that it is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted."

34. Woodrup was a case involving psychotherapy treatment for "anxiety neurosis". In the Court of Appeal, Simon Brown LJ held that the claimant had not done enough to prove the deduced effects of medical treatment for her mental condition, stating: *"Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary".* The "*present class of case*" in Woodrup was the class of mental impairments in which the deduced effects of treatment (in Woodrup – psychotherapy) were in issue. It is easy to see that expert evidence would be necessary in such a case. By contrast, in a straightforward physical impairment case like the present, the effects of anti-inflammatory drugs and pain relief on a physical condition are within judicial knowledge – they reduce inflammation and relieve pain.

(3) Is the effect substantial?

35. "Substantial" is defined in Section 212(1) Equality Act 2010 as *"more than minor or trivial"*. The Act does not create a spectrum. Rather, unless the adverse effect can be classified as "minor or trivial" it must be treated as substantial. That is a relatively low standard. I concluded that the effect was substantial during the relevant period in the sense that what the claimant could not do was not trivial or insubstantial.

(4) Is the effect long term?

36. As set out above, an impairment will have a long term effect only if:

(a) "It has lasted for at least 12 months,

(b) It is likely to last for at least 12 months, or

(c) It is likely to last for the rest of the life of the person affected."

37. As submitted by Ms Todd, on the evidence before me the claimant's bursitis had not lasted 12 months at the beginning of the relevant time. The relevant period was 14 September 2022 to 20 March 2023. The claimant's evidence, which I accepted was that the effect of his impairment on his ability to carry out normal day-to day activities had begun around mid-January 2022.

38. In the absence of medical evidence, it was not possible to determine whether the claimant's symptoms, which began in mid-January 2022 were likely to last for at least 12 months as at the start of the relevant period (September 2022). As paragraph C3 of the Guidance makes clear, "likely" in this context should be interpreted as meaning that 'it could well happen'. However, the Guidance also states at C4:

"C4. In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances <u>at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood.</u>" (My emphasis).

39. In determining whether the claimant was disabled at a date earlier than the twelve month anniversary of the onset of the substantial adverse effect of his impairment on day-to-day activities, it is not what actually later occurred but what could have been expected to occur which is to be judged. The fact that a condition has, since the date of the alleged discrimination, lasted for 12 months is - according to the law - not relevant to the question whether these eventualities were likely at the time of the alleged discrimination. A tribunal must determine the hypothetical question of what the prognosis would have been in the light of the information available at the time of the alleged act or acts of discrimination. Where a tribunal is asked to make a judgment of this nature, it needs an evidential basis for doing so, and medical evidence is usually required. As Ms Todd submitted, on 14 September, the effect had lasted less than 12 months (9 months). I am unable to determine whether the claimant's condition, assessed at the earliest relevant date (14 September 2022) - or at any point up to the 12 month anniversary - would have been expected at that point to last longer than 12 months because no medical evidence was led on the matter. Thus it was only with effect from the 12 month anniversary of bursitis having

a substantial adverse effect on the claimant's ability to carry out day to day activities in around mid-January 2023 that that claimant was disabled as defined in the Equality Act 2010.

Time Bar

Unfair Dismissal Claim

40. The respondent submits that the claimant's claim for unfair dismissal is time barred. The first question to consider is the effective date of termination ("EDT") of the claimant's employment. Under section 97 ERA, that depends upon whether or not the employment was terminated by notice. If it was terminated by notice, section 97(1)(a) provides that the EDT is the date the notice expired. If it was terminated without notice, section 97(1)(b) provides that the EDT is the date on which the termination takes effect.

41. Paragraph 705 of Harvey on Industrial Relations and Employment Law; (Division DI Unfair Dismissal; 5. Date of Dismissal and Effective date of Termination; B. Dismissal with notice; (2) Construing the notice of the dismissal) explains that *"Where the employer terminates the contract, pays a sum of money to the employee to cover the notice period and dispenses with the employee's services for that period, the dismissal may take one of two forms. As the EAT pointed out in Adams v GKN Sankey Ltd [1980] IRLR 416, it may mean either that the employee is dismissed with notice but is given a payment in lieu of working out that notice, or that the employee is dismissed immediately with the payment being made in lieu of notice. If the dismissal falls into the former category, the EDT is the date when the notice expires; if it falls into the latter category then the EDT will be when the employment terminates (para [724] below). Where the termination is by letter, it is a matter of construction which form the dismissal takes. But often the letter is ambiguous." For example, in the Adams case a letter was written in November stating 'you are given 12 weeks' notice of dismissal from this company with effect from 5.11.79. You will not be expected to work out your notice but will receive money in lieu of notice …' Despite this last phrase, the fact that the monies were paid gross without deduction of tax, and that pension rights were treated as ending*

on 5 November, the EAT held that the EDT was when the 12 weeks' notice had run its course.

42. At paragraph 706 of Harvey, the learned authors state: "*In Chapman v Letheby and Christopher Ltd [1981] IRLR 440 the EAT held that the construction to be put on a dismissal letter should not be a technical one, 'but should reflect what an ordinary reasonable employee would understand by the words used'. It should be construed, moreover, in the light of the facts known to the employee at the date he received the letter. Consequently where there has been an oral notification followed by a written letter the oral and written words have to be construed together. It is not permissible to focus solely upon the letter, presumably even where its meaning is otherwise unambiguous (Leech v Preston Borough Council [1985] IRLR 337, [1985] ICR 192, following the approach adopted in the Chapman case). If the wording is still ambiguous when viewed in that context, the language should be construed against the person using it. So it will be for the employer to make his intentions clear if he wishes to rely upon a particular meaning.*"

43. I considered what the respondent had communicated to the claimant about his dismissal in this case and what a reasonable employee would have made of it.

44. The claimant was employed by Caledonian MacBrayne Crewing (Guernsey) Limited. Mr Smith is retail development manager of Calmac Ferries Limited. My understanding of the relationship between them for present purposes is that Mr Smith did not have the power to carry out the termination of the claimant's employment himself. For this reason, he stated at the end of the capability hearing: "*We will be making a recommendation to Guernsey that your employment is terminated on grounds of capability. You will receive an outcome letter detailing the reasons for the decision. You will have the right to appeal".* Ms Kerr then orally confirmed payment details: *"12 weeks pay as compensation for loss of earnings (non-taxable) a week's pay for every year they have been in the business up to a maximum of 12 (taxable) any outstanding AL/call back"*. It was not specifically stated to the claimant at the end of the meeting that his employment was being terminated immediately with a payment in lieu of notice.

45. The claimant then received the promised outcome letter on 13 January (J124). That letter was headed 'Termination of Employment on Ill Health Grounds". The first paragraph was as follows: "*Further to your meeting on 12 January 2023 with Gordon Smith, Retail Development Manager of CalMac Ferries Limited, and Natasha Kerr, HR Business Partner of David MacBrayne HR (UK) Limited, I now write to confirm our decision to terminate your employment with Caledonian MacBrayne Crewing (Guernsey) Limited on grounds of capability."* The letter did not stipulate - in so many words - the date the termination was effective. It did not say that termination was effective immediately. Towards the end of the letter, a paragraph stated: "*After careful consideration of the above, the decision has been taken to terminate your employment on the grounds of capability due to your long term incapacity and due to the unlikelihood of your return in the foreseeable future."* There was then a section entitled: "*Outstanding Leave and any other final payments".* The section stated: "*Your final monies will include full pay up until 12 January 2023, any outstanding leave you may have accrued, 12 weeks compensation for loss of earnings (non-taxable) and 7 weeks payment in lieu of notice (taxable). Your final monies will be paid directly into your bank account on 28 January 2023. Your final pay slip and P45 will be sent to you as soon as possible after this date."*

46. The question I have to decide is what an ordinary reasonable employee would understand by the words used, construing the oral notification at the end of the meeting and the letter together. Would he understand that he was being dismissed with notice but being given a payment in lieu of working out that notice (in the colloquial sense) or would he understand that he was being dismissed immediately with a payment being made in lieu of notice, to represent the equivalent of the damages a court would award for wrongful dismissal? Ms Todd submitted that the claimant admitted he knew he had been dismissed on 12 January and that he was told he would receive his final payments at the end of January. He had also appealed the decision. Furthermore, he put the [13] January date on his ET1 and he was not turning up to work. All of this is true. The claimant clearly was advised on 12 January and again in the letter of 13 January that the decision had been taken to terminate his employment. It was clear that that decision had been taken

by Mr Smith on 12 January and by 'Guernsey' on 13th. However, the claimant was not advised when that decision would take effect. His understanding was that his contract was continuing and would terminate after the appeal if it did not succeed. Payment in lieu of notice was mentioned in the letter, but it was not clear in which sense. Neither the announced decision at the end of the meeting nor the letter stated that the termination was effective immediately, suggesting dismissal with notice, with the payment being made in lieu of working the notice out (which is more usual and appropriate for an ill health dismissal). Furthermore, whilst the "12 weeks' compensation for loss of earnings" is described as "non-taxable" and as "compensation", the "7 weeks' payment in lieu of notice" is described as "taxable", suggesting that it is pay rather than damages /compensation. Thus, on balance, and construing any ambiguity against the author, I concluded that a reasonable employee would understand that the term 'payment in lieu' was being used in the colloquial rather than the legal sense. If I am right to understand the oral remarks and the letter in this way, then the effective date of termination of the contract was accordingly when the seven weeks' notice given to the claimant expired. Accordingly, the contract terminated on 3 March 2023 (seven weeks after 13 January 2023). This would mean the claimant had until 2 June 2023 to notify ACAS and that the unfair dismissal claim is accordingly in time.

47. If I am wrong to construe the payment in lieu of notice colloquially rather than legally, and to conclude that the claim of unfair dismissal was presented in time, I would have concluded that in the circumstances of this case, it was not reasonably practicable for the claimant to have presented his claim in time and that it was presented within such further period as was reasonable in the circumstances for the following reasons.

48. Despite the notification to the claimant that his final monies would be paid into his bank account on 28 January 2023 and that his final payslip and P45 would be sent to him as soon as possible thereafter, that was not what actually happened. The claimant's final monies were not paid into his bank account on 28 January. The claimant did not receive payment in lieu of notice. Instead, he received his notice pay as pay in the ordinary sense at the end of each month accompanied by a pay

slip. He did not know that this was a mistake because no one informed him of this at any point.

49. Section 111(2) of the Employment Rights Act 1996 ("ERA) provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented to the tribunal before the end of the period of three months beginning with the effective date of termination of employment, or, within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three month period.

50. Time limits are strictly enforced in employment cases. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. The claimant requires to show that it was not reasonably practicable, in the sense of not reasonably feasible for him to present the claim in time. Normally, it is necessary for a claimant to establish that there was some sort of impediment or hindrance to the presentation of the claim.

51. I first considered the claimant's explanation for notifying ACAS and presenting the claim when he did. The claimant understood that his employment had terminated on 20 March 2023, when he received the letter from the respondent informing him that his appeal was not upheld. This was the effective cause of him notifying ACAS and presenting his claim when he did. I considered whether, in light of this cause, it was not reasonably practicable for the claimant to notify ACAS within 3 months of 13 January (being the EDT contended for by the respondent) and to present his claim within one month thereafter. (The two are related because if the claimant had been correct that time started to run on 20 March, both actions would have been in time.) The issue here is a mistake as to fact on the part of the claimant about the date his employment terminated. The question is whether, in the light of the evidence about that mistake, it was not reasonably practicable for the claimant to present the complaint within the primary limitation period. Ms Todd referred me to the test articulated in the leading case of Wall's Meat v Khan 1978 [IRLR] 499 in which the Court of Appeal held that:

"the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."

52. Ms Todd reminded me that in Wall's Meat, the Court of Appeal held that mistaken belief will not be reasonable if it arises from the fault of an employee in not making such enquiries as he should have made. Ms Todd submitted that the claimant ought to have queried with the respondent why his final payment did not arrive in January and why his salary continued to be paid. She suggested that the claimant ought to have checked whether he was still employed. He had admitted he knew the decision to dismiss him had been taken in January and that he was not attending work. I considered this submission carefully. I concluded that the fact that the claimant was not attending work was neutral for present purposes, given the respondent's position on the adjustments referred to in the claimant's ENG1 certificate and the seven week notice period. Furthermore, although the letter the claimant received on 13 January stated that his employment was being terminated, it was not clear about the date of that termination. At some point prior to 20 March 2023, the respondent had realised that a mistake had been made in relation to the claimant's final payments. However, they did not contact the claimant to inform him of their mistake. This allowed him to go on believing that the continuation of pay and the end of month payslips were intentional and that his employment had therefore continued until the outcome of his appeal. This was then reinforced when the claimant received his P45 one or two weeks after 28 March 2023. It seemed to me that where one party knows a mistake has been made and does not inform the other party, it is a bit rich for them to then submit that it is the ignorant party's fault for not inquiring, especially given the respondent's other mixed messages. I did not conclude that the claimant's failure to inquire was unreasonable in the circumstances.

53. Ms Todd submitted and I accepted that the existence of an internal appeal is not, on its own sufficient to justify a finding of fact that it was not reasonably practicable to present a claim within the limitation period. There must be some factor beyond the mere use of an internal appeals process which justifies the failure to meet the primary time limit. In this case, there are facts (outlined in detail above) in addition to the bare fact of the internal appeal process which, if the claim had been outside the primary limitation period, would have made it not reasonably practicable for the claimant to meet the time limit. The respondent was continuing to pay the claimant's salary along with payslips as normal. The claimant testified and I accepted that he assumed from this that his dismissal had not yet taken effect and that his employment was continuing pending his appeal. He checked with his union and was told (correctly) that he could not bring a claim for unfair dismissal until his employment terminated. The respondent wrote to the claimant on 20 March 2023 informing him that his appeal was not upheld. They did not take the opportunity to clarify to the claimant in that letter (J129) that a mistake had occurred in relation to his pay. At the end of March, the claimant received a final pay slip (J133). This showed the remainder of his notice pay (described as "cash in lieu") and showed various adjustments. It also paid to the claimant his annual leave accrued but untaken. His P45 followed.

54. My primary conclusion is that the claim was in time. If, I am wrong about that and the EDT was 13 January, the claimant would have had to contact ACAS by no later than 12 April 2023 and to submit his claim by one month after the issue to him of the early conciliation certificate. This would have taken him to 13 May. ACAS were in fact notified on 24 April and the claim was submitted on 23 May 2023, so that the ACAS notification would have been 12 days late and the claim would have been approximately 10 days late. The claimant explained in evidence that the reason why he contacted ACAS and presented the claim when he did was that he believed that his employment had terminated on 20 March 2023. He continued to believe this until he received the respondent's email in July 2023 stating that the claim was time barred. With regard to the time taken after the claimant was told that his appeal was unsuccessful, he had googled how to make a disability discrimination claim and had spoken to his wife about it. He knew he had three months less a day to

bring the claim and understood that this time limit started to run on 20 March. However, he found the claim form very difficult to fill in because of the way some of the things were worded and he had to look things up. He spent some time trying to get advice from his trade union but they told him to contact ACAS and the Tribunal and to "*make sure you fill the forms in right*". In all the circumstances, had the claim been presented outside the time limit in 111(2)(a), I would have concluded that it was submitted within such further period as was reasonable in the circumstances and I would have granted an extension of time for the claimant's unfair dismissal claim under section 111(2)(b).

Discrimination Claims

55. The claimant has shown that he was disabled as defined in the EqA but only with effect from the 12 month anniversary of the date in January 2022 when his bursitis began to have a substantial adverse effect on his ability to carry out normal day to day activities. Disability claims prior to that date cannot succeed because the claimant has not shown he was disabled as defined in the EqA any earlier as explained above.

56. With regard to the claims of alleged discrimination therefore, the only acts still in issue are the claimant's capability dismissal and appeal. Time does not run in respect of an alleged discriminatory dismissal until the notice of dismissal expires and the employment ceases. British Gas Services Ltd v McCaull [2001] IRLR 60 EAT. Thus, the finding that the claimant was dismissed on seven weeks' notice and that the reference to payment in lieu of notice was to payment in lieu of working out the notice rather than to payment of damages for breach of the contractual notice term is also relevant to the discrimination claim. Thus, the date of the act complained of for the claim of allegedly discriminatory dismissal is also 3 March 2023.

57. The claimant benefits from the early conciliation extension because he presented his ET1 tribunal claim on 23 May 2023, so within one month of the issue of the early conciliation certificate on 26 April 2023. Allowing for this and working three months

less a day backwards from the date of notification of the claims to ACAS on 24 April 2023, acts of alleged discrimination prior to 25 January 2023 are out of time.

58. During the period when the claimant was disabled as defined, the two acts of alleged discrimination arising from disability are his dismissal, effective 3 March 2023 and his appeal, effective 20 March 2023. Both are within the primary limitation period and therefore in time.

59. In relation to any alternative time bar arguments about conduct extending over a period or a just and equitable extension, (if I am wrong about the payment in lieu of notice), these would require to be determined at the full hearing alongside the merits of the case. I therefore reserve them to that hearing.

60. Date listing stencils will be sent out to parties for a full hearing to be fixed.

61. The claimant may be able to seek legal advice without charge from the Faculty of Advocates Free Legal Service Unit or the following law clinics: Glasgow Caledonian University Law Clinic; University of Strathclyde Law Clinic; Aberdeen Law Project; The University of Edinburgh Free Legal Advice Centre; Edinburgh Napier Law Clinic; Or the law clinic at Robert Gordon University.

Employment Judge: **M Kearns**
Date of Judgment: **20 November 2023**
Entered in register: **21 November 2023**
and copied to parties