EMPLOYMENT TRIBUNALS

Claimant: Mr S Hughes

Respondent: Secretary of State for Justice

HELD AT: Liverpool **ON:** 31 October 2016 to 2 November 2016, 20-23 February 2017

BEFORE: Employment Judge T V Ryan
Mr A G Barker
Mrs J L Pennie

REPRESENTATION:

Claimant: Mr C Bourne, Counsel
Respondent: Miss K Knowles, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant's claims of disability discrimination are dismissed on the claimant having withdrawn them during the course of the final hearing.

2. The claimant's application to amend his claim to include claims of sex discrimination against Peter Francis, made during the final hearing and after Mr. P. Francis' had given evidence to the tribunal and had left the hearing, is refused.

3. The claimant was fairly dismissed by the respondent for a potentially fair substantial reason (other than one specified in s.98 (2) Employment Rights Act 1996) on 9 September 2015. The "substantial reason" was the respondent's reasonable and genuine belief, in the light of medical opinion and that of the claimant, that on the balance of probabilities it was unlikely the claimant would have capacity to provide future full and effective service in circumstances where the claimant agreed with the respondent's decision and invited it.

4. The claimant's claims of sex discrimination by way of direct discrimination and harassment were presented to the Tribunal out of time in circumstances where it would be not be just and equitable to extend the time for presentation to the date of actual presentation of the claimant's claims. Further and in any event it is the Tribunal's finding and judgment that neither the respondent's failure to fully

investigate the claimant's complaints of 10 July 2014 or its decision to redeploy him in the Resettlement Unit, and to maintain his employment in that unit, were related to reasons of sex or were because of the claimant's sex. Had the claims been presented in time or if the Tribunal is in error over the time issue, nevertheless it finds that the claimant's claims are not well-founded, fail and are dismissed.

5. The parties' respective costs applications are dismissed on their respective withdrawal.

REASONS

The parties kindly prepared an agreed List of Issues on matters of liability only; it was agreed that the hearing would consider liability only at this stage. Whilst a draft List of Issues was prepared for the final hearing in November, on 20 February 2017 the parties provided an updated version (C4) which I set out below adding where appropriate in brackets and in italics any explanatory note. The agreed List of Issues on liability is as follows:

1. **The Issues**

Unfair Dismissal –

1.1 Was the claimant dismissed by the respondent or did his employment terminate by mutual agreement?

1.2 Was the reason for dismissal the potentially fair reason of capability?

1.3 Was dismissal within the range of responses open to a reasonable employer and was it fair in all the circumstances?

Sex Discrimination –

1.4 Where the allegations of less favourable treatment are –

1.4.1 That he raised a complaint against Officer DH dated 10 July 2014 (page 89 of the trial bundle to which all future page references refer unless otherwise stated) but this was not investigated/not investigated until after an incident between the claimant and DH on 31 August 2014; *["the date of the act was 31 August 2014" (paragraph 1.2 of the claimant's replies to the respondent's request for further information)…the person (sic) responsible is Deputy Governor Dan Cooper and Governor John Illingsworth (paragraph 1.3 of the claimant's replies to the respondent's request for further information at page 49).]*

1.4.2 That he was deployed to the resettlement unit (in around September 2014) *("The date of this was in the days following the incident on 31 August 2014" (a further paragraph numbered 1.2 of the claimant's replies to the respondent's request for further information); "the person responsible is Governor Illingsworth"*

(paragraph 1.3 of the claimant's replies to the respondent's request for further information at page 49).]

1.5 Did the respondent treat the claimant as alleged?

1.6 Was the claimant less favourably treated than a female officer in comparable circumstances was or would have been, in circumstances where the claimant relies on Officer DH as an actual comparator in relation to allegation 1.4.1 (the respondent denies that she is an appropriate comparator)?

1.7 Was the reason for any less favourable treatment because of the claimant's sex?

1.8 Did the treatment afforded to the claimant amount to an act or omission extending over a period ending with the termination of his employment?

1.9 If not, was the claim brought within three months (as may be extended following early conciliation) of the act or omission complained of; the respondent avers that the claim is out of time and that any act/omission occurring prior to 28 August 2015 is out of time?

1.10 If the claim was not brought within the primary limitation period is it just and equitable to extend the time limit to hear these claims?

Harassment related to sex –

1.11 Where the alleged unwanted conduct was being "moved into an isolated role" i.e. resettlement –

1.11.1 Did the respondent move the claimant into an isolated role and if so was that unwanted conduct? *["The person responsible is Governor Illingsworth" (paragraph 4.3 of the claimant's replies to the respondent's request for further information page 51)].*

1.11.2 Did the conduct have the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.11.3 If not, did it have that effect having regard to the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

1.12 Was the conduct related to the claimant's sex?

1.13 Did the treatment afforded to the claimant amount to an act or omission extending over a period ending with the termination of his employment?

1.14 If not, was the claim brought within three months (as may be extended following early conciliation) of the act or omission complained of; the respondent avers that the claim is out of time and that any unwanted conduct occurring prior to 28 August 2015 is out of time?

1.15 If the claim was not brought within the primary limitation period is it just and equitable to extend the time limit to hear these claims?

2. The Facts

2.1 The parties agreed a joint chronology (C3) which was submitted to the tribunal during the final hearing on 20th February 2017; it is adopted for the purposes of this judgment as a correct and relevant chronology without the need for all of the dates to be repeated herein.

2.2 By the date of the material events in these claims the claimant was a senior officer in a challenging prison wing, G Wing, at HMP Liverpool. He was responsible for managing and supervising a team of nine prison officers including his personal partner, Miss Berry, and a colleague, Doreen Harrison, who I will refer to throughout as DH.

2.3 DH was known to be and was described variously as "difficult…quirky…emotional" and she has a disciplinary record for assaulting a colleague.

2.4 Ms Berry and the claimant had consistently received good appraisals from their line managers; their line managers did not complain to them about their personal relationship or its effect on "the dynamic" within G Wing. There was no managerial suggestion that they ought to be separated during working hours by the redeployment of either or both of them.

2.5 Some of the team of prison officers on G Wing, however, did have problems with the relationship between the claimant and Ms. Berry in so far as they perceived that it affected them at work. Whether or not they wilfully isolated Miss Berry she certainly perceived that that is what happened. During the course of an investigation by Mr Johnson (see below paragraph 2.16) several of the claimant's colleagues expressed their concerns about the effect of the personal relationship upon the dynamic on the wing; it was said that personal matters became public matters and there was a feeling that the relationship complicated line management on G Wing.

2.6 Around the time in question there were personnel changes to the team of officers on G Wing. The dynamic on the wing was in a state of flux around the time of spring 2014 when the claimant returned to work from a period of absence.

2.7 The claimant had a number of issues with DH and he detailed these in a letter dated 10 July 2014 (pages 89-95). His letter was a grievance letter. It contained a series of allegations made by him as a senior prison officer against one of his reports, a series of allegations of serious misconduct, the most serious aspects of which are summarised by him in a list at page 94. The claimant specifically addressed his letter to the then Acting Deputy Governor, Dan Cooper.

2.8 Mr Cooper discussed the said letter with the then Governing Governor, Mr Illingsworth. Mr Illingsworth told him to deal with it. Mr Cooper delegated it to another manager, Mr Hartless.

2.9 Mr Cooper either did not read or at best did not read the entire grievance letter attentively. He cannot have done. Mr. Cooper conceded that he may not have read it fully and he did not recognise the letter as a grievance. He certainly failed to understand the seriousness of its contents and in our findings displayed a lack of care, both as to the content and the effect of that content on the claimant and G Wing. He failed to take any care or pay any real attention to whether the letter raised serious issues with regard to the conduct of DH and the claimant or the management and supervision of prisoners on G Wing. It explicitly raised all of these as issues.

2.10 On 31 July 2014 Mr Hartless (acting further to Mr Cooper's delegation of responsibility for dealing with the claimant's grievance) together with another senior manager, Mr Davies interviewed DH who was accompanied by her union (POA) representative. Mr. Hartless made it clear at the outset that this was not an investigation or a fact finding mission. There was a discussion. It was as much for giving DH an opportunity to express her concerns and issues as it was to consider any of the allegations raised by the claimant. It was a pastoral chat and it included a brief discussion of two of the points specifically raised by the claimant in his grievance letter of 10 July 2014. Mr. Hartless raised in conversation the claimant's allegation of an assault by DH on the claimant with a clipboard and that DH had accused the claimant of being drunk on duty.

2.11 Mr Hartless confirmed to Mr Cooper that he had had an informal chat with DH but that no real progress had been made in resolving relationship difficulties between the claimant and DH. Matters were left there. The claimant knew that DH had been "spoken to" but he did not receive a formal acknowledgment of his grievance, was not interviewed, was not given a hearing and received no formal or proper outcome from the respondent.

2.12 On 30 August 2014 the claimant spoke to a Deputy Governor, Denise Dennis, about his issues with DH and Ms Dennis did nothing about it at that time. She had little time to take effective action before a major incident occurred on 31st August 2014.

2.13 On 31 August 2014 there was an altercation between DH and the claimant on G Wing in the presence of colleagues and prisoners. This led to raised voices which in turn led to the claimant repeatedly referring to DH as a "bitch". He had to be calmed down by colleagues and his immediate superior officer Ms Dennis. The claimant went to Deputy Governor Dennis' room, together with DH. Deputy Governor Dennis found it difficult to control them and their reciprocal shouting. This what she has recorded in what we believe to be a contemporaneous account, and she asked the claimant to leave the room. He went out but he came back in, still remonstrating and using abusive language about DH. This was a public

outburst. Part of it was witnessed by prisoners and details of it are set out at pages 97-99, which we accept as being reasonably accurate. We do so not least because of the claimant's admissions and concession that his behaviour was "out of order", that he did repeatedly refer to DH as a "bitch" and that he expected that he would have been disciplined for it. He got a lot off his frustrations and annoyance with DH off his chest. The claimant wanted the whole issue, all of the issues between himself and DH, to be investigated. He said he could not work with her and would not work with her.

2.14 Later that day, on advice, the claimant confirmed that he would return to work but he was relieved that he had got everything off his chest and he was relieved that Deputy Governor Dennis was going to take the matter on by way of an investigation. This was effectively an oral airing of the claimant's written grievance. He was pleased that at last someone in authority would take the situation seriously and would investigate his problems with DH.

2.15 The relationship between the claimant and DH had by that point, if not before, reached the point of no return. The claimant had lost self control and had evidenced an inability under pressure to supervise DH.

2.16 Deputy Governor Dennis was to advance matters by way of an investigation. She was to investigate or cause an investigation to take place in respect of what had occurred on 31st August 2014 and the matters that the claimant raised with her. On 2 November 2014 the respondent received a complaint from a prisoner who alleged that he had witnessed the claimant assaulting DH on 31 August (in the altercation described above). He had completed a formal complaint form (p126-129). He triggered a formal procedure that was clearly recognised by management; it took action in respect of the complaint. Helen Lund appointed Alan Johnson to investigate the events of 31 August 2014. She commissioned the formal report on 26 September 2014. The report was not concluded until 5 August 2015. Mr Johnson's terms of reference are at page 101. The terms of reference were to investigate the incident of 31 August and any related matters that led to it. At least in part this action was in response to the complaint that the claimant raised on 31st August 2014 orally to Deputy Governor Dennis. There was no formal written complaint from DH against the claimant.

2.17 In his investigation Mr Johnson addressed three questions that are set out at page 101A. One relates to the alleged assault by DH on the claimant on 10 July 2014 with a clipboard. The second question is about the incident on 31 August 2014 in general. The third question is about the management's response. Mr Johnson was not specifically instructed to investigate the claimant's letter of 10 July 2014 but he did look into the clipboard allegation and he did so, and he made it one of the bullet pointed questions at page 101A, only because the claimant raised it with him during the interview conducted by Mr Johnson.

2.18 During Mr. Johnson's interview of the claimant regarding the 31 August 2014 incident the claimant produced for Mr Johnson a further copy of his letter of 10 July 2014. The claimant gave Mr Johnson further details.

2.19 Ultimately, on 5 August 2015, Mr Johnson made recommendations that appear at page 124. There were nine specific recommendations. Only number 3 could relate to the matters that the claimant had raised in his written grievance regarding DH in that it refers to DH reacting emotionally (albeit that was evident on 31st August too), and only number 8 is specific with regard to the letter of 10 July, although it does not mention the letter, because Mr. Johnson recommended that management treat any complaints by one colleague against another as a grievance. The report does not make recommendations that are explicitly specific to the claimant's complaints of 10 July 2014. His complaints were not directly investigated but some of the incidents were covered in the investigation insofar as they were raised again by the claimant during its course.

2.20 Shortly after the above incident in early September 2014 the claimant was redeployed, and he moved reluctantly to the Resettlement Unit (RSU). His role in the RSU was said to be to assist in ensuring prisoner attendance at educational classes and similar activities. He was taken off G Wing. He was taken away from supervisory responsibilities and duties. His role involved him in counting heads in the educational block; we accept his evidence that it took him approximately 25 minutes every morning and 25 minutes every afternoon just to see and record whether any, and which, prisoners were present. The aim was to ensure maximum attendance of prisoners at organised activities. HMP Liverpool has a large educational budget and its stated policy is to further the rehabilitation of offenders. The follow up on the absentees or attendees was left to one of the claimant's colleagues in the RSU; the claimant had no other role of any substance, and in fact the role that he carried out was one that had been previously disbanded in a cost cutting (Benchmarking) exercise. The claimant remained in that role in the RSU until the effective date of termination of his employment.

2.21 DH was not redeployed in September 2014 and remained on G Wing in her substantive post until December 2014 when she was moved in the normal course of rotational redeployment. Her move away from G Wing was not related to the incident on 31st August 2014, the claimant's grievance of 10th July 2014 or her relationship with the claimant, such as it was.

2.22 Bearing in mind the length, breadth and level of the claimant's service to September 2014, as he assessed it, he felt undervalued and demeaned in the RSU. His colleagues made jokes at his expense likening him to a milk monitor, and commenting on their surprise that he was still in post as the months elapsed. His skills and experience were not utilised and in that respect he reasonably felt he had been re-deployed to a "non-job". He found the re-deployment to be degrading and humiliating. He was offended by it. This situation was obvious to his colleagues, hence the

joking; that situation and those perceptions continued to the effective date of termination of employment.

2.23 We are invited in the List of Issues to make findings as to whether or not the claimant (a male) and DH (a female) were comparable and were comparators for the purposes of these claims. The claimant is a prison officer and DH is a prison officer; the similarities cease there. The claimant was a senior prison officer; DH a junior. The claimant was a supervisor; DH was supervised. The claimant was a Band 4 officer; DH was on Band 3. The claimant was responsible for a team of nine; DH was one of the team of nine. In circumstances of the management of a prison wing they were not in comparable employment.

2.24 We find as a fact that the reasons that the claimant's complaint was not investigated in July 2014 or any time before 31 August 2014 was poor management and indifference on the part of then Deputy Governor Cooper, followed by an ineffective attempt at an informal resolution by Mr Hartless. Mr. Hartless' informal attempt was because the grievance was an internal complaint following on from earlier complaints made by the claimant against a male colleague in circumstances in which Mr Cooper particularly seems to have expected him to manage without such fuss (our terminology based on the impression given by Mr. Cooper in his evidence). In short, neither Mr Cooper nor Mr Hartless took the complaint seriously despite the apparently serious nature of the grievance letter. Deputy Governor Cooper did not read it attentively, if at all. He showed both a lack of care and indifference to matters raised by a senior officer about one of his subordinates because, it appeared to us from his evidence under cross-examination, he did not think the matter was serious or worthy of consideration at his level at that time; he was dismissive of these inter-personal problems between a supervisor and supervised. His indifference was not because of the claimant's sex. He believed that Mr. Hartless would achieve reconciliation between two people who were not getting on with each other and that was all that it amounted to. On reflection and during cross-examination Mr Cooper conceded that the issues raised by the claimant were mostly of the utmost seriousness.

2.25 Mr Johnson's investigation was very long and drawn out for genuine reasons. However, (and we accept all of those reasons existed namely a number of tragic deaths in custody and their consequences which he had to manage), there appeared to be no urgency with the investigation or any consideration that perhaps so serious was the matter that it should be investigated by a different investigating officer. The investigation was not accorded any priority and management appeared content to let matters lie despite the claimant being in what was effectively a "non-job" pending its conclusion.

2.26 Mr. Johnson's investigation was into, amongst other things, the claimant's oral complaints about the situation on 31st August 2014 which he addressed to Deputy Governor Dennis. Those oral complaints at least in part rehearsed some of what was contained in his written grievance of 10th July 2014. It was also an investigation into what was observed by Ms

Dennis and other colleagues and prisoners (including one who made a formal complaint). It was not an investigation initiated by a complaint made by DH against the claimant. It was not an investigation commissioned or pursued principally because the claimant insulted DH as a woman with abusive name calling, although that was part of the circumstances looked into. It was an enquiry into the whole altercation including the claimant's loss of self-control, his abuse of a colleague, her actions and reactions and, in a very general sense, the matters that lead up to the altercation.

2.27 As a result of Mr Johnson's investigation Ms Lund, the deputy governor who commissioned the investigation, prepared a letter to the claimant dated 24th August 2015 confirming that there would be no disciplinary action but that his conduct fell short of the expectations of the prison service. The letter confirms that a repeat of conduct such as he displayed on 31st August 2014 could lead to disciplinary action. This written advice and guidance was to remain on his file. Mr Francis, Governing Governor, signed the letter; there was no significance to his signing it as opposed to Ms Lund.

2.28 As a result of Mr Johnson's investigation Ms Lund wrote a letter to DH dated 24th August 2015 confirming that there would be no disciplinary action but that her conduct fell short of the expectations of the prison service. The letter confirms that a repeat of conduct such as he displayed on 31st August 2014 (described as an "isolated incident") could lead to disciplinary action. This written advice and guidance was to remain on her file. Ms Lund signed the letter; there was no significance to her signing it as opposed to Mr Francis.

2.29 The reason that the claimant was redeployed was because he had held a supervisory role on G Wing and he lost self control on 31 August in a semi-public forum giving rise to concerns to the Deputy Governor Dennis and giving rise to a prisoner's formal complaint. Redeployment was to remove the claimant from a supervisory role; it was to the RSU because of a perceived need by its managing officer, Mr Prins, for some assistance. It appeared to us from the evidence we heard about what Mr Prins said that Mr Prins was merely offering to accommodate the claimant in order to help him out rather than it reflected a particular or pressing need on his part. The reasons for the claimant's move from G Wing, and the reason for the move to the RSU, were not related to the claimant's sex.

2.30 As regards the evidence that we heard in respect of the above matters, we found Mr Illingsworth and Mr Cooper to come across as evasive, distant and disengaged from managerial issues raised, quite properly, by the claimant, and distant and disengaged from any detail. Their evidence was vague and unconvincing insofar as they gave any explanation of being proactive in response to the claimant's grievance. In Mr Cooper's case he gave a very unconvincing account that his failures were due to inexperience. We consider that he was being disingenuous; he was a long serving officer and was a reasonably experienced manager; it would not have taken much experience in either role to have understood the potential seriousness of allegations such as those made by the claimant –

that is if he had taken time to read them. In fairness to Mr Illingsworth, we accept that he was justifiably removed from day-to-day details however he ought to have overseen the task that he had delegated but he did not. Mr Cooper then went on to further delegate it without any proper consideration of the potential seriousness of the matters raised and he absolved himself from responsibility.

2.31 Facts regarding chronology in respect of the above and "time issues" raised by the respondent:

2.31.1 With regard to the failure specifically to investigate the letter of 10 July 2014 under the respondent's grievance procedure or otherwise assiduously, there was an absolute failure in July 2014 by Mr Illingsworth and Mr Cooper and that failure continued on their part until they left HMP Liverpool. Mr Illingsworth left HMP Liverpool in October 2014 and Mr Cooper in September 2014. There was a partial enquiry between September 2014 and September 2015 by Mr Alun Johnson but it was oblique with regard to the claimant's written complaints and there was an omission to fully cover in the investigation all of the matters that were raised; the claimant's written complaint was not comprehensively covered in the recommendations. This omission continued until the effective date of termination but it was an omission by Mr Johnson and not any of the named perpetrators; the claimant advanced no claim against Mr Johnson.

2.31.2 The decision to redeploy was a decision made by Mr Illingsworth in September 2014, and as I have said he left HMP Liverpool in October 2014. He had no further involvement in the claimant's redeployment after he left Liverpool.

2.31.3 The acts of which the claimant complains against Messrs Illingsworth and Cooper crystallised no later than their respective departures from HMP Liverpool, September 2014 in the case of the complaint against Mr Cooper and October 2014 in the case of the complaint against Mr Illingsworth.

2.31.4 The claimant's early conciliation notification was issued on 26 November 2015. The Early Conciliation certificate is dated 21 December 2015 and his claim was presented to the Employment Tribunal on 20 January 2016

2.32 The claimant was left in the RSU pending the outcome of Mr Johnson's investigation. He knew that was the reason. He was continuously unhappy with it throughout his sojourn. He asked senior managers about progress with the investigation and eventually gave up the will to continue in employment. There was an omission throughout all of that time on the part of the respondent's management to manage the claimant compassionately or effectively. The claimant did not raise any further grievance; he did not threaten to resign or resign because of the situation.

2.33 The claimant felt demoralised and unappreciated. He felt a lack of trust and confidence in the respondent ever resolving the issue to his satisfaction. He chose not to resign in response. He approached then Governing Governor, Mr Francis, with a view to leaving the service on the best terms available. Mr Francis managed the claimant's wish to exit the service. Contrary to some of his colleagues, Mr Francis' evidence was clear, cogent and credible and it was reliable. I say reliable because it is supported by the claimant's reported comments in his Occupational Health and GP records; he commented to the effect that he wanted to leave his employment and the plan was that he would be dismissed with compensation. We find that the claimant did indicate a wish to leave his employment at HMP Liverpool and the prison service generally. He reached the end of his tether and he wanted to leave as soon as possible on the best terms. This point was reached prior to the investigation outcome letter of 24 August 2015.

2.34 The claimant and Mr Francis together facilitated a situation whereby the respondent could dismiss the claimant ostensibly on grounds of medical inefficiency despite evidence to the contrary; there is evidence that he actually was fit to work at the date of the decision to dismiss him. The so-called "medical inefficiency" was insofar as the Occupational Health adviser could not assure the respondent of future full and effective service; OH felt that was unlikely, but it is difficult for us to make any finding that there was any actual medical cause for that. The cause was the claimant's will in all the circumstances. He wanted to leave. He does not satisfy the criteria for medical inefficiency in terms of a physical or mental incapacity to work, but his decided will meant that he would not work. He wanted a decision to be dismissed on grounds of capability. Understandably, and we are not criticising him, he wanted to be dismissed so as to access the compensation scheme. Mr Francis was willing to oblige him. Again we are not criticising Mr Francis, this was the application of "ways and means" (my expression), to a potentially intractable problem.

2.35 There was a decision by the respondent to dismiss the claimant, and that reason was a substantial reason, other than one of those listed in s.98 (2) (a) – (d) Employment Rights Act 1996, the reason being the claimant's stated intention which militated against his future full and effective service provided he had access to the compensation scheme. In short, the respondent, its OH advisor made it happen and the claimant allowed them to do so. That was potentially fair to both parties. It was the claimant's wish for the respondent to so decide, and where two parties agree to an available and lawful course of action then that action must be within the range of reasonable responses. The claimant did not resign. He stayed in employment deliberately until the respondent decided on termination of the relationship. The claimant makes no claim that the respondent breached his contract of employment in a fundamental particular leading him to resign because of the respondent's conduct.

3. **The Law**

3.1 Counsel for both parties provided written submissions and they supplemented them with oral submissions. Both sets of submissions made reference to the applicable law by reference to the Equality Act 2010 and authorities. Neither counsel took issue with their opponent's analysis of the case law nor statutory authorities cited and they confirmed this.

Unfair Dismissal

3.2 The claimant claimed that he had been dismissed by the respondent in contravention of his right not to be unfairly dismissed provided under section 94 Employment Rights Act 1996 ("ERA"). Section 98(2) ERA lists potentially fair reasons for dismissal and that list includes as a potentially fair reason a reason that relates to the capability or qualifications of an employee for performing work of the kind which he was employed by the employer to do (section 98(2)(a)). By virtue of section 98(3) (a) capability in relation to an employee may mean capability assessed by reference to a physical or mental quality (such as health or "medical efficiency"). Section 98(1) (b) provides that in addition to the potentially fair reasons listed at section 98(2) there may be some other substantial reason which is of a kind to justify the dismissal of an employee holding the position which the employee held (SOSR).

3.3 On enquiry during their respective submissions counsel for both parties accepted that whilst the respondent's pleaded case was that the claimant's dismissal was for a reason related to his capability, it was open to the Tribunal both to find that the actual reason was SOSR, and that such dismissal for SOSR was fair.

3.4 Whilst it is for the respondent to show the reason for the dismissal the Tribunal must decide whether the dismissal was fair or unfair (having regard to the reason shown by the respondent) dependent on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating it as sufficient reason for dismissing the claimant, which question shall be determined in accordance with equity and the substantial merits of the case.

3.5 In considering all of the circumstances in the context described above the Tribunal ought to give due consideration to evidence obtained by the respondent as to the claimant's capability and matters arising in consultation with the claimant, canvassing his wishes as to alternatives to termination including suitable alternative employment.

3.6 In considering all of the circumstances it would be appropriate for the Tribunal to consider whether the dismissing officer had a reasonable and genuine belief that the actual reason for the dismissal was potentially fair and sustainable on enquiry, that all steps taken in the dismissal fell within the band of reasonable responses and that dismissal itself fell within that range.

Sex Discrimination

3.7 The claimant has claimed direct discrimination contrary to section 13 Equality Act 2010 ("EA"). By virtue of section 4 EA sex is a protected characteristic. Section 39 EA provides that an employer must not discriminate against an employee by dismissing the employee or subjecting the employee to any other detriment. Direct discrimination is where a person discriminates against another person by, because of a protected characteristic, treating that person less favourably than it treats or would treat others. A claimant may rely on a named or hypothetical comparator. The circumstances of the comparator must not be materially different from those of a claimant save in respect of the protected characteristic. Where there is difficulty in identifying a comparator there is authority for the proposition that a Tribunal should consider the reason for the treatment and if it is clearly found to be non-discriminatory then there need be no further delay or analysis around the possible identification of a potential comparator.

3.8 Section 40 EA provides that an employer must not harass an employee where harassment is defined in section 26 EA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect referred to then the Tribunal must take account of the perception of B, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect. Sex is again a relevant protected characteristic in respect of section 26 EA.

3.9 By virtue of section 136 EA and established case law a claimant must prove facts from which a Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned (such as those above) and then the court must hold that the contravention occurred. The burden of proof shifts from the claimant to the respondent only if the claimant can prove those primary facts. If he were to do so then the respondent must prove a non-discriminatory explanation in order to defend the claim. In those circumstances, absent any non-discriminatory explanation, a claimant's claim of discrimination will succeed. Reference to a court in section 136 EA includes reference to an Employment Tribunal.

3.10 Paragraph 123 EA provides that proceedings on a complaint such as those detailed above may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as a Tribunal thinks is just and equitable. Conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when it does an act inconsistent with doing it, or if it does no inconsistent act then on the expiry of the period in which it might reasonably have been expected to do it.

3.11 Mr Bourne for the claimant did not rely on any case law authorities in his written or oral submissions but commented approvingly on the authorities referred to by Miss Knowles in her written and oral submissions. For the avoidance of doubt and without unnecessarily reiterating what was submitted by Miss Knowles and approved by Mr Bourne, principles from the authorities cited as listed below were taken into account by the Tribunal, namely:

Hendricks v Metropolitan Police Commissioner [2003] IRLR 96

Bahl v The Law Society & others [2004] EWCA Civ 1070

Madarassy v Nomura International PLC [2007] EWCA Civ 33

Unite the Union v Nailard [2016] IRLR 906

Khan v HGS Global Limited & another UKEAT/0176/15/DM

3.12 Withdrawal: Rules 51 and 52 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 concern withdrawal of claims. Where a claimant informs the Tribunal either in writing or in the course of a hearing that a claim or part of it is withdrawn, the claim or part comes to an end subject to any cost considerations. Under rule 51 where a claim or part of it has been withdrawn the Tribunal shall issue a judgment dismissing it, unless the claimant has reserved his or her position on dismissal or the Tribunal believes that to issue such a judgment would not be in the interests of justice.

3.13 Amendment: A tribunal may consider an application to amend a claim at any stage of the proceedings under its general power to regulate its own proceedings and specific case management powers. A tribunal must seek to give effect to the overriding objective, to act in the interests of justice dealing with cases fairly and justly, having in mind the factors and considerations set out in Rule 2 ETs (Constitution & Rules of Procedure) Regs 2013. Guidance on general case management was issued in March 2014 by the President of the Employment Tribunals in England and Wales which includes guidance on amending a claim, explaining the factors the ET will take into account when considering such an application. In Selkent Bus Co Ltd t/a Stagecoach v M.N. Moore [1996] UKEAT 151-96-0205 (Selkent) the EAT set out the principles, considerations and correct procedures to be taken into account by a tribunal in exercising its discretion to grant an application to amend claims (affirmed by the Court of Appeal in Hammersmith and Fulham London Borough Council v Jesuthasan [1998] ICR 640). A Tribunal should take into account all the circumstances of and incidental to the application and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Specifically it was said in Selkent:

3.13.1 "(a) It may be a proper exercise of discretion to refuse an application for leave to amend without seeking or considering representations from the other side. For example, it may be

obvious on the face of the application and/or in the circumstances in which it is made that it is hopeless and should be refused. If the Tribunal forms that view that is the end of the matter, subject to any appeal. On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the Appeal Tribunal that the Industrial Tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable Tribunal, properly directing itself, could have refused the amendment. See **Adams v. West Sussex County Council [1990] ICR 546.**

3.13.2 (b) If, however, the amendment sought is arguable and is one of substance which the Tribunal considers could reasonably be opposed by the other side, the Tribunal may then ask the other party whether they consent to the amendment or whether they oppose it and, if they oppose it, to state the grounds of opposition. In those cases the Tribunal would make a decision on the question of amendment after hearing both sides. The party disappointed with the result might then appeal to this Tribunal on one or more of the limited grounds mentioned in (a) above.

3.13.3 (c) In other cases an Industrial Tribunal may reasonably take the view that the proposed amendment is not sufficiently substantial or controversial to justify seeking representations from the other side and may order the amendment ex parte without doing so. If that course is adopted and the other side then objects, the Industrial Tribunal should consider those objections and decide whether to affirm, rescind or vary the order which has been made. The disappointed party may then appeal to this Tribunal on one or more of the limited grounds mentioned in (b) above.

3.13.4 (4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

3.13.5 (5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

3.13.6 (a) The nature of the amendment: Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether

the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

3.13.7 (b) The applicability of time limits: If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions e.g., in the case of unfair dismissal, S.67 of the 1978 Act.

3.13.8 (c) The timing and manner of the application: An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision"

4. **Application of Law to Facts**

4.1 The claimant withdrew his disability discrimination claims and they were accordingly dismissed.

4.2 At a very late stage in these proceedings and during the resumed hearing after Mr Francis had given his evidence the claimant applied to amend the claim to include a claim of sex discrimination naming Mr Francis as the perpetrator. The ET1 claim was prepared by lawyers or at least on advice; the claimant had legal advice throughout the substantive proceedings and during theM he provided further particulars of his claim in writing. At no time prior to Mr Bourne's application on behalf of the claimant was there any intimation of a claim against Mr Francis or that he was the perpetrator of sex discrimination vicariously covered by the respondent. The sought for amended claim was a new one made out of time without adequate or satisfactory explanation for its delay. Taking all of the circumstances into account and the principles of natural justice (not least because Mr Francis' evidence to the tribunal had been completed) it would not have been just and equitable to extend the applicable time limits; the respondent would have been far more prejudiced by allowing any such amendment than the claimant. The claimant could continue with the claims he had made and confirmed from any early stage and in respect of which both parties had prepared their respective cases. On the other hand, and in light of all of

the considerations set out in paragraph 3.13 above the tribunal exercised its discretion by refusing the application. Allowing it would have been wholly unfair to the respondent and to Mr. Francis who would have been effectively ambushed; he would have to have been recalled. We note that he was in fact called away from the hearing to attend to a very serious incident relating to the escape of a prisoner and he was obviously otherwise engaged for the remainder of the listed hearing. The application was refused.

4.3 Turning to the issues agreed by the parties and expressed as questions above:

Unfair Dismissal –

4.3.1 Was the claimant dismissed by the respondent or did his employment terminate by mutual agreement? The claimant was dismissed by the respondent; he invited such a decision; he co-operated with the respondent's OH advisor to facilitate the decision. In better circumstances he would have wanted to continue his career as a senior and supervising prison officer but in the circumstances that pertained he wanted to leave the prison service. He did not wish to, and did not, resign. The claimant was content with the respondent taking the initiative as this would secure his entitlement to compensation on termination. The relationship was brought to an end by confirmation of the respondent's decision. The claimant did not appeal against it because by the exercise of "ways and means" he felt he had secured the best exit available to him.

4.3.2 Was the reason for dismissal the potentially fair reason of capability? The actual reason for the dismissal was the substantial reason that the claimant had reached the point whereby the OH advisors reported it was unlikely he would render proper future service. That appeared to amount to medical inefficiency and again, by adopting a "ways and means" approach, the respondent was able to dismiss the claimant with compensation by adopting that terminology. Both parties felt it to be appropriate at the time. The evidence we heard would not in fact have justified a dismissal for incapacity substantiated by medical evidence. We find that the dismissal was for SOSR, the claimant unwillingness to work on. Alternatively if that could be described as a "mental quality" (s.98 (3) (a) ERA) the tribunal finds that it was, broadly speaking, a capability dismissal.

4.3.3 Was dismissal within the range of responses open to a reasonable employer and was it fair in all the circumstances? On the claimant's request the respondent followed an applicable fair procedure for capability dismissal. An OH report was obtained. The claimant was invited to and did attend a meeting with Mr. Francis. He was reminded of his rights including the right to appeal. The claimant wanted to leave and knew that the

procedure would effect this if he went along with it. He refused the offer of a re-grading and different employment; he did not appeal against dismissal. The decision to dismiss in all of the circumstances was within the range of reasonable responses being consistent with the wishes of the claimant.

Sex Discrimination –

4.3.4 Where the allegations of less favourable treatment are –

4.3.4.1 That he raised a complaint against Officer DH dated 10 July 2014 but this was not investigated/not investigated until after an incident between the claimant and DH on 31 August 2014;

4.3.4.2 That he was deployed to the resettlement unit (in around September 2014).

4.3.5 Did the respondent treat the claimant as alleged? Yes. The claimant's written grievance was not given due consideration and was not properly investigated. There was no real investigation before 31st August 2014. Subsequently there was an investigation into the events of 31st August 2014 including the claimant's oral grievances made to Ms Dennis. During the course of that investigation he produced to Mr Johnson a further copy of his written grievance which was partially investigated (in so far as it confirmed his oral complaints and provided background to the incident of 31st August). He was subsequently redeployed to the RSU in early September 2014 during the investigation.

4.3.6 Was the claimant less favourably treated than a female officer in comparable circumstances was or would have been, in circumstances where the claimant relies on Officer DH as an actual comparator in relation to allegation 4.3.4.1 (the respondent denies that she is an appropriate comparator)? DH was not a comparator for the claimant. Save that they were prison officers they were not comparable owing to the claimant's senior and supervisory position. The claimant has not proved facts from which the tribunal could find that he was treated less favourably than a female supervisor would have been had she written a very lengthy and detailed complaint about a reporting subordinate regarding matters within that woman's areas of responsibility. Tin any event the respondent has proved that the Governing Governor would delegate the matter to a Deputy Governor. Mr Cooper certainly, and we believe any Deputy Governor at HMP Liverpool probably, would not give it detailed formal consideration before at least trying an informal dispute resolution through a manager below Deputy Governor level. The respondent has shown that a woman's officer's written complaint would not have triggered a formal enquiry if made in the

circumstances and to the management that pertained in July 2014. The incident of 31st August 2014 was not investigated because it involved any particular complaint by a woman officer against a man. The incident was public. It was the subject of concern by a Deputy Governor who witnessed it. It was the subject of a formal complaint from a prisoner. During the course of it the claimant, male, asked for the matter to be looked into and he "got a lot of his chest". The claimant himself called for and welcomed the airing of the incident and background leading to it. The incident included behaviour on the part of the claimant that he conceded amounted to misconduct likely to lead to deserved disciplinary action. The conduct of both the claimant and DH was investigated and they received similar written counselling and guidance short of a disciplinary sanction. The claimant's use of the word "bitch" referring to a female colleague was not of and in itself the reason for any particular action; what mattered and what would have mattered whether the recipient of the abuse was male or female was that a supervising senior officer lost control, shouted at and abused a subordinate in the circumstances described.

4.3.7 The fact that the claimant abused a woman and the fact that a sexist insult was used did not cause or influence the respondent to treat the 31st August 2014 incident more seriously than the 10th July grievance; they were relevant but not determinative details.

4.3.8 *Was the reason for any less favourable treatment because of the claimant's sex?* There was no less favourable treatment than the respondent gave to or would have given to a hypothetical comparator; DH is not a comparator. In any event and as an alternative finding, even if DH was a valid comparator the reason for the treatments described was not tainted by sex.

4.3.8.1 The claimant's letter of 10th July 2014 was not fully investigated out of a mixture of management indifference and lack of care, and a wish to see matters of inter-personal relationships between senior officers and their reports sorted out informally and with the minimum of fuss.

4.3.8.2 The claimant was redeployed and DH was not because he was in a supervisory position yet he had lost his self-control on 31st August 2014 acting unprofessionally in shouting at and verbally abusing DH a subordinate officer; he failed to act as one would expect a supervising officer to act towards a subordinate and his loss of control brought into question his suitability to manage a difficult prison wing. The claimant has failed to prove that the same treatment would not have been afforded to a female

supervising officer. The respondent has shown that a female supervisor would have been moved had she behaved as the claimant did on 31st August 2014. DH was not a supervisor; she was subject to the supervision and control of superior officers such that she could be expected to perform her duties properly in a what was referred to throughout as a "disciplined service", especially in the light of the written advice and guidance that she received from Ms Lund.

4.3.9 *Did the treatment afforded to the claimant amount to an act or omission extending over a period ending with the termination of his employment?* The claimant particularised his claim by confirming that the treatment of which he complained were restricted to the actions of Messrs Illingsworth and Cooper and to the dates when they were posted to HMP Liverpool. They were not actions or omissions of the named perpetrators that extended to the effective date of termination. The consequences of their acts and omissions did so. The claimant has no claim against the respondent's managers in respect of decisions, acts or omissions after the last of the named perpetrators left Liverpool (save for his claim of unfair dismissal).

4.3.10 *If not, was the claim brought within three months (as may be extended following early conciliation) of the act or omission complained of; the respondent avers that the claim is out of time and that any act/omission occurring prior to 28 August 2015 is out of time?* The claimant's claims are out of time. They were presented more than three months after the matters of which the claimant complains.

4.3.11 *If the claim was not brought within the primary limitation period is just and equitable to extend the time limit to hear these claims?* It would not be just and equitable to extend time. We considered the balance of hardship and the principles of justice and equity however in view of our findings of fact the claims fail in any event. There is no injustice to the claimant in refusing to extend the time for presentation of claims that fail on their facts. The claimant was a member of, and availed of the facilities of, his union (POA). To his mind the treatment he received was abhorrent from the start. He knew it. He complained. He sought official recourse. There were things, such as presenting a claim, resigning (with or without then claiming constructive unfair dismissal), that he could have done. He chose not to do so. He chose to remain in employment regardless of the matters of which he complains and he failed to present a claim. This situation pertained until the claimant was able to accept dismissal with compensation. We do not criticise the claimant for his tactical and other choices but they do not justify extending the statutory time limits for making a claim, particularly as those claims are not well-founded and fail.

Harassment related to sex –

4.3.12 Where the alleged unwanted conduct was being "moved into an isolated role" i.e. resettlement –

4.3.12.1 Did the respondent move the claimant into an isolated role and if so was that unwanted conduct? ["The person responsible is Governor Illingsworth" (paragraph 4.3 of the claimant's replies to the respondent's request for further information page 51)]. Yes. The role in RSU was isolated from the claimant's usual place of work and his colleagues. He was not totally isolated from prisoner contact but it was of a different nature to that he was substantively employed to engage in. The move was unwanted. The claimant wished to remain in his supervisory role on G Wing. The role in RSU was not congenial employment and was not satisfactory to him.

4.3.12.2 Did the conduct have the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? No. The purpose of the move was to take the heat out of the situation on G Wing and to occupy the claimant in a role that did not involve supervising colleagues in and around prisoners.

4.3.12.3 If not, did it have that effect having regard to the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect? Yes. In all of the circumstances and comparing the claimant's experience, qualifications and substantive role on the one hand with the non-job in RSU on the other it was reasonable for the claimant to find the RSU role degrading, humiliating and offensive. He did. He felt under-valued, sidelined and he was the butt of his colleagues' attempts at humour.

4.3.13 Was the conduct related to the claimant's sex? No. The conduct was related to his supervisory and senior position and his obvious loss of self-control while exercising his duties on 31st August 2014. Again the claimant has not proved facts from which we could find unlawful discrimination and in any event the respondent did establish a non-discriminatory explanation.

4.3.14 Did the treatment afforded to the claimant amount to an act or omission extending over a period ending with the termination of his employment? Rather than repeat our earlier findings please refer to 4.3.9 above.

4.3.15 *If not, was the claim brought within three months (as may be extended following early conciliation) of the act or omission complained of; the respondent avers that the claim is out of time and that any unwanted conduct occurring prior to 28 August 2015 is out of time?* Rather than repeat our earlier findings please refer to 4.3.10 above.

4.3.16 *If the claim was not brought within the primary limitation period is it just and equitable to extend the time limit to hear these claims?* Rather than repeat our earlier findings please refer to 4.3.11 above.

Employment Judge T V Ryan

2nd March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 March 2017

FOR THE TRIBUNAL OFFICE