



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Ealing

**Respondent:** The Secretary of State for Justice

**HEARD AT:** HUNTINGDON ET **ON:** 30<sup>th</sup> March 2017  
24<sup>th</sup> & 25 November 2016  
27<sup>th</sup> & 28<sup>th</sup> June 2016

**BEFORE:** Employment Judge D Moore

**MEMBERS:** Mr H Smith  
Mrs L Gaywood

## REPRESENTATION

**For the Claimant:** In Person

**For the Respondent:** Ms Masood (Counsel)

# RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed.
2. The Respondent was not in breach of its duty to make reasonable adjustments.

# REASONS

1. This case arises from the Claimant's employment as a Prison Officer. He commenced his employment with the prison service on the 12<sup>th</sup> September 2011 and he was dismissed on the 27<sup>th</sup> March 2015. His claim form, which was submitted on the 21<sup>st</sup> August 2015 contains a complaint of unfair dismissal and a complaint of disability discrimination. No particulars of these complaints other than a single averment that he



considered that the decision to dismiss had been taken before his appeal were included with the Claim form but pursuant with a direction from Employment Judge Ord he submitted particulars on the 8<sup>th</sup> September 2015. On his unopposed application at a closed preliminary hearing (Case Management Discussion) on the 13<sup>th</sup> November 2015 he was permitted to amend his claim to include these particulars. Those particular whilst confirming his health problems have not added greatly to this averment that the essence of his case is that there should not have been a decision to dismiss prior to his appeal, that he was fit enough to return to his duties at the time of the appeal and that he should have been found work in some capacity. He is not familiar with the applicable legislation and this is his first experience of Tribunals but we have identified the Claims as being unfair dismissal but he confirms his complaints and failure to make reasonable adjustments.

2. Dismissal is admitted by the Respondents. Initially they did not concede that the Claimant was disabled within the meaning of Section 6 of the Equality Act 2010 and a further preliminary hearing was listed to determine the question. On the 16<sup>th</sup> February 2016 (prior to the preliminary hearing) the Respondent conceded that the Claimant was disabled and the preliminary hearing was vacated.
3. At the outset of the Hearing it transpired that the Claimant had breached an order to serve a medical report dealing specifically with the question of his disability and the basis of the Respondents admission was not (in terms of what facts the Respondent was admitting) clear. This became a material difficulty and we adjourned for the service of medical evidence. We gave reasons for that decision in these terms:-

### **ORDERS**

- 1) *This case is adjourned to the 24<sup>th</sup> and 25<sup>th</sup> November 2016.*
- 2) *On or before the 2<sup>nd</sup> August 2016 the Claimant shall serve on the Respondent a copy of any medical report upon which he intends to rely to support his contention that he was disabled within the meaning of Section 6 Equality Act 2010 on or around the 16<sup>th</sup> June 2015 the date of his internal appeal against dismissal. The author of any such report shall have his or her attention drawn to the relevant statutory provisions and the guidance and shall comment thereon.*
- 3) *On or before the 2<sup>nd</sup> August 2016 the Claimant shall serve on the Respondent a witness statement or statements including all of the evidence he intends to give or call in respect of his ability to carry out normal day to day activities on or around the 16<sup>th</sup> June 2015.*
- 4) *If the Respondent intends to rely on medical evidence he shall, on or before the 6<sup>th</sup> September 2016 serve on the Claimant a copy of any medical report upon which they intend to rely. The author of any*



*such report shall have his or her attention drawn to the relevant statutory provisions and the guidance and shall comment thereon.*

- 5) *If the Respondent wishes to call evidence in respect of the Claimant's ability to perform normal day to day activities the shall on or before the 16<sup>th</sup> September 2016 serve on the Claimant witness statements containing all of the evidence each witness intends to give.*

### **REASONS**

1. *Reasons have not been requested but we give reasons as an aide memoir particularly for the benefit of the Claimant who is representing himself.*
2. *The claim contains a complaint of Disability Discrimination and a complaint of Unfair Dismissal. Disability within the meaning of Section 6 of the Equality Act was initially disputed and the matter was set down for a preliminary hearing to determine the matter on evidence. That hearing was vacated when the Respondent's conceded the point.*
3. *That concession contained no detail of the facts admitted. The Claimant had or has a condition from which he will or has recovered. It flows from an accident. The Respondent had not had in mind when he became disabled and if he had ceased to be disabled when they made their admission.*
4. *On the second day of the Hearing they indicated through Counsel that they admitted that the Claimant was disabled at all material times. There is an allegation of discrimination in respect of the Claimant's appeal against dismissal in June 2015. His evidence in Chief was that he had made a sufficient recovery by this date to perform all of the duties of his former role as a Prison Officer. There is a tension between this evidence and the Respondent's admission. The Claimant's position was initially that he did not understand that he needed to satisfy the definition (i.e. be disabled within the meaning of the Act) in order to bring a claim of failure to make reasonable adjustments; he nonetheless pursues the claim.*
5. *In the afternoon of the second day we discovered that the Claimant had breached an order to serve a medical report choosing instead to send some aspect of his medical records. It was subsequently confirmed that those records did not refer to the Claimant's condition on the date in question the 16<sup>th</sup> June 2015. The Respondent had not complained or disclosed the fact of this breach to the Tribunal at any time and made heir admission regardless of this failure.*
6. *If a party's adviser makes an 'unfortunate admission' which impacts on that party alone then ordinarily that is a matter between that part and his advisers. However that admission in this case has an impact*



*on the Claimant's position. These points crystallized during cross examination and the Claimant has not adduced specific evidence of his medical condition. We recognise that the fact of the Respondents admission influenced that position. The resulting position of the tension between the admission and the tension or potential tension between the Claimant's assertion that he was disabled on the date in question and his evidence in respect of his recover have to be determined. The Tribunal tries cases on evidence and accordingly has afforded the Claimant the opportunity to produce evidence.*

7. *The Respondent has opposed that course pointing out that the root cause of the problem was the Claimant's failure to comply with the order. The only detriment they are able to refer to is costs. A fair trial of the point remains possible and the Respondents position can be remedied (if appropriate) by a costs order against the Claimant. Whilst recognising the need in due course to consider whether they compounded the Claimant's error we have met their point by recognising that they may make such an application at the conclusion of the case irrespective of the outcome.*
8. *We have reminded the Claimant of the terms of the order and repeated to him the information he was given at the Case Management Discussion in these terms:-*

*The Tribunal does not have the ability to interpret medical records prepared for other purposes. The question of disability under the act, in common with all the issues in the case, falls to be determined on evidence. If the medical evidence is not agreed then ordinarily the parties will need to call their respective experts to give evidence and be cross examined in the usual way.*

*We have further reminded him that the Tribunal is an impartial judicial body and cannot advise him how to run his case or give him legal advice. It was suggested to him at the Case Management Discussion that he may benefit from a discussion with an informed adviser who could help him understand what the relevant statutory provisions were in order that he could prepare and present his case effectively. He was reminded that this assistance could be obtained from a solicitor on payment of a fee or free of charge from organisations such as the Citizens Advice Bureau. We have repeated that advice in respect of the current position.*

4. At the resumed hearing the Claimant attested to the accuracy of his impact statement and confirmed that he had been put back on prescription medication. He had suffered from lower back pain for years (prolapsed disc) He was still suffering from this condition at his capability hearing. He was unable to pursue leisure activities was not able to carry out cleaning cooking or laundry and had a hot water boiler as the weight of a kettle caused him discomfort. He was still on prescription medication at the time of his appeal and he admits that if he stopped taking it or reduced the dose the pain



would intensify. He thought by the time of the appeal he could (whilst on medication) manage the vacuum cleaning but the medication blurred his recollection and made things vague. He couldn't be certain that this wasn't at a later time than the appeal. He was continuing with the medication well into 2016 and then tried to stop taking it. However the pain became intense and he had to resume taking it.

5. The medical report confirmed that on June the 15<sup>th</sup> 2015 the Claimant had impairment as defined by the Equality Act 2010 that it was of a fluctuating and recurrent nature and had been ongoing since May 2012. At the time of examination in July 2016 the Claimant still suffered from chronic pain in his neck and parasthasia (a burning sensation) and pain in both legs and feet. The medication he had been taking to control his symptoms (Pregabalin and Codeine) had a negative effect on his memory and concentration and loss of sleep due to pain affected his ability to concentrate and undertake tasks which required clarity of mind. The respondents do not seek to retract their admission and continue to contend that the Claimant was not fit to return to his duties at the date of his appeal.

## THE FACTS

6. The Claimant commenced his employment with the Respondent in an operational support grade. He applied for and was appointed to be a Prison Officer on the 12<sup>th</sup> September 2012. Fitness is a mandatory requirement for Prison officers (Prison Service Order 8625). The rule is explained at page 10 of Chapter 2 of the NOMS handbook; *'All Prison Officers who have joined the Prison Service since April 2001 must pass a fitness test once a year'* The attached explanatory note explains that Prison Officers must reach the required standard in respect of each element of the test each year and if unable to return to an acceptable level of fitness they could be regraded or dismissed. In 2012 the Claimant was absent from work with severe pain in his neck, upper back, left shoulder and arm between the 24<sup>th</sup> February and the 21<sup>st</sup> March. On the 4<sup>th</sup> and 5<sup>th</sup> November 2013 he was absent with a recurrence of back pain. As he has admitted in paragraph 5 of his witness statement he was in too much pain at this time to perform the duties of a prison officer and he was permitted to return on light duties. He was asked by the respondent if he had any special requirements and he asked for a supportive chair. The Respondent agreed to this.
7. On the 18<sup>th</sup> November 2013 the back of a chair that the Claimant was sitting on gave way. He did not fall but did experience pain in his lower back. On the 28<sup>th</sup> November 2013 he was assessed by Occupation Health, found unfit for normal duties but that he could remain on light duties (largely operating the switchboard in the gatehouse). He was assessed again on the 6<sup>th</sup> March 2014. By this time he had undergone an MRI scan which showed two ruptured discs. The prognosis was that they would take 4–5 months from November 2013 to heal. The report (P161) noted that the Claimant may be in a position to resume his duties in 4–6 weeks but if not that he should be regraded to a position where he would not be required to lift heavy weights or open heavy gates. On the 18<sup>th</sup> March in a meeting with



his line manager Mr Whittaker the Claimant indicated that he would be able to return to his duties in the near future and a further appointment with occupational health was made for the 6<sup>th</sup> May 2014. In the interim the Claimant was absent with back pain on the 1<sup>st</sup> and 2<sup>nd</sup> May 2014.

8. The occupational Health Report of the 6<sup>th</sup> May (Page 203) did find that the Claimant was fit to return to his full duties and he did so on the 14<sup>th</sup> May 2014. Given his attendance history and the length of time he had been on restricted duties the Claimant was required to attend a level 2 Attendance Management Meeting. As he had returned to full duties it was decided that no action should be taken at that stage.
9. On the 25<sup>th</sup> September 2014 the Claimant was again absent due to a neck injury caused by him braking hard whilst driving. He remained absent for the remainder of 2014. On the 2<sup>nd</sup> December 2015 he was certified unfit to work for a further 6 weeks. On the 5<sup>th</sup> January 2015 a further occupational health report confirmed that he was unfit to work. Page 3 of Chapter 6 of the NOMS Handbook sets out the provisions in respect of sick leave. If a manager is concerned about serious illness or repeated absences or if the employee reaches an unsatisfactory attendance figure then a process of meetings is engaged and if sickness exceeds 20 days with little indication of a return to work then Occupational Health Support and a formal meeting may be engaged.
10. The Governor (Mr Evans) concluded that the matter should be addressed at a capability hearing and this was convened for the 26<sup>th</sup> January 2015. (The notes of that hearing are at page 338 of the bundle). The Claimant explained that he could not return to work as his medication made him drowsy and he could not drive. Mr Evans discussed with him the fact that the advice from Occupational Health was that he was likely to be considered disabled and that it was necessary to consider permanent adjustments. In the course of the discussion the Claimant indicated that he was awaiting a referral to an orthopaedic consultant and a scan. On learning this Mr Evans adjourned the Hearing in order to await this further information.
11. The Claimant had also indicated that in the interim he felt able to do some non prisoner facing work. Given that earlier Occupational advice had been that a return to work may exacerbate the Claimant's condition he referred him back to occupational health to see whether sedentary work was possible. He did remind the Claimant that he could not remain on light duties indefinitely and in any event no longer than 3 months. We are satisfied that he did not promise the Claimant that he could have a three month period to see if his health improved in that time. He was merely reminding the Claimant of the prison policy that light duties are a temporary measure put in place to assist a return to full duties. On the 28<sup>th</sup> January 2015 he confirmed the salient points of the meeting to the Claimant in writing. The letter is at page 349. The letter makes it clear that if there is not progress within a reasonable time and /or a return to full duties it would be necessary to consider a permanent regrade or dismissal on grounds of medical inefficiency. We accept Mr Evans' unchallenged



evidence that there is no position within the prison structure that achieves permanent light duties for a Prison Officer. The Claimant was required to keep his line manager updated and was informed by Mr Evens that the Hearing would be convened at the appropriate stage.

12. The Occupational Health advice was that the Claimant could operate the switchboard for 4 hours a day (P362) and he commenced those duties on the 3<sup>rd</sup> February 2015. The Claimant saw his consultant in February 2015 and it was confirmed that he had a further split disc in his neck, surgery was not an option and the disc would have to be left to correct itself over time but it was not possible to give a timeframe. The Claimant passed this information to his line manager on the 27<sup>th</sup> February 2015 (P 371). He was absent on sick leave with this condition on the 2<sup>nd</sup> and 5<sup>th</sup> March 2015 but attended a further Occupational Health assessment on the 3<sup>rd</sup> March 2015. Their advice is at page 373 and it states that the Claimant was able to continue with his restricted (switchboard) duties but was unable to progress further at that time, it was not possible to predict a timescale for recovery or the Claimant's return to his post of Prison Officer.
13. Mr Evens reconvened the meeting on the 18<sup>th</sup> March 2015. We are satisfied that this was a reasonable decision that fell within the band of responses open to a reasonable employer. Mr Evans had adjourned the meeting to await the outcome of the Claimant's appointment with his consultant and that had now taken place. As we have earlier indicated Mr Evans had not undertaken to wait for three months and there was no requirement for him to do so. We do not accept the Claimant's argument on this point.
14. The notes of the Hearing are at page 401. The Claimant indicated that although he was managing quite well on light duties he had still been absent on two occasions and that his condition had not improved since January. He did not indicate the possibility of a return to his Prison Officer Duties in the near Future. We do not accept the Claimants contention that the matter should have been adjourned again for a further medical report. Mr Evans had the information from the Claimant's Consultant, effectively the same information from his Occupational Health Service and neither they nor the Claimant himself was giving any indication of a prospect of improvement in the near future. We are satisfied that he had current and complete medical information and that it was reasonable for him to proceed.
15. Mr Evans could not identify any adjustments that would enable the Claimant to carry out the duties of a prison officer. The Claimant has accepted that physical fitness is a requirement and that in his condition he would expose himself, other officers and inmates to risk in a prisoner facing role. Non prisoner facing roles and roles which entail sedentary duties are carried out by staff in the Claimant's former grade (OSG). The Claimant was not motivated to accept a regarding. The OSG role can be physically demanding and as Mr Evans noted the Claimant was struggling at times with a wholly sedentary and part time role since he was finding it difficult to sit for long periods of time.



- 16 Mr Evans although reluctant to end the Claimant's employment concluded that he had no option other than to do so given the Claimant's condition and the absence of a positive prognosis. Both he and the Claimant recognised that the Claimant was incapable of carrying out the duties of a prison officer. And there were no viable alternatives. We find Mr Evans decision to be reasonable in the circumstances of the case. He dismissed the Claimant on grounds of medical inefficiency with notice. Under regulation PIN40 a prison Officer who becomes unfit for service is entitled to compensation on dismissal and the Claimant was paid £5607.81. Mr Evans made it clear to the Claimant that if his health improved in the future he could re-apply for work at the Prison. He confirmed his decision to the Claimant in a letter dated the 27<sup>th</sup> March 2015 (Page 411) and advised him of his right to appeal.
17. The Claimant did appeal and the appeal was heard by Mr Vince on the 16<sup>th</sup> June 2015. His evidence that appeals under the respondent's procedure are a review of the decision to dismiss and not a rehearing has not been challenged. Mr Vince's task was to consider whether the decision maker had followed the correct procedure and whether the decision was fair and reasonable in the circumstances.
18. The Claimant advanced just one ground of appeal (namely that he was given insufficient time to recover from his injury) and the assertion that the injury was caused whilst at work. His letter confirms that at the time of his dismissal he was unfit to work. At the appeal the Claimant advanced a different ground namely that at the point of appeal he had recovered sufficiently with the aid of new medication to be able to perform the duties of an OSG and possibly the full duties of a Prison Officer. We note that the medical report he produced for the purposes of this hearing and the Claimant's own account in his impact statement establish that he was not fit to return to his duties at that Time.
- 19 Mr Vince noted that the Claimant had had a considerable period of absence at the time of his dismissal and indeed that for the majority of his service as a Prison Officer he had been unable to perform the duties of that role. He concluded that he had been given sufficient time to recover, that Mr Evans had obtained relevant medical evidence and adjourned the capability hearing to obtain fresh and current opinions. He was satisfied that there was no indication of improvement or recovery in the foreseeable future. He did not consider the incident of the Claimant braking whilst driving his car to be an injury caused at work. He upheld the decision to dismiss. We have found Mr Vince's conduct of the case, reasoning and decision to be within the band of reasonable responses and thus reasonable.

## CONCLUSIONS

20. Dealing first with the complaint of Unfair Dismissal; Section 98 of the Employment Rights Act 1996 provides that it is for the employer to establish the reason for the dismissal. If he does so and if that reason is one of the potentially fair reasons set out in the section it is then for us to establish on



a neutral burden of proof whether in all the circumstances of the case (including the Respondent's size and access to administrative resources) they acted reasonably in treating that reason as a sufficient reason for dismissal. The Reason relied upon is capability and that is one of the potentially fair reasons. It is a ground which subdivides into two parts and can reflect an inherent lack of skill or ability of it can relate to health and physical fitness. There is no doubt in this case that it is the latter category. The Claimant was well thought of by his employers and they have made it clear that if he recovers his health and is able to reliably carry out the duties of a Prison Officer he would be welcome to re-apply. I am satisfied on the evidence before me, which is essentially unchallenged, that the reason for the dismissal was a reason related to capability.

21. The question then is whether they acted reasonably in treating that as a sufficient reason for dismissal. The role of a Prison Officer requires a level of physical fitness. They have to be alert to inflammatory situations and they have a critical role in keeping colleagues, prisoners and sometimes the public safe. The Claimant has himself admitted that for the greater part of his service he could not operate in a prisoner facing role and that he was a threat to his colleagues if an incident involving physical engagement. Again it is unchallenged evidence that there are no permanent 'light duty' roles for Prison Officers Light duties are employed as part of a structured return to full duties. They generally comprise tasks that would be carried out by the operational support grade. Sadly it is the case that the Claimant was not able to give full service in this grade and was only able to work part time on restricted duties.
22. There is no doubt that this was extremely disappointing for the Claimant as having achieved promotion to the role of prison officer he took great pride in the position. There can be no doubt that the Respondent gave full and careful thought to the question of whether there was alternative employment. The Claimant was not willing to be returned to the support grade and in any event as he has confirmed during cross examination his condition put him below the physical requirements of that role. There was no other possible capacity in which to employ him and the requirements of the roles are applicable to all irrespective of where in the Country they are employed. His assertions of fitness were not of an ability to return to either role but only considerably restricted duties and in truth were no more than expressions of hope or desire to return to his post. The Respondents both at the initial hearing and the appeal took careful account of the medical evidence and there was no prognosis of a return to full duties in the foreseeable future. I am satisfied on the evidence before me that there was not another role that the Claimant was capable of performing available. The decision to dismiss was not made in haste, it involved consideration of the medical evidence and the decision was delayed to await the Claimant's consultant's report in the hope that it would contain an optimistic prognosis. I find the respondents to have conducted the matter reasonably and I find their decision to dismiss reasonable.



23. My decision on the complaint of failure to make reasonable adjustments (which has not been pursued separately from the unfair dismissal claim is perhaps self evident from the facts. It is Section 20 of the Equality At 2010 that provides the statutory definition. In respect of the facts of this case it is subsection (3) that is applicable and it provides that where a provision criterion or practice of the employer (PCP) puts the puts a disabled person in relation to a relevant matter at a substantial disadvantage in comparison with persons who are not disabled the employer should take such steps as are reasonable to have to take to avoid that disadvantage. It is inherent in the Claimant's case that the PCP he relies upon is the requirement that Prison Officers have to maintain the required level of physical fitness. There was no adjustment that would enable to perform the duties of a Prison Officer or even the duties of an Officer Support. He was struggling to maintain a level of service in the very light duties that he had been assigned. These were not the duties of an actual role within the prison and had been created or assembled as a recuperative measure in the hope that they would aid the Claimants return. On these facts I have to conclude that there were no reasonable adjustment that would address the particular disadvantage in this case.

---

Employment Judge D Moore, Huntingdon.

Date: 22 June 2017

Sent to the parties on: .....

.....  
For the Tribunal Office