EMPLOYMENT TRIBUNALS

Claimant Mr. P. Chadwick

Respondent Secretary of State for Justice

v

Heard at: Watford **On**: 4 to 8, 11 - 12 September 2017
(in chambers for the afternoon on 11 and also 12 and 25 September)

Before: Employment Judge Heal
Mr. W. Dykes
Mr. D. Bean

Appearances

For the Claimant: Mr. A. Allen, counsel
For the Respondent: Mr. C. Milsom, counsel

JUDGMENT

The complaints of unfair dismissal and disability discrimination are not well founded and are dismissed.

REASONS

1. By a claim form presented on 26 April 2016 the claimant made complaints of unfair dismissal and disability discrimination.

2. We have had the benefit of an agreed bundle running to 4 volumes and 1582 pages. Pages 1527 to 1609 were subsequently added by consent. Some page number duplication resulted. We have also been provided with an opening note by the claimant and a cast list. Initially each party provided us with a chronology and then on the second day we were given an agreed chronology, for which we are most grateful.

3. We have heard evidence from the following witnesses in this order:

   Mr Paul Chadwick, the claimant;

Mr Mark Edwards, Head of Reducing Re-offending at Her Majesty's Prison Springhill,
Ms Amanda Burnham, Head of Security at Her Majesty's Prisons Grendon and Springhill;
Mr Jamie Bennett, Governing Governor at Her Majesty's Prisons Grendon and Springhill,
Mr Paul Baker, Head of Residence at Her Majesty's Prison Springhill
Mr Kevin Leggett, Governing Governor at Her Majesty's Prison, The Mount.

Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called to give evidence and then the witness was cross examined and re-examined in the usual way.

Issues

4. At the outset of the hearing and with the assistance of counsel, we identified the issues as follows. Having carried out that exercise we gave to the parties for checking the following list (which now contains their helpful amendments):

4.1 Did the respondent's decision to transfer the claimant from a band 5 Custodial Manager to a band 4 Supervising Officer on 29 January 2016 constitute an express dismissal?

4.2 Did the claimant consent to this transfer?

4.3 Insofar as this constituted an express dismissal, what was the reason for it? The respondent says the reason was capability.

4.4 Was the dismissal fair in all circumstances pursuant to section 98 of the Employment Rights Act 1996?

Disability Discrimination

4.5 The claim form was presented on 26 April 2016. Day A was 29 February 2016. The parties agree that any act or omission before 30 November 2015 is therefore potentially out of time. In relation to any such act does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time? Was any complaint presented within such other period as the employment tribunal considers just and equitable?

4.6 The respondent has conceded that the claimant is a person with a disability (PTSD) from 1 October 2014. Insofar as it is relevant, was the claimant a person with a disability between January and October 2014?

Direct discrimination

4.7 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:

4.7.1 commencing disciplinary action against the claimant in January 2015 and pursuing it to penalty on 31 March 2015;
4.7.2 taking the decision to start the capability processes from 14 October 2014 onwards, that is making the original decision to start the process and to restart the process on occasions when it appeared to have stopped, as well as making the outcome decisions.
4.7.3 Downgrading the claimant with effect from 30 January 2016.

4.8 Has the respondent treated the claimant as alleged less favourably than it treated or would have treated comparators? The claimant relies upon a hypothetical comparator.

4.9 If so, are there primary facts from which the tribunal could, properly and fairly, conclude that the difference in treatment was because of the protected characteristic?

4.10 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 15 discrimination

4.11 Did the respondent treat the claimant as set out in paragraph 4.7.1 to 4.7.3 above?

4.12 What was the 'something arising'? The claimant says that it was

4.12.1 Paranoia (especially about the disciplinary matter);
4.12.2 That the claimant was stressed, anxious and emotional;
4.12.3 That the claimant had difficulty working beyond his job description and coping with work load in addition to that contained in his job description; and
4.12.4 The claimant had difficulty working in OMU and on risk boards.

4.13 The respondent concedes that those matters did arise out of the disability (at least in part). The respondent's position is that there is no issue about whether attendance issues arise in consequence of disability. The respondent makes no concession about the disciplinary board. The claimant had to establish that the conduct that led to the disciplinary warning arose in consequence of the disability, and that is not conceded.

4.14 In relation to the disciplinary matter, did the respondent treat the claimant as aforesaid because of the 'something arising'?

4.15 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies upon the following as legitimate aims:

4.15.1 As to the disciplinary issue, to maintain appropriate communication within the workplace;

4.15.2 For attendance/capability matters: the delivery of an effective prison service, ensuring the claimant provided regular and effective service, maintaining the expectations of a custodial manger grade and ensuring a fair distribution of work amongst custodial managers and managers. The claimant agrees that those aims are legitimate.

4.15.3 Therefore any argument will be about proportionality. In relation to the disciplinary matter, there is also an argument about causation.

4.16 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

Harrassment

4.17 Did the respondent engage in unwanted conduct as set out in paragraphs 4.7.1 to 4.7.3 above?

4.18 Was that conduct related to the claimant's disability?

4.19 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.20 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.21 In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Reasonable adjustments

4.22 Did the respondent apply the following provision, criterion or practice generally, namely imposing a requirement for custodial managers to be prepared to work in any area of prison, including the Offender Management Unit?

4.23 Did the application of the provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The claimant says that he was put at a substantial disadvantage because he found working in the Offender Management Unit difficult because of his disability

4.24 If so, did the respondent fail to make reasonable adjustments to avoid the claimant being put at that disadvantage? The claimant contends that allowing him to refrain from working in the Offender Management Unit would have been a reasonable adjustment in the circumstances. The respondent asks when did the duty fall to be fulfilled: the claimant says that that failure included a failure in January 2016 at the capability hearings.

4.25 Did the respondent not know, or could the respondent not be reasonably expected to know, that the claimant had a disability or was likely to be placed at the disadvantage set out above?

4.26 If the dismissal was unfair or discriminatory, did the claimant contribute to it by contributory conduct? This requires the respondent to prove, on the balance of probabilities that the claimant actually committed the misconduct alleged. The respondent relies upon the sending out of office reply which was unprofessional.

4.27 What is the percentage chance that there would have been a fair and/or non-discriminatory dismissal in any event? What would have happened had the claimant not been regraded?

4.28 We agreed that we would deal with issues of liability, contributory fault and/or Polkey/Chagger separately from remedy and mitigation issues.

Facts

5. We have made the following findings of fact on the balance of probability.

6. Her Majesty's Prisons Grendon and Springhill are 2 separate prisons on the same site. Springhill is an open prison. Mr Jamie Bennett is Governing Governor of both.

7. The claimant began his employment with the respondent in October 1994. He was initially employed as a Principal Officer, which was then the highest ranking uniformed grade. In 2013, Prison Service jobs were re-graded and the ranks of Principal Officer and Senior Officer disappeared, being replaced by Custodial Manager and Supervising Officer. The claimant therefore became a Custodial Manager in 2013. There was a period during which the role of Supervising Officer disappeared, at least in these establishments, but it had reappeared before the end of January 2016.

8. There were approximately 14 other Custodial Managers beside the claimant. They each had duty management responsibilities primarily as Orderly Officers which they carried out at the prison on a shift basis. However they all also had duties as managers of a particular department. In 2012 the claimant was manager of the Offender Management Unit ('OMU').

9. The Job Description of the Custodial Manager for the OMU says that the job holder will provide day-to-day management of the OMU, will be required to undertake incident management response and to undertake Orderly Officer duties. The job description then sets out a detailed list of specific tasks and then it adds what we have called 'additional duties' with this paragraph:

'*The duties/responsibilities listed above describe the post as it is at present and is not intended to be exhaustive. The job holder is expected to accept reasonable alterations and additional tasks of a similar level that may be necessary. Significant adjustments may require re-examination under the Job Evaluation scheme and shall be discussed in the first instance with the Job Holder'*

10. It has been common ground before us that the claimant's role as manager of the OMU, until July 2013, involved spending 2 to 3 days each week carrying out risk boards. This involved the claimant taking responsibility for decisions about whether to allow individual prisoners release on temporary licence ('ROTL').

11. The parties agree that the claimant had been promoted to Principal Officer/Custodial Manager grade in the offender management unit/activities from 1 April 2004.

12. In 2006 and 2007 the claimant experienced some psychological problems. He was absent from work and attributed the difficulties to his high workload.

13. In 2013 resources in the Prison Service were stretched: it was common ground that resources have been a problem for the service for a long time. In this context, in May 2013 Mr Edwards had a meeting with the claimant during which they agreed that the claimant would temporarily add to his duties the management of Farms and Gardens as well as Waste Management. These duties did not involve him in the management of those 2 departments but involved line management of individuals who had the practical day-to-day running of those areas, one in Waste Management and 3 in Farms and Gardens.

14. The claimant was, we find, overall hard-working, conscientious and loyal, particularly in his orderly officer role in which he worked hard to ensure that the day-to-day running of the prison was achieved. We find that he was happiest in that role and showed a tendency to react negatively to change and uncertainty. For example he struggled to adapt to some of the changes caused by the re-grading in 2013. The additional roles which were added to his job description (Farms and Gardens, Waste Management and Enabling Environments) seem to us to be factors which disturbed his equilibrium so that he was unable to cope with his workload.

15. In July 2013, an incident took place in which a prisoner released on temporary licence murdered a member of the public ('the July 2013 incident'). The claimant had been involved in the decision-making process which led to the prisoner's release. No blame has been attached to the claimant in relation

to this decision at any time in the evidence which we have heard. Indeed the respondent was clear in cross examination that it did not blame the claimant. Nonetheless, custodial managers nationwide were removed from completing risk boards while a review of the process of risk assessment about release on temporary licence was carried out.

16. The practical result for the claimant was that he too ended his involvement with risk boards while that review process was underway. Therefore the 2 to 3 days a week which he had spent conducting risk boards became available for other tasks.

17. In or about November 2013 the claimant was expected to attend a meeting in Winchester. John Steele chased the claimant about arrangements for that meeting. The claimant reacted on 13 November 2013 with an email to Mr Steele refusing to attend the meeting and complaining that he had too much work to do.

18. As a result, the respondent referred the claimant to an occupational health advisor. As a result of a discussion with the claimant, the adviser reported on 16 January 2014 (the assessment having taken place on 15 January) that the claimant had been taking time off in lieu and annual leave so that he had been working two and a half days per week for some time. His workload had accumulated, he was tired and because he was conscientious and applied pressure to himself, he had an emotional outburst. He said that he was required to manage Farms and Gardens about which he had no experience. There was a contributing factor of an incident several years earlier which he had discovered had not been dealt with properly. He said that the incident of the email was a solitary incident and he could manage the expected workload.

19. The adviser gave an opinion that the claimant was fit for work and able to take on the full range of duties required of him. He did not have a physical/mental condition and no work adjustments were required. The claimant requested a further meeting with management to quantify expectations around his duties. The adviser supported this.

20. We note that the adviser's report is inconsistent with the account of the claimant's symptoms during this period as set out in his witness statement. If the claimant was suffering daily nightmares and emotional outbursts, difficulties relaxing and constant thoughts about the July 2013 incident, he did not report these to the occupational health advisor.

21. On 4 March 2014, the claimant had an operation on his knee. He returned to work on crutches following day. Mr Bennett agreed to fund a taxi to enable him to travel to work and he worked restricted hours for a week.

22. In June 2014, the claimant had been sent his Staff Performance and Development Record ('SPDR'). In June 2014 Mr Edwards, then the claimant's line manager, awarded the claimant a grading of 'almost achieved' on his SPDR. This was countersigned by Mr Bennett on 16 July.

23. In the SPDR Mr Edwards recorded that the claimant had not been able to provide regular support in the oversight of Farms and Gardens and Waste Management. He had not been able to complete his full range of duties in OMU because of the review post July 2013. He praised the claimant's fantastic work with 'Enabling Environments' and described the claimant as hard-working, loyal and conscientious. He noted the claimant's struggle to adapt to change. He was clear that the 'almost achieved' marking did not reflect the work the claimant did daily as an orderly officer, but stressed that the job involved achieving in other areas of the job description.

24. The claimant was not happy with his 'almost achieved' marking. He complained that he had been given work which was not in his job description and for which he did not have skills. He said that others of his rank and grade were not treated the same as him and that he had been singled out.

25. By email dated 16 July 2014 the claimant wrote to Ben Smith of the National Offender Management Service ('NOMS'). His email is reasoned and structured. He said that he had been asked to do work in Waste Management and Farms and Gardens which he believed was part of a non-operational band 6 job description and outside his job description. He says that he had also been asked to deliver what he described as project work on an Enabling Environments award. This he said was part of the job description at band 7 level. He said that the award was based around a drug treatment program which was not part of his job description. He said that he had repeatedly raised his concerns that this work was not part of his job description. He said he had nonetheless been told to complete the work and, although he had been given no time to complete this additional work, he had now received an 'almost achieved' marking. He said that he was now at the end of his tether.

26. On 18 July 2014, the claimant presented 3 grievances, one relating to each area of the 'additional work'. Each of these grievances was consistent with the reasoning in his email dated 16 July. At this point, the claimant was not saying to the respondent that his difficulties with his work were due to the incident in July 2013, or to any mental health problem.

27. By an email dated 28 July 2014 the claimant told Mark Edwards, his line manager, that he had been greatly affected by his almost achieved mark, was no further forward with the situation, and was exhausted. He said that he was very capable of delivering his work but required support. He asked Mr Edwards to arrange some counselling.

28. By a further grievance dated 28 July 2014, the claimant reiterated the points made in his earlier grievances. His concern remained his 'almost achieved' marking.

29. In this grievance as well as his earlier 3 grievances of 18 July, the claimant ticked boxes saying that he raised grounds of discrimination under the heading ethnic origin and religion or belief. In his evidence before us, the claimant told us that he had ticked these boxes by mistake and that he was

using a template. This evidence was not challenged, however in answer to a question from the tribunal, Ms Burnham said that when she investigated the grievances the claimant said that he had been discriminated against because he came from the Isle of Man.

30. Before Mr Edwards could meet with the claimant to discuss his concerns, on 6 August 2014 the claimant experienced chest pains and breathlessness at work. He went to hospital and he tells us that an enlarged heart and problems with the electrical system of his heart were diagnosed. He then attended his GP on 7 August and his GP certified him fit for work but said that he might benefit from amended duties. The claimant's hours were reduced as a result and Mr Edwards removed some tasks from him, however these were not tasks about which the claimant had been complaining. These reductions were set in place to last until cardiac investigations had been concluded.

31. On 12 August 2014, the claimant presented two further grievances. One was a complaint about his job description which he said had not been properly agreed, resulting in his almost achieved marking; and the other complained about his work in 'Activities' which he said had been allocated to another manager so that it was not clear for which elements the claimant was responsible. He had not been detailed at any time to complete that work which was not a smart objective and had been only allocated to him in February. The result of this, he said, was his almost achieved marking.

32. In both these grievances, the claimant again ticked boxes alleging discrimination on grounds of ethnic origin and religion or belief.

33. On 13 August 2014 at a meeting of the respondent's Attendance Management Committee it was decided that Ms Burnham would complete an occupational health referral for the claimant.

34. A further fit note dated 14 August confirmed that the claimant 'may be fit for work' subject to reduced hours.

35. On 22 August 2014, the claimant's cardiology consultant wrote to his GP noting that the claimant both worked and exercised very hard. He recorded the claimant telling him that his stress level at work had significantly increased due to lack of staffing: he took up several people's jobs and this had clearly increased his stress levels over the previous 12 months or so. The consultant explained to the claimant that his symptoms could be those of exhaustion due to excessive stress over time. Some investigations were proposed.

36. A fit note was signed by the claimant's GP on 26 August saying that due to cardiac problems under investigation the claimant may be fit for work subject to amended duties and altered hours. Specifically, the GP said that the claimant needed to do a maximum of 5 hours a day, do an appropriate workload and avoid extra work as he had been affected medically by the stress of excess work. This should continue until the end of investigations.

37. On 1 September 2014, the claimant submitted two further grievances, each raising complaints on a different basis about his job description and his additional duties which resulted in his 'almost achieved' marking.

38. On 4 September 2014, the claimant approached Melissa Hunt of Human Resources for assistance. Although sympathetic, Ms Hunt did not feel it consistent with her professional ethics to become directly involved.

39. A meeting took place on 9 September 2014 between the claimant, Mr Edwards and Ms Burnham. The claimant wished to be relieved of his additional duties in Waste Management, Farms and Gardens and Enabling Environments. He also said that he welcomed a return to conducting risk boards. Mr Edwards made it plain in subsequent correspondence that he was not prepared to relieve the claimant of the additional duties, because the claimant had agreed to them, because they involved management oversight only and because he had been trained in the relevant accreditation process for enabling environments and had been given time to do the work. There would be a long lead-in to a return to OMU with appropriate training.

40. The claimant took part in an assessment by an occupational health advisor on 10 September 2014. This was in response to the concerns about the claimant's heart condition. The adviser recorded the findings of the claimant's consultant and also the claimant's report that he was overloaded with work. The report gave an account of the claimant's additional work and confirmed that he was fit to attend work for 5 hours a day pending the results of investigations. Management were advised closely to consider a level of work which was reasonable and consistent with a 5 hour day which should be documented as restricted duties due to ongoing medical investigations. The adviser also recommended a stress risk assessment. At this stage, there was no mention of the incident in July 2013 or the claimant's reaction to it.

41. The claimant was seen again by a cardiologist on 15 September 2014. The report sent that day to the claimant's GP makes a cautious diagnosis of a vagal episode. The claimant was otherwise very fit and healthy from a cardiac point of view but he reported to the cardiologist that he was under a lot of pressure and stress at work and was taking on extra roles including his own job. There remained no mention of the incident in July 2013 or a reaction to it.

42. By letter dated 26 September 2014 Mr Bennett invited the claimant to an attendance review on 14 October. Mr Bennett proposed to discuss the claimant's current fitness for work in his role, whether he could provide regular and effective service going forward, and whether there were any adjustments which could be made or support offered to enable the claimant to provide regular and effective service now and for the foreseeable future.

43. On 5 October 2014 Ms Burnham sent to the claimant the outcomes to his 7 grievances. No complaint is made about those grievances before us. Ms Burnham considered that the claimant had agreed his job descriptions and oversight of areas at the opening of his SPDR. She considered that as a manager the claimant should be able to structure his work and time so as to

complete the tasks required. She thought that other custodial managers were able to do this. She expected that his work as an orderly officer would give him quiet periods during which he could undertake other work. She had not been given evidence to support the claimant's allegations of discrimination.

44. The claimant attended the cardiology outpatient clinic on 9 October. The resulting letter to the claimant's GP is reassuring in that there is no significant coronary artery disease. The claimant was feeling very well and reported less pressure at work. The claimant and his cardiologist discussed coping strategies in relation to stress. He was therefore discharged from the cardiology unit.

45. The claimant attended the meeting on 14 October together with his union representative. He told Mr Bennett that he was now back in full duties and would be seeing his GP tomorrow to obtain a fit note. Mr Bennett was very pleased to hear that. Mr Bennett reviewed the occupational health advisor's report and said that he was satisfied that the range of duties the claimant was expected to carry out was appropriate for his role as Custodial Manager. He suggested regular meetings between the claimant and Mr Edwards so that Mr Edwards could help support the claimant. Mr Bennett said that he would be happy to help the claimant with the Enabling Environment work. At this stage, Mr Bennett was left with the impression by the claimant that a difficult period of time was now over and the claimant was fit for work. Mr Bennett recorded the outcome of this meeting by letter to the claimant dated 24 October.

46. However, on 15 October the claimant attended his GP who signed a certificate saying that he *may* be fit for work taking into account advice about amended duties. The GP added, 'to work to job description only with no additional tasks.' This would be the case for 6 months from 15 October 2014. The diagnosis given is work-related stress.

47. The claimant attended an assessment face-to-face with an occupational health physician on 24 October 2014. The physician had been asked for advice about the claimant's fitness for work and his capabilities. The report sent to Mr Edwards is dated 24 October and summarises the history of the claimant's cardiology problem which started in August. It said that the claimant had been feeling under stress at work for some time and was concerned about his workload which he said was excessive. The claimant told the physician that he was expected to deal with his own workload and also to take on other roles for which he was not given sufficient training or time. As a result he was feeling under stress. The physician recommended dialogue between the claimant and management as well as regular management contact and ongoing support. He suggested a review of his workload to ensure that it was reasonable and that the claimant was managing. The physician supported a stress risk assessment. He said that the claimant was fit for all duties and the long-term outlook for his health was good.

48. After Mr Edwards received this report, and before Christmas 2014 he met with the claimant and asked the claimant to fill in a stress risk assessment questionnaire. The claimant did fill it in, however he gave answers using

historical information rather than setting out how he felt at the time he was filling in the questionnaire.

49. When Mr Bennett received the GP's certificate of 15 October, he found the position confusing. He had himself received from the claimant the impression that he *was* fit for full duties, however the day after his meeting with the claimant the claimant had attended his GP who had signed a certificate to say that he was *not* fit for his full duties, if full duties meant the list of duties specified in his job description together with any additional duties which he might reasonably be asked to do. Mr Bennett did not regard that as being fit for full duties. The GP's report was not consistent with the report from the Occupational Health Physician.

50. By email dated 1 November 2014 Mr Bennett wrote to Mr Edwards about Mr Chadwick. Mr Bennett thought that the recommended review of the claimant's duties had in fact been carried out by the grievance procedure. If the claimant's duties were consistent with his grade then he should be offered management support as well as counselling. However, if the claimant could not meet the requirements of his grade then management should consider whether on performance and health grounds the claimant was capable of meeting the requirements of his grade. Mr Bennett hoped that this last action would not be necessary and that the claimant would be able to achieve the requirements of his grade with support and given time.

51. After further discussion between Mr Bennett and Mr Edwards in early November 2014 the respondent relieved the claimant of the additional duties not expressly specified in his job description that is, Farms and Gardens, Waste Management and Enabling Environments. He was, however, returned to those duties which were expressly specified in his job description including chairing ROTL boards and orderly officer duties.

52. To Mr Bennett's mind, this situation was one of the claimant working restricted duties in the sense that he was working only to the exact list of specified duties in his job description, but was not able to complete work additional to that list which fell into the category of work reasonable to ask the claimant to do.

53. The claimant began the counselling sessions provided by the respondent in November 2014. He received 6 sessions of counselling which ended in January 2015.

54. By letter dated 27 November 2014 Mr Bennett invited the claimant to a capability hearing on 8 January 2015. The purpose of this hearing was said to be to discuss the claimant's capability in his current role of Custodial Manager. The letter said:

'at this meeting I would like to discuss the following:

- *Your current fitness for work in your role as Custodial Manager.*
- *Whether you will be able to provide regular and effective service going forward.*

- *Whether there are any adjustments that could be made to enable you to provide regular and effective service now and for the foreseeable future.*
- *Dismissal on the grounds of Medical Inefficiency*.'

55. The letter continued to say that, because the claimant's future employment would be discussed, he had a right to be accompanied by a trade union representative or work colleague.

56. By email dated 2 December 2014 the claimant asked under which procedure the hearing was being heard and asked for the reasons why the hearing was taking place.

57. On 3 December 2014, the claimant attended his counsellor who raised with him the possibility that he was suffering from PTSD arising out of the incident on 13 July 2013. This was the first occasion on which any of the claimant's medical or other advisers had raised the issue of PTSD. The counsellor did not make a diagnosis of PTSD but raised it only as a possibility.

58. By email dated 24 December 2014 Mr Edwards again asked the claimant to complete the stress risk assessment questionnaire which he would find on 'my services' and send Mr Edwards a copy so that he could carry out another risk assessment. He asked the claimant to fill it in setting out how he felt currently and not historically.

59. We do not find that on 5 January 2015 the claimant told Mr Edwards that he had PTSD. In reaching this conclusion, we note that he also says that he told Miss Burnham on 12 January that he had PTSD. However, Miss Burnham's notes of that meeting, which she sent to the claimant asking for any corrections, do not record him mentioning PTSD and the claimant did not reply making a correction saying that he had. So, we think, on balance, that he did not mention PTSD to Miss Burnham. We think this sheds light also on his assertion that he told Mr Edwards on 5 January that he had PTSD, which Mr Edwards also denies. On the balance of probability, we consider that on neither 5 nor 12 January did the claimant tell his managers that he had PTSD.

60. On 8 January, the claimant attended the capability meeting. Leaving to go to the meeting, he set up an 'out of office reply'. This said, in block capitals:

'I have been placed onto a capability hearing for reasons unknown and therefore do not know if I will be employed by the service after 08/01/2015. I cannot help you further.'

61. The 8 January meeting was attended by the claimant, Mr Bennett, the claimant's union representative, a Human Resources case manager and a minute taker. Mr Bennett confirmed the matters set out in the invitation letter which he would consider. He said that the capability hearing was being convened because the claimant had been on continuously unrestricted duties since August. Initially he had been on reduced hours, then on 14 October an attendance review had been carried out at which the claimant had confirmed that he was on full duties. This had been supported by an occupational health

report which said that the claimant was fit for full duties. On 15 October, a fit note from the GP had stated that the claimant should only work to his job description with no additional tasks. Mr Bennett considered this to be restricted duties because the claimant was not fulfilling his full role including that part of his job description which required him to accept reasonable alterations and additional tasks of a similar level that may be necessary.

62. The claimant challenged whether a capability hearing was appropriate for an employee who was attending work. Mr Bennett said that in the circumstances the claimant was not providing regular and effective service and in such circumstances a capability hearing was appropriate. The claimant confirmed that he was able to carry out additional tasks as detailed in his job description. Mr Bennett told him that what was appropriate as an additional task was a decision for his line manager and not for the claimant. Mr Bennett then adjourned to consider the outcome of the hearing. He had continued concerns about the claimant's ability to sustain full performance of his duties and he wanted further clarification about the fit note from the GP, given that it conflicted with the report from occupational health. The capability hearing was adjourned therefore until a further occupational health report was received.

63. Neither the claimant nor his union representative told Mr Bennett at the meeting on 8 January that the claimant had or might have PTSD.

64. By email dated 9 January 2015 a Custodial Manager called Eddie Laidler wrote to Mark Edwards raising concerns that he had found an envelope containing the claimant's personal belongings, ID card, fish knife, tallies and shoulder epaulettes together with a statement saying that the claimant was expecting to be dismissed. Mr Laidler found this behaviour bizarre and it led him to express concern for staff, prisoners and members of the public. Mr Laidler added that he was also concerned about the claimant's out of office reply which we have set out above.

65. Mr Edwards himself had already discovered the out of office reply on 8 January. He was worried at what appeared to be extremely unprofessional behaviour as well as concerned about the claimant's well-being and state of mind. Mr Edwards was going on leave but he left the matter in the hands of Miss Burnham and Mr Steele.

66. When the claimant arrived at work on 12 January he was not able to 'draw his keys' as usual. He was told to attend a meeting with Miss Burnham and Mr Steele. Miss Burnham and Mr Steele asked the claimant to explain his out of office reply. Miss Burnham told him that it was not appropriate and asked him how he thought it would be seen by others. The claimant did not think that the out of office reply was inappropriate because he was unsure if he would have a job to return to. After discussion, the claimant said that if it was wrong then he apologised and he had not realised the impact that it had had. They also discussed the matters described by Mr Laidler. The claimant said that he had not really considered his actions at the time and he explained that he thought he was going to be dismissed. There was other discussion about the claimant handing in his uniform and leaving immediately after the hearing.

67. Miss Burnham asked the claimant if he had used staff counselling but he said that he had not. He had not been using the counselling sessions provided to discuss this matter. He said that he wanted to be at work and to get stuck into work. Mr Steele and Miss Burnham agreed that he could remain at work and he was told that he could collect his keys. Mr Steele told the claimant that the out of office reply needed to be looked at further.

68. The notes of this meeting contain no mention of PTSD. As we have already said, a copy of the notes was sent to the claimant for correction but he did not correct them to add a mention of PTSD. We find that he did not mention PTSD at this meeting.

69. By a further fit note dated 14 January 2015 the claimant's GP said that he may be fit for work but should work to his job description.

70. By letter dated 21 January 2015 Mr Goulding wrote to the claimant notifying him that an investigation had been opened into the matter of the out of office reply.

71. The claimant returned the stress risk assessment questionnaire to Mr Edwards on 21 January 2015.

72. The claimant attended an investigation meeting conducted by Mr Goulding on 30 January 2015. The claimant accepted that he had set up the out of office reply with the wording that we have set out above. He defended his actions by saying that the wording was factually correct and he did not accept that what he had done was unprofessional. As the discussion developed however he told Mr Goulding that he had work-related stress and that he was having counselling to deal with that stress but which also encompassed the incident of 13 July 2013. He said that on 3 December his counsellor said that she believed that the claimant had developed PTSD because of the 13 July incident. This we find is the first mention to the respondent by the claimant that he had PTSD.

73. The claimant went on to say that he saw his doctor and talked about the counselling and his fears about the capability hearing and his doctor responded by doubling his medication. He said that he had researched the medication and that over 31% of people prescribed that medication could develop paranoia. He said that he had been very paranoid and that what he did was out of character. At the end of the hearing Mr Goulding asked the claimant, if it happened again would he behave any differently? The claimant did not give him a direct answer to that question. His lengthy answer implied that he behaved as he did because the governor had not sent him all the information he wanted before the capability hearing.

74. Mr Goulding considered that it was clear that the claimant strongly believed he was about to be dismissed, he was very confused, suffering from stress and on medication. He did not have a clear idea why he was being placed on a capability hearing and therefore was very worried. However, he

also concluded that the claimant did place the out of office reply and did return his belongings. Mr Goulding did not consider that the message left was professional and he believed the claimant's behaviour was that of someone confused and mixed up with feelings of losing his job combined with medication.

75. Mr Goulding made 3 recommendations: that the commissioning authority might wish to give the claimant a letter of advice and guidance, it might wish to consider giving him additional IT training or it might wish to test the evidence in formal disciplinary proceedings.

76. On 5 February 2015, the claimant filled in a consent form to enable medical information to be sent to OHAssist in case he was eligible for ill-health retirement. This does not mean that he was seeking ill-health retirement but the forms were generated and sent to employees automatically in his circumstances.

77. By letter dated 9 February 2015 Mr Bennett wrote to the claimant setting out an account of the capability hearing on 8 January. He explained that he had called the meeting because he needed to be assured that the claimant was able to give regular and effective service in the full duties of a Custodial Manager. He reminded the claimant that if this was not the case then dismissal on grounds of capability was an option open. Mr Bennett had concerns that the claimant had been on unrestricted duties since 6 August 2014. Mr Bennett reiterated the history of the medical evidence about whether the claimant was fit for work. He told the claimant that it was clear that he and Mr Bennett had fundamentally different views on what constituted 'additional tasks'. The claimant had said that it was clear that he was fit and able to undertake the duties in his job description but no more. Mr Bennett took a different view: any role reasonably allocated to the claimant by his line manager was in line with the provision of his job description. Because the claimant had been, according to Mr Bennett's interpretation, on restricted duties for 5 months including 2 months on restricted hours, the claimant might find it difficult to sustain full hours and duties. Therefore the decision was postponed pending an occupational health referral and some time to see how the claimant was coping with his full range of duties. This would be put in hand and there would be a further meeting.

78. Mr Steele took the decision to proceed with a disciplinary hearing. He wrote to the claimant on 23 February 2015 setting out the allegation against the claimant that his behaviour was inappropriate and unprofessional on 8 January 2015 in that he placed an inappropriate out of office notice with the words we have set out above. He had left a note to the same effect on his office door and handed in his uniform and other effects to Eddie Laidler. He gave the claimant the option of accepting the allegations and having his case considered by a fast track process.

79. Alternatively, the claimant could contest the allegations at a full hearing.

80. The claimant opted for a full hearing.

81. On 3 March 2015, the claimant presented a grievance saying that Mr Bennett's account of the meeting on 8 January was inaccurate and that he had not sent him the original notetaker's notes.

82. By letter dated 9 March 2015 Mr Tilt invited the claimant to a disciplinary hearing on 23 March 2015.

83. On 15 March 201, the claimant submitted two further grievances. The first complained that he had not been given a copy of the original minutes of 8 January and the second complained that the reason for placing the claimant into a capability hearing was not in line with the respondent's procedures and that Governor Bennett bullied the claimant by saying that he intended to discuss dismissing him when there was no reason for this.

84. The claimant attended an assessment with the occupational health physician on 19 March 2015. He told Dr Scott that he was suffering from work-related stress and felt that he was being bullied and harassed at work which was making him feel worse. The claimant thought that the trouble started in summer 2013 when he was asked to take on extra duties because of staff numbers. This worsened with the claimant becoming anxious and angry, eventually needing counselling and he was still on medication. Dr Scott did not think that there was a serious underlying medical problem. He thought that the claimant was fit for full officer duties without any restrictions. (*This sentence was later amended by Dr Scott before 24 March 2015 to read, 'I have no doubt that he is physically and mentally capable of performing any of the relevant roles within the prison required of a Custodial Manager')* The claimant was physically and mentally capable of performing any of the relevant roles within the prison but the question was how much should be expected of him long term. Dr Scott suggested a stress risk assessment and said that it was reasonable to assume that the claimant's health would continue to deteriorate without intervention. He noted that recently the claimant's work had been modified and the claimant felt very happy so that if issues were resolved then there was no obvious reason why the claimant should not give regular and effective service in the future.

85. The claimant attended a disciplinary hearing with Mr Tilt on 23 March 2015. He was accompanied by his union representative. The hearing was very lengthy and was recorded. The claimant accepted that he had set up the out of office reply. He argued at length and repeatedly at the hearing that to do so was not inappropriate and was not unprofessional. (Mr Tilt focused on this issue and did not pursue further the allegations of the notice on the door and the return of belongings.)

86. In mitigation, the claimant stressed how worried he was about the capability hearing and gave to Mr Tilt a letter from his GP dated 9 March 2015 which confirmed that he was on Sertraline to control his anxiety. The letter said that the dose of medication was gradually increased to gain optimal effect. However, said the GP, the claimant had developed severe side-effects in the form of intrusive paranoid thoughts, he became very emotional and

reacted irrationally due to his paranoid thoughts. This was a known side effect of the medication. The medication had now been changed (as at 9 March 2015) and the claimant had responded quite well to his new treatment.

87. Mr Tilt considered carefully what the appropriate penalty should be. He considered that the out of office reply was inappropriate and unprofessional. He took it so seriously that he considered downgrading the claimant. However, he took into account what he regarded as a last-minute change of stance in which the claimant appeared to accept that what he had done was not appropriate. He was worried however that the claimant's approach to the hearing showed that there was a risk he might do something similar again. He decided to give the claimant a chance and to give him a written warning to remain in force for 12 months. He told the claimant that if anything else of that nature took place within that 12 month period he could expect a higher level of penalty to follow. He told the claimant of his right of appeal.

88. By an email dated 23 March 2015 Mr Bennett wrote to Mr Edwards that the claimant was fit for full duties and should therefore carry out full duties. He also said that the claimant was content with his current allocation of duties and it should be clear that the claimant would be expected to carry a full workload. Mr Bennett told Mr Edwards that the claimant said there had been no discussion of the stress in this assessment.

89. On 26 March, the claimant spoke with Mr Edwards to express his concern that the occupational health physician's report was inaccurate in saying that he had not had an assessment of his level of stress when in fact he had met twice with Mr Edwards to discuss this.

90. On 31 March 2015 Mr Tilt wrote to the claimant with the outcome of the disciplinary hearing about the out of office reply. He said that he found the allegation of unprofessional conduct proven and that the claimant was given a written warning to remain in place for 12 months. He gave his reasons as those set out in the transcript (and summarised above) but included that unprofessional conduct is a serious charge, particularly for a manager and that a lower level of disciplinary award was given due to the claimant's apology and commitment that this type of behaviour would not happen again. He told the claimant of his right to appeal.

91. In April 2015 Ms Burnham became the claimant's line manager.

92. The claimant appealed against the written warning on 1 April 2015. He did so on the basis of an unduly severe penalty and also that the original finding was against the weight of the evidence because he thought that the evidence about the effect of his medication had not been given due weight.

93. By letter dated 16 April 2015 the claimant was invited by Mr Bennett to an appeal hearing to be heard on 30 April 2015 about the written warning.

94. By letter dated 20 April 2015 Mr Bennett invited the claimant to a reconvened meeting on 20 May 2015 because he had now received the Occupational Health Physician report.

95. The claimant did not attend the appeal hearing on 30 April. He confirmed that he was happy for Mr Bennett to proceed in his absence taking into account his written representations. Accordingly, Mr Bennett proceeded with the appeal and wrote to him on 30 April to tell him the outcome. Mr Bennett upheld the written warning. Mr Bennett agreed with Mr Tilt's approach to the seriousness of the misconduct. He thought that the award given was proportionate to the allegation. He noted that the claimant had been given the opportunity to offer mitigation at the disciplinary hearing and that he had raised the points about his anxiety about the threat of dismissal from the capability hearing and the side effects of medication at that time. Mr Bennett was content that the correct procedures had been followed and due consideration given.

96. The capability review hearing reconvened on 20 May 2015. The notes describe the hearing as an attendance review meeting but this was a typographical error, the hearing itself had not changed its nature.

97. The claimant attended again together with his union representative. Mr Bennett explained that the occupational health physician's report said that the claimant was fit to carry out the full range of duties. That superseded the doctor's note which said that the claimant was not fit to carry out any duties outside of his job description. Therefore, Mr Bennett was assured that the claimant was fit to carry out a full range of duties.

98. Mr Bennett said that there were two things he wished to discuss. He asked whether there was anything else which would help the claimant to carry out the full range of his duties throughout his career. The claimant said that he was currently delivering all duties but was waiting for a report following his final counselling session as he wished to have more counselling. Mr Edwards was dealing with this. Mr Bennett said that if there were no health issues preventing the claimant from doing his full duties, if he refused to carry out his duties then disciplinary procedures would be used and if the claimant did not carry out his duties to the required standard then performance procedures would be used. This was the same for all staff. Mr Bennett said that he did not anticipate that this would be necessary as the claimant had improved and seemed to be, 'in a better place than previously.'

99. Mr Bennett said that he could see an improvement in the claimant since the last meeting and the claimant confirmed that a change of medication had helped and he felt positive about carrying out the OMU role.

100. By letter dated 9 June Mr Bennett confirmed to the claimant the outcome of the meeting in writing. He told the claimant that the capability process was now concluded.

101. The claimant met with Ms Burnham on 26 June 2015 for a bilateral meeting to review the progress of SPDR objectives and job descriptions. The SPDR for the claimant was signed and agreed. The claimant's job description as OMU hub manager remained the same from the previous year.

102. A similar meeting took place between the claimant and Ms Burnham on 24 July 2015. Amongst other things Ms Burnham praised the effort made by the claimant: she could see that he was being more focused, had been arriving for risk boards and producing and organising the work asked.

103. The claimant was assessed by occupational health advisor on 30 July 2015 after he had requested an occupational health referral. He told the adviser that he was experiencing psychological symptoms which included feeling anxious about attending work and had an impact on his sleeping patterns and concentration levels. He believed that the triggers for his symptoms were work-related and related to an investigation that the claimant carried out sometime earlier. The claimant believed that repercussions from this had resulted in many grievances against him and he felt that he was being harassed and bullied.

104. The claimant's psychological symptoms had been managed with prescribed medication and a course of talking therapy. The adviser gave her opinion that Mr Chadwick was fit for work and that no other work adjustments needed to be considered. She recommended a meeting with management and constructive dialogue around perceived organisational issues. The solution was likely to be management not medically orientated. The adviser made no mention of PTSD.

105. The claimant was absent sick for 17 days in August and September 2015.

106. Ms Burnham wrote to the claimant on 21 September 2015. She expressed hope that he had fully recovered. She expressed some disappointment however in actions by the claimant in which he left a message on her phone in circumstances which she felt were deceitful. She was concerned that with such a long absence the claimant would be falling short in his work. She asked the claimant to come to Springhill on the Saturday so they could complete the claimant's sick paperwork and discuss work. During the forthcoming set of nights which the claimant was to work she set out a list of work for the claimant to complete. She pointed out that she and a colleague had been managing all the work.

107. On 22 September 2015, the claimant attended his GP who diagnosed increased stress levels and said that he was not fit to work until 31 October 2015.

108. On 22 September 2015, the claimant submitted a grievance about Ms Burnham's letter of 21 September.

109. On 13 October 2015, the claimant wrote at length to Mr Tilt who had visited the claimant at home. He referred to the incident of July 2013 and said

that he was responsible for that incident. He said that he had been shown little empathy or support and his health had declined since July 2013. He said that the recommendations of occupational health report had not been implemented and that he had suffered PTSD as a result of the July 2013 incident. He said that he had communicated this diagnosis of PTSD in January 2015 but no supportive actions were taken and this made his condition worse. Requests for counselling had not been actioned by the establishment. He referred to allegations made against him by a difficult member of staff which were not the subject of evidence in this case. He said that his capability hearing made him worse. No manager had even spoken to him about the 30 July Occupational Health Advisor's report. Since then however a bullying letter had been written to him which had made his condition worse. He referred to the discussion he had with Mr Tilt at which he said Mr Tilt had told him he would be subject to a capability hearing for being sick, wanted him back at work before 31 October and suggested a phased return. The claimant asked for a move away from Springhill to Grendon and the areas which he associated with the July 2013 incident. He said that he was able to give regular and effective service that he needed support instead of punitive actions.

110. On 14 October 2015 Mr Baker spoke to the claimant and introduced himself as his new line manager. The claimant told him about his stress at work and PTSD. Mr Baker arranged to visit the claimant at home on 16 October.

111. The claimant's SPDR was filled in by Ms Burnham on 16 October 2015 recording a 'must improve' interim rating. She recorded that the claimant could be very good with staff and prisoners and she praised his work when he was focused. She said however that he was distracted by other events and so he found difficulty focusing on work. She and the claimant had spoken about this at length during bilateral meetings and she had encouraged claimant to be open.

112. Mr Baker did visit the claimant at home on 16 October and it was agreed that the claimant would return to work on 26 October on reduced hours (28 hours in the week).

113. Mr Tilt responded to the claimant's letter of 13 October on 19 October. He said that it was clear from the letter that the claimant was feeling angry about a number of issues and was also suffering from stress. He said that Paul Baker would discuss the occupational health report previously received and suggested that it would be a good idea to get a full occupational health physician's report into the claimant's recent condition. This would enable the respondent to get a thorough clinical assessment of the claimant's condition, and get some prognosis and advice on how best to support the claimant and get him back to work. He reminded the claimant of employee assistance and also the respondent's own counselling sessions that were available.

114. The claimant was invited to a grievance hearing on 28 October 2015 by letter dated 21 October 2015.

115. On 26 October, the claimant did return to work with delegated duties as a supernumerary custodial manager. He was not given responsibilities for managing a department, or for risk boards and was relocated from the OMU to Residential. The respondent regarded this situation genuinely as one of restricted duties, in that the claimant was working the core orderly officer duties without any additions.

116. On 5 November 2015, the claimant was relocated to be Custodial Manager on A wing in HMP Grendon.

117. The claimant was assessed by Dr Alam, an occupational health physician on 18 November 2015. The claimant told Dr Alam that he attributed his symptoms to work-related issues since 2013. He described an excessive workload and responsibilities outside his job description and also the incident of July 2013. He said that he had been feeling stressed since. The claimant said that his GP had diagnosed PTSD. He had been experiencing intermittent exacerbations of his psychological symptoms mainly triggered by his perceived work-related stressors. These included excessive anxiety, loss of confidence, mood changes and sleep problems.

118. Dr Alam considered that the claimant was fit for work. He suggested a list of support measures including a risk assessment, exclusion from risk boards, the transfer to a different department which had taken place, and a review of the claimant's workload. He noted that the claimant felt stressed about receiving threats of dismissal. This could be dealt with when carrying out the stress risk assessment and action could be taken to make Mr Chadwick feel supported and valued at work.

119. Dr Alam said that the outlook depended on how quickly and effectively the claimant's perceived stress levels were addressed and concluded. Otherwise there was no other significant medical problem. If the claimant's perceived stress was not dealt with effectively it might have a long-term impact on his psychological and mental well-being.

120. We pause to note that the parties agree that 30 November 2015 is the cut-off point before which any act or omission is potentially out of time for the purposes of discrimination proceedings.

121. Human Resources forwarded Dr Alam's report to Mr Baker by email dated 4 December 2015, summarising the report and saying, 'please be aware that Dr Alam has advised that Mr Chadwick is fit for work. If Mr Chadwick is now back at work, we would not usually advise that a capability hearing be held.'

122. By letter dated 11 December 2015 Mr Bennett invited the claimant to a capability hearing to be held on 5 January 2016 to discuss his capability in his current role of Custodial Manager. The letter said that Mr Bennett would like to discuss the following:

- '*Your current fitness for work in your role as Custodial Manager.*

- *Whether you will be able to provide regular and effective service going forward.*
- *Whether there are any adjustments that could be made to enable you to provide regular and effective service now for the foreseeable future.*
- *Dismissal on the grounds of Medical Inefficiency is an issue that may need to be considered as part of this process at a later time, but at this meeting I will not be considering this*.'

123. Because the claimant's future employment with the respondent was being discussed, he was reminded of his right to bring a union representative or work colleague.

124. At about this time a stress action plan was prepared in relation to the claimant.

125. The claimant attended the capability hearing chaired by Mr Bennett on 5 January 2016 accompanied by his union representative. Mr Bennett reiterated the matters set out in his letter which he would consider. Mr Bennett referred to the previous capability hearing in January 2015 when the claimant had said that he could carry out a full range of duties. He had been told then that a further capability process might be considered if regular and effective service was not sustained. At the review meeting on 20 May the claimant had said that he was more positive and could maintain regular and effective service. The occupational health report had said that the claimant was fit to carry out a full range of duties. The claimant had since then had 40 days of absence including 21 days in September with stress. He had been on restricted duties since then because he could not carry out his substantive role as OMU Custodial Manager. The occupational health report of 18 November said that the claimant was suffering with psychological symptoms which he said were due to the July 2013 incident. He was receiving treatment and counselling for this. The report recommended a review of the claimant's workload and said that the claimant felt stressed about receiving threats of dismissal.

126. The claimant's union representative said that the claimant had not been made aware officially that he was unrestricted duties. The claimant said that he was currently carrying out all duties asked of him although he was not currently managing any staff and was not in a substantive Custodial Manager role. He was receiving help through medication, CBT and through the employee assistance program.

127. After a break, the claimant said that he was expecting to return to work on A wing when he returned from sick leave, he would work where ever he was asked to but asked for consideration to be given with regard to carrying out risk boards at Springhill. He said that he was now receiving good treatment and had not taken any further time off work despite being assaulted the previous week (outside work).

128. Mr Bennett thought that there was an ongoing problem relating to work-related stress and despite changing role following the previous capability

hearing, the claimant had had a further period of absence and a period of not carrying out his full role. Mr Bennett was concerned that this was a recurring issue and he was mindful of the occupational health recommendations about a review of the workload and the need to reach a sustainable conclusion because the capability processes themselves were causing stress. He told the claimant that he was not considering dismissal. However he was concerned that the claimant was unable to provide regular and effective service as a custodial manager. He said that he would consider a regrading to supervisory officer. He said that this would include a reasonable adjustment of the period of pay protection 2 years. It would offer the claimant a more sustainable workload and he would be more confident of the claimant's ability to manage that workload without stress. Mr Bennett gave the claimant time to consider that option before reconvening.

129. The claimant asked whether his only options were either to regrade or be sacked. Mr Bennett said that this was not the case but if the claimant did not accept a regrade, the capability process would be reconvened which would encompass all options, including dismissal. He did not know what the outcome of a reconvened capability hearing would be.

130. The claimant's union representative asked if the claimant could return to the OMU to carry out the custodial manager's role. Mr Bennett confirmed that the claimant should continue in his existing role at Springhill.

131. On 5 January 2016, the claimant submitted 8 grievances about the hearing.

132. By letter dated 7 January 2016 Mr Bennett summarised the 5 January hearing and invited the claimant to a reconvened hearing on 29 January 2016 when the claimant was entitled to be accompanied by a union representative or work colleague.

133. By email dated 7 January 2016 the claimant wrote to Mr Baker saying that he had returned to duties on 26 October 2015 for one week on restricted duties and that from 31 October he had been back on full duties and had remained on full duties since that date. He says therefore that to be told on 5 January that he was not on full duties was confusing. He said that he had completed the work that he had been given to do.

134. By a lengthy letter to Mr Bennett on 9 January 2016 the claimant said that he had accepted and welcomed medical retirement but that he had not received a medical retirement estimate. He said therefore that he should not be subjected to a capability hearing in those circumstances. The claimant then submitted two grievances on 12 January 2016 raising these issues.

135. The capability hearing was reconvened on 29 January 2016. The claimant attended together with his union representative. Mr Bennett asked the claimant whether he had considered the option of re-grading and Mr Chadwick said that this was something he would consider following further discussions. After reviewing the chronology, Mr Bennett clarified that re-

grading would be to band 4 supervisory/specialist officer. The claimant would undertake orderly officer duties (he had coped well with these) and would not have ongoing responsibility for line management and departmental management. There would be 2 years' pay protection which Mr Bennett regarded as a reasonable adjustment and there was no exclusion from promotion so that the claimant could apply for promotion in the future.

136. After discussion, there was a break after which Mr Bennett concluded that a regrade was the best way forward because he still had concerns that regular and effective service would not be sustained. On his view, the claimant had not been undertaking his full allocated duties for 10 out of the last 18 months. The claimant had consistently raised concerns about workload and it appeared that there was a fundamental mismatch between the demands of the Custodial Manager role and the claimant's ability to cope with it. Mr Bennett considered other possible adjustments including further training, reduced hours or a change of role within grade but concluded that these would not address the fundamental issues. He was grateful that the claimant was considering re-grading and thought that it would provide time and space for the claimant to improve his health.

137. The claimant had himself privately discussed the re-grade during a break with his union representative. We have not heard evidence from the union representative but the claimant tells us that he told his representative that he did not want to accept the re-grade. However, when they returned to the meeting, the representative told Mr Bennett that the claimant would accept a re-grade, albeit reluctantly. The claimant did not say anything to correct his representative's statement that he would accept the re-grade, so that what Mr Bennett heard and understood was the claimant's agreement, expressed through his authorised representative.

138. The claimant's representative then asked if the decision could be appealed and Ruth Hall of Human Resources that it could be.

139. The re-grade took effect straightaway.

140. The claimant attended the Fire Fighters' Charity between 1 February and 12 February 2016. The discharge summary produced by the psychological therapist as a result of that attendance recorded that the claimant had been suffering from severe anxiety and depression, workplace and post-traumatic stress and that he presented with symptoms of possible post-traumatic stress disorder. The symptoms related directly to an incident in July 2013. In the counselling sessions, the claimant had described repetitive distressing nightmares, catastrophic and negative thinking, loss of confidence in his ability to make safe decisions, low morale, poor self-esteem and difficulties with concentration, depression, fearfulness and anger. He had difficulty sleeping, relaxing, connecting with people in and outside work and difficulties experiencing positive emotions. He was about to start a series of CBT.

141. By letter dated 15 February 2016 Mr Bennett wrote to the claimant confirming the result of the meeting on 29 January. Mr Bennett recorded that

the claimant said that he would accept a re-grading if there was no other option. Mr Bennett said that having considered everything he had come to the conclusion that there is no other option but to re-grade if the claimant was return to good health and give regular and effective service. Therefore he would re-grade to band 4 supervising officer from 30 January 2016 and he would take up these duties when he returned from the Fire Fighters Rehabilitation Centre on 15 February. The claimant would undertake supervising officer duties but would not have line management or departmental management responsibilities. The letter told the claimant that he could appeal against the decision.

142. The claimant did appeal on 15 February 2016. His 'Appeal Paper' written by his union representative says that at the capability hearing the claimant decided under duress to accept the regrade because he was in no fit mental state to cope with the possibility of dismissal and needed to be in work to support his family.

143. The claimant first approached ACAS on 29 February 2016 and a certificate resulting from that approach was issued on 29 March.

144. On 9 March 2016, the claimant was assaulted by a prisoner while carrying out his work as a supervising officer. The claimant was involved in moving a prisoner from Springhill to Grendon. He suffered multiple injuries, and was taken to Stoke Mandeville Hospital for treatment.

145. The claimant saw his GP on 10 March 2016 who signed him off work as a result of injuries sustained in the assault. The claimant did not return to work at all after this point.

146. On the same day, the claimant was assessed by the occupational health advisor who reported that the claimant was diagnosed with PTSD. On 10 March he was in pain, bruised and swollen and unfit to attend work due to his injuries. Once he had recovered from those injuries he was fit to attend work.

147. By letter dated 31 March 2016, Claudia Sturt, Deputy Director Custody, wrote to the claimant saying that the decision about the re-grade was not an appealable decision because it had been done with the claimant's agreement. She suggested a paper review instead.

148. From March to July 2016, the claimant continued to submit further grievances including grievances about the capability hearing and about the handling of earlier grievances.

149. The claimant approached ACAS again on 26 April 2016 and an ACAS certificate was issued on the same day.

150. The claimant presented his claim form to the tribunal on 26 April 2016.

151. On 29 June 2016 Mr Baker wrote to the claimant saying that he had received an occupational health report which indicated that the claimant was

likely to remain permanently incapacitated for the normal duties of his employment and an application should be made for an opinion regarding medical retirement. Mr Baker included with his letter an application for an ill-health retirement assessment which he asked the claimant to complete.

152. The claimant was invited to the capability hearing on 24 January 2017 to be chaired by Mr Bennett.

153. By letter dated 9 January 2017 the claimant accepted medical retirement.

154. By letter dated 7 February 2017 Mr Bennett accepted the claimant's request for medical retirement and confirmed 28 April as the claimant's last day of service.

155. The claimant's effective date of termination was 28 April 2017.

Statement of the law

156. Both counsel supplied us with detailed written submissions which we read in advance of oral submissions. We thank them both for their hard work and thoroughness.

Dismissal?

157. We must not forget that an employment relationship is governed by a contract. This is key to the analysis of *Hogg v Dover College* [1990] ICR 39. In that case the claimant was Head of History at the respondent school. He became ill and the headmaster wrote to him without prior discussion, to tell him that as from the new school year he would not be Head of History but would work a substantially reduced number of hours and at a reduced salary. The claimant replied that he would continue to work at the College on the terms offered but he regarded himself as having been dismissed by the letter.

158. The Employment Appeal Tribunal held that the claimant had been dismissed. As a matter of contract, he was told by the headmaster's letter that his former contract had gone. The contract had not been varied because the claimant had not consented to the changes. The question is whether the contract under which the employee was employed at the relevant time was terminated by the employer. Where an employer unilaterally imposes radically different terms of employment there is a dismissal, if on an objective construction of the documents or conduct of the employer, there is a removal or withdrawal of the old contract. (*Alcan Extrusions v Yates and others* [1996] IRLR 327).

Time

159. In the Equality Act 2010, proceedings on a complaint under s120 'may not be brought after the end of—(a) the period of three months starting with the date of the act to which the complaint relates' (s 123(1)(a)). The 2010 Act extends the meaning of the phrase 'date of the act to which the complaint

relates' by providing that (a) conduct extending over a period is to be treated as done at the end of the period; and (b) failure to do something is to be treated as occurring when the person in question decided on it (s123(a),(b)).

160. In determining the existence of a continuing act, it is important to distinguish between the continuance of the discriminatory act itself and the continuance of the *consequences* of a discriminatory act, for it is only in the former case that the act will be treated as extending over a period.

161. The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (*Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, at para 51–*52*). What the claimant has to prove, in order to establish a continuing act, is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'.

162. Section 123 allows a tribunal to hear a claim brought inside the initial three month time limit, ‘or, such other period as the tribunal thinks just and equitable.’ This is often referred to as an extension of time.

163. These words appear give the tribunal a wide discretion to do what it thinks just and equitable in the circumstances. However, the time limits are exercised strictly in employment cases, and there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion. The onus is on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule'.

164. The discretion to grant an extension of time on the 'just and equitable' basis is as wide as that given to the civil courts by s 33 of the Limitation Act 1980 to determine extensions of time in personal injury actions (*British Coal Corporation v Keeble [1997] IRLR 336*.) Under that section the court must consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (*a*) the length of and reasons for the delay; (*b*) the extent to which the cogency of the evidence is likely to be affected by the delay; (*c*) the extent to which the party sued had co-operated with any requests for information; (*d*) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action).

165. It is always necessary for tribunals, when exercising their discretion, to identify the cause of the claimant's failure to bring the claim in time.

Burden of proof

166. We have reminded ourselves of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258.

167. Until *Efobi v Royal Mail Group Limited* UKEAT/0203/16/DA, it was understood to be the claimant who must establish his case to an initial level. Once he did so, the burden transferred to the respondent to prove, on the balance of probabilities, no discrimination whatsoever.

168. The accepted state of the law has been thrown into some disarray by the judgment of the EAT in *Efobi* in which Laing J has held that properly understood, section 136 does not place the burden of proof on the claimant to adduce facts from which a tribunal could conclude, in the absence of an explanation, that the respondent has committed an act of discrimination. At paragraph 77, Laing J points out that section 136 states, 'If there are facts from which the court could decide…' and does not expressly place the burden of proving those facts on one party or the other. This is not the way the burden of proof has been understood in the case law, including *Igen v Wong.* Section 136 itself was not at issue in *Igen v Wong*, but its predecessor, section 63A of the Sex Discrimination Act 1975. The wording of section 63A did place the burden of proof on the claimant.

169. The respondent invites us to conclude that *Efobi* is wrong in law and was decided per incuriam. We do not consider this to be a case that requires us to enter into that fray. Whether we ask: 'has the claimant proved the necessary primary facts from which a tribunal could properly conclude….', or simply, 'is there evidence from which a tribunal could properly conclude…', we think we would reach the same conclusion in this case, for the reasons that appear below.

170. The shifting in the burden of proof - however the initial 'burden' is understood - simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if he had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of a protected characteristic. What then, is that initial level that the evidence must reach?

171. In answering that we remind ourselves that it is unusual to find direct evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves.

172. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer discrimination.

173. In deciding whether there is enough to place the burden of proof onto the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant

circumstances which are the *'same, or not materially different'* as those of the claimant.

174. Facts adduced by way of explanations do not come into whether the first stage is met. There must however be facts which we find actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, he must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to lead to a finding of discrimination.

175. If unreasonable conduct therefore occurs alongside other indications that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to place the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

176. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. This is particularly likely to be so where a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as he was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

177. Some cases arise (See Martin v Devonshire's Solicitors [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Section 15

178. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) makes it clear that the prohibition from discrimination arising from disability does not apply 'if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability'.

179. Section 15 requires two steps. We have first to focus upon the words “because of something”, and therefore have to identify

"something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link.

Reasonable adjustments

180. When we deal with a complaint of failure to make reasonable adjustments under sections 20 and 21 of the 2010 Act, we ask these questions. Did the respondent apply the alleged provisions, criteria and/or practices (often called PCPs)? If it did, did those PCPs place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? Did the respondent to take such steps as were reasonable to avoid the disadvantage? If relevant, did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

181. Sections 20 and 21 replace section 4A of the Disability Discrimination Act 1995 so that numerous concepts remain identical and much of the old law remains of use.

182. We must identify:

1. The provision, criterion or practice applied by or on behalf of the employer;

2. (or the physical feature of the premises, but that does not apply in this case);

3. The identity of the non-disabled comparators (where appropriate);

4. The nature and extent of the substantial disadvantage suffered by the claimant. (Environment Agency v Rowan [2008] IRLR 20, [2008] ICR 218)

183. Unless we have identified those matters, we cannot then go on to say that an adjustment is reasonable.

184. When the "PCP" has been identified, then we are able to identify the pool of comparators for the purpose of seeing whether there has been the required substantial disadvantage of the disabled person in comparison with those who are not disabled.

185. While it will always be good practice for an employer to consult with an employee, it is not a failure of this duty to fail to consult. (*Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664.)

186. A proper comparator can be identified only by reference to the substantial disadvantage caused by the arrangements in question (*Smith v Churchills Stairlifts plc* [2006] IRLR 41; [2006] ICR 524. The comparators are not the general population of non-disabled people. The analysis must not be of the

way in which an employer has treated the employee generally or their thought processes, but the focus should be an objective analysis of the practical result of the measures that could be taken.

187. If the substantial disadvantage complained of is not because of the disability at all then the duty will not arise at all (*Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley* UKEAT/0417/11.)

188. If the claimant can satisfy the tribunal that he has proved those matters, then the duty to make a reasonable adjustment arises. Section 18B(1) and (2) of the 1995 Act used to give guidance on what factors might be taken into account in deciding what was reasonable. That has not been re-enacted into the 2010 Act. The non-exhaustive list provided is nonetheless a helpful aid to our thinking.

189. That included at section 18(B)(1)(a), the extent to which taking the step would prevent the effect in relation to which the duty is imposed. This involved an objective test. It is unlikely that an adjustment would be reasonable if it involved little benefit to the disabled person. In many cases however a "yes/no" answer is not possible to this question. If the adjustment sought would have no prospect of removing the disadvantage then it could not amount to a reasonable adjustment. (*Romec v Rudham* [2007] All ER (D) 206). A chance of removing the disadvantage may make an adjustment reasonable (Cumbria Probation Board v Collingwood [2008] All ER (D) 04).

190. No duty is imposed on an employer if it does not know or could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirement.

Analysis

191. We have used the issues set out above to guide and structure our analysis.

Dismissal

Did the respondent's decision to transfer the claimant from a band 5 Custodial Manager to a band 4 Supervising Officer on 29 January 2016 constitute an express dismissal?

192. No. Even though the claimant was reluctant and made this reluctance clear, the claimant, through his representative, did state that he accepted the re-grade. The claimant says this acceptance was given under duress. We are alive to the degree of pressure that the claimant felt at this time. Much of that pressure must have come from the difficulty of the entire situation which, realistically viewed, could well lead to a result which he found adverse; although some pressure was also the result of the capability proceedings themselves and Mr Bennett's firm stance. However, we do not consider that this pressure vitiated his consent. He had a union representative to guide and support him. He was given

time from 5 to 29 January to consider the situation. He was told clearly that the options were not simply to accept a re-grade or be dismissed: the alternative to the re-grade was for the capability proceedings to continue to an outcome that was as yet unknown. The evidence shows us that the claimant accepted the re-grade, albeit he did not like it. Therefore, there was a consensual variation to his contract and no dismissal. His old contract was not 'removed' by his employer but varied with his agreement.

Did the claimant consent to this transfer?

193. Yes. See above.

Insofar as this constituted an express dismissal, what was the reason for it? The respondent says the reason was capability.

194. This does not now arise.

Was the dismissal fair in all circumstances pursuant to section 98 of the Employment Rights Act 1996?

195. This does not now arise.

Disability Discrimination

Time

196. The claim form was presented on 26 April 2016. Day A was 29 February 2016. The parties agree that any act or omission before 30 November 2015 is therefore potentially out of time. In relation to any such act does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time? Was any complaint presented within such other period as the employment tribunal considers just and equitable?

197. The claimant's witness statement is silent on why he did not present his claims earlier. When asked for a reason in oral evidence, he said simply that he was not aware of the three month time limit. He accepted that he was a union member throughout the period covered by the matters we have been hearing about; indeed he was a member of the Prison Officers' Association committee. He had a union representative and access to advice.

198. For reasons set out below, we have not found discrimination, so that it becomes artificial to ask whether acts that we have not found have been linked in the way Hendricks requires. For what it is worth, we would not extend time (where parts of the claim are out of time) should it have become necessary to address that issue: we have been given little evidence to answer all the Keeble questions, although we remember that they are not a formal checklist. The claimant has identified only one reason for delay: that he did not know of the time limits. Yet he had union advice throughout, and therefore the means to make

enquiries about legal proceedings. He has shown himself active in presenting grievances when he seeks redress internally.

199. The length of the delay varies from issue to issue but is substantial: the capability proceedings began in November 2014 and the disciplinary proceedings in January 2015. This case is well documented, and we have not often heard witnesses say that they cannot recall events or motivations; however the claimant's own recall has shown itself to be not wholly reliable. We have noticed how his own perception of the cause of his symptoms has varied and how he has not remained consistent in what he has said to his managers about whether and to what extent he has been fit for work. We have not found him a wholly reliable historian. We think that makes it less safe to rely on the evidence where there have been delays.

The respondent has conceded that the claimant is a person with a disability (PTSD) from 1 October 2014. Insofar as it is relevant, was the claimant a person with a disability between January and October 2014?

200. It is not relevant to answer this question.

Direct discrimination

Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:

1.1 commencing disciplinary action against the claimant in January 2015 and pursuing it to penalty on 31 March 2015;
1.2 taking the decision to start the capability processes from 14 October 2014 onwards, that is making the original decision to start the process and to restart the process on occasions when it appeared to have stopped, as well as making the outcome decisions.
1.3 Downgrading the claimant with effect from 30 January 2016.

201. Factually, all these events took place.

Has the respondent treated the claimant as alleged less favourably than it treated or would have treated comparators? The claimant relies upon a hypothetical comparator.

If so, are there primary facts from which the tribunal could, properly and fairly, conclude that the difference in treatment was because of the protected characteristic?

If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Disciplinary action

202. The evidence shows that the respondent began disciplinary action in January 2015 because Mr Laidler sent an email to Mr Edwards raising

concerns about the claimant's behaviour: leaving his personal belongings, together with a statement that he was going to be dismissed, and also the out of office reply. Mr Edwards was already alert to the out of office reply. He, Ms Burnham and Mr Steele were concerned about the behaviour and that it was inappropriate.

203. The claimant had not at this stage said to the respondent that he had PTSD.

204. Without knowledge of the PTSD, Mr Steele decided to pursue a disciplinary route because he considered that the behaviour was inappropriate and unprofessional. Mr Tilt did not pursue the additional allegations but did continue with the allegation about the out of office reply. He thought that this was inappropriate and unprofessional.

205. When the claimant did begin expressly to say that his behaviour was influenced by PTSD and in particular his response to the anxiety about the capability hearing and the increase in his medication, then Mr Tilt accepted this as mitigation and decided on a lesser sanction than he would have chosen otherwise.

206. The evidence shows us that when the respondent did not know about the PTSD, it decided to commence disciplinary proceedings. When it did know about the PTSD, it entertained leniency. The evidence shows that the claimant himself was treated with some additional lenience when the respondent did know about the PTSD.

207. So, we do not consider that a hypothetical comparator would have been treated more favourably than the claimant. On the balance of probability the evidence shows us that an employee with PTSD (and/or paranoia/anxiety caused by medication and a reaction to the capability proceedings) was treated more favourably than he would have been without those impairments. Going on, we do not find that there are facts from which we could conclude properly that the respondent had treated the claimant less favourably because of his disability; and in any event, we have accepted the respondent's explanation for its treatment of him. It treated him as it did because it was concerned about behaviour which it viewed as inappropriate and unprofessional.

208. We have found it appropriate to look directly at the 'reason why' the respondent began and continued with the capability proceedings from 14 October 2014 onwards. We have found that Mr Bennett was motivated throughout by his concern that the claimant could not do his full duties as understood by Mr Bennett. Mr Bennett was in a difficult situation in that the claimant would tell management that he could cope and do full duties, when in fact, as he told his medical advisers, he could not. Mr Bennett understood full duties to include the list of specified duties in the job description as well as the 'reasonable additions and additional tasks of a similar level that may be necessary.' The chronology showed that the claimant consistently could not take on these additional tasks.

209. It was when the GP signed a fit certificate on 15 October adding that the claimant was to work to his job description only with no additional tasks and this reached Mr Bennett that Mr Bennett set out to explore this precise situation and invited the claimant to a capability hearing. That sheds some clear light on his motivation. He had thought that the problem of the claimant working - as he saw it - on restricted duties had been solved, but the GP's certificate showed that it had not. At that point, Mr Bennett had no knowledge of the claimant's PTSD so he cannot have been motivated by any reaction to that particular condition.

210. As at 8 January 2015, Mr Bennett still had no knowledge of the PTSD. Mr Bennett continued, on our findings, to be motivated by concern that the claimant was not performing full duties as he understood them. Where he saw a conflict in the evidence before him about whether the claimant could really perform full duties, he acted to resolve the issue by adjourning to seek a further occupational health report.

211. On 20 May 2015 Mr Bennett was comforted by the claimant and the Occupational Health report reassuring him that the claimant could carry out full duties and therefore he closed the capability proceedings.

212. On 11 December 2015 Mr Bennett began capability proceedings again: in circumstances when the claimant had been working on a supernumerary basis from 26 October, on core orderly officer duties without additional responsibilities.

213. Mr Bennett's consistent concern throughout was that the claimant was unable to carry out the additional duties which he believed the claimant's job description required him to do. It is relevant too that his re-grading proposal targeted just that problem.

214. So, we consider the evidence shows that Mr Bennett would have treated any other employee who could not carry out additional duties in just the same way, regardless of whether they had PTSD specifically or any disability.

Re-grade

215. We take the same view about the re-grade, for similar reasons. Mr Bennett proposed a re-grade because the claimant appeared to be coping with his orderly officer duties. There was a recurring issue of him being unable to cope with full custodial manager duties. The re-grade might give the claimant an opportunity to recover his health. Furthermore, the claimant appeared to agree to the re-grade. We have found that Mr Bennett was genuinely motivated by the claimant's inability to carry out full duties and not by his disability. This was the 'reason why'.

Section 15 discrimination

Did the respondent treat the claimant as set out in paragraph 4.7.1 to 4.7.3 above?

It is not in dispute that it did treat him in those ways.

What was the 'something arising'? The claimant says that it was

1.12.1 paranoia (especially about the disciplinary matter);
1.12.2 That the claimant was stressed, anxious and emotional;
1.12.3 That the claimant had difficulty working beyond his job description and coping with work load in addition to that contained in his job description; and
1.12.4 The claimant had difficulty working in OMU and on risk boards.

The respondent concedes that those matters did arise out of the disability (at least in part). The respondent's position is that there is no issue about whether attendance issues arise in consequence of disability. The respondent makes no concession about the disciplinary board. The claimant has to establish that the conduct that led to the disciplinary warning arose in consequence of the disability, and that is not conceded.

Discipline because of the out of office reply.

216. We accept on the balance of probabilities that the claimant was made temporarily paranoid as a result of his medication. The medical evidence confirms that likelihood. We have seen throughout the chronology of events that the claimant tends to react adversely and sometimes emotionally to change, stress and criticism. However, we see the behaviour of sending the out of office reply as out of character and as different in kind from his usual adverse reactions. It did have a distinct flavour of paranoia. Given the co-incidence of timing with the increase in medication and what we are told are the properties of that medication, we accept that the out of office reply behaviour was caused by the medication. The claimant was taking the medication because of his disability. Therefore, the paranoia and the setting up of the out of office reply worded as it was, was 'something arising' in consequence of his disability.

In relation to the disciplinary matter, did the respondent treat the claimant as aforesaid because of the 'something arising'?

217. We think the answer to this is, 'yes'. The claimant was subjected to a disciplinary process and given a warning by the respondent because of the out of office reply which was something that arose, at least in part, in consequence of his disability

Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies upon the following as legitimate aims:

As to the disciplinary issue, to maintain appropriate communication within the workplace;

218. We consider that a situation such as this is not one to be seen in absolute terms. Just because there was, or (as seen at the outset of the process) could well have been, a medical reason behind the behaviour does not mean that the respondent could only exonerate the claimant in full. The respondent was faced with a situation where it had reason to be concerned about the claimant's reactions and the risk that he was under real stress. However, he was also an employee with a highly responsible role who had to interact with a variety of others. In that context, the respondent was also concerned about the need to have its employees behave and, in particular, communicate, professionally and appropriately.

219. What the respondent had to do in those circumstances was to engage in a fair process whereby the claimant could explain himself, the respondent could explore the different possible explanations and their possible consequences and where any medical issues could be explored. That is what the respondent did. It was possible that, once the matter was investigated, the respondent could conclude that it was a matter for discipline.

220. We have found paragraph 87 of the respondent's submissions helpful. An employer has to be aware that an employee may well have control over his own actions and to explore where the line should be drawn between those actions he can and those he cannot help. That, as we have said, is what the respondent did. The final decision was an exercise in balancing the possible culpability and capacity in the claimant to control his actions, sympathy for his situation and awareness that he might have been influenced by medication.

221. Different employers and managers might have reached a different outcome. That is not relevant to us.

222. The claimant concedes that the aim given by the respondent was legitimate. We think what the respondent did was proportionate: the respondent had to explore what lay behind the situation. It had to explore what it thought was the appropriate sanction and to weigh up the extent to which claimant was to blame. The respondent seriously considered down grading the claimant. In fact, the respondent was more lenient than it was at first inclined.

For attendance/capability matters: the delivery of an effective prison service, ensuring the claimant provided regular and effective service, maintaining the expectations of a custodial manager grade and ensuring a fair distribution of work amongst custodial managers and managers. The claimant agrees that those aims are legitimate.

Therefore any argument will be about proportionality. In relation to the disciplinary matter, there is also an argument about causation.

223. We consider that subjecting the claimant to a capability process was a proportionate means of achieving the stated aim. The respondent's resources were stretched. All custodial managers were doing additional duties. The respondent had tried to keep the claimant in supernumerary duties temporarily but could not sustain this as a permanent measure. If the claimant was not carrying out his full range of duties, then other senior managers would have to pick up those tasks, which would therefore add to their workloads. This could be managed for a short period, but in time would lead to other managers becoming fatigued and stressed.

224. The respondent took time to enable the claimant to improve and recover, took time to double check the medical position, gave the claimant ample opportunity to make representations and to consider his position. We think the respondent entered the capability process and considered re-grading when other available approaches had failed.

Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

225. This does not now arise.

Harrassment

Did the respondent engage in unwanted conduct as set out in paragraphs 4.7.1 to 4.7.3 above?

Was that conduct related to the claimant's disability?

226. We do not consider that the conduct (which was certainly unwanted by the claimant) was directly related to his disability. However, it related to the impact the claimant's disability had on his attendance and performance. So, we think it is related to the disability.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

227. No. There is no evidence that this was the purpose of the disciplinary or capability proceedings or the re-grading. There is no evidence from which we could properly conclude that this was the respondent's purpose, and indeed our findings above show us that the respondent's purpose was quite different: to maintain appropriate communication and to ensure that the claimant gave effective and efficient service in particular.

If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

228. We think that the claimant perceived what was done to him as intimidating, hostile, degrading and humiliating. His many grievances and some of his

other reactions show how deeply he was affected by the conduct complained of and we think genuinely so. However, this does not complete our reasoning.

In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

229. In the circumstances of the case, we do not think that it was reasonable for claimant to have the above perception. The respondent had reached a point when it had exhausted other available options: it had checked the medical situation repeatedly, it went slowly, it gave the claimant periods when he worked restricted duties, it gave him chances to make representations and to be represented, but it also had a prison service to run, resources to use effectively and other staff members to consider. The claimant almost certainly did and does not see matters from that point of view himself, however the point of view remains valid. Were it otherwise, probably all attempts to manage the practical adverse effects of a disability would amount to harassment under the 2010 Act. Given all the other circumstances, we do not think it reasonable for the claimant to hold the perception that the conduct had the prohibited effect. We do not find therefore that there was harassment.

Reasonable adjustments

Did the respondent apply the following provision, criterion or practice generally, namely imposing a requirement for custodial managers to be prepared to work in any area of prison, including the Offender Management Unit?

230. We are by no means clear that the alleged provision was applied generally (as opposed to being a one-off event): the parties' submissions do not deal with this point exactly and the evidence has been directed more at the question of whether the provision was applied to the claimant himself.

231. However that may be, the claimant himself was not subjected to the provision. He was removed from the OMU on 26 October 2015, which on the face of it, might suggest that the provision was not applied to him. However, that is not our rationale for saying that the provision was not applied to the claimant. If the claimant had been subjected to capability proceedings and re-graded because he could not work in the OMU, then the provision would have been applied to him.

232. As we have followed events through, we see that the claimant's inability to work at the OMU of itself was not behind the subsequent decisions. The problem was not only one of the claimant being unable to undertake risk boards (as set out in Dr Alam's OH report of 18 November 2015) and therefore not work in the OMU. We think that if that was the limit to the problem it could and would have been resolved by the respondent.

233. The continual underlying problem was also that the claimant was unable to undertake 'additional duties'. What was motivating the respondent was the claimant's inability to work 'additional duties', that is to undertake full Custodial

Manager duties, whether in the OMU or elsewhere. This was the provision applied: that the claimant must be able to work additional duties in the long term, not the provision pleaded.

Did the application of the provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The claimant says that he was put at a substantial disadvantage because he found working in the Offender Management Unit difficult because of his disability.

234. In any event, we consider that the claimant was not put at a substantial disadvantage by the provision relied on. The disadvantage he experienced came from a wider cause: his inability to undertake *full* Custodial Manager duties as understood by Mr Bennett. As we have said, had the claimant only been unable to work in the OMU, but able to take on duties additional to orderly officer duties, we think the problem would have been solved.

If so, did the respondent fail to make reasonable adjustments to avoid the claimant being put at that disadvantage? The claimant contends that allowing him to refrain from working in the Offender Management Unit would have been a reasonable adjustment in the circumstances. The respondent asks when did the duty fall to be fulfilled: the claimant says that that failure included a failure in January 2016 at the capability hearings.

235. We do not think that this issue now arises, because we have found that the duty to make adjustments does not arise in the respects pleaded. However, we do not think it would be reasonable to require the employer in these circumstances to make an adjustment that would have no effect on the employee's ability to work. If the respondent simply arranged for the claimant to avoid the OMU, he would still be unable to manage other duties not expressly set out in his job description and would still have been unable to work as more than an orderly officer.

236. In any event, it would not be a reasonable adjustment to allow the claimant to continue working on orderly officer duties alone in the long term and on a custodial manager's salary. The respondent's resources were limited. It was necessary in the circumstances to expect custodial managers to take on additional duties, and they all did those duties. The respondent gave the claimant supernumerary duties for a period but could not continue with this permanently. As we have already found, if the claimant was not carrying out his full range of duties, then other senior managers would have to pick up those tasks, which would therefore add to their workloads although they would not be given additional time in which to do the work. This could be managed for a short period, but in time would lead to other managers becoming fatigued and stressed.

237. What the respondent did offer seems to us to have been a reasonable adjustment: a re-grading that would preserve the claimant's salary level for two years, would allow him to limit himself to work he could do well and without damaging strain, together with a freedom to apply for promotion when he was able to do so. That would enable him to recover, would protect him

from the stress that had impaired his ability to work and would protect him financially while he recovered.

Did the respondent not know, or could the respondent not be reasonably expected to know, that the claimant had a disability or was likely to be placed at the disadvantage set out above?

238. This does not now arise, but from 30 January 2015, the respondent had known of the PTSD.

239. These remaining issues do not arise:

If the dismissal was unfair or discriminatory, did the claimant contribute to it by contributory conduct? This requires the respondent to prove, on the balance of probabilities that the claimant actually committed the misconduct alleged. The respondent relies upon the sending out of office reply which was unprofessional.

What is the percentage chance that there would have been a fair and/or non-discriminatory dismissal in any event? What would have happened had the claimant not been regraded?

We agreed that we would deal with issues of liability, contributory fault and/or Polkey/Chagger separately from remedy and mitigation issues.

240. For all the reasons set out above, the claims are not well founded and we dismiss them.

_____
Employment Judge Heal

Date: ……13.10.17……..

Sent to the parties on: .....

.....
For the Tribunal Office