



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr P Webb

v

The Secretary of State for Justice

Heard at: Bury St Edmunds

On: 2 – 9 October 2017

Before: Employment Judge Laidler

Members: Mr D Sutton
Mr V Brazkiewicz

Representation

For the Claimant: Mrs K Jarvis (Lay Representative)

For the Respondent: Mrs J Russell (Counsel)

RESERVED JUDGMENT

- 1. The Claimant was not treated less favourably because of his disability.**
- 2. The Claimant was not treated unfavourably because of something arising in consequence of his disability.**
- 3. The Respondent did not fail in its duty to make reasonable adjustments.**
- 4. All claims brought by the Claimant fail and are dismissed.**

REASONS

- 1. This is the claim of Mr Paul Webb received on 4 April 2017 in which he brought claims of disability discrimination. The claimant remains employed by the respondent. In it's response the respondent denied all of the claims.**

2. There was a preliminary hearing before Judge Warren on 9 June 2017 when the issues in the claim were clarified. These issues remained the issues before this tribunal as further clarified at this hearing.

Reasonable Adjustments

1. Mr Webb relies on the PCP that upon his return to work on the 17th May 2016, after working a week on Reception and a week's leave, on the 1st June 2016 he was required to work on the same C Wing in Highpoint South on which he had been working when he had been threatened with 'potting', which made him anxious. He says this placed him at a disadvantage as a person with depression, as such a person is vulnerable to such anxiety. The adjustment that he contends for is that he should have been placed on another Wing at Highpoint South or Highpoint North.
2. Mr Webb further relies upon the provision criterion or practice of the making of a decision not to allow him to continue working at Highpoint, which he says placed him at a disadvantage as a person suffering from depression because the other work locations open to him were a long distance from his home and a long commute is mentally wearing, which a person with depression is less able to endure. The adjustment that he contends for is to allow him to work at Highpoint Prison.
3. The third provision criterion or practice upon which Mr Webb relies, is the decision by Governor Cartwright to require that Mr Webb return to duty at Wayland Prison on the 19th January 2017. That requirement placed Mr Webb, as it would place any other person suffering from depression, at a disadvantage because he is less able to endure the longer commute, which is mentally wearing. The adjustment contended for is to allow him to work at Highpoint Prison.

Direct Discrimination and Disability Related Discrimination

4. Mr Webb relies upon a series of allegations as set out below:-
 - 4.1 Governor Hampson failed to follow Occupation Health advice in that:
 - 4.1.1 There was no risk assessment in May 2016, and
 - 4.1.2 No appropriate phased return to work in May 2016.
 - 4.2 Governor Cartwright made a decision not to allow Mr Webb to return to Highpoint Prison on the 19th January 2017, and the Respondent should have referred Mr Webb to Occupational Health before making any such decision.

- 4.3 Governor Hampson, Governor Thurston and CM Morton did not respond appropriately to the 'potting' threat against Mr Webb. The Respondent should have moved all of the prisoners responsible for that threat before Mr Webb returned to work in early April 2016.
- 4.4 Governor Hampson and Governor Smith withheld an Occupational Health Report from the 20th April, until the 17th November 2016.
- 4.5 Governor Smith did not consider evidence relating to Mr Webb's health and did not accept that his health contributed to the event for which he was disciplined on 17th November 2016 and in the decision communicated thereafter on the 22nd November 2016.
- 4.6 Governor Hampson, Governor Smith and Governor Newnes failed to acknowledge that Mr Webb was disabled throughout the disciplinary process.
- 4.7 Governor Hampson and Governor Smith failed to re-refer Mr Webb to Occupational Health after the incidents on the 1st and 2nd June 2016.
- 4.8 Governor Cartwright delayed for 6 weeks in making a further Occupational Health referral of Mr Webb following his reinstatement on the 19th January 2017, the referral being made on the 10th March 2017.
- 4.9 Governor Hampson, Governor Smith and Governor Cartwright did not follow the Respondent's own Attendance Management Policy in:
 - 4.9.1 Not considering the content of the April 2016 Occupational Health Report.
 - 4.9.2 Not holding a formal or informal meeting with Mr Webb when returning to work in May 2016 or since reinstatement in January 2017.
 - 4.9.3 Not monitoring or reviewing his disability or managing his attendance.
 - 4.9.4 Not following up on his counseling.
 - 4.9.5 Not sharing the contents of the Occupational Health report.
 - 4.9.6 On his return in May 2016, not discussing with Mr Webb the detail of his phased return to work and the

duties that he would do, (that is what Mr Webb meant when he referred to not considering a period of adjusted duties in his claim form).

- 4.10 Governor Smith ignoring Mr Webb's request for an Occupational Health referral on the 7th November 2016 prior to the disciplinary hearing.
 - 4.11 The Respondents failure to acknowledge that Mr Webb was injured at work and its failure to follow its own process by reimbursing him the cost of his dental treatment, occasioned by that injury.
 - 4.12 Governor Hampson in May 2016 requiring Mr Webb to return to work on full duties when he was not fit.
 - 4.13 Governor Cartwright in his outcome letter of 19th January 2017, saying that Mr Webb should have informed the Respondent of his disability.
 - 4.14 The Respondent's failure to acknowledge or discuss his grievance is no longer pursued.
 - 4.15 The Respondent and in particular, Governor Carwright, ignoring Mr Webb's emails and or delaying responding to his emails after his re-instatement. In those emails he had raised questions arising out of the appeal and his re-instatement. In particular, Governor Cartwright had said on 9th February 2017, that he was to receive no more communications, leaving Mr Webb with no point of contact for communication.
3. On the 21 July 2017, the respondent conceded that the claimant was disabled by virtue of depression but not post traumatic stress disorder. The claimant has not pursued that as a disability before this hearing.
 4. At this hearing, there was further clarification of the issues and in particular the way in which the reasonable adjustment claims are put. The claimant's advisor was given time to consider the "provision, criterion or practice" (PCP) relied upon and confirmed these as follows in place of those set out above which did not seem to the tribunal to fall within the meaning of the statute :-
 - 4.1 In relation to numbered paragraph 1 in the issues above the claimant clarified that his case is that the respondent's common practice was to keep the employee on a wing where any threat had been made, and for the prisoner to be moved.

4.2 In relation to paragraph 2 above it was agreed that the PCP relied upon was that it was common practice that an employee re-instated in the same circumstances as the claimant would not be returned to the prison where the incident occurred.

4.3 In relation to paragraph 3 above the claimant relies upon the respondent's commuting policy seen at page 928 of the bundle. In paragraph 2.3.2 which provides

“if this is within the London pay area you will normally be expected to travel daily for up to 90 minutes each way between your home and work; outside the London pay area you will be expected to travel up to 75 minutes each way”.

The tribunal noticed when preparing these reasons that this is in the Instruction related to Permanent Transfers and in deciding whether a move of home can be approved. It has been referred to throughout this hearing to as the respondent's “commuting policy” but that does not appear to be a correct description of it.

5. The background to these proceedings was that the claimant was dismissed but re-instated. The respondent suggested on the first day that it would wish to play CCTV footage showing part of the incident which led to the claimant's dismissal, namely an assault on a prisoner. This was objected to by the claimant's advisor who did not see it's relevance. The tribunal decided it would read the witness statements first and then give the parties it's view. On having read it did not see the relevance of the CCTV footage as it was not dealing with whether the claimant was fairly or otherwise dismissed. On returning on the second day however, the respondent's counsel confirmed that they were no longer pursuing their argument that this footage was relevant. It was not therefore seen by the tribunal.

6. The tribunal took the first day to read the witness statements and these were then taken as read. As an adjustment for the Claimant it had regular breaks throughout each day that it heard evidence and upon agreement with the claimant's advisor these were approximately every 45 minutes to assist the claimant. That continued throughout the hearing, even after the claimant had given evidence.

7. The tribunal heard from the claimant and from the following on behalf of the respondent:-

7.1 Ruth Morton, Custodial Manager at HMP Highpoint.

7.2 Tony Hampson, Head of Residence (Services).

7.3 Nigel Smith, Governing Governor.

- 7.4 Simon Cartwright, Deputy Director of Custody for the East.
- 7.5 Garry Newnes, Deputy Governor.
- 7.6 Paul Cawkwell, Governor at HMP Wayland.

8. From the evidence heard the tribunal finds the following facts.

The Facts

- 9. The claimant is employed by the respondent as a prison officer having commenced employment on 1 October 1990.
- 10. Although all of the issues are set out as above it became apparent that in relation to various factual issues there were a number of legal issues related to that matter. The tribunal has therefore tried to give its reasons below in a chronological order but has put together some of the issues when they relate to the same incident. To this extent they have followed the order in which the issues appeared in the respondent's closing submissions. The reference in brackets is to the original paragraph numbering from Judge Warren's Preliminary Hearing Summary document.

Issue 4.3 (Preliminary Issue 11.3)

Governors Hampson and Thurston and CM Morton did not respond appropriately to the "potting" threat against the claimant. The respondent should have moved all the prisoners responsible for the threat before the claimant returned to work in early April 2016.

- 11. By email of 4 April 2016 the claimant advised Tony Hampson, Ruth Morton and Nicola Thurston of an alleged threat made against him. It is relevant to set out the email in full, with the reply being at the top : -

Cc: Wawryka, Stefan [HMPS]; Newnes, Garry [HMPS]
Subject: RE: ASSAULT / POTTING

Paul, I will speak to the dep about this, and I am sorry you feel as you do, I am only back today after attending the coroners court yesterday, I will ask Governor Hampson to speak with you.
For your information though I no longer work in security but will pass this on to Garry Newnes who is.

Nicola

From: Webb, Paul [HMPS]
Sent: 04 April 2016 00:53
To: Hampson, Tony [HMPS]; Morton, Ruth [HMPS]; Thurston, Nicola
Subject: ASSUALT / POTTING

Hi Everyone,

I've been off for two weeks did a night on Saturday just gone, and was told there is a plot to get me assaulted or potted or both, it has been S.I.R ed by myself and c- wing staff the note is in our ob's book I believe this is because I seem to be the only one who wants to get rid of the non IDTS prisoners and they don't like this but as we have about 22 non IDTS on the wing and I don't get any help from management. I know you won't like what I've put down but I don't want to be the third officer potted, the prisoner involved will carry this out as they think it will be funny, I know you have only just received this but it has started to get to me and I don't mind admitting it but I'm struggling with this as I personally feel that I don't get support from management team, as the last two police investigations showed me and also other things that prisoner have said about me that has proved not to be true I had no support even when I went to court for an assault on me, no one from management helped me or Tabs. I do not want to be moved off c- wing as I'm the victim and that will not be sending the right message, I'm off tomorrow Monday and I'm a late shift on Tuesday so some guidance would be appreciated. The prisoners are [blank], [blank], [blank], [blank] and [blank].

Officer Webb

Sorry if you take this the wrong way

12. The tribunal then saw an email dated 8 April 2016 from Ruth Morton the claimant's Line Manager to confirm that one prisoner had been moved on the 7th and another prisoner had also been moved. She would look to move all the others in due course as spaces became available and would try and keep them apart.
13. Whilst this was one of the issues in the claim the claimant's advisor accepted in submissions that they now agreed this threat had been handled appropriately. It does not therefore remain one of the issues before this tribunal.
14. The claimant had attended his GP on 5 April 2016. He was already on anti-depressant medication but this was doubled. He was also referred to the NHS Mental Health Department. He was signed off for two weeks with depression and anxiety relating to the threat.
15. By email of the 8 April 2016 Tony Hampson confirmed to Ruth Morton that the claimant had gone sick before he could speak to him but that he was

aware of the actions he had taken, namely that he was referring him to Occupational Health as the reason for the absence was said to be depression.

16. Mr Hampson kept a log of his contact with the claimant. This shows that the claimant was telephoning in but appears to have been speaking to the Regulating Officer to report in sick.
17. Mr Hampson was dealing with the claimant at this time as Ruth Morton was working nights.
18. An Occupational Health referral was made on 6 April 2016, (pages 83 – 86 in the bundle). The referral stated that the claimant had reported sick with depression. It gave details of previous absences. These were not related to depression but concerned various injuries and other conditions.

Occupational Health Report 20 April 2016

19. The report stated that the claimant had given an account to the Occupational Health Advisor of increasing low mood, irritability and reduced motivation over a few weeks. He had suffered depressive symptoms in the past and had been maintained on a maintenance dosage of an anti-depressant for a few years. The advisor recorded that the general practitioner had increased the medication and referred the claimant for counseling therapy.
20. The advisor did not consider the claimant was yet fit to work. He had indicated his wish however to get back and appeared well motivated to seek the counseling support. She understood from him that he had found counseling therapy helpful to his recovery in the past, and therefore she was hopeful of his being in a position to return to work with 2-3 sessions of therapy. The claimant was still waiting a date to commence counseling therapy but it was hoped this would be within a week or so. The advisor was therefore anticipating the claimant should be fit for work by the second to third week in May. On his return to work she would advise management to undertake a Stress Risk Assessment with the claimant as he had highlighted recent issues or decisions regarding his safety which he felt had not been adequately addressed, and which he considered had added to his anxieties and low mood.
21. Whilst the advisor acknowledged that the issue of disability was one for a tribunal her interpretation was that his psychological condition was likely to be considered a disability because of it's length and it having a significant impact on his ability to undertake normal day to day activities.

22. At the end of the report it was clearly stated “I have discussed the content of this report with Mr Webb and have verbal consent to release this information to you”.

Issue 4 (Preliminary Hearing Issue 11.1) Governor Hampson failing to follow Occupational Health (OH) advice in that (1) there was no risk assessment in May 2016 and (2) no appropriate phased return to work in May 2016.

Issue 4.9.6 (PH Issue 11.9.6) Governor Hampson, Governor Smith and Governor Cartwright did not follow the Respondent’s own Attendance Management (AM) Policy in not discussing with Mr Webb the detail of his phased return to work and the duties that he would do.

Issue 4.9.1 (PH Issue 11.9.1) Governor Hampson, Governor Smith and Governor Cartwright did not follow the Respondent’s own Attendance Management (AM) Policy in not considering the content of the April 2016 OH Report.

Issue 4.9.2 (PH Issue 11.9.2) Governor Hampson, Governor Smith and Governor Cartwright did not follow the Respondent’s own Attendance Management (AM) Policy in not holding a formal or informal meeting with Mr Webb when returning to work in May 2016.”

23. The tribunal saw minutes of the ‘Sick Management Board Meetings’ which Tony Hampson attended. These noted detailed of all prisoner officers off sick. The meeting of the 20 April 2016 (page 95A) noted that the OH Report on the Claimant was awaited. The meeting however on the 27 April 2016 recorded that the report had been viewed and that the claimant hoped to return to work in the next week. By the meeting on 4 May 2016 it was recorded that Ruth Morton was to do a return to work meeting with the claimant that day, and the claimant was on full duties from Monday.

24. The log kept by Mr Hampson records that he spoke to the claimant on 24 April 2016. The OH Report had been received and the claimant was looking to return to work on 2 May 2016. In their discussion the claimant stated that a factor in his depression was fatigue. Mr Hampson felt that might have been contributed to by the excessive number of hours the claimant had been working and it was agreed that on his return to work he would commit to working his scheduled shift pattern and not volunteer to work additional shifts including nights. He was to work initially on restricted duties as operational support in reception, a non-prisoner facing role. The return to work plan at page 99 records that “an individual stress assessment will need to be completed, however in the interim Paul is only to complete his detailed shifts and not carry out any additional hours. This is to ensure that he is better able to manage his time”.

25. It is acknowledged by the respondent that the individual risk assessment was not done.

26. The claimant did not receive the Occupational Health report until he requested it for the disciplinary hearing in November. The respondent was not aware that he had not received it direct from Occupational Health and no earlier request had been made for it. The final paragraph of the Occupational Health report indicates that the advisor had discussed the report with the claimant and had his consent to release it. The respondent took all of this into account in the claimant's appeal when Mr Cartwright found that: -

“I accept that the contents of the Occupational Health report dated 20 April 2016 should have been shared with you by your Line Manager in a timely manner and that a more comprehensive phased return to work plan informed by a stress risk assessment may have been appropriate in this instance.” (Outcome letter 19 January 2017)

27. It is accepted that there was no formal return to work meeting that had been pre-planned and was conducted in a room away from where the claimant was working. What occurred was an informal meeting between him and Mr Hampson in an area towards the back of the reception which was not completely private. There is however no suggestion that on that occasion people entered and that the discussion was overheard.
28. Ruth Morton was to meet with the claimant to complete the return to work paperwork. She emailed him on 16 May 2016 to arrange to meet. She was then off. It appears they did meet and the claimant acknowledges that during that meeting Ruth asked how he was. He states in his witness statement that although still suffering from anxiety and depression he felt ok working in a non-prisoner facing role.
29. The claimant was then scheduled to return to C wing from the 1 June 2016. Although in his witness statement he states that he was “then expected to return” he acknowledged in his cross examination that he was happy to do so and that there was no log of him raising concerns about his mental health at this time. The tribunal is satisfied from seeing his original email and his evidence that he was content and indeed wanted to return to C wing.
30. The claimant was on rest days on the 21 and 22 May 2016 and had a medical appointment on the 23 May 2016. He then had a period of annual leave and was due to return on 1 June 2016.

Issue 4.12 (PH Issue 11.12): Governor Hampson in May 2016 requiring C to return to work on full duties when he was not fit.

Reasonable Adjustment: C should have been placed on another wing at Highpoint Prison on his return

31. By the time the claimant returned to C wing on 1 June 2016 all prisoners involved in the potting incident had either been moved or had left the prison.
32. Although the claimant said to this tribunal that there were other things that could have been done, namely the non-prisoner facing role could have lasted longer, there could have been more contact with him, he could have had time out in an “enhanced wing where prisoners comply and not so many problems” and/or a rest period, he accepted that he did not mention any of these matters at the time and had stated he was fit to return to full duties.
33. The claimant made it very clear throughout his evidence to this tribunal that he wanted to remain and return to C wing.

Issue 4.4 (PH Issue 11.4): Governors Hampson and Smith withheld an OH Report from 20 April – 17 November 2016.

Issue 4.9.5 (PH Issue 11.9.5): Governor Hampson, Governor Smith and Governor Cartwright did not follow the R’s own Attendance Management (AM) Policy in not sharing contents of the OH report.

34. It is acknowledged by the respondent the claimant did not receive the occupational health report until 17 November 2016. The report itself makes it clear that it was discussed with the employee before it was released to the respondent.

Issue 4.7 (PH Issue 11.7): Governors Hampson and Smith failed to re-refer Claimant to OH after the incidents on 1 and 2 June 2016.

Issue 4.10 (PH Issue 11.10): Governor Smith ignoring Claimant’s request for an OH referral on 7 November 2016 prior to the disciplinary hearing.

35. When the claimant returned on the 1 June 2016 he had hot water thrown at him by a prisoner detained on the segregation unit. The claimant notes in his witness statement he reported this on the same day and medical treatment was not necessary.

36. The next day 2 June 2016 there was an incident with a prisoner that led to the claimant's dismissal. In his own words in his witness statement at paragraph 22 the claimant states:-
- “At approximately 9am I was provoked and attacked by a prisoner which resulted in me being badly beaten and I lost a tooth as a result of the attack. C&R techniques were used to try and control the prisoner, and the prison officer with me was not able to support during this attack, he removed his belt and left the cell so I was left to act alone to protect myself.”
37. The claimant was sent home from work. He visited his general practitioner that day who issued a sick certificate due to depression and anxiety. He visited his dentist on the 2 June 2016 following a visit to A&E and was advised he would need the tooth extracted. That was completed on that day.
38. The claimant was called to a meeting with Nigel Smith on 7 June 2016. A letter was sent to the claimant after that meeting that day confirming his suspension. The letter made it clear he was suspended from work to allow the service to look into an alleged incident of assault against a prisoner on 2 June 2016. The claimant was told that he must remain available to meet with the investigating officer who would be Governor Garry Newnes. During the claimant's period of suspension, he must report to Tony Hampson on Tuesday each week and notify him if he would be unfit to attend work due to sickness.
39. It was made clear at the outset of this hearing when clarifying the issues that the issue of the claimant's dismissal was not before this tribunal. The tribunal therefore only proposes to set out the bare facts of the procedure that was then followed in so far as it relates to the issues it has to determine.
40. Garry Newnes prepared a report of his investigations seen in the bundle at page 142. He concluded:-
- 40.1. Allegation 1, abusive language/behaviour towards prisoners – that there is sufficient evidence for the allegation to be tested at a disciplinary hearing.
- 40.2. Allegation 2, assault/unnecessary use of force on a prisoner – recommendation that there is sufficient evidence for the allegation to be tested at disciplinary hearing.
41. In the list of issues that the tribunal was working to there are no allegations against Mr Newnes in relation the conduct of the investigation process.
42. By letter of 20 October 2016 the claimant was invited to a disciplinary hearing. The allegations were: -

- 42.1. that on the 2 June 2016 he deliberately provoked a prisoner by kicking his heels when he was walking down the landing.
- 42.2. That on the 2 June 2016 he used excessive force on a prisoner by punching him continually in his cell.
- 42.3. That his actions were unprofessional, reckless and placed others at risk.

43. The letter advised the claimant that Mr Smith would be conducting the disciplinary hearing and that the investigating officer would present his findings. The claimant was reminded of his right to be accompanied. The investigation report was enclosed with the letter. It was also made clear that in addition to Mr Newnes, Officer Martin Hurst and SO John Drury witnesses would be attending to give evidence at the hearing.
44. It was made clear to the claimant that if misconduct were found there were various options open to the employer including ending his employment with the service.
45. The claimant prepared a statement in an email dated 3 November 2016 for his disciplinary hearing.
46. Following the hearing on 17 November 2016 at which the claimant was supported by Simon Bilton a work colleague, Mr Smith confirmed his findings to the claimant in a letter dated 22 November 2016 (having verbally given the decision to the claimant on the day of the hearing).
47. The decision was that the claimant be dismissed without notice on the grounds of gross misconduct.
48. The claimant appealed this decision. His appeal was acknowledged by letter of 29 November 2017 by Simon Cartwright who would hear the appeal. He is the acting Deputy Director of Custody for the East. The hearing took place after various postponements on 9 January 2017. The claimant was again accompanied by Office Bilton.
49. In an outcome letter dated 19 January 2017 Mr Cartwright found that the dismissal should be overturned and the claimant be issued with a final written warning which would be in force for 2 years. In that period he would be banned from the field of promotion. He advised the claimant that if there were any further proven acts of misconduct against the disciplinary code during that period the warning would remain on the claimant's file and may lead to further disciplinary action being taken against him. After the two years expired the warning would be removed from his file.
50. He did agree with the decision that the claimant's actions amounted to gross misconduct. He decided as follows:-

“Your actions on 2 June 2016 constituted gross misconduct in Governor Smith’s view and I agree with his decision in principle that this warranted dismissal on this occasion. However, I have now had an opportunity to reflect on the further mitigation you have put forward regarding your mental health at the time of the incident. I accept that the contents of the occupational health report dated 20 April 2016 should have been shared with you by your line manager in a timely manner and that a more comprehensive phased return to work plan, informed by a stress risk assessment, may have been appropriate in this instance. It is on this basis that I have decided to overturn the dismissal. I am disappointed to note that you did not at any time raise your own concerns about your mental health with anybody and strongly recommend that you take responsibility for doing this in future in order to ensure that you have the appropriate support at the right time. I would like to highlight that mechanisms for support including the Employee Assistance Programme and your Local Care Team are available at all times.”

51. In conclusion he stated: -

“It is my view that in order to give you a ‘fresh start’ I have decided that on your return to work you will transfer to HMP Wayland, which I understand is equidistant from your home. Using my discretion I will permit you to claim excess fares for the life of the disciplinary warning (i.e. two years). At the appeal hearing you reported that you could do the prisoner officer job and that you wanted to do the prison officers job at present. I note your comments that you have suicidal thoughts and that your GP has advised that it will not be appropriate to lower the dose of your antidepressant medication until you are ‘stable’. Accordingly I will advise your new Governor/Line manager to seek advice from an occupational health physician before they agree a phased return to work plan with you, but in the short term you may be asked to attend the workplace and support the establishment in a non-prisoner facing role, until the outcome of any OH report is known. Your new line manager will be in contact with you in due course to discuss this.”

52. The claimant submitted a grievance to Human Resources in February 2017, (page 485).

53. There had been a referral to occupational health and a further occupational health report was eventually received dated 28 June 2017. This confirmed the claimant was fit to undertake a prison officer role and although he could physically make the journey to another establishment “he may well experience increased anxiety and struggle to undertake an increased journey time as well as deal with the stress he perceives to be associated with his role. As such I would advise that you reconsider the requirement for him to move on a permanent basis to another establishment”.

54. Having received the appeal outcome the claimant took issue with this in his email of 29 January 2017, stating that “HMP Wayland was not in fact equal distant from his home address” and pointing out it was 55 miles away

whereas HMP Highpoint was 7 miles away. He asked that occupational health advice be sought and stated that it would have a detrimental effect on his mental health condition to be subject to that extra travelling time.

55. The claimant also advised the service in that email that he had been in contact with ACAS regarding early conciliation and “would be lodging an employment tribunal on the grounds that all evidence presented shows that there was direct discrimination in form of disability and there were a number of policy and process miss failings”.
56. Custodial Manager Pickles contacted the claimant on 30 January 2017. The claimant was still signed off sick until mid March 2017. He raised various concerns about whether or not the distance from his home was suitable. She confirmed in an email to Mick Gallagher on 30 January 2017 that she had spoken to the claimant.
57. The claimant wrote again to Mr Cartwright on 8 February 2017 asking for a response to his email of 29 January 2017.
58. By letter of 9 February 2017 Mr Cartwright responded to the claimant. He emphasised there were vacancies for prison officers at HMP Littlehey, HMP Warren Hill and HMP Hollesley Bay. He stated:-

“If you would prefer to work at one of these establishments rather than HMP Wayland please let me know by 15 February and I will make the necessary arrangements. Otherwise I will assume that you will transfer to HMP Wayland with effect from 15 February.”

59. He made clear to the claimant that his new line manager would contact him directly to discuss his phased return to work including any referral to occupational health. He went on:-

“Please be reassured that your line manager will consider the advice and recommendations from occupational health but he/she will also be keen to hear your views about what will facilitate your return to work and what support you may need in managing your condition at work going forward.”

60. Mr Cartwright ended the letter:-

“Now that I have given you my decision about your appeal I see no further reason for us to engage in correspondence. I advise you that there is no further internal route of appeal and accordingly I consider this matter closed. If you have any further queries please direct them to your new line manager.”

61. By email of 14 February 2017 the claimant replied to Mr Cartwright. He stated that none of the prisons offered were suitable given his disability and ill health and/or were an inappropriate distance from his home. He stated he would not be providing a response as to his choice of prison until an occupational health assessment had been undertaken.

62. At this point the claimant submitted his grievance
63. By letter of 16 March 2017 occupational health contacted the claimant with the date of a telephone consultation on 30 March 2017. That appointment was cancelled and re-arranged for 4 April 2017. It was following that appointment that the letter of 5 April 2017 was written which stated that due to the nature of the case the health advisor believed it prudent to refer the claimant to an occupational physician.
64. This then lead to the report of 28 June 2017.
65. In the meantime, the claimant received a letter from Paul Cawkwell inviting him to a grievance hearing on 26 April 2017. It appears they then actually met on the 2 May 2017 and a letter of that date confirmed the outcome of their discussion.
66. He set out in his conclusions the following:-

“You yourself told me that the Grievance application was belated and only initiated because a Tribunal would have expected you to try and resolve matters internally.

There were clearly failings in adherence to procedure relating to your case management. The Stress Risk Assessment being the case in point. My sense however is that the organisation was not blind to this failing when the decision was taken to reinstate you following the dismissal decision of your disciplinary hearing. You raised your concerns, the Appeal Authority considered them and the Appeal Authority acted upon them.

We should not however ignore the part you played in your own demise. Moving forward it is important that you accept responsibility for your own actions and learn from them because a fresh start awaits you at Wayland prison should you commit yourself to accepting this opportunity. I really do hope we can all move on from this episode in your career.

It is my conclusion that any action that may have needed to have been taken was addressed at the Appeal against your dismissal, and if you were unhappy with how your sickness absences were being managed then you had ample opportunity to address any concerns way before this juncture. With hindsight you might have asked for more structure to be applied to your return to work, but it wasn't ignored by management and today you yourself admitted that the thought never crossed your mind until a week after the seminary incident. Nothing new emerged today that would lead me to uphold your Grievance.”

67. The claimant was advised of his right to appeal that decision.
68. Although this chronology is not relevant for the purposes of determining the issues it should be recorded that as a result of a formal attendance review

meeting (FARM) on 18 August 2017, chaired by Paul Cawkwell the claimant agreed to transfer to HMP Littlehey. Mr Cawkwell adjourned the meeting to see if there were vacancies and returned to advise that there were. He received confirmation from the governor that he would be prepared to accept the claimant onto his staff, and Mr Cartwright's deputy also agreed that this was an appropriate course of action with a phased return to work.

69. By letter of 22 August 2017 the claimant was advised of formal arrangements for his transfer to HMP Littlehey, and it is understood the claimant could return to work there on 4 September 2017 where he still remains.

Relevant Law

70. The following sections of the Equality Act 2010 have been considered.

Section 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 15 Discrimination arising from disability

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

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

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

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

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

...

Section 23 Comparison by reference to circumstances

(1) *On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

71. In deciding whether there has been direct discrimination the tribunal must determine whether there was less favourable treatment and if there was, whether it was 'because' of the protected characteristic. It was acknowledged in *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL that in some cases the 'less favourable treatment issue cannot be resolved without, at the same time. Deciding the reason why issue'.
72. With regard to a claim of discrimination arising from disability the claimant must establish not only that he/she suffered unfavourable treatment but that was because of something arising in consequence of his or her disability.
73. In *Environment Agency v Rowan* 2008 ICR 218 the EAT stated that in a reasonable adjustments claim the tribunal must consider:
 - 73.1. The PC applied by or on behalf of the employer
 - 73.2. The identify of non-disabled comparators (where appropriate)
 - 73.3. The nature and extent of the substantial disadvantage suffered by the claimant
74. The requirement is then for the employer to make reasonable adjustments to prevent the Claimant suffering that disadvantage.

Submissions

For the Respondent

75. Counsel for the Respondent handed up written submissions and it is not proposed to recite those again in these reasons.

For the Claimant

76. It was argued that the Respondent had accepted it had not sent the OH report to the Claimant. The entirety of it had not been discussed with him. OH advice was not followed.
77. It was acknowledged that the work location during the initial phased return to work was agreed with the Claimant but the plan now seen in the bundle was not.
78. There was no consideration given to an alternative work location when the Claimant returned in June and no adjustments were made. There was no point of contact or support for the Claimant when he returned to full duties and no risk assessment carried out.
79. It was now agreed that the 'potting' incident was appropriately managed.
80. Following the hot water incident the Claimant was not up dated. He provided a medical certificate at the suspension meeting and informed the Respondent he was unwell but this was ignored.
81. Although it was agreed that the Claimant had incurred an assault at work there was no process to reimburse the Claimant his medical expenses. There was no mention of the Claimant's disability in the investigation report. The Claimant requested additional information before the disciplinary hearing but this was withheld.
82. There was no valid business reason why the Respondent could not carry on with its investigation rather than wait for the police investigation. That only increased the Claimant's anxiety.
83. After the appeal there was no contact with the Claimant between 9 February and March 2017. There was no OH referral until 3 months after the Claimant's reinstatement.
84. With regard to reasonable adjustments the Claimant was not given full reasons as to why he could not return to Highpoint. He does not agree with the business reasons of the Respondent.
85. OH advice of June 2017 continued to be ignored. The Respondent did not make reasonable adjustment with regard to the long commute.

Tribunal's conclusions

Issue 4.3 (PH issue 11.3) – the potting threat

86. This was withdrawn by the claimant's advisor in submissions. The tribunal would have found there was no less favourable treatment of the claimant on any grounds let alone his disability. The respondent's policy was to move

prisoners not staff after such an incident. That is what they did. By the time the claimant returned to work the prisoners involved were no longer on C wing. There was no less favourable treatment of the claimant.

Issues 4.1, 4.16, 4.9.6 & 4.9.2 (PH issues 11.1, 11.6, 11.9.1 and 11.9.2)

87. It has been acknowledged through the proceedings by the respondent that it did not do the stress risk assessment. This was taken into account at the appeal and is clearly one of the reasons for the overturning of the dismissal decision. The tribunal was surprised to hear Governor Hampson state that he did not know what one was and had never done one. It should have been standard practice upon receiving the advice of occupational health for one to be put in place, and indeed his return to work plan even notes that “an individual stress assessment will need to be completed”. In a very loose and informal sense some of the matters that occupational health wanted considered in that stress risk assessment were considered by the employer for example the prisoners had been removed, the claimant was not to work excessively long hours, but that does not remove the need to in a formal way complete the individual stress risk assessment and discuss that and all matters arising with the individual employee concerned.
88. The tribunal however has no direct evidence and cannot draw any inferences from any of the other evidence heard that the reason why this was not done was because of the claimant’s disability or was less favourable treatment arising in consequence of his disability. If anything, the reason why this was not carried out the tribunal has concluded was because of the varying shift patterns of the line managers involved, in particular Ruth Morton and Tony Hampson and the fact there was not one individual be that a line manager or HR support in charge of the overall return to work process. That does not however make it an act of disability discrimination and that claim is dismissed.

Issue 4.9.6 (PH issue 11.9.6)

89. It is asserted that the respondent failed to discuss with the claimant his phased return to work and the duties he would do. That is not the evidence that this tribunal heard. Not only were there telephone calls between Governor Hampson and the claimant before he returned, but it was agreed that the claimant would have a non-prisoner facing role in the reception area. The claimant himself wished to return to C wing and was visiting it during the time he was in reception, although not at a time when prisoners were around. His duties were discussed with him albeit informally when he returned in the meeting Governor Hampson had with him at the back of the reception area. The claimant was not treated less favourably because of his disability and this was not less favourable treatment of him for matters arising in consequence of his disability.

Issue 4.9.1 (PH issue 11.9.1)

90. The tribunal is satisfied that Governors Hampson, Smith and Cartwright did consider the content of the April 2016 report.
91. Governor Smith is clear in his evidence that he accepted what the claimant told him and what was in the occupational health report about the claimant's condition. Governor Cartwright clearly considered it and acknowledges that in his outcome.

Issue 4.9.2 (PH Issue 11.9.2)

92. The allegation is that a formal or informal meeting with the claimant was not held on his return to work in May 2016. In fact the tribunal has accepted an informal meeting was indeed held with him by Governor Hampson at the back of the reception area. Although no formal meeting was held this cannot amount to an act of less favourable treatment because of his disability or discrimination arising from.

Issue 4.12 (PH issue 11.12)

93. The allegation was that in May 2016 Governor Hampson required the claimant to return to work on full duties, and that as a reasonable adjustment the claimant should have been placed on another wing at HMP Highpoint on his return. The tribunal accepts the respondent's submissions that the claimant was not required to work on full duties, but actively pursued that. There was no evidence that he was not fit to resume those full duties. He also as has been recorded had some rest days and a period of annual leave between the time that he had started in the reception area before he returned to C wing. By the time he returned to C wing as already stated all of the prisoners involved in the potting threat had been removed.
94. The claimant was not treated less favourably because of his disability or for matters arising from.
95. Further the claimant never stated that he wanted to work on another wing. He at all times stated to Ruth Morton and Tony Hampson that he wanted to stay on C wing and not be moved.

Issues 4.4 and 4.9.5 (PH issues 11.4 and 11.9.5)

96. The respondent has not disputed that the claimant was only given a copy of the OH report on 17 November 2016. The occupational health report itself had stated very clearly at the end of it that the writer had discussed the contents with the claimant and he had agreed to its release. It was reasonable for the employer to believe that the contents had therefore been fully discussed with the claimant prior to him authorising the release of the report. That does not detract from the employer's obligation to provide the claimant with a copy, and this failure was in breach of their procedure. There is however, no evidence before this tribunal that that was done

because of the claimant's disability or that it was a matter arising in consequence of his disability. There was a breach of procedure and as soon as it was brought to the employer's attention they corrected it. At no time prior to November did the claimant contact the respondent, occupational health or HR to request as copy of the report which had not been provided to him.

Issues 4.5 & 4.6 (PH issues 11.5 and 11.6)

97. The allegation is that the respondent did not take account of the claimant's disability in the disciplinary process led by Governor Smith. Governor Smith's evidence to this tribunal was that he accepted everything that the claimant had said about his condition and about the fact that no assessment had been undertaken. He however did not take any steps to satisfy himself as to whether the recommendations in the occupational health report had been dealt with. He stated to this tribunal he did not dispute any part of the occupational health report and considered everything the claimant told him prior to making his decision. In his dismissal outcome letter other than to recognise that the claimant was 'going through a difficult stage, on medication and were having counseling' he made no reference to the occupational health report. This tribunal has concluded however that that issue went to the fairness of Governor Smith's decision and was something that Mr Cartwright took into account when he overturned the decision to dismiss. He specifically stated in the second page of his letter that on reflection he considered the further mitigation the claimant had put forward regarding his mental health.
98. The tribunal does not find this was an act of direct discrimination because of the claimant's disability. The tribunal is satisfied from the evidence heard that the claimant was not treated less favourably than others. The comparator must be someone without a disability or a different disability charged with the same offences as the claimant. There is no evidence that they would have been treated any other way, and no evidence produced to that effect by the claimant. The claimant was not dismissed because of his disability.
99. Neither was the claimant treated unfavourably because of something arising in consequence of his disability. To infer that the tribunal would have to make findings upon which there was no evidence before it. No evidence was produced that the claimant had acted the way he had as a consequence of matters arising out of his disability. That is a case which was not before this tribunal.

Issue 4.7 (PH issue 11.7)

100. The allegation is that the Respondent failed to re-refer the claimant after the incidents on 1 and 2 June, and ignored his request for a referral on 7 November prior to the disciplinary hearing. There were two occupational health reports, one of 20 April and one of 30 November. Any failure to make other referrals was not because of the claimant's disability and the

tribunal accepts the respondent's submissions that that allegation was not put to the relevant witnesses.

Issue 4.2 (PH issue 11.2)

101. The allegation is that Governor Cartwright made a decision not to allow the claimant to return to Highpoint prison and should have referred him to occupational health before making such a decision, and as a reasonable adjustment the claimant should have been allowed to work at Highpoint prison after the 19 January 2017.
102. The respondent has produced to the tribunal a reasonable business case why the claimant could not return to HMP Highpoint prison: -
 - 102.1. The relationship with the Governor had broken down.
 - 102.2. Other prisoners at Highpoint would know the claimant had assaulted a prisoner which would likely put the claimant at risk.
 - 102.3. The impact on the claimant's return on staff who had given evidence against him.
103. There was no less favourable treatment connected with the claimant's disability in relation this.
104. The decision not to allow the claimant to return was not because of his disability but because of those business reasons which were reasonable in the circumstances of this case.

Issue 4.13 (PH Issue 11.13)

105. Governor Cartwright is criticised in his letter of 19 January for stating that the claimant should have informed the respondent of his disability. This refers to Mr Cartwright's outcome letter. The tribunal accepts that this was a reasonable management request and legitimate to make particularly bearing in mind the environment in which the claimant was working. The respondent has a duty of care towards the claimant and he also had a duty of care in relation to his own situation within that environment. They could not act on matters that he did not bring to their attention. The Claimant's evidence has been accepted that he had not found it easy and did not choose to talk about his mental health condition, however the tribunal cannot accept that it was less favourable treatment on the grounds of his disability to remind him of the obligation upon him when seeking to work full time in the prison environment to advise his employer if his condition was affecting his ability to perform his role.

Issue 4.8 (PH issue 11.8)

106. The allegation is that Governor Cartwright delayed for 6 weeks before making an OH referral following the claimant's reinstatement. It was made

clear to the claimant in the outcome letter that the referral would be made by his new line manager when the claimant took up his new post. There was no less favourable treatment and further it was not connected with the Claimant's disability. It is accepted this was not put to the relevant witnesses.

Issue 4.9.2 (PH issue 11.9.2)

107. That the respondent failed to hold a formal or informal meeting with the claimant in January 2017. The claimant was not fit to attend work and it was a reasonable management decision to take that they did not have a meeting with him during that time. He then did have a meeting on 30 January with Miss Pickles who was to be his line manager at HMP Wayland. There was then a formal attendance review meeting. The meeting therefore was held and the policy followed. In so far as there was any departure, it has not been suggested to the witnesses that this was because of his disability and that claim is dismissed.

Issue 4.15 (PH issue 11.15)

108. The claimant is critical of Governor Cartwright's stating that the correspondence with him had ended, and that there was not another level of appeal. It is quite clear from the claimant's correspondence that in effect he was trying to initiate another level of appeal and it was perfectly reasonable for Governor Cartwright to say he had fulfilled his role as the appeals officer and that their correspondence should end. He had made his decision, re-instated the claimant, made it clear that he would be contacted by a line manager and he was to have no further involvement. He was director level and not part of that line management structure. There was no less favourable treatment and even if there were to have been any it was not in connection with the claimant's disability.

Issues 4.9.3 and 4.9.4 (PH issues 11.9.3 and 11.9.4)

109. The allegation is that the Respondent failed to follow the policy in not monitoring or reviewing the claimant's disability, managing his attendance and not following up on counseling.

110. There were occupational health referrals and it can be seen from Tony Hampson's log that there was monitoring. The Claimant was also subject to the FARM meeting once he had been re-instated. It was never put to any of the Respondent's witnesses that they should have followed up counseling, but in any event that would have been a confidential matter between the claimant and his counsellor. There was no less favourable treatment in relation to the claimant's disability.

Issue 4.11 (PH issue 11.11)

111. The allegation is that the respondent failed to acknowledge the claimant was injured at work and failed to follow its own process for reimbursing him for the cost of his dental treatment.
112. The respondent has never disputed that the claimant was injured at work. This is specifically acknowledged in Mr Smith's witness statement, and in Mr Hampson's log he refers to the claimant's mouth and teeth. The respondent's policy is that it is the responsibility of the employee to trigger the process to be reimbursed for the cost of dental work which the claimant has not done to date. This cannot amount to less favourable treatment because of his disability of depression, there was no evidence of that and it is not a matter arising in consequence of his disability.

Observation

113. Although the tribunal has not found any failure to make reasonable adjustments on the facts of this case it does wish to express its concern that the respondent and Mr Hampson in particular referred to any decision particularly about the return to work being the employee's alone and that decisions were made in conjunction with the employee but "led by the employee". It seems to the tribunal that in some cases that could lead to their being a failure to make reasonable adjustments. The duty to make reasonable adjustments is on the employer and not on the employee. To adopt a system whereby such decisions are as stated "led" by the employee could result in the employer, in a different factual matrix, being in breach of its statutory obligations under the Equality Act 2010.

Employment Judge Laidler

Date: 23 November 2017.....

Sent to the parties on: ...23/11/2017.....

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For the Tribunal Office