EMPLOYMENT TRIBUNALS

Claimant: Ms L Sweet

Respondent: Secretary of State for Justice

HELD AT: Liverpool **ON:** 5, 6, 7 September 2018

BEFORE: Employment Judge Horne
Mr M Gelling
Mrs J E Williams

REPRESENTATION:

Claimant: Mr Campion, Counsel
Respondent: Mr Redpath, Counsel

Judgment having been sent to the parties on 24 September 2018 and the respondent having requested written reasons orally at the hearing, the following reasons are provided:

REASONS

Introduction

1. These reasons are to be displayed on the tribunal's website which is visible to the public. In some respects they are more detailed than the oral reasons given by the tribunal at the hearing. Some of the detail mentioned in the oral reasons, however, is not reproduced here. In particular, we have left out operational information about the security arrangements for a prison. Our findings about these security arrangements helped us to reach our eventual conclusion that the claimant's duties were restricted more heavily than they should have been. The same findings also, in our view, support our finding that, had the respondent acted proportionately, the claimant would still have had a strong sense of grievance.
2. At the conclusion of the hearing the respondent expressed a preference for information of this kind to be omitted from the tribunal's reasons. We agreed to

accommodate the respondent's wishes and made a case management order dated 10 September 2018 for the management of any request for reasons in any more detail.

Complaints and issues

3. By a claim form presented on 29 November 2017, the claimant raised a single complaint of discrimination arising from disability, contrary to section 15 of the Equality Act 2010. The claimant was, and still is, employed by the respondent as a prison chaplain. At the time with which this claim is concerned she was based at Her Majesty's Prison Risley. She has been disabled since birth. The disability that is relevant to this claim is left-sided hemiparesis with an associated foot drop. There is no dispute that the respondent treated her unfavourably in July 2017 by placing her on restricted duties against her wishes. Nor is there any dispute about the reason why she was treated in that way. In consequence of her disability, the claimant had a tendency to fall whilst at work. That tendency led to a senior manager forming the belief that aspects of the claimant's role presented too high a risk to the claimant's safety and the security of the prison. Restricting the claimant's duties was undoubtedly a means of maintaining appropriate measures for health, safety and security. Those aims are plainly legitimate. What we have to decide is whether the means were proportionate to those aims.

4. At the outset of the hearing the claimant applied to amend her claim to allege that the unfavourable treatment had continued until April 2018. We refused the amendment, giving our reasons orally at the time. Written reasons for this decision will not be provided unless a party makes a request in writing within 14 days.

5. If the claim is well-founded, further issues arise in relation to remedy. The claimant has not suffered financial losses, but seeks damages for injury to her feelings. The parties disagree about what the appropriate award should be. If damages are awarded, there is a dispute about whether they should be increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 for alleged failure to comply with the ACAS *Code of Practice 1 – Disciplinary and Grievance Procedures.*

Evidence

6. Three witnesses were called by the respondent. These were Mr Makan, Mr Laidlaw and Mr Gregory. The claimant gave oral evidence on her own behalf. All four witnesses confirmed the truth of their written witness statements and answered questions.

7. We considered documents in an agreed bundle, concentrating on those documents to which the parties drew our attention in the witness statements and orally during the course of the hearing.

Facts

8. The respondent is responsible for prisons including Her Majesty's Prison Risley, or "HMP Risley" for short. It is a Category C prison in Cheshire. It houses Category C prisoners and prepares them for eventual release. Amongst the prison population are prisoners serving sentences exceeding 12 months for violent crimes, arson, drug dealing and sex offences.

9. Prisoners at HMP Risley have access to chaplains of a variety of faiths. They operate from the Chaplaincy, which includes a multi-faith chapel and Chaplaincy Office. Work in the Chaplaincy is assisted by Orderlies. These are prisoners who are specially assessed as being suitable. The chaplains' clerical and administrative work is done partly in the Chaplaincy Office and partly in the Administration building.

10. At the time with which we are concerned, the chaplains were line managed Mr Makan, the Managing Chaplain. In turn, Mr Makan reported to Mr Laidlaw, Head of Reducing Reoffending. Effectively, Mr Laidlaw was third in charge at the prison and occasionally deputised for the Governor.

11. The claimant is an ordained priest. She began her employment as an Anglican chaplain with the respondent on 29 August 2014. Her employment continues to this day, although, because of the events we describe here, she was eventually re-assigned to a Category D prison, HMP Thorn Cross.

12. Prior to starting her employment, the claimant completed a pre-employment health questionnaire. On the form the claimant declared that she was disabled and that she had a medical problem which caused her problems with walking and climbing stairs. The questionnaire did not specifically ask her whether or not she had any tendency to fall over. The claimant did not go out of her way to mention it.

13. The normal duties of a prison chaplain were set out in a written job description, supplemented by a more informal written presentation prepared by Mr Makan. Although the presentation was only written about 7 to 8 months ago, it is still a helpful document in the light of Mr Makan's oral evidence that it reflects the exact same duties that the claimant had at the time of the alleged discrimination. To summarise, an Anglican chaplain would be expected:

    13.1. To visit every prisoner within 24 hours of arrival;

    13.2. To see all prisoners on the Care and Separation Unit daily;

    13.3. To visit daily all prisoners designated for self-harm support;

    13.4. To attend daily review meetings;

    13.5. To help and support prisoners at times of bereavement and serious family illness;

    13.6. To risk-assess and arrange prisoners' release to attend hospital and funerals;

    13.7. To receive telephone calls from prisoners' loved ones;

    13.8. To respond to prisoners' requests to see a chaplain, either by appointment or by being stopped on the prison wing;

    13.9. To conduct Sunday worship in the prison chapel;

    13.10. To facilitate a Bible study group on a Monday evening.

14. Most of these tasks require a chaplain to move freely around the prison, entering prison wings and prisoners' cells as and when needed. Some duties (such as Sunday worship) were performed in the chapel. Others, such as taking telephone calls and attending review meetings, were done in the chaplaincy office, which was located in a separate building from the prison wings.

15. The Sunday service was open to prisoners from all wings. As well as enabling them to join in collective worship, the Sunday service also provided prisoners with an opportunity to meet prisoners from other wings. Unfortunately, from time to time, some prisoners would take advantage of this social opportunity for illegitimate purposes, such as settling grudges or trading in illicit items. Partly for this reason the Sunday service was supervised by prison officers.

16. If we were called upon to provide more extensive reasons, we would describe in detail which keys the claimant carried, which doors they would open, which keys the claimant would use to get to particular parts of the prison, and the assistance that the claimant needed in order to open particular doors.

17. It hardly needs to be said that the respondent takes prison security very seriously. Without revealing operational details, it is sufficient to say that prison keys are heavily protected. Procedures are in place to minimise the risk of any prisoner having any opportunity to take any key that would allow access to any part of the prison.

18. For a number of years, the respondent has experienced challenges associated with violence, disorder and drug use in prisons, including HMP Risley. The reasons for these problems are complex and we do not need to analyse them. It is sufficient to note that in 2017, managers at the prison were particularly concerned about the risk of disorder. They also received intelligence during the course of 2017 that suggested that certain prisoners were looking to target vulnerable people for illegitimate purposes of their own.

19. Prison chaplains are generally less at risk of assault than prison officers. The nature of a chaplain's role is such that they are less likely than prison officers to be in situations of potential conflict with prisoners. That said, to Mr Laidlaw's knowledge, prisoners have previously threatened a Roman Catholic chaplain and an imam, although there was no physical violence in either case.

20. The claimant has always been medically fit to carry out her role. She does, however, have a problem with falling over. Her foot-drop means that she has a tendency to trip. Because of her left-sided weakness, if she does trip, she is less able to recover her balance, so she falls to the ground. She experiences falls regularly and unpredictably. She might go for a couple of months without falling at all. At other times she falls more than once in the same week. When she does fall, her left-sided weakness sometimes makes it more difficult for her to get up again immediately.

21. Some of these falls have occurred at work. According to the respondent's accident records, the claimant fell over on six separate occasions during the 12 months ending on 25 October 2016. The incidents happened in a variety of locations including prison wings, outdoor paths outside the wings and the visitors centre. Despite the frequency of these events, Mr Makan did not know about the claimant's history of falling until about October 2016.

22. On 8 December 2016, a prison officer informed Mr Makan that the claimant had fallen on D Wing. Mr Makan also learned that the claimant had fallen whilst walking on the grass. By this time, Mr Makan was sufficiently concerned to make a referral to occupational health. He sent his referral on 28 December 2016. In the meantime, on 4 January 2017, the claimant had another fall, this time on E Wing.

23. On 16 January 2017, Ms Maureen Allen, an occupational health advisor, prepared an interim report that was delivered to Mr Makan the following day. Amongst other things, Ms Allen advised,

> "… she is not fit to be on the prison premises/have prison contact as she is a hazard to herself and her client group. Her safety is of paramount importance and walking around the premises with the ever evident possibility of falling is not conducive to duty and care in the establishment."

24. Ms Allen also noted that the claimant was "very angry with all this information and vehemently refuses to accept that there is anything further wrong with her that the business did not know about when they gave her the job".

25. On 18 January 2017 the claimant arrived at work covered in mud. On being questioned by Mr Makan, the claimant said that she had slipped whilst crossing the road.

26. Mr Makan discussed the recent incidents and the contents of the report with Mr Laidlaw. They agreed that the claimant's duties should be temporarily restricted. With the narrowing of her duties came a reduction in the profile of keys that she was allowed to carry. Initially, the claimant was confined to the Chaplaincy, having no unsupervised contact with prisoners apart from Chaplaincy Orderlies. Later the claimant was allowed to go to the Administration building to collect post and do photocopying. Her work in the Chaplaincy Office included taking telephone calls, arranging funerals and preparing documentation for a forthcoming inspection. She continued to take the Sunday service. On Mondays, she continued to lead the Bible study group, chaperoned by a member of the Chaplaincy team. In order to ensure adequate supervision, Mr Makan often stayed behind after hours.

27. In an effort to keep the claimant meaningfully occupied, Mr McCann also asked her to facilitate a volunteer-led prisoner course called, "Sycamore Tree". This would not normally have formed part of the claimant's duties. Whilst helping with the course, the claimant occasionally had unsupervised contact with prisoners whilst carrying keys.

28. All other duties of the claimant's role were temporarily removed. In general terms, these were the duties that required the claimant to enter prison wings or to have unsupervised contact with prisoners. There was, however, an exception. The claimant could have participated in supervision meetings whilst remaining in the Chaplaincy and without having any prisoner contact. These meetings took place every one or two months.

29. On 10 February 2017, Dr Sofia Erikkson, the claimant's consultant neurologist, prepared a report that was passed to the respondent's occupational health provider. The report stated, in summary, that the claimant's disability had not changed.

30. The claimant's occupational health referral was passed to Dr Richard Archer, an occupational health physician. His final report was prepared on 6 February 2017. He noted that the claimant "may be slightly more likely to stumble and not regain her balance than colleagues, but there is no reason to suppose that either her risk of falls or seizures is changed over many years." He added:

> "In terms of her fitness for prisoner contact and carrying keys you do have to take into account management's and colleagues' observations of any absences or falls, and determine whether these incidents and carrying keys and prisoner contact pose a risk, but at the same time you need to ensure that risk assessments are proportionate."

31. Dr Erikkson reported again on 4 April 2017 essentially repeating that the claimant's left-sided weakness had not changed.

32. The claimant was not happy with the restriction on her duties and with the slow pace of obtaining updated occupational health advice. Her polite but insistent e-mail of 11 April 2017 shows her frustration at that time.

33. On 25 April 2017 Dr Alam, a consultant occupational health physician, prepared a report taking Dr Erikkson's opinion into account. In Dr Alam's opinion, the claimant was "medically fit to resume full duties of her job role".

34. Mr Laidlaw was unconvinced by Dr Alam's report, but felt that he had no choice but to abide by it. He held a meeting with the claimant on 18 May 2017. At the meeting he explained to the claimant that she could resume her normal working practices. There was, however, a sting in the tail. Mr Laidlaw told the claimant that "if there was another episode of you falling or finding yourself incapacitated in any way, the prison would have to take immediate remedial action, which will entail making reasonable adjustments pending medical advice." His decision, with its important caveat, were confirmed in an e-mail sent to the claimant the same day.

35. All went well for about 4 weeks. Then, on 14 June 2017, the claimant had another fall as she was entering G Wing. On 3 July 2017 the claimant was on E Wing when she fell in front of some prisoners.

36. The claimant's two most recent falls came to the attention of Mr Laidlaw. At that time Mr Laidlaw was acting up as Deputy Governor in addition to his substantive role. His workload was extremely busy. He did not stop to analyse the risks. He did not consider whether there had been any change in risk since the period from January to May 2017. He decided that, in order to protect the claimant and the prison, he needed to remove the claimant's keys and prevent future prisoner contact. He made his decision without any thought to whether there had been any change in the level of risk. Our finding is that there had in fact been no actual change in risk level. All that had changed was the opinion of Mr Laidlaw about how that risk should be controlled.

37. Mr Laidlaw's decision meant, effectively, that the claimant could do virtually none of her normal duties as a chaplain. For reasons that we would explain more fully if needed, she could not even enter the Chaplaincy office. The claimant was told to go home and get a "sick note". The claimant's GP was rightly rather confused by this request. There was no need for her to obtain a GP fit note, because she was well enough to work. The claimant's feelings were rather stronger. Remembering Mr Laidlaw's warning on 18 May 2017, she was not surprised by having her keys removed, but she was nonetheless upset and deeply aggrieved. She felt bullied and intimidated at being required to submit a fit note. Nonetheless, the claimant did as she was instructed and remained at home.

38. On 6 July 2017, Mr Makan made a further referral to Occupational Health. The claimant was seen by Ms Allen, who prepared a report on 19 July 2017. Her report stated:

> "The prison site is not conducive to people falling recurrently; [the claimant] is vulnerable in this setting for various obvious reasons, she also carries keys. There is a duty of care to her and her client group and in my opinion should not be allowed to work where there is potential that she may be vulnerable in her health and safety.
>
> I suggest that she is taken off prisoner contact and drawing down keys immediately until we can get an occupational therapist assessment performed."

39. The same day, 19 July 2017, the claimant raised a formal grievance alleging disability discrimination. In essence, the substance of the complaint was partly that it has been inappropriate to require the claimant to submit a fit note when she was medically fit for work, and partly that her duties should not have been restricted.

40. On 24 July 2017, Mr Makan, together with Mr Bevan, Health and Safety Officer, completed a written risk assessment document with a view to allowing the claimant to return to work on restricted duties. Although the document was a risk assessment in form, the thought process in substance did not really involve analysis of risk at all. Mr Makan took it for granted that the claimant would not have keys or prisoner contact. This was not the product of his own risk assessment, but an inevitable consequence of Mr Laidlaw's decision. All that remained for Mr Makan was to try to find something for the claimant to do within those constraints.

41. The risk assessment document reiterated the decision that the claimant should have no keys or prisoner contact. It added that the claimant should have restricted duties in the Administration Building and the Visitor Centre. This was an improvement on being required to stay away from work altogether. On any view, however, the claimant was subject to a far greater restriction in the claimant's duties than had been in force between January and May 2017.

42. At no point in 2017 was the claimant offered any temporary or permanent transfer to a prison such as Thorn Cross. Mr Makan did not think it would be appropriate to offer such a move, because he did not think the claimant would take it well. For that reason he did not look into the question of whether such a move would be available.

43. The claimant's work in the Administration Building was largely based in the post room. She spent her time sorting, packaging, franking and distributing mail, with occasional photocopying and filing tasks in other parts of the building. Much of this work was physically unsuitable for her as well as having no relevance to her role. The claimant found the work demoralising. She felt isolated from the Chaplaincy.

44. In the afternoon, the claimant went to the Visitor Centre to speak to family and friends of prisoners as they waited to enter the prison for their visit. This new responsibility at least called on her pastoral skills, but the claimant found it frustrating because she had no contact with the prisoners themselves, so could not follow through any concerns raised by their loved ones.

45. In order to work in the Administration Building without a key, the claimant had to be escorted to and from the main gate. The claimant found the experience demeaning.

46. At this point we ought to record that, in the reasons announced orally to the parties, the employment judge stated that the decision to allow the claimant to work in the Visitor Centre was not made until November of 2017. This part of the oral reasons was incorrect. At the conclusion of the hearing, counsel for the respondent rightly pointed out the error. The employment judge informed the parties that he would consult the lay members of the tribunal with a view to deciding whether or not to reconsider the judgement on the tribunal's own initiative. Following the hearing we discussed whether our conclusions would have been any different had we found that the claimant's work in the visitor centre had begun in July 2017. We unanimously decided that this point of detail made no difference to our conclusions either in relation to liability or remedy.

47. Just as it had been during the period February to May 2017, the claimant was not invited to Chaplaincy meetings. Whereas during that earlier period there had been no reason why she could not participate, there was now a practical obstacle: the claimant could not get into the Chaplaincy without a key.

48. The reader will recall that part of Ms Allen's recommendation was for there to be a referral to an occupational therapist. Mr Makan made this referral in August 2017. One would think that, on receipt of the referral, it would have been relatively straightforward for the occupational health provider to arrange an occupational therapist appointment for the claimant. Unfortunately, this simple step took an inordinately long time. Mr Makan complained about the service on 8 February 2018.

49. This was not the only delay. It also took a long time for the claimant's grievance to be heard. A meeting was initially scheduled to take place in August 2017, but it had to be postponed due to the unavailability of the claimant's trade union representative. Mr Makan, who was appointed to consider the grievance, took sick leave for several weeks starting on 22 August 2017 and did not return to work until 2 November 2017. In a telephone call with the claimant Mr Makan offered to return to work specially in order to hear the grievance, but it was clear to the claimant that he was far too ill to do so. During his absence Mr Makan submitted a series of short-term fit notes, leaving it the possibility open that he might return to work in a matter of days.

50. On 12 September 2017, the claimant e-mailed Mr Laidlaw to chase the progress of her grievance. On 18 September 2017 the claimant's union representative, Ms Brennan, e-mailed to place on record her disquiet about the length of time it was taking to complete the grievance process. She specifically raised concern about the possibility that the grievance may not take place until Mr Makan returned to work and asked for the grievance to be allocated to someone else. Despite having received this e-mail, no attempt was made to find another manager who could hear the claimant's grievance in Mr Makan's place.

51. The claimant found the latter part of 2017 very demoralising. She was doing physically unsuitable work that was completely unrelated to her role and could do nothing about it because the progress of her grievance had effectively ground to a halt.

52. On 26 October 2017, Dr Alan Scott, occupational health physician, reported as follows (with original emphasis):

> "This is not a health issue, it is a SAFETY one and needs to be resolved by the employer.
>
> Any employee could trip and fall over at work, so the question here is the extent to which the impaired function of [the claimant's] left leg increases the risk of that happening and what the consequences would be after she had fallen over.
>
> In other words, this is a SAFETY issue not a health one, and it is for the employer to carry out a risk assessment and decide on any further action as a result of that."

53. The claimant's claim was presented on 29 November 2017. The claim form, which was prepared by the claimant's solicitors, gave a very detailed narrative of events.

54. After the presentation of her claim, the claimant continued to feel upset and frustrated by the slow pace of her grievance. She also continued to feel isolated and demeaned because of her inability to carry out her role. Our decision on the claimant's application to amend means that we must be careful in our approach to the claimant's hurt feelings after November 2017. Prolonged upset at the continuing restriction in her duties may not have been caused by the initial unfavourable treatment if they were actually due to a state of affairs that was no longer discriminatory. Mr Campion acknowledged on the claimant's behalf that we must try to disentangle these hurt feelings (which are not recoverable) from the residual hurt that was directly caused by the alleged discrimination that occurred in July 2017. Bearing this distinction in mind, our finding is that, from November 2017, the claimant continued to be upset about how she had been treated in July 2017. She was also frustrated about the slow progress of her grievance, which was only made necessary by the respondent's initial treatment of her.

55. Eventually a grievance meeting took place on 7 December 2017. Mr Makan then reached a decision which was communicated to the claimant on 18 December 2017. He upheld the grievance so far as it related to the fit note. He thought, however, but the restriction on the claimant's duties had been justified. Moving forward, Mr Makan agreed that the claimant should be permitted to conduct Sunday services, provided that she was accompanied by a key carrier. Because of difficulties in arranging cover, she could not actually start taking Sunday worship until February 2018.

56. The claimant appealed against the grievance outcome. Her appeal was heard by Mr Laidlaw on 7 February 2018. Mr Laidlaw decided to wait for the occupational therapist report before making his appeal decision.

57. On 2 February 2018 a preliminary hearing took place before Employment Judge Sherratt. Mr Brand, the claimant's solicitor, told the employment judge at the hearing that the claimant sought compensation that would be "probably lower-band Vento".

58. The occupational therapist report finally arrived on 22 March 2018. Its key recommendation was that the claimant was fit to return to work with the aid of a

walking stick. The therapist also recommended that the claimant carry items in a bag "Bandolier"-style across her back. The walking stick was purchased for the claimant. On 11 April 2018, she returned to full duties and her keys were returned to her

59. With hindsight, it is possible that the claimant's walking stick may have been more of a hindrance than a help. Following her return to work, the claimant fell two more times. On 23 April 2018 the claimant was on C Wing when she tripped over her own walking stick and fell. A prisoner offered to help her to her feet but she asked the prisoner to stand back. On 11 May 2018 Mr Makan found the claimant unconscious. She remained in that state for about two minutes before she revived. There is a dispute, which we do not need to resolve, about what precisely caused her to lose consciousness.

60. Following these falls, a further occupational health report was obtained. Ultimately it was agreed that the claimant would transfer to HMP Thorn Cross. Initially the transfer was on a temporary basis, but it was subsequently made permanent. If there was any difficulty in making these arrangements, we did not get to hear about it.

61. At Thorn Cross the prisoners are assessed as presenting a lower risk. All occupants, including chaplains, have more freedom to move around the prison than they do at a Category C prison. Details of the extent of the difference can be provided if it is considered necessary. The claimant, in her words, was able to minister more easily in her new workplace. She felt she was able to do good at Thorn Cross as she had at Risley.

Relevant law

Discrimination arising from disability

62. Section 15(1) of EqA provides:

> (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.

63. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565*,* applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

64. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

65. The *Code* offers guidance on the interrelationship between the making of adjustments and the proportionate means defence. The following extract appears to us to be relevant:

> "5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments…
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.
> …"

66. Paragraph 5.21 of the *Code* is consistent with the following statement made by Simler J in *Dominique v. Toll Global Forwarding Ltd* UKEAT/0308/13 (concerning the Disability Discrimination Act 1995) at paragraph 51:

> "….where there is a link between the reasonable adjustments said to be required and the disadvantages …being considered in the context of ….disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a reasonable adjustment that has not been made can, as a matter of practical reality, be justified."

67. Whether unfavourable treatment was proportionate or not must be judged according to the circumstances prevailing at the time of that treatment. During final submissions, however, a point of law arose as to what evidence we should consider in determining what those circumstances were. Should we confine our analysis to the evidence that was before the respondent at the time of the unfavourable treatment? Or can we take into account evidence that has since come to light, such as an occupational therapist's report? In our view, the latter is more likely to be the correct statement of the law. The question of proportionality is entirely objective. It is not an analysis of the respondent's mental processes. If a subsequent occupational health physician's report, or occupational therapist's report, suggests that risks were not actually as severe as they had earlier been thought to be, or suggests that they could have been controlled with a lesser degree of restriction in the claimant's duties, we do not see any reason why we should not take such evidence into account. If our view is held to be wrong, and we are constrained in our analysis to the evidence that was available to the respondent at the time of the original unfavourable treatment, we would add that we should not just consider the evidence which the respondent actually *had,* but also such evidence as the respondent could have been reasonably expected to have obtained.

68. In his skeleton argument, Mr Campion made a point on the claimant's behalf that it is for an employee to decide for herself what risks she will run when coming to work. Employers cannot be required at common law to refuse to employ someone who is willing to work for them simply because they think that it is not in the person's best interests: *Withers v. Perry Chain Co Ltd* [1961] 1 WLR 1314. This case was decided in the context of an employer's tortious liability for illness or injury to an employee whilst at work. In that context, we have no difficulty in accepting Mr Campion's argument. What we are concerned with, however, is something different. For the argument to have any relevance to this case, the argument would have to be that restrictions in an employee's duties to protect an

employee's safety will be disproportionate where the employee has chosen to accept the dangers. We do not think that this is an accurate statement of the law. A safe workplace is not just a means to avoid liability for personal injury claims. It benefits employers and employees alike. Employers can legitimately do more to protect an employee's safety than the common law requires them to do, even if that means restricting a disabled employee's duties. The absence of tortious liability, and the respect for an employee's autonomy, are of course *factors* in deciding what level of restriction is proportionate, but the weight to be accorded to such factors must vary according to each case.

Damages for injury to feelings

69. The starting point is section 124 of the Equality Act 2010:

> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> …….
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by a county court … under section 119.

70. It is well established that compensation is not limited to financial losses but can include an award for injury to feelings. In *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102 the Court of Appeal gave guidance as follows in paragraphs 65-68:

> 65. Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.
>
> i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

66. There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case.

67. The decision whether or not to award aggravated damages and, if so, in what amount must depend on the particular circumstances of the discrimination and on the way in which the complaint of discrimination has been handled.

68. Common sense requires that regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular, double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case."

71. Subsequently in *Da'Bell v NSPCC* [2010] IRLR in September 2009 the EAT said that in line with inflation the Vento bands should be increased so that the lowest band extended to £6,000 and the middle band to £18,000. However, a Tribunal is not bound to consider the effect of inflation solely pursuant to *Da'Bell*. In *Bullimore v Pothecary Witham Weld Solicitors and another* [2011] IRLR 18 the EAT chaired by Underhill P said in paragraph 31

> "As a matter of principle, employment tribunals ought to assess the quantum of compensation for non-pecuniary loss in "today's money"; and it follows that an award in 2009 should – on the basis that there has been significant inflation in the meantime – be higher than it would have been had the case been decided in 2002. But this point of principle does not require tribunals explicitly to perform an uprating exercise when referring to previous decided cases or to guidelines such as those enunciated in Vento. The assessment of compensation for non-pecuniary loss is simply too subjective (which is not a dirty word in this context) and too imprecise for any such exercise to be worthwhile. Guideline cases do no more than give guidance, and any figures or brackets recommended are necessarily soft-edged. "Uprating" such as occurred in *Da'Bell* is a valuable reminder to tribunals to take inflation into account when considering awards in previous cases; but it does not mean that any recent previous decision referring to such a case which has not itself expressly included an uprating was wrong."

72. Paragraph 10 of the *Presidential Guidance - Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879* states:

> "…in respect of claims presented on or after 11 September 2017, and taking account of *Simmons v. Castle* and *De Souza v Vinci Construction (UK) Ltd,* the Vento bands shall be as follows: lower band of £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that do not merit an award in the upper band)…"

73. Where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort (*Hurley v Mustoe (No 2)* [1983] ICR 422*, EAT*). it is on the basis that as best as money can do it, the claimant must be put into the position he would have been in but for the unlawful conduct of his employer (*Ministry of Defence v Cannock* [1994] IRLR 509*,* per Morison J at 517, [1994] ICR 918*, EAT*).

74. We have borne in mind some further general principles, for which we do not cite authority as we believe them to be uncontroversial:

    74.1. Damages for discrimination are compensatory, not punitive.

    74.2. The purpose of damages should be to restore the claimant to the position she would have been in had the discrimination not occurred.

    74.3. Tribunals should not allow any feelings of indignation at the respondent's conduct to inflate the award.

    74.4. Awards for injury to feelings should bear similarity to the range of awards made in personal injury cases. Tribunals should keep awards in perspective and not make them unduly low or high.

    74.5. In assessing the correct sum, tribunals should remind themselves of the value of the award in everyday life.

    74.6. The discriminator must take the employee as it finds her. This is sometimes known as the "eggshell skull" principle.

75. We have had regard to the *Judicial College Guidelines for the Assessment of Damages in Personal Injury cases, 14th Edition.* We considered the guidelines for psychiatric injuries to be of particular relevance. We set out the extract with the guideline awards **inclusive** of the *Simmons v. Castle* 10% uplift.

> The factors to be taken into account in valuing claims of this nature are as follows:
>
> (i) the injured person's ability to cope with life, education and work;
>
> (ii) the effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;
>
> (iii) the extent to which treatment would be successful;
>
> (iv) future vulnerability;

(v)	prognosis;	
(vi)	whether medical help has been sought…	

(c) Moderate £5,130 to £16,720

While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.

(d) Less severe

£1,350 to £5,130

The level of the award will take into consideration the length of the period of disability and the extent to which daily activities and sleep were affected.

Adjustment of awards

76. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies to proceedings before an employment tribunal relating, amongst other things, to complaints of unfair dismissal. The section provides, relevantly:

"

(1) If…it appears to the employment tribunal that-

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

…"

77. Paragraph 1 of the ACAS *Code of Practice 1 – Disciplinary and Grievance Procedures (2015)* provides:

"… Grievances are concerns, problems or complaints that employees raise with their employers."

78. Paragraph 33 requires that:

"Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received."

Conclusions on liability

79. We remind ourselves that the sole issue for us to decide is whether or not the restriction of the claimant's duties in July 2017 was proportionate.

80. Before addressing that question head-on, we look at a slightly different question, because it may help the reader to understand our approach to remedy. We have asked ourselves whether it would have been proportionate in July 2017 to deny the claimant unsupervised contact with prisoners (apart from Orderlies) whilst holding a key. In our view, that level of restriction would have been justified. Our reasons, essentially, are as follows:

80.1. Without revealing operational details, we cannot explain exactly which duties would have had to be removed from the claimant, but the restriction in prisoner contact would have been substantial.

80.2. Chaplains were generally less at risk of assault than prison officers, but they were not immune and the claimant was more at risk than other chaplains.

80.3. By July 2017 the claimant was falling over far more frequently than would be expected of an employee just about any workplace. Some of those falls were in the presence of prisoners. If the claimant was on the ground she was particularly vulnerable to attack by a prisoner determined to steal a key.

80.4. Just because the prisoners were Category C and nearing the end of their sentences did not mean that they only posed a low risk. Category C encompasses a broad range of prisoners at different risk levels. Incidents of disorder at Risley were on the increase. There were prisoners at Risley who were believed to be waiting for an opportunity to exploit someone vulnerable. At least some prisoners knew by July 2017 that the claimant had a tendency to fall over.

80.5. Even if there were no violence, a prisoner would have an opportunity to take a key before the claimant knew what was happening. It hardly needs to be said that if a prisoner obtained a set of keys, the consequences for prison security could be catastrophic. We would explain more if called upon, but the theft of just one key would be enough for prisoners to create havoc.

80.6. We have considered whether, as an alternative to restricting unsupervised prisoner contact, the respondent could have put in place the adjustments that were subsequently recommended by the occupational therapist. In our view, those adjustments would not have reduced the risks to an acceptable level. Even with the walking stick and Bandolier-style bag, the claimant continued to fall.

80.7. Though it would still have made the claimant unhappy, she could not reasonably have complained had she been prevented from unsupervised prisoner contact whilst holding a key.

81. This brings us to the question at the heart of this claim. Was it proportionate to go beyond restricting unsupervised contact and to take away the claimant's keys and prisoner contact altogether?

82. The discriminatory impact of this unfavourable treatment was stark. It effectively prevented the claimant from carrying out her role. The sole reason for the treatment - the claimant's tendency to fall - arose directly in consequence of her disability.

83. The aim of maintaining appropriate measures for safety and security could have been achieved by preventing unsupervised contact with prisoners (other than Orderlies) whilst carrying a key. For reasons which we would explain more fully if we had to do so, this security precaution would not have prevented the claimant from entering the Chaplaincy.

84. We find that the respondent would have been able to achieve its aim whilst permitting the claimant to do following:

    84.1. Moving around the Chaplaincy. The only prisoners with whom the claimant would have contact would be Orderlies. The fact that Orderlies had been specially trusted meant that there was no significant risk of an assault by an Orderly or a key theft by an Orderly.

    84.2. Office-based Chaplaincy work. Just as in February to May 2017, the claimant could have arranged funerals and hospital visits, answered telephone calls, and assisted with Chaplaincy documentation. Having access to the Chaplaincy would also have made Visitor Centre outreach more meaningful, as it would have enabled the claimant to follow up on conversations with the prisoners' friends and family.

    84.3. Attending Chaplaincy meetings. This would have made her feel more valued and would have made it easier to return to her role.

    84.4. Preparing and conducting Sunday worship. This was a significant part of her role. In fact, it was a duty that the claimant could have done even without a key. The fact that it did not start until February 2018 is explained by the fact that the necessary cover had already been allocated elsewhere by the time of the grievance outcome. Had the decision been taken to allow Sunday worship in July 2017, there is no reason to think the required cover could not have been arranged much earlier. As it is, we find that the respondent did not need to remove the claimant's keys altogether. There was no need for cover, because prison officers attended the Sunday service in any event.

    84.5. Leading Bible study. This was a part of her role, closely connected to her ministry, that the claimant had been consistently able to do between February and May 2017. There would, of course, have been practical problems between August and November whilst Mr Makan was absent from work and unable supervise. At other times, however, we do not see why the claimant could not have been permitted to continue.

85. All of these responsibilities would have been far more meaningful and relevant to her role than the work that the claimant was actually given to do in the Administration Building.

86. We have decided that all of these duties would have been consistent with the respondent achieving its legitimate aim. In coming to this view, one fact that we cannot ignore is that the claimant was permitted to do all these things between February and May 2017. The level of risk had not changed between February and July 2017. Her falls were no worse and no more frequent. There is no evidence that anything happened in the prison in those 5 months to suggest that prisoners were any more likely to exploit the claimant falling than they had been before. If the claimant could safely do those duties in February, she could safely do them in July.

87. The respondent argues to the contrary. Mr Redpath submitted that, in the light of Ms Allen's report of 19 July 2017, the respondent had no choice but to remove the claimant's keys altogether and restrict all prisoner contact until an occupational therapist's report had been obtained. We disagree, for three reasons:

    87.1. First, the respondent could not reasonably have considered itself to be constrained by Ms Allen's report. It begged the obvious question of why it was necessary to take away the claimant's keys when they had not been taken between February and May 2017. It appeared to contradict all the medical advice which was that the claimant's tendency to fall had not changed. In any case, Ms Allen's report was superseded on 26 October 2017 by Dr Scott, who pointed out that it was for the employer to assess the risks. Mr Laidlaw did not assess the risks either in July 2017 or October 2017. He was too busy to think through whether there had been any change in risk level since February 2017. As for Mr Makan, he simply implemented Mr Laidlaw's decision.

    87.2. Second, if the respondent had to wait until it received occupational therapist's report, the respondent should have obtained such a report much more quickly than it did. The respondent's argument appears to be that unfavourable treatment that would otherwise be disproportionate was nonetheless proportionate because it needed to take a particular step before any alternatives to the unfavourable treatment could be found. If that is right, any delay in taking that step must be no longer than reasonably necessary. We do not see why it should have taken more than a week or two from 19 July 2017 to arrange an occupational therapist's appointment.

    87.3. Third, in any event, we think that the respondent's argument addresses the wrong question. It goes to the question of whether the respondent reasonably thought that the restrictions were proportionate. But the question of proportionality is one that we have to decide for ourselves. Objectively we do not see why it was necessary to wait for an occupational therapist when the risk could already be adequately managed by restricting the claimant's unsupervised contact with prisoners.

88. Even if the respondent could not have allowed the claimant to carry out her role at Risley within an acceptable safety and security risk margin, the respondent could still have achieved its legitimate aim by temporarily transferring the claimant to HMP Thorn Cross. To the extent that there is any dispute about whether such arrangements were practicable, we decide that they could have been implemented without significant difficulty. The evidence of any practical difficulties is so scant that we can effectively disregard it. The evidence is not

there because the respondent never addressed its mind to the possibility until nearly one year after the unfavourable treatment began.

89. In our view, restricting the claimant to the Administration Building and the Visitor's Centre was disproportionate and unjustified. The respondent therefore discriminated against the claimant arising from her disability.

Conclusion – damages for injury to feelings

90. We start our assessment of damages by trying to establish a baseline. How would the claimant have felt if the restrictions to her duties had been no more than proportionate? On our findings, she would undoubtedly have felt wronged. The best evidence of this is how the claimant actually felt in February 2017 when the more proportionate restrictions were imposed. Her sense of grievance would have continued until she returned to full duties in April 2017.

91. As it was, the actual effect on the claimant's feelings by the disproportionate restrictions was considerably worse than it would have been had the restrictions been kept within proportionate bounds.

92. Two factors accentuated the injury to the claimant's feelings. Neither of them were discriminatory in themselves, but they both arose as a direct consequence of the discrimination that occurred:

    92.1. But for the restriction in her duties, the claimant would not have been told to obtain a fit note. That instruction caused the claimant to feel bullied and intimidated.

    92.2. The effective disappearance of the claimant's role led to her being allocated physically unsuitable work in the post room which the claimant rightly resented.

93. The claimant felt demeaned at having to be escorted; there would have been no need for an escort had the restrictions been proportionate.

94. Although we must proceed on the basis that no actionable discrimination took place after November 2017, we have found that the claimant continued after November 2017 to be upset about the way she had been treated the previous summer and that her frustration at the slow progress of her grievance was a direct result of the original discrimination.

95. We found the *Judicial College Guidelines* to be a useful check on our assessment. In comparing our award with the *Guidelines* we bore in mind that the claimant did not have a diagnosis of any psychiatric injury, but also that that the *Guidelines* do not reflect the very real additional suffering caused by discrimination based on a person's inherent characteristics. It appears that where a relatively minor psychiatric injury has had a substantial effect on the claimant's ability to work and there has been marked improvement by trial, damages inclusive of the 10% uplift would start at approximately £5,000.

96. Mr Redpath reminds us that the claimant's solicitor appeared in February 2018 to have been content with an award for injury to feelings in the lower Vento band. Rightly in our view, Mr Redpath stopped short of arguing that the claimant should be held to the lower band as a matter of law or procedure. Rather, he invites us to infer that the claimant's legal advisors have made an informed assessment of the claimant's likely damages based on what they knew of the actual effect of the discrimination on the claimant's feelings. In our view, this is a point that carries

some force. We do not know, and have no business to enquire, what the claimant told her solicitors that caused them to assess the value of her claim in this way. It is legitimate, however, to infer that the claimant would have given her legal advisors a reasonably good impression of strength of her feelings. It is plain from the claim form itself that the claimant had given very full instructions. By the time of the preliminary hearing, the worst of the discrimination had already happened. The restrictions on the claimant's duties were starting to be relaxed. In particular, the Sunday services restarted around this time. The Vento bands are very well known amongst employment lawyers. The claimant solicitors were well placed to assess the likely award of damages.

97. Taking all of those factors into account we think that the effect on the claimant here was such as to place the award on the borderline between the lower Vento band and the middle band. This was a long-lasting state of affairs that had a very real effect on the claimant's self worth. She did not do the job she was employed to do or practise the ministry for which she had been ordained. The discrimination may have been a single act of unfavourable treatment, but its effects were not short-lived. They lasted many months. We think that an award of £8,800 inclusive of the uplift, would be about the right amount of damages in this case.

Section 207A adjustment

98. The only remaining question is whether the award should be increased for the respondent's alleged failure to comply with the ACAS Code.

99. In order to answer that question, we must first address a dispute about whether the *Code* applied to a matter to which this claim relates. In our view it did. As we have found, the claimant was not just complaining about the demand that she produce a "sick note". She was also clearly bringing to the respondent's attention her unhappiness at the restriction of her duties.

100. We think that the delay up until 18 September 2017 was not caused by any unreasonable failure on the respondent's part. Mr Makan was ill and it was not clear how long his illness was going to last. From 18 September 2017, however, the respondent dragged its heels unreasonably by failing to appoint an alternative manager to hear the claimant's grievance, despite the clear request from the claimant's union representative and the very considerable resources available to the respondent. This failure effectively led to a further delay of more than 2½ months.

101. Had the grievance been resolved earlier, it would not have avoided the claimant bringing her claim. This is apparent from the fact that the claimant brought her claim without waiting for the results of the grievance. It is also clear from the fact that the claimant has always put her case on the basis that she should have been permitted to return to full duties. That was not an outcome that she could reasonably have expected from the grievance process. No matter how prompt the decision, it would have inevitably have left her feeling disappointed. On the other hand, it would probably have lessened the claimant's hurt feelings because she would have been able to start Sunday services sooner.

102. Doing the best, we can, taking into account the unreasonableness of the delay and the impact that it has on this claim, we do not think it is appropriate to

award the full 25% uplift. In our view the just and equitable adjustment is an increase of 10%.

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Employment Judge Horne

26 November 2018

REASONS SENT TO THE PARTIES ON

30 November 2018

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FOR THE TRIBUNAL OFFICE