Case No: 3305303/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr M Croker **Mitie Care & Custody Ltd**

v

Heard at: Watford **On:** 18-22 February 2019

Before: Employment Judge Smail
Mr I Bone, Member
Mr R Jewell, Member

Appearances:

For the Claimant: Mr D Stewart, Counsel
For the Respondent: Mr J Cooke, Counsel

Judgment having been sent to the parties on 7 March 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 29 March 2018, the claimant claims first, constructive unfair dismissal, secondly disability discrimination in the forms of a) failure to make reasonable adjustments, b) direct discrimination, c) harassment, d) discrimination arising from disability.

2. The claimant was employed by the respondent, following at least two TUPE transfers between 17 February 2008 and 30 November 2017. He resigned on 30 October 2017 and it seems that the effective date of termination is treated as 30 November 2017.

3. He was employed as a detention custody officer. The place of work was known, latterly, as Heathrow Immigration Removal Centre. As the name suggests, the centre housed detainees who were subject one way or another to deportation. That would include those subject to a court deportation order. In other respects, it was the Home Office who would decide who was deported. In all cases the Home Office allocated the detainee to the particular institution. Heathrow IRC was an amalgamation of Harmondsworth IRC and Colnbrook IRC. They used to be separately administered, although have always neighboured one another, divided only by the width of a road.

4. On 1 September 2014, this respondent contracted for administrative responsibility for both. This being the first time both were administered by

one company. The respondent, from the outset of its responsibility, sought to treat the previously two sites as one amalgamated site. It will be seen below that the claimant claimed that he was contractually obliged to work at Harmondsworth only.

5. At a preliminary hearing, before Employment Judge James on 5 October 2018, the Tribunal found that the claimant was disabled by reason of post traumatic stress disorder from the 13 March 2017. The onset of PTSD was caused by two assaults the claimant experienced whilst working at Harmondsworth Healthcare Centre on level 3 of the building.

6. On 11 June 2016, the claimant was spat at by detainee "D" and the claimant ingested some of detainee "D's" saliva, necessitating blood test monitoring thereafter. On 25 August 2016, some two and a half months later, the claimant was subject to a violent outburst from detainee "S" who was sat in a wheelchair in the course of which detainee "S" cut the claimants forearm with a plastic knife from a meals trolley. Following the release of detainee "S", the claimant saw on the television news that detainee "S" had murdered a young person. That triggered flashbacks and a realisation that he had been exposed to a real danger.

7. The claimant, it seems, suffered a stress related seizure on 18 December 2016. He was off sick for the most part between then and 26 July 2017. In the meantime, he was described as having PTSD type symptoms and was signed off by his GP for PTSD.

8. Employment Judge James found at paragraph 5 of his judgment that the effects of all of this were not minor or trivial.

> 'I accept that the condition is ongoing and that the claimant continues to take medication to overcome the symptoms. I am satisfied that the claimant has suffered PTSD and that in light of its duration and effect on his day to day activities it represents a disability in accordance with section 6, sub-section 1 of the Equality Act 2010. I am satisfied that the disability existed not later than 13 March 2017 and probably existed earlier, albeit without diagnosis or treatment.'

We note that the report of Dr McGuiness that was relied upon as opinion evidence in the preliminary hearing before employment Judge James, recorded that the PTSD had a 'delayed expression'.

The Issues

9. These have been helpfully clarified by the claimants' counsel, both at the outset and at the conclusion of the evidence before us.

10. <u>Constructive unfair dismissal</u>

    10.1 In 16 October 2017, the claimant was rostered to work in Colnbrook in the domestic visits unit. The claimant alleges that this was in breach of an express provision in his contract of employment that his place of work was Harmondsworth.

    10.2 The claimant alleges that there was undue delay in dealing with his

grievance dated 2 August 2017, a meeting for which was cancelled on 16 October 2017. The undue delay is said to be a breach of the implied term of trust and confidence.

10.3 In further breach of that implied term, the claimant alleges that the head of residence of Harmondsworth at the time, Mr Andrew Willock, when dealing with the claimants' telephone complaint that he had been rostered at Colnbrook, said words to the effect "I don't give a shit what your doctor's note says and what your contract says".

10.4 In further breach of the implied term, the deputy centre manager, Mr Duncan Partridge, and the centre manager, Mr Paul Morrison, were indifferent to his complaint about having been rostered to Colnbrook, expressed to them in the car park of the centre on 16 October 2017.

11. Disability Discrimination – Failure to make reasonable adjustments

11.1 The pleaded provision criterion or practice (PCP) is a requirement to perform all duties of a detention custody officer. This was refined before us as being required to work at Colnbrook. Mr Cook, on behalf of the respondent, objected to this refinement. We will return to this if it matters. The claimant says that being required to work at Colnbrook put him at a substantial disadvantage, compared with non-disabled people, because it was his perception that Colnbrook detainees are more violent when compared with Harmondsworth ones and was in breach of his return to work plan.

11.2 The reasonable adjustment he contends for was to work safely at Harmondsworth in low risk areas. The claimant submits that was the intended plan in any event.

12. Disability Discrimination in the form of direct discrimination and/or harassment

12.1 There is a list of allegations in the agreed list of issues.

12.2 Rostering the claimant to work at Colnbrook on 16 October 2017.

12.3 Failing to deal with the claimants' grievance in good faith and/or in line with the respondents' procedure.

12.4 Failing to ensure that the claimant worked in a safe area, in other words a low risk area and not Colnbrook on 16 October 2017.

12.5 The conduct of Andrew Willock on 16 October 2017.

12.6 The conduct of Duncan Partridge and Paul Morrison on 16 October 2017.

12.7 Failing to ensure that the claimant worked in accordance with the plan by rostering him in an area where he says was not a low risk area.

12.8 Dismissing the claimant with effect from 30 November 2017.

13. Disability Discrimination – Disability arising from disability

13.1 The unfavorable treatment said to arise from the disability was being rostered to work at Colnbrook. Knowledge of disability - the respondent disputes that it ever knew the claimant was a disabled person.

The law

14. The relevant statutory provisions are as follows:

Disability

14.1 Duty to make adjustments, section 20, sub-section 3 of the Equality Act 2010. The first requirement is a requirement, where a provision criterion or practice of the employer 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 avoid the disadvantage.

14.2 Direct discrimination section 13 of the 2010 Act, sub- section 1. A person A discriminates a person other B, if because of a protected characteristic A treats B less favorably than A would normally treat others.

14.3 The comparator for direct disability discrimination is provided for under section 23. By sub-section 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 and under section 23, sub-section 2, the circumstances relating to a case include a persons' abilities if on a comparison for the purposes of section 13, that protected characteristic is disability.

14.4 Harassment is provided for in section 26 of the 2010 Act by section 26, subs-section 1: a person A harasses another B, if:

> A engages in unwanted conducted related to a relevant protected characteristic; and
>
> The conduct has a purpose for the effect of (i) violating B's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> In sub-section 4, in deciding whether conduct has the effect referred to in sub-section 1b, each of the following must be taken into account:
>
> (a) the perception of B.
>
> (b) the other circumstances of the case.

(c) whether it is reasonable for the conduct to have that effect.

14.5 Discrimination arising from a disability is provided in section 15. By sub-section 1, a person A discriminates against a disabled person B if: A treats B unfavorably because of something arising in consequence of B's disability; and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

14.6 By sub-section 2, sub-section 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.

14.7 Knowledge for the purposes of reasonable adjustments is dealt with in paragraph 20 of Schedule 9 to the 2010 Act. A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know B has a disability and is likely to placed at the disadvantage referred to in the first, second or third requirement.

14.8 Burden of proof is important in discrimination cases. It is dealt with in Section 136 by sub-section 2, if there are facts from which the court could decide in the absence of any other explanation that a person A contravened the provision concerned, the court must hold that the contravention occurred. Sub-section 2, does not if A shows that A did not contravene the provision. What this means is that the claimant must establish a prima facie case of discrimination. If that happens the burdens transfers onto the employer to show that the matter was not tainted by discrimination being anyway whatsoever. That follows the guidance of a court of appeal authority called Igen -v- Wong [2005] IRLR 258 (CA).

Constructive Dismissal

14.9 It is trite law that the claimant must show:

(a) a breach of contract;
(b) of sufficient seriousness to justify resignation;
(c) that he did in fact resign for the reason of the breach; and
(d) that he did not delay in such a way as to affirm the contract.

Breach may be of express terms and/or of an implied term. The implied term of trust and confidence is relied upon in this case, that can be stated as meaning that an employer will not commit an act or omit to act in a manner designed or likely to destroy the mutual relationship of trust and confidence between employer and employee without reasonable cause.

Findings of fact on the issues

Knowledge of Disability

15. The first sick note is dated 20 December 2016 and was for one month. The reasons given are cough, stress and post-seizure. On 16 January

2017, there is a one month sick note for post-seizure. On 17 February 2017 for one week, seizure under investigation. On 22 February 2017 a four month fit note is subject to a phased return to work and altered hours with post-seizure under investigation.

16. It seems the claimant was back to work for about two weeks before the next sick note which was for four weeks from 6 March 2017, 'stress related symptoms and still awaiting further investigation of seizure'. There was a telephone consultation with Dr Farmah, an occupational physician on 10 March 2017. Dr Farmah reported on 13 March 2017 that the claimant was displaying features of post-traumatic stress disorder. He recommended he return to the GP. He recorded the claimant's account of the assault by detainee S in these terms.

> In September 2016 he reflected on experiencing a further assault, resulting in superficial cuts to his arms. He reflected that he did not feel supported by work in dealing with the offender who recalls at this point that he started to develop psychological symptoms, in particular, feelings of constant worry, poor sleep, which resulted in him visiting his GP. His symptoms then continued to escalate when he was requested as part of his role to work in a different location. Evidently, I am not in a position to comment on the veracity of the care provided for Mr Croker, however I reflected to you, as provided to me, his perceptions of issues within the workplace; if left unresolved these can continue to act as a barrier to return to work.

17. The current situation was described as Mr Croker relating feelings of low psychological wellbeing.

> He described the panic attack he experienced on the train to work on his return to work. He describes poor sleep and reports nightmares of his previous traumatic, alleged assault, he also experiences flashbacks. As a result of his seizure, he is fearful of going out of the house in case further episodes occur. As a result of his anxiety towards his assault as well as his worry regarding his condition, he is isolating himself at home and not undertaking his usual hobbies or socialising.

The doctor reported undertaking a validated objective mental health questionnaire which indicated significant ongoing levels of worry and low mood. The assessment was that Mr Croker suffered a seizure and as a result was unfit to drive at present; however he was also suffering from significant levels of reduced psychological wellbeing and it was recommended that he return to the GP as he was displaying features of traumatic stress disorder. It was not likely that he would return to work within three months as a significant amount of reduced psychological wellbeing was being reflected as a result of work-related experiences, in particular regarding the assaults and the requirement for him to change work locations. After appropriate assessment, diagnosis and treatment for his reduced psychological wellbeing, there was potential for Mr Croker to return to work and provide a reliable service and attendance.

18. The employer, as a result of this report, was on notice that potentially there was a significant problem. They were on notice of the symptoms which had been found to amount to a disability. The claimant was signed off for four weeks from 28 March 2017 with stress and panic attacks, the therapist was saying he was not well enough for work place meetings yet. He was signed off for a further month on 25 April 2017 for stress and panic attacks. On 22 May 2017 he was signed off for a month for PTSD; by

this time, the pattern being confirmed.

19. There was a further occupational health report on 22 June 2017. This was prepared by Dr Brown. The current situation was that the claimant was currently taking appropriate medication for low mood. He had access and additional online treatment which was arranged by his GP but had not had any formal face to face CBT or counselling, yet it was noted that in the previous report from Dr Farmah that the claimant might exhibit some symptoms suggestive of PTSD, but it would seem that he has not been formally assessed in this respect by a psychiatric service. Dr Patel had used a validated psychometric tool to consider the presence of moderate symptoms of anxiety and depression during the consultation. The opinion was that Mr Croker was deemed unfit for work secondary to ongoing symptoms of depression and potential diagnosis of PTSD which had yet to be assessed. The apparent breakdown of the relationship with his employers, it was noted, created a major barrier to return to work. There appeared to be an impasse in that situation. The report then confirmed a mental impairment of some description with ongoing substantial effects on the claimants' ability to carry out normal day to day activities which were likely to last a year or more, including if not medicated.

20. So even if knowledge of disability was not generated by the first occupational health report on 13 March 2017, it was by 22 June 2017; by which time the respondent did or ought to have known that the claimant was a disabled person. As it was, the respondent did purport anyway to make reasonable adjustments.

<u>The long-term sickness review meetings.</u>

21. The first was with Paul Morrison, the centre manager on 10 July 2017. At all of the meetings there was a trade union representative for the claimant and HR were in attendance supporting management. At the first meeting, Mr Morrison wanted some input from the GP as to which areas of work would be appropriate for the claimant. At that point there was insufficient clarity for Mr Morrison to determine that and he arranged a further meeting in 10 days time at which point it was to be hoped that there would be some clarity as to where the claimant might work. In his confirmation letter of 13 July Mr Morrison wrote –

> "I explained that the business is more than willing to consider reasonable adjustments to facilitate your return work, for example I mentioned that one option could be to change your location and advised you to discuss this with your GP if you felt this would be beneficial".

The significance of the reference to work location was that the claimant had been assaulted twice in his usual place of work, level 3 healthcare at Harmondsworth. The meeting was rearranged to 24 July 2017 because of the claimants' sickness. The fit note dated 24 July 2017 covering four months provided for a phased return to work for the claimant to start on four-hour days, three days a week; then to add on four hours per week, every two weeks and review as needed. The claimant was said to be unable to work night shifts.

22. Mr Morrison conducted the meeting of 24 July, the outcome letter was two days later. The hours pattern suggested by the GP were accepted as was the fact that a low risk work location would be identified. Mr Morrison asked specifically which work location and it seems that the claimant had not managed to discuss this by this time with his GP. In evidence to us, Mr Morrison was very clear that Colnbrook was not excluded in keeping with the one site policy; more as to which below.

23. There is a photocopy of a note clearly showing the domestic visits and legal visits as appropriate work areas and with an apparent rotation of week 1 in Harmondsworth and week 2 in Colnbrook. The latter rotations were not discussed in evidence and were not recorded in the outcome letter but we make note of them nonetheless.

24. The third meeting was with Mr Partridge, the deputy centre manager on 25 August 2017. It had been arranged once more because of the claimants' sickness and the work location was expressly dealt with in these terms.

> "The note does not mention any adjustments to work location [that was a reference to the GP's fit note], so I asked you where you are normally detailed to work. You confirmed Harmondsworth ops and said that you had been working in legals, hearing centre and domestic visits. This group does include nights so I did confirm a move of work groups could be an option if you thought not working nights could go on longer than the initial four months. You said hopefully this would not be the case so I agreed you would remain in the Harmondsworth ops group."

There was then a sensible adjustment to the hours to ensure that the increasing four hours every two weeks did not, on any one day, total an unmanageable amount.

The Grievance

25. On 3 July 2017, the claimant had told HR that he would be raising a grievance in respect of duty of care failures. That was in reply to the invitation to the sickness review meeting on 10 July 2017. The grievance was eventually written on 2 August 2017. On 31 July 2017 the claimant was sent notification of a rearranged disciplinary investigatory meeting in respect of 15 December 2016 when he had left work for home. It was said that the claimant, on 15 December 2016, had refused an instruction to work at Colnbrook and had absented himself from duty. The seizure happened on 18 December 2016. The investigation therefore had been on hold pending the claimants' return to work. The grievance raised three matters:

    (a) The first was a reference to December 2016. The claimant wrote "several managers failed in their duty of care" towards him when he repeatedly informed them that he was not feeling well but insisted that he work at a different work location, which was also in defiance of a union dispute which was in place. That is Harmondsworth -v- Colnbrook – we will return to that.

(b) Secondly, the claimant alleged that the company had failed in its duty of care towards him in that it put him in a work location fully knowing that CCTV cameras in that work location were not working. In respect of both assaults, the second assault being in August 2016, the first in June 2016, the CCTV camera had not been working to record the assaults.

(c) Thirdly, the claimant argued that the company had failed in its duty of care in respect of him by not reporting the second assault to the Police.

So, it is clear then, that in this grievance dated 22 August 2017, the claimant himself was raising matters of some history. As a result of the grievance he asked for the investigation meeting in connection with his walking off site in December 2016 to be put on hold. Whether his grievance was in any way tactical is not necessary for us to determine.

26. The grievance was referred to Andrew Willock on 3 August 2017. The claimant was on leave between 5 and 25 August 2017. Mr Willock was then on leave between 28 August 2017 and 12 September 2017. A grievance meeting was arranged to take place on 4 October 2017 but the claimant could not attend that meeting because he had to have a tooth removed. He asked for a re-scheduled date with at least two weeks' notice so the union could attend. The meeting was arranged to 16 October 2017 by letter dated 28 September 2017.

27. The arranging of the meeting for 16 October 2017 was then explained by a combination of clashes of annual leave and the dental appointment. The delay around that seems to us to be unavoidable.

28. On 16 October 2017, the claimant attended work expecting to do a shift and have a grievance meeting at 2pm. He arrived to find he had been rostered in Colnbrook. There was some dispute as to where within Colnbrook he had been rostered. The claimant told us that at one point he had been rostered into healthcare. The respondents' records suggest domestic visits. The record we have seen was amended after the event, recording the claimant as absent. The claimants' case has been put on his being rostered at Colnbrook. We find on the balance of probability that he was rostered into domestic visits in Colnbrook. The claimant still had an objection to working in Colnbrook based on his understanding of his contract.

29. Her Majesty's Inspectorate of Prisons was conducting an inspection into IRC Heathrow. They had been collating evidence the previous week but required to see management on 16 October. There was a briefing in the morning of the management team. They required meetings with Mr Willock at 13:30 and 15:00 that day. At approximately 12:30 Mr Willock asked HR by e-mail to seek an alternative chairperson for the grievance meeting with the claimant and if that could not be achieved to send apologies and rearrange for early the following week. HR e-mailed the claimant at around 12:57 but it seems that the claimant did not have access to his e-mails around this time. The claimant telephoned Mr Willock at around 13:15 and he did so for two reasons, first for being

rostered in Colnbrook and secondly to ask where the grievance meeting was to be. It was then that Mr Willock informed the claimant that he could not attend the grievance meeting because of the inspection. The discussion was a difficult one. Mr Willock wrote up his account of the meeting the following day and an e-mail in turn was sent to HR.

30. He said he got a telephone call at 13:15 and he writes the following:

> "The caller was DCO Mick Croker. Mick Croker asked will the meeting be in Harmondsworth or the Colnbrook Board Room. I apologized and explained that the meeting would have to be cancelled as HMCIP inspectors had requested to meet me at 13:00 and 15:00. Mick stated "I am unable to return to work – they have put me in a high risk area which is against my agreement", I asked why have they put you in there and Mick stated they have put me in Colnbrook", I asked which part of Colnbrook – Mick responded with a quick response "I will not work in Colnbrook, this is what caused me to be unwell last time and had a seizure, my contract states Harmondsworth not Colnbrook, I will not work in Colnbrook". Mr Willock continues "to diffuse the escalating call, to share a comparison, I stated my contract states Colnbrook but I am working Harmondsworth, we are all one centre now. Mick responded in a very abrupt way – "I don't care what your contract says, mine says Harmondsworth and I'm not working in Colnbrook, I will go home and see my doctor and get signed off; this is causing me stress, and cancelling the meeting today is causing me more stress."

At that point the conversation was closed and the call ended.

31. In contrast to that account the claimant tells us in evidence that it was Mr Willock who slammed the phone down and Mr Willock who said words to the effect "I don't give a shit about your contract and what your doctor says" – words to that effect anyway.

32. We have a conflict of evidence. On the balance of probability, we prefer Mr Willock's account. This is because there is no contemporaneous suggestion from the claimant that he was in any sense abused in this conversation with Mr Willock. The claimant contacted HR on 17 October. He wrote that the respondent had repeatedly undermined doctors notes leading to a complete relapse in his symptoms. We interpret that as a reference to his being rostered in Colnbrook, which the claimant says was against the return to work plan. Had Mr Willock abused the client as suggested, the claimant would have made express reference to it in some contemporaneous document. Over the course of his employment, the claimant had raised numerous grievances, some of which had been successful but not all. He had held Trade Union responsibility for Health & Safety. He would not have been slow in making a point relevant to his employment. Not only was the matter not referred to by him in his e-mail of 17 October, it was not referred to in his exit interview on 10 November 2017. There is no reference to it either in his letter of resignation of 30 October 2017.

33. The claimant was most upset and angry on 16 October 2017. He encountered Mr Patridge and Mr Morrison who were walking across the car park to a meeting. For what it is worth, there were other visitors and members of staff around the car park. The managers described the

claimant as 'ranting' and 'angry'. He was complaining about being rostered at Colnbrook. Mr Partridge tells us that he attempted to discuss the matter but the claimant was so angry that all he could do was swear and rant and said he was going home. He did indeed leave the site. Mr Morrison did not participate in the conversation but confirmed Mr Patridge's account. On the balance of probability, we accept the account of Mr Partridge and Mr Morrison. The claimant was indeed very upset about being rostered to work at Colnbrook, he expressed that upset and he left site. We do not find that Mr Partridge and/or Mr Morrison and/or Mr Willock acted in any way unprofessionally, so as in effect to disrespect the claimant. We, of course, know that the claimant was not 100% well at this time.

The Contractual Dispute

34. The claimants' objection to working at Colnbrook was a longstanding theme and had been discussed with him by his managers at Mitie on regular occasions previously. We accept from those managers that they had throughout adopted the position that Heathrow IRC was now one site and working obligations applied to the amalgamated site as a whole. The contract of employment that the claimant held was his original one dated 17 March 2008 with a company called Kalyx Limited. At clause 6 under the heading place of work it was provided that the claimant's initial place of work will be Harmondsworth IRC. It did not say "only place of work", it was of course true that his initial place of work was Harmondsworth IRC.

35. Mitie came on board in September 2014 and had distributed across the workforce a letter called the "Measures Letter" on 29 August 2014. Under the heading 'One centre', the following was written:-

> The Heathrow IRC will operate as one workforce, operating as one immigration removal centre. This means that employees may be required to work in what is currently the Colnbrook or Harmondsworth IRC, irrespective of where their current work location is. Mitie Care & Custody will take a pragmatic approach to ensure utilization of specific work knowledge to avoid unnecessary disruption to detainees. Mitie Care & Custody can confirm that within six months of going live, there will be a single control room, the location of which will be confirmed in due course. Mitie Care & Custody accept that some employees may not have mobility clauses within their Terms & Conditions of Employment, but due to the requirements of the contract to operate as one centre and the close proximity of the current dual work locations, this change in work locations is viewed to be acceptable within the TUPE legislation as a genuine organisational reason. Mitie Care & Custody are currently developing the profile and this will be communicated to employees as part of the restructure.

36. The claimant, and some other Trade Union members, but by no means all, objected to this. There was a plan to rotate 25% of the workforce on an annual basis across the two former sites to introduce the employees of one site to the new site. This was in a dispute with the union that went to ACAS Arbitration. The arbitration was resolved in the employers' favour, but admittedly after the claimant left. We note the reference to mobility clause. Most commonly a mobility clause provides for moving between sites, significantly separate in terms of geography, some indeed can require an employee to move home. Here the gap in geography was the width of a road and we find that the employers interpretation of the contractual position as enabling them to request working at the other half

of the amalgamated site was entirely valid as a matter of law. The claimant's contract said that his 'initial place of work' would be Harmondsworth. That did not preclude reasonable management instructions to work elsewhere, particularly when elsewhere was the expanded amalgamated site.

37. Mr Patridge told us, and we accept, that whilst every employee would be allocated to a principal department within the amalgamated site, for operational reasons, on any relevant day, the employee might be required to work anywhere within the site. That, he told us, was accepted by the union so as to ensure the service worked on a daily basis across the site as a whole in order to ensure staff and detainee safety. Indeed, the claimant had worked a number of shifts, certainly not very many, in Colnbrook, probably less than five. He also, in his trade union capacity, attended meetings in Colnbrook and conducted Health & Safety assessments of Colnbrook. We have no difficulty in interpreting his contract as not precluding him from being asked to work in Colnbrook. We reject the claimants' interpretation of his contract. He could be asked as a matter of operational need by reasonable management instruction to work in Colnbrook. We find that the operational exception also applied to his return to work plan, agreed with Mr Patridge on 25 August 2017, when he remained allocated to Harmondsworth Ops, albeit to the identified low risk areas. Operationally, he could be asked, as a matter of contract, to work at Colnbrook on an exceptional basis provided it was low risk. We accept from the respondent that there was no greater risk in terms of detainee profile between detainees at Harmondsworth and those at Colnbrook.

38. The Home Office allocated detainees to these sites. The Home Office did not use the criteria of detainee risk to allocate between the sites. The Home Office did not allocate riskier detainees to Colnbrook than Harmondsworth. Whilst the claimant has expressed a belief in that regard, there is has been no evidence, whether obtained in disclosure or otherwise to back that up. We accept the evidence of Mr Partridge that this is not the case. We further accept the analysis of risk as being dependent on his historical incident report events. The claimant has not successfully challenged the charts describing the risk of each area, which we find were used in Health & Safety meetings at which the claimant was likely to have been present. There is a record in a rolling year up to February 2016, which is the document that we have seen, showing historical incident reports for each department within each site. From that, it is possible to glean which departments are of lower risk. That explains why in the return to work plan, Harmondsworth legal hearing centre and domestic visits were selected. The same basis can be applied to Colnbrook domestic visits. Colnbrook domestic visits was a low risk site.

39. Accordingly, there was no logical difference in terms of allocating the claimant to Colnbrook domestic visits than there was the equivalent in Harmondsworth. We further accept that the respondent did not roster the claimant to Colnbrook on 16 October out of spite or because he had been absent from work with something amounting to a disability. He had been allocated to low risk areas and, as we say, in terms of domestic visits there was no logical difference between Harmondsworth visits and Colnbrook

ones.

40. The difference between Harmondsworth and Colnbrook was not disability-related. In the claimant's eyes, the difference was contractually related and the claimant, in our judgment, misinterpreted the meaning of his contract.

Grievance – Part 2 – The Conclusion

41. The grievance was concluded after the claimant served notice of resignation. At the exit interview he asked for the grievance to be concluded by way of a letter. He did not require a meeting. Following the exit interview, Mr Partridge attended to the matter and wrote a response on 13 November 2017. Surprisingly, the claimant told us that he did not receive that response at the time. His witness statement does not indicate that. He told us in evidence that the first time he saw it was in the bundle for these proceedings. He certainly had sent no communications throughout the entirety of 2018 chasing up the response. It is true that the letter was sent to a Surrey address from which he had moved. We do not know for sure whether the claimant had arranged a redirection service of his post to Devon, but we do know that he did not chase up a response, if he did not receive it.

42. The claimant had put his house up for sale in 2016. He moved to Devon on 7 November 2017. He had been planning that move for some time. There is a note in HR's record of 25 August 2017 meeting that it might be the case that the full four months of the return to work would not be necessary because the claimant was moving to Devon. It is beyond doubt that the claimant told Mr Tinsley, a treating doctor, on or around 31 October 2017, that he was moving to Devon in a weeks' time and therefore there was a decision to be taken as to where he ought to be treated, specifically, that it should be Devon. The respondent has suggested that the resignation on 30 October 2017 was not for the reason of any honestly believed breach of contract but because the claimant was moving to Devon and was retiring.

43. The claimant has told us that if he was well enough to work he would have kept local accommodation, either with his son, or in a flat that was offered rent free by a friend. This was confirmed by Mrs Croker, who has given evidence in support of her husband before us.

44. We only have to decide whether the true reason for the resignation was Devon, rather than an honestly held belief in breach of contract, if the claimant was right that there was a breach of contract. So we will only turn to this matter if we have to. But it is a chronological fact that the resignation does coincide with the time of a move to Devon.

Conclusions

Constructive Unfair Dismissal

45. The claimant does not establish a breach of contract in being required to work at Colnbrook. Once Heathrow IRC expanded to include both sides, his place of work was the expanded site and it was a reasonable instruction whether for operation reasons or at all, to require him to work in a low risk department in Colnbrook on 16 October 2017.

46. Secondly, the claimant does not establish a breach of contract by reason of any delay in dealing with his grievance. His grievance itself was raised many months after the subject matter complained about, and then a combination of annual leave and the claimant's need for dental treatment required the postponement of a meeting. The claimant then required two weeks' notice so as to be able to enable the trade union representation which, of course, was fair. The meeting adjourned to 16 October had to be cancelled at short notice for good reason, namely that the prison inspectorate wanted meetings with Mr Willock. The respondent was not in breach of the implied term of trust and confidence for failing to have held a meeting or resolve the claimants' grievance at the point of his resignation.

47. Thirdly, the claimant does not establish a breach of contract in respect of the behaviors of Messrs Willock, Partridge and Morrison, in the course of the events of 16 October 2017. We find that they did behave professionally. It was the claimant who was not 100% well at the time and on the balance of probability who was angry and expressed himself in that manner and walked off site. Accordingly, the claimant does not establish a constructive dismissal. He was not unfairly dismissed, in fact there was no dismissal, he resigned.

Disability Discrimination

48. The respondent knew, or ought to have known, that the claimant was disabled person at latest from 22 June 2017.

49. Failure to make reasonable adjustments: the pleaded PCP was not made out on the facts. The claimant was not on full duties, he was on restricted duties at the time. The real PCP the claimant wanted to argue was being required to work at Colnbrook. But even if that were allowed as a PCP, there was no substantial disadvantage to him in that regard because he was perfectly able to work in Colnbrook in a low risk department. Such as on domestic visits where he was rostered to work on 16 October. His objection to that was not based on anything to do with disability; his objection to that was based on his mistaken interpretation of contractual rights. The respondent had made the reasonable adjustment of permitting reduced hours and facilitating work in low risk sites. Even if - and this is an important point which we have not yet emphasised - by accident he had been rostered elsewhere in a higher risk area a simple request to the duty manager to correct the rostering to a lower risk area would be likely to have resolved the matter without the need for resignation. There was no failure to make reasonable adjustments.

50. Section 15, discrimination arising from disability: the unfavourable treatment relied upon was being required to work at Colnbrook. It was not something arising from the claimants' disability that he could not work at

Colnbrook. It might have been that he could not work for the time being in high risk areas. He was not treated unfavorably by being asked to work in Colnbrook domestic visits. Accordingly, the section 15 claim fails.

51. Direct discrimination. The comparator for direct discrimination in a disability case regularly makes it difficult for a disabled employee. That is why the Section 15 cause of action and the reasonable adjustments cause of actions where made out are more effective. The comparator in this case is a duty custody officer who was not able to work in a high risk area but who was disabled. That person would not have been treated differently in our judgment. As a direct discrimination case the claim fails.

52. Fundamentally, however, the claimant believes he was coerced into that course of action. Harassment seems to be closer to the way he wishes to put the case. For harassment to be made out, there has, of course, to be unwanted conduct related to disability which has the purpose or effect of violating the claimants' dignity or creating an intimidating etc environment. The perception of the claimant is relevant but the Tribunal has to have regard to the other circumstances of the case and whether it is reasonable to regard the conduct as having a harassing effect. The relevant list of alleged harassment starts at letter (b) of the issues:

> (b) Rostering the claimant to work at Colnbrook on 16 October 2017. This did not have the purpose and was not reasonably regarded as having the prohibited effect. We find he was rostered at Colnbrook rather than Harmondsworth for operational reasons, namely there was a need for him to work in Colnbrook. He was rostered in a low risk area. The low risk was compatible with the return to work plan. There was certainly no malice behind this.
>
> (c) Failing to deal with the claimants' grievance in good faith and/or timeously in accordance with respondents' own procedure. The explanation for the delay in dealing with the grievance were good explanations, as we have found above. There was no bad faith, the claimant resigned before the grievance could be finalised. The claimant had brought this grievance many months after the relevant matters had happened in any event. There was no conduct by the respondent with the purpose, or reasonably to be regarded as having the effect, of the prohibited matters. There was the claimants' mistaken view that Colnbrook was necessarily more dangerous than Harmondsworth in terms of category of detainee. That is not right. There is no reason to distinguish between them. He was rostered to work in Colnbrook visits, which was a low risk site.
>
> (e) The conduct of Andrew Willock on 16 October 2017. We do not find that Mr Willock acted as the claimant alleges, we prefer Mr Willock's evidence, as set out above.
>
> (f) The conduct of Duncan Partridge and Paul Morrison on 16 October 2017. We do not find that Mr Partridge or Mr Morrison behaved as alleged by the claimant. We prefer their evidence in respect of 16 October 2017. There was no harassment - it was the

claimant who was angry. We know that the claimant was not 100% well around this period.

(g) Failing to ensure that the claimant worked in accordance with the plan by rostering him in an area which he says is not a low risk area. This, again, is the same point about Colnbrook as dealt with above. Whilst the plan related to Harmondsworth Ops, low risk department, it was a permitted operational adjustment to ask the claimant to work in Colnbrook in a comparable low risk area on 16 October 2017.

(h) dismissing the claimant on 30 November 2017. The respondent did not dismiss the claimant. The claimant resigned on 30 October 2017. He was accordingly not dismissed, nor was he constructively dismissed.

53. In short, all allegations of harassment are unsuccessful, also. The claim fails.

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Employment Judge Smail

Date: …15.05.19…….

Judgment sent to the parties on

.....30.05.19.....

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For the Tribunal office