THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Steven Carruthers**

Respondent: **Sodexo Limited**

Heard at: **North Shields Hearing Centre** **On:** **2, 3 & 4 September 2019**

Before: **Employment Judge Morris**

Members: **Ms M Clayton**
Mrs D Winter

Appearances

For the Claimant: **Dr L Sherlock of Counsel**
For the Respondent: **Mr P Sangha of Counsel**

REASONS

Representation and evidence

1. The claimant was represented by Dr L Sherlock of Counsel who called the claimant to give evidence and Mr G Edgar and Mr D Wingfield (both employees of the respondent) to give evidence on his behalf.

2. The respondent was represented by Mr P Sangha who called three employees of the respondent to give evidence on its behalf: Mr R Nixon, at the relevant time SDU Resource and Project Manager; Ms C Rule, at the relevant time Deputy Head of Residences at HMP Northumberland; Ms J Barr HR Business Partner.

3. The Tribunal also had before it an agreed bundle of documents comprising some 560 pages.

The claimant's claim

4. The complaints of the claimant are as follows:

4.1 Contrary to section 21 of the Equality Act 2010 ("the 2010 Act") the respondent failed to comply with the duty to make adjustments imposed upon it by section 20 of the 2010 Act.

4.2 The respondent had harassed the claimant as that term is defined in section 26 of the 2010 Act.

The issues

5. The issues to be determined by the Tribunal were identified at a Preliminary Hearing conducted by telephone on 29 November 2018, at which both parties were represented, being as follows:

"*Disability*

5.1 Does the claimant have physical or mental impairments that have a substantial long-term adverse effect on his ability to carry out normal day-to-day activities?

Reasonable Adjustments

5.2 Did the respondent apply to him any of the provisions, criteria or practices (PCPs) set out in the claim?

[*ie. "the requirement to work in all parts of the prison and/or be moved to different parts of the prison"*]

5.3 In respect of each PCP, did it place the claimant at a substantial disadvantage in comparison with persons who were not disabled?

5.4 When did the respondent know, or ought it to have known, the claimant was disabled and placed at a substantial disadvantage?

5.5 Did the respondent take such steps as were reasonable for it to have to take to avoid or reduce the disadvantage?

Harassment

5.6 Did the respondent subject the claimant to the unwanted conduct related to disability set out in the claim?

[*ie. informing the claimant on 17 April 2018 "that he could no longer work on HB 10"*]

5.7 If so did it have the purpose, or reasonably have the effect, proscribed by s26 of the Equality Act 2010?"

Consideration and findings of fact

6 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by it on the balance of probabilities.

6.1 The respondent is a well-known international company in the business of facilities management services, primarily to the public sector, including the operation of five prisons across the UK. It is a very large undertaking with significant administrative resources including a dedicated HR department. One of the prisons it operates is HMP Northumberland ("the Prison"). The claimant was employed by the respondent as a Prison Custody Officer ("PCO"). His employment commenced on 10 May 2004 and is continuing.

6.2 The Prison is divided into two principal sections: non-vulnerable prisoners are housed in house blocks 1 to 9 and vulnerable prisoners are housed in house blocks 10 to 14. It is generally accepted within the Prison that working with the latter group of vulnerable prisoners is the easier of the two options.

6.3 PCO's are assigned to a particular house block; referred to in these proceedings is being a "home" house block or a "base" house block. Despite such assignment, PCOs can be allocated to other duties on a temporary basis. There can be many reasons for this including, for example, to ensure complacency does not creep into performance, to prevent any form of conditioning by prisoners, to enable PCOs to learn other aspects of the job and share their experiences, to cover sickness or holidays, to attend the Vulnerable Prisoners' Education Unit ("VPEU"), to help with visits and to patrol other house blocks. There might also be circumstances of emergency at the Prison to which all PCOs can be required to attend.

6.4 At the relevant time the claimant was assigned to work in house block ("HB") 10. As indicated above, HB 10 houses vulnerable prisoners but not only that, it houses the best-behaved prisoners at the Prison including a number of prisoners termed "enhanced prisoners" who are the most proactive in the Prison environment and are low-risk.

6.5 In 2017 the claimant presented a complaint to an employment tribunal in respect of disability discrimination. Those proceedings were settled under the auspices of Acas in a binding COT3 agreement, the key provision of which for the purposes of these proceedings is at clause 4 (page 203/5):

> "It is agreed between the Parties that the Claimant can remain assigned to House Block 10 unless and until the Respondent

(acting reasonably) decides that (notwithstanding the duty to make reasonable adjustments) there is a need that the Claimant must be assigned to a different location due to operational reasons. The Respondent will consult with the Claimant in relation to any proposal to move the Claimant from House Block 10 for operational reasons and also about the location he will be redeployed to. Input from the Respondent's Occupational Health provider or other relevant medical practitioner agreed between the parties (both parties acting reasonably) will also be requested and considered before any decision is finalised. Nothing in this Agreement prevents the Claimant from requesting a move from House Block 10 and the Respondent will act reasonably in considering a request."

6.6 Part of the context for that Agreement is found in the claimant's claim form (ET1) in respect of his previous tribunal claim when he refers to a conversation with Ms Barr including that he "acknowledged that I could cover an occasional shift but could not work with non-vulnerable prisoners on a permanent basis. (549)"

6.7 At the beginning of 2018 the Prison became the first privately-managed prison to pilot an initiative of Her Majesty's Prison and Probation Service ("HMPPS") known as Key Work. The concept was to support and formalise rehabilitation of prisoners, reduce violence, self-harm and suicides and enhance prisoner/officer relationships in a more controlled and safer environment.

6.8 This was a hugely important contract for the respondent, and HMPPS provided funding for extra staff and resources for training and the introduction of Key Work generally.

6.9 It was intended that Key Work would take some forty to forty-five minutes of a PCOs time per prisoner per week, which included preparation, meeting the prisoner and documenting a short record of the meeting on an electronic system known as PNOMIS. Key Work replaced the previous Personal Officer scheme, the objectives of which were similar but Key Work was more prescriptive including, for example, the requirement for the record to be maintained and the formalisation of the one-to-one meetings.

6.10 Mr Nixon was responsible for assisting with the implementation of the Key Work project including by being one out of two facilitators at the training of the PCOs. The claimant's involvement in the training took place on 17 to 19 January 2018 (104).

6.11 Sensibly, the respondent determined that Key Work should be rolled out across the Prison one house block at a time. In this respect the Tribunal does not accept the claimant's contention that Key Work did not go live until June or July 2018; rather, it went live incrementally across the Prison housing blocks.

6.12 HB 16 was first for the roll-out of Key Work on 8 January 2018. That was a small house block of twenty prisoners with one PCO. The respondent's experience of that roll-out demonstrated that one PCO could undertake the Key Work functions without the need for additional staff to be allocated to the house block to cover what might be termed 'ordinary duties' while the PCO undertook Key Work.

6.13 HB 10 then became the second house block for the roll-out of Key Work. As mentioned, that block contained a high number of enhanced prisoners and untoward incidents within the block were few. There are two PCOs to forty prisoners. Given the experience at HB 16 it was decided that no additional staffing would be needed at HB 10. Mr Nixon's oral evidence, on which he was not challenged, was that at the Key Work training he had explained that not all house blocks would receive additional staffing resource and he specifically told the claimant at one of his own training sessions that no additional resource would be provided at HB 10. Mr Nixon subsequently explained this in his email to Ms Rule on 11 April 2018 (241). This is also apparent from Mr Nixon's email to the claimant and other PCOs of 19 January 2018 in which, amongst other things, he stated as follows:

> "I now ask that you being [*begin*] to Key Work your residents each time you are based on HB 10. At this stage, you will not be assigned time to do this, but expected to conduct you interviews when on duty. Once the new profiles are in place, this will happen." (210)

6.14 There is no dispute that the claimant was enthusiastic about the Key Work initiative and engaged with the training. This is apparent from his oral evidence, "I love Key Work, it's fantastic, it works well". Given the engagement of the claimant and the other PCOs with the training and his email of 19 January referred to above Mr Nixon was somewhat surprised that by 22 January none of the PCOs had recorded any Key Work session on the electronic system. He therefore wrote on that date requiring entries to be made with immediate effect (211) and provided a template for PCOs to use in that respect.

6.15 The claimant was regularly rostered on HB 10 and parked in a disabled space. He says that he was constantly questioned about this and therefore asked that it should be documented that he had reasonable adjustments in place. To this end he wrote to Ms Barr on 1 February 2018 (213) attaching a document headed "Formal Request for reasonable adjustments" in which he requested her to consider implementing six reasonable adjustments (214). It is the first adjustment that is of relevance in these proceedings:

> "In line with the legally binding COT3 Agreement in place – I shall remain assigned to House Block 10 when *I am on duty*."

6.16 We return to this point below but to maintain chronology interject that at this stage some two weeks had passed since Key Work had been introduced into HB 10. Nevertheless, Mr Nixon identified that there had only been one entry by a PCO on the electronic system compared with the expected sixty to eighty entries. He therefore wrote by email on 4 February 2018 to all the PCOs on HB 10 reminding them that they must, with immediate effect, carry out Key Work interviews and make the entries (237). The claimant refers to this email as "very bullying-esque" (237) but the Tribunal considers the email to be very reasonable for a manager who was seeking to implement an important initiative, and his previous requests in this regard were seemingly being ignored.

6.17 The claimant then commenced a period of sickness absence on 19 February returning on 9 April 2018.

6.18 During that period other PCOs were allocated to work on HB 10 to cover the claimant's sickness absence. They had also been trained on Key Work and undertook such work in HB 10. The claimant's return to work was in accordance with an agreed phased return to work plan that he said he had proposed with his doctor's support. The claimant submitted this proposal within an email dated 4 April 2018 to his line manager, Mr Richards. In essence he would work on Monday 9 April and Wednesday 11 April in one week then Tuesday 17 April and Thursday 19 April in the second week. He would then return full-time if all went well in week-commencing 22 April. In his email the claimant added "on Hb10 of course" (224).

6.19 Returning to the claimant's request for the reasonable adjustment set out above that he should "remain assigned to House Block 10 when *I am on duty*", Ms Barr had replied on 27 February 2018 (394). She asked the claimant that in order for her to consider properly the issues he had raised it would help if he could give her some more detail on various matters. Regarding this particular request of the claimant, Ms Barr wrote in the following terms:

> "The Cot 3 Agreement as I recall said you would be allocated to House Block 10. As far as I am aware this hasn't changed and you are still allocated to House Block 10. My understanding was that we agreed you could be detailed other tasks off the wing, as necessary and within reason, but that House Block 10 would remain your "home" House Block. Can you let me know if your position on this has changed, or has something at work changed to lead you to raise this?"

6.20 As mentioned above, at this time the claimant was off work. On the first day of his return to work on 9 April, however, he replied to Ms Barr stating that he would answer her queries in detail as soon as possible (394). She replied acknowledging that that would be no problem. The

claimant was then absent from work again for a considerable period of 199 days. Then, on 23 August, he responded to Ms Barr with a detailed attachment setting out his explanations for the reasonable adjustments that he had requested (393 and 396). Once more, it is the first point relating to the reasonable adjustment to remain assigned to HB 10 that is relevant to these proceedings. The claimant stated as follows:

> "Detail, as always, have been amazing with me and have afforded my presence on HB 10 when I have been on duty. But this has been un-official and not a recognised adjustment, as necessary and within reason. Who knows what the future holds for the Detail Team and also the introduction of Kronos coming, I thought it would be prudent for myself to get something more permanent, where reasonably possible of course put in place. This will help alleviate any anxiety issues related to unexpected detail changes that may arise or that could arise …."

6.21 In this respect the Tribunal accepts Ms Barr's evidence that if the claimant wanted further clarification as he asserts he would have reacted to her explanation more strongly than he did in that response to assert that what she was saying was not the case and he could not be moved from HB 10 at all; but he did not do so.

6.22 Returning to the chronology, on the claimant's first day back at work two of the Key Work managers, one of whom was Mr Bruce, attended at HB 10 to issue the Key Work allocation to the claimant and another PCO. The claimant raised with Mr Bruce the question of whether he would get profile time for this (ie. another PCO covering his non-Key Work duties). It was again explained to him that there would be no extra staff. The claimant responded that until he sought advice he would not be doing his Key Work sessions. This exchange is recorded in Mr Bruce's email to Mr Nixon of 9 April 2018 (235). The claimant's perception of this meeting with Mr Bruce is contained in an email to his line manager, Mr Roberts, of 9 April 2018 (251) including that he was "seeking further advice from the union". The claimant also wrote by email that day to his trade union representative and other colleagues (237) including as follows:

> "I am under the impression there are two officers on HB10 for a reason, not one for wing duties and one for KW. I am also under the impression, (because I read the policy), that hours for KW are to be detailed accordingly. This is what we have received funds for and extra officers.
>
> So, this leads me to think that what is being DEMANDED, IS FRAUDULAENT and doubling up work. This is not only a health and safety issue but an illegal process. I for one am going to request a STRESS MANAGEMENT RISK ASSESSMENT and I will

be informing any of my colleagues to do the same if I notice any stress issues arise."

6.23 The claimant's evidence is that he never refused to undertake Key Work. The Tribunal does not intend to engage in semantics on that point but it is abundantly clear to it that the claimant did decline to follow what the Tribunal considers to be a reasonable management instruction to begin Key Work for which he had been trained.

6.24 On 10 April 2018 a Key Work Stakeholder meeting was held. At the meeting were Ms Samantha Pariser, Deputy Director at the Prison, Mr Nixon and Ms Rule. In her email of that date Ms Pariser recorded that the good news was that the claimant was back at work but the very disappointing news was that he was point blank refusing to undertake Key Work until he had received further advice (239). She asked Ms Rule to "use every tool available" to reverse the claimant's thinking in this respect. The claimant considers that that phrase is threatening. The Tribunal accepts the evidence of Ms Rule and Mr Nixon, however, that "every tool" includes further training, mentoring and coaching and is not therefore threatening.

6.25 On 11 April, the claimant's second day back at work, he again declined to undertake the Key Work duties. Mr Nixon wrote to Ms Rule to inform her of this and explained that there was no basis for the claimant's reluctance including, for example, HB 10 was profiled to the correct staffing numbers, there was plenty of scope for Key Work and therefore the claimant could do Key Work (241). He sent a copy of his email to Ms Pariser who then wrote that day to Mr Nixon, Ms Rule and Ms Barr regarding the claimant's refusal to undertake the work (242) including as follows:

> "Bearing in mind the complexities of this member of staff we feel it is appropriate to have a brief meeting to discuss our strategy of support, coaching and performance management of this individual. This needs to take place asap and will include Nick to ensure that he is in agreement. This should help safeguard any future fall-out should PCO Carruthers be subject to formal performance procedures."

6.26 Ms Pariser also wrote that day to Ms Rachel Lewis at the respondent's People Centre (244) including as follows:

> "We have rolled this project out so far on HBs 10, 16, 1 and 4 and it has been very successful otherwise. Our mobilisation plan is tightly managed and will conclude in November this year when all residents will have an assigned Key Worker. PCO Carruthers refusal is not entirely unexpected and may present us with an opportunity."

The claimant is suspicious of that phrase "present us with an opportunity". Ms Barr's evidence was that it referred to an opportunity to establish and address why the claimant was not undertaking Key Work duties. Although that does not seem to be a very satisfactory explanation, the phrase is not unequivocal and in the absence of any evidence from the author of the email, Ms Pariser, the Tribunal is unable to divine her meaning or even to draw inferences from what she wrote.

6.27 The proposed meeting then took place on 11 April. Mr Nixon, Ms Pariser, Ms Rule and Mr Nick Leader, the Director at the Prison, were physically present with Ms Lewis attending by way of telephone conference call. At the meeting the managers understandably recognised the business need for the Key Work duties to be performed in HB 10 and the claimant was still unwilling to do that. The outcome of the meeting was two-fold as follows:

(i) Other PCOs trained in Key Work would be temporarily allocated to HB 10. They had experience of working there during the claimant's recent sickness absence and knew the prisoners and had undertaken Key Work duties with them.

(ii) The claimant would be temporarily allocated to the VPEU with the result that he would not be required to undertake Key Work duties (to which he was resistant) and, in this time, his line manager could discuss the claimant's concerns with him and hopefully address and resolve them. The Tribunal is satisfied that this allocation to the VPEU was both reasonable and appropriate. The claimant's own evidence was that he is familiar with the VPEU, that it is in close proximity HB 10 and that he is familiar with the prisoners in the VPEU. Only vulnerable prisoners attended that Unit, the claimant would know at least some of them and work there would only require him to undertake what we might loosely term 'general supervision' and not Key Work duties.

6.28 Mr Nixon gave effect to this decision by changing the claimant's work Detail (ie. the respondent's deployment of its staff) assigning him on his next day at work (17 April) to work in the VPEU rather than HB 10. He informed Mr Edgar and Mr Wingfield of this.

6.29 There is a significant conflict of evidence on this point. The fact that Mr Nixon changed the Detail and informed Mr Edgar and Mr Wingfield that he had done that is accepted. They say, however, that he did not refer to the claimant by name but only to "someone" and further added that if he (Mr Nixon) found out that the change that he had made had got out there he would know who had informed them: ie. informed the claimant. In this respect Mr Edgar and Mr Wingfield gave identical accounts, which were disputed by Mr Nixon. He confirmed that there was a conversation but denied that he did not name the claimant or

that he had made the reference to it getting out. He reinforced that by explaining that as soon as the change was made on the Detail it would be in the public domain (at least in the context of the Prison). Mr Edgar and Mr Wingfield agreed that the change would become public immediately.

6.30 Such conflicts of evidence are never easy for any Tribunal but given that all three of these individuals accept that the change in the Detail would be public knowledge as soon as it was made, the Tribunal does not accept that Mr Nixon made the apparently threatening remark attributed to him. Neither does the Tribunal accepts that Mr Nixon did not name the claimant but only referred to "someone": that would not make sense as the change in the Detail would be by specific reference to the claimant by name.

6.31 On a related point neither does the Tribunal accept Mr Edgar's evidence that during the week commencing 4 September 2017 Mr Nixon spoke to him about the claimant being on HB 10 and seemed angry and dismayed that he could not be moved and if that was right he would "get him on his absence record". Mr Edgar's evidence was that he informed the claimant of this but the Tribunal is satisfied that had that conversation between Mr Nixon and Mr Edgar taken place and had the claimant been informed of it early in September 2017 (which is only a matter of weeks after he had completed the COT3 Agreement on 9 August 2017 and on that basis had withdrawn his previous tribunal claim) he would have immediately taken issue with Mr Nixon's comments by raising them with his managers or respondents HR Department; but he did not do so. For this reason the Tribunal does not accept that this conversation between Mr Nixon and Mr Edgar took place and does not accept the claimant's explanation that he did not raise the point at the time because he did not want to make waves. The Tribunal is satisfied that such an explanation is simply not consistent with the context of the claimant having been prepared to present to an employment tribunal a complaint against the respondent, which might be thought more likely "to make waves".

6.32 On 17 April the claimant came into work; his third day back. He checked the Detail board in the Gate as he was accustomed to do. The claimant's evidence was that he tended to check the board to gain some reassurance that he would still be on HB 10. The Tribunal notes, however, that that reassurance would not have been necessary if the situation was as he maintains that he would only work on HB 10.

6.33 Be that as it may, the claimant's evidence is that to his horror he read that he had been allocated to work in the VPEU. He reacted very severely to this information. The Tribunal need not set out the details here because it accepts the claimant's evidence in this respect. Suffice it to say that, as the claimant said in evidence, he felt absolutely broken and, accepting that evidence, the Tribunal records that he has its sympathy for that.

6.34 The claimant spoke to Senior Officer Tubby who advised him to go to HB 10 for the morning period despite his Detail and the situation would be sorted, which the claimant did. Mr Nixon then came into the Gate and instructed Mr Tubby that the claimant should go to work in the VPEU in accordance with his Detail and he should inform the claimant of this. When Mr Tubby did so the claimant responded that he would be walking out as that was not part of his adjustment and Mr Tubby advised him to speak to the Duty Manager to which the claimant replied, "he can speak to my solicitor". Ms Rule then arrived in the Gate and discussed the situation with Mr Nixon after which Mr Tubby was instructed to tell the claimant he could remain on HB 10, which Mr Tubby did but the claimant replied, "it's too late, I am I'm not being bullied, this is work place stress they can contact my solicitor." The claimant then left work, saw his GP and did not return to work until 14 August 2018. Mr Tubby's account of the incident is contained in his email of 17 April to Ms Rule (303).

6.35 Ms Barr then wrote to the claimant that day, 17 April, what the Tribunal considers to be a supportive letter explaining, amongst other things, why the decision to move the claimant temporarily to the VPEU had been made (301).

6.36 Several other matters were raised in the evidence before the Tribunal in respect of events occurring after 17 April but they are not addressed by the Tribunal in these findings of fact as they are not relevant to the issues before us at this hearing.

Submissions

7 After the evidence had been concluded, the parties' representatives made oral submissions by reference to comprehensive skeleton arguments, which addressed the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those written submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, both orally and within the respective written submissions, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to our decisions. That said, the key points in the representatives oral submissions are set out below.

8 The respondent's representative made submissions including as follows:

Reasonable adjustments

8.1 The temporary allocation of the claimant to the VPEU still met his criteria of working with vulnerable prisoners so as to lower his anxiety levels and, therefore, the allocation did not place him at a substantial disadvantage.

8.2 When considering the construction of clause 4 of the COT3, the background knowledge available to the parties is important: for example, in his previous ET1 the claimant had acknowledged that he could cover an occasional shift. The clause does not say that the claimant would only be assigned to HB 10. If the intention had been that the claimant would work in just one location it is incumbent on the claimant to have that stated in the contract.

Harassment

8.3 Reliance is placed on the decision in Richmond Pharmacology v Dhaliwal [2009] ICR 724, particularly at paragraphs 15 and 22:

> "overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to be violated, there will be no harassment ….".

Thus, just because the claimant says that he had that reaction in that way is not the end of the test. The tribunal must look at the reason. Intention matters as part of the circumstances.

> "One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence …."

The claimant has real difficulties because the evidence he relies upon to assert intention is the conversation between Mr Edgar and Mr Nixon, which is unsatisfactory because the claimant was moved because he was not doing Key Work.

9 The claimant's representative made submissions including as follows:

Reasonable adjustments

9.1 Key Work would require six hours a week on average. The claimant says that it would not go live until June of July 2018. The claimant's perception was that other staff would cover his general duties and his line manager Mr Richards accepted that as valid. The claimant should have been able to raise his concerns without fear of retribution and this should have been taken into account.

9.2 The claimant suffered personal injury as a result of the incident on 17 April. He put across the impact he felt on learning that he had been allocated to the VPEU very eloquently clearly portraying how the felt, and Mr Nixon accepted that was how he felt and that the respondent

was generally aware of the claimant's disability yet he did not take that into consideration.

9.3 Knowing that he would work in HB 10 every day provided the claimant was the stability and certainty. Not just the prisoners but also the building from which he could look out at the forest and there was a room where he could practice mindfulness.

9.4 The respondent did not take reasonable steps to avoid the substantial disadvantage caused by the PCPs: they effectively breached the COT3 Agreement in that they arranged to move the claimant from HB 10 without prior consultation. The claimant's interpretation of the Agreement was clear and consistent. His interpretation was that he would only work in HB 10. This is supported by Ms Rule's email to Ms Barr of 13 April 2018 (248) and the claimant's email requesting reasonable adjustments. The interpretation suggested by the respondent renders the Agreement worthless. Mr Edgar and Mr Wingfield both knew that he was only to work in HB 10. From August 2017 until April 2018 the system worked entirely well with no hiccoughs and at no additional cost to the respondent. If the claimant was to be moved there have to be consultation with Occupational Health whether the move was temporary or permanent. The claimant was party to the Agreement so his evidence should be preferred regarding its intention. If the respondent's interpretation of the Agreement is correct the claimant is no different to other prison officers and, therefore, there was no reasonable adjustment at all. The respondent could have discussed the move with the claimant but chose not to. He found out from the Detail Board, which was particularly insensitive. The respondent prioritised Key Work over the prison officers and possibly the prisoners.

Harassment

9.5 A mental health disability is more difficult to apprehend. Knowing that he would only work on HB 10 was the claimant's crutch. If a person uses a wheelchair and the employer takes away a ramp that would be harassment. On 17 April the claimant had been told that he could work on HB 10 but as the claimant explained it was then too late. Mr Tubby had tried to move the claimant to HB 10 but Mr Nixon had then moved him to the VPEU.

9.6 The claimant was then off work due to psychiatric injury.

The Law

10 The principal statutory provisions that are relevant to the issues in this case are contained in the 2010 Act. So far as is relevant they are out below:

10.1 Failure to make adjustments

"20 Duty to make adjustments

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

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

"39 Employees and applicants

A duty to make reasonable adjustments applies to an employer."

10.2 *Harassment*

"26 Harassment

(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), 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.

(5)The relevant protected characteristics are -

…..
disability;

….."

Application of the law and the facts to determine the issues

11 The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

12 The Tribunal now turns to consider the claimant's complaints addressing first his complaint in respect of reasonable adjustments.

Reasonable adjustments

13 In this regard the Tribunal records that the respondent had conceded that the claimant is a disabled person in respect of depression and anxiety, those being the impairments relevant to these proceedings, and also OCD and Psoriasis.

14 As discussed with the representatives, unlike most reasonable adjustment claims the issue for the Tribunal in this case is less whether the respondent failed to make a reasonable adjustment but whether it honoured and maintained the reasonable adjustment agreed with the claimant as recorded in the COT3 Agreement.

15 We have sought to interpret clause 4 of that agreement in accordance with the guidance in Investors Compensation Scheme v West Bromwich Building Society [1997] UKHL 28, including what the paragraph would convey to a reasonable person having all the background knowledge which would have been available to the parties to the agreement at the time.

16 In this regard we bring the following matters into account:

16.1 The claimant's position in his previous ET1 that, as mentioned above, he "could cover an occasional shift, but could not work with non-vulnerable prisoners on a permanent basis" (549). That claim was presented on 22 May 2017 and the settlement was reached on 9 August 2017 (203). That statement in the ET1 is therefore sufficiently proximate to the time during which the Agreement was being negotiated and concluded to give an indication of the intention of the claimant and his advisers at the time.

16.2 As to the meaning of "assigned" in clause 4, it is accepted by both parties that at the time of the Agreement and now, all PCOs are assigned to a particular house block as their "home" base while, in contrast, no PCOs are assigned to the VPEU as their base.

16.3 It is also accepted, at the time of the Agreement and now, that despite being assigned to a base house block, PCOs can be allocated to other duties on a temporary basis. Several examples are given above including to cover sickness absence, which is apparent from the PCOs covering the claimant's sickness absence on HB 10.

All of the above constitutes background knowledge available to the parties at the time of entering into the COT3 Agreement.

17 With that background knowledge the Tribunal is satisfied that the meaning of clause 4 was that the claimant would be assigned to HB 10 as his "home" base and subject to temporary reallocation as explained above (unless and until the respondent decided that he must be assigned elsewhere due to operational reasons but only after consultation with the claimant) and not, as the claimant now contends, that he would only ever be required to work in HB 10 and could never be required to work elsewhere in the Prison. That interpretation is directly contrary to claimant's own statement referred to above that he "could cover an occasional shift, but could not work with non-vulnerable prisoners on a permanent basis".

18 Additionally, the meaning of clause 4 of the Agreement for which the claimant now contends is not supported by the exchange of emails he had with Ms Barr, which is detailed above. In short,

18.1 he had requested a reasonable adjustment in line with the COT3 Agreement that he would "remain assigned" to HB 10 when on duty;

18.2 she had replied that he was still allocated to HB 10, specifically referred to it having being agreed that he "could be detailed other tasks off the wing as necessary and within reason" but that HB 10 would remain his ""home" House Block" and expressly asked the claimant whether his "position on this has changed";

18.3 when the claimant eventually replied in some detail on 23 August he did not challenge Ms Barr's assertion that he could be detailed other tasks off the wing or answer her question whether his position had changed.

19 The logical explanation for the claimant's failure to challenge Ms Barr on her interpretation of the COT3 Agreement is that he accepted that that was the meaning that it had both then and when it was entered into in 2017.

20 The Tribunal is reinforced in the above interpretation by the reference in clause 4 of the Agreement that if there is a need to assign the claimant to a different location there will be discussion with him about the "location he will be redeployed to". In the experience of this Tribunal the word "redeployed" signifies a permanent reassignment rather than a temporary placement.

21 The wording of the Agreement is that the claimant "remain assigned" to HB 10. The Tribunal is satisfied that despite the allocation of the claimant to the VPEU on 17 April he did "remain assigned" to HB 10 as his base. As mentioned above, the claimant would know that no PCOs are assigned to the VPEU as their base and therefore that his Detail to the VPEU on 17 April 2018 would not be a permanent assignment.

22 Thus the Tribunal is satisfied that there was no breach of the COT3 Agreement and, it follows, no failure on the part of the respondent to make the reasonable adjustment as agreed with the claimant in August 2017 and recorded in that Agreement.

23 In conclusion of the claim of failure to make reasonable adjustments, the Tribunal addresses the particular issues set out above as follows:

23.1 While it is right that the respondent generally applied the PCPs relied upon by the claimant of requiring its PCOs to work flexibly across the Prison, for the reasons set out above the Tribunal is not satisfied that in this case the respondent required the claimant "to work in all parts of the prison" or required that he "be moved to different parts of the prison". The evidence of both parties is clear in this respect: the respondent only required the claimant to work in HB 10 and, on 17 April 2018, allocated him to work in the VPEU. No requirement was placed upon the claimant to work elsewhere.

23.2 If the decision of the Tribunal in this respect had been to the contrary and the respondent did impose the asserted PCPs on the claimant the Tribunal is not satisfied that either of them placed the claimant at a substantial disadvantage in comparison with persons who are not disabled given that the general PCPs were not applied to him and he was only required to work in HB 10 or, on 17 April 2018, in the VPEU. As found above, the Tribunal is satisfied the VPEU was a reasonable alternative given that only vulnerable prisoners attended that Unit, the claimant would know at least some of them, it was located close to HB 10 and would only require him to undertake what we have described as 'general supervision'.

23.3 The respondent took such steps as were reasonable for it to have to take to avoid or reduce any disadvantage to which the claimant was placed by the general PCPs in that it only required the claimant to work in HB 10 (where he wanted to work) or temporarily allocated him to work in the reasonable alternative location of the VPEU on 17 April 2018.

Harassment

24 Turning to the complaint of harassment. The unwanted conduct relied upon by the claimant is as follows: "informing him on 17 April 2018 that he could no longer work on HB 10".

25 The Tribunal's finding set out above that the respondent did not breach or remove the reasonable adjustment agreed in the COT3 Agreement provides the context in respect of this complaint.

26 More particularly, the Tribunal is satisfied that the respondent did not inform the claimant that he could "no longer work" on HB 10. To the contrary, on the morning of 17 April 2018 he was allocated to work in the VPEU and even the

claimant's own evidence does not suggest that he was told that he could "no longer work" in HB 10. It follows, therefore, that the Tribunal is not satisfied that there was the unwanted conduct contended for by the claimant.

27 Each of the representatives referred the Tribunal to the three stage analysis contained in decision of the EAT in Richmond Pharmacology. In this case, however, as the Tribunal is satisfied that the respondent did not engage in unwanted conduct upon which the claimant relies (the first stage), it is unnecessary for it to consider the other two stages or, indeed, this claim of harassment further.

Conclusion

28 In conclusion, the unanimous judgement of the Tribunal is as follows:

28.1 The claimant's complaint, pursuant to section 21 of the Equality Act 2010, that the respondent discriminated against him in that it failed to comply with its duty under section 20 of that Act to make such adjustments as were reasonable to ameliorate the disadvantage to which he was put by a provision, criterion or practice of the respondent is not well-founded and is dismissed.

28.2 The claimant's complaint, pursuant to section 26 of that Act, that the respondent harassed him in that it engaged in unwanted conduct related to disability is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

REASONS SIGNED BY EMPLOYMENT JUDGE ON 9 October 2019