EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Reed	**v**	Secretary of State For Justice

Heard at: Bury St Edmunds

On: 24, 25 and 26 February 2020
27 February 2020 – Discussion day (No parties in attendance)

Before: Employment Judge S King

Members: Mrs M Prettyman and Mr B Smith

Appearances
For the Claimant: In person.
For the Respondent: Ms J Gray, Counsel.

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant was discriminated against arising from his disability under s.15 of the Equality Act 2010.

3. The respondent failed to comply with its duty to carry out reasonable adjustments under s.20 of the Equality Act 2010.

REASONS

1. We heard evidence from the claimant. On behalf of the respondent; Mr Manko (the claimant's line manager), Ms Doolan (Governing Governor and dismissing officer) and Mr Cartwright (the appeal manager). We had an agreed bundle that ran to page 624A.

2. The claimant brought claims of unfair dismissal, discrimination under s.15 and s.20 of the Equality Act 2010, failure to make reasonable adjustments

and an unlawful deduction from wages claim in respect of sums which have since been paid plus a shortfall in damages.

The Issues

3. The issues were set out by the parties in an agreed list of issues and are as follows:

Unfair Dismissal

(i) What was the principal reason for the claimant's dismissal?

(ii) Has the respondent shown it was a potentially fair reason such to justify the dismissal?

(iii) If so did the respondent act reasonably in treating it as a sufficient reason to dismiss the claimant, i.e. was the decision to dismiss within the band of reasonable responses of the reasonable employer in all the circumstances taking account of equity and substantial merits of the case?

(iv) Did the respondent follow a fair procedure in respect of the dismissal?

Disability Discrimination

(v) The claimant was disabled within the meaning of the Equality Act from 29 September 2017?

(vi) Did the respondent know or should they reasonably have known that?:

a. The claimant had a disability; and

b. That he was likely to be placed at a disadvantage.

Discrimination arising from disability under s.15 of the Equality Act 2010

(vii) Was the claimant treated unfavourably? The claimant claims the following unfavourable treatment:

a. Being denied pay protection on 11 December 2017.

b. Being dismissed by way of letter on 15 December 2017 with effect from 12 March 2018.

c. Being denied the opportunity to attend an appeal hearing in person on or around 27 February 2018.

(viii) Was the reason for that treatment because of something arising in consequence of his disability?

(ix) If so, was the treatment a proportionate means of achieving a legitimate aim?

Reasonable adjustments under s.20 of the Equality Act 2010 (as provided for in the list of issues – however the PCP's are not correctly articulated)

(x) Did the respondent apply a provision, criterion or practice which put the claimant at a substantial disadvantage in relation to relevant matter in comparison with a person who is not disabled, in?:

a. Requiring the claimant to work at HMP Littlehey from the date on which he was disabled and 15 December 2017.

b. Taking the decision to i) dismiss on 15 December 2017 and ii) upholding the decision on appeal on or around 13 March 2018 without the benefit of a contemporaneous medical report.

c. Requiring the claimant to be fit to return to a substantive post and/or to re-deployment at Littlehey by a) 15 December 2017 and b) 13 March 2018.

d. Requiring the claimant to take part in appeal hearing in person or without a representative on 27 February 2018.

e. Requiring the claimant to work at HMP Littlehey between the dates of 15 December 2017 and 12 May 2018 and the outcome of his appeal on or around 13 March 2018.

(xi) If so and each case, did the respondent take reasonable steps to avoid that disadvantage? The claimant contends the respondent should have made the following adjustments:

a. Offered suitable alternative employment at HMP Hampton office following request on 6 June 2017 and 29 September 2017 between the dates of 6 June 2017 and being notice of dismissal on 15 December 2017.

b. Obtaining contemporaneous medical report i) prior to the decision to dismiss and ii) the date of the dismissal on 12 March 2018.

c. Extending the sick leave until at least the result of the claimant's operation on 8 February 2018 became clearer.

d. Postponing the appeal hearing until he was able to attend with a representative.

e. Offering suitable alternative employment at HMP Hampton office between the date of notice of dismissal 15 December 2017 and a) the date of dismissal 12 March 2018 and/or date of the outcome of his appeal on or around 13 March 2018.

Unlawful deduction from wages

(xii) Was there a deduction made for the payments properly due as wages to the claimant?

(xiii) If so, what was the amount of that deduction in each case?

ACAS Uplift under TULCRA

(xiv) Does s.207A apply in this case?

(xv) If so, was the respondent in breach of the relevant provisions of the ACAS Code of Practice?

Time Issues (if applicable)

(xvi) Were any of the acts or omission complained of outside the primary time limits?

(xvii) If so, did they remain outside the primary time limits as adjusted by the ACAS Early Conciliation procedure?

(xviii) If so, were any of the acts or omissions acts extending over a period under s.123 of the Equality Act 2010? If not, will it be just and equitable to extend the time limit under s.123(1)(b) of the Act?

The Law

4. S.98 of the Employment Rights Act 1996 states as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(ba) . . . . . .

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(2A) . . . . . .

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(3A) . . . . . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(5). . . . . .

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action)."

5. S.207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 states as follows:

> "(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (c) 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."

6. S.15 of the Equality Act 2010 states as follows:

> **"Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

7. S.20 of the Equality Act 2010 states as follows:

> **"Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature 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.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column."

8. S.123 of the Equality Act 2010 states as follows:

> **"Time limits**
>
> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (d) when P does an act inconsistent with doing it, or
>
> (e) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

9. We have had regard to the EHRC Code of Practice of Employment. The parties also drew our attention to a number of authorities.

9.1 On behalf of the respondent:

a. DB Schenker Rail UK Limited v Doolan (IKEATS/0053/09/B1).

b. East Lindsey District Council v Daubney [1977] ICR 566.

c. Lynock v Cereal Packaging [1988] ICR 690.

d. Gallop v Newport City Council [2013] EWCA Civ 1583 and [2014] IRLR 211.

e. Donelien v Liberata UK Ltd [2018] EWCA Civ 129 at paragraph 32.

f. Pnaiser v NHS England and Another [2015] UKEAT/0137/15/LA.

g. Environment Agency v Rowan [2008] IRLR 20.

h. Secretary Of State For Work and Pensions (Jobcentre Plus) v Higgins UKEAT/579/12.

i. Griffiths v Secretary Of State For Work and Pensions [2015] EWCA Civ 1265.

j. HM Land Registry v Wakefield [2009] ALL ER D 2005.

9.2 The claimant referred to many cases in his submissions. Many were employment tribunal decisions which are not binding on us and which we have not referred to below but we have of course considered both parties submissions:

a. Hendricks v Commissioner of Police for the Metropolis [2002] EWCA Civ 1686.

b. Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548.

c. Pugh v National Assembly for Wales UKEAT/0251/06.

d. Cast v Croydon College [1998] IRLR 318.

e. Secretary Of State For Work and Pensions (Jobcentre Plus) v Jamil and Others UKEAT/0097/13.

f. Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17.

g. British Coal Corporation v Keeble [1997] IRLR 336.

h. Little v Richmond Pharmacology Ltd UKEAT/0262/11.

i. Hart v AR Marshall and Sons (Bulwell) Limited [1977] IRLR 61 (IRLR 51?).

j. BS v Dundee City Council [2013] CSIH91 applied in Monmouthshire County Council v Harris [2015] UKEAT/0010/15.

k. O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145.

l. East Lindsey District Council v Daubney [1977] ICR 566.

m. Spencer v Paragon Wallpapers Ltd [1977] ICR 301.

n. Iwuchukwu v City Hospital Sunderland NHS Foundation Trust [2019] EWCA Civ 498.

o. Portals Ltd v Gates [1980] UKEAT/202/80.

p. Garricks (Caterers) Ltd v Nolan [1980] IRLR 259.

q. Scottish and Southern Energy Plc v Mackay [2007] UKEAT/0075/06.

r. First West Yorkshire Ltd (T/A First Leeds) v Haigh [2007] UKEAT/0246/07.

s. Williams v Trustees of Swansea University Pension Insurance Scheme and Another [2018] UKSC65.

t. Basildon and Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14.

u. Pnaiser v NHS England and Another [2016] IRLR 170.

v. Risby v London Borough of Waltham Forrest UKEAT/0318/15.

w. DL Insurance Services Ltd v O'Connor UKEAT/0230/17.

x. Archibald v Fife Council [2004] IRLR 651.

y. Southampton City College v Randall [2006] IRLR 18.

z. G4S Cash Solutions (UK) Ltd v Powell UKEAT/0243/15.

aa. Anya v University of Oxford and Another [2001] IRLR 377.

bb. Din v Carrington Viyella Ltd [1982] ICR 258.

cc. Chattopadhyay v Headmaster of Hollway School and Others [1981] IRLR 487.

dd. Qureshi v Victoria University of Manchester and Others [2001] ICR 863.

ee. Nagarajan v London Regional Transport [1999] House of Lords.

ff. Barton v Investec Henderson Crosthwaite Securities Ltd [2003]

gg. IGEN Ltd & Others v Wong [2005] IRLR 258

hh. Tree v South East Coastal Ambulance Service NHS Foundation Trust UKEAT/0043/17.

10. Employment Judge King referred the parties to:

a. Polkey v AE Dayton Services Ltd ([1987] IRLR 503?).

b. Holmes v Qinetiq Ltd UKEAT/0206/15.

The Facts/Findings of Fact

11. The claimant was a specialist prison officer in PE at HMP Littlehey. He commenced employment on 27 November 1995 with the respondent. The claimant's employment was uneventful until an injury was sustained at work on 4 March 2017 which resulted in a period of sickness absence from which he never returned. He was dismissed under the Absence Management Policy on 11 December 2017 and served with notice, so his employment ended on 12 March 2018.

12. The issues in this case commenced with the injury sustained at work on 4 March 2017 whilst the claimant was paying volleyball as part of his role. This was therefore whilst at work. The claimant did not recover as anticipated and there were complications.

13. Employment Judge Foxwell determined on 19 June 2019 at a preliminary hearing that the claimant was disabled within the meaning of s.6 of the Equality Act 2010 with effect from 29 September 2017. The claimant only had this one injury/condition which occupies this Tribunal.

14. The claimant originally self-certified his absence due to the injury. Mr Manko was the claimant's line manager at all relevant times. On 6 March 2017 the claimant felt his absence would be short (less than 7 days).

15. The claimant was signed off as unfit for work by his GP for 7 days until 17 March 2017. On 16 March 2017 the claimant was signed off for a further period and an occupational health referral was submitted.

16. The first occupational health report was dated 27 March 2017 which referred to an appointment with a specialist on 29 May 2017 and a scan on 5 April 2017 so a follow up would be appropriate.

17. The claimant was signed off again from 29 March 2017 to 19 April 2017.

18. Occupational Health spoke to the claimant on 3 April 2017 and wrote a further report setting out that further exploratory treatment and physiotherapy was underway. This report was only days after the first report and before the scan and the specialist appointment so was of limited value. A follow-up for 1 May 2017 was arranged.

19. The claimant was signed off again on 19 April 2017 until 17 May 2017.

20. On 20 April 2017 Mr Manko arranged an informal attendance review meeting for the 26 April 2017 at the claimant's home. The claimant was sent a written invitation to the meeting. This is the only written invitation the Tribunal has seen for a meeting with Mr Manko throughout this process.

21. With regards to the attendance management process of the respondent, a number of relevant points arise from the policy:

> "2.27 – If the employee reaches or exceeds their trigger point during their sickness absence the line manager must carry out a formal unsatisfactory attendance meeting when the employee returns to work. See Managing Unsatisfactory Attendance. At this meeting all reasonable adjustments need to be discussed prior to any warnings being issued."
>
> "2.28 – If the sickness absence reaches 14 consecutive calendar days regardless of normal working patterns the line manager must follow the guidance on continuous sickness absence. See continuous sickness absence."
>
> "Managing unsatisfactory attendance
>
> 2.45 – Attendance is unsatisfactory if your employees sickness absence reaches or exceeds 8 working days (less pro rata for employees who do not work every day of the normal working week) or four spells of sickness absence in a rolling 12 month period, this is called the trigger point. The rolling 12 month period is the 12 months up to the last day of the most recent sickness absence."
>
> "2.46 – The employee may reach or exceed the trigger point by taking frequent short sickness absences or a continuous spell of sickness absence, part day sickness absences count toward a trigger point including trigger points during the improved and sustained improvement periods."
>
> "2.47 – If the sickness absence level reaches or exceeds a trigger point the line manager must arrange a formal unsatisfactory attendance meeting when the employee returns to work and follow the procedure for managing unsatisfactory attendance."
>
> "2.54 – A warning must not be given if the sickness absence is due to an injury, assault or disease contracted in the course of the employees duties – see how to support staff involved in an accident for further guidance or visit NOMS-help.wellbeingzone.co.uk. The employee may be able to claim injury benefit – see my services for further guidance. If injury benefit is awarded the department must provide up to maximum 6 months injury absence on full pay before normal

sick pay arrangements are applied. Any subsequent sickness absence will be treated in the same way as other sickness absences. See sick leave exclusal arrangements for further guidance."

"2.55 – Disability related absences will count towards a trigger calculation but managers will be able to use their discretion to decide whether to issue employees with a warning. A manager must make sure that reasonable adjustments are considered such as adjusting the trigger point, variation to working practices or providing specialist equipment for an employee covered by the disability provisions of the Equality Act 2010 taking into account absences that are directly related to that disability. The trigger point may vary for disabled employees where a higher trigger point has been deemed a reasonable adjustment or where employees exceed the adjusted trigger point warnings may be issued."

"Continuous absence

2.72 – A continuous period of sickness absence is one which reaches 14 consecutive calendar days."

"2.73 – During any continuous sickness absence period the line manager and employee should work together to explore what the employee can do or might be capable of doing with help and support to return to work as soon as they are able – see how to hold a return to work discussion for further guidance."

"Meetings during continuous sickness absence

2.75 – there are two types of meetings which must take place between the line manager and the employee during a continuous sickness absence.

- An informal review – to keep in touch with the employee and explore the support needed to help the employee return to work.

- A formal attendance review meeting – to explore the support needed but also to consider whether the employee is likely to return within a reasonable timeframe and therefore whether the business can continue to support the absence, this is a formal meeting where the employee has the right to be accompanied."

"2.76 – These meetings must take place at the following points:

- An informal review – after 14 consecutive calendar days of sickness absence and every month thereafter.

- A formal attendance review meeting after 28 consecutive calendar days, another when the sickness absence has lasted 3 months and every quarter thereafter. There is no need to hold an informal review in a month where a formal attendance review meeting is scheduled."

"Informal reviews

2.77 – Informal reviews must take place during periods of continuous sickness absence including any which are pregnancy related. The first informal review should be carried out when the period of sickness reaches 14 continuous calendar days unless the employee is due to return in the next few days."

"2.78 – further informal reviews should be held on a monthly basis. Exception in the line manager and employee may agree the less frequent reviews if appropriate."

"2.79 – In the month where a formal review meeting is required, usually every third month of the continuous absence period with the need to hold an informal review in addition."

"2.80 – It is important to continue with informal reviews on a monthly basis in between formal attendance review meetings as the purpose of the informal reviews is to keep in touch with the employee and establish whether there is any support which can be provided to help the employee return to work – see how to keep in touch with employees on sickness absence for further guidance."

"2.81 – during an informal review the line manager should:

- Ask the employee how they are feeling and where they are in their recovery. Discuss any medical advice for example from GP, consultant or occupational health.
- Ask the employee when they think they will be able to return to work and what support they need to achieve this. See how to adopt a work focussed approach for further guidance.
- Remind the employee of the attendance standards expected of them, inform them if they have reached a trigger point.
- Bring the employee up to date with any key developments in their work areas and/or the organisation."

"2.82 – Following the review with the employee the line manager must consider whether the sickness absence can be continued to be supported except where the sickness absence is pregnancy related – see how to manage pregnancy related absence for further guidance. If the manager believes the sickness absence cannot be supported they will need to arrange a formal attendance review meeting."

"2.83 formal attendance review meeting – The first formal attendance review meeting must take place when sickness absence reaches 28 consecutive calendar days unless the employee is due to return to work in the next few days."

"2.84 – Further formal attendance review meetings must be held:

- When an employee has been absent for 3 months and then every 3 months thereafter as a minimum.

- If following an informal review a line manager considers an absence cannot be supported – see how to decide whether an absence can continue to be supported for further guidance."

"2.86 – During the meeting the line manager should:

- Ask the employee how they are feeling and where they are in their recovery.

- Discuss any medical advice, for example from the GP, consultant or occupational health.
- Ask the employee when they think they will be able to return to work and what support they need to achieve this – see how to adopt a work focussed approach for further guidance.
- Remind the employee the attendance standard required of them, inform them they have reached their trigger point.
- Bring the employee up to date with any key developments in their work area and the organisation.
- Discuss with the employee whether a return to work is likely within a reasonable timescale.
- Consider whether the sickness absence can continue to be supported.
- Explain that downgrade, re-grade or dismissal may be considered if their level of sickness absence cannot be supported."

"2.87 – If a return to work is likely within a reasonable timescale and/or the absence can continue to be supported the line manager should arrange an informal review with the employee to held in a month's time."

2.88 – If a return to work is not likely within a reasonable timescale and the absence cannot continue to be supported, consideration should be given as to whether the employee should be referred for consideration for ill-health retirement or whether downgrade/re-grade or dismissal is appropriate. Further guidance on ill-health retirement is available on My Services."

"Decision is dismissal

2.98 – The decision manager must dismiss the employee if all of the following apply:

- The business can no longer support the employee's level of sickness absence.
- Downgrade or re-grade is not appropriate without employee's consent.
- Where appropriate there are no further reasonable adjustments which can be made which can help the employee return satisfactory attendance and all other considerations have been exhausted.
- Occupational health advice from the OHP has been received in the last 3 months unless the employee withheld their consent to the occupational health referral.
- An application for ill-health retirement would not be appropriate or has been refused – refer to my services for further guidance."

"Following the decision

2.101 – After making the decision, the decision manager must:

- Make a full written record on the discussions and the outcome, this may include the reason for the dismissal, for the decision.
- Write to the employee within 5 working days of the meeting to advise them of the decision taken the reasons for it including a summary of the key points from the meeting. If a decision is to dismiss the letter must include the effective date of dismissal, details of notice period, any compensation payment, tell the employee they have a right to appeal against the dismissal within 10 working days of receiving the letter.

- Inform the employee of the right to appeal to the Civil Service Appeal Board regarding the amount of compensation paid on dismissal on efficiency grounds for unsatisfactory attendance.
- Send a copy of the letter and complete a conversation certificate to My CSP of the decision to dismiss.
- Update the employee's absence record on Oracle."

"Appeals

2.111 – An appeal hearing is a full re-hearing of the case, this means that the appeal manager must consider all the facts afresh and come to their own decision."

22. On 24 April 2017 an occupational health telephone appointment was arranged for the 3 May 2017.

23. On 26 April 2017 the claimant's line manager with a company witness attended the claimant's home to carry out the informal review meeting as previously arranged. There were no formal notes of the meeting taken but Mr Manko made notes in a document entitled "Part E record of home visits" which in fact became a record of his notes throughout the management of this matter and was referred to as the parties as Annex B. This documents the claimant's absences, correspondence and contact with the claimant, and medical evidence. Whilst this is not complete (see below) this was not seen by the claimant at any point in the process until these proceedings were underway.

24. On 28 April 2017 Mr Manko arranged a further informal attendance review meeting at the claimant's home for 10 May 2017.

25. There does not appear to be a written invitation but it is not in dispute that this took place. The claimant had another consultant's appointment later that month. The claimant had by this stage engaged the services of a private chiropractor in an effort to return to work.

26. The claimant was signed off from 17 May 2017 to 24 May 2017. On 24 May 2017 the claimant was signed off for 2 weeks until 6 June 2017 and the fit note further stated that a 12-week phased return on reduced hours and desk duties would be appropriate thereafter. This statement of fitness was from the claimant's treating doctor, Dr Carmichael.

27. The claimant attended an appointment with occupational health practitioner, Doctor Stripp on 26 May 2017. The occupational health practitioner advised s/he would get further medical evidence from the treating specialist to be able to advise on prognosis and future treatments. This report was however not received by the respondent until 26 June 2017. The respondent had by this stage escalated the matter from the occupational health advisors to the occupational health practitioners.

28. Mr Manko arranged another meeting on 5 June 2017. At this meeting Mr Manko had not had the benefit of the occupational health practitioners report dated 26 May 2017.

29. The claimant's treating doctor had indicated now was the time for the claimant to undergo a 12-week phased return on reduced hours/desk duties. This did not happen. At the meeting the claimant raised the issue of being unable to drive long distances and that he may be able to work from the Hampton/Yaxley area office and Mr Manko agreed to look into this. We accept the claimant's evidence that the reason he highlighted Hampton was it was close to his home and he could arrange transport.

30. At this meeting, Mr Manko discussed the two main outcomes of the process, namely that the claimant could apply for Ill-Health Retirement (IHR) or could be dismissed due to inefficiency. The claimant was given an IHR Form but did not complete this until much later. At this point the claimant's focus was on his return to work. The claimant was also told to submit a sickness leave excusal request as his absence was related to an injury at work.

31. The claimant emailed Mr Manko on 6 June 2017 asking in writing that the suggestion of Hampton is looked into. This is omitted from Mr Manko's case notes.

32. On 7 June 2017 the claimant was signed off unfit for work until 6 July 2017. No phased return had taken place.

33. On 14 June 2017 Mr Manko replied to the claimant's email to inform him that he had discussed the options and was advised working from Hampton/Yaxley office was not possible and enquired whether the claimant would consider 1-3 days a week with lifts to work with another member of staff. The claimant was prepared to consider the latter

34. The Respondent's evidence on Hampton was inconsistent. Mr Manko's note (which is the closest in time to being contemporaneous) says he discussed it and was advised that it was not possible. Mr Manko's witness statement says he had the wrong building number and his correspondence went to the wrong address. When questioned, in his oral evidence, he accepted there was no correspondence but rather he had attempted to call the Hampton office using a telephone number from the intranet to no avail over several days. This is not referenced in his case notes either way.

35. Ms Doolan in her witness statement said that Mr Manko's enquiries led him to tell her that the office had been closed but in any event it was a specialist facility she had no control over and no authority to offer a role at. When questioned, in oral evidence Ms Doolan stated that she contacted the lead manager escort controller at Hampton to satisfy herself this was not an option but this was omitted from her witness statement, it is also not referenced in the FARM meeting notes or the outcome letter (see below). Ms Doolan told us she would regularly meet with Mr Manko to discuss

staffing issues including sickness absence, these meetings are not covered in Mr Manko's case notes.

36. Further, Ms Doolan's oral evidence was that she "would not just dump someone who was vulnerable with two teams they did not know, it would not have been right." The wild variations in evidence on this point concerned the Tribunal.

37. Considering all the evidence, we find on this fact, that Mr Manko did make limited enquiries as to Hampton but that having discussed it with Ms Doolan it was swiftly ruled out and he took it no further. We do not accept Ms Doolan's evidence that she made enquiries at the time of dismissal as there is no reference to this in the outcome letter or notes of the meeting. There may have been further enquiries but not at the relevant time although may have been explored subsequently for the purposes of litigation.

38. Mr Manko contacted the claimant on 26 June 2017 as he had still not had the occupational health practitioners report. Mr Manko advised him that the lifts had not been possible to organise due to logistics. This is contrary to his witness statement which said that it was the claimant who refused this. Subsequently, in oral evidence Mr Manko confirmed he had himself ruled this out as the colleague left at 6.30am and he felt it would be "not reasonable to be picked up at that time and would not be fair on him". At no point was the claimant asked of his opinion on this proposal. The claimant did not therefore refuse the proposal as Mr Manko suggested in his evidence. There were several examples of the respondent's witness evidence orally not supporting their written witness statement evidence.

39. On 22 June 2017 Mr Manko emailed the claimant confirming that the sickness leave exclusal application had been made, he also confirmed that this meant that the claimant would receive one years' full pay entitlement and then it would be reviewed if the absence was to be longer. This gave the claimant the impression his employment was not at risk.

40. On 26 June 2017 the respondent received Doctor Stripp's Occupational Health Practitioners Report from May. This was a short report and she confirmed that she was obtaining further evidence from the claimant's treating specialist before being able to advise on his future fitness from work.

41. The claimant called Mr Manko on 5 July 2017 and he updated him on his private treatment. The claimant followed this up with an email outlining his private appointments and the efforts he was undertaking towards rehabilitation to be able to return to work.

42. On 6 July 2017 the claimant was signed off until 6 August 2017. The claimant contacted Mr Manko on 8 August 2017. Mr Manko replied confirming he had contacted OHP regarding completion of the "final report" and as soon as Doctor Stripp assessed the information he would complete

the “Final Occupational Health Practitioners Report to indicate next steps”. This is again not referred to in Mr Manko’s note but appears in email chains. Mr Manko does however outline his contact with occupational health portal on the same day with the same references in his notes to “final report”.

43. Also on 8 August 2017 Ms Doolan (not Governor Stephenson as Mr Manko’s note suggests) completed a sickness leave exclusion application to “seek guidance on whether the injury warrants sickness leave exclusion for the extended period of duty “Mr Reed does not appear to be able to attend duty in any capacity despite offers of support from his line manager. The OHP report has not offered any guidance on whether Mr Reed could return to Littlehey on restricted duties and indications are that this injury will require protracted time off duty, advice on how to proceed would be appreciated”. In actual fact there had been no offer of support from his line manager that were actively pursued by the respondent.

44. On 8 August 2017, the claimant sent his fit note for the period of 6 August to 7 September 2017 as unfit for work.

45. On 14 August 2017, Mr Manko chased Occupational Health Assist as he “urgently needs the final report”.

46. On 15 August 2017, Mr Manko spoke to the claimant and advised him that his pay would reduce to half pay from 30 August 2017 as his sickness leave exclusal application was still outstanding. Mr Manko also chased the “Final Occupational Health Report” again on this day.

47. On 23 August 2017 the claimant contacted Mr Manko to query his sick pay and advise he would need to stop his private treatment due to not being able to meet the cost on half salary.

48. On 31 August 2017 Mr Manko visited the claimant’s home (having arranged the same on 24 August 2017). The claimant updated him on his upcoming appointments and Mr Manko explained that a colleague Tony could drop him into work and home again 3 days a week on main shifts and the claimant was receptive to this idea. Mr Manko explained the possible avenues as the claimant was unaware of the same. There was no evidence that the process or policy was explained to the claimant at any stage in writing during this period. Ill-health retirement was said to be unlikely. Dismissal due to efficiency with compensation and a re-grade being the alternatives. The re-grade option was either under the Disability Act (sic), but the claimant would more than likely not be disabled or a re-grade into an appointment of an appropriate available position straight onto new terms and conditions but the occupational health report was required to ascertain the next stage.

49. On 5 September 2017 the sickness leave exclusion application was underway and the claimant was referred for medical evidence as part of that application.

50. On 6 September 2017 the claimant updated Mr Manko and told him that he was due a review in 3 weeks to decide on either an operation or steroid injections and advised Mr Manko that he was signed off unfit until 26 September 2017.

51. On 6 September 2017 Ms Doolan received an update that the sickness leave exclusion application would be delayed. At this time the respondent also received a personal injury litigation claim concerning the injury sustained by the claimant.

52. On 12 September 2017, the occupational health practitioner requested another appointment before the final report was completed. This was conducted by telephone on the 22nd September 2017. On 22 September 2017 the occupational health report was received, this was the final report referred to above.

53. The final report confirmed as follows:

> "Mr Reed tells me he is due to have a further review with a specialist next week after trialling 3 weeks without his ankle brace to see whether this has helped and that there is a possibility the he may be offered injections but is unclear whether these are for treatment or diagnostic purposes."
>
> "And as he cannot drive he will struggle to come to work, once he can drive then he could undertake an adjusted role which was mainly sedentary in nature, this would be minimal offender facing providing it was risk assessed as he cannot mobilise well and remains unfit for CNR."
>
> "Under current outlook
> With regards to the future a timetable for improvement and resumption of full duties is difficult to predict and this may well require him to have further treatment. If he does progress to having surgery then he will remain unfit to undertake CNR or his fitness tests for at least the next 6 months. However it is premature to say he will not regain full fitness and as such progression for ill-health retirement is not supported at this stage."
>
> "Under disability advice
> But while ultimately it is for a Tribunal to determine whether an individual is considered to be disabled my interpretation of the relevant UK legislation is that Mr Reed's ankle impairment is unlikely to be considered disability because it has not lasted longer than 12 months."

54. Mr Manko confirms that this report was sent to Ms Doolan and other Governors. It is not clear why the report was written as a final report the week before such a key medical review for the claimant. The claimant was then signed off for 12 weeks until 19 December 2017. No updated or clarifications were sought from OH about timescales, adjustments and alternative roles.

55. On 2 October 2017 Mr Manko's notes advise that, "I contacted Darren as agreed following the sick meeting, I updated him with what was discussed.

I have made Darren aware that we have requested compensation figures from Shared Services in order to fully inform and prepare for a formal attendance meeting. I explained that due to the length currently of his sickness absence and him further signed of for 12 weeks that this is process and inevitable."

56. We find that this is in part a reference to a meeting between Mr Manko and Ms Doolan where progression to a Formal Attendance Review Meeting (FARM) was decided.

57. In the call, the claimant also updated Mr Manko on his need for an operation and that the first 3 months would be non-weight bearing. The claimant provided a copy of Mr Carmichael's letter dated 29 September 2017 which confirmed that he was placed on the waiting list for an operation with a 50% chance of being able to return to all duties. This further confirmed that conservative treatment had failed. From this point the claimant was disabled within the meaning of the Equality Act 2010 as found by Employment Judge Foxwell.

58. On 1 November 2017 an application for compensation was submitted by Ms Doolan (albeit her evidence is that this was her office and not made by her personally). Compensation figures were needed for an inefficiency dismissal which was not in progress. IHR had been ruled out by the medical report at this stage.

59. On 22 November 2017 Mr Manko called the claimant to advise him that once the figures (compensation figures) are received a Formal Attendance Review Meeting (FARM) would be arranged.

60. By letter dated 30 November 2017, the claimant was invited to a Formal Attendance Review Meeting on 11 December 2017. He was given the right to be accompanied and sent the attendance management policy and procedure, the occupational health report and a copy of his consultant's letter. We are told that Ms Doolan had Mr Manko's notes ("Annex B") for the meeting but these were not sent to the claimant. The letter also refers to a call between Mr Manko and the claimant on 24 November 2017 which was missing from Mr Manko's notes ("Annex B"). The respondent does not provide the claimant with any evidence as the lack of sustainability that it later relies upon for the purpose of this hearing. The letter confirmed:

> "Mr Manko told you I would consider whether you should be dismissed or re-graded. I am writing to invite you to a meeting to discuss the prognosis for a return to full duties in the near future and the circumstances of your case.
>
> At the meeting you will have the opportunity to put forward all additional new facts which you wish me to consider. I'll also explore with you whether you would accept a re-grade/downgrade as an alternative to dismissal if this option was preferred to you."

61. The claimant queried the letter due to inaccuracies as to the date and topic of the call with Mr Manko and the accuracies with regard to an employee

number etc. A subsequent shorter invite with the correct date, time and employee number was sent to the claimant.

62. On 11 December 2017 the claimant attended the FARM meeting with his Trade Union representative. His request to record the meeting was refused. Minutes were said to be taken; these are in fact limited notes as they covered just one side of A4 for a 1¾ hour meeting. This was the only formal review meeting held by the respondent contrary to its own policy.

63. The claimant was dismissed with notice at that meeting. By letter dated 15 December 2017 the respondent confirmed dismissal with effect from 12 March 2018. This letter is not set out in full but the key passage for this Tribunal is as follows:

> "I have carefully considered all the evidence available to me today from Dr Dar's assessment of the 22 September 2017, your health history and your own comments. The key points for me from Dr Dar's report are, you are currently experiencing ongoing symptoms from your ankle injury and you cannot drive and you struggle to attend work. It is difficult for Dr Dar to predict any timescale of when an improvement in your condition will occur without further treatment to allow you to resume full duties, however this will take at least 6 months to achieve. You went on to describe how your specialist was looking to improve your current ankle condition through surgical intervention. You inform me that you have a date for this surgery 8 February 2018 with a predicted recovery period about 3 months followed by a period of restricted duties.
>
> You informed me that you have not been able to return to work earlier due to difficulties in transportation. You said you did not feel able to accept the prison's offer of lifts with colleagues as you felt that was not in line with the advice from your doctor and would have been difficult to manage. You cannot see this changing until after you have had your operation recovery period. Even once your operation has taken place you cannot foresee a return to your band 4 PEI role as you would be unable to pass your CNR.
>
> We discussed potential adjustments and re-grading options. I described how we had a new band 4 role available which would not require CNR. This was a role as an interventions facilitator that would require you to pass a suitability assessment. We also discussed the band 3 administrator post. Also had to make you aware that as your condition is not covered by under the Equality Act 2012 (sic) you would not receive pay protection if you are to take up this offer. You described your current difficulties commuting work so you could not foresee yourself being able to take up either of these roles.
>
> I reminded you that you have been absent from work since 4 March 2017 which equates to 282 calendar days absence which can no longer be sustained.
>
> With this said it was with regret I took my decision to dismiss you from HMPPS as you've been unable to return to return to work within a reasonable timescale. Your last day of service will be the 12 March 2018."

64. With regards to the lack of sustainability now relied on, no evidence was produced for the claimant at the point of the dismissal hearing and again the respondent's evidence at Tribunal on this point was conflicted.

Mr Manko (the claimant's line manager) in his evidence confirmed that numbers were not below the minimum required and during the claimant's absence, the impact on the regime was minimal and some overtime was used but not extensively. Ms Doolan however painted a very different picture of the prison as being unable to manage the claimant's absence. There are approximately 400-500 members of staff on site and given the claimant's specialist role, we prefer the evidence of Mr Manko in this regard since he was close to the reality of what went on he was on the ground managing the situation day to day.

65. By a letter dated 21 December 2017 the claimant appealed his dismissal stating he was disabled within the meaning of the Equality Act 2010 and that the respondent should have obtained up to date medical reports.

66. The respondent wrote to the claimant by letter date 16 January 2018 advising he had not set out the prescribed grounds of appeal.

67. By letter dated 26 January 2018 the claimant provided the further information requested. The claimant was invited to attend an appeal meeting on 21 February 2018 at Sterling House (about 1 hour further than HMP Littlehey).

68. On 2 February 2018 the claimant advised his intention to attend the appeal meeting but that he had his operation on 8 February so would confirm after the operation. On 9 February the claimant emailed to advise he was unable to travel to the meeting location as he was in plaster and on crutches. The claimant asked if it could be arranged for Peterborough so he could probably attend.

69. On 14 February 2018 Mr Cartwright's personal secretary (who arranged his diary) told the claimant it was not possible to hold the meeting in Peterborough giving him two options, hearing it in his absence or the second is to reschedule for another date in March. She asked what option would you prefer? Mr Cartwright's evidence was that he was unaware these options were given and he was very busy so it was probably because his diary would not permit it.

70. On 14 February 2018 the claimant replied to say, "I think it is essential I be allowed to attend".

71. On 20 February 2018 Mr Cartwright's personal secretary advised that Mr Cartwright is keen to hear your appeal and suggested a conference telephone call as a reasonable adjustment. "Your Union representative is welcome to attend in person at Sterling House during the call and you may prefer for your representative to attend at your house during the call." The claimant was also told "I advise you can make an application for ill-health retirement yourself provided you do so before your last day of service".

72. We are told that Dr Carmichael produced another report in February 2018.

73. On 22 February 2018 the claimant submitted a letter from his GP surgery as follows:

> "This in now causing considerable stress and anxiety affecting his mood which can be further affect the quality of any work if undertaken.
>
> I would appreciate it if you could support the patient during this difficult period of recovery by avoiding work related activities that could put more stress on him and effect his health further."

74. Mr Cartwright knew that the claimant was disabled. He confirmed this in his oral evidence. On 28 February 2018 Mr Cartwright wrote to the claimant a letter as follows:-

> "I note that your GP has advised you to avoid work related activities at present which I assume includes engaging with the appeal process. I acknowledge you've expressed a wish to attend your appeal hearing in person but given there is no projected date for your recovery I've concluded it's not possible so it's not reasonable to wait any longer before considering your appeal. Accordingly I will now consider your appeal on paper and invite you to submit any further material in support of your appeal by close of business on 7 March."

75. By email dated 1 March 2018 the claimant replies:

> "Mr Cartwright I feel I am being bullied out of my right to defend myself at this appeal hearing taken advantage of whilst in this delicate condition I feel it's therefore essential at the very least I be allowed a PRO Member to represent my interests at the appeal meeting."

76. There appears to be no response to this email and the claimant raised a stage 1 grievance on 2 March 2018 which stated:

> "I feel I am being bullied out of my right to defend myself at this appeal meeting. Taken advantage of whilst in a delicate condition. Feeling my concerns are being swept aside. Not given time to recover from my recent operation despite sending a GP letter requesting the same on 22 February 2018."

77. Notwithstanding the claimant's protests and the respondent's own offer of a March date, the respondent dealt with the claimant's appeal on paper. The claimant wanted a face to face meeting so did not submit further evidence so the appeal could be conducted on paper. On 13 March 2018 Mr Cartwright dismissed the claimant's appeal and confirmed the same by letter which stated as follows:

> "I informed you via a letter dated 28 February 2018 that I had concluded it was not reasonable to wait any longer before considering your appeal, I have not seen anything since then to change my view about this. I have not received any further material in support of your appeal and accordingly have made my decision on the basis of the information before me. I decided to uphold the decision to dismiss you and my reasoning is set out below. In your grounds of appeal dated 26 January 2018 you raised concerns … you state the report from your consultant dated 30 September 2017 was not taken into account at the formal attendance review meeting (FARM) at which you were dismissed on 11 December 2017.

> You do not attach a copy but have explained that it gives the details of conservative treatment options as an alternative to surgery. I do not see how this material would have caused Governor Doolan to make a different decision and you have not explained this.
>
> At the FARM on 11 December 2017 Governor Doolan did duly consider the facts before her which were that you had been absent for 9 months that no possible return to work date was given and that the absence was no longer sustainable. That there was no reasonable adjustment possible which could facilitate your return to work that the advice of Occupational Health was that you were not fit for CNR and that ill-health retirement was not recommended. Accordingly I have concluded that Governor Doolan's decision was reasonable and I see no reason to overturn it."

78. Mr Cartwright's outcome did not deal with any of the claimant's points in detail, with discrimination (save for the reference to reasonable adjustments) and he indicated that he had not himself considered the treating doctors report. The appeal was supposed to be a re-hearing under 2.111 of the respondent's policy but it was not.

79. Mr Cartwright's oral evidence was that he understood the appeal must be concluded otherwise the claimant remained an employee until the appeal procedure had concluded. Ms Doolan contradicted this revelation but clarified that recruitment could not commence until an appeal had conclude. Neither of these points were confirmed in a policy document.

80. Mr Manko told the claimant that his grievance of 2nd March 2018 was out of scope and this was not dealt with. The claimant's discrimination elements of his appeal were said to have been dealt with under the appeal procedure.

81. A further OH report was obtained on 12th March 2018 (the claimant's last day of service) for the purpose of a decision on sick pay at pensionable rate rather than for the purpose of dismissal/capability. This report confirmed that the claimant had a surgical procedure on 8th February 2018, that he was in plaster and due to start weight bearing exercises. The current capacity for work was that he was unlikely to return to work but the current outlook was that the prognosis for ankle recovery is fairly positive in the long term. No timescales are provided but the OH report confirmed that the claimant was likely to be disabled. Again, no questions were put to the OH practitioner on timescales, adjustments etc.

82. The claimant raised another grievance on 12th March 2018 about sick leave excusal which was later granted so the claimant withdrew that grievance.

83. The claimant commenced ACAS Early Conciliation on 30 May 2018 and received his ACAS Certificate on 30 June 2018. The claimant submitted his ET1 on 7 July 2018.

Conclusions

Unfair dismissal

i) What was the principal reason for the claimant's dismissal?

84. We accept that the claimant was dismissed for capability. No other reasons were advanced by the claimant.

ii) Has the respondent shown this was a potentially fair reason as to justify the dismissal?

85. Capability is a fair reason under s.98 of the Employment Rights Act 1996, namely ill-health.

iii) If so, did the respondent act reasonably in treating it as a sufficient reason to dismiss the claimant, i.e. was the decision to dismiss within the band of reasonable responses of the reasonable employer in all the circumstances taking account of equity and substantial merits of the case?

86. We remind ourselves that we must not substitute our views for that of the respondent. We must judge the respondent using the Burchell standard of reasonableness. We have particular regard to the case of DB Schenker Rail Ltd v Doolan when dealing with capability and that the decision to dismiss is a managerial one and not a medical one. The issue is whether a reasonable employer could find from the material before them that the claimant was not capable of returning to his post. Paragraphs 33-37 of the Schenker judgment assisted the Tribunal. Did the respondent genuinely believe in the stated reason, was it a decision reached after a reasonable investigation and whether they had reasonable grounds to conclude as they did. The respondent has listed 5 general principles concerning capability related dismissals that the tribunal should consider.

(a) The employer should take steps to find out the current medical position and prognosis should be judged against the standards of reasonableness (Schenker).

87. The last report was the final one which was put in train in July 2017. It was produced on 22nd September 2017 and the meeting was 11th December 2017. The report was written a week before a key medical review was due for the claimant with his treating consultant at which surgery was decided.

88. The medical evidence (OH final report dated 22nd September 2017) was almost 3 months old, pre-dated the claimant's own doctors' assessment as to whether he was having an operation or injections. This final report also confirmed that it was too early for ill-health retirement, that the prognosis was not certain and it was premature to say that he would not regain full fitness. It was short and not detailed on key issues and wrongly concluded that the claimant was not disabled as it did not ask the right questions under the Equality Act 2010.

89. In our view, a reasonable employer would have sought and clarified up to the date the position with a prognosis. In this case the respondent closed its mind to the future as it had made the decision that the September report was its "final report". In June 2017, the respondent had decided and communicated to the claimant that there were two outcomes to the process IHR or dismissal due to inefficiency.

90. At the time of dismissal, the occupational health report had been received but there was a scheduled operation for 8 February 2018. A reasonable employer would therefore have waited until after that operation (8 weeks) to determine the prognosis for the future. As early as July 2017 in this case, the respondent had focused on dismissal and this meant that it approached the process with a closed mind.

91. This was compounded at the appeal stage because the appeal was supposed to be a re-hearing, yet the medical evidence was pre the operation and almost 6 months out of date. It was written before the course of operation or injections had even been settled. There was an OH report dated 12th March 2018 (decision to dismiss the appeal dated 13th March 2018) that confirmed that the prognosis was fairly positive but no timescales were given. Given that by the time the claimant had his appeal decision, it was clear he had had the operation a reasonable employer would have considered up to date medical evidence before reaching that decision. Specific questions as to timescales should have been raised and addressed on the evidence.

92. Given that there were some significant changes on the horizon for the claimant with his planned operation, a reasonable investigation had not taken place. The focus had been on dismissal so evidence around prognosis was not obtained. Dr Dar's report and prognosis was 6 months but this was based on it being difficult to predict without further treatment. Further treatment was in fact scheduled. The respondent could also have sought evidence from the treating physician Dr Carmichael.

93. The dismissing officer found that the claimant had been unable to return to work within a reasonable timescale but she did not comment on what would have been a further reasonable period. The claimant was indicating that this could be within months of when he was dismissed. The respondent did not reasonable grounds to draw the conclusions it did particularly in a developing medical position with medical evidence that was outdated.

(b) The employer should seek to consult with the employee (East Lindsay DC)

94. The respondent's policy provides for a series of informal meetings and a series of formal review meetings (FARMs). In actual fact, the claimant only had one FARM and four informal meetings. The respondent accepts that it did not follow its own procedure but that this was more

advantageous to the claimant as he did not have a FARM until almost 8 months after his first absence. However, an informal review should be held within 14 days and then every month thereafter in the respondent's policy. This further states that FARMS should be after 28 consecutive calendar days, at 3 months and every quarter thereafter (paragraph 2.76 respondent's policy). This meant that apart from Mr Manko's chats, the only opportunity for the claimant to have a formal review and have his representative accompany him for support was the dismissal meeting. This is contrary to both its own procedure and a fair capability process.

95. The fact that the respondent did not utilise a series of warnings is not fatal to its case if we felt that the respondent had nevertheless carried out formal reviews. However, in this case the focus as early as June was on IHR/dismissal, not on return to work for somebody with 22 years' service. This meant that the respondent closed its mind some six months earlier to anything other than getting a final report and proceeding to dismiss. This was quite clear on the documented case and from the evidence of its witnesses.

96. Consultation should be a two-way process. The bullet points as to what should have happened at the informal meeting (paragraph 2.81 of the respondent's policy) did not happen at the informal meeting. At the formal meeting, the notes of the meetings (Appendix B) were not shared with the claimant which were incomplete in any event. These were the basis of the respondent's case. The business case was never set out to the claimant and aside from the oral evidence at Tribunal no evidence was ever produced for the claimant to comment on about the alleged difficulties Mrs Doolan stated his absence was causing. The bullet points as to what should have happened at the formal meeting did not all take place at the one and only FARM meeting (paragraph 2.86 of the respondent's policy).

97. During this process, the efforts regarding alternatives to dismissal such as Hampton and the lifts were paid lip service. The claimant was not consulted on whether he wished to have a 6.30am start or whether he felt isolated at Hampton. This was unilaterally decided for him. Both Mr Manko and Ms Doolan decided without any consultation that to do so would have been unfair on the claimant. He was not asked about it. The view was not shared with him to comment on but the alternatives just dismissed out of hand. Both were at pains to point out the unfairness to the claimant to emphasis how fair they had been but without considering that failing to consider them but dismiss him instead was better.

98. The only FARM meeting was in fact the dismissal meeting. Two posts were discussed at that FARM meeting. The grade 4 post without restraint was raised with the claimant by Ms Doolan and he expressly stated he accepted that but yet that was ignored and not looked into further.

99. The respondent felt that the claimant was unable to drive and closed its mind to other alternatives. The view was he could not get here so he could not do it. This was rather chicken and egg. The respondent failed to

give due consideration to other options to get him to work to show he could carry out tasks such as lifts, taxi, access work or whether options were possible.

100. We are not sure whether this was because Ms Doolan wrongly did not consider the claimant to be disabled so the respondent closed their mind to the solutions. They did not have any meaningful consultation with him. The options tabled by the respondent were not progressed. The process was about him and not with him. Even if the claimant had not been disabled, any reasonable employer would have looked at alternatives to dismissal rather before taking that decision and would only dismiss after exploring any alternatives and after consultation with the claimant.

(c) Relevant factors for the employer to take into account when reaching a decision as per Lynock v Cereal Packaging.

101. The respondent's submissions took us through the bullet points of factors that would be relevant to take into account when reaching their decision. It was an injury at work and it submitted that the nature of his illness made it difficult to predict how long he would remain fit for when considering the likely recovery. The prognosis was uncertain but before the operation the prognosis was 50% chance he would be unable to return to full duties. It was however too early to determine with certainty as corrective surgery was planned. Once the claimant returned to work if he was at full fitness it was not likely that his sickness absence would re-occur.

102. He had had a lengthy period of absence by the time of his dismissal but this had to be weighed against the length of his service and previous record. On the need for the role to be done by him, it was clear colleagues were covering for him but he was one of ten people. We do not however accept the respondent's position as to the impact his absence had on the respondent. We prefer the evidence of Mr Manko on this point as found above and that there was little impact.

103. Turning to the adoption and the carrying out of their own policies, the respondent had not followed them. There was confusion with the panel as to which policy they were following as their own policies suggested that for capability injury at work absence should be discounted but we are told that this was not the correct interpretation as this only applied for non-long term absences.

104. This aspect of the work related injuries or diseases section of the respondent's policy (s2.54), the first six months absence on is on full pay and is discounted before normal sick pay arrangements apply. Any subsequent absence is treated the same as normal absences. We are told that this only applies to instances where the claimant has returned to work. If this was wrong then at the time of dismissal the claimant's absence was 9 months which should have been treated as three months. We were told that actually section 2.72 onwards was applicable in this case. However, the respondent did not follow this policy either as it did not

hold a FARM after 3 months and then another at three month intervals. Whatever, the approach it was not followed.

105. The claimant was told in the June 2017 email that this was a sick leave excusal application covered 12 months and this would be reviewed if longer. This application was outstanding at the time of dismissal. This alternative to dismissal was built into the respondent's policies and processes but was deviated from for the claimant so that he was dismissed well within a year.

106. The factors indicate that there should be a personal assessment in the ultimate decision. Ms Doolan did look at it but she came to the prison after the claimant was absent and he was impacting on her long term sickness absence record. She had not worked with him, met him or had any experience of him. The full circumstances of his case were not considered fully by her.

107. The factors set out the extent to which the difficulty of the situation and the position of the employer had been made clear to the employee. Here the outcome should have been made clear. The claimant was not provided with any evidence of the difficulties or given the chance to comment on them. Even at the dismissal meeting this was not addressed with the claimant and he was not given the chance to comment on the steps the respondent had considered "unfair" to him which could have enabled him to carry out a role within the respondent that was not prisoner facing.

108. The process was inevitable, as early as August 2017 the respondent had written the claimant off and dismissal was in train and the claimant was told from June 2017 that there were two outcomes IHR or dismissal due to inefficiency.

(d) Alternative positions

109. With regard to Hampton we have found as a fact that Mr Manko made limited enquiries but that this was vetoed by Ms Doolan. The respondent made decisions that it would not be reasonable to expect the claimant to have lifts or unfair to the claimant to be left at Hampton without any discussion.

110. The only proposal that the respondent came up with a role band 4 (at the FARM) that would not require control and restraint as an Interventions Facilitator which would require him to pass a suitability test. Despite at the dismissal meeting the claimant expressing an interest in this role, the respondent dismissed him instead of exploring this position further.

111. There was also another band 3 administrator role but Ms Doolan wrongly concluded that pay protection would not apply because he was not disabled which was of course wrong. In any event the claimant was not asked whether he would take it anyway without pay protection. It was again just ruled out. Ms Doolan formed the view that if he could not get to HMP Littlehey now then that was it.

112. In line with McAdie v Royal Bank of Scotland [2008] whether or not the reason for the capability was caused by the respondent will not determine fairness. We make no findings as to the cause of the accident which the claimant asserts could have been deliberate by a prisoner but the fact that this was an accident at work is not a determining factor.

113. Taking all of the above into account we do not find that the respondent acted reasonably in treating the claimant's absence as a sufficient reason to dismiss. No reasonable employer of the size and resources of the respondent would have dismissed when they did. Their mind was closed from August 2017 (arguably from June 2017) to alternatives, they failed to explore the alternatives for this reason and did not wait for the forthcoming surgery and obtain up to date medical evidence specifically addressing prognosis, best case and worse case and what the claimant would be capable of post operation and when. The medical evidence is unimpressive, it is legally incorrect, short and gives no detailed analysis of the issues given that the respondent was relying on it to dismiss a long serving employee. The respondent's OH reports focus on exit and not what the claimant can do and when. The decision to dismiss was therefore outside the range of reasonable responses for them to take in all the circumstances.

(iv) Did the respondent follow a fair procedure?

114. Having concluded that the dismissal was substantively unfair we now consider whether the dismissal was procedurally unfair. The respondent did not follow its own procedure in many ways. It did not adequately consult with the claimant with regard to alternatives.

115. Further from June the respondent was exploring ill-health retirement dismissal and by August it was decided that this was final occupational health report. By 2 October the dismissal was inevitable given the respondent was seeking compensation figures in respect of the claimant's dismissal.

116. There was no series of warnings or an indication that the claimant would only have a certain period of time before his dismissal if he was not fit enough. He was told the contrary, he was told by his manager that he could get full pay for 12 months and beyond it. Alternatives were not explored. He was written to invite him to a meeting to dismiss him but this was not following a series of warnings.

117. The process was not a process a reasonable employer would follow with a series of warnings and meetings with set timetables. In circumstances where the respondent has not even followed its own procedure which does not provide for a series of warnings expressly before dismissal but nevertheless has a staged approach, it is hard to see how it can be fair. The process lacks consultation, alternatives and warnings all keystones of fairness for a capability dismissal.

118. Further, the appeal was clearly inadequate as Mr Cartwright rushed the appeal to ensure that the claimant did not remain an employee past 12 March 2018. It went ahead in the claimant's absence and without a rep. This was notwithstanding the claimant's clear pleas that it was imperative it did not go ahead without him. Mr Cartwright claimed ignorance over the arrangements offered by his administrative staff and stressed to the tribunal how busy he was. It was supposed to be a re-hearing yet sought no new medical evidence or an up to date occupational health report. This is particularly given the passage of time since the dismissal notice and that the claimant had by this time had the operation. This would have been ample opportunity for the respondent to make amends for the process used to date. An adequate appeal could have corrected the numerous issues in the process but not in this case.

119. There are issues in the outcome of appeal letter concerning the accuracy of the summary of the position and the medical reports. If Mr Cartwright did actually have the Carmichael report, he had not given it proper consideration. The impression he gave was of "we want to crack on and get it done" and it was an appeal giving lip service to the process so he could tick the box to say the claimant had one.

120. Further on appeal Mr Cartwright failed to consider wholeheartedly the claimant's representations on disability. He accepted in evidence he never disputed the claimant was disabled yet completely ignored the claimant's representations on this issue.

121. The outcome of the appeal does not address the claimant's grounds of appeal. Mr Cartwright criticises the claimant for not explaining something in his outcome letter but had not given him the chance to explain it because the meeting had gone ahead in his absence despite the claimant's protests. The outcome suggests contrary to his evidence his personal secretary had spoken to him about options. The witness gave the impression that he was dismissive towards the appeal.

122. We accept that the ACAS Code of Practice, does not apply to capability dismissals, but in any event the claimant was not treated fairly. This was a classic case of the decision being pre-determined.

123. The respondent failed to follow a fair dismissal process and then compounded this by the appeal process. We therefore find the dismissal to be substantively and procedurally unfair. The claimant was therefore unfairly dismissed.

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124. We have considered whether we can say that the claimant would have been fairly dismissed with any degree of certainty to limit the compensation by a % or to a passage of time.

125. We have found the dismissal to be substantively unfair but even if the respondent had not acted outside the range of reasonable responses and only failed on the procedural issues, we cannot say with any certainty what would have happened. There are too many variables in this case and the medical evidence is contradictory. His doctor references a 50% chance of returning but there is also evidence that he could return within months and doctors' prognosis as positive towards a full recovery. The final report confirmed the timescale for improvement was difficult to predict but that it was premature to say he would not regain full fitness.

126. Without up to date medical evidence that would have been possible to obtain before the dismissal took effect, we cannot say what the claimant was capable of doing and when by. If the medical evidence confirmed he would not recover ever to be able to return or with some certainty, then we could have made an assessment.

127. It is also not possible to say what impact the alternative positions or vacancies would have had on his attendance as the respondent never explored that avenue. Had efforts been made to allow the claimant to return to work in a non-prisoner facing role and solve the transport issues he could have been given support then he could have returned to work as he may have made continuous improvements to a full recovery. This is unknown and we simply do not have enough information to say that the claimant's compensation should be limited in this way.

128. We consider that on the balance of probabilities the evidence was too unreliable to enable us to reach with any confidence the view that the dismissal would on the balance of probabilities still have occurred at a certain point or as a percentage chance in this case. Other issues as to what is just and equitable will be addressed at the remedy stage.

Disability Discrimination

(v) The claimant was disabled within the meaning of the Equality Act from 29 September 2017.

Discrimination arising from disability under s.15 of the Equality Act 2010

(vi) Did the respondent know or should they reasonably have known that?:

a. The claimant had a disability (both s15 and s20); and

b. That he was likely to be placed at a disadvantage (s20).

129. The claimant has been found to be disabled from 29 September 2017. The issue is therefore with regard to the respondent's knowledge of disability.

130. Mr Cartwright stated in oral evidence that at no point did he say he was not disabled (contrary to the respondent's own case). The claimant was making it clear in his appeal he considered himself to be disabled. Mr Cartwright said he had made reasonable adjustments for the phone call and therefore considered that he knew he was disabled.

131. Mr Manko made reference to the Disability Act in August 2017 (this of course having been replaced years earlier with the Equality Act 2010) but is again illustrative that the respondent was alive to the issues.

132. As per *Gallop v Newport City Council [2013] EWCA Civ 1583* while occupational health assessments may be helpful, a responsible employer must ultimately apply its own mind to the test for deciding whether an employee is disabled under the discrimination legislation. The court also made it clear that the required knowledge is of the facts of the employee's disability. The employer does not need to also realise that those particular facts meet the legal definition of disability.

133. The respondent relies on the OH report dated 22nd September 2017 which confirmed that the claimant was unlikely to be disabled. The test set out in that report is the wrong legal test as it is not whether the claimant's disability had lasted longer than 12 months but this should have been apparent to the respondent given their access to advice. It was not reasonable for the respondent to rely on this when the test the physician applied was clearly wrong. Ms Doolan refers to the Equality Act 2012 (presumably in error) but ignorance is not sufficient. We need to consider whether the respondent ought to have known on the facts. On knowledge the Donelien case confirmed that where an OH report is well reasoned it can be given substantial weight. This is not the case here.

134. Notwithstanding this by the time the respondent dismissed the claimant there was only three months before the claimant's injury would have lasted 12 months and the respondent should have known that it was likely to last 12 months since their whole case was that the claimant was not going to be able to return within the 12 month period.

135. The respondent therefore seeks to rely on this time issue. The fact that the claimant is unable to walk without aids or drive means that it is clear that he has a physical condition which had a substantial and adverse effect on his day to day activities as it impacted his mobility including walking and driving and caused him to be off work. We judge this knowledge as at the time of dismissal since contrary to the respondent's pleaded case, Mr Cartwright now accepts that he knew the claimant was disabled. All that changed in the period between dismissal and appeal to acquire knowledge (the respondent still maintains it did not have constructively or expressly at dismissal) is the passage of another three months which was still within the notice period the respondent gave at dismissal. The suggestion it did not know or ought not reasonably to have known is at odds with the reason for the dismissal because he would not be fit for the foreseeable future and certainly not in the notice period.

136. The claimant clearly had an issue with his mobility, the respondent knew he could not drive and by the time the notice expired he would have been off for 12 months and therefore it was reasonable that the respondent should have known the claimant was disabled. We do not accept that the respondent did not know or ought reasonably to have known that the claimant was disabled. His limitations were clear and the timeline clearly progressed and they built their dismissal case around the fact his injury would last beyond 12 months. To argue otherwise is simply not credible, even if they did not know (which we do not accept) they ought reasonably to have known at the time of dismissal and have now confirmed they knew at the time of appeal (between dismissal and appeal by February 2018 as this is when Mr Cartwright says that it made adjustments because of disability.

137. The question of whether the respondent knew that the claimant would be placed at a disadvantage needs to be addressed when looking at the points the claimant relies on for s20 Equality Act 2010 specifically, so this is addressed below.

(vii) Was the claimant treated unfavourably? The claimant claims the following unfavourable treatment:

a. Being denied pay protection on 11 December 2017.

138. We accept that the claimant was not offered pay protection on 11 December 2017 but this was in respect of the band 3 role. The respondent failed to offer or consider the claimant for this role. The claimant was not offered the role with or without pay protection. The failure to offer the pay protection was therefore not unfavourable treatment. The failure to offer the role at all to the claimant could have been unfavourable treatment but the failure to offer pay protection on its own was not unfavourable treatment as the role was never offered. The way the claimant puts his case as to the unfavourable treatment means that this aspect fails.

b. Being dismissed by way of letter on 15 December 2017 with effect from 12 March 2018.

139. It is an agreed fact that the claimant was dismissed by letter dated 15 December 2017 with effect from 12 March 2018. This is clearly unfavourable treatment.

c. Being denied the opportunity to attend an appeal hearing in person on or around 27 February 2018.

140. The respondent denies that the claimant was denied the opportunity to attend an appeal hearing in person. This cannot be right as a matter of fact the respondent concluded the appeal on paper. The claimant clearly requested this was face to face and he could not have been any clearer.

Telephone was not the same. The respondent offered to postpone the hearing to allow for this then withdrew that option when the claimant selected it.

141. The claimant made it clear that it was imperative that he have that meeting face to face but in his hurry to get it over and done with Mr Cartwright ignored that and ploughed on regardless. The failure to have a face to face appeal hearing and the chance to put his points across meant that the claimant was at a disadvantage when his appeal was considered. Taking guidance from paragraph 5.7 of the EHRC Code of Practice on Employment we consider this to be unfavourable treatment.

(v) Was the reason for that treatment because of something arising in consequence of his disability?

142. As per Pnaiser v NHS England and another [2015] having identified that there was unfavourable treatment we must determine what caused the impugned treatment or what was the reason for it. We have found that the respondent had actual or constructive knowledge of disability, so the question is whether the unfavourable treatments arose in this case at least partly because of something arising in consequence of his disability.

143. Here the claimant relies on his sickness absence as the thing arising in consequence of his disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability as per paragraph 5.8 of the EHRC Code of Practice on Employment. He was unable to carry out the full duties in his substantive post. Notwithstanding that we have not found the denial of pay protection to be unfavourable treatment, if we had, it would not have been because of his sickness absence. It was because the respondent wrongly did not consider the claimant to be disabled. It therefore follows that the failure to offer pay protection is because it did not offer the job and is not because of something arising in consequence of his disability but was because the respondent refused to accept the claimant was disabled.

144. Given the reason for the dismissal was the claimant's long-term sickness absence, the respondent accepts that the claimant was dismissed because of something arising in consequence of his disability but disputes knowledge.

145. As set out above we do believe that the respondent should have known that the claimant had a disability. Mr Cartwright knew, Mr Manko had considered it and the OH report relied on used the wrong test to come to that conclusion. The respondent cannot hide behind the advice of Occupational Health for the reasons set out above. We therefore find (as is the only logical conclusion in a capability dismissal for sickness absence) that the claimant's dismissal was because of something arising in consequence of his disability.

146. Turning to the appeal, the respondent argues that the appeal could not wait any longer. Mr Cartwright had a mistaken belief that the appeal had to conclude before the termination date. However, had the claimant not been off on long term sickness he would have been able to attend in person and this would not have been an issue. We therefore find that the reason for the failure to hold the appeal face to face was because the claimant was off on long term sick otherwise, he would have been able to attend.

147. The claimant asked for a further period to allow him to attend face to face and this was refused because the respondent was in a hurry but we do not accept the respondent's submission that this was the subjective reason for it because it could not be put off any longer. This may have been right for the reason not to postpone the meeting but when one examines the reason why the appeal could not take face to face this was because the claimant was absent from work. As such, the failure to hold a face to face appeal was because of something in consequence of disability.

148. In both the dismissal and the failure to hold a face to face appeal, the claimant had established that there is a prima facie case that these were in consequence of his disability and the burden to show it was in no way connected to his disability shifts to the respondent. The respondent accepts that the dismissal was because of something arising in consequence of his appeal but we do not accept that the failure to hold a face to face appeal was unconnected as set out above.

(v) If so, was the treatment a proportionate means of achieving a legitimate aim?

149. The respondent relies on the need to maintain the safe and efficient running of the prison and to ensure the wellbeing of the prisoner population in their care as being legitimate aims. We accept that the safe and efficient running of a prison and the well-being of the prison population are capable of being legitimate aims. For us the issue is whether this is a proportionate means of achieving a legitimate aim.

150. The EHRC Code of practice at paragraphs 4.30 – 4.32 deals with proportionality. It is a balancing exercise taking into account the discriminatory effect and the legitimate aim. Proportionality means appropriate and necessary but not the only way of achieving the legitimate aim. It is sufficient that the same aim could not be achieved by less discriminatory means.

151. The only matters to be considered here are the dismissal and the failure to hold the appeal face to face. The failure to offer pay protection was not unfavourable treatment and the reason for that failure was not the claimant's absence so we do not deal with pay protection in this section.

152. The respondent argues that the claimant's dismissal was proportionate as his absence could no longer be sustained for the reasons set out by Ms Doolan and Mr Cartwright. As set out above the respondent has failed to

provide any evidence of the impact, in terms of figures, statistics, overtime usage etc. As per EHRC Code of Practice on Employment paragraph 4.26 it is for the employer to justify and produce evidence to support that justification. Generalisations are not enough. We do not accept that this absence could no longer be sustained as we did not accept the evidence of Ms Doolan/Mr Cartwright on this issue. We preferred the oral evidence of Mr Manko that actually the impact on the running of the prison and the wellbeing of the prisoners was minimal and therefore we do not consider that the dismissal was a proportionate means of achieving that legitimate aim. There may be scenarios where dismissal could be a proportionate means but this case is not one of them on the facts as we have found.

153. Turning to the failure to hold the appeal face to face the respondent relied on the same legitimate aim but that the decision to proceed with the appeal on papers was a proportionate response given the length of the claimant's absence to date and the uncertainty over when the claimant could attend and the continuing strain on the service. As set out above we accept that the legitimate aim relied on is capable of being a legitimate aim.

154. Was a failure to hold the appeal face to face a proportionate means of achieving that aim, we have not accepted the respondent's evidence of Mr Cartwright or Ms Doolan as to the impact on the service. This was minimal.

155. We do not consider it proportionate to not delay the appeal as the claimant requested. There was no need to conclude this before the termination date. It was said in oral evidence that the respondent needed to conclude the appeal before it could recruit. This was its own internal process but was not documented anywhere and was given in oral evidence only when the rationale for fast tracking the appeal was queried by the tribunal. This was not in the witness statements or agreed bundle. There was no evidence that there was such a strain or that it was a proportionate response. The claimant had been off for some time but had offered to meet more locally as transport was an issue, there was no evidence as to when he could attend and the respondent was prepared to delay the appeal initially then withdrew that option. There was no evidence as to why Mr Cartwright could not come to a location closer to the claimant for the appeal other than he was busy. We therefore do not accept that to proceed with the appeal on paper and deny the claimant the right to a face to face meeting (particularly in light of all the other procedural failings) was proportionate. Therefore, we do not consider this proportionate means of achieving this aim.

<u>Reasonable adjustments under s.20 of the Equality Act 2010</u>

(x) Did the respondent apply a provision, criterion or practice which put the claimant at a substantial disadvantage in relation to relevant matter in comparison with a person who is not disabled, in the following ways:

a. Requiring the claimant to work at HMP Littlehey from the date on which he was disabled and 15 December 2017.

b. Taking the decision to i) dismiss on 15 December 2017 and ii) upholding the decision on appeal on or around 13 March 2018 without the benefit of a contemporaneous medical report.

c. Requiring the claimant to be fit to return to a substantive post and/or to re-deployment at Littlehey by a) 15 December 2017 and b) 13 March 2018.

d. Requiring the claimant to take part in appeal hearing in person or without a representative on 27 February 2018.

e. Requiring the claimant to work at HMP Littlehey between the dates of 15 December 2017 and 12 May 2018 and the outcome of his appeal on or around 13 March 2018.

156. We accept the respondent's submissions that the current PCP's are not PCP's but a conflation of the PCP and the disadvantage. This element of the claim has taken considerable time for the panel to consider as a result. Taking guidance from Griffiths v Secretary of State we believe that the claimant's case is really about the following PCP's when one looks at the reasonable steps he has advanced and the disadvantages and the points highlighted by the underlining above in the issues:

a. The requirement to be fit to return his substantive post and/or redeployment;
b. The requirement to maintain attendance;
c. The requirement to work at HMP Littlehey;
d. The requirement to conclude the appeal process before the respondent recruits a replacement;
e. The requirement to have a medical report from the last three months for a FARM.

157. In order to engage the duty, there must be a PCP which substantially disadvantages the claimant when compared to a non-disabled person. The precise nature of the disadvantage which it creates by comparison with its effect on the non-disabled must be identified.

158. In this case the claimant was not found to be disabled until 29th September 2017 so the substantial disadvantage contended for and that are really at the heart of this case are as follows:

a. Dismissing the claimant
b. Upholding that decision on appeal;
c. Not permitting the claimant to attend the appeal meeting in person.

159. The claimant's submissions have not assisted us with regards to the s20 case as his submissions reference pay protection for roles but this is not part of the case he brings in respect of s20. (we have already dealt with pay protection above in any event and that as a matter of fact he was never offered a role with or without pay protection) None of the reasonable adjustments or the PCP's in the agreed list of issues relate to pay protection.

160. The respondent accepts that the claimant was disadvantaged as he was dismissed and that decision was upheld on appeal but the respondent does not accept that factually the claimant was prevented from attending the appeal hearing in person with which we have disagreed in our findings and conclusions.

161. We have gone on to consider whether the duty was engaged for each PCP by reference to the substantial disadvantages the claimant suffered when compared to a non-disabled person. As per Griffiths the duty arises once there is evidence that the arrangements placed the disabled person at a substantial disadvantage because of his disability.

162. Looking at the requirement to be fit to return to his substantive post and/or redeployment - The claimant's disability caused him to be absent from work and for him to be unable to pass the control and restraint test which was a requirement of his role. The respondent required him to be fit (pass the C & R test required fitness) to attend his substantive post and if he was not capable of fulfilling his contractual role then he would be more liable to dismissal. Likewise, by the respondent not considering redeployment until he was fit and able to return this meant he was more likely to be dismissed. This is clearly a substantial disadvantage to a disabled employee. A non-disabled employee is more likely to be fit to return than a disabled employee. We therefore believe that the duty is engaged for the requirement to be fit to return to his substantive post and/or redeployment and this substantially disadvantaged the claimant.

163. Looking at the requirement to attend work, a disabled employee is less likely to be able to maintain attendance than a non-disabled person and therefore if he was not capable of fulfilling his contractual role then he would be more liable to dismissal. This is clearly a substantial disadvantage to a disabled employee. We therefore believe that the duty is engaged for the requirement to be attend work and this substantially disadvantaged the claimant.

164. Looking at the requirement to work at HMP Littlehey, this is his place of work. As the claimant's disability meant that he could not drive he could not get to work without steps being taken to adjust that requirement. Clearly, he could not do his substantive role from home and his ability to get to work at HMP Littlehey meant he was not capable of fulfilling his contractual role then he would be more liable to dismissal. This is clearly a substantial disadvantage to a disabled employee. We therefore believe that the duty is engaged for the requirement to work at Littlehey and that this substantially disadvantaged the claimant.

165. Looking at the requirement to conclude the appeal process before the respondent recruits a replacement, this came out in oral evidence as being the policy of the respondent but was not documented anywhere. This is the reason why the claimant was not permitted to attend the appeal hearing in person as this would have delayed the appeal and meant that the respondent could not recruit his replacement. This could also have substantial disadvantaged the claimant as his appeal was not upheld. The reason why the claimant could not attend the appeal hearing in person was because of his disability and reasons connected with it. This is clearly a substantial disadvantage to a disabled employee. We therefore believe that the duty is engaged for the requirement to conclude the appeal process before the recruitment of a replacement.

166. Looking at the requirement to have a medical report from the last three months for a FARM this is more difficult to see how this causes a disabled person to be substantially disadvantaged compared to a non-disabled person. We can see the point that the claimant is making that the respondent should have obtained an up to date medical report before dismissing him. We concur with this given that the report was written before a critical review of his treatment and it was older. We have dealt with this on the fairness of the dismissal. The PCP only requires one within the last three months in accordance with the respondent's policy but the report actually predates the point he was found by the Tribunal to be disabled from.

167. We do not believe that the duty is engaged on this PCP as the respondent would have dismissed whatever the date of that report as it had determined this in June and August 2017 and was focused on that outcome. Obtaining medical reports in capability dismissals are of course key and this should benefit those with a disability more than non-disabled employees if they were full reports. We do not believe that the requirement to have a medical report from the last three months for a FARM can substantially disadvantage the claimant by meaning it is more likely he will be dismissed upheld on appeal or not being permitted to attend the appeal meeting in person.

168. Having considered that the PCP's put the claimant at a substantial disadvantage as indicated as a disabled person in comparison with people who are not disabled the next stage is to consider whether the respondent knew or could reasonably be expected to know that the claimant had a disability (dealt with above) and that he was likely to be placed at a disadvantage.

169. For the reasons set out above we find that the respondent knew or ought reasonably to have known that the PCP's we say were engaged were likely to place the claimant at a disadvantage. By requiring him to be fit to return to his substantive post and/or redeployment and to attend work and work at Littlehey the respondent knew that the claimant was more likely to be dismissed and this that this would be a disadvantage. This is accepted by the respondent.

170. With the requirement to conclude the appeal process before the respondent recruits a replacement, this led the respondent to rush through the appeal and leaving aside the impact on fairness of a dismissal it follows that the claimant would be substantially disadvantaged by not attending in person and in upholding the appeal. The claimant was himself highlighting this to the respondent that it was imperative he attend and we find on the facts that the respondent knew or ought to have known that this was likely to place him at a disadvantage. This is the very reason why the appeal meetings normally take place face to face to allow a claimant to be heard.

171. Having considered this, we must now go onto consider whether the respondent took reasonable steps to avoid that disadvantage. We have particular consideration here, as to the steps the claimant contends it would have been reasonable for the respondent to take.

(xi) If so and each case, did the respondent take reasonable steps to avoid that disadvantage? The claimant contends the respondent should have made the following adjustments:

a. Offered suitable alternative employment at HMP Hampton office following request on 6 June 2017 and 29 September 2017 between the dates of 6 June 2017 and being notice of dismissal on 15 December 2017.

b. Obtaining contemporaneous medical report i) prior to the decision to dismiss and ii) the date of the dismissal on 12 March 2018.

c. Extending the sick leave until at least the result of the claimant's operation on 8 February 2018 became clearer.

d. Postponing the appeal hearing until he was able to attend with a representative.

e. Offering suitable alternative employment at HMP Hampton office between the date of notice of dismissal 15 December 2017 and a) the date of dismissal 12 March 2018 and/or date of the outcome of his appeal on or around 13 March 2018.

172. The respondent argues that it discharged its duty. The respondent relies on the fact that the policy was adjusted to not have a FARM for eight months after the policy provided for one. Further that the fact that the respondent continued to support the claimant's absence was of itself a reasonable adjustment and that he was awarded full pay for his time off sick. Aside from the fact the respondent denied disability and then knowledge on the one hand and on the other points that it made these

reasonable adjustments, it argues that the further adjustments are not reasonable by reference to the factors set out in the EHRC Code of Practice at paragraph 6.28 of:

a. Whether taking any particular steps would be effective in preventing the substantial disadvantage;
b. The practicability of the step;
c. The financial and other costs of making the adjustment and extent of any disruption causes;
d. The extent of the employer's financial or other resources;
e. The availability to the employer of financial or other assistance to help make an adjustment such as advice through Access to work); and
f. The type and size of the employer.

173. The decision as to whether the adjustments are reasonable or not are considered using an objective test as per HM Land Registry v Wakefield [2009]. The respondent being a public sector employer is a large employer with larger resources including financial and HR resource and so we bear that in mind when considering the claimant's suggested reasonable adjustments. Taking each one in turn.

a Offered suitable alternative employment at HMP Hampton office following request on 6 June 2017 and 29 September 2017 between the dates of 6 June 2017 and being notice of dismissal on 15 December 2017.

174. The respondent would not have been under a duty to consider reasonable adjustments until the claimant was disabled. We accept that the claimant requested this in June but the Tribunal has found that the claimant was disabled from 29th September 2017. The period is therefore between 29th September 2017 and 15th December 2017. We accepted the claimant's evidence that this site was close to his home and he could have arranged transport to get there. We accept that if the claimant had been offered suitable alternative employment at HMP Hampton then he would have been back to work and therefore not off work and subject to the capability process and dismissed in December. It must therefore follow that there would have been no appeal so it is clear that this could have prevented the substantial disadvantage. He would have had to have a further period of absence off in February 2018 for the operation but under the respondent's policy he would have returned to work and the first six months absence would have been discounted from his record as it was an accident at work.

175. In a reasonable adjustment claim the burden of proof does not pass to the employer until we are satisfied on the balance of probabilities that the claimant was substantially disadvantaged, the suggested adjustment is made in enough detail for the respondent to deal with it and there is evidence that is at least capable of leading us to conclude that the proposed adjustment would be reasonable and would eliminate or reduce

the disadvantage. If the burden shifts, then the respondent must prove that the proposed adjustment was not reasonable.

176. The evidence was that the claimant's role could not be done from Hampton so this would have had to be suitable alternative employment at this site. We accept the respondent's evidence that this was a specialist facility and that this was not practical. If the site had been another prison with role similar to the claimant's then it would have been practical even if Ms Doolan did not have gift to recruit there, she could still have organised it. The time the claimant raised this was however pre-disability and it was not raised again in the relevant period. The respondent is not under a positive obligation to create new roles for the claimant. On balance we do not consider that offering the claimant suitable alternative employment at HMP Hampton between 29th September 2017 and the date of dismissal was a reasonable adjustment.

b. Obtaining a contemporaneous medical report i) prior to the decision to dismiss and ii) the date of the dismissal on 12 March 2018.

177. For completeness notwithstanding the above findings as to PCP's and medical evidence we have dealt with this here. We do not think that obtaining an up to date medical report would have prevented the dismissal as per our findings of fact this was inevitable and predetermined. However, obtaining a contemporaneous medical report prior to the effective date of termination on 12th March 2018 could have been a reasonable adjustment. It could have meant that the appeal was upheld. A medical report for the appeal hearing should have been obtained anyway given the change in circumstances, so it was a failure to do it which we have already dealt with in unfairness. There was however a report by OH on 13th March 2018. However, there is no identifiable PCP which creates that disadvantage that engages the duty to make reasonable adjustments. The requirement to have a medical report from the last three months for a FARM does not engage the duty. There is no PCP not to obtain reports or anything that can be easily quantified to make this a reasonable adjustment to alleviate the disadvantage from a PCP.

178. Mr Cartwright did not have the report of the claimant's treating physician (even though this was available and before the dismissing officer) so there is no evidence that leads us to conclude that the proposed adjustment would eliminate or reduce the disadvantage.

c. Extending the sick leave until at least the result of the claimant's operation on 8 February 2018 became clearer.

179. The respondent submits that this was not practical, proportionate or effective. This would have been effective in preventing the substantial disadvantage of dismissal and thus there would have been no appeal. It would have been practicable as the outcome would have then be clearer. We have found as stated above that there was minimal impact on the service. This could have also been done at minimal cost to the

respondent even though they have large resources. There is no requirement for sick leave to have been on full pay. We therefore consider it would have been practical and proportionate to do so.

180. The more difficult question for the Tribunal is whether this would have simply delayed dismissal so as to not alleviate it entirely. We are agreed that if the respondent had delayed the claimant would not have been dismissed when he was but would it have alleviated that disadvantage? The claimant's evidence was that he would have been capable of a phased return to his substantive post from July/August 2018 but that he has since had further surgery in July 2019.

181. Here the claimant is clearly disadvantaged and there is an adjustment made in sufficient detail. We need evidence that is at least capable of leading us to conclude the proposed amendment would be reasonable to eliminate or reduce that disadvantage to shift the burden of proof onto the respondent.

182. It is not the position that an adjustment will only be reasonable if it is completely effective. As per Griffiths it may not be clear whether the proposed step would be effective or not. It may still be reasonable to take the step notwithstanding the success. Uncertainty is one of the factors to weight up when it is not guaranteed in assessing the question of reasonableness.

183. If the purpose of the reasonable adjustment in this case was to eliminate the unknown, the fact the claimant would still have been dismissed at that time if the adjustment had been made, would impact on compensation.

184. We consider that the extension would not alleviate the PCP identified by the Tribunal namely that the claimant be fit to perform his role and/or redeployment. To what extent would the extension allow the claimant to return to his substantive role. It would not, if it was before his operation. In accordance with Griffiths, extending the consideration point by a relatively short period was unlikely to remove the disadvantage. The longer that period needed to be extended for (given that this was unknown and we could not say with any certainty when the claimant could return to his post) the less likely it was to be reasonable.

185. On balance, we do not conclude that the proposed adjustment would be reasonable because it would not eliminate or reduce the disadvantage.

    d. Postponing the appeal hearing until he was able to attend with a representative.

186. Given our findings this was a practicable step for the respondent to take. It was a principle of fairness; it clearly had the substantial disadvantage that he did not attend the appeal meeting in person. However, the effectiveness of the step in preventing the substantial disadvantage is less clear.

187. Here we have found that the claimant is disadvantaged and there is an adjustment made in sufficient detail. We need evidence that is at least capable of leading us to conclude the proposed amendment would be reasonable to eliminate or reduce that disadvantage to shift the burden of proof onto the respondent.

188. It is not the position that an adjustment will only be reasonable if it is completely effective. As per Griffiths it may not be clear whether the proposed step would be effective or not. It may still be reasonable to take the step notwithstanding the success. Uncertainty is one of the factors to weight up when it is not guaranteed in assessing the question of reasonableness.

189. If the purpose of the reasonable adjustment in this case was to give the claimant the opportunity to be heard and to convince the appeal officer that his dismissal was unfair then this could have eliminated or reduced the disadvantage relied on.

190. On balance, we do not conclude that it would have been reasonable to take the step notwithstanding that it may not have made a difference to how Mr Cartwright approached the appeal. However, if he had attended and Mr Cartwright had thus been forced to engage in the process if may have changed his approach. This shifts the burden onto the respondent to show us that the proposed adjustment was not reasonable.

191. The respondent has failed to establish this. The reason why Mr Cartwright rushed through that appeal came out in oral evidence and as such the respondent was unprepared to deal with it. The reason why Mr Cartwright did not consider it reasonable to make the adjustment was that he held a mistaken belief that the claimant would still have been an employee until he dealt with it. This is wrong as a matter of law.

192. The claimant made it clear it was imperative and at one point the respondent considered a postponement to be reasonable as it offered one. A shorter postponement would have been possible if the respondent had held the meeting closer to the claimant's home or provided transport. It was reasonable and practicable and the respondent failed to make that reasonable adjustment.

    e. Offering suitable alternative employment at HMP Hampton office between the date of notice of dismissal 15 December 2017 and a) the date of dismissal 12 March 2018 and/or date of the outcome of his appeal on or around 13 March 2018.

193. We have dealt with HMP Hampton above and the only difference here is the dates for when this reasonable adjustment should have happened. On balance for all the reasons set out above, we do not consider that offering the claimant suitable alternative employment at HMP Hampton between 15th December 2017 and the 13th March 2018 was a reasonable adjustment.

194. In summary, the respondent failed in respect of its duty to make reasonable adjustments in one way in respect of the failure to postpone the appeal hearing until the claimant could attend.

Unlawful deduction from wages

(xii) Was there a deduction made for the payments properly due as wages to the claimant?

(xiii) If so, what was the amount of that deduction in each case?

195. The unlawful deductions claim has been paid with the exception of a shortfall of damages and a deduction of £43.00 but we will need to hear submissions from the parties as to whether the Tribunal has jurisdiction to hear these complaints and whether the sums are due as part of remedy. This is a very small element of the claimant's claim. All the other sums have been paid since the claim was issued.

ACAS Uplift under TULCRA

(xiv) Does s.207A apply in this case?

(xv) If so, was the respondent in breach of the relevant provisions of the ACAS Code of Practice?

196. This arises in two respects firstly the dismissal and secondly the discrimination. The case of Holmes v Qinetiq is authority for the position that the ACAS code of practice on disciplinary and grievance procedures does not apply to a dismissal for ill health where there was no suggestion of poor performance so in respect of the dismissal s207A does not apply. There is no degree of culpability in this case, so it does not apply to the dismissal.

197. The claimant did raise a grievance against Mr Cartwright on 2nd March 2018 but the respondent told the claimant that he was out of scope and this was not dealt with by the respondent. His subsequent grievance of 12th March 2018 was withdrawn as this was about sick leave excusal and this was granted. His complaints about disability discrimination within the appeal were said to be dealt with in the appeal.

198. Whilst the appeal outcome is short like Mr Cartwright's consideration of the appeal and does not expressly deal with discrimination it does make reference to reasonable adjustments. The claimant did not raise a separate grievance about disability discrimination. Whilst we accept that a grievance outcome should have the right of appeal, the issues were in fact part of the dismissal appeal and not separate discriminatory conduct aside from the dismissal. We therefore do not find that the respondent was in breach of the ACAS code of practice and that there is no uplift applicable.

Time Issues (if applicable)

(xvi) Were any of the acts or omission complained of outside the primary time limits?

(xvii) If so, did they remain outside the primary time limits as adjusted by the ACAS Early Conciliation procedure?

(xviii) If so, were any of the acts or omissions acts extending over a period under s.123 of the Equality Act 2010? If not, will it be just and equitable to extend the time limit under s.123(1)(b) of the Act?

199. The unfair dismissal complaint was presented in time. The parties agreed with this also. The only discriminatory acts that we have found for the claimant relate to the dismissal and the appeal. Where the act complained of is a dismissal, time starts to run from the date on which the alleged discriminatory dismissal takes effect, not from the date on which notice is given so the claimant's claims are in time and not outside the primary time limits so there is no need to consider time further in this regard.

200. For all of the above reasons, the claimant was unfairly dismissed. The claimant was discriminated against on the grounds of his disability under s15 of the Equality Act 2010 in respect of the dismissal and the appeal. The respondent failed to comply with its duty to carry out reasonable adjustments under s20 of the Equality Act 2010.

_____27/05/2020___
Employment Judge King

Date: ……..

Sent to the parties on: ...3 June 2020..

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For the Tribunal Office