Case Number 2207417/2017

1301565/2018

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **Respondent** |
|---|---|
| Mr Darren Meynall | The Secretary of State for Justice |

**AND**

**RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT Birmingham** **ON 23,24,25,26,27,30 September and 1 October 2019 26 & 28 February and 4, 5 & 9 March 2020 (in chambers)**

**EMPLOYMENT JUDGE Dean**

**MEMBER Mrs S Campbell**

Representation

**For the Claimant: Ms G Nicholls, of counsel**

**For the Respondent: Ms H Trotter, of counsel**

## RESERVED JUDGMENT

**The judgment of the Tribunal is that**: -

1. The Claimant was subject to unlawful discrimination because of the protective characteristic of his disability and prohibited conduct in breach of Section 26 of the Equality Act 2010 in respect of his claim for unlawful harassment.

2. The Claimant complaint that he was subject to unlawful direct discrimination because of his disability in breach of Section 13 of the Equality Act does not succeed and the complaint is dismissed.

3. The Respondent, in taking a decision to dismiss the Claimant, did not unlawfully discriminate against the Claimant because of something arising from his disability. The Respondent's treatment of the Claimant was proportionate means of achieving a legitimate aim, namely to seek to ensure a safe operation of the Prison Service for Prison Officers, Staff and Prisoners. The complaint that the Respondent discriminated against the Claimant in breach of Section15 of the Equality Act does not succeed and is dismissed.

4. The Claimant was not unfairly dismissed by the Respondent, the complaint does not succeed and is dismissed. The Claimant was dismissed by the Respondent because of his misconduct which amounted to a fair reason to dismiss the Claimant in all the circumstances of the case. The claim is dismissed.

The Claimant's complaint for unpaid wages of unlawful deduction from pay and holiday pay are dismissed on withdrawal by the Claimant.

# REASONS

**Background**

1. By way of background in this case, there are two complaints brought by the Claimant. The first complaint was presented in a claim made on 13 October 2017 in which the Claimant brings the claim of harassment and direct disability discrimination based upon a conversation that he had with Governor David Bowkett on 8 May 2017. The alleged act was that at a meeting on the 8 May 2017, Governor Bowkett stated that the claimant needed to get his "head

checked out" and that he was "mad" if he thought the Prison Service was out to get him. The Claimant made a reference to ACAS for early conciliation on the 2 August 2017 and an early Conciliation Certificate was issued on the 16 September 2017 that led to the Claimant's first claim being presented to the Tribunal on the 13 October 2017 [29-41]. The Claimant's initial response was that Governor Bowkett did not know that the Claimant suffered with depression and had a disability and the complaint of discrimination was denied.

2. A second complaint was presented by the Claimant to the Tribunal on the 5 April 2018 [61-78]. The complaint Case No. 1301565/2018 presented a complaint that the Claimant had been unfairly dismissed by the Respondent on the 20 March 2018 and that the Respondent had discriminated against the Claimant by treating him less favourably on the grounds of his disability, while his employment was terminated for his misconduct, for his actions on the 8 May 2017, the decision to dismiss him being taken on the 5 January 2018. The decision to dismiss was upheld on appeal on the 20 March 2018. In short, the Claimant asserts that the something arising from his disability was his reaction to events which included going on to the suicide netting to restrain uncooperative prisoners which the Claimant asserted were actions as a result of the Claimant's depression (with hallmarks of PTSD). The second claim originally included a claim for unlawful deduction from pay and holiday pay, which claim was subsequently withdrawn by the Claimant. The Respondent's defence was set out in their response [105-122].

3. The Respondent is responsible for the Prison Service and the Claimant was employed by the Respondent as a Prison Officer and at the relevant time worked at HMP Hewell. The background to events leading subsequently to the Claimant's dismissal were those surrounding an incident that occurred at HMP Hewell on the 8 May

2017. The Claimant began working for the Respondent in November 2004. In May 2017, the Claimant was employed by the Respondent as a Prison Officer at HMP Hewell. On the 8 May 2017, there was an incident at HMP Hewell whereby a number of prisoners were involved in an act of concerted indiscipline, during which the Claimant and other staff members were required to intervene. The incident which led ultimately to the Claimant's dismissal was one which occurred when the Claimant followed a prisoner on to the so-called suicide netting. The Claimant asserts that his reaction to events which included going on to the suicide netting to restrain uncooperative prisoners was one which resulted from the Claimant's depression. The Claimant believed that at all times his use of force was justified and therefore lawful, because it was reasonable in the circumstances necessary and proportionate with no more force being applied than necessary. The Respondent considered that the Claimant's intervention and his use of force required an investigation. The Claimant asserts that during the initial conversation he had with Governor Bowkett on the 8 May 2017, Governor Bowkett made comments to him which were directly discriminatory and unlawful harassment of him because of his disability. Governor Bowkett denies making the comments as asserted by the Claimant and apologised for his remarks which may have caused offence to the Claimant, taking his comments out of context. The Claimant was subsequently subject to an investigation into his intervention and use of force and the Claimant was suspended on the 10 May 2017 and an investigation was commissioned which led to disciplinary proceedings being instigated which led ultimately to the Claimant's dismissal.

4. The Claimant has brought a complaint of unfair dismissal and unlawful discrimination arising from disability, in addition his first claims of unlawful harassment and direct discrimination. The

Claimant asserts that his dismissal was procedurally and substantively unfair for reasons that are set out in the list of issues.

5. The Respondent's concede that at all material times the Claimant was disabled by reason of his depression.

**Issues**

The issues to be determined by the Tribunal are agreed by the parties and are set out below.

**General**

6. Are the employment start and end dates agreed as: 29 November 2004 and 20 March 2018?

**Unfair Dismissal**

7. Is the Respondent able to prove, on the balance of probabilities, the reason for the Claimant's dismissal? The Respondent asserts that the potentially fair reason is conduct (amounting to gross misconduct).

8. Did the Respondent have a genuine belief that the Claimant was guilty of misconduct?

9. Did the Respondent have in mind reasonable grounds upon which to sustain that belief?

10. Did the Respondent carry out as much investigations into the matter as was reasonable in all the circumstances of the case?

11. Did the Respondent act reasonably in treating the conduct in which the Clamant engaged as sufficient to amount to a reason for dismissal?

12. Was the sanction of dismissal outside the band of reasonable responses?

13. Did the Respondent conduct a fair procedure?

14. Was the dismissal fair or unfair in all the circumstances of the case?

15. The Claimant asserts that in all the circumstances, his dismissal was unfair both substantively and procedurally for the following reasons:

a. The allegations against the Claimant were altered during the investigation process
b. The decision was unduly harsh given that no prisoner and no staff member was injured as a result of the Claimant's actions
c. The decision was made without any real or meaningful consideration of mitigating factors given the Claimant was suffering from severe depression or PTSD at the time of the incident, that mental health condition was at least partially the result of the Respondent's various failures over past years of service
d. There was an inappropriate finding that because the Claimant did not acknowledge wrongdoing, he could not continue to work for the Respondent. This was unfair given the Claimant's perception of the correctness of his actions was influenced by training. The Claimant had not had proper training since 2010, and the failure to train was the Respondents.

**Disability**

16. The Respondent has conceded that the Claimant was a disabled person at all material times by virtue of his depression.

17. The Claimant contends that his depression has hallmarks of PTSD.

18. The time at which to assess disability is the date of the alleged discriminatory acts, namely for Section 13 and Section 26 purposes, 8 May 2017 and for Section 15 purposes, the decision to dismiss on 5 January 2018, as upheld on 20 March 2018.

**Section 13: Direct Discrimination**

19. Did the Respondent discriminate against the Claimant by treating him less favourably on the grounds of the protected characteristic, namely disability?

20. The Claimant relies on a hypothetical comparator.

21. The alleged act of less favourable treatment are that in a meeting on 8 May 2017, Governor Bowkett stated to the Claimant:

a. That he needed to get his “head checked out”; and

b. That he was “mad” if he thought the Prison Service was out to get him.

**Section 15: Discrimination arising from disability**

22. Did the Respondent discriminate against the Claimant by treating him unfavourably because of something arising in consequence of his disability?

23. The alleged act of unfavourable favourable treatment was dismissing him on 5 January 2018 for his actions on 8 May 2017. The decision to dismiss was upheld on appeal on 20 March 2018.

24. The Claimant asserts that the “something” arising from the disability is his reaction to events which included going onto the suicide netting to restrain un-cooperative prisoners which were the result of the Claimant’s depression (with hallmarks of PTSD). His PTSD was not

diagnosed until August 2017. The Claimant did however believe at all times that the use of force was justified and therefore lawful because it was reasonable in the circumstances, necessary and proportionate, with no more force being applied than necessary.

25. If the Respondent is found to have treated the Claimant unfavourably and seeks to rely on the justification defence, what was the legitimate aim and has the Respondent shown that the treatment was a proportionate means of achieving that legitimate aim? The Respondent contends that the Claimant's dismissal was a proportionate means of achieving a legitimate aim, in that the action taken by the Respondent protected the secure and efficient running of the prison service.

26. The Claimant contends that dismissal was not the only possible response to the actions and considers that dismissal was not a proportionate means of achieving a legitimate aim; the Respondent could have supported the Claimant with his mental health and could have arranged counselling, or retrained the Claimant.

**Section 26: Harassment**

27. Did the Respondent harass the Claimant in engaging in unwanted conduct related to his disability which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

28. The alleged acts are that in a meeting on 8 May 2017, Governor Bowkett stated to the Claimant:

a. That he needed to get his "head checked out"; and

b. That he was "mad" if he thought the Prison Service was out to get him.

**Statutory Defence**

29. In relation to the Section 13 and Section 26 claims, if it is found that the Claimant was subjected to disability discrimination as above, had the Respondent taken such steps as were reasonably practicable to prevent such discrimination?

**Remedy**

30. The Final Hearing, originally scheduled to be heard on 23 September – 4 October 2019, was listed to determine liability only. If applicable, the following will need to be considered:

31. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy, which may include:

a. Compensation including but not limited to loss of earnings, injury to feelings and pension loss (the Claimant was in a final salary scheme at the date of dismissal),
b. a declaration or recommendation in respect of any discrimination,
c. interest.

32. If the Respondent had adopted a fair procedure, what is the percentage chance that he would have been dismissed?

33. Did the Claimant's conduct cause or contribute to his dismissal? If so, by what percentage would it be just and equitable to reduce his basic and compensatory awards?

**Law**

34. Both parties in this case are legally represented and we are grateful to both Ms Nicholls and Ms Trotter for their written submissions in which they draw our attention to the detail of the relevant law to which we have had regard.

**Direct discrimination**

35. The law relating to direct discrimination is set out at section 13 of the Equality Act 2010 ('EqA') which provides that a person discriminates against another if, because of protected characteristic, they treat that person less favourably than they treat or would treat others.

36. In respect of the burden of proof, s136(2) EqA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravenes the provision concerned, the court will hold that contravention occurred unless the person can show that they did not contravene the provision. Igen v Wong [2005]EWCA Civ 142.

37. Less favourable treatment may itself be for a number of reasons and if a protected characteristic has a significant influence on the outcome of a decision to treat a person in a less favourable way discrimination is made out: Nagarajan v London Regional Transport [1999] IRLR 572.

38. Less favourable treatment alone will not be sufficient to establish direct discrimination unless there is 'something more' from which the tribunal can conclude that the different treatment was because of the claimant's protected characteristic: Madarassy v Nomura International Plc [2007] IRLR 246.

39. The general proposition the respect the concept of direct discrimination is considered in some detail at paragraph 40 of the judgment of the EAT in London Borough of Islington v Ladele [2009]IRLR 154.which sets out seven key points:

*The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:*
*(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in* ***Nagarajan v London Regional Transport*** *[1999] ICR 877, 884E – "this is the crucial question". He also observed that in most cases this will call for some consideration*

*of the mental processes (conscious or subconscious) of the alleged discriminator.*

*(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in* ***Nagarajan*** *(p.886F) as explained by Peter Gibson LJ in* ***Igen v Wong*** *[2005] ICR 931, para 37.*

*(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the* ***Burden of Proof Directive*** *(****97/80/EEC****). These are set out in* ***Igen v Wong****. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:*

***"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."***

*If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination. (The English law in existence prior to the* ***Burden of Proof Directive*** *reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference must be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in* ***King v The Great Britain-China Centre*** *[1991] IRLR 513.)*

*(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in* ***Zafar v Glasgow City Council*** *[1998] ICR 120 :*

***"it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."***

*Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in* ***Bahl v Law Society*** *[2004] IRLR 799, paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.*

*(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the* ***Igen*** *test: see the decision of the Court of Appeal in* ***Brown v Croydon LBC*** *[2007] ICR 897 paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.*

*(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in* ***Anya v University of Oxford*** *[2001] IRLR 377 esp.para.10.*

*(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in* ***Watt (formerly Carter) v Ashan*** *[2008] ICR 82, a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paras.36-37):*

40. **Discrimination arising from disability**

41. S.15 (1) EqA 2010 states

> *"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."*

42. The Supreme Court has given Judgment in **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65 upholding the Court of Appeal's Judgment. At para [12] Lord Carnwarth sums up the position succinctly as follows:

> ***"…****section 15 appears to raise two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?"*

43. We remind ourselves that in Pnaiser v NHS England [2016] IRLR 170 at para 31 Mrs Justice Simler DBE identifies the proper approach to be taken in cases involving consideration of s15 EqA.

> *"(d) … The causal link between the something that causes unfavourable treatment and the disability may include more than one*

*link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

*(e) … The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

*(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator."*

44. It is for the tribunal to reach its own judgment when fairly assessing proportionality based upon a detailed analysis of the working practices and business considerations involved having regard to the business needs of the employer: Monmouthshire County Council v Harris UKEAT/001/15 at para 44 which applied Hensman v Ministry of Defence UKEAT/0067/14. The business consideration may also include as part of the matrix of an assessment of the proportionality of how much longer an employer may be expected to wait.

45. In assessing proportionality for the purposes of s.15 EqA 2010 Underhill LJ in O'Brien v Bolton St Catherine's Academy [2017]EWCA Civ 145 at para 53 confirmed that the test is broadly the same as the reasonableness test for unfair dismissal.

**Failure to make reasonable adjustments**

46. S.20 EqA 2010 provides that there is a requirement where a provision criterion or practice ('PCP') of A puts a disabled person at a substantial disadvantage in relation to the 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.

47. S.21(1) EqA 2010 provides that a failure to comply with the requirement is a phase comply with the duty to make reasonable adjustments.

48. It is necessary for a tribunal to identify the PCP applied by or on behalf of the employer, the identity of the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant: Environment Agency v Rowan [2008] ICR 218.

49. In considering the reasonableness of the proposed adjustment the question of whether the adjustment would work in practice is relevant. Having identified whether an adjustment is reasonable the burden of proof shifts to the respondent to show that an apparently reasonable adjustment that has a prospect of success was not a reasonable adjustment: Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10.

**Harassment**

50. Section 26 of the 2010 Act is concerned with harassment. Where relevant, it provides as follows:

*" (1) A person (A) harasses another (B) if—*

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

*(b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*. . .*

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
*(a) the perception of B;?*

*(b) the other circumstances of the case;*

*(c) whether it is reasonable for the conduct to have that effect.*
*(5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation."*

51. There are three essential elements of a harassment claim under S.26(1):
    a. unwanted conduct
    b. that has the proscribed purpose or effect, and

c. which relates to a relevant protected characteristic.

52. The case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements which can be summarised as follows:
    a. Was the respondent responsible for the "unwanted conduct" towards the claimant;
    b. Did that conduct have the effect of violating the claimant's dignity or creating an adverse environment for the claimant; and
    c. Was the conduct related to the claimant's protected characteristic?

53. The test of whether the conduct has the "effect" expressly requires the tribunal to have regard to s.26(4):

> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

54. A threshold must be met, otherwise the language of the legislation is trivialised. Richmond Pharmacology, at Para 22:

> *"While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of*

*hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.*

55. Ms Trotter reminds us that in the case of Pemberton v Inwood [2018]EWCA Civ 564 Underhill LJ revised his Dhaliwal guidance in respect of the precise language of para 13 of that judgment and reformulates it as:

*"In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider <u>both</u> (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) <u>and</u> (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."*

**Unfair Dismissal**

56. Section 98 Employment Rights Act 1996 provides:-

(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."

(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."

57. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the misconduct alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

58. In the words of the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439:-

a) the starting point should always be the words of section 98(4) themselves

b) in applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair

c) in judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer

d) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another

e) the function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

59. The Court Of Appeal in Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 3 concluded that the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. In A V B 2003 IRLR 405 the EAT concluded that when considering the reasonableness of an investigation it is relevant to consider the gravity of the charges and the consequences to the employee if proved. Serious allegations of criminal misbehaviour must always be the subject of the most careful and conscientious investigation.

60. The tribunal has considered the provisions of the ACAS code of practice to disciplinary and grievance procedures

**Evidence**

61. The Tribunal have heard evidence over the course of 9 days. The hearing has been somewhat unusual as the case was heard by a panel that initially comprised three members. Having heard six days of evidence the parties had cause to make an application on the seventh scheduled day that the third member of the panel, who had been seen to have his eyes closed, albeit intermittently on a number of occasions, caused the parties to be concerned that the panel ought to be excused. The application was made for the hearing to be brought to a close and begin again before a different panel. On the seventh day of the hearing the apparent inattention of the panel member on the previous days caused the claimant to make an application that the member whose eyes were closed should not continue to hear the case. At first the parties asked that the case was adjourned and relisted to be heard by a fresh panel, albeit one in which they asked that EJ Dean and Mrs Campbell, who had been identified to them as a member of the employer panel of tribunal members, might remain panel members joined by a new member, apparently in the hope that the evidence, to be heard again from the start, would be better able to move more quickly through the evidence aided by an established familiarity with the evidence and the issues.

62. The parties were informed that, if before a newly constituted panel, it would be heard before an entirely new panel and that the listing of the case for a new hearing of 10 days could not be accommodated to be listed before January 2021.

63. With the approval of the Regional Judge, the parties were presented with an alternative whereby, with the agreement of both parties, the case would be adjourned to be heard by EJ Dean and Ms Campbell sitting as a panel

of two. The soonest date to accommodate the availability of the parties and the two original panel members was February 2020. The initial dates of 10 – 14 February 2020 were adjourned owing to Ms Trotter, counsel for the respondent being unable to travel because of extensive flooding in the north of England which prevented her travel to the hearing. The case has continued to hear evidence on 26 and 28 February and the parties proposed to rely upon written submissions. The panel have agreed to accept the written submissions and conducted deliberations on 4 & 5 and 9 March with our written judgment and reasons for it being sent to the parties in liability only.

64. We have been referred to the agreed bundle of 3 lever arch files of documents which extend over 1570 pages.

65. We have heard from the claimant. For the respondent we have heard from six witnesses, Governor David Bowkett, Governor Sands, Joanne Noakes, Head of regional Intelligence Unit (North West and West Midlands) who conducted a number of grievance appeals, Governor Paddy Keane, Head of Safety, Equalities and Admissions at HMP Stafford, who conducted the disciplinary investigation into events on 8 May 2017, Alison Clarke, Prison Group Director who conducted the disciplinary hearing and Teresa Clarke who at the relevant time was Director for Midlands Prisons who conducted the disciplinary appeal hearing.

**Findings of Fact**

66. The Respondent is responsible for the Prison Service and the Claimant was employed by the Respondent as a Prison Officer and at the relevant time worked at HMP Hewell. His employment in the Prison Service started on the 29 November 2004. At HMP Hewell, a Category B local prison, which houses prisoners both on remand and convicted. The prison houses approximately over 1,000 prisoners and staff and at the relevant time, was under performance improvement standards following a poor performance

review over several years. We have heard evidence from Governor Sands that the Prison was one in which the dynamic was continuously changing. At the relevant time, Governor Sands was the governing Governor of HMP Hewell and was responsible for the legal running of the Prison and staff and prisoners within that Prison. Governor Sands began work at HMP Hewell in March 2017. On his arrival at HMP Hewell, Governor Sands was made aware of an issue that had occurred in the Segregation Unit during control and restraint exercise that had happened earlier. On his arrival in late March early April 2017, Governor Sands commissioned an external investigation into the incident as it required external scrutiny. We accept Governor Sands account that the investigation ought to have been initiated before his arrival. In any event, the commission of the investigation was overlapped with an incident that occurred on the 8 May 2017 which, given its level of severity, had more immediate priority. The Claimant was involved both in the control and restraint exercise that was the subject of an external investigation and also an incident that occurred on the 8 May 2017, which led ultimately to the Claimant's dismissal.

67. We have been referred during the course of the Tribunal Hearing, to the Respondent's policies in respect of the 'Use of Force' and 'Control and Restraint' and the so-called operation of the so-called "Tornado Team".

**Policies & Procedures**

68. Prison Service Order 1600 details the Respondent's policy in relation to the "Use of Force" [339-359]. We have been referred in particular to the provisions dealing with types of force used in the Prison Service and in particular, "Control and Restraint" (C & R) at Section 4 of the Use of Force Policy.

69. Prison Service Order 1600 is the Prison Service's policy covering the use of force and it details the circumstances in which force can be used and

the framework for justifying the use of force. The use of force policy document covers not only "*control and restraint techniques but also de-escalation skills, personal safety techniques and the use of batons*."

70. We have been referred to Section 2 Policy, thought and theory relating to the use of force and Section 2.2 described "*the use of force will be justified, and therefore lawful, only:*

- *If it's reasonable in the circumstances*
- *If it's necessary*
- *No more force than is necessary is used*
- *If it's proportionate to the seriousness of the circumstances*."

71. The Prison Service Order 1600 details the circumstances in which the use of force by a new member of staff in an establishment is lawful 2.3 – 2.20 we have had in regard to particular to: -

> *"Considering Necessary Use of Force*
>
> *2.6 It is important to take into account the type of harm that the member of staff is trying to prevent – this will help to determine whether force is necessary in the particular circumstances they are faced with. "Harm" may cover all of the following risks:*
>
> - *Risk to Life*
> - *Risk to Limb*
> - *Risk to Property*
> - *Risk to the good order of the Establishment*
>
> *It is clearly easier to justify force as "necessary" if there is a risk to life or limb.*
>
> *Guidance to decide whether Use of Force is Necessary*
>
> *2.7 Deciding whether "force is necessary" in order to maintain the good order of the Establishment may be complicated – the*

*member of staff must take into account the consequences of the Prisoner not complying with his/her lawful instruction. There are 3 examples given below: - …..*

*Example 2 – giving a lawful instruction to a prisoner to stop swearing at a Teacher. The instruction is "a Lawful Order", but it would not be reasonable or necessary to follow the order with the use of force if the prisoner did not comply immediately. However, subsequent refusals to leave the classroom/stop swearing at the teacher may eventually lead to a C & R planned intervention (once all other alternatives such a persuasion and de-escalation have been tried and failed)"*

Types of force and in particular control and restraint ("C & R") are detailed at paragraph 4 of the Prison Service Order 1600. Control and restraint techniques are used as a last resort in order to bring a violent or refractory prisoner under control. The techniques are applied for as short a time as possible. The policy provides: -

*"4.23 Control and restraint to basic techniques are used by a team of 3 officers (with the option of having another person involved to control the legs) in order to manage a violent or refractory prisoner.*

*4.24 The deployment of a 3 Officer team is the approved method of dealing with violent or recalcitrant prisoners. It must only be used as a last resort after all other means of de-escalation (eg: persuasion or negotiation). The incident, not involving the use of force have been repeatedly tried and failed."*

It continues:

*4.29 Unplanned incidents occur where there is an immediate threat to someone's life/limb or to the security of an establishment and staff need to intervene straight away. In these situations, a member of healthcare and a supervising officer will attend as soon as possible.*"

Reverting to PSO 1600 the policy provides:

*"No More Force Than Is Necessary"*

*2.8 No more force than is necessary shall be used. Any greater force than is necessary could be deemed as unlawful.*

*Proportionate In The Circumstances*

*2.9 Staff should demonstrate a reasonable relationship of proportionality between the means employed and the aim pursued. Action taken is unlikely to be regarded as proportionate where less injurious, but equally effective alternatives exist.*

*2.10 Where the use of force is necessary, only approved control and restraint techniques should be used unless it is impracticable (ie: whenever there are less than 3 Officers present)".*

72. The Claimant has, during the course of Hearing on completion of evidence provided by Governor Keane, produced a copy of a document described to us as '*C & R Training Manual'*, the version produced by the Claimant is that of 2006, albeit not current at the relevant time [189a-d]. The Training Manual suggests reasonable response options to certain behaviour types including: -

*"Violent behaviour, where the prisoner has caused a concern ie: their behaviour is deemed as threatening either verbally or non-verbally. This could escalate to actual violence towards a person or property".*

The proposed reasonable response options include

*"Use diffusion strategy or withdrawal.*
*If no other practical option used, reasonable force to prevent assault.*
*If practical, use control and restraint techniques"*

73. The techniques of control and restraint advocate that every opportunity should be taken to de-escalate an incident and only as a last resort should controlling restraint techniques be used. The Training Manual acknowledges how judgment is affected by stress.

74. Under Section 1.2.1 whilst acknowledging that when under stress, the so-called "*fight or flight*" response is commonly engaged and the effect of it: -

> *"Gives us extra strength, a greater tolerance to pain and a heightened awareness. On the negative side, we develop tunnel vision, lose our ability to execute fine and mentor skills and lose our perception of the speed of events.*
>
> *What this means is that once we are under the influence of the fight or flight response, it is unrealistic to assume that we will maintain a 360° awareness of the situation was, be able to execute skilful and complex techniques, "unless we are highly trained, or that we would be able to measure accurately our response to the perceived threat".*

Mindful of identifying the positive and negative effects of stress, the policy goes on to identify: -

> "1.2.2 <u>Resolution Strategies</u>
>
> When in a conflict situation, we should have 3 objectives, these are: -
>
> - Avoid danger
> - Defuse the situation
> - Control the situation "

75. The extract from the Training Manual to which we have been referred is precisely that and we have been shown extracts of that manual [pages 39, 57, 83 and 25]. We are satisfied that the training that has been given to the Claimant all with consistency, reinforces that the appropriate response to violent behaviour is, in the first instance, to use a diffusion strategy or

withdrawal and only if there is no practical option or there is no other practical option to use reasonable force to prevent assault. We find that the Claimant was one of a group of highly trained Officers being a member of the Tornado Team and was aware of the need to engage in resolution strategies before physical intervention and on the 8 May 2017, the Claimant, without first engaging resolution strategies, engaged in uncoordinated physical intervention.

76. As a member of the Tornado Team, the Claimant was trained every year in the correct operation of use of force.

**8 May 2017 Incident**

77. There is a general consensus from the parties that on the 8 May 2017, an incident occurred in the Respondent's House Block 4 at HMP Hewell. The incident occurred on Spur B and in particular on Landing B3. The Claimant was one of a number of Prison Officers who, whilst he was working a short distance from House Block 4, heard a number of personal alarms being activated at approximately 11.15am which was a sign that all available staff were asked to report to House Block 4. The Claimant was not first on the scene on Landing B3 at Spur B, House Block 4 and we do not doubt that the noise and scenes of disruption with recalcitrant prisoners was one which caused him to engage his not inconsiderable training. The Claimant, as a Tornado Team Member, was part of a team of Prison Officers who underwent specialist training who from time to time are involved in dealing with incidents of concerted indiscipline at prisons, not only those at which they work but on call to other prisons, this the Claimant describes as dealing with riots. The incident at HMP Hewell on 8 May 2017 was not an incident in which the Tornado Team had been engaged.

78. There is a consistent account that the incident occurred at about 11.15am. The Claimant along with many other prison officers responded to a personal alarm call and went to House Block 4 on B Spur Level 3, a landing

known as B3. Prisoners were asked to return to their cells and Prison Officers were locking prisoners up in their cells on B3 and some prisoners returned to their landing on B2, the landing below B3. It is accepted that the incident that occurred on the 8 May 2017, was one of serious disruption in Block 4. The Claimant was not first on the scene when he entered House Block 4 B Spur. We accept the consistent accounts given by all Prison Officers to the investigation that the B Spur was noisy and chaotic. Prisoners were refusing to do what they were told and they were fighting with each other. We accept that the Claimant, when he was on Level 3 of B Spur – B3, told prisoners to stop what they were doing and to return to their cells. The incident in relation to the prisoner's behaviour was one of passive resistance, namely they refused to comply with reasonable requests or direct orders. The Claimant, on the B3 landing, behaved consistently with the reasonable response options [189A] asking the prisoners to comply with the instructions, namely to return to their cells and asked if there was anything they could say or do to make them comply. The Claimant and other of his fellow Prison Officers tried to lock prisoners away and asked them to return to their cells and undoubtedly there were jeers and bravado from the prisoners who verbally made threats of violence. The Claimant has given an account that he feared that he was going to be attacked again as he had been attacked during his long service in the prison service.

79. Prisoners whose cells were located on B2 ran down to the lower floor and the subsequently the Claimant went down the flight of stairs to landing B2. When he arrived on B2 landing a number of his colleagues were already there, the Claimant saw a number of prisoners formerly who had been on B3 and had already returned to landing B2. The Claimant has described that one of the ringleaders from B3, who had been wearing a dressing gown there was now on B2, the prisoner by then had changed and was wearing sweatpants and a top. The Claimant describes that he saw two prisoners on the so-called "suicide netting" which is a permanent netting installed across the open area of the internal quadrangle of the landing.

The Claimant described that he saw that one Prison Officers, PO O'Keefe, was talking to one of the prisoners on the netting who engaged in active resistance which, as described in the C & R training manual [at page 39] [189A], reflects a situation whereby a Prison Officer does not feel in immediate danger but the prisoner threatens violence if approached. The reasonable response option in such circumstances is described as being to:

> *"Use diffusion strategy or withdrawal.*
> *If no other practical option used, reasonable force to prevent assault.*
> *If practical, use control and restraint techniques"*

80. The Claimant gives an account that he recognised one of the individuals on the net as a very influential individual amongst the prisoner community and describes that that individual was trying to incite others to jump on to the netting. The Claimant describes that the situation caused him to fear dire consequences as the Claimant considered that whilst on the netting, the prisoners would gain access to the bars causing the Health & Safety issue at height. On the Claimant's account, he undertook a dynamic risk assessment and climbed on to the net to remove the two refractory prisoners. The Claimant considered that it was appropriate for him to "try to take control", he, having issued verbal commands to the prisoners to stop disobeying instructions when they had been on the upper landing B3. The Claimant acknowledges that he walked/ran past Prison Officer O'Keefe, who was talking to one of the prisoners on the net, engaging in a strategy to defuse the situation. The Claimant accepts that he did not give any instructions to the prisoners on B2 to get off the netting on B2 before he ran past Prison Officer O'Keefe and, without attempting himself to deescalate the situation on B2, nor giving an instruction to the two prisoners on the net to get off, he leapt over the railings and approached a prisoner from behind whilst on the netting.

81. The Claimant in his evidence has accepted that he did not attempt to deescalate the situation on B2 in any way, nor did he tell the prisoners to

get off the netting. The Claimant accepts that he failed to comply with the provisions of PSO1600 paragraph 4.24 in relation to the use of force which deals with the deployment of a 3-officer team as being the approved method of dealing with a violent prisoner to be used only as the last resort after all other means of deescalating the incident, not involving the use of force, have been repeatedly tried and failed.

82. The Claimant in cross examination describes the event as being a "mutiny" and the Claimant on reflection at the Employment Tribunal has accepted that he might have given Prison Officer O'Keefe, who was in charge at the time, the opportunity to complete his attempt to persuade the two prisoners on the netting, off. The Respondent does not accept that the presence of two prisoners on the netting was a mutiny.

83. The Tribunal have been shown DVD footage of the incident on Landing B2 on the 8 May 2017. The DVD video shows the Claimant having launched himself on to the netting, approach a prisoner from behind, shows him put his arm around the prisoner's neck and the prisoner break free. Other Prison Officers seeing other prisoners get on to the netting to help their fellow prisoner who the Claimant sought to hold around his neck, tried to get on to the net to assist their colleagues, as a result, other Prison Officers on Landing B2 who had previously been locking up prisoners in their cells had no alternatively but then to jump on to the net to assist the Claimant who was then outnumbered.

84. Although it is accepted that the Claimant did not comply with the procedures contained within Prison PSO1600. The Claimant has confirmed that he had received his control and restraint training within the previous twelve months as it was training delivered on an annual basis. As there had been a use of force by the claimant, the Claimant completed a use of force/staff statement [332-333]. The Use of Force statement completed by the claimant confirms that he had completed his advanced C & R training and been a member of the Tornado Team for over 10 years

having attended 12 operational call-outs, totalling in excess of 100 hours and that during the call-outs many of them had been dealing with concerted indiscipline. The Claimant described he had been involved in recent HMP Birmingham riots. We, like the respondent, find that the account given by the Claimant of the incident on landing B2 is not consistent with the evidence viewed on the video recording of the incident. The Claimant describes that when he was on Landing B2 that two of the prisoners who had been present at B3 had moved to Landing B2, had jumped on to the netting and appeared to be quite influential and perhaps "ringleaders". The Claimant's account is that he made a dynamic risk assessment of the situation and climbed on to the netting to try and remove the prisoners from there. The Claimant says that:

> *"at this point I remember seeing a number of Officers doing the same and eventually the non-compliant prisoners were removed."*

We would observe that the Claimant was the first Prison Officer to climb on to the netting, ignoring PO. O'Keefe's efforts to engage in dialogue with the two prisoners on the netting to deescalate the situation. It is evident that the other Prison Officers climbed on to the netting only after the Claimant had approached the prisoner from behind and held him around his neck prompting other prisoners to gain access to the netting. The Claimant's account continues:

> *"I was then faced with another prisoner who was refusing to return to his cell on the B3 Landing. As with other refractory individuals, I am unsure of their identities. Once again, I gave clear and precise instructions as to what was expected from him. I asked him to return to his cell. He made some sort of implicit and explicit threat that I believed was detrimental to my health and safety and wellbeing. I then asked if there was anything I could reasonably say or do to make him comply with my own instructions. He remained non-compliant."*

The Claimant describes that he believed that force was needed to be used in accordance with the Criminal Act 1967 as permitted by PSO 1600 amongst other things. The Claimant describes that:

*"I attempted to take control and support the prisoner's head, he appeared to be experiencing the effects of adrenalin. He was immensely strong, a lot stronger than me with an extremely high pain tolerance. The prisoner struggled and it was deemed necessary to take the prisoner to the floor in a prime position. I then managed to apply a lock on the prisoner's left arm. It is my understanding Officer Day took control of the prisoner's right arm. I believed that Officer Westwood took the role of the number 1 and took control and supported the prisoner's head. Due to the refractory of prisoner non-compliance, it was deemed necessary to carry the prisoner to his cell. I believe that Officer Little assisted in some way in the procedure.* "

Whilst it is not our role to substitute our view for that of a reasonable employer, having compared the Claimant's statement of use of force, with the footage of the DVD recording, we find that the account that the Claimant gives on the 8 May 2017 immediately after the incident, is not an accurate reflection of the events and was not consistent with the video recording, nor consistent with the answers that the Claimant has given to questions in cross-examination at the Tribunal and the Claimant's contemporary account is not credible of the events which occurred on Landing B2.

85. When the incident occurred on Landing B2, the governing Governor of HMP Hewell, Governor Sands, was not at the prison, he was visiting the regional office, meeting with Teresa Clarke, Director of the Midlands Prisons. When Governor Sands was informed that the regional office had been contacted by HMP Hewell in order to consider the prison's options concerning advanced C & R assistance, known as "Tornado" assistance. In the event the incident in Block 4, B spur was not considered to require a Tornado Force intervention. The enquiry had been raised following the incident that had occurred in House Block 4, B Spur. When Governor Sands contacted the prison, he was briefed generally about the incident and informed of an incident of concern regarding the actions of the

Claimant, Governor Sands instructed that the Governor on the day, Governor David Bowkett, was to be asked to meet with the Claimant to establish what had happened on the day and to establish that the Claimant was safely able to operate his role. On his return to the prison, Governor Sands saw the CCTV footage of the incident which caused him concern which he considered required further enquiries to be made.

86. We have heard evidence from Governor David Bowkett, who at the relevant time was Head of Drugs Strategy & Equality at HMP Hewell. At the time Governor Bowkett was also responsible for ensuring that HMP Hewell had a policy in place to uphold the protected characteristics and to ensure that in respect of both staff and prisoners and that the policy was applied. Governor Bowkett was not the Claimant's line manager, however he was aware that the Claimant was considered to be a difficult character at HMP Hewell. In May 2017, Governor Bowkett had been an assistant investigator on a matter related to the Claimant, though his involvement was limited to the administration of an investigation into the Claimant's conduct at that time and for updating the Claimant about extension of time during that investigation following the direction of the lead investigator.

**Bowkett Incident – 8 May 2017**

87. In line with the direction given by Governor Sands that the Day Governor, Governor Bowkett should speak to the Claimant in the first instance to establish what had happened and that the Claimant was safe and able operate in his role, the direction was passed to Governor Bowkett whose account is that he spoke to the Claimant at about 16:40 on the 8 May 2017. Governor Bowkett made a note of his meeting with the Claimant as a resume, the note was made within 48 hours of the meeting [236-237], Governor Bowkett has given an account that the Claimant during the course of the discussion was defensive, confrontational and argumentative. The meeting took place at 16:30 in the Visits Manager's office, near where the Claimant was working, the meeting was private and,

when asked about the C & R incident that occurred on HB4, the Claimant informed Governor Bowkett that he had a back injury that had been made worse by the incident and Governor Bowkett directed the Claimant to enter the incident in the accident book. Governor Bowkett's account is that when he raised with the Claimant the subject of staff not going on the safety netting, the Claimant became defensive and made derogatory comments about all of the Governors at HMP Hewell being *"corrupt*", "*stitching him up*" and deliberately "*digging him out*". The Claimant wondered why the Governors were interested only in criticising, investigating and sacking the staff and not acknowledging good work. Having heard evidence from the Claimant, it is clear that he anticipated as he was being spoken to by Governor Bowkett he would be praised for his intervention and going on the netting.

88. Governor Bowkett gives the account that the Claimant launched into a tirade of derogatory comments about the Governors and about their being corrupt and trying to "*stitch him up*". We find that Governor Bowkett's account was that the Claimant had suggested that he personally was trying to "*stitch him up*" as he had previously done, was not a correct claim, the Claimant sought to suggest that Governor Bowkett had tried to sack the Claimant when he was being investigated in or around 2010, the suggestion is without foundation. We have considered the account provided by Governor Bowkett [236-237] alongside the Claimant's later email to the Equalities Group sent by him on the 9 May 2017 [238]. We conclude that the Claimant, when he was asked to meet with Governor Bowkett, expected to be congratulated not questioned about what he had done in going on to the netting and his response to the incident. In response to the Claimant making a range of allegations that all of the Governors at the prison were corrupt and were trying to deliberately to dig the Claimant out of employment we find Governor Bowkett's response had been to ask the Claimant whether he really thought that Governors had time or inclination to go out of their way to "*stitch him up*" in respect of the Claimant. We accept the account given by Governor Bowkett that he had

suggested to the Claimant that he must need counselling or something to get his head straight as what he was saying sounded as though he was being persecuted. We find that the Claimant in his email to the Equalities Group reports that he spoke with the Governor Bowkett and stated:

> *"we entered into a discussion which left me feeling deflated, he stated you need to get your head checked out. I immediately challenged him with regards to the remark that he had made. I am currently receiving counselling for the work-related stress that I have had to endure over the past few years. I have previously been signed off work due to work-related stress and I am currently taking medication for this. Hence, the reason why I feel so strongly that the Governor should not make remarks so flippantly with regard to a mental illness*."

He concluded in his email to the Equalities Group

> *"I believe this behaviour causes an oppressive and intimidating working environment for myself and my colleagues".*

We note that in the more contemporary report of the discussion on the 8 May, the Claimant made no reference to Governor Bowkett having said that he was "*mad*", Governor Bowkett's evidence is that he does not recall saying that the Claimant was "*mad*" but accepts that he raised concerns about the Claimant's thoughts of persecution. After the event, on the 11 May, the Claimant raised a grievance against Governor Bowkett [241] in his email address to Tracey Johnson, the email reports: –

> "*During the conversation, Governor Bowkett made an insulting remark and reiterated it a second time. He stated that "I need to get my head checked out" and implied that I was "mad" and vehemently thought this to be the case".*

89. We find, having balanced the evidence before us, that Governor Bowkett had a one to one meeting with the Claimant on the 8 May at approximately 16:30, the Claimant was agitated and made a number of allegations about the conduct of Governors at the prison, the purpose of the meeting having

been to remind the Claimant that staff going on to the netting was not permitted and to ensure that the Claimant was fit and well to continue undertaking his duties. We conclude that whatever words were used, the Claimant inferred from the comments that the comments to the effect that he "*needed to get his head checked out*" called into question generally his mental health. The claimant's initial report of the incident and the email of the 9 May [238] makes no reference to the wording "*mad*" which is referred to as being implied in a grievance raised on the 11 May. We find that whatever words were used, the comments made by Governor Bowkett were in the context of the Claimant's extreme assertion that all Governors were corrupt and the comments made in that context would have been made to any Prison Officer making such assertions and whether or not they suffered from a disabling mental health condition. We find however that words to the effect, that the Claimant "*must need counselling or something to get his head straight*" as what he was saying sounded like he was being persecuted and that his thinking was not right ,were undoubtedly perceived by the Claimant to be words to cast aspersions upon his mental health and beliefs.

90. Having heard all the evidence in this case we find that on the 8 May 2017, Governor Bowkett was not aware of the Claimant's depression and indeed the Claimant has confirmed in answer to cross-examination that the Occupational Health Report which referred to the claimants mental health dated the 14 September 2015 [220], was not brought to Governor Bowkett's attention at that time or at the relevant time.

91. The Claimant subsequently raised a grievance in respect of Governor Bowkett's behaviour towards him on the 8 May 2017. We deal with our findings in respect of that grievance below. We find that the enquiries raised by Governor Bowkett did not form part of any formal investigation and was not a meeting in respect of which the Claimant was under any of the Respondent's formal policy or procedures in respect of which he was entitled to be accompanied by a trade union representative.

**9 May 2017**

92. Governor Sands viewed the CCTV footage of events, on House Block 4 B. Spur level 2 when he returned to the prison on Monday 8 May 2017. The next day the 9 May 2017, Governor Sands visited the reception in order to speak with the Claimant who was working a late shift. Governor Sands informed the Claimant that he wished to speak with him the next day Wednesday 10 May 2017 to get an understanding of his actions in relation to the incident on House Block 4, Level B2. Governor Sands informed the Claimant that if he wished, he could bring a trade union representative, a friend or a colleague to the meeting that was scheduled for the next day. On Wednesday 10 May 2017, the Claimant attended a meeting with Governor Sands at 10.30am accompanied by his Prison Officer Association Representative. The meeting was described to the Claimant as being an informal enquiry into his actions which could involve future action, however at that stage the meeting was not an investigation or a discussion that was disciplinary in its nature. During the meeting, the Claimant and his representative had sight of the CCTV footage of the incident and the Claimant informed Governor Sands that he considered that his actions were necessary and proportionate and that he was a highly experienced Officer. After an adjournment in the meeting, the Claimant and his representative were asked to return to Governor Sands' office so that he could reflect upon what, if any steps needed to be taken. The Claimant was informed at 11.30am that he was to be suspended with immediate effect as Governor Sands felt it was not appropriate for the Claimant to remain present in the prison on restricted duties only. Governor Sands did not consider in light of the Claimant's use of force on the 8 May 2017 that he should remain on operational duties while a full investigation was undertaken into the claimants conduct on 8 May in regard to his use of force on a prisoner.

93. As the meeting concluded, the Claimant informed Governor Sands that he had submitted a grievance against Governor Bowkett and the Claimant

was informed that he would be able to access any support services that he wished or required which included the Care Team and Counselling Services offered by the Respondent.

94. Governor Sands commissioned an investigation into the Claimant's conduct on the 8 May, the suspension was for the purposes of investigating the allegation that: -

> "*The circumstances of whether he used inappropriate use of force and/or demonstrated unprofessional conduct in your duties and actions".*

The letter of suspension confirmed the arrangements [240].

95. Following the meeting at which the Claimant was informed of his suspension, on the 11 May 2017, the Claimant made a formal grievance against Governor Bowkett [241] as confirmed in the notification of formal grievance stage 1 [282-296].

96. The investigation commissioned, was ultimately commissioned by Alison Parry to be undertaken by Governor Paddy Keane, the investigating officer who wrote to the Claimant on the 19 May 2017 [254-255].

97. On the 12 May 2017, the Claimant raised a grievance against Governor Seymour and Custody Manager Wall [242] in an email sent to the Corruption Prevention Unit as he reported that they failed to report other colleagues of possible misconduct for having climbed on to the suicide netting in an incident at height in which by comparison the Claimant claimed that he had been treated less favourably than both Governor Seymour and CM Wall who are not facing disciplinary actions for their decision.

98. The terms of reference of the investigation were detailed on the 10 May 2017 [268-270] with Governor Keane being identified as the Investigating

Officer, he was Head of Safety, Equalities and Admissions at HMP Hewell. The terms of reference were identified as being: -

> "*Please investigate the circumstances surrounding the incident on HB4 on 8 May 2017 and please investigate any inappropriate use of force and/or any unprofessional conduct".*

99. The objective of the investigation was described to be: -

> *"Your objective is to establish the facts and present any evidence in relation to the above incident, allegation or complaints in accordance with the conduct and disciplinary policy".*

100. The Report was scheduled to be completed by the 7 June 2017.

**Governor Keane Investigation**

101. Governor Keane wrote to the Claimant on the 19 May 2017 [254-255] identifying the terms of reference. The structure of the investigation and the possible outcomes which included: -

> *"1. Taking no further action*
> *2. Taking informal action eg: providing him with extra coaching training or support.*
> *3. The matter being dealt with through a formal performance management procedures.*
> *4. Holding a formal disciplinary hearing."*

102. Governor Keane undertook an investigation which included a number of interviews with: -

> Jane Bailey [259]
> Helen Seymour [261]

Jackie Quire [263]
Prison Officer Richard Day [384-391]
Senior Officer James O'Keefe [367-375] and
Prison Officer Victor Rumanyika [376-384]"

103. On the 25 May 2017, Governor Keane interviewed the Claimant [394-412]. When interviewing Officers Day, O'Keefe, Rumanyika and Seymour, the CCTV footage of the incident on Landing B2 was shown to the witnesses, who were asked to comment on the incident on B2 landing and the events of the morning. It is self-evident from the evidence that the Prison Officers gave that the events on the 8 May 2017 were clearly noisy and prisoners were heckling at the Prison Officers.

104. In the Claimant's interview, the Claimant confirmed that he was up-to-date with his C & R training and the Claimant who described the noise levels as "*horrendous just quite frightening*" described the atmosphere as "*hostile*". The Claimant identified 2 prisoners as being on the netting, Prisoner "DO" and Prisoner "MB". The Claimant in interview gives an account that on Landing B2, he did not engage in talking with the prisoners to resolve or de-escalate the situation. The claimant gives an account that his work-related stress began in 2010 that when his work-related stress started, he did not get immediate support . The claimant confirmed that during the period of his then current suspension his current Line Manager Russ McCombs had referred him to Occupational Health. The Claimant's account [401] confirmed that he had gone on to the net and tried to hold prisoner MB's head and tried to restrain him and had thought that other Prison Officers would get on to the net to help him and to restrain prisoner MB's arms. However, the Claimant had not in acted in accordance with the control and restraint guidelines, he had not had any discussion with his fellow Prison Officers on the B2 landing to plan the control and restraint and indeed the Claimant had not made reference to his expectations in his original use of force statement [332]. During the course of the interview which began at 10.06am there had been a break at 10.34am which was

extended for the Manchester bombings silence and the meeting reconvened at 11.03am after the two minute silence. The meeting continued until it concluded at 11.17am.

105. Subsequently, the Claimant asserted that during the break in the interview on 25 May 2017, Governor Keane had tried to persuade him to change his evidence about Prisoner MB and the Claimant raised a grievance against Governor Keane [438-439]. In a grievance presented on the 8 August 2017 in respect of the meeting held on the 25 May 2017 the Claimant agued that Governor Keane had failed to conduct the investigation in accordance with the principles of natural justice and procedural fairness, he failed to conduct the investigation in the correct timeframe and failed to justify the delay. The Claimant also alleged that during the break, Governor Keane had sought to ask leading questions whilst the interview tapes were switched off. Having conducted all of his investigations, Governor Keane had prepared a report with recommendations [302-308] and annexed to the report the record of his investigation [309-412]. We find that the investigation was extensive and thorough, though not forensic in its detail. It is an investigation that we found to have been reasonable in its extent and conclusions. We considered the evidence in relation to the allegations and balanced the evidence to the extent that it supported the allegation that the Claimant had endangered safety of both prisoners and staff in breach of the PSO1600 Use of Force and Unprofessional Conduct. It balanced the evidence to support the allegation that the Claimant had attempted to control Prisoner MB by the neck and head area, it identified as do we that the Claimant in his original Use of Force statement [332-333] report stated that a number of other officers were on to the net when he took the decision to move on to the net himself, which was self-evidently not an accurate reflection. Members of staff interviewed confirmed that they only entered the netting in response to the Claimant's actions because they feared for his safety and that there was evidence before the claimant's intervention of members of staff beginning to take control of the situation on B2 by de-

escalating with communication with prisoners on the netting and of locking up other prisoners on the landing. The Claimant's pre-emptive action in accessing the netting, escalated the situation such that the Claimant did not follow the PSO1600 and the CCTV showed the Claimant ignored the process of engaging in communication with the prisoner in breach of PSO1600. The report took account of the evidence against the allegation, that the Claimant was concerned two prisoners were making their way towards the bars at the end of the landing and he acted to prevent the prisoners gaining a position of height and that all members of staff interviewed confirmed that the scene was chaotic, horrendous and one of the worst incidents they had attended. The report identified any special and mitigating issues, and did a further investigation and in its conclusions found that the Claimant had endangered the safety of other staff and prisoners and that the use of force was inappropriate, but the Claimant did not, in accordance with PSO1600 act in a common-sense manner and had not awaited the arrival of other staff.

106. We find that the investigation undertaken by Governor Keane was one which was full and fair and during the course of the investigation the CCTV recording of the incident was shown to the Claimant on numerous occasions and statements were taken from the Claimant and the others involved. The Claimant has made an allegation that during the course of the investigation by Governor Keane, the allegations against him were changed. We conclude that the investigation in terms of reference included the circumstances surrounding the 8 May incident and the inappropriate use of force was consistently part of the investigation and that the incident occurred on the netting, inevitably prompted comments from those questioned about the fact that the incident was on the netting rather than on the landing corridors. We conclude that the investigation focused its conclusions upon the circumstances surrounding the incident and in particular any inappropriate use of force and/or any unprofessional conduct and that to the extent access to the netting was discussed. The Claimant was given the benefit of any doubt by both Governor Keane and

Alison Clarke about his access to the netting and although Governor Keane was of the view that the Claimant ought not to have entered the netting, the disciplinary charges do not flow from that fact, but rather on the force used by the claimant in the intervention and whether it was appropriate and in accordance with the regulations or not.

107. The Claimant has complained that Governor Keane, during the break that began at 10.34am tried to converse him into saying things whilst the tape was off and that the allegations against him changed. It is evident that the tapes had been turned off for a break and then remained off during the Manchester bombing silence and Governor Keane has accepted in his evidence at the Tribunal that before the tapes were switched back on, there was a 4-way conversation about the CCTV that he had shown the Claimant. Governor Keane has given an account, that during that period, he asked the Claimant what he was doing with his hands whilst on the netting because it looked like the Clamant had punched the prisoner. His account is that the Claimant said that he did not punch the prisoner and he was given the benefit of the doubt. The investigation report completed by Governor Keane was dated the 31 July 2017.

108. The outcome of the investigation was communicated to the Claimant in the letter from Governor Sands dated 31 July 2017 [299-301] which identified the allegation, which if proven would constitute gross misconduct, was that of “inappropriate use of force and/or unprofessional conduct”.

109. On the 8 August 2017, the Claimant raised a grievance about Governor Keane in relation to his alleged failure to conduct this investigation correctly in accordance with the conduct, and disciplinary manual and PSO1300 [438-449]. The Claimant asserted that Governor Keane had failed to conduct his investigation correctly, failed to conduct the investigation in the correct timeframe and failed to inform him in writing of the extension of the timeframe and the reasons why. The Claimant

raised a concern that the delay had a detrimental impact on the protected characteristic that he has and exacerbated his work-related stress that he had suffered for a prolonged period of time. The Claimant alleged that he had been subject to discrimination, harassment, bullying and victimisation on the grounds of his disability and other relevant factors. Whilst the investigation was being undertaken by Governor Keane, and the Claimant was suspended from duties, the grievances that he had raised in relation to events following the 8 May 2017 were progressed.

**Grievance Number 1 – 11 May 2017 against Governor Bowkett**.

110. The grievance was sent to Tracey Johnson in the absence of TDC Teresa Clarke [241-242]. The formal grievance was submitted [243-246] on 12 May 2017. On the 12 May 2017, the Claimant also sent an email to the Corruption Unit and to Tracey Johnson [242] raising a grievance against Governors Seymour and Wall.

111. In respect of the grievance against Governor Bowkett, on the 25 May 2017, Amanda Hughes considered the grievance [251-253] following a grievance meeting on the 9 June 2017. The grievance response was to partially uphold the Claimant's grievance against Governor Bowkett. Having made enquiries of Governor Bowkett, Amanda Hughes concluded her response to the grievance by indicating that Governor Bowkett acknowledged he had made a comment that was not well thought through, that in hindsight was insensitive and he offered an apology to the Claimant and as a result the Claimant's grievance was partially upheld, however, there was no evidence to support a finding that the Claimant was treated unfairly or discriminated against or victimised because of his disability. The Claimant made an appeal against the grievance outcome determined by Amanda Hughes [290-291] and in the first instance, the grievance was referred to be considered by Governor Sands, but it was reassigned to Alison Parry who invited the Claimant to a Grievance Appeal Meeting scheduled for the 24 July 2017 [297-298]. The Claimant objected to Alison

Parry holding the Grievance Appeal as she had been the commissioning authority for the formal investigation and as a result Governor Sands in his letter of the 4 August 2017 [427-428] was rescheduled to be heard on the 17 August 2017 before Joanne Noakes. At a Grievance Appeal Panel Hearing held on Friday 18 August 2017 [538f-h]. During the appeal, the Claimant reiterated his concerns that the Claimant's original grievance included a concern that at the meeting with Governor Bowkett, he had not been asked if he needed any assistance or if he needed a trade union representative and that on the basis that he had originally thought he was going to be commended for his actions, he did not take issue with the initial meeting. During the appeal conducted by Joanne Noakes, the Appeal Panel concluded that whilst the original grievance decision had not addressed the issue of trade union representation, during the meeting with Governor Bowkett, the Appeal Panel acknowledged that if a conversation had developed into a precursor to a formal investigation, union representation/colleague support should be offered in line with PSI06/2010. However, if that did not happen, it didn't necessarily follow that victimisation would occur. The Appeal Panel were satisfied that there was nothing to suggest that the Claimant received unfair or poor treatment or detriment as a result of the conversation with Governor Bowkett continuing and the Claimant was not victimised. The original decision was to stand including the partial upholding of the decision in relation to the inappropriate comment made by Governor Bowkett.

112. We find that nothing in the conduct of the grievance in relation to Governor Bowkett leads the Tribunal to draw an inference, that the Respondent in dealing with the Claimant's grievance discriminate against him in any unlawful way or at all because of his protected characteristic.

**Grievance Against Governor Seymour and CM Wall**

113. On the 12 July the Claimant raised a grievance against Governor Seymour and CM Wall [592]. In brief, the Claimant having been

suspended from duties as a result of his actions on the 8 May 2017, the Claimant had been made aware of an incident that occurred at the prison on 9 May, as a result of which the Claimant asserts that he was treated differently. The claimant brought a grievance against Governor Seymour and CM Wall as he asserted that they failed to report other colleagues for possible misconduct, in contrast to the treatment meted to him for his actions on 8 May which "could result in me being disciplined". The Claimant describes that the nature of the grievance was in respect of a management decision which he considered to be an act of discrimination, harassment and victimisation and identified protected characteristics of disability as being the nature of his grievance. The grievance was dealt with by Amanda Hughes, Deputy Governor at HMP Hewell who met with the Claimant on the 9 July 2019. The Claimant had identified that an accident had occurred at the prison on the 9 May 2019 in which staff were instructed to climb on to the netting by Governor Seymour and CM Wall and the treatment of those circumstances was different to the treatment the Claimant received in respect of his going on to the net on the 8 May. Having investigated the grievance and made enquiries, Amanda Hughes identified that the incident was different to that in which the Claimant had gone on to the netting to restrain a prisoner. Deputy Governor Hughes identified that in so far as on the 9 May, a prisoner had climbed on to a window ledge in front of the office just above the netting and a planned intervention had been authorised to take place, which Governor Seymour had described as being a decision taken on the advice of CM Wall as C & R Coordinator in a controlled situation. The two situations were identified as Amanda Hughes as not being comparable the latter occasion, having been a planned intervention with staff in full PPE and the intervention was controlled and supervised in contrast to the Claimant's intervention on the 8 May which was not planned, nor authorised, nor controlled, nor supervised. [596].

114. The Claimant appealed the decision made by Amanda Hughes by an email dated 23 June 2017 [277] and [598]. The Appeal was submitted

to Joanne Noakes who heard appeals against the Claimant's grievances in respect of both Governor Bowkett and the second appeal in respect of Governor Seymour and CM Wall. Ms. Noakes has given evidence to the Tribunal that she had a meeting on the 18 July 2017 with the Claimant and his trade union representative [602-603] and notes of the meeting were produced to us [538a-538h]. In conducting her appeal, Ms. Noakes who is the Head of Regional Intelligence Unit [Northwest and West Midlands] spoke to the Head of the National Tactical Response Group NTRG on the 18 August who was advised that staff should not go on to the netting but that that could be overwritten where there was:

> "*a clear threat to life, for example hanging or bleeding out, but not where there is a prisoner on the netting who is refractory. By refractory, we mean, a prisoner who is aggressive (not necessarily violent), argumentative or not compliant*."

Ms. Noakes considered that having watched the CCTV footage of the incident involving the Claimant on the 8 May, there was no imminent threat to anyone's life. The Appeal reached the conclusion that although the decision taken by Governor Seymour and CM Wall was considered to be a poor management decision. It had been a decision taken after consideration, in contrast to the circumstances of the incident involving the Claimant on the 8 May which was an incident which required consideration of the use of force in the incident, which was the reason for the Claimant's suspension rather than his having gone on to the netting, in circumstances other than a planned intervention. Ms. Noakes found that the Claimant's suspension was reasonable and that there was an outstanding investigation to determine whether his use of force was appropriate, the CCTV footage having showed that the Claimant had gone on to the netting and went on to forcibly restrain a prisoner and thereafter causing other staff to have to move on to the netting to react to an escalating situation as a consequence of the Claimant's interventions. Ms. Noakes concluded that the Claimant's appeal in respect of the grievance against Governor Seymour and CM Wall was not successful as she did in the Claimant's

appeal against the outcome of his grievance in respect of Governor Bowkett [615-617].

**Grievance against Governor Keane – 8 August 2017**

115. Having received confirmation that as a result of Governor Keane's investigation, the Claimant would be invited to a Disciplinary Hearing. The Claimant raised a grievance on the 8 August in which he asserted that Governor Keane had failed to carry an investigation correctly [438] in so far as he asserted that Governor Keane had failed to conduct the investigation within the correct timeframe and failed to justify the delay and asked leading questions of the Claimant whilst the tape was switched off during his investigation which caused the Claimant to assert that he was subject to victimisation and discrimination.

**Grievance against Governor Sands – 3 August 2017 [451-465]**

116. The grievance against Governor Sands was that he alleged that Governor Sands:

> *"has breached the Equality Act of Harassment, failed in his duty to abide by the Public-Sector Equality Duty. Failed to adhere to the conduct and discipline procedures. Failed to conduct investigations / hearings / grievances according to the principles of natural justice and procedural fairness. Failed to follow correct investigatory procedures set out in PSO 1300. Also making failures amounting to a contravention of the duties under Health & Safety Act 1974 and the management of Health & Safety at Work Regulations 1999."*

In short, the grievance related to a conversation that had taken place between the Claimant and Governor Sands on the 13 July in relation to Governor Sands initial proposal that he should hear the appeal against the grievance against Governor Seymour and CM Wall in respect of an incident that occurred on the 9 May, as well as Governor Sands decision about who would conduct a Disciplinary Hearing in relation to the fact that

the Claimant had been suspended in circumstances which he considered were the same as the actions of Governor Seymour and CM Wall. The Claimant was also aggrieved against the letter of advice and guidance given to him by Governor Sands on the 4 August [427-429] in respect of an incident that had occurred at HMP Hewell in February 2017 before Governor Sands had begun working at the prison. In the event, Governor Sands confirmed that he would not hear the Disciplinary Hearing in respect of the Claimant's alleged misconduct.

117. In the event, the grievance submitted by the Claimant against Governor Sands in relation, amongst other things, to the decision to suspend the Claimant and against Governor Keane in respect of the investigation was referred to Teresa Clarke, the Director of Midlands Prisons. Ms. Clarke wrote to the Claimant on the 6 September 2017 [655] to inform the Claimant that the staff grievance procedures do not apply to grievances about management decisions which could potentially lead to an employee's dismissal which would include investigations. Ms. Clarke identified that the Claimant's concerns could be raised and addressed following the correct conduct of the disciplinary appeals procedure after the outcome of the investigation and that the proposed grievance meetings to consider those grievances would not proceed. The Claimant wrote in response an email in 2017 [658] requesting that Teresa Clarke should reconsider her decision and we find that the decision taken by Teresa Clarke in respect of the grievances brought against Governor Sands and against Governor Keane, were decisions reasonably taken, based upon the serious allegations that were subject to a disciplinary investigation process, properly to be considered at a Disciplinary Hearing.

118. The Claimant subsequently brought a further grievance against Governor Sands in respect of an alleged data breach. The grievance was raised by the Claimant on the 24 November 2017 and related to an email sent by Governor Sands that contained information relating to the Claimant's health assessment [975-987]. The grievance was

acknowledged and the Claimant was informed that it would not be possible to deal with that grievance within the 10-day deadline because of diary constraints of Ms. Clarke [990].

119. On the 31 January 2018, a Grievance Hearing was conducted with the Claimant, accompanied by his Trade Union Representative [1172-1176] and a letter confirming the outcome of that Grievance Hearing was sent to the Claimant on the 16 March 2018 [1201-1203]. The Claimant's grievance in respect of breach of data protection referred to the Claimant's grievance that Governor Sands had forwarded medical information concerning the Claimant ,that had been provided by the Claimant's medical practitioners, when he sent an email on the 14 September 2017 to Julia Bealby, Janice Webb, Amanda Hughes and Matthew Evans without the Claimant's consent which the Claimant asserted had caused him further stress and anxiety and it had exacerbated his mental health conditions. The Claimant asserted that the breach amounted to an act of harassment and discrimination against him as a direct result of his disability. The grievance decision reached by Teresa Clarke was that consent had been given for the information to be disclosed to Janice Webb and having regard to the roles of Amanda Hughes and Julia Bealby, the information had been reasonably disclosed. Ms Clarke identified that Julia Bealby being the HR Case Manager assisting Governor Sands in the disciplinary process where reasonable adjustments may have had to be considered because of the Claimant's mental health condition and to Amanda Hughes as Governor Sands Deputy required to be informed of the information in the interests of business continuity in the event of Governor Sands being absent. Tracey Clarke, Director of Midlands Prisons concluded that the information had been shared with Matthew Hughes as Head of Business Assurance and as Functional Head of the People Hub which administered all activity concerning Occupational Health having full access to all Occupational Health related information and activity at HMP Hewell. Tracey Clarke considered that the level of information shared with Mr Evans was not needed to perform his role and

therefore she concluded Governor Sands had acted appropriately in managing information, with the exception of the disclosure of information to Matthew Evans and in that regard, she partially upheld the Claimant's grievance. We have not been referred to further appeals in respect of that final grievance.

120. We have considered the various grievances that the Claimant brought against a number of individuals within the Prison Service, not because they form a substantial part of the Claimant's complaints as identified in the agreed list of issues, but rather to make findings of fact which may in a formal review of this case and in particular whether the matters in relation to the grievances cause us to consider whether any adverse inference ought to be drawn in respect of the Respondent's behaviour if it was considered to be discriminatory in relation to the Claimant's protected characteristic. We have found no evidence in relation to the conduct of the various grievances that lead us to consider that the outcomes of the grievance decisions or in limited circumstances or the lack of them lead us to conclude that they inform or infer discriminatory treatment of the Claimant by the Respondents.

**Disciplinary Decision**

121. We turn next to the substantial part of the Claimant's claim in respect of the Respondent's decision to terminate the Claimant's employment on the 5 January 2018 for his actions on the 8 May 2017, a decision to dismiss was subsequently upheld on appeal on the 20 March 2018.

122. The disciplinary investigation having recommended disciplinary action be taken against the Claimant, on the 31 July 2017, Governor Sands wrote to the Claimant [299-300] requiring the Claimant to attend the Disciplinary Hearing in respect of the allegation of conduct which if proven, would constitute gross misconduct, namely: -

"*Inappropriate use of force and/or unprofessional conduct*."

123. The Claimant raised concerns about Governor Sands conducting the Disciplinary Hearing and as a result, in his letter of the 4 August 2017 [427-429] Governor Sands indicated that although he was confident he would be able to hear the case objectively, to alleviate the Claimant's doubt and concern, he had requested another Governor to hear his case. Alison Clarke, an experienced Governor who is the Prison Group Director and at the relevant time was transitioning from a role as Governing Governor of HMP and YOI Glen Parva to November 2017 being Head of the Offender Management In Custody Project [515-519] was identified as the person to hear the disciplinary hearing. Ms. Clarke set out in considerable detail in her letter to the Claimant of the 18 August, details of whom would be in attendance at the Disciplinary Hearing to make contributions as required, namely Governor Paddy Keane the Investigating Officer and Officer Rumanyika, SO O'Keefe and Officer Day witnesses to the events on 8 May 2017 to clarify their evidence. In responding to an email sent by the Claimant to Donna Hopwood, the Management Coordinator at the Respondent's Prison at HMP Hewell, on the 10 August 2017 [511-513] Alison Clarke filed a detailed response as to why the list of 19 witnesses the Claimant had identified that he wished to be available to attend the disciplinary hearing would not be in attendance at the disciplinary hearing. Ms. Clarke provided an explanation why she did not consider any of those witnesses to be relevant to the Hearing, the investigation or the allegations that had been brought against the Claimant. Ms. Clarke indicated that the Claimant, if he considered he had evidence of the relevance of each of the witnesses in relation to the issues to be determined at the Hearing, could write again to request their attendance and she would consider a request for witnesses that would be presented at the time of the Hearing. The disciplinary hearing was scheduled to take place on Tuesday 5 September 2017. We find that the reasons why the Claimant's list of 19 witnesses were not considered relevant to the Disciplinary Hearing were clearly identified in Ms. Clarke's letter [516-518] and we consider the explanation

given to the claimant to be reasonable and indeed kept the door open to the Claimant, if he could later explain in more satisfactory terms why he considered the witnesses were relevant to the issues to be decided at the Hearing.

124. On the 17 August 2017, Governor Sands wrote to the Claimant to inform him that the Respondent could not provide the Claimant with a personal copy of the CCTV footage of the 8 May 2017 incident on Landing 2. The Claimant was to be permitted to view the footage, either alone or with his trade union representative on the premises of HMP Hewell and on the 17 August Governor Sands wrote [528-529]:

> *"as explained with you and your solicitor you were invited to review the footage at any time and day of the week and at your convenience".*

125. In parallel with the disciplinary proceedings, the Claimant's grievances against Governors Bowkett, Seymour and CM Wall were progressing. The Claimant, whilst suspended from duties, was certified unfit for work and on the 22 August 2017, the claimant submitted a sicknote [572] in respect of the period 22 August 2017-22 September 2017 described as "*post-traumatic stress disorder*". On the 27 August 2017, the Claimant reiterated his request for 19 witnesses to attend the Disciplinary Hearing and asked for it to be referred to the Alison Clarke Hearing [575] in consequence of his recent diagnosis of PTSD.

126. On the 24 August, Alison Clarke [581] wrote confirming that the proposed Disciplinary Hearing would be postponed and indicating that the Respondent would be seeking occupational advice on whether or not he Claimant was fit to attend a Hearing and reminding the Claimant that if he wished to be permitted to call some, or all of the 19 witnesses, he was required to provide further information. The Claimant wrote again to Alison Clarke on the 24 August 2017 [589] suggesting that he had provided

reasons why the witnesses were necessary already and in response, Ms. Clarke wrote on the 24 August [588-589] in which she reiterated: -

> *"Based on my assessment of the investigational report, this issue was not specifically about you going on to the netting, it is about whether or not you used force appropriately during the incident. This is the reason I have declined a number of your witnesses as they appear to relate to previous "netting" incidents which I do not feel will be relevant. Witnesses in a Disciplinary Hearing should be relevant to the matter in hand. If you have further reasons/explanations why you would like to call some of the witnesses, demonstrating how they are relevant to this charge, then please let me know so that I can consider them."*

127. Prior to the direction from Alison Clarke that the Respondent would await an Occupational Health recommendation in terms of the Disciplinary Hearing, the Claimant following his suspension on the 9 May had previously been subject to a number of Occupational Health referrals. The Claimant has confirmed that Governor Bowkett was not aware of the existence of an Occupational Report from 19 June 2013, an Atos Healthcare Occupational Health review [218-219] confirmed that the Claimant was then:

> *"absent from work due to stress. He reported his symptoms are due to work-related stress. He also said he was under investigation in 2010 which took eight months to resolve and he received treatment from the Psychotherapist. He had a further investigation in 2011 which lasted 17 months. Last week he was advised this was resolved. There is an ongoing investigation from last April. Mr Meynall advised he is concerned that he was unable to establish the allegation, despite asking Management and his Solicitor.*
>
> *Mr Meynell also advised he has had three assaults at work, from 2008-2012. During the assault in 2012, he injured his back and has*

*had ongoing issues with his back. He has an appointment on the 22/07/13 to have steroid injections in his spine. This is adding to his stress. He also said he had not received an appointment for counselling as recommended in the last occupational health report. I recommend management arranges counselling with the prisons providers to help him deal with his Stressors."*

128. On the 14 September 2015, OH Assist provided an Occupational Health Report [220-221] which observed that:

*"he also said he has had depression for several years and there is an ongoing investigation. He is also appealing the decision of another investigation. This is affecting his mental health, causing low mood and low energy due to disturbed sleep. This is exacerbated by his back and knee pain. He discussed therapy with EAP. He reported he has had counselling in the past and feels further counselling will not be beneficial."*

129. More recently, in an OH Assist Report dated 2 June 2017 [266-267] in response to a referral made on the 11 May 2017 it was confirmed that the Claimant had described a history of stress-related symptoms which had been present since 2010, during which there had been work issues and also some issues at home and the Claimant had been diagnosed with depression and anxiety for which he was treated over the last few years. The Claimant described that:

*"Since being suspended, he reports that his symptoms have got worse. He is having counselling under the reins and the care of the GP. He is also displaying some symptoms that are suggestive of a trauma response."*

In describing the outlook, the report advised:

"*the symptoms are likely to improve slightly once the investigation has been concluded as the uncertainty is impacting on his anxiety. I have referred him for some cognitive behavioural therapy which should address some of his symptoms and he may also benefit from*

*some trauma related therapy which will be addressed at the initial assessment with our therapist. He will investigate an NHS referral also in case he requires more long-term treatment."*

A further Occupational Health referral was made on the 3 August 2017 [422-423]. The originally scheduled Occupational Health appointment did not take place as the Claimant did not attend, however on the 22 August 2017, Russell McCombe of the Respondent confirmed to OH Assist that he had spoken to the Claimant on the 22 August in which the Claimant advised that he was seeing his GP and the EMDR Counsellor and that they had diagnosed him with PTSD [564]. Subsequently, the Respondents were provided with a copy of correspondence from the Cheltenham Trauma Clinic to the Claimant's GP [691-692] to whom the Claimant had been referred by OH Assist having undertaken 7 appointments with the Claimant by August 2017 Samantha Linley the Psychologist advised that the psychiatric assessments of the Claimant indicated that "*he is experiencing symptoms characteristic of post-traumatic stress disorder".* In reference to the Claimant's suspension and investigation, in relation to the 8 May incident, she confirmed:

*"in my opinion the ongoing time that it is taking to draw this investigation to a conclusion as well as the limited contact from his employer in the interim, is only serving to maintain his anxiety and low mood due to the uncertainty around his role and is therefore in my opinion hampering his recovery*."

130. An interim report was prepared by OH Assist on the 24 August 2017 [675-676] which having confirmed that the Claimant was unfit to work due to his symptoms, advised that:

*"the outstanding investigation in disciplinary also seems to be compounding his anxiety. It is my advice that the disciplinary should go ahead as soon as possible but he does have some reservations*

*about the process, so I would advise that you discuss this with him before the Hearing is arranged to help allay his anxiety*."

131. In preparation for the Disciplinary Hearing, Governor Alison Clarke received a case analysis submission from the HR Case Manager Julia Bealby on the 25 August 2017 [627-630]. The summary set out the background, identified the case, the decisions to be taken at a Disciplinary Hearing, including when the investigation report was fit for purpose, whether the allegations were proven, appropriate sanctions if allegations for improvement and mitigation and the options available to be considered in the event that the misconduct was proven, including dismissal, downgrading, disciplinary warning, or a final written warning or no further action.

132. On the 25 September, in light of the Occupational Health Report, Alison Clarke wrote to the Claimant as recommended by Occupational Health to discuss with him the process of the Disciplinary Hearing. The Claimant's response [417] made a number of statements about the concerns he had raised and Ms. Clarke responded on the 2 October reminding the Claimant that if he was able to provide further information about why he required the witnesses to give evidence that would be relevant to the Hearing, he should submit that information. In response the Claimant indicated that he was not able to elaborate any more than he had already and he waited for Ms. Clarke to decide what she wished to do. As a consequence, the Respondent proposed reconvening the Disciplinary Hearing for Monday 9 October 2017 [719-720] and in light of the Claimant's request for a postponement and more notice of the meeting, the Hearing was rescheduled to be heard on the 30 October 2017. The Disciplinary meeting took place on the 30 October 2017 beginning at 10.10am and was adjourned at 4pm to be reconvened at a later date. The Claimant was represented at the Hearing by Mr Les Dennis the POA Branch Secretary and Governor Alison Clarke chaired the Disciplinary Hearing [764-818]. The meeting was reconvened again on the 10 November 2017 [819-874]

10am to 15:00hrs and continued on a 3rd day on 5 January 2018 from 11:15hrs – 13:00hrs [1055-1072]. The notes of the Disciplinary Hearing are almost a verbatim record of the Hearing. They are extensive and have been referred by the parties in their evidence to the relevant parts of the transcript.

133. On the first day of the Disciplinary Hearing, the Claimant was accompanied by his trade union representative who indicated that he had not had sufficient time to prepare for the Hearing. Mindful that the Claimant was put on notice on the 2 October of the Respondent's intention to invite him a Disciplinary Hearing originally on the 9 October that at his request was deferred to the 30 October, we find that Ms. Clarke's decision toallow the Claimant 2-hours to meet with his representative before the detailed discussion and the Hearing was a reasonable decision and the meeting was adjourned until 12:17hrs. The disciplinary meeting considered the Claimant's concerns in relation to the disciplinary investigation and process and in particular the CCTV footage that was used in evidence. We find that the Claimant and his representative had had previous opportunities to view the CCTV footage which was again viewed in the Hearing and was relevant to determining the Claimant's conduct on the 8 May. We find that the Claimant was reminded that the issue in respect of the Disciplinary Hearing was not whether or not he had been authorised to go on the netting, but rather the issue was the Claimant's use of force and his judgment in its application.

134. The meeting discussed the Claimant's concerns in relation to the conversation that he had with Governor Bowkett on the 8 May and the Claimant was reminded that it was not relevant to the issue that was the subject of the Disciplinary Hearing and the investigation. There was a discussion about the Claimant's discussion with Governor Sands on the 9 May which Governor Clarke considered was reasonable in order for Governor Sands to establish if in principle there was a need to commission a disciplinary investigation. The issue as to whether or not an extension

letters had been sent to the Claimant by Governor Keane, in relation to the disciplinary investigation, was a matter that was to be discussed when Governor Keane was present at the Disciplinary Hearing. In the Disciplinary Hearing, Governor Keane confirmed that no extension letters had been sent due to an administrative breakdown as a result of members of staff leaving and during the Disciplinary Hearing in October and when reconvened on the 10 November a number of Officers interviewed by the Investigation, namely Victor Rumanyika, James O'Keefe and Richard Day were questioned, as was the Claimant. At the reconvened Disciplinary Hearing on the 10 November, the Claimant and his representative had not taken the opportunity to review the CCTV footage and, although the Respondent sought to rearrange the Disciplinary Hearing on the 20 November, as the review of the CCTV footage had not been completed by the Claimant and his Representative, the Hearing was rearranged again for the 5 January 2018. During the period from the 10 November 2017 until the reconvened Hearing on the 5 January 2018, the Claimant had not made arrangements to visit the prison to securely view the CCTV footage. The Claimant refused to attend the Hearing until he had been provided with a personal copy of the CCTV film footage. We find that the arrangements made by the Respondent to enable the Claimant to view the footage which was to be held securely was not entirely unreasonable and Ms. Clarke had understood that it was standard practice of the Prison Service not to release CCTV footage in the circumstances. At the meeting on the 5 January 2018 [1049-1054], the Claimant and his representative confirmed that they had viewed the CCTV footage of the 8 May 2017 from the 2-camera angles that had been seen by Ms. Clarke. The Claimant was informed that Ms. Clarke accepted the Claimant's assertions about the confusion regarding going on to the netting, however Ms Clarke focused the Claimant's attention on the issue to be considered at the Disciplinary Hearing in respect of the Claimant's inappropriate use of force. During the course of the Disciplinary Hearing, Governor O'Keefe confirmed that the investigation identified that the reason an additional 10 or 12 prisoners had gone on to the net was in response to the Claimant, having tried to hold a

prisoner around his neck by restraint had prompted a significant number of prisoners to climb onto the netting to support the prisoner who the claimant had restrained.

135. It is evident at the November disciplinary hearing that the Claimant was of the view that he ought to have been commended for his actions and that, regardless of the negative effects of adrenalin and the negative effects on his PTSD, he considered what he had done in intervening on the 8 May and restraining the prisoner had been the right thing to do. The Claimant did not accept that his restraint of the prisoner had escalated the incident. He confirms [857] when asked if he would acknowledge that he had made a mistake that "*I'm not going to, I don't think I made a mistake*". He stated: -

> "*No, I went to the ringleader, I went to the you know the influential character, I went to that, and I dealt with and I nipped it in the bud. I dealt with the main one, not the little divs or anything, I went to the main perpetrator, dealt with him, swiftly got him off and the rest of the prisoners seen what happened and they're thinking "well do you know what, we'll bang up now".*

136. When challenged by Governor Clarke *"that's incorrect Darren, you've watched the CCTV, they don't think oh my friend he's been restrained now, so we'll go back behind our door, they will jump on the netting and start offering violence".* The Claimant accepted that, but said "*we got control didn't we, we dealt with it*".

137. Having considered the transcripts of the Disciplinary Hearing that extended over 3-days, we find that the disciplinary process had regard to the occupational advice that it was better for the Claimant to go to a disciplinary hearing rather than it be postponed until his health returned. During the course of the disciplinary hearing, Governor Clarke sought confirmation from the Claimant and his representative that he was fit enough to participate on a number of occasions and received assurances

from the Claimant that he wished to go ahead. It is evident that Ms. Clarke carried out a full, thorough and detailed investigation during the disciplinary process and reached her conclusion to dismiss the Claimant on the 5 January 2017. Her decision was confirmed to the Claimant in writing in her letter of the 11 January 2017 when she set out the full consideration of her reasons for the dismissal which were summarised to him at the final instalment of the disciplinary hearing on the 5 January [1099-1101]. We conclude that Ms. Clarke having determined that the Claimant in his attempt to restrain a prisoner had escalated the situation causing more prisoners to go on to the netting offering violence to the staff considered that his actions amounted to inappropriate use of force and/or unprofessional conduct.

138. The letter confirming the reasons for the Claimant's dismissal [1099-1101] sets out the full consideration of the reasons for the Claimant's dismissal on the grounds of gross misconduct. We conclude that the decision taken by Governor Clarke was one reached having given due consideration to the disciplinary investigation which was considered to be full and reasonable. Having taken into account the extensive information provided to her during the course of the 3-day Disciplinary Hearing as well as the disciplinary investigation, Governor Clarke set out the circumstances which led to the disciplinary charges being brought in respect of the Claimant's conduct. The letter confirms that in taking her decision, Ms. Clarke considered the concerns that the Claimant had raised in relation to a number of procedural issues, in particular, in respect of the Claimant's concerns that he had not been provided with a personal copy of the CCTV footage, which had been refused in line with the prison services standard practice, and she confirmed that the Claimant had been provided with appropriate access to the footage and that the absence of the claimant being given a personal copy of the CCTV footage to take away from the prison premises did not impact on the Claimant's ability to recollect events and his decision-making in respect of the incident. We like Ms. Clarke find that the claimant was not prevented from viewing the

CCTV evidence and had sufficient opportunity to respond to the disciplinary charges against him.

139. In respect of the concerns that the investigation report had focused considerably on the incident being at height, Ms. Clarke accepted during the disciplinary hearing that whilst the instructions regarding incidents at heights may be described as a “grey area” at HPM Hewell the reality was that the disciplinary charges against the Claimant did not relate to the incident being at height but rather to the inappropriate use of force and unprofessional conduct and the fact that the incident took place on the netting was not a fundamental part of the charge.

140. Although the Claimant asserted that expert specialist input was required into the investigation process in regard the use of force, Ms. Clarke was of a view that that was not necessary given that the incident was one that involved the use of basic Control & Restraint techniques.

141. The Claimant asserted that it had been unfair that he had called 18 witnesses, none of whom were allowed to attend the disciplinary hearing. Governor Clarke considered that the witnesses’ evidence relating to netting and other management issues were not relevant to the disciplinary incident and the evidence was not relevant to the issues to be considered that were the subject of the disciplinary hearing.

142. The Claimant had asserted that he had not received first on-scene training since 2010 and that was insufficient, Governor Clarke considered that as an experienced Officer, the Claimant had appropriate knowledge and experience to deal with the situation appropriately.

143. Ms. Clarke considered the mitigation that was offered by the Claimant, namely his record of good conduct and letters of recognition, his illness (PTSD) and the impact of that upon his decision-making and behaviour in respect of decision-making and behaviour. In respect of

incidents in the past for which the Claimant asserted he had been provided with appropriate support. The Claimant asserted that others used force in similar ways and had gone unchallenged and that the respondnet's treatment of him hds been disproportionate.

144. In her conclusions, Governor Clarke having considered the evidence and mitigation concluded that the Claimant, as a Prison Officer, held a position of trust and he had failed to understand how his actions escalated what was already a volatile situation. The Claimant failed to acknowledge that the so-called "*dynamic risk assessment*" which he had undertaken was flawed.

145. Ms. Clarke concluded that the Claimant's actions were in breach of the Use of Force policy and outside the expected standards of professional conduct. She explicitly referred to the fact that, whilst accepting the claimant had subsequently been diagnosed and was receiving ongoing treatment for PTSD, that his condition may have had an impact on his actions, it was the Claimant's inability to acknowledge any wrongdoing that justified a finding of gross misconduct and that there had been an irretrievable breakdown of trust rendering a dismissal the appropriate sanction.

146. The Claimant was given notice that he had a right to appeal within one week of the date of the dismissal letter.

147. We find that the Respondent's decision to dismiss the Claimant on the 5 January 2017 was one which considered all options available to her and we are satisfied that the options available if they were outlined to Governor Clarke were all considered and considered not to be a suitable outcome in the circumstances of the case. The options were set out in the original Disciplinary letter [299-300] and as provided in the case summary prepared by HR which reiterated again the options available [627-630]. The conclusions reached by Governor Clarke we find were those which

amounted to a response within a band of reasonable responses having regard to the investigation both within the investigation report and its conclusions and the further investigations undertaken by the Disciplinary Manager, Ms. Clarke, during the course of the extended Disciplinary Hearing.

148. Having been informed at the Disciplinary Hearing Meeting on the 5 January 2018, that his employment was to be terminated on the 5 January 2018, the Claimant had had cause on the 10 January 2018 to send an email to the Respondents addressed to Teresa Clarke, Tracey Johnson and Julia Bealby [1094] appealing the decision to dismiss him and also in to appeal in respect of grievances that remained unheard. On the 12 January 2018, the Claimant sent an email to Alison Clarke [1141] informing her of his intention to appeal the unfair dismissal for the following reasons:

> *"Undue Severe Penalty:*
>
> *New evidence has come to light which could affect the original decision:*
>
> *The disciplinary proceedings were unfair and breached the rules of natural justice:*
>
> *The original findings against the weight of evidence."*

149. We have heard evidence that although the Respondents assert that the Claimant's written confirmation of the disciplinary decision was sent to him under cover of the letter 11 January, he denied having received the post, despite the fact that it was at the Post Office awaiting collection by him [1144] and [1151] Although the Claimant failed to collect the letter which was sent to him, Recorded Delivery from the Sorting Office, the evidence is clear that the Claimant received an electronic copy of the letter which was attached to an email he sent to Teresa Clarke.

150. The Claimant appealed the disciplinary decision. The appeal was forwarded to Teresa Clarke, Director of Prisons (Midlands) and a case

analysis submission was forwarded to her on the 22 February 2018 as prepared by Robert Handley the HR Case Manager [1185-1189].

151. The Disciplinary Appeal Hearing for the Claimant was held on the 12 March 2018 at Stafford Regional Office before Teresa Clarke, Director of Midlands Prisons accompanied by Robert Handley HR Case Manager and Tracey Johnson notetaker. The Claimant was accompanied by Alan Dennis the Officer and Prison Officer Association Representative for HMP Hewell [1190-1200]. The Appeal Hearing conducted by Teresa Clarke was a review of the decision previously taken by Alison Clarke at the Disciplinary Hearing. Prior to the Hearing of the disciplinary appeal Teresa Clarke had had contact with the Claimant as she had considered earlier grievance appeals that the Claimant had brought during a Grievance Hearing held on the 31 January 2018 in respect of grievances against Governor Sands in respect of his having passed sensitive information to others without consent. We have referred to the progress of that grievance appeal above. Teresa Clarke confirmed at the Tribunal Hearing that as a result of her involvement in the grievance appeal, she was aware that the Claimant had PTSD. The Disciplinary Appeal Hearing was held on the 12 March 2018 and the Claimant was accompanied by his trade union representative and there was no suggestion at that Hearing that the Claimant was unfit to attend the Disciplinary Appeal Hearing.

152. Teresa Clarke gave clear and unequivocal evidence to the Tribunal that although the Claimant's disciplinary charges related to his unreasonable use of force, it was not a matter in respect of which the Claimant was being disciplined in respect of an incident at height. However, Teresa Clarke was clear that the national policy in respect of Control and Restraint was one where in the ordinary course of events, the appropriate recourse in a situation at a prison would be to await the arrival of the national C&R team to arrive, even if that meant that prisoners were left at height on netting for a length of time. Teresa Clarke also gave an account that, contrary to the Claimant's assertion that he had not had first

on scene training since 2010, there was no requirement to deliver training on an annual basis and that only update information, for example in respect of what to do in a hostage situation, was sent to staff through notices. The Claimant in any event we have found was not first on scene on Landing 2 for that First on Scene procedure to have been implemented. Teresa Clarke was clear that as an experienced Prison Officer, the Claimant was well aware of the de-escalation procedures and how to implement them. The Claimant had acknowledged that on Landing 3 he had endeavoured to engage in the de-escalation procedures strategy, but that he had not re-engaged in the strategy when he went to the Second floor landing where he saw other officers engaging in dialogue with the two prisoners who were on the net.

153. In answer to questions in cross-examination, Teresa Clarke confirmed that at the relevant time she was a Silver Commander in the Midlands, now she is a Gold Commander, she had 30-years' experience and she deals with national incidents as well as local. In her experience, the incident was not one that was likely to lead to an incident of concerted indiscipline. Although the DVD showing the incident from different angles had no sound, it was clear that before the Claimant had gone on to the netting even though the two prisoners had been encouraging others to join them on the netting other prisoners had not gone on the netting until the Claimant had launched himself on to the netting and, in seeking to restrain the one prisoner, he taken a hold of the prisoner's head. The Claimant described "I *tried to support his head. He was more fit than I and I couldn't control him."* [1196]. The Claimant described how he took the prisoner's head down. Other prisoners had then climbed onto the netting followed by prison guards to entered the netting to support the claimant who was outnumbered by more prisoners.

154. In dealing with the appeal, Teresa Clarke considered the 4 points of appeal in turn.

**(1) The disciplinary proceedings were unfair and breached the rules of natural justice**.

155. Although Teresa Clarke acknowledged that on occasions, the Claimant's trade union representative had restricted opportunities to speak with and prepare the Claimant's case in advance of the Disciplinary Hearing that then took place over three separate days, she considered that the incident had taken place on the 8 May 2017, the disciplinary hearing took place some long time after the disciplinary charges were put to the Claimant following the disciplinary investigation and report on the 31 July 2017, before the Disciplinary Hearing. The disciplinary hearing, having been deferred at the Claimant's request, took place on the 30 October 2017 and was reconvened on the 10 November 2017 and again on the 5 January 2018 providing the Claimant with a full opportunity to liaise with his trade union representative as necessary.

156. The Claimant's original request for a copy of the CCTV had been denied, however he was provided with an opportunity to view the CCTV footage with his trade union representative at any convenient time in advance of the Disciplinary Hearing first beginning and during the adjourned periods. The Claimant chose not to take the opportunity to view the footage in advance of the investigation meetings and the Disciplinary Hearing.

157. The Claimant raised concern that the CCTV footage shown at the Disciplinary Hearing had been different to that as seen in the investigation meeting. The CCTV was shown at the Disciplinary Hearing and opportunity was given to the Claimant during the period of adjournment between 30 October and 20 November to view and review the footage and prepare his case. Ms. Clarke concluded that the Claimant was not prejudiced as a result of a second angle of the CCTV footage being viewed at the Disciplinary Hearing.

158. The Claimant had raised issues concerning the length of time between the investigation and the Disciplinary Hearing and that no extension letters on the suspension have been provided. Teresa Clarke acknowledged that an extended period of time had lapsed, during which a number of the delays were as a result of Occupational Health advice being sought at the Claimant's request and Teresa Clarke concluded that the Claimant was not prejudice by the lack of extension letters and that the process was not so flawed as to undermine the fairness of the decision to dismiss.

159. The Claimant had complained that no expert specialist input was obtained in relation to the Control & Restraint techniques employed by the Claimant and he asserted that Alison Clarke, the Dismissing Manager had not been qualified to make an assessment. Teresa Clarke concluded that Alison as a Governing Governor had the necessary level of knowledge and experience to determine the issue and that expert evidence in relation to C&R was not relevant as the incident related in this case was one relating to the use of force with regard to basic techniques and that the Claimant's actions during the incident could not be deemed as Control & Restraint which the Claimant acknowledged required the coordinated involvement of three or more Officers. The Claimant had engaged with the prisoner by himself, without prior consultation with his work colleagues who engaged physically only after the situation became out-of-control such that other officers present on the landing were required to intervene and move onto the netting.

160. In respect of the Claimant's allegation that he was not permitted to call 19 witnesses, Teresa Clarke found that three witnesses were in fact called, all of whom provided a similar account of the incident, none of whom contained particular criticism of the Claimant other than to record the sequence of events, all of which corroborated the fact that their intervention was prompted by the Claimant's unilateral and pre-empted intervention. Teresa Clarke in considering her appeal considered that to

have discounted the CCTV footage would have been inappropriate as that identified the potentially serious safeguarding issues surrounding the Claimant's use of force as she was satisfied that the use of the footage did not amount to procedural unfairness, nor did it make the decision unfair.

161. Having considered the information that was before Teresa Clarke in hearing her appeal, namely investigation report, witness statements and the outcome letter from Alison Clarke dated 11 January 2018 as well as the CCTV evidence from both available angles, we conclude that the conclusions reached by Alison Clarke in relation the appeal that the disciplinary proceedings were unfair and breached rules of natural justice were conclusions that a reasonable employer could reach.

**2) The original findings against the weight of evidence**

162. The Claimant asserted that the fact that there was no sound on the CCTV footage of the incident that occurred on the 8 May was found by Teresa Clarke not to render the CCTV footage unreliable. Both Alison Clarke and Teresa Clarke at the appeal accepted the evidence of the Claimant and other witnesses that the atmosphere on Landing B2 was highly charged and showed a difficult and hostile situation and the CCTV footage showed, on the balance of probabilities, the Claimant engaging in behaviour which was considered to be an inappropriate use force and below the levels of conduct expected from a Prison Officer.

163. The Claimant does not dispute that he entered the netting without prior consultation with his work colleagues in a planned C&R response. The Claimant accepts that he approached the prisoner from behind without making any attempts to de-escalate the situation on Landing B2, that he restrained the prisoner around his neck and brought him to the floor, holding his neck.

164. The Claimant asserted that he had not received appropriate training to deal with such incidents since 2010 and that had he done so, he may have behaved differently. Teresa Clarke at appeal as did Alison Clarke at the Dismissal Hearing, considered the Claimant was an experienced officer who should have known that the level of force used by him was excessive. Both the Dismissing and the Appeal manger held the view that the Claimant was well aware of basic restraint techniques and where it was appropriate to use them and that the decision to dismiss the Claimant was not in relation to his engagement in an incident at height, rather the inappropriate way in which he engaged with a prisoner and his use of force.

165. The Claimant had asserted in the appeal that he had attempted to resolve the situation verbally before physically engaging with the prisoner and that he had undertaken a dynamic risk assessment before engaging with the prisoner physically. The view at appeal on review of the evidence, as had been the view of Alison Clarke at dismissal, was that the decision made by the Claimant to engage with the prisoner was flawed and the Claimant had not engaged in C&R procedures to de-escalate the situation, rather his behaviour escalated what was already a hostile situation and was inappropriate use of force. On review, the Claimant was found to have made no attempts to coordinate with his colleagues on how to resolve the situation on Landing B2, nor to take steps to resolve the situation prior to physically engaging the prisoner who had not been physically threatening to the Claimant or anyone else prior to the Claimant's intervention. Teresa Clarke considered the Claimant's use of force was:

> "*highly disproportionate and did not prove to be an effective method of dealing with the situation, instead, your actions appear to have made the situation even more volatile, and caused a number of your colleagues to then become involved*". [1210]

166. In respect of the weight of evidence, the Claimant asserted that his diagnosis of PTSD had affected his decision making at the time and it should be taken into account when considering the situation as a whole.

Whilst accepting that the Claimant's mental health condition, subsequently diagnosed as PTSD, may possibly have affected his decision making during the incident the Claimant, with the benefit of hindsight, did not recognise that his use of force was excessive. As a result, Teresa Clarke considered that, even with the benefit of hindsight, the Claimant's lack of insight to recognise that his use of force had in fact been excessive, led her to believe that there was no prospect of the Claimant learning from the incident, causing significant concern to contemplate the Claimant's reinstatement and determine it was not a suitable alternative to dismissal.

**3) New evidence has come to light which could affect the original decision**

167. At the Appeal Hearing, the Claimant referred for the first time to an incident he identified as similar that had occurred in a prison in Leicester in which a prison officer had gone on to the netting to perform a C&R on a prisoner and in that case the prison officer had been commended and not subjected to disciplinary action. The Claimant in presenting the so-called "*new evidence*" did not provide Teresa Clarke with details of the prison or the officer involved, details of their authority to undertake their actions, anything that happened following the incident or any investigations that might have been still ongoing. Teresa Clarke considered the incident to be entirely separate and, absent details of evidence of the Leicester case being on all fours with the circumstances of the Claimant's use of force on the 8 May, Teresa Clarke considered that the so-called new evidence was not relevant in relation to the Claimant's case, but to an entirely separate incident and had no bearing on the fact that the Claimant's use of force in his case was deemed inappropriate in any event.

**4) Unduly severe penalty**

168. Having considered the evidence and arguments, Teresa Clarke maintained the view that she was satisfied that the level of force used by

the Claimant was *"highly inappropriate and does amount to gross misconduct*" [1211]. Teresa Clarke held on the basis that the Claimant did not accept any wrongdoing on his part in relation to the level of force which he used in dealing with the situation, caused her to conclude that she was not satisfied that if the Claimant returned to his role as a prison officer, he would not behave in a similar way again. We find Teresa Clarke considered the context of the Claimant's so-called dynamic risk assessment and the fact that he made a quick decision in a difficult situation. It remained the fact however, that the Claimant even with the benefit of hindsight did not appear to accept that his use of force was inappropriate, but rather and conversely believed it to be commendable. Teresa Clarke concluded that she agreed with the finding of Alison Clarke that there had been an irretrievable breakdown of trust and confidence and that the appropriate sanction was dismissal on the grounds of gross misconduct.

169. In addition to the four key areas with the grounds of appeal, the Claimant at the Appeal Hearing raised concerns that mixed messages had been provided to HMP Hewell staff over the years with regard to the process of going on to a netting during the incident. Teresa Clarke confirmed in her letter confirming the grounds on which she upheld the original decision made by Alison Clarke to terminate the Claimant's employment, that she, like Alison Clarke, was content that the original decision did not take into account the fact that the incident occurred on the netting, but that the reason for the Claimant's dismissal related to the level of force which he had applied.

170. We have found Teresa Clarke considered options other than dismissal as the penalty, including the issue of a warning, none of which alternatives she considered appropriate in the circumstances. The Claimant had been trained regularly in C&R and the process and legal parameters of its engagement and the Claimant's lack of responsibility for the inappropriate use of force he employed led Teresa Clarke to conclude

that she did not consider any lesser penalty than dismissal and the termination of the Claimant's employment because of the breakdown in the trust and confidence would be acceptable. The Claimant refused to accept that what he had done had been wrong, refused to take responsibility for his actions that were inappropriate and refused to see that he could have de-escalated the situation in a different way. In all the circumstances the trust and confidence that the prison service were required to have in their prison officers, was broken down and his employment could not continue. The Claimant's conduct was found to be such that he had used unreasonable force on a prisoner and that if he did the same thing on a landing and not at height, the same decision would have been taken. Whilst Teresa Clarke was of the view that the Claimant going on to the netting was inappropriate, the Claimant was given the benefit of the doubt because of apparent mixed messages that had been given to staff about the appropriateness of entering the netting, however, it was the fact that the Claimant grabbed a prisoner's neck and head from behind on his own without engaging in a controlled prisoner C&R which would ordinarily involve three officers in a planned way which led to the conclusion the claimant was at fault. When planned C&R is employed with three officers in the team, one of the roles of one of the officers would be to hold the prisoner's head, to protect it. Teresa Clarke was of the view that a prison officer alone grabbing a prisoner's head and neck area in the way that the Claimant had was not an act of protection, rather it was the use of inappropriate force to restrain a prisoner.

171. Furthermore, it is evident that Teresa Clarke was of the view that an intervention has to be necessary if it is to protect life or limb or to prevent a crime, for example where the restraint is a pre-emptive strike to avoid an imminent assault of a prisoner on a prison officer when restraint should then be proportionate and necessary. In the circumstances, at the Hewell Prison on the 8 May, other prison officers were engaged in techniques to seek to de-escalate the situation and for officers to be able to contain the

situation by locking up prisoners on the landing as other staff were doing at the time of the Claimant's intervention.

172. Having considered the contemporaneous notes of the Appeal Hearing and the letter confirming the outcome of the Appeal Hearing and having heard evidence from Teresa Clarke, we accept her evidence as that of a very experienced manager within the prison service who was reasonable in concluding that the Claimant's grounds of appeal, after scrutiny, did not provide grounds for her to consider it reasonable to overturn the original decision to dismiss the Claimant. Moreover we conclude that the decision taken by Alison Clarke at dismissal was one which based on the evidence before her and the decision at appeal before Teresa Clarke led her to conclude the decision to dismiss was one taken having been based on a reasonable investigation which founded a reasonable belief in the claimants gross misconduct.

173. We conclude that Teresa Clarke had regard to the Claimant's disability and we are left with no doubt that had the Claimant had sufficient insight, following cool reflection of his behaviour in May 2017, to accept that his use of force was inappropriate, there may have been sufficient evidence in mitigation to consider reinstating the Claimant to the prison, albeit in other duties and subject to appropriate supervision and training. The Claimant's lack of acceptance of any culpability or error of judgment on his part led Teresa Clarke to conclude that there was an irreversible breakdown of mutual trust and confidence in the Claimant's ability to satisfactorily perform his role as a prison officer and not in similar circumstances to use inappropriate force and therefore the appropriate sanction was dismissal on the grounds of gross misconduct.

174. We conclude that the decision made by Teresa Clarke having regard to the nature of the Respondent's service was a reasonable decision founded upon the objective evidence.

175. The Appeal Hearing confirmed that the Claimant's last day of service with the Respondent would be the 20 March 2018 when his pay will be stopped with effect from that date and the Claimant's employment having under the terms of the Respondent's policy having continued to maintain the status quo subject to the outcome of his appeal.

176. Finally, we would observe that during the course of cross-examination, Ms. Nicholls on behalf of the Claimant has sought to suggest that the Claimant's inability to accept that his intervention had been an inappropriate use of force and ill-advised was because his judgment was impaired by PTSD not only the occasion of the 8 May but in his ability to reflect upon his actions. Ms. Nicholls has however accepted that no such assertion was made during the course of the Disciplinary Hearing nor in the Appeal Hearing and Teresa Clarke has confirmed that at no time did the Claimant, nor his representative ask for a medical assessment to be undertaken of the Claimant's ability to do his job.

**Proportionate means of achieving a legitimate aim**

177. In dealing with the submissions that the cause of the dismissal ie: the Claimant's excessive use of force was arising from his disability, the PTSD/depression, the Tribunal accept that his use of force on the 8 May 2017 was arising from his disability and that behaviour was less favourable because of something arising in consequences of his disability that led to his dismissal. The Claimant asserts that his behaviour was on account of his hypervigilance as a result of his PTSD.

178. The Claimant makes no acknowledgement of his actions having been wrong and even if PTSD clouded his judgment on 8 May, he had enough awareness to be able to acknowledge with the benefit of hindsight that he had done wrong in using excessive force, albeit as a consequence of his hypervigilance. The Claimant however, would not acknowledge that he had done anything wrong, rather that he felt that he should be

commended for his actions. The Claimant was considered by the respondent to have a warped sense of right and wrong and as a prison officer in a position of trust the claimant had to be able to recognise what he had done was wrong in order that his behaviour could be altered accordingly. The Claimant failed to accept how his actions escalated a volatile situation and that he was in breach of the use of force policy and that his actions were outside of acceptable professional conduct. At the Appeal Teresa Clarke considered that the Claimant's behaviour was a blatant, and an unnecessary attack on a prisoner and with the benefit of hindsight, the Claimant did not recognise the use of excessive force. It was considered there was no prospect of him learning from the incident and by the appeal, the Claimant had completed his various courses of counselling. He had not told the Respondents of historic concerns regarding his PTSD and his inability to make a proper judgment. Alison Clarke's dismissal considered there was an irretrievable breakdown of trust and confidence,111 and 269-230. She considered all possible penalties.

179. At the Appeal Hearing, Teresa Clarke considered that the Claimant had assessed himself to be fit to work on the 8 May and the Claimant had not accepted responsibility for his actions and would act the same in similar circumstances. It was considered that the Respondent's trust and confidence in the Claimant as a prison officer had irretrievably broken down and that the Claimant had had all of the correct training and he had had C&R training. With the benefit of hindsight, the Claimant did not learn from the incident as being a cause for concern, nor did he accept that he had acted inappropriately. The Respondents accept that their procedures permit a prison officer to use necessary and proportionate force, however in this case, the Claimant's behaviour was an unnecessary assault and not proportionate force used to restrain a prisoner in appropriate circumstances. The Claimant did not take responsibility for his inability to make a judgment.

180. A penalty less than dismissal was not considered to be appropriate, the Claimant had been trained in the C&R process and the legal parameters were known by him, but he failed to take responsibility for his actions that the respondent considered to be unacceptable. We conclude that the Claimant's refusal to see what he was doing was wrong led to a breach in the Respondent's trust and confidence in the Claimant's ability to remain employed by them as a prison officer and his refusal to take responsibility was such, that retraining would not address the issue at all.

Conclusions

181. Turning to the specific issues we are required to determine we reach the following conclusions having had full regard to the legal arguments that have been put before us in the written submissions made and the amplification of them in the hearing:

**General**

182. *Are the employment start and end dates agreed as: 29 November 2004 and 20 March 2018?* It is clear that the claimant's employment was extended during the period of waiting the outcome of the appeal to preserve the status quo. The claimant's employment with the respondent terminated on 20 March 2018.

**Unfair Dismissal**

*Is the Respondent able to prove, on the balance of probabilities, the reason for the Claimant's dismissal? The Respondent asserts that the potentially fair reason is conduct (amounting to gross misconduct).*

183. In light of the findings of fact that we have made the respondent terminated the claimant's employment as a result of his misconduct which we have found to be his unreasonable use of force and inappropriate

behaviour and moreover his failure with the benefit of hindsight to acknowledge the unreasonableness of his actions.

*Did the Respondent have a genuine belief that the Claimant was guilty of misconduct?*

184. Our findings of fact led us to conclude that the respondent concluded a full and fair investigation into the events of 8 May and the investigation, supplemented by the further enquiries made during the disciplinary hearing and its various adjournments founded a genuine belief in the claimants misconduct. The investigation though not forensic was extremely thorough. Ms Nicholls for the claimant has suggested that the respondent did not have reasonable grounds on which to sustain a belief in the claimants misconduct talking into account what she describes as “grey area” in terms of the netting policy at HMP Hewell and the impact of the claimant’s mental health on his actions. Our findings of fact concluded that the claimant was given the benefit of the doubt in relation to entering the netting area and the key issue in relation to the claimants behaviour was his having employed unreasonable use of force and his failure even with the benefit of hindsight to acknowledge that his actions had been inappropriate.

*Did the Respondent have in mind reasonable grounds upon which to sustain that belief?*

185. The respondent concluded in the investigation and when tested at the disciplinary hearing that regardless of the incident having occurred on netting whether or not at height the claimant’s conduct in failing to follow the C&R procedures was not acceptable. We remind ourselves that it is not for the tribunal to substitute it’s view for that of a reasonable employer. Similarly although Ms Trotter refers to the interviews of the investigator Paddy Keane not having asked witnesses if they thought that the claimant’s use of force was inappropriate it is not the opinion of the claimant’s peers which determines whether the claimants use of force and intervention was appropriate.

*Did the Respondent carry out as much investigations into the matter as was reasonable in all the circumstances of the case?*

186. The investigation carried out by the respondent was reasonable in the circumstances of the case. The inappropriate use of force was investigated having been seen on CCTV footage, investigated through interviews and was made out. The investigation considered CCTV footage and considered contemporaneous statements from the claimant and others involved. The investigation, commissioned on 10 May 2017 [268] consistently considered the case to be answered by the claimant "*to investigate the circumstances surrounding the incident on HB4 on 8 May 2017 and investigate any inappropriate use of force and/or any unprofessional conduct*"

187. The claimant's complaints of procedural irregularity in the investigation were considered at the disciplinary hearing and at appeal and we conclude that the decision makers at those meetings were independent of HMPP Hewell and the hearing and the conclusions reached were thorough and sustainable.

188. The claimant complained that he was not able to call 19 witnesses to the disciplinary hearing and we have found that the claimant was clearly informed of the reasons why those witnesses were not relevant to the issue to be determined, they related in the main to the issue of the netting which was not relevant to the issue for which the claimant was subject to disciplinary investigation.

189. We find that in reaching the disciplinary decision Alison Clarke carried out a detailed and thorough process and in reaching her decision she gaveclear reasons for reaching the conclusions that she did having considered all of the options available to her and considered that dismissal was the appropriate sanction.

*Did the Respondent act reasonably in treating the conduct in which the Clamant engaged as sufficient to amount to a reason for dismissal?*

190. The employer in this case is an employer charged with the safe operation of HMP Hewell and the policies and procedures which applied to Control and restraint in the prison service are well documented and trained. The claimant failed to follow the respondent's procedures with which he was familiar and failed to acknowledge even with the benefit of hindsight that his use of force had not been reasonable. The claimant acknowledged that in order for force to be justified and lawful under the rules of PSO 1600 [339] four elements had to be made out, that force was reasonable in the circumstances, it was necessary, no more force than was necessary was to be used and that the force was proportionate to the seriousness of the circumstances. The guidance to the policy provides [343] *"it is not enough that a prisoner be given any 'lawful order' to do something and has refused to do so"* The claimant was aware that the control and restraint procedures required three officers to act in conjunction with each other if it is practical and that the use of force was always to be the last resort and that de-escalation should be repeatedly tried and failed [348]. The claimant acknowledged that in the incident on 8 May he had not followed the procedures and that at the time he had entered the netting and used force on the prisoner who he approached from behind that one officer was engaged in attempts to de-escalate the situation through negotiation and other prison officers were locking prisoners in their cells.. Having had regard to the nature of the respondent's business and their statutory obligations we conclude that the respondent acted reasonably in treating the claimant's conduct as sufficient to amount to a potentially fair reason to dismiss an employee.

*Was the sanction of dismissal outside the band of reasonable responses?*

191. Ms Trotter for the claimant has suggested that the sanction of dismissal was unduly harsh given that no prisoners or members of staff were in anyway injured during the netting incident. We find that the respondent

reasonably concluded that the inappropriate use of force was such to justify the sanction of dismissal and the lack of injury arising from the claimant's intervention was a matter of luck rather than judgment. We have considered the evidence given by the dismissing manager and the appeal manger both of whom considered the mitigating circumstances, the explanation given by the claimant that his immediate reaction and failure to follow procedure was because of the impact of his illness, which he described in the disciplinary hearing as PTSD, and they concluded that the claimant had used unreasonable force and had failed to follow procedure and that he did not, with the benefit of hindsight, accept that the steps he had taken were not appropriate behaviour.

*Did the Respondent conduct a fair procedure?*

192. In our findings of fact, as acknowledged by the respondent's witnesses in their evidence, the respondent did not formally review the claimant's suspension. We have made findings that the failure to formally review the suspension does not render the disciplinary process unfair.

193. When an investigation procedure was instigated the claimant asserted that Governor Sands could not hear the disciplinary complaint and a grievance was instigated. Governor Sands did not in the event conduct the claimants disciplinary hearing.

194. The disciplinary process was conducted by Alison Clarke who conducted the hearing over three separate days giving the claimant additional time to prepare his case. We have found Ms Clarke conducted a fair and thorough process and reached her decision to dismiss the claimant on 5 January 2017. In confirming the reasons for her decision in the outcome letter the claimant was given the right to appeal the decision [1099-1101].

195. The claimant appealed the decision to terminate his employment and his appeal was heard by Teresa Clarke. The appeal hearing determined that the decision to dismiss the claimant was upheld and a detailed letter was

sent to the claimant detailing the reasons why the claimants appeal was unsuccessful [1199].

196. *The Claimant asserts that in all the circumstances, his dismissal was unfair both substantively and procedurally for the following reasons: -*

*a. The allegations against the Claimant were altered during the investigation process*

Our findings of fact lead us to conclude that the allegations against the claimant were throughout the investigation and the disciplinary process consistent and were not altered in either their substance or form.

*b. The decision was unduly harsh given that no prisoner and no staff member was injured as a result of the Claimant's actions*

We have concluded that on the evidence before us the decision reached by the respondent was a decision that was within the range of reasonable responses. It is not for this tribunal to substitute our judgment for that of a reasonable employer in the circumstances of the respondent.

*c. The decision was made without any real or meaningful consideration of mitigating factors given the Claimant was suffering from severe depression or PTSD at the time of the incident, that mental health condition was at least partially the result of the Respondent's various failures over past years of service*

Our findings of fact conclude that the dismissing manager Alison Clarke and the appeal manager Teresa Clarke each took steps to enable the claimant to participate in the disciplinary and appeal process. At the time of the incident there was nothing to suggest that the claimant was not fit to do his job and notwithstanding the claimant claim that he has only acted as he did on 8 May because of his PTSD he has throughout asserted that what he did was in any event not in breach of the respondent's policy on control and restraint and use of force. The respondent had regard to the claimants mental health however his failure to accept and recognise that what he had done in his unreasonable use

of force was unacceptable conduct meant that there was no reasonable alternative to his dismissal.

*d. There was an inappropriate finding that because the Claimant did not acknowledge wrongdoing, he could not continue to work for the Respondent. This was unfair given the Claimant's perception of the correctness of his actions was influenced by training. The Claimant had not had proper training since 2010, and the failure to train was the Respondents.*

The evidence before the tribunal has led us to find that the claimant was up to date on his Control and restraint training and there was no gap in the claimants training to which we have been referred that leads us to conduced that the claimant we unaware of the correct procedures to be employed. We remain mindful of the importance to the respondnet that staff abide by their training in particular in respect of the use of force on prisoner. The respondent consider the inappropriate use of force by officers on inmates to be capable of constituting an assault on prisoners that cannot be permitted.

197. *Was the dismissal fair or unfair in all the circumstances of the case?*
We reach the conclusion that the respondent conducted a fair disciplinary procedure in all of the circumstances of the case and that the decision to terminate the claimants employment was one that was fair and reasonable in all the circumstances of the case. The claimants complaint that he has been unfairly dismissed does not succeed and is dismissed.

***Disability***

198. The Respondent has conceded that the Claimant was a disabled person at all material times by virtue of his depression. The Claimant contends that his depression has hallmarks of PTSD. The time at which to assess disability is the date of the alleged discriminatory acts, namely for

Section13 and Section26 purposes, 8 May 2017 and for Section15 purposes, the decision to dismiss on 5 January 2018, as upheld on 20 March 2018.

199. In reaching our conclusion in respect of the complaints if unlawful discrimination we consider each of the complaints in turn and have had full regard to the relevant law.

***Section 13: Direct Discrimination***

200. *Did the Respondent discriminate against the Claimant by treating him less favourably on the grounds of the protected characteristic, namely disability?*

201. *The Claimant relies on a hypothetical comparator.*

202. *The alleged act of less favourable treatment are that in a meeting on 8 May 2017, Governor Bowkett stated to the Claimant: -*

a. *That he needed to get his "head checked out"; and*
b. *That he was "mad" if he thought the Prison Service was out to get him*

203. The allegation in respect of which the complaint of direct discrimination is raised relates to the so called Bowkett incident that occurred on 8 May 2017. In particular we refer to our findings of fact as detailed at paragraphs 87-91. The claimant has confirmed in his answers to questions that Governor Bowkett was not aware that the claimant had a mental health condition and confirmed that Governor Bowkett had not seen the Occupational Health reports sent to the respondent in respect of the claimant's mental health in September 2015 [220]. We have found that the reason for Governor Bowkett's treatment of the claimant on 8 May 2017 and his comments were made in the context of the Claimant's extreme assertions that all Governors were corrupt and were out to get him and that

the comments made in that context would have been made to any Prison Officer making such assertions and whether or not they suffered from a disabling mental health condition. We have taken the guidance provided in Ladele and we have asked ourselves why Mr Meynall was treated as he was by Governor Bowkett. Governor Bowkett was not aware of the claimant's disability nor was he aware of the fact that he had any mental health condition disabling or otherwise.

204. We are satisfied that the reason for Governor Bowkett's treatment of the claimant on 8 May 2017 was that the claimant's allegations were so extreme and without foundation that his allegations were considered beyond the realms of good reason. Governor Bowkett's comments we have no doubt, though poorly chosen, would have been said by him to any prison officer of Mr Meynall's experience who made an assertion that all Governors in the prison were corrupt and out to get him. The claimant has not satisfied us that Governor Bowkett's treatment of him was less favourable treatment that would have been met to a hypothetical comparator. The claimant has himself acknowledged that Governor Bowkett was not aware of the claimants disability at the 8 May 2017 and we conclude that the claimant has not discharged the burden of proof and the Igen test to enable us to conclude that the discrimination has been made out. Furthermore on the fact as we find them to be Governor Bowkett has provided an explanation for the unfavourable treatment complained of that was not tainted by discrimination and his explanation for his behaviour is legitimate. The claimant's complaint of direct discrimination because of his disability does not succeed and is dismissed.

***Section 15: Discrimination arising from disability***

205. *Did the Respondent discriminate against the Claimant by treating him unfavourably because of something arising in consequence of his disability? The alleged act of unfavourable favourable treatment was dismissing him on 5 January 2018 for his actions on 8 May 2017. The decision to dismiss was upheld on appeal on 20 March 2018.*

206. *The Claimant asserts that the "something" arising from the disability is his reaction to events which included going onto the suicide netting to restrain un-cooperative prisoners which were the result of the Claimant's depression (with hallmarks of PTSD). His PTSD was not diagnosed until August 2017. The Claimant did however believe at all times that the use of force was justified and therefore lawful because it was reasonable in the circumstances, necessary and proportionate, with no more force being applied than necessary.*

In our detailed findings of fact in relation to the respondent's decision to dismiss the claimant we have found that Alison Clarke the dismissing manager had accepted that the claimants condition, diagnosed in August 2017 to be PTSD may have had an impact on his actions on 8 May 2017 [para 146 above]. However Miss A Clarke had regard to the fact that the claimant demonstrated an inability to acknowledge that any of his actions and what he had in fact done was wrong. On the contrary the claimant considered that his actions had been commendable.

207. The fact that even on cool reflection the claimant did not acknowledge that his actions had been in breach of the respondent's policies and procedures in respect of the use of force and control and restraint was the reason why the respondent took the decision to terminate the claimant's employment.

208. Our findings of fact in regard the decision making process and the appeal process was that the respondent acknowledged that the claimants actions on 8 May 2017 may have been affected by his disabling condition. Were that the sole reason for the claimant's dismissal we would consider that the respondent's decision to terminate the claimants employment was less favourable treatment because of something arising in consequence of the claimants disability. However, we have made findings of fact that the reason why the respondent took the decision to terminate the claimant's employment was for reasons more than the claimants actions on 8 May

which on the facts as they have been found would amount to something arising from the disability.

209. *If the Respondent is found to have treated the Claimant unfavourably and seeks to rely on the justification defence, what was the legitimate aim and has the Respondent shown that the treatment was a proportionate means of achieving that legitimate aim? The Respondent contends that the Claimant's dismissal was a proportionate means of achieving a legitimate aim, in that the action taken by the Respondent protected the secure and efficient running of the prison service.*

210. Both Alison Clarke making the decision to dismiss the claimant and Teresa Clarke at the appeal hearing considered that the claimant's conduct amounted to an act of gross misconduct having disregarded his training and made unreasonable use of force. However, both acknowledged that the claimant's behaviour may have been something arising from his disabling condition, and had regard to the claimant's failure to appreciate with the benefit of hindsight that his behaviour had been inappropriate and had disregarded the standards of the prison service in implementing the reasonable use of force and control and restraint. Our findings of fact in respect of the evidence of Teresa Clarke [para166 above] concluded that :

> "*As a result, Teresa Clarke considered that, even with the benefit of hindsight, the Claimant's lack of insight to recognise that his use of force had in fact been excessive, led her to believe that there was no prospect of the Claimant learning from the incident, causing significant concern to contemplate the Claimant's reinstatement and determine it was not a suitable alternative to dismissal."*

211. We find that in this case the respondent had demonstrated that, notwithstanding the claimants gross misconduct was misconduct that had it's root cause as a result of his hypervigilance arsing from his PTSD

condition, the respondent has demonstrated that their decision to dismiss the claimant was a proportionate means of achieving a legitimate aim.

212. *The Claimant contends that dismissal was not the only possible response to the actions and considers that dismissal was not a proportionate means of achieving a legitimate aim; the Respondent could have supported the Claimant with his mental health and could have arranged counselling, or retrained the Claimant.*

213. The fact remains that at the time of the respondent's decision to dismiss the claimant he had ready received the benefit of counselling provided following the respondents Occupational Health referral that had identified his condition as consistent with PTSD and notwithstanding that fact the claimant was not accepting that his behaviour had been in breach of the respondent's policies and procedures. The claimant failed to recognise his responsibility for his actions [para 170] and continued to consider that on the contrary his actions had been commendable [para173].

214. Ms Teresa Clarke at the appeal hearing echoed Ms Alison Clarke's rationale for terminating the claimant's employment when we found [para 178] that:

> "*Teresa Clarke considered that the Claimant's behaviour was a blatant, and an unnecessary attack on a prisoner and with the benefit of hindsight, the Claimant did not recognise the use of excessive force. It was considered there was no prospect of him learning from the incident and by the appeal, the Claimant had completed his various courses of counselling. He had not told the Respondents of historic concerns regarding his PTSD and his inability to make a proper judgment. Alison Clarke's dismissal considered there was an irretrievable breakdown of trust and confidence,111 and 269-230. She considered all possible penalties."*

215. In conclusion we have found that at the time of the decision to terminate the claimant's employment the respondent was aware of his disability and the decision to terminate the claimants employment was unfavourable treatment because of something arising in consequence of his disability. We have gone on to consider the second limb of s15(1)(b) of the Equality Act and conclude that the respondent has shown that the treatment of the claimant was a proportionate means of achieving a legitimate aim. The respondent considers that it is imperative that their staff abide by their policies and procedures and comply with the standards set in training particularly in respect of the use of force on prisoners. The respondent holds the view that the inappropriate use of force by prison officers on inmates can constitute an assault upon prisoners and that behaviour cannot go unchecked. We conclude that the respondent has demonstrated that their treatment of the claimant was a proportionate means of achieving a legitimate aim and the claimants complaint that he has been subject to the prohibited conduct of discrimination arsing from his disability does not succeed.

***Section 26: Harassment***

216. *Did the Respondent harass the Claimant in engaging in unwanted conduct related to his disability which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

217. *The alleged acts are that in a meeting on 8 May 2017, Governor Bowkett stated to the Claimant:*

   a. *That he needed to get his "head checked out"; and*
   b. *That he was "mad" if he thought the Prison Service was out to get him*

218. We have detailed our analysis of the events of the so called "Bowkett Incident" in our findings of fact [87-91]. We distinguish the complaint of harassment from the analysis and the law as it relates to the complaint of

direct discrimination. We remind ourselves in particular that harassment is in the eye of the beholder not the intent of the perpetrator. We do not doubt that Governor Bowkett did not know of the claimant's fragile mental health and he did not intend to harass the claimant because of his disability however the carelessly and ill-chosen comments of Governor Bowkett undoubtedly had unintended consequences.

219. We have had regard to the three step approach to be taken as commended in Dhaliwal in considering whether the test in s26(1) of the Equality Act is satisfied. In our findings of fact we have concluded that words to the effect, that the Claimant "*must need counselling or something to get his head straight*" because what he was saying sounded like he was being persecuted and that his thinking was not right, were undoubtedly perceived by the Claimant to be words to cast aspersions upon his mental health and beliefs.

220. We consider the approach in light of the further clarification of his Dhaliwal guidance given by Underhill LJ in the case of Pemberton v Inwood which reminds us to consider both whether the claimant considers themselves to have suffered the effect in question and whether it was reasonable for the conduct to be regarded as having that effect taking into account all of the other circumstances.

221. Ms Trotter for the respondent has suggested that had Governor Bowkett made the phase "*you must be mad…"* it was merely in the colloquial sense in using an expression used the world over. Governor Bowett says he may have used the word 'mad' he is not sure, had that been the limit of his comment the context may have caused us to consider that the claimant was not reasonable in regarding such a single comment as having the effect of violating the claimants dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. However Governor Bowkett acknowledges that he made a further comment and suggested that the claimant needed "*counselling*" and "*to get his head checked out*"

or words to that effect. There is no doubt that the claimant was offended by the comment and swiftly made a contemporaneous comment raising concern about the words that had been said to him.

222. We have no reason to doubt that the claimant was offended by Governor Bowkett's comments which he considered were offensive and hostile and created an intimidating, hostile, degrading, humiliating and offensive environment, the claimant raised his concern immediately after the comments were made to him. We have found that the claimant was genuinely offended by the comment and was reasonable in taking offence at the comment which the respondent themselves found was made. The respondent upheld that part of the claimant's grievance made by him against Governor Bowkett. We found that notwithstanding the claimants confrontational behaviour towards Governor Bowkett on 8 May he was not unreasonable in taking offense at the comments made. Governor Bowketts lack of knowledge of the state of the claimants mental health does not nullify the offense that it caused to the claimant.

223. In respect of the complaint of direct discrimination we find that the comment made by Governor Bowkett to the effect that the claimant needed to have his "head checked out" was an act of direct discrimination against the claimant treating him less favourably on the grounds of the protected characteristic of disability.

***Statutory Defence***

224. *In relation to the s13 and s26 claims, if it is found that the Claimant was subjected to disability discrimination as above, had the Respondent taken such steps as were reasonably practicable to prevent such discrimination?* To the extent that Governor Bowkett subjected the claimant to a single act of discrimination by his disparaging comment we have heard nothing to suggest that the respondent seeks to rely upon the statutory defence and we conclude that the respondent is liable for the act of Governor Bowkett.

**Remedy**

225. The Final Hearing has been listed to determine liability only. In reaching the conclusions that we have we have found that the claimant's complaint succeeds to the limited extent that his complaint of unlawful harassment succeeds. A separate hearing to determine remedy has been listed to determine the remedy limited to that liability.

**Employment Judge Dean**
03 July 2020