Case Number 2505499/13

EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr Alan Johnson **Secretary of State for Justice**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at North Shields **On 17-19 February 2020**
Before Employment Judge Garnon **Members Ms C Hunter and Ms E Wiles**
Appearances:
For Claimant Mr M Brien of Counsel
For Respondent Mr A Tinnion of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:
1. the claimant's name is amended to that shown above;
2. his claim of harassment is well founded in part , as explained in the reasons;
3. remedy will be decided at a one day hearing on a date to be fixed.

REASONS (bold print is our emphasis and italics are quotations)

1. The complaints and issues

1.1. The claimant's surname is now Johnson. He had taken his wife's surname of Rayfield at the time he presented a claim on 19 December 2013 but since their divorce has reverted to Johnson. The respondent defended the claim. At all times both parties have been represented by experienced solicitors.

1.2. A claimant who can show negligence by his employer caused him psychiatric injury can bring a claim in the courts. Sheriff-v-Klyne Tugs held a claimant should bring a claim for such injury in the Tribunal if asserting injuries were caused by acts of discrimination. Claims in the two jurisdiction may overlap. In March 2014 came the first application for a stay of these proceedings pending civil proceedings which was granted by Employment Judge Johnson until 29 August 2014. Regional Employment Judge Reed kept the case under regular review. The stays were extended. The Tribunal was informed in the middle of 2015 the court case had been placed on hold due to the claimant's ill-health. Towards the end of 2018, the Tribunal was informed the court case had been given a listing window of March-June 2019. The stay was extended. In about April 2019, the civil proceedings were settled for a payment of £125,000. Neither Counsel was fully aware of the overlap between the civil claim and the proceedings in this Tribunal as to what remedy could remain to be awarded.

1.3. Only on 23 August 2019 did the respondent accept the claimant had been disabled by post-traumatic stress disorder (PTSD) at all material times. Since 27 August 2019, when Employment Judge Garnon conducted a telephone preliminary hearing, the claimant has withdrawn all but one claim-harassment. Chapman-v-Simon precludes us dealing with claims

which are not pleaded. Office of National Statistics –v-Ali held each type of discrimination is separate from the others and must be pleaded. Both parties accept we can deal with the pleaded case of harassment, but no more. The claimant relies upon the instances identified in his Particulars of Claim at paragraph 122.

1.4. The respondent had provided an adequate draft list of liability issues which included
Did the Respondent engage in unwanted conduct related to disability? If so, did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, with reference to the Claimant's perception, the other circumstances of the case and whether it would be reasonable for the conduct to have that effect?

Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA)? This will involve consideration of when the treatment complained about occurred, whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis. Given the date the claim was presented, any complaint about something that happened before 20 September 2013 is potentially out of time.

2. Findings of Fact

2.1. The claimant was born on 10 November 1960 and employed as a Prison Officer from 4 July 1999, latterly at HMP Frankland which houses the most challenging and violent prisoners. He developed PTSD and Major Depressive illness as a result of involvement in an incident on 1 October 2011 where a prisoner was brutally mutilated, disembowelled and murdered by two prisoners. He was first on the scene, did what his job required of him and worked the rest of his shift. He says what he witnessed will haunt him for the rest of his life .We accept that and the profound effect it has had on his mental health. We heard his evidence and, for the respondent, Senior Officer (SO) Michael Gartside, SO Andrew Raymond Nutton and Ms Donna Pickering of HR at HMP Frankland.

2.2. The claimant returned to work the day after the murder and was detailed back to the same landing on C wing. On 17 October 2011, while carrying out a cell fabrication check (CFC) he was required to enter the cell where the murder had taken place. He walked in, looked down and realised he was standing in a pile of dried human blood that had been scraped by the forensics team and swept into a pile. He left the cell and informed his wing manager what had occurred. On 20 October 2011 when carrying out a CFC he was required to enter the cell again. When checking the integrity of the bed, he pressed down on the springs and blood ran out onto his hand. He informed his wing manager and Governor Aled Edwards.

2.3. He continued to attend work. On 8 November 2011, following an application in February 2011, he was transferred to G Wing. His behaviour was so changed at home, his wife left him and refused to return until he sought appropriate treatment. He asked Ms Carol Wetherall of Occupational Heath (OH) at HMP Frankland to make a referral for counselling. His appointments were on 15, 18 and 30 November, 2 and 8 December 2011 and 24 February 2012. He was granted "special" leave for some which is granted to anyone who has an important appointment that cannot be arranged outside work time and should not be confused with disability leave, only granted once a disability has been confirmed.

2.4. On 21 November 2011 he contacted Ms Wetherall saying his Counsellor had expressed grave concerns he was displaying all the classic symptoms of PTSD. She **laughed** and asked if Counsellors were now making diagnoses.

2.5. In December 2011 he tried to speak to Ms Jeanette Liddell (Head of Human Resources at HMP Frankland) but only managed to speak to her assistant Ms Moira Robinson whom he told he was feeling unwell, struggling to stay at work and was suffering from PTSD. He explained he had no wish to leave the prison service, but it may be his only option as he was not coping. He suggested a temporary secondment to another prison or some post in the civil service. He requested a meeting with Ms Liddell to discuss his options but, despite many calls, she never rang back as Ms Robinson promised many times she would . He continued to ring over the next three months, each time spoke to Ms Robinson but was never contacted by Ms Liddell.

2.6. On 20 December 2011 his wife rang and spoke to Officer Mark Lewis to check whether the claimant was on duty the following day. Mr Lewis said he was not, so he did not attend. The claimant had been mixed up with another officer called Johnson before. This time Mr Lewis had been wrong- the claimant was on duty. Such errors happened to all staff on a regular basis. On 21 December the claimant was called to a meeting with Governor Lamb to explain his absence. He explained the reason, the difficulties he was experiencing with PTSD and the lack of response of people he had contacted asking for help. Nothing happened to help him.

2.7. On 17 February 2012 he spoke to Ms Wetherall and requested ongoing counselling. She said the respondent had done all that was legally required of it by providing 6 sessions so he should ask his GP.

2.8. On 23 February 2012 he still had not been contacted by Ms Liddell so emailed Ms Robinson saying a post advertised in the prison service webpage 'My Services' and an email sent to everyone of a secondment to a different department (he does not recall where) would be a possible solution as he had worked as a Senior Officer in a secure unit for young offenders prior to joining the prison service. He had no reply.

2.9. On 22 March 2012 he was assessed via the NHS by the Mental Health Team (MHT) at Derwentside Centre. A diagnosis of PTSD was made. On 26 March 2012 he was told he would be offered intensive treatment and secondary care under the MHT. On 30 March 2012, a report was written confirming he was having anxiety and flashbacks.

2.10. On 1 April 2012 he emailed Ms Wetherall, Governor Lamb and SO Gartside (then his line manager) providing an update on his diagnosis and treatment plan. On 5 April he emailed Ms Wetherall and Governor Lamb confirming what he had been told by Ms Wetherall on 17 February 2012. Still nothing was done to help him. We have not seen those emails but his evidence on the point was not challenged.

2.11. On 28 April 2012 he contacted SO Clarke in the department which allocates shifts saying he would be reporting sick. A mere 30 minutes later he received a telephone call from Governor Lamb, to whom he again explained how he was feeling and said he doubted he would be returning to work at all. Governor Lamb stated as the claimant was booked for leave the next week he should take an extra day's leave instead of reporting sick. Governor Lamb said he would investigate what assistance could be made available. Upon his return to work the claimant saw Governor Lamb who waved at him in passing and said he was off to the security department. He never spoke to the claimant or investigated support options. HMP Frankland had a Disability and Equality Co-ordinator, Ms Linda Butler, but she was not consulted. On 19 May 2012 the claimant received correspondence from the respondent asking him to explain his absence on 28 April.

2.12. On 7 June 2012 he recorded the incidents of 1,17 and 20 October 2011 in the accident book and wrote he had not done this sooner as he could not cope with recalling the details.

2.13. On 8 June 2012 he was reviewed in the Derwentside Clinic by Dr. Thejam Paralapalli, Consultant Psychiatrist, of Tees Esk and Wear Valley NHS Foundation Trust, a mental health trust. Also present were his Care Co-ordinator Michael Rogan, Dr. Toft and Dr. Miriam Lomas, Consultant Psychologist. He was diagnosed with PTSD and Secondary Depression.

2.14. On 12 June 2012 despite having been transferred to G Wing he was detailed back to the landing on C Wing where the three incidents had occurred **for the fifth time** since his transfer.

2.15. On 19 June 2012 a report by Dr Toft confirmed the diagnosis and that the claimant was having nightmares, flashbacks, poor sleep, panic attacks, and feeling frustration and anger. It is often unclear to whom **at the respondent**, if anyone, reports prepared by the MHT were sent, or when .

2.16. On 28 June 2012 the claimant received a telephone call from Governor Jobling querying why the three incidents were entered into the accident book only on 7 June 2012 when they had occurred in October 2011.The claimant explained the reasons and later queried in an email to Governor Jobling why this was being investigated by a Governor. The respondent has a health and safety department with a number of managers, all of whom were capable of asking him. To ask a Governor to investigate was unusual.

2.17. **None of the above facts asserted by the claimant have been challenged, let alone disproved. We have heard no evidence at all from Governors Lamb, Finlay, Fox or Jobling, Ms Liddell, Ms Robinson or Ms Wetherell. This is the context in which we judge the effects of the specific acts of which the claimant complains. Until he went off sick none of his pleas for help had received any constructive attention.**

2.18. On 29 June 2012 the claimant was taken into an office by SOs Gartside and Stewart Johnson. It was a confrontational meeting, not to do with his health, but an incident SO Gartside had seen in which he thought the claimant had not acted as he should during a unlocking procedure. For the next two days the claimant was not rostered for duty. On 2 July 2012 he went sick certified as "*PTSD (work related . Under Psychiatrist.*) The sick note was for two months. The meeting, to him in his vulnerable mental state, was a "last straw" but it probably would not have been had he been well. In oral evidence he said until then, SO Gartside had regularly, albeit in passing, asked him how he was. The claimant did not return to work before his dismissal.

2.19. SO Gartside has been employed in the Prison Service since 16 May 1994 and at HMP Frankland since October 2004. He says he sought to maintain contact with the claimant In line with the relevant Absence Management Policy (PSO 8404) and noted his attempts in a record of contact log (pages 270-326). The record shows he tried to telephone the claimant on 3 July, left an answerphone message but received no call back. One entry describes the first date and reason for absence as "*2/7/12—Undisclosed reason for sick absence. From the sick note the reason for absence is work related PTSD*". SO Gartside was totally unable to explain the use of the word "Undisclosed". The claimant had worked for nine months since the murder and SO Gartside would have known little or nothing about the counselling he had received or how much the claimant had struggled to remain at work. From his point of view, he had given the claimant a telling off and then been handed a 2 month sick note. It is unsurprising he would be suspicious of such absence being genuine. He made 3 calls to the claimant in 3 days and a

referral to the Occupational Health (OH) provider ATOS on 3 July. On 7 July, Dr Toft's report was forwarded to OH.

2.20. On 13 July 2012 the claimant received a letter from SO Gartside "*reminding*" him of his obligations to maintain contact. SO Gartside does not recall the terms of this letter, but took HR advice before writing it. We accept the claimant read it as a written warning. SO Gartside tried calling, again unsuccessfully, on 23 July 2012 and left a message they should arrange a meeting. The log refers him saying a second letter would be sent " *reminding him of his responsibilities to maintain contact whilst on sickness absence*". SO Gartside does not recall sending a second letter. The claimant says he was too ill to keep in touch with anyone, **but he did not expressly tell anyone so, at that time**. The respondent later relied upon this as part of their reason for withholding 50% of his compensation when they dismissed him.

2.21. On 23 July 2012 at about 9:45 am the claimant received a phone call from Christine Hitch of OH at HMP Frankland, which he missed. She left no message on the answer machine. He found out later that day from CM (Custodial Manager, or Principal Officer as they were known before July 2012) Colin Harris, that Ms Hitch had rung to say he had an ATOS appointment that morning at 10:00am. We now see from the contact log Ms Hitch was under the mistaken impression it was a telephone appointment, which makes sense because the claimant could not possibly have travelled to the prison from his home in 15 minutes. He had no prior notification of this appointment. At approximately 10:20 am he received an answer phone message from Ms Claire Stone, ATOS OH Advisor, who was at Frankland enquiring where he was. This missed appointment was the respondent's mistake.

2.22. The claimant telephoned CM Colin Harris and explained he was having extreme difficulty communicating with anyone, let alone work, and requested he be allowed to maintain contact with a manager with whom he felt comfortable, or Linda Butler. CM Harris refused saying, according to his note, Ms Butler was "*only the disability rep*", it was not in his opinion "*in her remit*" so the claimant would have to keep in contact with SO Gartside. Again, it is not clear to whom and when the claimant explained why the normal requirements to keep in regular contact with his line manager were causing him a particular problem.

2.23. SO Gartside made an unsuccessful attempt on 31 July to speak to the claimant by telephone and, on 1 August 2012, was informed SO Nutton would take over as the claimant's line manager. SO Gartside's determination to contact the claimant is explained by him as offering "support" to the claimant *in line with policy and HR advice*. We asked if an officer's sick note said he had an accident or a stroke, whether he would contact such a person so soon and persist so frequently until he got an answer. He said he would unless they were in hospital. The prison service is a "ranked" profession and if a Governor, more senior Officer, HR, or written policy tell an SO to do something, he will. SO Gartside says he was not told why he was removed as the claimant's line manager and was not curious to find out. The claimant accepts, as do we, some employees claim to have ailments which they do not, and some doctors write diagnoses on sick certificates which are only the claimant' view. PTSD is triggered by a traumatic event which in this case is clear. The claimant himself says initially he was "*in denial*" of having PTSD and later used a telling phrase when he called his admission of his illness as "*coming out*". In our judgment several people involved believed a prison officer in a maximum security prison should not be so vulnerable as to become disabled by "genuine" mental illness and/or is lying if he claims to be. This scepticism continued even after medical evidence to the contrary became known.

2.24. SO Nutton has been promoted to CM of a Unit at HMP Frankland. He started as a Prison Officer in 1990 and held this position at three different prisons. He was an SO from 2006 until

2012. He says he was asked to manage the claimant's sick absence by the Deputy Governor after the working relationship between the claimant and SO Gartside *"had broken down"* **but he does not know why it had.** He did not ask, because if a Governor tells him to do something, he does. On 2 August, SO Nutton telephoned the claimant to introduce himself but the claimant did not pick up so he left a message. His contact log shows they spoke on 8 August in the afternoon for 50 minutes but the note of what was said is scant. The claimant said he had an ATOS assessment phone call on 13 August at 09:30 and they agreed to have a face to face meeting later that day.

2.25. On 2 August 2012 Linda Butler met with Wing Governor Darren Finley to discuss the claimant's disability and offer advise on reasonable adjustments the respondent could make to assist him back to work. Governor Finley could not understand why Ms Butler was involved, stated it was not confirmed the claimant had PTSD and he did not believe he would be classed as disabled. Ms Butler confirmed he had been diagnosed. SO Nutton's statement says where an employee is absent for "psychological reasons", or for more than 20 days, there is a requirement for a referral to OH. SO Gartside had made a referral to ATOS in July.

2.26. SO Nutton's statement says he followed the Absence Management Policy (PSO 8404) which requires managers to maintain contact with officers on sick, disabled or not, and log actual and attempted contacts. He asserts the contact log (270-326) shows significant problems contacting the claimant experienced by SO Gartside and himself, which it does, but, as the claimant said, everything put in the log did not necessarily happen.

2.27. On 13 August the claimant had a telephone assessment by an ATOS OH Nurse Claire Stone whose report (110 – 111) said he had PTSD, was not currently fit for work and unlikely to be for a further 8 weeks until his symptoms significantly improved. He was reporting low mood and disturbed concentration. She recommended a review in 6 weeks and said he was likely to be disabled. The 6 week review never took place. That day the claimant and SO Nutton had a face to face meeting. Also present was another SO, Ms Butler and the claimant's wife Paula. SO Nutton said the prison service would only acknowledge a diagnosis of PTSD when they saw it clearly written in "*black and white* ". Twice in his log, SO Nutton uses the phrase "***alleged*** *PTSD*". The meeting lasted I hour 25 minutes, is recorded in about the same number of words as this paragraph and makes no mention of what Ms Butler said.

2.28. On **28 August 2012,** the Governor of the prison told SO Nutton to ask the claimant to complete forms for a further OH referral and consent to a report **for the purpose of Ill Health Retirement (IHR).** SO Nutton's statement says *I first spoke to the Claimant about this on 10 September 2012 and the Claimant explained he did not wish to consider this and he intended to return to work. I advised him I would speak to the Governor again in light of his comments.*

2.29. On 30 August the claimant was assessed by Laura Eltringham Psychological Therapist, Dr's Lomas and Paralapalli. The two doctors made a joint report dated 3 September 2012 (112-113) confirming the diagnosis of PTSD and saying he should have Cognitive Behavioural Therapy (CBT) and Eye Movement Desensitisation and Reprocessing (EMDR). There were two possible routes forward (a) to try to cure, or at least improve, the claimant's mental health to enable him to return to work or (b) accept he never would and should be given IHR.

2.30. When the Governor told SO Nutton to get "IHR1" forms completed, which initiate IHR, the claimant had only been absent for 8 weeks. On 21 September 2012 the claimant rang SO Nutton requesting another face to face meeting.

2.31. On 17 October 2012 they met. SO Nutton handed to the claimant an IHR application form. The claimant asked why he had to complete this as he did not want to retire. SO Nutton stated he did not know. The report from Drs Lomas and Paralapalli was handed to SO Nutton.

This was the last time the claimant saw SO Nutton despite the Keeping in Touch policy stating a Line Manager should meet face to face at least every 20 days with officers on long term sick.

2.32. SO Nutton denies **compelling** the claimant to complete the application for IHR when he said he did not want to be medically retired. He says genuine efforts were made to support the claimant to return to work including on 17 October 2012 he was specifically asked about returning to work and replied he did not wish to return to Frankland. SO Nutton claims he proposed a return to two other establishments, but the claimant declined. We find the claimant did not decline any **offer**, as none was made, only mention of a possibility of work elsewhere.

2.33. SO Nutton's statement says IHR must be considered where a member of staff is on long-term sickness absence, or has a serious underlying health issue, and may have their employment terminated for being unable to render regular and effective service. This entails a referral to CAPITA to give a medical opinion whether the criteria for IHR are met. Our Employment Judge asked him whether he believed the claimant **wanted** to return to work. He said he did not. His view was the claimant was **making use** of the traumatic incidents in October 2011 as a means of exiting the prison service with the best financial package. That would be IHR. He was unable then to reconcile that view with his assertions the claimant failed to co-operate with the IHR process. SO Nutton's statement says

I first issued the IHR form for the Claimant to complete on 17 October 2012 I talked to him about this form at the time. I explained that as a capability hearing is likely to take place, a compulsory application for IHR is made to Capita to ask for advice on this before a capability hearing is held.

There was delay managing the Claimant's ill health as he changed his mind several times about consenting to disclose his medical records to the OH provider and to Capita. He also failed to attend and cancel OH appointments. The delays also arose because the Claimant claimed that he did not receive the relevant consent forms on three occasions between December 2012 and January 2013.

The Claimant initially declined to be considered for IHR, which if granted, would entitle him to 75% of his salary until retirement at 65 years of age.

By letter dated 27 November 2012, I wrote to the Claimant regarding his initial indication that he did not wish to be considered for IHR. I explained that I respected his choice on the matter, but wished to make clear the implications of this decision. I did not compel him to complete the IHR application, but wanted to ensure that he was making a fully informed decision. I explained that if he did not consent, he could not be considered for IHR. I stated that if he wished to reconsider his decision on this, he could contact me. ***I took advice from HR before writing this letter to the Claimant who advised my letter was appropriate.***

2.34. We accept SO Nutton did not force the claimant to apply for IHR but he painted a bleak picture of what might happen if he did not. The claimant believes Ms Liddell and at least one Governor wanted him out of the prison because his continued employment may mean having to make adjustments, and absences would be likely to recur. IHR was the easier option **for them**. For him, it would involve mental acceptance he was never going to be able to return to work. Like physical illnesses, some mental illness can be cured, or at least controlled, while others cannot. In most cases, time alone will tell. **We accept the claimant's view as genuine, reasonable and consistent with the documentary evidence**. On 23 October 2012 Ms Liddell emailed SO Nutton saying the claimant's was "*not an easy case to manage*" and he would be eligible for Sick Leave Excusal (SLE) available if absence is due to injury on duty. She advised the IHR paperwork needed to be completed and, as the claimant was worried confidential medical information may "leak" from HR to colleagues, as Frankland, like all

prisons is a hotbed of gossip, asked SO Nutton to assure him HR would not see medical records, only ATOS and CAPITA would.

2.35. On 6 November 2012 the claimant received written notification his pay would reduce to half as of 31 December 2012. He queried this with SO Nutton as an SLE application had been submitted on 2 November. It was his union representative, CM David Redford, who is at Durham prison, who explained about SLE and printed off the form for him, **not** SO Nutton Manager or anyone else at Frankland. We do not accept SO Nutton's evidence he "*supported*" the claimant by assisting him with his SLE application. However, without his help, SLE was granted in November 2012 and gave him a further 6 months full sick pay.

2.36. On 16 November 2012 the claimant received notification ATOS, acting as OH advisors to presumably the DWP, said the incidents in October 2011 were industrial accidents, had caused impaired psychological function and qualified him for Industrial Injuries Disablement Benefit. On 22 November 2012 he received notification from Rachel Atkins (Shared Services) SLE had been approved from 2 July 2012 and **was open ended**.

2.37. On 27 November 2012 SO Nutton ***advised*** the claimant to tick the box on the OH consent form that he wanted to be considered for IHR on the basis that in cases where a Capability Hearing is likely to be held a compulsory application for IHR is made. The claimant therefore, on 29 November 2012, completed the forms saying he was doing so on their advice as his aim was to return to work (130). He was "hedging his bets". This was wise, and advised by CM Redford, but he was still not abandoning hope of recovery sufficient to enable him to work somewhere in the prison service.

2.38. On 3 December 2012 a Medical Report was prepared by Dr Lomas (130A) and a copy sent to SO Nutton on 7 December 2012. It did not abandon hope of recovery with treatment. The claimant was due an ATOS appointment for 18 December 2012, which was cancelled.

2.39. On 11 January 2013 the claimant had a telephone call with SO Nutton who said the Prison was refusing to accept his sick note. The claimant was anxious for the ATOS appointment to go ahead and on 18 January 2013 wrote to the respondent asking why the 18 December appointment was cancelled, what needed to be done so it could go ahead, clarification of the forms to be completed for IHR, confirmation his sick note was rejected and the reasons for this. He said he was more than happy to co-operate fully as it was in his own interest to do so. The reason he had not received certain documents from the respondent was that they had not put sufficient postage on them (131-132).

2.40. SO Nutton replied on 21 January 2013 the appointment was cancelled due to the claimant not allowing CAPITA to access his medical file (133) and his GP needed to stamp the sick note (no earlier ones had been) so he had to resubmit it, but it was never returned to allow him to get it stamped. The claimant replied (134) on 29 January 2013 saying he had no issue with CAPITA or ATOS considering his records, his issue was with accepting retirement . He explained he was having difficulty completing the form and asked for patience.

2.41. The claimant received a memo from the respondent dated 20 February 2013 saying it had been decided to progress an IHR referral for him **and** management were considering convening a capability hearing at the end of the process (135-136). This distressed him so much his doctors refused to continue the EMDR treatment because he must be in the right mind set and needed no distractions to concentrate fully on EMDR. He was still hoping to get back to work by organising reasonable adjustments through Mr Redford and Ms Butler.

2.42. SO Nutton's statement says "*I later explained the process of managing his absence in more detail by letter dated 20 February 2013 and I stated in this letter that he could waive his right to be considered for IHR and said he should only complete the Capita consent form if he wished to consent to be considered for IHR."* Mr Tinnion's excellent closing submissions say on this part of the claim the respondent applied no *improper* pressure on the claimant to complete the IHR forms in 2012 or the first half of 2013. He quotes passages from SO Nutton's letter, written by HR, which say applying for IHR, or not, is a serious decision, but one for the claimant to make. It reads well, but we agree with the claimant he was being given a choice between IHR and a capability process virtually certain to end in dismissal.

2.43. SO Nutton says he offered in February to explore roles in other establishments in the area but the claimant declined. In March 2013, SO Nutton notified him of a role at another prison and the claimant said he had approached HMP Durham directly for alternative roles. He queried further training for himself. SO Nutton looked into this but the training requested could not be provided for reasons he explained by email. On 1 March 2013 the claimant received a memo and application for a Band 3 role at HMP Kirklevington Grange. Every officer in the prison service received this. We accept the claimant's version no practical proactive steps were being taken by anyone at HMP Frankland to identify work elsewhere which would be suitable for his particular problems. We see here an attempt by the respondent make it appear the claimant was making a free choice to aim for IHR, but long before he was prepared to give up hope of recovery, and before any medical advisors were, the Governors, his line managers and HR had written him off because that was the easiest option for them. If he had returned to work anywhere, they thought a likelihood of future absence existed .

2.44. On 10 March the claimant wrote to SO Nutton asking what action was required to remedy Shared Services not accepting his sick note (140). He said he did not want to be accused of not fulfilling any responsibilities. HR must have seen this.

2.45. The respondent made an OH referral again on 28 February 2013. On 9 April 2013 OH reported (141-141) he had PTSD was unfit for work and would not be ready until after EMDR treatment. HR would see this too.

2.46. Mr. Tinnion put to the claimant he was being deliberately awkward and " hard to manage". That, **out of context,** is how it appears, but put in context it is symptomatic of the deep distrust which had grown between the claimant and what he called "Frankland". Our Employment Judge asked who he meant, and his reply was Ms Liddell as the Head of HR. Mr Tinnion submitted the claimant at times was his "*own worst enemy*" and gave as one example asking for letters to be written explaining why a sealed sicknote was necessary. We reject that. The fact he was difficult for SO Nutton, and SO Gartside before him, to manage, is a reflection of their lack of training and understanding of mental health and their scepticism of the claimant being genuine despite all the medical evidence. It is precisely why someone in HR should have taken a grip on the situation, but no-one did. Ms Butler's attempts to help were rejected. Importantly, SO Nutton too thought Ms Butler advised on adjustments for physical disabilities only. Ms Pickering said this was wrong, her role covered mental health disabilities too.

2.47. The claimant was then only 52 years old. Having his employer consign him to retirement, even with a good financial package, would violate the dignity of any person who had worked all his life and create a hostile environment for him. Mr Tinnion also submitted the claimant was for a long time in denial about the state of his own health and the likelihood of his making a return to work as he admitted in answer to the Employment Judge's questions, and

this must have coloured/tainted his reaction to the respondent's otherwise reasonable conduct. This speaks volumes. The claimant was not ready to accept what turned out to be true, that he would never recover to the extent needed to return to work in a prison. This is not him being "awkward" or "hard to manage". Examples exist of people who have committed suicide in circumstances where they lose self esteem and that is what was happening to the claimant.

2.48. On the time point Mr Tinnion says "*by the last quarter of 2013*" the claimant's attitude towards applying for IHR had changed (following advice), and he continued with an IHR application of his own free will, so the respondent's conduct was no longer "*unwanted*". We will deal with that in our conclusions.

2.49. On 6 May 2013 the claimant received written notification he would be going onto half pay from 1 July 2013. He contacted SO Nutton who told him not to worry as he had SLE. From pages 307 to 320 are recorded communciations including SO Nutton and Shared Services (Emma Canning) who said there had been a misunderstanding, he would remain on full pay and a letter of apology and explanation would be sent to him. He never received one. There are calls from SO Nutton saying he had received an email from a Ms Lillian Stone regarding SLE that '*policy was policy'*. The claimant wrote to Ms Stone regarding the situation and enquired about disability leave. The problems over SLE halted his EMDR treatment for a second time because this news had such a destabilising effect on him his doctors cancelled treatment until he resolved this matter. On this point, we accept SO Nutton was doing his best to help. No-one of robust mental health could fail to be baffled and annoyed by the contradictions and bureaucracy these pages contain. They also contain many communications regarding his IHR application, including from him, showing he was not being difficult to contact He was placed on half pay from 1 July 2013. He was informed verbally by SO Nutton on 23 July his disability leave application had been refused, with written confirmation on 25 July.

2.50. Returning to the question of "contact", the claimant had written to SO Nutton on 26 February 2013 saying he had called him on 13 and 15 February and SO Nutton had not called back. He said again he could be easily contacted by email. SO Nutton says he spends 80% of his day in his office but has no answer machine. When our Employment Judge asked why he did not use a reliable method , email as the claimant had requested or text, to indicate to the claimant he needed to speak to him, his response was Governors and HR advised personal phone contact was the method to use. Ms Pickering later confirmed this. Mr Brien asked if he had any discretion to which he said no, contact was to be made on the first day of absence and every few days thereafter. Our Employment Judge asked if he would do that if an officer had a stroke, and he replied he would probably contact less frequently. Ms Pickering later confirmed this too. **We find every absent person, disabled or not, is persistently checked upon**. The respondent says this is out of concern for them. Whether that is so or not, a person with a broken leg, which will heal in its own time, would still be telephoned weekly.

2.51. SO Nutton's statement says he wrote on 17 July 2013 *an informal short and polite reminder* the claimant was required to be contactable whilst absent. This was done on advice from HR. SO Nutton says it was not a **warning** letter. The tone of it is fair. We accept the claimant in fact had difficulties contacting SO Nutton as he was busy. SO Nutton asked for an alternative contact number or email address (149) despite previously having his home and mobile telephone numbers and his email address. The claimant responded in writing stating he felt he was being unfairly singled out for unfavourable treatment as a result of his disability (150). He confirmed he took his responsibilities seriously and wanted to return to work, had contacted him on 9 occasions in 2 days without response. He said, due to being on half pay, to save money he had given notice to terminate his telephone and broadband contracts.

2.52. In his closing submissions on this part of the complaint, Mr Tinnion says nothing in the 17 July 2013 letter "*reminding*" the claimant of the "*requirement to be contactable when on sick*" is inappropriate , it is a standard letter about the respondent's policy written in polite, professional, respectful terms. It is unreasonable for the claimant to perceive it as violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. He says the same of the 2012 letter sent by SO Gartside. It is the timing of that which is unreasonable as the claimant had only been off work 10 days. Mr Tinnion also submitted in 2013, the claimant's physical and mental health was sufficiently robust that he could (i) engage in what would for most people be the hugely stressful exercise of building/project-managing a new home build in Otterburn (ii) go on holiday with his friends in Scotland. He said *If C was fit and well enough to oversee the build of a new house in Otterburn, C was fit and well enough to be sent a letter like this* ".

2.53. Again, these examples speak volumes. We have heard several cases where physical activity is recommended as a therapy to distract those suffering from mental ill health from over introspection. In the eyes of his managers, the claimant's mental ill health was an excuse for not coming to work as SO Nutton admitted he thought. **In context,** the criticism implied by these letters certainly caused the claimant to feel harassed and we can see why.

2.54. SO Nutton's statement says "*the Claimant did not engage meaningfully and in a timely manner with myself during the period of his absence. He showed a lack of cooperation with the process of obtaining occupational health advice, and referral to Capita for consideration of medical retirement. He showed a reluctance to comply with the OH process, this was evident in his repeated indications to agreement and then withdrawal of consent to the OHP / HR process. All of these factors prevented me from being able to seek timely OH advice and work with Mr Johnson to monitor his progress and recovery and facilitate an early return to work.* We do not accept this. It is obvious to us, his caution and suspicion about what he was being asked to do was a consequence of him not being able to cope with the technicalities of policies being applied and the contradictory information being given, all of which understandably led to his loss of trust in the respondent as an organisation .

2.55. The valid point Mr Tinnion makes is that the letter of 17 July 2013 does not "relate to" disability –it relates to perceived failure to reply to missed calls. When we come to SO Nutton's calls, the claimant's case is **not** that he missed those calls because of his disability **but** that he or his wife tried to reply to each and every missed call.

2.56. On 5 August 2013 the claimant was informed he did not qualify for IHR (153-157). The reason given by CAPITA is plain. On the available medical evidence, treatment had started, may succeed, so it was **premature** to say he would be permanently incapable of work. The claimant did appeal this decision and IHR was granted after he had been dismissed (255-256 and 267-268) based on fuller medical evidence and the passage of time without recovery.

2.57. SO Nutton says he had a discussion with the claimant on 28 August 2013, exactly one year after the Governor had told him to get the claimant to apply for IHR during which the respondent had given him no practical help but left him to struggle with needless red tape at the same time as serious mental illness. The claimant asked for his wife to accompany him to the capability hearing. SO Nutton checked with HR and was told to tell the claimant he could be accompanied his union representative or a workplace colleague. His wife could attend the venue but not be present during the hearing. He told the claimant that on 2 September 2013**.** He says he mentioned the date of the hearing to the claimant, who accepted when cross examined he **may have**, but it did not "register".

2.58. On 2 September 2013 he received the letter to attend a Capability Hearing to be chaired by Governor Fox **on 1 October 2013** (162-163). He was traumatised as that was the same date as the murder two years earlier. He says ***the respondent*** knew the effects of his condition as they had medical reports confirming he was suffering flashbacks to the incident but arranged a meeting to determine dismissal on the exact same date. When he received the letter he wondered if it was some kind of sick joke. He wrote requesting an alternative date. We accept the date was arranged through HR which schedules meeting based on availability of the necessary parties. Governor Fox wrote to the claimant describing the date choice as an "*administrative oversight*" (166) apologised for any upset caused saying it was not intentional, and rearranged the hearing for 4 October 2013 .

2.59. The claimant informed the respondent on 18 September 2013 medical advice he had received was he should not attend a Capability Hearing (169). A report of Professor Stephen Martin, a Consultant Psychiatrist (169A – 169D) states the claimant was very mentally ill, had a less than 20% chance of getting better and was not fit to attend. Ms Liddell wrote on 25 September saying she was "*disappointed*" he could not attend and asking for a letter from his consultant confirming this (170), which the claimant reasonably read as her not believing him . The claimant on 29 September sent Professor Martin's report redacted save for the last sentence which gave that confirmation. Mr Tinnion suggested he had deliberately excluded damaging entries. Our view is he was exercising his right to respect for private life as he is entitled to do under the Human Rights Act. Be that as it may, no-one at the respondent saw the full version until much later. The hearing was fixed for 18 October.

2.60. SO Nutton's statement says
*Efforts were made by Governor Fox to encourage the Claimant to attend the capability hearing at a neutral venue, and if he could not, to consider attending by telephone, providing written submissions and/or having his union representative attend on his behalf [**172]**.*

I telephoned the Claimant on 17 October 2013 to confirm whether he would be attending the meeting. However, I was unable to speak to the Claimant and only spoke to his wife. I was advised the Claimant would not be attending but would be represented by his union representative and disability advisor. The Claimant's wife made no complaint he was being pressured to attend the meeting the following day, and simply advised he was not attending.

2.61. The claimant considers the call on 17 October 2013 was offensive, insensitive and an act of harassment. He says "***they***" already knew he had representatives attending and had been informed of Professor Martin's advice. SO Nutton's unchallenged oral evidence was that on 17 October 2013 **he** did not know. We agree Mr Tinnion's note
Q: *By the time you spoke to C's wife on 17 October, were you not aware of the medical advice that C could not attend*?
A: *Correct. I did know the Capability hearing was on 18 October. I was aware of the significance of that hearing. No-one from HR had informed me of the Claimant's medical refusal.*
We accept SO Nutton did not know and was checking to ensure there was no change of plan.

2.62. The claimant did not attend on 18 October 2013 and provided a medical note to support his non-attendance. CM Redford, his union representative, represented him and Linda Butler was present too. The hearing lasted a mere 20 minutes (189-190) and the decision, based on a report by an HR case manager, Ms Julie Bennett, of whom we have heard nothing, was to dismiss on the grounds of medical inefficiency. There was a discretion to pay compensation in accordance with section 11.4 of the Civil Service Management Code. The claimant was informed he would receive 50%, as he had failed to engage in a meaningful , timely manner

with his managers during his absence and not co-operated with the process by disclosing medical advisers recommendations. The OH report of 9 April 2013 confirms he had provided his clinical psychologist report. The CAPITA report of 5 August 2013 refers to medical evidence he had provided. He sent medical evidence to his managers on 17 October 2012, 7 December 2012, and 18 September 2013. The issue of compensation on termination was not discussed with his representatives but the HR report shows it was to be considered(the HR officer recommended a reduction of **up to 25%)** and at the end of the meeting Mr Redford asked if the point would be decided . The claimant says reducing compensation by 50% was harassment. He received written confirmation dated 30 October on 4 November 2013.

2.63. He appealed the decision on 6 November 2013 and was invited to the appeal meeting by letter from an HR Case Manager based in Manchester. The meeting was proposed for 3 December 2012. The date, time and venue were set by the HR Case Manager in liaison with the Personal Assistant to the Director of High Security Estate, Mr Richard Vince, who was to hear the appeal in Wakefield. Mr Vince bases himself in London or Wakefield. The respondent refused to allow the claimant's wife to attend the hearing though they knew he was relying on her as his carer. He says that too was an act of harassment as was requiring him to travel to Wakefield when they knew travelling was difficult for him .

2.64. Donna Pickering, employed as a HR Case Manager by the Ministry of Justice for 10 years, gives HR advice to managers of all levels. She had **no direct involvement** with the claimant's case but explains the arrangements for his appeal, *as dictated by policy*. Ms Liddell is still with the prison service and has been promoted, but the respondent did not call her or any CM or Governor. Ms Pickering's statement says:
It was and is not policy to pressure employees to attend formal meetings. ... Reasonable attempts are always made to hold meetings with employees. If these fail, meetings may take place in their absence, but employees are invited to provide written representations or to send a representative. The Claimant clearly understood this from the first stage capability meeting for which he just sent his representative.

As to the complaint that the Claimant was told his wife could not attend the appeal meeting with him, he was told that she could attend with him, but not in the meeting, as he also had a union representative. This is in accordance with the statutory right to be accompanied and with policy.... This is an unusual arrangement and one put in place ***as a reasonable adjustment****.*

As any HR officer would know, "reasonable adjustments" are made for disabled people, and the respondent did not concede the claimant was disabled until **23 August 2019**.

2.65. The Appeal was heard on 23 December 2013. At the start Mr Vince kept calling the claimant Stephen. When asked why, he said that was the name on the paperwork. The claimant says the fact the respondent could not even get his name right demonstrates insensitivity and lack of interest in him. He raised the 50% reduction in compensation. Mr Vince threw the letter saying he would only get 50% into the bin and said he would be getting 100% compensation. The claimant did not even have to make any argument which suggests the previous decision was manifestly unfair and unreasonable. The claimant's statement says the "*most ridiculous thing about this however is that because I was then ill health retired, I never received the compensation at all. The statements made to reduce the award to 50% therefore never had to be made …"*

3. Relevant Law

3.1. Section 40 makes harassment unlawful and s 26 includes
(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.

The relevant protected characteristics include disability.

3.2. Mr Brien stated this case is brought on the basis of 'effect' not "purpose". Harassment can arise regardless of intent and regardless of whether or not the alleged harasser knows the victim has a particular protected characteristic. Noble v Sidhil Ltd EAT 0375/14 held even where an employer had no reason to know an employee was depressed, it could still be liable for harassment by comments he was 'weird', 'a fucking idiot' and 'not well in the head'.

3.3. In deciding whether conduct has the effect referred to in S.26(1)(b) each of the claimant's perception; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect must be taken into account. The test has both subjective and objective elements. The subjective part involves looking at the effect the conduct had on the claimant. The objective part requires the tribunal to ask itself whether it was reasonable for the conduct to have had that effect on him.

3.4. The EAT in Richmond Pharmacology v Dhaliwal 2009 ICR 724 gave guidance as to how the 'effect' test should be applied. In Pemberton v Inwood 2018 ICR 1291, Lord Justice Underhill, who sat as the President of the EAT in Dhaliwal, revised his guidance thus: '*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 both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (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*.'

3.5. The EAT adopted this in Ahmed v Cardinal Hume Academies EAT 0196/18, The 'other circumstances' part will usually shed light both on the claimant's perception and on whether it was reasonable for the conduct to have the effect. The EHRC Employment Code notes relevant circumstances can include those of the claimant, such as his mental health. It can also include the environment in which the conduct takes place (see para 7.18).

3.6. In Dhaliwal Underhill P said in assessing effect, '*One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt*' . In HM Land Registry -v-Grant 2011 ICR 1390, Lord Justice Elias said '*When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile*

speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.' In determining whether a remark violated a worker's dignity, it is relevant to consider the purpose of making it **in context**, Heafield v Times Newspapers Ltd EAT/1305/12 . These cases **do not mean** the harmful consequences of incompetent or insensitive conduct cannot be harassment, simply because no harm was meant.

3.7. In Chawla v Hewlett Packard Ltd 2015 IRLR 356, the claimant was signed off work with stress. In accordance with its normal practice on long-term sickness absence, the respondent shut down his access to e-mail and internet and informed colleagues to stop communicating with him during working hours. In the Employment Tribunal (ET)'s view, these actions were taken for justifiable security reasons so it dismissed the harassment claim. On appeal, the claimant argued the respondent's motive was irrelevant, given his claim was based on the effect of the conduct, not its purpose. The EAT held the context of the conduct and whether it was intended to produce the proscribed consequences were material, but not decisive, to the decision as to whether it was reasonable for the conduct to have the effect relied upon.

3.8. Harassment may result from separate incidents. The EAT in Reed v Stedman 1999 IRLR 299, counselled against carving up a case into a series of specific incidents and then trying to measure the harm or detriment in relation to each. Instead, it endorsed a cumulative approach quoting from a USA Federal Appeal Court decision: '*The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes*' (USA v Gail Knapp (1992) 955 Federal Reporter). This was approved by the EAT in Driskel v Peninsula Business Services Ltd and, although both cases were decided before the EqA, there is no reason why the same approach should not apply. However, this does not give us licence to go outside the scope of the pleaded case.

3.9. The subjective part is a factual inquiry. Tribunals should bear in mind different people have different tolerance levels. Conduct that might be shrugged off by one person might be found much more offensive or intimidating by another. The objective test is intended to exclude liability where the claimant is hypersensitive and unreasonably takes offence. As said EAT in Dhaliwal , '*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.."* Underhill P also said '*Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question*.'

3.10. If we find it was not reasonable for conduct to have the proscribed effect, the claim will fail,Ahmed v Cardinal Hume Academies EAT/0196/18. However, we must consider whether it was reasonable for the conduct to have the effect on ***that particular claimant***. The EAT in Reed v Stedman said '*it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what the tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.*' In an ET case, not binding on us, Southern v Britannia Hotels Ltd Case No.1800507/14 where a claimant a young waitress in a fragile mental state suffered more extremely due to being particularly vulnerable, it resulted in a higher compensatory

award for injury to feelings following sexual harassment. There is no doubt the so called "eggshell skull rule" applies at the remedy point. The more difficult point is what effect it has on liability. In another ET case Punch v Maldon Carers Centre 3202677/06. the claimant's manager told her her crutch was a trip hazard. The ET noted this would not generally be reasonably considered as creating a hostile environment as employers need to consider the health and safety of the workforce and the crutch could have been a trip hazard. However, in that case it was reasonable for it to have the effect, given the manager's generally unsympathetic attitude towards the claimant and her failure to consider her needs as a disabled person. It caused her to feel bringing a crutch into the office was an issue with the manager so the tribunal found unlawful disability harassment.

3.11. In those cases, there was no problem seeing how the conduct "related to" the protected characteristic. In this case it is argued it did not, especially as to the "contact requirements". Mr Tinnion in written submissions of law, which Mr Brien said he agreed, put the point thus:
*In order to be unlawful, the conduct must be related to a protected characteristic. It is not sufficient for the ET to conclude merely that unwanted conduct had been "**in the circumstances**" of the employee's disability – this is not necessarily the same as "related to". Private Medicine Intermediaries Ltd. v Hodkinson EAT/013/15 para. 36.*

3.12. A feature of this case is the relationship between s26 and other forms of discrimination none of which are before us. We explore them briefly. Unlawful conduct under the EqA requires an **act** and a **type** of discrimination. The acts in s 39 include subjecting an employee to detriment which means doing or not doing anything which he might reasonably consider changes his position for the worse or puts him at a disadvantage. Section 212(1) includes *"detriment" does not, subject to subsection (5), include conduct which amounts to harassment.* So, if detriment caused by conduct falling within s. 13, 15, 19, 20 or 27 has an effect proscribed by s.26, it is s. 40 which is infringed, not s.39.

3.13. There are four types of discrimination related to disability. The first two are s13 direct discrimination which means treating an employee less favourably than the employer treats or would treat others **because of** a particular disability and s15 treating him unfavourably because of something arising in consequence of his disability . The second two are s19 indirect discrimination and s20/21 failure to make reasonable adjustment both of which involve the application of a provision criterion or practice (PCP) which places a claimant and other disabled people at a disadvantage. Disability discrimination law has changed since it was enacted by the Disability Discrimination Act 1995 (DDA) but still discrimination occurs when one treats people whose circumstances, apart from the protected characteristic , are the same, differently OR when one treats people the same when their circumstances, due to the protected characteristic are different. In addition, s27 prohibits victimisation which means subjecting an employee to a detriment because he does a protected act, or the employer believes he has done, or may do, a protected act. A protected act includes bringing proceedings under the EqA and making an allegation (whether or not express) that the employer or another person has contravened it. **Some of these were pleaded, but have been dismissed on withdrawal.**

3.14. In victimisation, s 13 and s15, we look for the "reason why" treatment was afforded. Not even in direct discrimination is malicious motive a requirement. Benign motive does not save a respondent from liability where causation between the "protected characteristic" and the subjection to detriment is established Amnesty International-v-Ahmed. Unreasonableness of treatment does not show why acts were done, neither does incompetence (Glasgow City

Council –v- Zafar and Quereshi-v- London Borough of Newham). Sir Patrick Elias said in the EAT in Law Society –v- Bahl

94 The reason for this principle is easy to understand. Employers often act unreasonably, as the volume of unfair dismissal cases demonstrates. Indeed, it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight. It is however a wholly unacceptable leap to conclude whenever the victim of such conduct is black or a woman then it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. .

101. .Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.."

3.15. Sections 19 and s20/21 require a Tribunal to decide what PCP's existed, which were applied to the claimant and whether doing so placed him at a disadvantage. It matters not why the respondent applied them to him or what factors caused the disadvantage (see Essop-v Home Office and Naeem-v- Secretary of State for Justice).

3.16. Before harassment was a separate statutory tort, if a person engaged in conduct towards another related to a protected characteristic but not **because of** it, there was no direct discrimination Porcelli-v-Strathclyde Council. Under previous legislation many forms of harassment still required a causal link. In Bakkali-v- Greater Manchester Buses Slade J said

31. In my judgment the change in the wording of the statutory prohibition of harassment from "unwanted conduct on grounds of race …" in the Race Relations Act 1976 section 3A to "unwanted conduct related to a relevant protected characteristic" affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. (We respectfully disagree as we have seen many examples of unwanted conduct, possibly done because of something relating to a protected characteristic, but in which the conduct itself did not. However, if it is both, we can only find harassment proved). Slade J added*, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus* ***on the context*** *of the offending words or behaviour.*

3.17. We have no difficulty accepting that conduct such as described by Elias J in Bahl, which is incompetent or insensitive can cause harassment, but if it does so to disabled and non-disabled people alike it would not infringe s 19 or s20. That acts cause a claimant detriment does not mean they result from the application of a PCP. In Ishola v Transport for London, the Court of Appeal upheld this saying an ET was entitled to conclude requiring an employee to return to work without a proper and fair investigation of his grievances was not a PCP, as it was a *'one-off act in the course of dealings with one individual'*. HH Judge Shanks said in Carphone Warehouse Ltd v Martin EAT/0371/12:*…What the Employment Tribunal found, in effect, was the lack of competence or understanding by The Carphone Warehouse in preparing the Claimant's wage slip for July 2010 was capable of being a "practice" within the*

terms of s 4A and that the reasonable step they should have taken was the step of not delaying payment of the correct amount of pay. Mr Hutchin says, in effect, that this approach is misconceived. We are afraid we agree with him in this contention, for two related reasons. First, a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer. Onu v Akwiwu and Taiwo v Olaigbe 2014 ICR 571, are examples of mistreatment of workers which did not contravene the EqA and we must always be resist the temptation to think all bad treatment must be unlawful.

3.18. Requiring regular contact is a PCP and would be justified in itself. Its application to the claimant would only be a breach of s20 if the respondent knew or ought to have known it was significantly harder for the claimant to comply because of his disability, see Schedule 8. We doubt Parliament ever intended harassment, primarily invented to remedy the gap in protection identified in Porcelli , should be seen as a further means of pursuing other claims for which the EqA expressly catered. This is particularly important in this case because such claims were brought and have been dismissed on withdrawal.

3.19. Section 109 includes
(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

3.20. Section 136 includes
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

This reversal of the burden of proof was first explained in Igen-v- Wong (as elaborated upon in Madarassy –v- Nomura International. Royal Mail-v-Efobi confirms the claimant must prove the primary facts he alleges are more likely than not to be true otherwise the point of reversal is not reached, but, once he has, the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities the treatment was not of a prohibited kind. If it fails to establish that, the Tribunal must find the case proved

3.21. Section 120 EqA includes:

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

3.22. The question of acts " extending over a period" has been considered in a number of cases notably Cast-v-Croydon College 1998 IRLR 318 and Hendricks-v-Commissioner of Police for the Metropolis 2003 IRLR 96. Acts with only continuing consequences or a succession of isolated unconnected acts are not an act extending over a period.

3.23. The wording of s 120 is significantly different from its various predecessor Acts. The Tribunal may consider a claim it is just and equitable to do so. The guidelines on exercising that discretion are still best described in British Coal Corporation v Keeble [1997] IRLR 336. The length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom and the extent to which the quality of the evidence is impaired by the passage of time are all relevant considerations. Fault of an advisor is not of itself fatal (see Chohan v Derby Law Centre) . Using internal proceedings is not **in itself** an excuse for not issuing within time , Robinson v The Post Office but is a relevant factor.

3.24. A Tribunal must consider evidence of acts beyond the claim upon which it adjudicates which points to proscribed grounds being, or not being , the cause of acts of which complaint is made, as established in Chattopadhay-v-Holloway School, Din-v-Carrington Viyella, explained by Mummery J in Qureshi v Victoria University of Manchester from which Sedley LJ quoted in Anya-v-University of Oxford. In our view we should approach the time limit issues after, not before, the merits issues.

4 Submissions and Conclusions

4.1. Mr Tinnion started his cross examination by asking the claimant why, after all these years, he maintained his harassment claim , to which the claimant replied the court case was about what the respondent did not do which it should have, whereas this case was about what they did which they should not have. That puts it fairly well.

4.2. Mr Tinnion breaks the claim down in his submissions thus:
First, C was harassed by being sent "unfounded written warning letters".
Second, C was harassed by being compelled to complete an ill-health retirement assessment application (after expressing the fact he did not want medical retirement).
Third, C was harassed by being pressured to attend his Capability hearing (combined with a complaint about the fact it was originally scheduled to take place on the anniversary of the 1 October 2011 incident).
Fourth, C was harassed by a phone call A NUTTON made on 17 October 2013 in which he asked if C was attending the Capability hearing.
Fifth, C was harassed by being pressured by the Director General of the High Security Estate to attend his own Dismissal Appeal hearing (combined with a complaint about C's wife not being allowed to attend C's Disciplinary Appeal hearing).

4.3. In our judgment he takes slightly too strict a view of the wording of the pleaded claim. Point 1 includes all alleged harassment about contact responsibilities including the 50% reduction of compensation, not just the letters . Point 4 includes the call came after his wife told Ms Liddell on 4 October 2013 why he would not be attending. Point 5 includes holding the appeal in Wakefield.

4.4. We agree with Mr Tinnion that (a) other than a dispute about whether the claimant returned (or tried to return) all calls made to him in 2012-2013 there are few material factual disputes and (b) Mr Brien did not put to SO's Gartside or Nutton the contact "log" was fabricated misleading or incomplete despite the claimant so hinting in his evidence. Also Mr Brien confirmed purposive harassment is not alleged.

4.5. Mr Tinnion makes what he calls "*broad submissions*" one of which we now set out with our reason for firmly rejecting it

First, the Prison Service is a large organisation with thousands of employees, and tens of thousands of prisoners to care for. It is inevitable that an organisation of that scale and public importance will create policies and procedures which it will then try to apply in practice - an 'ad hoc' approach is plainly neither workable nor desirable. This matters because many of C's complaints about the support he was provided during his period of sickness absence appear to relate to the fact that they were 'box ticking' exercises and not personalised to him. To some extent, this was unavoidable.

It was not unavoidable. Had the input offered by Ms Butler not been rejected as irrelevant, it would have produced a very different outcome. Had Ms Liddell, as Head of HR, responded to the claimant's attempts to contact her and taken a grip of a situation which was not normal , the respondent , as an organisation, may not stand accused of harassment. However, we must not allow our view to obscure the legal tests

4.6. As for claim 1, SO Gartside started contact immediately, persisted and warned the claimant within 10 days of his absence starting he was not fulfilling his obligations. He would do so to anyone who was absent, disabled or not. The notes in the contact log about walking in Scotland and working in Otterburn show the SO's thought the claimant, like probably others on sick, had to be checked on. A person with a broken leg would not get better any quicker for being contacted weekly but the SO's will contact everyone, unless they are hospitalised, because that is what they are told by policy and HR to do. It is hard to see disproportionate adverse effect of this practice on disabled people generally so a s19 claim would probably fail. The claimant did not himself, or via his union, raise at the time why this practice was causing him particular problems so a s.20 claim would probably not overcome a Schedule 8 defence. In effect, we are now being asked to treat what was a s 20 claim as infringing s26. Doubtless it did distress the claimant and create a hostile environment for him but (a) the conduct itself does not relate to disability, but to absence and (b) objectively frequent contact is not unreasonable even though its main purpose is to ensure those on sick really are too unwell to work and (c) he did not make the claim within time. Mr Tinnion says the claim should be confined to unfounded written "*warning*" letters and is plainly out of time. The first letter was sent on 13 July 2012. The second letter is dated 17 July 2013 (149), which the claimant presumably read no more than a few days later. Any 'continuing act' here must have ended after the second letter and it would not be just and equitable to extend time. The reduction in compensation was in October but we struggle to see that as conduct which relates to disability. In short, this is the wrong claim at the wrong time, so it fails.

4.7. The same does not apply to claim 2. Working in a prison like Frankland is a demanding job for which an officer must be of sufficiently good physical and mental health not to be absent frequently or for long. It appears Governors at all levels at Frankland do whatever is necessary to run the prison well, which is laudable. The HR officers, particularly Ms Liddell, appear to aim to deliver whatever the Governors want and CM's and SO's obey orders and follow policy. If an officer says he cannot cope for mental health reasons, some think he must be making an excuse, whilst others think if he is genuine, he is of no use to the prison service. Either way, the claimant was pushed down the IHR option which clearly " relates to " disability as anyone who satisfy the eligibility criteria for IHR would , having regard to such cases as SCA Packaging –v-Boyle 2009 ICR 1056 and Banaszczyk v Booker Ltd 2016 IRLR 273 be a disabled person.

4.8. The Disability advisor, Ms Butler, was viewed as only useful to advise on aids and adaptation for physical impairments . Managers at all levels show no sign of having absorbed

any training of equality, if any, they may have received. In many respects information was not shared when it should have been hence SO Nutton did not know the claimant was not attending his capability hearing for medical reasons. The SLE application was a fiasco.

4.9. Society expects prison officers, like members of its armed forces , the police and other emergency services, to put themselves at risk . If they are so injured in the line of duty that they are permanently incapable of work they may qualify for IHR. The fact the claimant was later given IHR and his civil case for compensation has been settled does not detract from the harm done to him by writing him off as a hopeless case for rehabilitation to some work long before he or any medical advisors were ready to do so . It is that which violated his dignity and created a hostile environment for him and it is entirely reasonable it would. The so called "eggshell skull rule" is relevant to reasonableness of effect, and will be to remedy.

4.10. Mr Tinnion argues the claimant's attitude to being asked to complete an IHR application changed over time, from (i) an initial period in 2012 and part of 2013 when he was opposed to making one, to (ii) a period starting **no later than early September 2013** when he accepted (following advice he trusted) it was in his own interests to do so. Since harassment relates only to unwanted conduct, Mr Tinnion says the only acts complained of can be in the earlier period, which since it predates 20 September 2013 means it is out of time. Ingenious though this argument is, we are not convinced acceptance of his union's advice makes the conduct "wanted" but even if this claim is out of time, it is only by a few weeks at most.

4.11. He adds it is not just and equitable to extend time because (a) the claimant had the benefit of trade union advice throughout at the time he was trying to reach a solution before issuing proceedings (b) it is necessary his witness statement should put forward grounds for us to extend time because the burden rests on him to show it is just to extend time, not on respondent to show it is not, and (c) there is prejudice to the respondent in having to answer in February 2020 complaints about matters which occurred in 2012 and 2013

4.12. We reject these submissions . On point (a) , for many years Parliament has tried various means to ensure before employees rush to a Tribunal, they try to resolve problems internally. That is what the claimant and Mr Redford were doing . The claimant was in no fit mental state to be making fine decisions on when to issue and even if , which we do not accept, Mr Redford should have pressed him to, applying Chohan v Derby Law Centre we are not willing to say there were not good reasons for any delay If we do not exercise the discretion, patience before bringing proceedings to allow the respondent the opportunity to remedy the situation would result in a decision that great wrong was done to a claimant but he can have no remedy because he waited too long. That is not just or equitable. On point (b) the discretion is for us to exercise and our decision may be made based on the facts we have found and submissions without the point being in a witness statement . On point (c) it is the short delay in bringing the claim to which we must have regard not the delay in it being brought to trial which is the fault of neither party. This case passes all the tests in Keeble for extending time

4.13. Claims 3-5 have common elements as all relate to the claimant feeling harassment from the effects of being "forced", as he sees it, to attend meetings. The respondent denies improper pressure was put on him to attend the capability hearing, including SO Nutton's phone call on the day before it, or to attend his appeal. Due to the importance of the both to his career, it was in his own interests to attend if he could. The first indication he would not attend was by letter dated 18 September 2013. Ms Liddell's response on 25 September 2013 (170) expressing her "disappointment" and adding "*I would be grateful if you could provide me with a letter from your consultant stating this* " was reasonably read by the claimant as her doubting

the truth of what he said. He was perfectly entitled under the Human Rights Act to think his medical records should be for the eyes only of people who need to see them to understand his condition. Ms Liddell said earlier they would not be seen by HR then asked for medical corroboration of the claimant saying he was too ill to attend. The last line of Professor Martin's report was all she needed to see, but the claimant has even through these proceedings been strongly criticised for sending a heavily redacted document.

4.14. As the meetings related to disability, the conduct might be seen to relate to it also, but we find it was only "in the circumstances of disability" as Eady J. said in *Private Medicine Intermediaries Ltd. v Hodkinson*.If we are wrong and the conduct is related to disability, the claimant passes the subjective test but in all the circumstances not the objective. We agree with Mr Tinnion the respondent was taking a prudent course of action in case the claimant later asserted unfairness of his dismissal due to it being decided in his absence. Governor Fox's 30 September 2013 letter canvassing (i) holding the meeting by telephone (ii) the claimant being represented by his POA representative or a workplace colleague or (iii) making written submissions, concluded: "*Please let me know your preference for taking this matter forward and if it is with written submissions, please send them to me prior to the scheduled meeting*." This was intended to give the claimant a choice of means by which he could meaningfully participate without being physically present. On 4 October 2013, his wife informed the respondent of the arrangements the claimant wanted which the respondent then confirmed in writing (173). However, we agree it was appropriate for SO Nutton as his line manager to call to check on the situation before the hearing. SO Nutton should have been told there was no need to. Checking, and checking again, the claimant was content for his future to be decided in his absence was sensible and reasonable. The letter does not ask him to reconsider his decision, or warn of any adverse consequences if he chose not to attend.

4.15. No pressure was put on the claimant to attend the appeal hearing at HMP Wakefield. His wife was allowed to attend but not be physically present in the room during the hearing itself. The claimant was accompanied by CM Redford and his own presence to give instruction helped his case. The sheer incompetence as various stages and insensitivity to the claimant by his managers and HR up to and including dismissal is staggering. This is contrasts with his treatment by Mr Vince, but even he could not then look for redeployment opportunities elsewhere in the service, let alone the wider civil service. These two parts of the claim fail. However, the one which has succeeded is what caused the claimant the greatest injury to feelings. We have fixed a one day remedy hearing on the basis we will only be dealing with argument about injury to feelings, aggravated damages and interest . If we are to be faced with any claim for direct financial loss or exemplary damages the parties must inform the tribunal soon as the remedy hearing may take longer.

Employment Judge Garnon
Date signed 28 February 2020