EMPLOYMENT TRIBUNALS

Claimant: Mr M Johnson
Respondent: Secretary of State for Justice

Heard at: Leicester by Cloud Video Platform
On: 11 – 13 January 2021
Before: Employment Judge Blackwell
Members: Mr G Austin
Mr S Hemmings

Representation
Claimant: Ms J Wilson-Theaker of Counsel
Respondent: Mr R Talalay of Counsel

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:-

1. The complaint of indirect discrimination pursuant to section 19 of the Equality Act 2010 (the 2010 Act) is dismissed on withdrawal by the Claimant.

2. The claim of a failure to make reasonable adjustments pursuant to sections 20 and 21 of the 2010 Act succeeds.

3. The claim of unfair dismissal pursuant to sections 94 and 98 of the Employment Rights Act 1996 (the 1996 Act) succeeds.

4. The claim of direct discrimination pursuant to section 13 of the 2010 Act fails and is dismissed.

5. The claim of discrimination pursuant to section 15 of the 2010 Act succeeds.

RESERVED REASONS

1. Miss J Wilson-Theaker of Counsel ably represented the Claimant who she called to give evidence.

2. Mr R Talalay of Counsel equally ably represented the Respondent and he called Mr J Donaldson, the Governor of HM Prison Leicester, and Mr L Starkey, the Security Custodial Manager at the same Prison. There was an agreed bundle of documents and references are to page numbers in that bundle. We repeat that we are grateful to Counsel, both for the manner in which they conducted the proceedings and for their detailed and helpful written and oral submissions.

Introduction

3. There was an agreed list of issues but after the first day of the Hearing the Claimant withdrew his claim of indirect discrimination and it is therefore dismissed. There remained, therefore, claims for
   - unfair dismissal
   - direct disability discrimination
   - discrimination arising from disability
   - a failure to make reasonable adjustments.

4. We will deal with each of these claims in detail in our conclusions. It was common ground that the claim of a failure to make reasonable adjustments was central and we deal with that issue first.

Findings of fact

5. Mr Johnson began his employment with the Respondent in January 1999 as an Operational Support Grade (OSG) at Glen Parva Prison until it closed in 2017. As a consequence, he therefore transferred to HMP Leicester on 25 July 2017.

6. Mr Johnson had to learn a new set of skills because on arrival at Leicester he moved to the operational side.

7. At pages 142 and 143, is the job description of an OSG. There is reference in that job description to a role in the Emergency Control Room. That is the same as the Communications Room (CR), which is the description used throughout the documents in this case.

8. Leicester is a relatively small community prison with a high turnover of prisoners. Glen Parva was more than twice as big. At the relevant times at Leicester, there were 22 OSGs, which reduced to 20 shortly after Mr Johnson's dismissal. There were also some 104 prison officer grades, which increased to 106 to compensate for the loss of 2 OSGs.

9. It is common ground that Mr Johnson is disabled within the meaning of section 6 of the 2010 Act. He has a physical impairment, namely Obstructive Sleep Apnoea (OSA). OSA is a serious condition where the muscles in the throat relax

during sleep causing the suffer to temporarily stop breathing. If untreated, it can occur a hundred of times in a night, leading to daytime fatigue and other serious health problems. It is further accepted by the Respondent that Mr Johnson had that disability throughout the relevant period, ie from 1 October 2018 to his dismissal on 25 July 2019.

10. Late in September 2018, Mr Johnson was informed that he would be required to undertake training so that he could perform the CR role. He had not previously worked in the CR, either at Glen Parva or at Leicester. He believed that it would be unsafe for him to work in the CR because it was a sedentary role working alone, which required concentration with potential life or death consequences if vigilance was not maintained and prompt action taken.

11. Mr Donaldson took up his post as Governor of HMP Leicester in November 2018. There was a policy already in place that all OSGs should be trained so that they could carry out any of the OSG roles. Mr Donaldson continued to implement that policy from his arrival onwards. In regards to the CR, it took until November 2019 for all OSGs to be trained in that particular role.

12. Mr Johnson concluded that if he carried out the training, he would then be detailed to the CR. Both Mr Starkey and Mr Donaldson confirmed that that conclusion was accurate. Mr Johnson then met his line manager, Mr Starkey, on 1 October 2018. It was at that meeting that Mr Johnson first disclosed that he had the impairment of OSA.

13. Quite properly as a consequence, Mr Starkey referred Mr Johnson to Occupational Health and we see the first report at page 153, which was carried out on 10 October 2018. In summary, that report recommended that Mr Johnson was not to work in the CR but took the view that Mr Johnson's symptoms would resolve.

14. Mr Johnson was placed on restricted duties from about 25 October 2018, which he first learned of when he was told that he was not eligible for overtime duties. The restricted duties were "*No prisoner contact; security duties; gate OSG*".

15. Mr Johnson immediately asked to see Mr Starkey and it is common ground that Mr Starkey told Mr Johnson that all OSGs would need to do all OSG roles. Mr Johnson says that he told Mr Starkey that no single OSG performed all the OSG roles. Mr Starkey says he invited Mr Johnson to put the facts in writing so that management could respond.

16. On 5 November 2018 at page 164, Mr Johnson raised a formal grievance and referred to three OSGs, a Miss Severn who would not do laundry duty, a Miss Hayes who would not do nightshifts and a Miss Guess who had never worked in the CR.

17. A second occupational health report was carried out on 14 December 2018 and it reached similar conclusions on Mr Johnson's capacity for work but it differed from the first report in indicating that the symptoms would persist.

18. On 17 December 2018, Mr Johnson's grievance was not upheld.

19. On 18 December 2018 came the first Formal Attendance Review Meeting (FARM) and the invitation is at page 211 and the invitation was to discuss:-

    19.1 What we deem to be reasonable adjustments
    19.2 Ability to complete full and effective service in a reasonable time frame.

20. The FARM took place on 10 January 2019. There is no written record but Mr Donaldson who conducted the Meeting accepts that he reiterated the policy that all OSGs would be required to carry out all OSG duties. Mr Johnson reiterated that in his experience no OSG did all OSG duties and he specifically referred again to Miss Guess. Both agreed that the two occupational health reports were contradictory and that a third was required.

21. On 20 February 2019, Mr Johnson was absent from work, certified as having work related stress. He never returned to work after that date.

22. On 5 March 2019, there was a third occupational health report. It recorded:-

> "*Mr Johnson reports that he manages well with his duties but that he has concerns working in the Comms Room as this requires vigilance and concentration and that the ergonomics of the placement of the microphone, buttons and monitors means that duties are expected to be undertaken when seated.*"

23. As to Mr Johnson's current capacity for work, it records:-

> "*Mr Johnson is fit to remain at work but I would advise against him undertaking duties that are mainly seated as this may prompt sleepiness or that require prolonged periods of increased vigilance and concentration due to his ongoing symptoms.*"

24. At 245 in answer to questions put by management, the report states that Mr Johnson would struggle to undertake comms duties. It also recommends a workplace assessment.

25. On 29 April 2019, Mr Johnson raised further grievances, reiterating the complaints he had made in his first grievance and complaining about being put on restricted duties. There was a further occupational health report on 22 March 2019 suggesting an adjustment that he avoid sedentary work, such as in the CR, and that if this can be supported he could return to work immediately. On this particular point, both Mr Starkey and Mr Donaldson accept that Mr Johnson would have returned to work rapidly had he been assured that he would not be required to work in the CR.

26. There was yet another occupational health report on 4 April 2019. It concluded that there was a psychological vulnerability due to moderate anxiety and depression due to a perceived work issue.

27. There then followed a workplace assessment which was carried out on 20 May 2019 beginning at page 310. We do not have the instructions sent to the assessor because it was completed online by Mr Starkey using a drop box process. Mr Starkey says, and we accept, that he asked for all of Mr Johnson's sedentary duties to be assessed. Mr Johnson was not told of the remit of the assessor. In fact, only two roles were assessed, namely the CR and gate duties.

28. As to gate duties, that is dealt with very briefly at page 312 and concludes that that duty poses no issues for Mr Johnson.

29. As to the CR, there is a description of the environment of the CR at page 312, which paints a picture of a very unpleasant place to work.

30. At 313, the recommendation is to avoid prolonged sitting (sedentary behaviour). There is a recommendation that consideration is given to rotation of his tasks from standing to sitting positions.

31. It also recommended that a stress risk assessment be carried out and there was a further recommendation that Mr Johnson be referred to the Counselling Service. Neither of those recommendations came to fruition.

32. At page 317, Mr Starkey wishes to challenge the workplace assessment, criticising it as vague and suggests that it is necessary to expand comment on the recommendation of rotation of tasks.

33. At page 380, Mr Starkey makes the formal request to the assessor but there was no reply to that email.

34. At page 400, Miss Marshall of the Respondent's HR Department advises that it would be a useful piece of information in terms of reasonable adjustments if it could be ascertained how much of Mr Johnson's work was sedentary. Again, that was a suggestion that bore no fruit.

35. On 19 June 2019, Mr Johnson was invited to a second FARM (see page 381), the purpose of which was to discuss his absence from work since 21 February 2019 and his ability to provide regular and effective service.

36. We note that the letter of invitation anticipated that the second FARM would lead to a third FARM, which might conclude in dismissal. Mr Donaldson accepted that that was an error and the letter should have indicated that dismissal might be a consequence of the meeting to be held on 25 July 2019.

37. The transcript of the FARM held on 25 July 2019 begins at page 434. There was a discussion on pages 435 and 436 of the duties that might give rise to difficulty having regard to Mr Johnson's disability. It is fair to say from that discussion that Mr Johnson agreed that the duty involving the CCTV cameras during visiting times was of a similar nature to the work in the CR. As to the other duties, he maintained that he would be able to carry those out.

38. At page 438, we come to the crux of the discussion. Mr Donaldson begins by discussing reasonable adjustments as follows:-

> "*Okay. So, so one of the, one of the questions I'm … and I want … I've got to talk to you about is, the DDA and what that means and about not covering those roles. So, you know, from your perspective you can do the OSG role but just not Comms and possibly not Visit's camera. So, as part of that, you know, the profile for the OSGs and especially the weekend evening, there's only one OSG on duty and that person has to do Comms, because that's the role that there is, on the profile. So, for me to be able to look at different system for you, and this is consideration for the DDA, is for every time that you would come up which, over the shift cycle to be in that position and then that's the 7:30 to 9 o'clock through the week and 6 o'clock to 9 o'clock at the weekend, we'd have to get somebody else to cover that, because you wouldn't be able to fulfil that role.*"

39. He goes on:

> "*Yeah. So what that would also mean is that that would potentially impact on your red hours that you do, the unsocial hours element of the role. So, you wouldn't be fulfilling the 20% of your red hours, therefore there's potential I might remove the unsocial hours aspect of the pay.*
>
> …
>
> *So, I've considered whether that will be a reasonable adjustment that we could do, but I consider that would be detrimental to other staff on the group, because they would have to be extended on unsocial hours to cover those roles at the times that you … you know, if we put in place a, a different shift pattern for you to do it. There's also the fact that we can't just put a different shift pattern for one person because it's a, an odd … an even number group, we need to keep even numbers, and it would have an impact on another person that way. So, so that's why I feel that we can't do that, yeah.*"

40. In our view, that is the point at which Mr Donaldson came to the view that he would need to dismiss Mr Johnson.

41. Mr Donaldson went on:

> "*So that leaves me to, to talk to you about alternative roles. And one, one of things we talk about under a FARM meeting is whether there are any alternative roles that you could cover that would fit. So, as a Band 2, the alternative roles that we have are: Support Services Admin, which is an administrative role, Band 2, or Support Services Facilities which is stores, waste management, etc.*"

42. He goes on to say that there are no such roles available at Leicester at that point. He says he would explore whether there were roles at other local prisons

but Mr Johnson makes it clear that he is not interested in such an alternative role.

43. There was then an adjournment but Mr Donaldson then makes it plain that he is going to dismiss for medical inefficiency.

44. On the same date, Mr Donaldson writes to Mr Johnson beginning at page 409 confirming the decision to dismiss.

45. He concludes:

"*Having considered the medical reports and our conversation today, my decision is that I will be dismissing you on the grounds of medical inefficiency*, *due to your failure to provide regular and effective service, and return to full duties, this will be with compensation. I take absolutely no pleasure in this but your continued absence cannot be sustained, and there are no reasonable adjustments that can be accommodated to support a return to work.*"

46. The letter set out Mr Johnson's right to appeal and how he should do so but Mr Johnson did not take up that opportunity.

Conclusions

The section 20 claim

47. At the heart of all of the issues we have to determine is what Mr Talalay correctly described as an impasse. The impasse was that Mr Johnson refused to return to work until he could be assured that he would not be required to work in the CR. We accept that Mr Starkey made a number of efforts to persuade Mr Johnson to return, particularly at a time when there was no training course scheduled and thus Mr Johnson could not be detailed to the CR. Thus, as both Counsel recognise, the central issue is whether, having regard to sections 20 and 21 of the 2010 Act, the Respondent was under a duty to make a reasonable adjustment and, if so, what was that adjustment.

"**20 Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical

feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

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

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

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

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

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

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

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

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

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

(d) any other physical element or quality.

> **(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.**
>
> **(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.**
>
> **(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column**.
>
> **21 Failure to comply with duty**
>
> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."**

48. Thus, the first element is whether there was in place a provision, criterion or practice. It is common ground that the relevant PCP in this case is the requirement for all operational support grades at HMP Leicester to work in the Communication Room.

49. The next element therefore is whether Mr Johnson as a disabled person was put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Mr Johnson maintains that that substantial disadvantage was that he was unable to properly carry out roles which involves sitting for long periods of time as he becomes tired and unable to concentrate and react quickly and effectively.

50. Mr Talalay does not concede that that is a substantial disadvantage. He submits that the Claimant's ability to undertake the CR work has never been properly assessed. That may well be true but it is clear from the decision to dismiss that central to that decision was Mr Donaldson's view that, having regard to the various occupational health reports, Mr Johnson could not carry out a 4-hour shift in the CR. Mr Talalay goes on to submit that Mr Johnson was never asked to do an 8-hour shift. However, there was no evidence to suggest that he would not be asked to do an 8-hour shift were he to return to work. In our view, Mr Talalay's submissions on the point are not supported by the

evidence. Mr Donaldson clearly wanted all OSGs to be able to cover the anti-social shifts at the weekend and that would have entailed as a minimum a 4-hour uninterrupted duty in the CR. We think that this is a simple factual matter. It is common ground that the work in the CR is important and that concentration is required. Mr Johnson's disability meant that he could not perform that role and we find that he was at a substantial disadvantage in being required to carry out the CR role.

51. The third element then is what were the reasonable step or steps that should have been taken so as to avoid that disadvantage. Mr Johnson maintains that he should have been excused from performing work in the CR. The Respondent contends that that was not a reasonable adjustment to make. The reasons for that, which emerge from the transcription of the FARM held on 25 July, are Mr Donaldson's dismissal letter of the same date and Mr Donaldson's evidence as follows:-

51.1 The cost of covering 14% of Mr Johnson's shifts, those being confined to the anti-social hours over the weekend in the CR. The indication was that overtime would have to be granted and there was no budget for such overtime.

No figure was advanced for that extra cost and when asked how in the past such absences had been covered, Mr Donaldson indicated that he did not always have the budgeted number of OSGs and he was able to apply the salary of unfilled posts to cover that expenditure.

51.2 The effect on other OSGs of having to work extra anti-social hours so as to cover Mr Johnson's absences. Mr Donaldson gave no evidence as to the attitude of other OSGs. However, Mr Johnson's evidence on the point, which was unchallenged, is as follows:

> "*In relation to the response to my claim particular at paragraph 8 and 9 from page 30 of the bundle about the number of OSGs, yes there was a small number but as I recall about a third of them were trained and competent in Comms, so maybe 8 or 9 members of staff that were happy in fact more than happy to sit all day doing Comms and avoiding busier roles. Many of these were also happy to do overtime should there be a shortfall in the detail.*"

Further, during the whole of Mr Johnson's employment of two years, there was no evidence that there was any difficulty in covering the weekend CR shifts.

51.3 That there would be an effect on Mr Johnson's pay if he could not attain the 20% of hours worked that were required to be worked during anti-social hours. Again, that did not seem to have been a difficulty during Mr Johnson's employment at HMP Leicester.

51.4 That it would be difficult to devise a shift system given that they were based on an even number of employees so as to cover Mr Johnson's

absences over the weekend shifts. Mr Donaldson, who we accept has considerable experience of devising such shifts, maintained that position after being pressed on the point in cross-examination.

52. The test as to whether an adjustment is reasonable is an objective one but both Counsel drew our attention to the guidance at paragraph 6.28 of the EHRC Employment Code of Practice, which we recognise as guidance, suggests the following matters to be taken into account:-

(a) Whether any particular steps would be effective in preventing the substantial disadvantage. There is no dispute that if Mr Johnson was excused CR duties, he would have returned to work swiftly.

(b) The next matter is the practicability of the step. We have explored the practicability in the paragraphs above and we conclude that on balance it is practicable, notwithstanding Mr Donaldson's views that it would be difficult to create a workable shift pattern. We can only say that it had been done before, therefore it could be done again.

(c) The next matter is the financial and other costs of making the adjustment and the extent of any disruption caused. As we have said above, no actual costs were put before us.

(d) The next matter is the extent of the employer's financial or other resources; here we are of course dealing with the State. We recognise that the Respondent is a public body and must manage its financial resources carefully and in accordance with budgets. Nevertheless, once again during Mr Johnson's employment the financial resources had been found.

(e) The next matter, namely financial or other assistance from outside is not relevant.

(f) The type and size of the employer; again we have dealt with that.

53. There is a further factor to be taken into account that being as from November 2019, Mr Donaldson had 19 of his OSGs trained to carry out CR duties, which would have given him further flexibility over and above the position at the beginning of Mr Johnson's employment, ie 8 or 9.

54. We conclude on balance therefore that it would have been a reasonable adjustment to excuse Mr Johnson from CR duties.

55. The matter, however, does not end there because as Mr Talalay correctly submits the duty is to take such steps as are reasonable to avoid a disadvantage. He goes on to say that that does not mean where there are multiple ways of doing that, the Respondent is obliged to choose the one preferred by the Claimant and he refers to the case of ***Garratt v Lidl [UKEAT/0541/08/ZT***. He relies in particular on paragraph 19 of that decision.

In that case, the Claimant was a store manager who could not carry out all of her duties because of her disability. In order to avoid the substantial disadvantage that the Claimant was at, she was moved to a different store as a supernumerary because there were more staff on duty so that more flexibility for the Claimant could be given. Also in that case, the Claimant had a mobility clause in her contract which required her to work at any place within the United Kingdom on either a temporary or indefinite basis. In ***Garratt***, the EAT said as follows:

> "*Whilst within a large organisation it seems to us that there is no fetter on the adjustments best being achieved at an alternative place of work, it clearly makes good industrial sense for employers to consider first of all whether, if possible, those adjustments can be put in place at the existing workplace. However, we do not consider it unreasonable for employer to conclude, particularly where there is a mobility clause and the employee has worked at several stores, that the adjustments required can best be achieved by a move to another place of work. …*"

56. Thus, there are significant differences to the facts and findings we have made here. Firstly, we have concluded that it was possible for the Respondent to make the reasonable adjustment required by Mr Johnson at Leicester. Secondly, the reasonable adjustment contended for, namely a move to either Gartree or Olney Prisons in a non-operational role, would have required both more travelling time and distance for Mr Johnson. Further, there is no mobility clause in his contract of employment; indeed to the contrary – see paragraph 6:-

> "*The OSG is locally recruited and a non-mobile grade.*"

57. In those circumstances, we do not consider that it would have been a reasonable adjustment to require Mr Johnson to give up an operational role and to move to another prison.

58. Mr Talalay also puts forward a second alternative adjustment namely, as we understand his paragraph 40i, that he prays in aid the discussion that took place between Mr Starkey and Mr Johnson on 3 June 2019 as recorded at page 431. In our view, that does not as a matter of fact support Mr Talalay's submission. At no time was the specific proposal put to Mr Johnson to try a period of work in the CR. It was plain all along that once Mr Johnson was trained, he would be detailed at the very minimum for 14% of his shifts to work in the CR during the antisocial hours at the weekend and that would have entailed at the minimum a 4-hour shift. We therefore reject that as a reasonable adjustment.

59. It therefore follows that the Respondent is in breach of their duty under section 20.

<u>Direct discrimination</u>

"13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7)."

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

(4) The reference to a contravention of this Act includes a

reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

…"

60. We have found this the most difficult of Mr Johnson's claims to determine. It is rare for there to be an arguable direct discrimination claim on the basis of the protected characteristic of disability but this is clearly such a case.

61. The less favourable treatment complained of is the dismissal itself.

62. The normal approach for a tribunal is to look at the reason why the employer acted as it did. That requires us to make findings as to what was in Mr Donaldson's mind when he dismissed Mr Johnson on 25 July 2019. It appears to us that it is a combination of three matters, all of which are clearly linked.

(a) That Mr Donaldson would not put in place the reasonable adjustment which we have found that he should have. That meant that Mr Johnson would not carry out CR duties and probably also CCTV (visits) duties.

(b) As set out in the letter of dismissal; "*Medical inefficiency due to failure to provide regular and effective service and return to full duties*".

(c) Thirdly, the recognition that the absence from work with work related stress would have swiftly ended if the reasonable adjustment required by Mr Johnson was put in place.

Clearly, all of these matters have a link to Mr Johnson's disability.

63. Ms Wilson-Theaker points to a number of written comments by Miss Noton-James, which we agree appear to take a confrontational approach to Mr Johnson's absence.

64. Further, we agree that Mr Donaldson's approach was to a degree inflexible and we note that on a number of occasions there emerged in his evidence a willingness to put in place a reasonable adjustment in the short-term but not the long-term. We further agree that the requirement for all OSGs to undertake Comms Room duties was at the front of Mr Donaldson's mind.

65. Ms Wilson-Theaker also points to two direct comparators. A Miss Hayes, an OSG who did not undertake nightshifts and we accept that that is relevant because that was the case at the time of Mr Johnson's dismissal. Ms Wilson-

Theaker also refers to a Miss Severn who did not undertake laundry work.

66. However, we remind ourselves of section 23 of the 2010 Act, as follows:-

> **"23 Comparison by reference to circumstances**
>
> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**
>
> **(2) The circumstances relating to a case include a person's abilities if—**
>
> **(a) on a comparison for the purposes of section 13, the protected characteristic is disability;**
>
> **(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.**
>
> **…**"

67. Mr Talalay submits that the only comparable OSGs are Miss Guess and Miss Jones. He points out that both acceded to the Respondent's requirement to train to do CR work and both did indeed carry it out.

68. In the circumstances, we are not satisfied that a prima facie case has been made out and if we are wrong about that, in our view we find that the dismissal was related to Mr Johnson's inability to carry out CR work and also CCTV (visits) work rather than his disability itself.

<u>Discrimination arising from disability</u>

> "**15 Discrimination arising from disability**
>
> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**"

69. There are two elements of alleged unfavourable treatment, the first being the placing of Mr Johnson on restricted duties between October 2018 and

December 2018. This is the only area where there is a jurisdictional point.

> **123 Time limits**
>
> **(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(2) Proceedings may not be brought in reliance on section 121(1) after the end of—**
>
> **(a) the period of 6 months starting with the date of the act to which the proceedings relate, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(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.**

70. It is common ground that this claim is out of time unless either it is a continuing act or we exercise our discretion to permit further time. It is common ground that if it is not a continuing act, the claim is some 2½ months late.

71. Ms Wilson-Theaker argues that the decision to place Mr Johnson on restricted duties is inextricably linked with the failure to put in place the reasonable adjustment which eventually led to the dismissal.

72. She directs us to the case of ***Dr V Lyfar v Brighton & Sussex University***

Hospitals NHS Trust [2006] EWCA Civ 1548*,* being a decision of the Court of Appeal. The Court of Appeal approved the following in relation to acts extending over a period:-

> "*She is in my view entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'. …"*

73. Further:-

> "*The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. …"*

74. In our view, the placement on restricted duties is a separate act not evidence of a continuing state of affairs and time began to run in December 2018.

75. The question therefore arises whether it would be just and equitable to extend time. Because Ms Wilson-Theaker relies upon the argument that it was a continuing act, there is no explanation for the delay. We further note that Mr Johnson at the relevant time had the support of the Prison Officers' Association. In the circumstances, therefore, we decline the exercise our discretion in favour of Mr Johnson and the section 15 claim in respect of restricted duties is dismissed because we do not have jurisdiction to hear it.

76. Turning now to the second allegation of unfavourable treatment, namely the dismissal. It is common ground that dismissal is unfavourable treatment. Thus, the second matter to be determined is whether the unfavourable treatment was because of something arising in consequence of the disability. Mr Johnson asserts that the something arising was in the circumstances that the Claimant was unable to quickly react and respond to situations, which was clearly a consequence of his disability.

77. We once again adopt the reasons for dismissal set out above at paragraph 62. Mr Talalay helpfully points us to the guidance of Simler J in ***Pnaiser v NHS England [2016] IRLR 170 at paragraph 31***. Mr Talalay further submits that the Claimant's absence from work at the time of dismissal was as a consequence of work related stress and did not constitute a disability. He further goes on to say the stress was caused by an impasse over something that the Claimant was entirely capable of doing, namely training, and to which his disability was not directly material.

78. We do not accept those submissions. As we have said on several occasions, the Respondent accepted that had they put in place the adjustment required by Mr Johnson, he would have returned rapidly to work. It follows therefore in our view that there is sufficient of a link to establish that the dismissal was something

arising in consequence of Mr Johnson's disability.

79. The next matter therefore is whether the Respondent can show that the dismissal was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b).

80. In summary, the legitimate aim advanced by Mr Talalay based on Mr Donaldson's evidence was that all OSGs should be first trained in all OSG roles so that they could then be detailed to any OSG role as required.

81. We have some difficulty with that proposition in that it seems to make no allowance for employees with disabilities. Thus, broadly stated, we do not accept that it is a legitimate aim.

82. However, if we are wrong about that, was the dismissal a proportionate means of achieving that aim? Mr Talalay's submission appears to be that it was the only choice left open to the Respondent given Mr Johnson's refusal to return to work. We reject that submission on the same basis that we have found the Respondent was under a duty to make an adjustment. Therefore, in our view the section 15 claim in respect of the dismissal succeeds.

Unfair dismissal

"**98 General.**

(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,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his

employer) of a duty or restriction imposed by or under an enactment.

...

(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.

83. The first matter to be determined is has the Respondent established a potentially fair reason for Mr Johnson's dismissal? Mr Talalay advances capability as that reason and that is not disputed by Ms Wilson-Theaker. Thus, we have to determine whether, having regard to subsection (4) of section 98 and the test of the band of reasonable responses, whether the dismissal was fair or otherwise.

84. Mr Talalay refers us to the case of ***McAdie v Royal Bank of Scotland [2008] ICR 1087***. In that case, the Claimant had also refused to come back to work. Mr Talalay also refers us to the Attendance Management Policy and submits that that Policy was followed. In particular, he refers us to paragraph 2.90 at page 124. We further accept his submission that the decision to dismiss was not predetermined, though it was clearly inevitable if the impasse could not be resolved. Thus, Mr Talalay says that because the approach was in line with its policy, he refers us to ***Kelly v Royal Mail Group*** as follows:

> "*It would be surprising if conduct, which is in line with policy, in particular one that has been expressly agreed with the relevant trade union, was to be regarded as unfair. …*"

85. Ms Wilson-Theaker in her submissions refers us to the evidential dispute which has arisen during the hearing as to precisely which duties Mr Johnson was capable of performing. In our view, he was capable of performing all of the roles save that in the CR room and the CCTV (visits) duty. In our view, those two duties are similar. We accept that the CCTV duty is of shorter duration but it requires similar levels of concentration and vigilance and the consequences of a lack of vigilance are, in our view, similar.

86. However, it seems to us that this has little impact on the question of fairness. As we have said before, it is common ground that Mr Johnson would have been medically capable of working if his required adjustment had been made. Again,

we accept that Mr Donaldson's requirement to implement the policy decision to have all trained OSGs carrying out all OSG duties was the dominant feature in his reasoning. Ms Wilson-Theaker points us to a number of other inadequacies in the Respondent's knowledge. For example, they did not analyse what percentage of Mr Johnson's duties were sedentary. They did not analyse the likely impact on the additional unsocial hours for other OSGs would be. Further, again as we have said above, there is no evidence of determining the actual cost of accommodating Mr Johnson's required adjustment.

87. We also take into account that at all times up to Mr Johnson's dismissal, there was clearly a widespread practice, surprisingly not known to either Mr Starkey or Mr Donaldson, of OSGs swapping shifts between themselves so as to do the work that they preferred to do.

88. Again, at the root of the decision to dismiss is the effect of the impasse. We have already found the Respondent to be in breach of their section 20 duty and we have found that the dismissal was discriminatory pursuant to section 15. Thus, in our view the dismissal was substantively unfair. It is not therefore necessary to determine the Claimant's allegations of procedural unfairness.

89. That leaves contributory fault as the only outstanding issue. We note that no compensatory award is being sought by Mr Johnson. Therefore the relevant provision is subsection (2) of section 122 of the Employment Rights Act 1996, this:-

> **122 Basic award: reductions.**
>
> **…**
>
> **(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**"

90. Contributory conduct must both contribute to the dismissal, ie there must be a causal link, and, further, that conduct must be blameworthy. Mr Talalay advances the Claimant's failure to engage at all with the Respondent's proposals and refusing to be trained in comms. However, the Respondent has throughout accepted that it would be unsafe for Mr Johnson to work shifts in the CR.

91. He advances the failure to engage properly with the occupational health assessments and, further, by not raising concerns about other sedentary roles. We have to say that this assertion is simply not supported by the evidence.

92. Thirdly, he advances Mr Johnson's failure to return to work in light of Mr Starkey's assurance on 1 May that he would not be allocated to the Comms

Room at that time as he was not trained and there was no upcoming training course. In our view whilst there is a causal link between that and the dismissal, it was not blameworthy conduct because although we accept it would have meant that Mr Johnson would not be required to work in the CR until he was trained, nevertheless it did not address the impasse between the parties.

93. Finally, Mr Talalay advances Mr Johnson's alleged failure to again engage at all with the attempts by Governor Donaldson to seek suitable alternative work in other prisons. It seems to us, having regard to the transcript notes of the dismissal meeting and in particular at page 438, that the decision to dismiss Mr Johnson from his employment as an Operational OSG had already been taken because Mr Donaldson had rejected the reasonable adjustment advanced by Mr Johnson and both parties knew at that point that dismissal from that role had effectively taken place. We accept that Mr Johnson did not engage in considering alternative employment and that would normally be a factor in determining the compensatory award. However, as we know in this case, Mr Johnson does not advance a claim for such compensation.

94. We therefore conclude that Mr Johnson did not engage in any conduct which would require the basic award to be reduced.

Remedy

95. Given that the only two issues for determination are the basic award, which is purely an arithmetical calculation, and the award for injury to feelings, we would hope the parties can come to terms.

96. If that is not possible, then the Claimant must within 28 days of the date of this Judgment apply to the Tribunal for a remedy hearing.

_____
Employment Judge Blackwell
Date: 27 January 2021

JUDGMENT SENT TO THE PARTIES ON

29 January 2021
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FOR THE TRIBUNAL OFFICE

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