EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR CHARLES THEOPHILE		SECRETARY OF STATE FOR JUSTICE

Heard at: London Central, by CVP

On: 4, 5, 8 February, 2021

Before: Employment Judge O Segal QC
Members: Ms J Grant; Ms P Slattery

Representations
For the Claimant: Mr S Brittenden, Counsel
For the Respondent: Ms S Idelbi, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The claim of unfair dismissal is rejected.

(2) The claims pursuant to ss. 15 and 20, 21 Equality Act 2010 succeed.

(3) The Respondent is to pay the sum of **£26,139.32** to the Claimant by way of compensation for pecuniary loss and injury to feelings.

REASONS

1. The Claimant brings claims arising out of the Respondent's decision to dismiss him on grounds of capability ('medical inefficiency'), with substantial compensation, on 4 March 2019.

2. Both parties were represented by counsel. We express our gratitude for the way in which they conducted the proceedings.

Evidence

3. We had an agreed bundle. We had witness statements and heard live oral evidence from:

    3.1. the Claimant;

    3.2. Ms Sara Pennington, Governor of HMP Wormwood Scrubs at the time;

    3.3. Ms Donna Taylor, Industries Manager at HMP Wormwood Scrubs at the time and the Claimant's line manager from January 2018.

4. We do not hesitate to say that all three of those witnesses were doing their best to give honest, accurate and helpful evidence to the tribunal.

Facts

5. There were very few disputed primary facts. We are therefore able to set out the relevant facts fairly shortly.

6. The Claimant was employed from January 2004 by the Respondent at HMP Wormwood Scrubs, a Category B men's prison; at the material time as a Specialist Instructor in the repair and recycle workshop ('the Workshop'). In that role he was required to instruct prisoners in the usage of hand tools to enable them to repair broken furniture and to make mainly garden furniture from pallet wood.

7. The Respondent described the Claimant as *"incredibly skilled"* and good at this job.

8. The Claimant suffers from longstanding back pain following an accident at work on 23 March 2009. Since then his pain has been persistent, though variable, with what he

describes as 'flare ups' or 'episodes' from time to time. From at least 2016, he has not been able to stand comfortably for much more than 30 minutes, has not been able to sit or walk for long periods of time, or safely lift heavy weights.

9. Having been reassigned for a period to other duties, the Claimant went back to work at the Workshop in about 2015. He told us that at that time he informed the Respondent that he would only continue working if he worked in the Workshop, that was *"the only job I'd come back for"*.

10. The Respondent accepts that at the material times the Claimant's back condition amounted to a disability within the meaning of the Equality Act 2010 ('the Act').

11. Between October 2017 and May 2018, the Claimant worked reduced hours of 4 days a week instead of 4½ days a week, on the advice of Occupational Health (OH). This was achieved by him not coming in to work on Friday mornings (he did not work Friday afternoons in any event). The effect was to reduce the amount of journeys and extend his weekly rest period.

12. In May 2018, an application to confirm or make permanent that adjustment was refused, following an OH Report, on the somewhat odd basis that *"Occupational health have advised that whilst your 4 day working arrangement assists you in managing pain, resuming 5 days a week will not have a detrimental impact on your underlying condition"*. The adjustment had always been sought and permitted on the basis of improving the Claimant's symptoms and reducing the risk of absence from work caused by those symptoms increasing. That basis applied no less in May 2018 than in October 2017; and there was no evidence of changed business needs between those dates. We note that Ms Taylor herself did not recommend turning down the Claimant's application and did not participate in the decision to do so.

13. Thereafter, the Claimant continued working 4½ days a week, including Friday mornings; and did not renew his application for reduced hours, even at his final meeting where he was told he was to be dismissed.

14. A risk assessment of the Workshop provided for a ratio of no more than 10 prisoners per Instructor. Attendance by prisoners at the workshop was regarded as a valuable part of a regime of up-skilling, rehabilitation and productive work (part of the work

done there was to make or repair furniture for the cells); and naturally the Respondent needed to maximise the use of the Workshop by prisoners.

15. Generally, there were two Officers present: the Claimant and a colleague, Mr Josh Baltrop, referred to during the hearing as 'Josh'.

    15.1. The Claimant was a Band 4 and his responsibilities included training and instructing the prisoners.

    15.2. Josh was a Band 3 (a less senior grade) and we were told that his job description did not include training and instructing the prisoners.

16. When both were present, at least since 2016, they split their tasks in part to accommodate the Claimant's disability.

    16.1. Such heavy lifting as was needed (the prisoners themselves did most of that) was done by Josh, although the Claimant sometimes helped to move pallets into the Workshop.

    16.2. More importantly, the searching of prisoners (which involved bending, twisting, etc.) was done by Josh, which, according to the Claimant, suited him in allowing him easier access to a cigarette break. This searching was a fundamental task, generally at the end of the prisoners' time in the Workshop, to ensure inter alia that no tool was secreted on their person.

    16.3. Taking the prisoners to the wings in order to install furniture in cells was almost always done by Josh.

    16.4. The Claimant, he told us in oral evidence, *"did the designs and measurements"* and other paperwork, as well as instructing the prisoners on using the tools etc.

17. It was common ground that the Workshop allowed for an Instructor to sit, stand and move about relatively flexibly.

18. At least latterly, the Workshop was in the same building as another workshop, linked by an interlocking door; and assistance could be requested from that other workshop when necessary.

19. When only one of the Claimant and Josh was present in the Workshop, as indicated above only up to 10 prisoners could be present.

20. Although we heard no evidence of what happened when the Claimant was absent (on annual leave or sick, or on Friday mornings for the relevant period), presumably there could be no instruction/training of the prisoners in using tools, etc.

21. When Josh was absent (typically on annual leave), at least until near the end of his employment the Claimant did the necessary searches, despite the risk of exacerbation of his symptoms, and occasionally accompanied prisoners to take furniture to the wings.

22. There was a dispute of evidence as to the impact specifically of the Claimant's absence on Friday mornings between October 2017 and May 2018 (strictly, between January 2018 when Ms Taylor arrived and May 2018).

    22.1. The Claimant said that the impact was negligible. If Josh were absent on a Friday, the Claimant would come in so the Workshop could remain open. If Josh were present, there would be no impact on prisoner numbers because Friday mornings were used to do a necessary weekly clean of the workshop and there were never more than the maximum 10 prisoners allowed who wanted to attend.

    22.2. Ms Taylor said that the Workshop did have to close sometimes and that sometimes prisoners had to be turned away because more than 10 wanted to attend (she also did not accept that Friday mornings were always used to clean the Workshop).

23. We cannot be confident in resolving this dispute as to the details of what was happening more than two and a half years ago. In so far as is necessary to do so (which is doubtful), we prefer the Claimant's evidence in relation to the period up to May 2018 on the basis that he was more likely to remember from that period because it was of particular importance to him; but it may be that at a later time (when the Claimant was working Fridays, and in particular perhaps after the site of the Workshop moved in late 2018, we were told, to larger premises) Friday mornings were used to do work other than cleaning and that sometimes there were more than 10 prisoners attending or wanting to attend.

24. The Claimant had no time off sick between November 2016 and October 2018. In October 2018 there was a flare up of his back problems and the Claimant was off sick between 2 October and 5 November 2018.

25. On 22 October 2018, whilst off sick and at a time when his symptoms were much more severe than normal, OH reviewed the Claimant. OH reported that the Claimant should be able to return to work on 5 November and recommended that *"if managerially possible"* he should be exempted from searching duties for a further 4-6 weeks and *"not left to work on his own"*. The prognosis was that the current level of symptoms would improve in 3 months' time with the help of physiotherapy and that the back pain could be controlled and managed in the next 6 to 12 months.

26. Having returned to work on 5 November, the level of the Claimant's pain remained higher than before he went off sick in October, affecting in particular his ability to walk any distance without pain. During this time, Josh was on annual leave for the Christmas holiday period, and when necessary the Claimant would do the prisoner searches, despite the pain involved. Ms Taylor's impression was that working during that period, including searches, aggravated the Claimant's symptoms.

27. During the period from 5 November to the date of his dismissal, the Claimant says that Ms Taylor did not 'consult' with him about what duties he could manage and what duties he could not. Ms Taylor accepts there were no formal 'consultation' meetings, but says that she had informal discussions with him on those issues as part of her engagement with him as his line manager. We accept there were such discussions in a general sense, although the Respondent provided no detailed evidence as to the content of those discussions.

28. On about 8 January 2019, the Claimant significantly exacerbated his condition whilst at home and went off sick. Around this time, following a meeting between the Claimant, his union rep and Ms Taylor, where the possibility of ill health retirement (not the same thing as dismissal on grounds of medical inefficiency) was discussed, Ms Taylor initiated an inquiry as to what sum(s) that would result in.

29. The Claimant returned to work on 29 January 2019, initially to his normal duties, but again in significantly more pain than before October 2018. Ms Taylor describes watching the Claimant walk the 6-8 minute distance between the front gate and the

Workshop using *"short, painful steps"*. During the two weeks or so after his return to work, another officer or Ms Taylor had to sometimes assist the Claimant with searches.

30. The Claimant was referred to OH, who reported on 11 February (during a period when the Claimant was working in the Workshop). Given the importance of that report, we set out much of its contents in full:

    "[He] has had longstanding, recurrent back pain for many years which has flared up from time to time and impacted on his attendance. This has been borne out in the sickness recorded supplied with the referral which indicates repeated short-term absence with a longer period in October last year. Mr Theophile thinks that episode may have been triggered by some manual handling at work and has not really settled down and he is struggling with pain. He reports ongoing back pain with pain radiating into his left leg along with some pins and needles and altered sensation in his thigh. Mr Theophile tells me that he has had a scan but it is unclear what this has shown and is now taking pain medication and having treatment with a physiotherapist who has advised him that his pain may take 18 months to 2 years to settle. Mr Theophile reports that he is currently working with a colleague and admits that he struggles with prolonged walking, sitting and standing, that he cannot bend to do searches or attend offenders when they need supervision so relies on his colleague to do these duties. …

    "Mr Theophile is only currently able to perform a duty that allows him to sit and stand as required and with limited walking and no repeated bending. As such he is only fit to undertake a proportion of activities at work and it appears that he is only managing when working with a colleague who is able to support him by undertaking activities that he cannot manage himself. It is a business decision whether this can continue to be supported for him until his back pain is sufficiently settled for him to resume his full role. …

    "Mr Theophile has had recurrent back pain for many years, and this is likely to continue to be the case, so that even once this exacerbation settles (which may take a prolonged period of time to be achieved) I cannot guarantee that he will not have any future episodes. It is now a business decision how his case is managed

but if adjusted duties or increased sickness absence cannot be supported, you may wish to consider whether medical inefficiency is an appropriate route for him. …

"Manager Questions: [1] *Charles's role involves use of Power tools, instructing, supervising and searching offenders. Can Charles continue these duties without aggravating the condition?* Performing these duties are likely to aggravate his back discomfort and may be just too painful for him to manage at this time.

[2] *previous reports back as far as 2015 state condition will improve with right treatment and intervention within months Will the condition ever improve enough to have regular attendance at work and what is the long term prognosis?* Although this current episode should eventually settle, Mr Theophile is likely to continue to experience episodes of back pain for the foreseeable future and this may continue to impact on his attendance going forward."

31. The OH doctor discussed the contents of the report with the Claimant at the time and the Claimant agreed it could be released to the Respondent.

32. Ms Taylor, having read this OH report, did two things. First, she removed the Claimant from the Workshop, despite his protests, and required him to work for the time being in the Coffee Shop (where prisoners are trained to be baristas) because that was much nearer the front gate and did not involve moving pallets or using tools. Mr Taylor felt she had no choice given the statements in the OH report that the Claimant was struggling with walking, etc., with working alone, and that performing some of his duties would aggravate his condition.

33. Secondly, Ms Taylor wrote to the Claimant on 13 February 2019 to invite him to a formal attendance review meeting (FARM) which was to take place on 18 February 2019. At that moment in time, as she confirmed to us in oral evidence, dismissal was not in view.

34. However, this meeting did not go ahead. At a weekly management review by Ms Pennington of staff off sick or on restricted duties which Ms Taylor attended, she decided that she should herself review the Claimant's case at a FARM, with dismissal on medical inefficiency being an option. Ms Pennington wrote to the Claimant on 22 February 2019 to invite him to a FARM on 4 March 2019. She explained the purpose

of the meeting was to consider his sickness absence and to explore what, if anything, could be done to support his return to full duties. She explained the possible outcomes of the FARM were that he could be dismissed or re-graded, or that the Prison would continue to support his sickness absence.

35. The meeting on 4 March took place, with the Claimant, a POA union rep of considerable experience, Ms Pennington, an HR Advisor, and a note-taker. Unfortunately, the notes taken are excessively summary. We find, materially, that:

    35.1. Ms Pennington went through the key parts of the recent OH report, to which no challenge was made by the Claimant or his rep.

    35.2. The Claimant accepted that some of his duties were being done by colleagues, which was not equitable.

    35.3. The Claimant was adamant that he did not wish to be re-deployed.

    35.4. Ms Pennington spoke of dismissal on grounds of medical inefficiency, to which no direct objection was made by the Claimant and his rep.

    35.5. The Claimant made a brief reference to 4-day a week working, along the lines *"That's not possible, is it?"*, but did not expressly propose the reintroduction of that.

    35.6. Ms Pennington decided and communicated to the Claimant that he would be dismissed on grounds of medical inefficiency.

36. Ms Pennington's reasoning, in brief, was that:

    36.1. The Claimant could not perform important parts of his duties according to the OH report, in particular searches and instructing/supervising prisoners, and was therefore not sufficiently productive in his role.

    36.2. The last two OH reports suggested that the Claimant shouldn't work alone if possible.

36.3. The prognosis was that this might well remain the case for some 18-24 months, which was far in excess of what she might consider a short-term solution that the Respondent could perhaps accommodate (generally up to 6 months).

36.4. It would not be reasonable to provide the level of support required to allow the Claimant to continue to work safely and productively in the Workshop for that length of time.

37. The Claimant was given a right of appeal, but did not exercise it. He says he had lost all faith in the Respondent by that time.

38. The Claimant's employment ended on 4 March. He was paid three months' salary in lieu and was given 100% 'medical inefficiency compensation' in the sum of just under £50,000.

39. Since his dismissal, the Claimant has become a self-employed sole trader doing repair, renovation and upcycling of furniture for resale. This enables him to do similar work to the work he was doing while employed by the Respondent and, as he puts it in his witness statement *"No other job would allow me the freedom to effectively manage my condition as required"*.

The Law

40. There was no dispute as to the relevant principles of law.

Unfair dismissal

41. We have well in mind the statutory language of sections 98 Employment Rights Act 1996; as also the principle that there is a range of reasonable responses available to an employer who decides to dismiss – the dismissal will be fair if it was a decision within that range.

42. In the context of the unfair dismissal claim, Ms Idelbi reminded us that an employer may be obliged in law to dismiss an employee whose work presents significant risk to their health; and that whether an employer can be expected to wait for an employee's health to improve before dismissing, depends on the nature of the illness, the length

of absence and the business needs of the employer (**Spencer v Paragon Wallpapers Ltd** [1977] ICR 301).

43. In **Lynock v Cereal Packaging Ltd** [1988] ICR 670, the EAT described the appropriate response of an employer faced with a series of intermittent absences as follows (emphasis added):

> *The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion.* ***There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture****. Secondly, every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following —* ***the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee****; ...*

<u>The Equality Act claims</u>

44. Section 15 of the Act provides that

(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 detriment is a proportionate means of achieving a legitimate aim.

45. For the purposes of the justification defence in s. 15(1)(b), in ***Hardy and Hansons Plc v Lax*** [2005] ICR 1565 Pill LJ set out the correct approach to be adopted by the ET when assessing questions of proportionality at [32]-[34] (approved by Lady Hale in ***Homer*** (at [20]) (emphasis added):

… The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. ***I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances****.*

The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in ***Allonby*** *and in* ***Cadman****, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal…*

It is therefore for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure, and to make its own assessment of whether the former outweigh the latter. ***There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal****.*

46. Section of the Act provides that

(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….

47. Section 21 of the Act provides that

(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. ...

48. Laws LJ in **Newham Sixth Form College v Saunders** [2014] EWCA Civ 734 noted that *"the nature and extent of the [claimant's] disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot ... make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP"*

49. The duty to make reasonable adjustments can, as HHJ Peter Clark said in **Redcar and Cleveland Primary Care Trust v Lonsdale** UKEAT/0090/12, [2013] EqLR 791, involve *"treating disabled people more favourably than those who are not disabled"*. Or, as it was put in the House of Lords decision in **Archibald v Fife Council** [2004] UKHL 32, [2004] ICR 954 (per Baroness Hale at para 47), the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs.

50. In **Cumbria Probation Board v Collingwood** [2008] All ER (D) 04 (Sep), EAT, HHJ McMullen said that *"it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage"*. The EAT in that case then went on to uphold a finding of a failure to make a reasonable adjustment which effectively gave the claimant 'a chance' of getting better through a return to work.

51. Finally, as Mr Brittenden pointed out, the duty to make adjustment arises by operation of law. It is not essential for the claimant himself to identify what should have been done (**Cosgrove v Ceasar and Howie** [2001] IRLR 653, EAT). Indeed,

the EAT held in **Southampton City College v Randall** [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

Discussion

52. Mr Brittenden provided written submissions and supplemented those orally. Ms Idelbi made detailed oral submissions.

53. We have taken those fully into account and refer to them as appropriate.

The s. 15 and ss. 20, 21 claims

54. It is not disputed that the Claimant was dismissed because of something arising from his disability: his inability to perform regularly and safely the full range of his duties as Inspector in the Workshop.

55. Nor is it disputed that, as at the date of dismissal, the Respondent was not prepared to make the requisite adjustments to permit the Claimant – in his then state of health, which was expected to remain at that level for 18-24 months – to continue in that role.

56. What is less clear is what those adjustments would have been (which we must of course identify before determining if they were 'reasonable').

57. Mr Brittenden argued, in essence for two reasonable adjustments:-

    57.1. The reintroduction of a four-day week, at least on a trial basis; and

    57.2. Providing the support necessary, by way of reallocation of certain duties, to allow the Claimant to continue working in his then current role.

58. As to the latter, the Claimant complains that there was no sufficient exploration of that issue before he was dismissed; there was no attempt systematically to determine what duties he could perform and what duties he could not perform and then to decide whether and if so how the latter could be performed by someone else.

59. The Respondent's position is that it knew enough. It knew, it said, from the OH report of 11 February 2019 that the Claimant could not do searches or supervise

prisoners; those were fundamental tasks. It was not reasonable for the Respondent to cover those tasks for 18 months or more. Also, it meant that the Workshop would have to close whenever the Claimant would be working alone unless additional cover were provided, which again would not be reasonable for such a long period.

60. The Respondent, not unreasonably, contends also that if the Claimant or his rep on 4 March believed there were ways of allowing him to continue working in the Workshop with adjustments, they would have made that case at the meeting, and they did not.

61. As we go on to say below, in the context of the unfair dismissal claim, we find that the Respondent acted reasonably in this context. However, the duties under ss. 15, 20, 21 of the Act are more exacting.

62. After the conclusion of the evidence and submissions, we were left in the uncomfortable position of not having a very clear understanding of each of the tasks that the Claimant's job had involved prior to October 2018, and which of those tasks he could and could not do in February 2019.

63. Part of the problem lies in the question and answer in the latest OH report, heavily relied on by the Respondent, repeated for convenience: *"Charles's role involves use of Power tools, instructing, supervising and searching offenders. Can Charles continue these duties without aggravating the condition?* ***Performing these duties are likely to aggravate his back discomfort and may be just too painful for him to manage at this time****".*

64. It is clear that Ms Pennington understood that as meaning that the Claimant, as well as not being able to manage searches, could not manage to instruct and supervise prisoners working in the Workshop. It is no less clear that the Claimant believed he could continue (and had been continuing since 28 January) to instruct and supervise prisoners; that is was only searching, lifting, etc., which he was not capable of doing. Ms Taylor was unfortunately not at the meeting on 4 March, nor had she been asked to write a report specifically for that meeting (though she had discussed the Claimant's position with Ms Pennington before the meeting). Equally unfortunately, the Claimant – the only person in the room who really did understand the range of his

duties in practice and which he remained capable of performing – contributed little or nothing on these points.

65. Likewise, the statements in the OH report that the Claimant was *"only fit to undertake a proportion of activities at work and it appears that he is only managing when working with a colleague who is able to support him by undertaking activities that he cannot manage himself"* – on which Ms Pennington naturally also placed reliance – are insufficiently specific to elucidate what job tasks the Claimant could and could not do in practice.

66. If it were right (we do not say that it is) that, albeit with a little more difficulty and pain than a fully fit officer, the Claimant was fit at that time to perform the substantive duties of his role other than heavy lifting (which he had not done for a long while) and searching (which was generally undertaken by Josh), then it would have been a reasonable adjustment to arrange for another officer to complete the searches at the end of each of the Claimant's shifts when Josh was not present.

67. In deference to Ms Idelbi's submissions, we say so having regard inter alia to the security implications of the Claimant's role (not much different materially to those of any prison officer dealing with Category B prisoners), and to the Respondent's duty of care to the Claimant as its employee (there appeared no risk of provoking a more significant underlying medical condition; the risk of provoking a flare up at work was real, but not so much worse than in any event – the most recent flare up had been caused by reaching for a falling cup at home).

68. If, however, there were other substantive parts of the role which the Claimant was not capable of performing regularly in the foreseeable future, such as using or demonstrating certain tools or moving around to supervise the prisoners at work, then it would probably not have been reasonable to expect the Respondent to provide cover to perform in addition those duties when Josh was absent – and perhaps even when he was present, in so far as those duties were not part of Josh's job description.

69. As to the other reasonable adjustment proposed by the Claimant at the hearing, we do not accept that it would have been a reasonable adjustment, at least *per se*, to reintroduce a four day week in March 2019. The issue was no longer how to reduce the risk of exacerbation of the Claimant's symptoms (the purpose of the 4-day week),

but about whether/how to accommodate a significantly increased level of symptoms since January 2019.

70. Nor do we consider in this context that there was a breach of s. 21 in May 2018 (the Claimant was not, at least for several months, at a substantial disadvantage within the meaning of the Act by reason of having to work Friday mornings); and even if we had taken the opposite view, we would have held that a claim based on the refusal of the Claimant's application in May 2018 is substantially out of time, is not part of a 'continuing act' and it would not be just and equitable to extend time to allow that claim to be brought.

71. Returning to the decision to dismiss in March 2019, we have considerable sympathy with the Respondent. We accept without hesitation that Ms Taylor and, in the context of these claims more importantly Ms Pennington, were trying to do their best within reason to keep the Claimant at work (they regarded his professional skills and experience highly) and that they saw dismissal as a last resort. Moreover, we accept that Ms Pennington did believe that the Claimant was, at the lowest, reconciled to leaving on grounds of medical inefficiency with the appropriate compensation.

72. However, in the end, and in the context of the Respondent's duties to ensure that it appreciated the nature and extent of the Claimant's disadvantage by reason of his disability at the material time, to ensure that potential reasonable adjustments are implemented at least on a trial basis if there is a good chance that they will sufficiently reduce that disadvantage, and to be proactive in those regards even in the absence of specific suggestions from the Claimant – we find that the Respondent did act somewhat precipitately on 4 March.

73. In doing so, we find – not without hesitation – that the Respondent was in breach of s. 21 of the Act.

74. For the same reasons, we find that the decision to dismiss on 4 March– albeit obviously in pursuit of the legitimate aims of maximising purposeful activity of prisoners in the Workshop and the efficiency of the prison regime – was not at that time, objectively, a proportionate means of achieving those aims.

Unfair dismissal

75. We do not accept, however (despite Mr Brittenden suggesting this should follow), that this means that the dismissal was unfair. Indeed the reasoning highlighted above from the **Lax** case makes that clear.

76. Whilst some reasonable employers would have made further investigations, perhaps sought further medical advice or clarification, it seems relatively clear to us that other reasonable employers would have concluded on 4 March that dismissal on grounds of medical inefficiency was the appropriate response.

77. We say so bearing in mind in particular:

    77.1. The gloomy prognosis;

    77.2. The recent periods of substantial absence through ill-health;

    77.3. The certainty that the Claimant would continue to need significant additional support for some time, at least as regards the essential daily searches;

    77.4. The Claimant's decision not to countenance any alternative role;

    77.5. The lack of resistance from the Claimant and his rep at the meeting to dismissal (reflected also in his decision not to appeal); and

    77.6. The substantial compensation that was known to be due to the Claimant if he were dismissed for medical inefficiency.

78. Mr Brittenden sought to persuade us that the dismissal was in any event procedurally unfair, by reference to passages in the Respondent's Attendance Management Policy which stipulate for a staged series of warning to an employee before dismissal. However, those parts of the Policy relate to a decision to dismiss because of sickness absence already taken and the purposes of the warnings is to notify the employee in clear terms of the consequences of further absences.

79. Here, the Claimant was at work. The dismissal was almost entirely by reason <u>not</u> of his historic (or even potential future) absences; but by reason of what the Respondent

believed were the restrictions on what he could do whilst he was at work, in particular since 29 January 2019.

Remedy

80. In determining the appropriate remedy, we have asked ourselves what would have happened had the Respondent sought more rigorously to identify what adjustments would be needed to allow the Claimant to continue in his role.

81. The exercise is highly speculative. But it must be undertaken. In circumstances where the result might well have been the same, it is not appropriate simply to assess loss on the basis that the Claimant indefinitely could and should not have been dismissed without breaching ss. 15 and/or 21 of the Act.

82. Doing the best we can, we make the following findings:-

    82.1. The Claimant would have been employed for a further two months whilst the necessary additional investigations were made by the Respondent and a further meeting(s) held with the Claimant.

    82.2. Thereafter, there is a 50% chance that the Claimant would have remained employed in the Workshop for the next 12 months; and a 25% chance he would have remained employed for the subsequent 12 months. We do not consider it would be fair to award any compensation beyond May 2021.

83. By way of explanation of the latter percentage figures, we find that half the time the Respondent would have lawfully dismissed in May 2019; and that there was a significant prospect that if the Claimant had remained at work from that date, he would have been lawfully dismissed by reason of further deterioration in his symptoms causing further sickness absences and/or reduced capacity at work. In any event, having regard to the Claimant's duty to mitigate, we consider that some two years' loss would in the circumstances be fair and note that this is similar to the the period claimed in the Claimant's (albeit now out of date) Schedule of Loss in the hearing bundle.

84. We heard additional evidence from the Claimant regarding his attempts to mitigate his losses since dismissal. In summary:- He set up a small business up-cycling

furniture and advertising as a 'man and van' for small jobs. He had not been able to make any profits from that business to date, but anticipated that he would have been able to, and will be able to in the future, but for the effects of the pandemic. He had not really looked to supplement his income by finding other paid work.

85. We find that he did not act unreasonably in seeking to set up a business exploiting his only skills and experience, from which he hoped to make a profit, given his level of disability, his age and his lack of any formal qualifications. We find that he would have been unlikely to have found alternative suitable work from March 2020 in any event because of the pandemic. We consider the Claimant did act unreasonably in the few months prior to March 2019, once it became clear that the new business was not yet making any profits, in not looking to supplement his income with part-time work (perhaps certain security, delivery, or 'odd job' work). We recognise the limitations imposed by his back condition and it is not certain that had he looked, he would have secured suitable alternative employment. In the circumstances, we accept Ms Idelbi's submission that a percentage discount should be applied to the award for pecuniary loss. We assess the appropriate discount as 10%

86. After discussions to the correct approach to the calculation of loss applying the findings set out in the previous four paragraphs, the parties were able to agree the figure for pecuniary loss, inclusive of interest, as £12,279.82.

87. The parties agreed a figure for an award for injury to feelings as £13,859.50 (also including interest).

88. The total award is therefore made in the sum of **£26,139.32**.

Oliver Segal QC

Employment Judge

12 February, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

18 February 2021