EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Bennett**		
Respondent:	**The Secretary of State for Justice**		
Heard at:	**Sheffield**	**On:**	**14, 15 and 16 December 2020**
Before:	**Employment Judge Brain**		
	Mrs J Lancaster		
	Mrs S Robinson		
Representation			
Claimant:	Mr K Ali, Counsel		
Respondent:	Miss R Mellor, Counsel		

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed.
2. The respondent may fairly have dismissed the claimant on or around 30 April 2020 upon the grounds that he was incapable of performing work of the kind that he was employed to do.
3. The respondent discriminated against the claimant by treating the him unfavourably for something arising in consequence of his disability.

REASONS

Introduction.

After hearing the parties' evidence and helpful submissions from counsel, the Employment Tribunal reserved its Judgment. The Tribunal now sets out reasons for the Judgment that we have reached as follows:

1. The claimant worked for the respondent as a prison officer. He took up his role on 27 November 2006. He worked at HMP Lindholme in Doncaster.
2. The respondent summarily terminated the claimant's employment on 29 November 2019. The employment was terminated upon the grounds of incapacity for work and an inability to provide a full and effective service. The claimant was paid his salary in lieu of the notice period to which he was entitled.

3. Arising from his dismissal, the claimant pursues the following complaints:

   3.1. That he was unfairly dismissed. This claim is brought under the Employment Rights Act 1996.

   3.2. That his dismissal was unfavourable treatment for something that arose in consequence of a disability. Thus, he complains that was discriminated against contrary to the provisions of the Equality Act 2010.

4. The relevant disability for the claim under the 2010 Act is trigeminal neuralgia. A helpful and succinct description of this condition is given in a report dated 5 November 2019 from Paula Doyle who is an occupational health advisor retained by the respondent. Her report is at pages 100 to 101 of the bundle. She says that, *"trigeminal neuralgia is sudden, severe facial pain. It is often described as a sharp shooting pain or like having an electric shock in the jaw, teeth or gums."*

5. The respondent accepts that the claimant's neuralgia is a disability within the definition in section 6 of the 2010 Act. The respondent also accepts that they had knowledge of the disability at the material time (that being the period from early November 2019).

6. The Tribunal heard evidence from the claimant. On behalf of the respondent, the Tribunal heard from:

   6.1. Leonie Lovell. She works for the respondent as a custodial manager. She was the claimant's line manager from September 2019. In that capacity, one of her duties is to monitor and manage the sickness absence of those falling under her management.

   6.2. Simon Walters. He is employed by the respondent as the governing governor of HMP Lindholme, a position which he has held from November 2016. Under the respondent's attendance management procedure, the power to dismiss, regrade or downgrade employees is vested in the prison governor. It was in that capacity that Mr Walters chaired the formal attendance review meeting of 29 November 2019 at which he took the decision to dismiss the claimant.

7. The Tribunal shall now set out its findings of fact. We shall then go on to consider the issues that arise in the case and the relevant law. We shall then go on to apply the law to the facts as found to arrive at our conclusions upon the issues.

Findings of fact

8. The claimant's dismissal followed a period of absence which commenced on 22 October 2019 and which was because of the neuralgia. The respondent's case before the Employment Tribunal was put upon the basis that the claimant was dismissed arising out of his post-22 October 2019 absence only. However, the claimant raises an issue that prior periods of absence were impermissibly taken into account by Mr Walters. It is necessary therefore to make some findings of fact about the claimant's absence history.

9. Paragraph 7 of the respondent's grounds of resistance consists of a table detailing the claimant's absence history from 12 September 2018 until

29 November 2019. Although helpful to a degree, it omits details of the length of the absences and their cause.

10. The absences referred to in paragraph 7 of the grounds of resistance were as follows:

    10.1. 12 September 2018 to 5 November 2018 – knee condition.

    10.2. 18 January 2019 to 26 February 2019 – hernia.

    10.3. 29 August 2019 to 31 August 2019 – high blood pressure induced by a virus caught from one of the claimant's foster children.

    10.4. 25 September 2019 to 30 September 2019 – absence following an assault at work in which the claimant was spat in his face and eye numerous times by a prisoner.

    10.5. 22 October 2019 to 29 November 2019 – trigeminal neuralgia.

11. The parties agreed that the claimant had been absent from 136 days over these five periods of absence. This was the number of days of absence over those periods referred to by Mr Walters at the review meeting of 29 November 2019: (the minutes are at pages 115 to 119 and the salient passage is at page 117).

12. Within that passage upon page 117, Mr Walters refers to the claimant having had 481 days of absence over his 13 years of service. Mr Walters observed *"that's an average of 37 days per year".*

13. In paragraph 7 of her witness statement, Miss Lovell introduced into her evidence the document at pages 72 to 77 of the bundle. This is entitled *"Case Notes".* Miss Lovell says that this is a document *"that records contact between Steve [Bennett] and the prison custodial managers concerning sickness absence since 16 November 2015."* The document to which Miss Lovell refers records some of the claimant's absence history prior to September 2018.

14. The Tribunal also notes the content of a referral to occupational health (known as a form OH1) at pages 79 to 82 which sets out the claimant's absence history between 22 December 2008 and 16 November 2015. There were nine periods of absence over this period.

15. It is unfortunate that the respondent did not assist the Tribunal by providing a comprehensive chronology of the claimant's absences and the reasons for those absences. It is no part of the Tribunal's function to attempt to piece matters together for itself from disparate pieces of information provided by a well-resourced party. Suffice it to say that the claimant had significant periods of absence at various times and attributable to different conditions during his service.

16. The onset of the neuralgia was from July 2018. The claimant describes the progression of the condition in paragraphs 3 to 6 of his witness statement. The diagnosis of neuralgia was made by the claimant's general practitioner on 11 February 2019. The claimant has received treatment from his general practitioner, from Mr Austen Smith and Mr Bhattacharya both of whom are consultant neurosurgeons and from Professor Loescher, consultant in oral maxillofacial surgery.

17. We now turn to the respondent's attendance management procedure. This is in the bundle at pages 42 to 71. The policy is introduced by way of an executive summary (in section 1 thereof). Paragraph 1.6 says that the attendance management policy (which we will now refer to simply as *"the policy"*) has been developed *"because high levels of sickness absence make it difficult to deliver our services and meet our business priorities."*

18. The procedure for the application of the policy is to be found in section 2. This is detailed and comprises155 clauses. There is a helpful overview in a flowchart at page 67. This helps to illustrate that broadly there are two processes within the policy. The first is concerned with unsatisfactory attendance. The second is concerned with continuous absence.

19. Attendance is deemed to be unsatisfactory (pursuant to clause 2.45 of the policy) if an employee's sickness absence level reaches or exceeds eight working days (or less, *pro rata*, for employees who do not work every day of the normal working week) or four spells of sickness absence in a rolling 12 months' period. Such a level of unsatisfactory attendance is called the *"trigger point".* Clause 2.49 of the policy says that where an employee's sickness absence level has reached or exceeded the trigger point managers must hold a formal unsatisfactory attendance meeting to make a decision on the next steps. Where formal action for unsatisfactory attendance is required, this will comprise a first written improvement warning followed by a final written improvement warning if required (*per* clause 2.51).

20. Continuous absence is defined (in clause 2.72) as arising where absence *"reaches 14 consecutive calendar days".* As this case concerns the part of the policy dealing with continuous absence it is necessary to recite some of the salient clauses in full:

"Meetings during continuous absence

2.75. *There are two types of meeting which must take place between the line manager and the employee during a continuous sickness absence:*

- An informal review – to keep in touch with the employee and explore the support needed to help the employee returning to work;
- A formal attendance review meeting – to explore the support needed, but also to consider whether the employee is likely to return within a reasonable time frame, and therefore whether the business can continue to support the absence. This is a formal meeting where the employee has the right to be accompanied.

2.76. *These meetings must take place at the following points:*

- An informal review after 14 consecutive calendar days of absence, and every month thereafter;
- A formal attendance review meeting after 28 consecutive calendar days, another when the sickness absence has lasted three months, and every quarter thereafter. There is no need to hold an informal review in a month where a formal attendance review meeting is scheduled.

2.82 *Following the [informal] review with the employee, the line manager must consider whether the sickness absence can continue to be supported, except when the sickness absence is pregnancy related … If the line manager believes that the sickness absence cannot be supported, they will need to arrange a formal attendance review meeting.*

Formal attendance review meeting 2.83

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

2.84 Further formal attendance review meetings must be held:

- When an employee has been absent for three months and then every three months thereafter, as a minimum;
- If, following an informal review, a line manager considers an absence cannot continue to be supported – see how to decide whether an absence can continue to be supported for further guidance. *[The underlined words contain a link to further guidance upon this issue. The further guidance was not provided to the Tribunal].*

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

Considering downgrade or re-grade/dismissal.

2.89 *Decisions on downgrade/re-grade or dismissal are taken by the governor in prisons …*

2.90 Downgrade/re-grade or dismissal must be considered when the attendance management procedure has been followed and;

- Attendance has not improved to a satisfactory level following a final written improvement warning …; or
- A return to work is not expected within a reasonable time frame during a period of continuous absence …

2.94 At the meeting the decision manager must:

- Explain why they are considering downgrade/re-grade or dismissal, and
- Give the employee the opportunity to present any new information which might affect their decision.

Decision is dismissal

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

- The business can no longer support the employee's level of sickness absence;
- Downgrade or re-grade is not appropriate without employee's consent;
- Where appropriate, there are no further reasonable adjustments which can be made which will help the employee return to satisfactory attendance and all other considerations have been exhausted;

- Occupational health advice from an OHP has been received within the last three months, unless the employee withheld their consent to an occupational health referral;
- An application for ill health retirement would not be appropriate or has been refused."

21. The policy then goes on to set out an employee's right of appeal. Clause 2.102 says that, "there is one right of appeal at each decision point in the attendance management procedure."

22. Clause 2.127 says that an application for ill health should be made if a breakdown in the employee's health prevents them from carrying out their duties and there is advise from occupational health that they are likely to meet the criteria.

23. There is limited information about the criteria for ill health retirement within the policy. We shall in due course see that the claimant made an application for ill health retirement. A medical report upon that application was prepared by Dr Stanislava Saravolac, specialist occupational physician, dated 29 May 2020. Dr Saravolac's report is at pages 187 to 191. Helpfully, upon the first page of the report at page 187 she sets out the criteria for ill health retirement as follows:

"*The criteria for ill health retirement at the lower tier payment threshold in the alpha scheme are that the member has suffered a permanent breakdown in health involving incapacity for employment. Incapacity for employment means that, as a result of the breakdown, the member is incapable of doing the member's own or a comparable job.*

The criteria for ill health retirement at the upper tier payment threshold in the alpha scheme are that the member has suffered a permanent breakdown in health involving total incapacity for employment. Total incapacity for employment means that, as a result of the breakdown, the member is incapable of doing the member's own or a comparable job and that the member is incapable of gainful employment. The incapacity to undertake other gainful employment means that the member is severely restricted by his loss of function caused by his illness. Their functional ability to carry out any reasonable paid employment should have been impaired by more than 90%.

Permanent, in this context and for the purpose of this report, means until normal pension age. Normal pension age is either the same as the members state pension age or 65 if that is higher. Mr Bennett's state pension age is 67."

24. Having considered the policy, the Tribunal will now look at the chronology of events leading up to the claimant's dismissal.

25. The claimant's hernia-related absence between 18 January 2019 and 26 February 2019 was for a period of in excess of 28 consecutive calendar days. This therefore triggered the requirement (under clause 2.76 of the policy cited above) for a formal attendance review meeting (this is known by the acronym *'FARM'*).

26. A FARM took place with the claimant's then-line manager Mr Compton on or around 26 February 2019. He decided to refer the matter to Mr Walters to make a decision about downgrade/re-grade or dismissal.

27. A formal attendance management meeting then took place on 7 March 2019. The notes are at pages 89 and 90. The claimant expressed the wish to carry on working at HMP Lindholme. He said that he harboured ambitions to achieve a promotion and in pursuit of that ambition while he was absent because of the hernia he had "*completed my Talent management stuff, now if I didn't want to be here why would I complete that at home?"* He went on to say, "*I have 12 years and I want to work to temp CM, that's what I want."*

28. Mr Walter's expressed concern about the claimant's level of sickness absence. Mr Walters concluded the meeting by saying that, *"This is a really easy decision for me. I don't need to re-grade because you don't want that, I don't need to dismiss, because that is an option. I will however see you for review in six months' time 90 plus days, that is equivalent of three months. For me it is about a duty of care to you as much as anything else. Thank you. I'll see you in six months' time."*

29. A further formal attendance review meeting was then held on 20 September 2019 (page 92). From the chronology of absences set out in paragraph 10 above, we can see that the claimant was absent for three days during the six months' period in question between March and September 2019. The absences were on 29, 30 and 31 August 2019. Mr Walters asked the claimant the reason for that three days' absence. The claimant said, *"well I foster kids and one of them had a temperature so we had the doctor out and after checking the child he checked me. I had high blood pressure due to having a virus, I was sent to hospital to be checked."* After listening to this explanation, Mr Walters concluded, *"Well there has been an improvement of your attendance and I am happy to close the case but would like to remind you of the importance of your attendance. Thank you."*

30. On 20 September 2019, Mr Walters wrote to the claimant (page 93). Mr Walters confirmed that, *"There has been an improvement over the last six months and therefore I have decided that I will close the case and there will be no further action."*

31. There was then a most unfortunate and unpleasant incident which took place on 24 September 2019. The claimant says in paragraph 15 of his witness statement that on that day, *"I was assaulted at work while restraining a prisoner. The prisoner spat into my face and eyes numerous times. After this assault, I was sent straight to hospital for an eye wash and blood tests. My medication was changed back to Tegretol as I had now finished the course of blood thinning medication (Rivoroxaban)."*

32. Mr Walters says in paragraph 13 of his witness statement that, *"I did not take this period of sickness absence into account when I met with Steve on 29 November 2019. This is because it is a workplace incident and was covered by a sick leave excusal, which is provided for in the attendance management policy".* The relevant clause (at 2.141 of the policy) is to be found at page 64 of the bundle. This says that, *"Someone who contracts a disease or is injured or assaulted whilst on duty may qualify for sick leave*

excusal. If excusal is granted all sick leave, up to a maximum of six months (182 calendar days) relating to that injury, assault or disease is removed from reckoning against the individual's sick leave record for sick pay purposes and excluded from consideration under the unsatisfactory attendance procedures."

33. The claimant then says the following about the next significant chronological events:

"(16) On 7 October 2019 I returned to Professor Loescher as the pain was increasing. Professor Loescher advised that I increase my medication in an attempt to control the pain. I went to see Professor Loescher again on 21 October 2019 who referred me to a neurosurgeon Mr Bhattacharya on 22 October 2019.

(17) At around 7pm on 21 October 2019 whilst at work I was taken off the landing by a senior prison officer who said I looked terrible.

(18) On 22 October 2019 I was seen at Sheffield Hallam Hospital by Mr Bhattacharya who admitted me into hospital straightaway. I contacted work immediately as I was kept in the hospital.

(19) On 24 October 2019 my wife contacted work on my behalf to let them know I was still in hospital and spoke to CM Jane Simms confirming to her that she did not know when I would be discharged from hospital.

(20) On 25 October 2019 I was discharged from hospital with a fit for work note for two weeks. I posted a copy into work on the same day. On 28 November 2019 I again attended Professor Loescher's clinic to monitor my pain levels after having had nerve blocks and other treatments."

34. Miss Lovell says in paragraph 11 of her witness statement:

"The sickness register shows that Steve was then absent from work for a further period [following the incident with the prisoner] *from 22 October 2019. Steve remained absent from work until his dismissal on 29 November 2019. The sickness register shows that on 22 October 2019 Steve report as sick and said that he was in hospital (page 75). On 25 October 2019 Steve's wife contacted the prison and said that he was not at work because of a problem with his jaw. Steve's wife also explained that he would not be getting to hospital in the next few days."*

35. Miss Lovell goes on to say in paragraph 12 of her witness statement that:

"As we were unable to make contact with Steve via telephone for an update regarding his sickness/hospitalisation and were concerned for his welfare, I arranged a home visit to see him on 1 November 2019. I had planned to have an informal meeting at this stage due to Steve's absence. I was unable to gain a response from Steve to arrange the informal meeting, which is why I made this visit with a colleague, custodial manager Luke Slater, as a safeguarding measure to ensure Steve's well-being. I planned to have a general welfare discussion with Steve to find out how he was and to arrange a formal attendance review meeting. When Luke and I visited Steve's home there was no answer. I left a letter at Steve's home inviting him to attend a formal attendance review meeting as I intended to send this following the informal meeting. However as Steve was unattainable I posted this through his letter box (page 105)."

36. The record at page 75 confirms that the claimant contacted work on 22 October 2019 to report that he was sick and in hospital. There were attempts by Mr Slater to contact the claimant on 23 October and 24 October. Unsurprisingly, given that he was in hospital, the claimant did not reply to Mr Slater's voicemail messages. The record also corroborates Miss Lovell's account that the claimant's wife contacted the respondent on 25 October 2019.

37. The record at page 75 says (in the entry dated 1 November 2019) that the claimant had provided a sick note until 7 November 2019. A copy of this does not appear to be in the bundle. There is a sick note dated 7 November 2019 at page 102. This is signed by the claimant's GP following an assessment of the claimant's case that day. It certifies the claimant as being unfit for work for the period from 7 November to 27 November 2019. No issue was taken by the respondent that any part of claimant's absence from 22 October 2019 was not covered by a sick note. (The entry made by Miss Lovell dated 1 November 2019 at page 75 in fact records that following the visit made to the claimant's house on 1 November 2019 by her and Mr Slater, she learned upon her return to the prison that day that the claimant had already provided a sick note to cover his absence).

38. We think that the reference in paragraph 12 of Miss Lovell's witness statement to page 105 is an error. Page 105 is a letter dated 8 November 2019 which was given to the claimant following the meeting which took place that day and to which the claimant was invited on 1 November 2019. The letter that was posted through the claimant's door on 1 November 2019 and which bears that date is at pages 97 to 99. This is headed *'formal attendance meeting invitation'.* In this letter, the claimant was invited to meet with Miss Lovell at 10am on 8 November 2019 at HMP Lindholme. The purpose of the meeting was to discuss the claimant's absence *"24 October – ongoing".* The claimant was notified of his right to be represented by a trade union representative or a colleague from the staff network. The claimant was told that he may *"find more information about the formal attendance meeting in the attendance management policy".* He was told that a copy of the attendance management policy would be provided for him upon request.

39. On 5 November 2019 the claimant was assessed by Paula Doyle, occupational health advisor. She prepared a report upon the same day. We have mentioned this report already. It is at pages 100 and 101.

40. After describing the condition of trigeminal neuralgia she goes on to say that, *"Mr Bennett reports that he has had this pain going on intermittently for many months but recently this has become so severe that moving his jaw, chewing food, eating and his ability to speak have been affected".* She says that he remains under the care of a specialist. She opined that the claimant *"is currently unfit for work due to the severity of his symptoms and taking medication which is making him drowsy. At the present time I am unable to predict a return to work date in the next four weeks."* She says that, *"The outlook is uncertain at this present time as Mr Bennett's recovery will depend on how he responds to the treatment and his symptoms resolving. If the business can continue to support the absence,*

I suggest that management refer Mr Bennett back once his pain has improved."

41. In the event, the meeting of 8 November 2019 did not take place at HMP Lindholme. Arrangements were made for the meeting to take place at the service station at Junction 29A of the M1. This is near to the claimant's home. The claimant's wife drove him to the meeting and then collected him from the service station after it had finished.

42. Miss Lovell says that the claimant gave her the sick note at page 102 at the meeting held on 8 November 2019. The claimant says that he posted it to work. At all events, it is not in dispute that the respondent was in receipt of the sick note.

43. Miss Lovell says that she prepared notes of the meeting. The notes are at pages 103 and 104. We can see from page 104 that they appear to have been signed electronically by the claimant. No issue was taken during the hearing that the claimant had not done so.

44. The notes appear to be a template *"checklist for discussion".* There are nine points upon the checklist each of which is then followed by heading *"key points of discussion".* There then appears to be provision for the insertion of free text of the matters discussed. Miss Lovell recorded the following:

- The claimant said that he *"would not be looking to return to work any time soon and that he was unaware of the prognosis of return to work due to the medication he was on, the pain he was in and potential of an operation".*
- *"Steve stated he was not stressed and more concerned about his condition at the moment than anything to do with work".*
- Miss Lovell said that she would be making a referral of the case to Mr Walters. The claimant replied, "*you and Luke [Slater] do what you need to do."*

45. Mention was made (at point 3 of the template) about occupational health and the need for there to be up to date information. Miss Lovell noted that, *"when I broached the subject of OHP he stated that he had 'sorted' it and had it all in one as a result of a previous referral for mental health due to an assault at work. I attempted to explain to Steve that he was required to have an OHP alongside his OHA and he said he 'had had enough' to Luke so terminated the conversation. I have sent a further email after the FUAM to check that Steve does not wish to participate in this process."*

46. The acronym *"OHA"* stands for occupational health advisor. OHP stands for "*occupational health physician."*

47. This was a difficult entry to understand. Miss Lovell does not seek to explain it in her witness statement. Miss Mellor asked the claimant about this issue. The claimant's interpretation of matters was simply that occupational health had advised Miss Lovell to desist from contacting the claimant because at that stage he was having difficulty speaking due to the pain. It is not the case that the claimant was being in any way uncooperative with occupational health. On the contrary, he had been interviewed by Paula Doyle just three days prior to the meeting with Miss

Lovell held on 8 November 2019. Further, and as we will see, a further consultation with an OHP took place just 11 days later on 19 November 2019.

48. Miss Lovell maintained that there had been a discussion with the claimant on 8 November about the issue of ill health retirement. The relevant entry (point 7 upon page 104) has been completed in the free text section *"N/A".* This of course stands for *'not applicable'.* Miss Lovell said in paragraph 26 of her witness statement that, *"I am clear that I covered IHR at the meeting but Steve was not interested and did not want to discuss it. Because the medical advice did not recommend considering IHR and Steve did not express any interest in it, there was no reason for me consider IHR any further at the meeting."*

49. The claimant said, in evidence given under cross-examination, that IHR was not discussed on 8 November. Plainly therefore there is a conflict of evidence between the claimant on the one hand and Miss Lovell on the other as to whether this issue was discussed. On balance, the Tribunal prefers the claimant's account.

50. There is no issue that temporary work place adaptations and reasonable adjustments were not discussed with the claimant. These are at points 5 and 6 of the checklist (pages 103 and 104). Miss Lovell also completed the free text *"N/A"* in reply to these points. She noted that the issue of reasonable adjustments was inappropriate because the claimant had provided a sick note covering him for the ensuing three weeks.

51. Miss Lovell's style, therefore, is to complete within the free text *"N/A"* where a matter is not discussed. Upon that logic, therefore, it follows that the note is consistent with the issue of ill health retirement not having been discussed.

52. Additionally, Miss Lovell was present at the meeting held on 29 November 2019 at which the claimant was dismissed. She is recorded as saying that the question of ill health retirement had *"never been discussed".* We refer to page 118. For these reasons, therefore, the Tribunal prefers the claimant's version and finds that ill health retirement was not raised by Miss Lovell or Mr Slater on 8 November 2019. In addition, Miss Lovell appears to have confused the unsatisfactory attendance and the continuous absence policies: she refers to FUAM in her communication recorded in paragraph 45. This is applicable to the former and not the latter policy. The Tribunal thus cannot be confident in Miss Lovell's record keeping or application of the policy.

53. Miss Lovell observed that the claimant was uninterested when she sought to update him about staffing issues at Lindholme. The note records (at point 2 upon page 103) the claimant observing that *"work was the last thing on his mind at the minute".*

54. The claimant's lack of interest in workplace issues coupled with the somewhat resigned exhortation from the claimant (referred to in paragraph 44) that Miss Lovell and Mr Slater should do what they *"need to do"* were advanced by the respondent as pointers in favour of the respondent's case that the claimant was not interested in returning to work. In our judgment, these two factors are small pegs upon which to hang such a heavy coat.

The claimant described the neuralgia as giving rise to *"the most excruciating pain known to mankind".* In those circumstances, it is unsurprising that the claimant's focus was not upon developments within the workplace and that he was resigned to the inevitability of the matter being referred to Mr Walters under the provisions of the policy. These factors cannot point to the claimant giving up on his job.

55. It was suggested to Miss Lovell by Mr Ali that she was rushing the application of the policy in the claimant's case and that she had not properly applied it. There is much merit in Mr Ali's proposition. Firstly, Miss Lovell and Mr Slater were seeking an informal review with the claimant within and not after 14 consecutive calendar days of the date upon which his sickness absence commenced contrary to clause 2.76 cited above. Fourteen consecutive calendar days had not elapsed between 22 October 2019 (the date of commencement of the claimant's absence from work) and 1 November 2019 (the date upon which the claimant was invited to attend the FARM).

56. Secondly, the claimant was invited to a FARM without an informal review in fact ever having taken place.

57. Thirdly, the FARM held on 8 November 2018 took place less than 28 consecutive calendar days from the date of commencement of the claimant's absence.

58. On any view, these are three matters are breaches of the policy (in particular of clauses 2.75, 2.76, 2.83 and 2.84).

59. Following the FARM held at the service station on 8 November 2019, Miss Lovell wrote to the claimant (page 105). She confirmed the decision to refer the claimant's case to Mr Walters for him to make a decision as to whether the claimant should be dismissed or regraded or whether his continued absence may continue to be supported.

60. On 12 November 2019, Mr Walters wrote to the claimant (pages 106 to 107). He was invited to meet with Mr Walters on 29 November 2019 at HMP Lindholme. The claimant was told that Mr Walters was to consider whether the claimant should be dismissed or re-graded or whether the sickness absence level may continue to be supported. The claimant was told of his right to be accompanied by a trade union representative or a work colleague. He was told of his right to advance additional or new facts and was sent a copy of the policy.

61. On 19 November 2019 a further occupational health report was prepared. This is at pages 108 to 110. It was addressed to Miss Lovell. It was prepared by Dr Andrea Voisian, occupational physician.

62. Dr Voisian described the report as being an *"interim report".* She prepared the report following a telephone assessment of the claimant conducted on 19 November.

63. Dr Voisian referred to the fact of the claimant's hospitalisation for a period of four days between 22 and 25 October 2019. She said that he had undergone pain management which had been of some help but *"the pain is now returning and getting worse despite his pain medication not being reduced. He is now waiting for an appointment with a neurosurgeon to*

discuss further medical management; surgery may also be considered. I understand from Mr Bennett that he is advised that he has an uncommon form of the condition and there is uncertainty about further medical management". She opined that the claimant was *"not fit to return to work in any capacity due to his current symptoms."* She went on to say that, *"all we can do at present is monitor Mr Bennett's condition and advise you along. I suggest we review him in four weeks to assess his progress. By then he would hopefully have had his appointment with the specialist."*

64. In paragraph 25 of his witness statement the claimant says that, *"On 26 November 2019 my pain levels were escalating and my GP provided me with a fit for work note which I forwarded to CM Lovell".* A copy of that fit note is not in the bundle. It is not mentioned in the case notes at pages 72 to 76. It is not clear for how long this sick note certified the claimant as unfit for work.

65. Prior to the meeting of 29 November 2019, Mr Walters had collated much of the relevant documentation. At paragraph 18 of his witness statement he says that he had before him the occupational health reports of 5 November 2019 (pages 100 and 101) and 19 November 2019 (pages 108 to 110). He also had the record of the formal attendance meetings of 7 March 2019 (pages 89 and 90) and 20 September 2019 (page 92). He had been furnished with Miss Lovell's notes of 8 November 2019 (pages 103 and 104) and also had *"access to Steve's sickness absence history".*

66. The claimant was represented by Leejay Feeney of the Prison Officers' Association. (The claimant had chosen not to be represented at the meeting with Miss Lovell and Mr Slater held on 8 November 2019). Miss Lovell was in attendance along with a note taker.

67. Mr Walters observed at the outset of the meeting that the claimant's latest sick note was for a further four weeks' period. Mr Walters then said, *"I would like to start by asking what the best outcome would be for you today Steve?"* to which the claimant replied, *"I haven't given it much thought I just want it over".*

68. Mr Feeney then referred to a statement which the claimant had prepared before the meeting took place. Mr Walters said in evidence that he read the statement and handed it back to the claimant. A copy of the statement was not provided for the benefit of the Tribunal. The claimant said that the statement was brief and was simply intended to convey to Mr Walters how he was medically and the medication that he was taking.

69. While accepting there to be some merit in Miss Mellor's point that the claimant could have prepared a fuller statement and sought an adjournment of the meeting upon the grounds of unfitness, the claimant said that he wished to attend in order to *"show them the condition I was in. I did say that it was the most excruciating pain known to humanity".* The claimant also said that he had handed to Mr Walters some medical information. Again, copies of this material are not within the bundle. The meeting note records (at page 116) Mr Walters advising the claimant to go on to the NHS website. The claimant accepts that Mr Walters did give such advice but pointed out that the material he sought to hand over had been given to him (the claimant) by his treating hospital.

70. At page 116, the record of the meeting contains the following exchange:

"S Walters: Just to confirm the contract between you (contract explained). You say you want an end to it now.

S Bennett: Yeah an end to what I got, I don't want to fight with you.

S Walters: I don't want to fight with you either, this is about what's best for you against the organisation. Have you ever considered re-grading? No? [there is then reference to the medical materials referred to in the foregoing paragraph].

S Bennett: I'll go to ATOS, I'll do whatever you decide.

S Walters: I'm not a doctor, OH clearly states you're not able to come back. You have had a poor period of attendance prior to this of 95 days and you have had another period where you can't possibly be back in the next four weeks, you clearly can't come back in any capacity, I can see that. How long have you been in the service?

L Feeney: 13 years I believe.

S Bennett: Does it not count all the drug finds all the hard work before."

71. At page 117, we see that Mr Walters adjourned the meeting after receiving representations from the claimant and Mr Feeney and before conveying his decision to dismiss the claimant. Mr Walters took the opportunity of reading through the material which he had before him referred to in paragraph 25 of his witness statement and summarised in paragraph 65 above. During the adjournment Mr Walters took the opportunity of checking upon the claimant's attendance record over the entirety of his service history.

72. After the resumption of the meeting, Mr Walters said that there was no issue that the claimant is a good officer but that *"this about your absences and effective service".* At page 117, Mr Walters says that he had looked at the claimant's *"full sick record."* He observed that 38 days had elapsed from 22 October 2019. He then went on to say that, *"In 13 years' service you have had 481 days off. That's an average of 37 days per year, I get some historical but the last two years is 136 days."* Mr Walters then says later on upon the same page, *"you have had around 481 days over 13 years' service and that's only going back to 2010".* He then went on to say (at page 118), *"I'm not disputing you are a good officer, you are just not here enough Steve."*

73. At this stage, Mr Bennett requested that Miss Lovell leave the meeting. Mr Walters declined this invitation. He said that it was appropriate for her to be present in her capacity as the claimant's line manager. Mr Walters then went on to say (at page 118), *"You are a good officer Steve but you are not here enough and providing full and effective service, with all the information I have concluded that your employment will be terminated on the basis of not providing full and effective service. I take on board you being a good officer and although some difficulties in maintaining contact I will be awarding 100% compensation. You can decide to take PILON and leave today or continue to provide sick notes and remain in contact with your line manager that is something that Lee Jay can advise on. Do you have anything else to say?"*

74. After informing the claimant of the decision to dismiss him upon the grounds of incapacity, a discussion then took place about ill health retirement. It was Mr Feeney who in fact raised the issue. He said, *"can you confirm that medical retirement has been applied for and if not that you will apply?"* Mr Walters asked whether the issue had been discussed. Miss Lovell said, *"no it hasn't, it has never been discussed."* (It is upon the basis of this record the Tribunal made its earlier finding of fact that the issue of ill health retirement had not been discussed with the claimant at the meeting held on 8 November 2019). There was then a discussion as to how the claimant could progress the question of ill health retirement. From this, the Tribunal concludes that ill health retirement was not raised with or discussed with the claimant until after the decision to dismiss him had been communicated.

75. On 29 November 2019 the claimant was informed that there would be a further occupational health consultation with Dr Sumra Dar. This was to take place on 18 December 2019. As we shall see, this consultation took place notwithstanding that the claimant was dismissed from his position and the claimant had not appealed against Mr Walter's decision.

76. The claimant immediately acted upon the ill health retirement issue. He made an application for ill health retirement on 29 November 2019. The application is at pages 155 to 173. The *proforma* questionnaire asks the applicant to *"explain any barriers to your working life in your usual job."* The claimant replied: *"Debilitating pain in right side of face, feeling dizzy, headache, double vision, lack of co-ordination, aggression, feeling tired, confusion. All side effects have been noted to my doctor."* The claimant replied in the affirmative to the question *"do you believe that you could do any other work?"* The claimant named Mr Bhattacharya as the specialist to whom an approach may be made by the ill health retirement scheme medical advisor for further information.

77. On 2 December 2019 Mr Walters wrote to the claimant (pages 120 to 122). This was to confirm the outcome of the meeting held on 29 November 2019. Mr Walters says, in the second paragraph, that *"We discussed the recent OH report by Dr Andrea Voisian which stated that you were not currently fit to work in any capacity. You reported sick on 22 October 2019 and had provided a further sick note for four weeks. Your sickness prior to this absence was around 95 days and looking further into your historical absences you have had in total around 481 days in your 13 years' service. There were also some concerns regarding your line manager having difficulties in maintaining contact with you."*

78. Mr Walters' decision to dismiss the claimant was confirmed along with confirmation that the claimant was to receive 100% compensation in accordance with the Civil Service Management Code. The claimant was paid compensation in the sum of £33,884.14. The claimant was reminded of his right of appeal. The claimant did not exercise that right. Mr Walters confirmed the claimant's entitlement to 13 weeks' notice to bring his contract of employment to an end and that the claimant was not required to work out his notice period. It was recorded that the parties had agreed that he would receive a payment instead of serving a notice period and therefore the effective date of dismissal was 29 November 2019.

79. Dr Dar prepared his occupational health report on 18 December 2019. This is at pages 123 to 124. Dr Dar is a consultant occupational physician. He said that, *"Mr Bennett's condition has not improved despite adjustments in his medication and he is continuing to experience extreme facial pain due to his trigeminal neuralgia as well as drowsiness and confusion linked with the side effects of his medication. He tells me that he is due to have an assessment with the neurosurgeon on 22 January but because of the unusual form of his condition, treatments may be somewhat limited."*

80. Mr Dar said that the claimant was *"unfit for work at the present time and there is no foreseeable timescale for him being able to resume."* Mr Dar opined that, *"The outlook for Mr Bennett is unclear and he will need to wait to see whether any adjustments in medication suggested by his GP or treatments advised by his specialist will bring his condition under better management. The timescale for this being achieved is not able to be predicted and as such I would support referring his case to the pension medical advisor for formal consideration for ill health retirement."*

81. The claimant saw Mr Dar again on 13 January 2020. Mr Dar's report is at pages 132 and 133. Mr Dar says that, *"Mr Bennett is continuing to experience symptoms of severe facial pain in relation to his trigeminal neuralgia and is on a variety of medications to try and manage this. He tells me that he has had his specialist appointment brought forward to 6 January and is now waiting to have surgery undertaken but there is no clear timetable for this."* Mr Dar said that the claimant remained unfit for work and that no management action would expedite his return. He said, *"There is no foreseeable return to work for Mr Bennett within any predictable timescale and as I have advised previously, I feel that ill health retirement is an appropriate consideration for him. Mr Bennett tells me that he has been sent the forms to apply for this which he has already completed."* Mr Dar was supportive of the claimant's application for ill health retirement.

82. On 29 May 2020 Dr Saravolac prepared her report which is dated 29 May 2020 (pages 187 to 191). We have mentioned her report already and in particular that she had helpfully set out the definition of ill health retirement under the relevant rules of the applicable pension scheme. She said that she had reviewed the several documents referred to at the top of page 188. These included the occupational health reports of 19 November 2019, 18 December 2019 and 13 January 2020. She also referred to medical information provided by Austin Smith, consultant oral and maxillofacial surgeon of 19 February 2020 and an independent medical assessment on behalf of the scheme medical advisor by Dr Navaratnam of 27 April 2020.

83. The opinions considered by Dr Saravolac from Austin Smith and Dr Navaratnam were not before the Tribunal. While this may be considered to be an unfortunate omission, the Tribunal may be confident that Dr Saravolac has considered the material and prepared her opinion upon the basis of it. She says that, *"Having considered the application and evidence there is, in my opinion, reasonable medical evidence that Mr Bennett has suffered a breakdown in health involving incapacity for*

employment. The key issue in relation to the application is whether or not Mr Bennett's incapacity is likely to be permanent."

84. She goes on to say that the medical evidence available indicates that the claimant remains incapacitated for work due to ongoing symptoms of right sided facial pain diagnosed as due to trigeminal neuralgia. She refers to Austin Smith's letter of 19 February 2020 in which he mentions *"various treatment activities available to be explored in the future."* She noted Austin Smith's wish to discuss the case with a local radiologist and *"subsequently come back with suggestions of potential treatment".* She went on to say that, *"At the present time I note that Mr Bennett remains on two types of medication suggested to be used by pain management clinic. However, he continues to experience ongoing complaints that are impacting on his ability to be at work and provide regular and effective service. Medical evidence is such that Mr Bennett remains incapacitated for work at the present time."*

85. She says that, *"It appears likely that Mr Bennett without any treatment would have had significant functional limitations in the long term. I note that a formal diagnosis of idiopathic trigeminal neuralgia was made in June 2019 and that treatment activities thus far have not resulted in significant functional improvement. Further treatment activities are yet to be explored through specialist services as noted above. In the circumstances, it would be difficult to conclude that Mr Bennett is likely to be permanently incapacitated for his role or any other role, on the basis that availability and usage of further treatment activities are likely to impact on permanent incapacity for his role or any other work."* She opined in conclusion that, *"Mr Bennett has suffered a breakdown in health involving incapacity for employment. This incapacity is unlikely to continue until normal pension age and so is unlikely to satisfy the scheme requirement for permanence. The pension scheme criteria are therefore unlikely to be met."* She enclosed an ill health retirement refusal certificate.

86. The following evidence and matters emerged from the evidence given by Mr Walters under cross-examination:

    86.1. It was the case that the management of attendance process following upon the hernia absence were considered closed as at 20 September 2019 (page 93). Mr Walters said that he had informed the claimant of the need to maintain good attendance when reaching that decision but accepted Mr Ali's point that a similar sentiment would be conveyed to any employee finding themselves the subject of procedures under the policy was well-made.

    86.2. Mr Walters saw nothing wrong in Mr Slater and Miss Lovell making an unannounced visit to the claimant's home on 1 November 2019. Mr Walters said that the job was very stressful and it can be a matter of concern if an individual is off work but makes no contact. There can of course be no quarrel with Mr Walters' assessment of the role being stressful. However, it is difficult to understand the need for the respondent to make an unannounced visit to the claimant's home in circumstances where both he and his wife had sought to

keep the respondent informed of progress at the end of October 2019.

86.3. The unsatisfactory attendance policy (at clauses 2.45 to 2.71 of the policy) were not applicable in the claimant's case. That being the case, the question becomes one as to whether the claimant was in a position to return to work within a reasonable period after continuous absence. Mr Walters did not accept Mr Ali's submission that making such a decision just five weeks after the commencement of a period of continuous sickness absence was premature. Mr Walters said that the claimant had had *"protracted absences in the past. It was highly unlikely he would return to work. He had a poor attendance record. The reason for his dismissal was he could not provide full and effective service at HMP Lindholme."* Mr Walters observed that just before the meeting of 29 November 2019 the claimant had furnished a sick note covering a further four weeks' absence from 27 November 2019.

86.4. Mr Walters accepted the claimant had a contractual entitlement to sick pay. Employees are allowed 182 days of sick pay at full salary rate in a rolling period of four years and thereafter 182 days upon half pay. Mr Walters considered that the claimant would have already exhausted his full sick pay entitlement given his sickness record and, indeed, had exhausted some of his half pay entitlement. However, Mr Walters was unable to assist the Tribunal with full detail of the claimant's entitlements.

87. As has been said, the respondent advanced its case upon the basis that the claimant wished to leave his employment. This was a theme that was pursued in Mr Walter's evidence. Mr Walters refers, in paragraph 27 of his witness statement, to the exchange recorded at page 115 and cited at paragraph 70 above. In paragraph 28 of his witness statement Mr Walters says that, "*I got the impression that Steve recognised and accepted that he had a poor absence history and that he was currently in serious pain with little prospect of recovery in the near future. Although he and his union representative spoke about performing well in the job and asked me to take this previous service into account, my overall impression was that Steve actually wanted to leave the service and that he did not want his employment to continue. I had numerous previous interactions with Steve at work. He was on a talent management programme and he had previously acted up to the next grade. When we met in March 2019, Steve was adamant that he wanted to stay. He had been keen to stress the importance of his career and commitments to his job. [The Tribunal have made reference to the relevant passages in the meeting notes at pages 89 and 90 at paragraph 27 above]. That was not the case at this meeting. Steve's comments indicated to me that he would not be returning to work and he would prefer to leave his job and focus on his health.*"

88. There is, we think, much merit in Mr Ali's point that the claimant did not expressly indicate a wish to leave the service and that Mr Walters reached his conclusion based upon impression. We agree that Mr Feeney and the claimant were advocating in favour the claimant staying in the role by praying in aid the claimant's service history and record (by reference to comments in page 116: see paragraph 70 above).

89. Mr Walters maintained that *"the claimant asked that day to leave the service."* The Tribunal has searched in vain for mention within the meeting notes of the claimant or his representative adopting such a stance. The Tribunal would have expected there to be a much clearer statement from the claimant or his trade union representative if were such the case. Expressing a firm and settled intention to leave secure and well-paid employment of 13 years' longevity is a profound and serious step. To draw an inference that that was the claimant's wish (absent a clear statement of intent from him or his representative) where the claimant was presenting in acute pain with a rare condition was, in our judgment a managerial decision or step which fell outside the range of reasonable responses given the circumstances.

90. In paragraph 46 of his witness statement, Mr Walters talks about the impact of the claimant's absence upon the service. He says, *"At the time the claimant was dismissed, Lindholme was expected to have 192 staff. At that time Lindholme actually had a staff total of 210. However, of the total staff number we had the following absences, which meant that they were unavailable for work: 5 staff members on maternity leave, 17 on temporary promotion, 2 on a career break, 8 away on training, 8 officers on sick leave and 2 officers on restricted duties; giving a total of 42 staff unavailable for full work or full duties. These figures do not take into account annual leave. Staffing arrangements are planned on the basis that 3.1% of our staff group will be on annual leave at any time. This is approximately 7 band 3 officers. We had at that stage 20% absence level which is clearly unsustainable."*

91. Mr Ali asked Mr Walters whether there had been any discussion with the claimant about the impact of his absence upon the service. Plainly, this was contemplated within the policy (in particular in clause 2.98). Mr Walters said that the claimant *"didn't own that risk. That's for me to know in the management of the jail. I didn't want to burden the claimant with it."* The claimant agreed that this issue had not been raised by Mr Walters on 29 November 2019. However, when this was put to him by Miss Mellor in cross-examination the claimant fairly accepted that there was, in reality, nothing that he could have said about such operational matters which would have influenced or which may have altered Mr Walters' decision.

92. Mr Walters fairly conceded that the sick employees mentioned in paragraph 46 of his witness statement may return to work at any time. He was not able to assist with the date of expiry of the temporary promotions to which he referred or for how much longer those away on training (upon a course lasting for nine weeks) would remain absent from work. Mr Walters did say that in any case the trainees were new members of staff who would require an induction before being able to work in the prison.

93. In paragraph 48 of his witness statement, Mr Walter alludes to the claimant's continued absence meaning his duties fell to be covered by other staff. He says, *"Staff absence and reduction to staffing levels affect our ability to perform fundamental duties such as unlocking regimes and supporting and interacting with prisoners. In turn, that has a negative impact on the provision of a safe and secure prison regime."* He gave

evidence that there was a limit upon his authority to pay overtime to cover staffing shortfalls.

94. The following evidence emerged from the evidence given by the claimant under cross-examination:

    94.1. He denied that his reference to seeking *"an end of it now"* (at page 116) was a wish to end his employment. The claimant said that he wanted an end of the pain which he was suffering. Miss Mellor contrasted the claimant's approach on 7 March 2019 with that on 29 November 2019. She said that the claimant was no longer fighting for his job. The claimant said, *"I couldn't fight. I had nothing left to give. I was in severe pain."*

    94.2. The claimant fairly accepted that on 29 November 2019 he was unfit for work in any capacity.

95. The claimant was asked how long he thought the respondent ought to wait before making a decision upon his employment. The claimant said that he was fit to work in January 2020. Miss Mellor put it to the claimant that this was contrary to Dr Saravolac's report of 29 May 2020 to which we have referred above. The claimant said that "*you have sudden bouts of pain."*

96. The claimant relied upon a letter from Dr Bhattacharya dated 9 January 2020. This followed a clinic of 6 January 2020. (That clinic was actually referred to in Dr Dar's report of 13 January 2020 at pages 132 and 133).

97. Mr Bhattacharya said (in the letter at page 126 addressed to Professor Loescher):

    "It was a pleasure to see Mr Bennett in clinic on 6 January 2020. His pain is now much better controlled from the medication though just recently he has got a bit of breakthrough pain. We discussed his medication and there is clearly an opportunity to increase the Amitriptyline by 10mg as it seems to eradicate his facial pain. We can also consider another cryotherapy session if the pain gets severe. However, this should be kept in reserve as currently his pain is significantly better controlled on the present regime. I referred him to Mr Austin Smith to see if he would consider decompressing the branch of the trigeminal nerve which appears compressed by the blood vessel in the masticator space. I will follow this up. We discussed in clinic that Mr Bennett's case is quite unique and without any evidence of such a condition. As a general rule, we should escalate treatment starting with the least invasive treatment option first as this offers the best risk/benefit ratio. I have left him with an open appointment and once I hear from Mr Austin Smith I will get back in touch."

98. Nothing said by the claimant in evidence given under cross-examination detracts from our finding that the claimant was fighting to keep his job and did not tell Mr Walters that he did not wish to retain his employment. That said, the Tribunal has difficulty accepting the claimant's assertion that he would have been fit to work in January 2013. This is contrary to the evidence of Dr Dar (pages 132 and 133) and Dr Saravolac (at pages 187 to 191). Indeed, Dr Saravolac opines, as late as 29 May 2020, that the claimant remains incapacitated for work. We accept there to have been an improvement by early January 2020 as evidenced in Mr Bhattacharya's letter of 9 January 2020 at page 126. That letter is very much consistent

with the opinion of Dr Saravolac to the effect that various treatments and options were to be explored. That is however a long way from an opinion that in January 2020 the claimant was fit to resume his role (or indeed any alternative role).

The issues

99. We now turn to consider the issues in the case. This matter benefited from a case management hearing which came before Employment Judge Little on 19 June 2020. The case management summary is at pages 36 to 39.

100. The relevant issues are set out in paragraph 4 of the case management summary. These are:

"4.1. At the material time (July 2018 to the date of dismissal) was the claimant a person with a disability by reason of the impairment of trigeminal neuralgia?

4.2. If so, was the respondent aware of that or should it reasonably have been expected to know that?

4.3. In so far as the reason for the claimant's dismissal was sickness absence and/or an inability to complete the duties of a prison officer, was the reason for the claimant's dismissal something which arose from his disability?

4.4. If it was, was the unfavourable treatment of dismissal a proportionate means of achieving the legitimate aim of ensuring satisfactory levels of attendance among its workforce sufficient to maintain good order and discipline at HMP Lindholme?

4.5. Can the respondent show a potentially fair reason for the claimant's dismissal? The respondent seeked to show the reason of capability.

4.6. If so, was that reason actually fair being within the reasonable band of decisions and satisfying the test in section 98(4) Employment Rights Act 1996. In particular:

- *Was the formal attendance meeting conducted on 8 November 2019 contrary to the respondent's own procedure because it occurred after 15 days' absence rather than 28?*
- *Proceeding to dismissal whilst the claimant's prognosis was uncertain and failing to consider the option of ill health retirement.*
- *Conducting a final formal attendance meeting on 29 November 2019 prematurely and making a decision to dismiss without an up to date occupational health report.*
- *Deciding to dismiss before any application for ill health retirement had been considered.*
- *Dismissing before the claimant's entitlement to sick pay had expired.*
- *Failing to take into account the claimant's long service and good performance.*

4.7. If the dismissal is found to be procedurally unfair, would a fair procedure have made any difference and if so what? How should that be reflected in terms of remedy?"

The relevant law

101. We now turn to the relevant law. We shall start by considering the complaint brought by the claimant under the 2010 Act.

102. By section 15 of the 2010 Act, a person discriminates against a disabled person if they treat the person unfavourably because of something arising in consequence of their disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim. An employer has a defence if it can be shown that they did not know and could not reasonably have been expected to know that the claimant had the disability at the material time.

103. Discrimination by way of unfavourable treatment for something arising in consequence of disability is made unlawful in the workplace by the provisions in part 5 of the 2010 Act. By section 39(2) an employer must not discriminate against an employee by dismissing the employee.

104. It is for the claimant to make out a *prima facie* case that he was unfavourably treated. Unfavourable treatment is something which a reasonable employee would consider to be to their disadvantage. The claimant must then show that the unfavourable treatment arose because of *"something"* and that the *"something"* arose in consequence of his disability.

105. Should the claimant succeed in establishing such a case then it will fall to the respondent to dispute or rebut the claimant's *prima facie* case of discrimination. There is also a burden upon the respondent in circumstances where the respondent seeks to establish the defence of a lack of actual or constructive knowledge of the disability or that the unfavourable treatment is capable of justification as a proportionate means of achieving a legitimate aim.

106. Upon the defence of justification, the legitimate aim relied upon must be legal and should not be discriminatory in itself. It must also present a real objective consideration. To be proportionate, the measure has to be both an appropriate means of achieving the aim and reasonably necessary in order to do so. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be reasonably necessary to that end. This is an objective test. It is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. The Tribunal has to weigh the real needs of the undertaking against the discriminatory effects of the requirements. It is necessary to consider the particular treatment of the employee in question in order to consider whether that treatment was a proportionate means of achieving the legitimate aim.

107. We now turn to the unfair dismissal complaint. As the claimant has worked for the respondent in excess of two years, he enjoyed the right not to be unfairly dismissed.

108. It is for the respondent to show a permitted reason for the claimant's dismissal. The permitted reason relied upon in this case relates to the capability of the claimant to perform work of the kind that he was employed to do by the respondent.

109. Should the Tribunal be satisfied that the respondent genuinely believed that the claimant was so incapable, then the Tribunal must consider whether the respondent had reasonable grounds upon which to sustain that belief and then whether the respondent acted reasonably in the circumstances in treating incapacity as a sufficient reason to dismiss the claimant when the employer did so. The relevant circumstances include the size and administrative resources of the employer's undertaking. The issue of reasonableness is to be determined in accordance with equity and the substantial merits of the case.

110. The burden of showing to the satisfaction of the Tribunal a genuine belief in the permitted reason and that the reason for dismissal was the one put forward by the employer is upon the respondent. Thereafter, upon the question of the reasonableness of belief there is no burden of proof. It is for the Tribunal to be satisfied that the respondent reasonably believed the claimant to be so incapable after carrying out as much investigation into the matter as was reasonable and after following a fair procedure.

111. Similarly, there is a neutral burden upon the question of whether the decision to dismiss was reasonable and is a matter for the Tribunal. The Tribunal must consider the reasonableness of the employer's conduct in dismissing the employee and not simply whether the Tribunal itself considers the dismissal to be fair. We must not substitute our decision as to what was the right course for that of the employer. The function of the Tribunal is to determine whether in the particular circumstances of the case the decision to dismiss the employee fell within the range of reasonable responses. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band it is unfair.

112. The range of reasonableness test applies not only to the decision to dismiss but also the procedure by which the decision is reached. In determining whether the procedure was one that fell within the range of reasonable management responses, the Tribunal will take into account the employer's policies and procedures.

113. Should the Tribunal determine in the claimant's favour his complaints brought under the 1996 Act and/or the 2010 Act then the Tribunal shall go on to consider remedy. Following a discussion with the parties' counsel at the outset of the case, it was resolved that remedy issues would be determined at a subsequent remedy hearing were the claimant to succeed with either or both of his complaints. The exception to this was upon the unfair dismissal complaint. It was agreed that should the Tribunal find that the dismissal was procedurally unfair and/or that this employer may have fairly dismissed the employee of the subsequent date, then those were matters to be determined by the Tribunal at this stage of proceedings.

114. Mr Ali and Miss Mellor both referred the Tribunal to the case of **BS v Dundee City Council** [2013] CSIH91. This was an unfair dismissal complaint. As in the instant case, it concerned an individual who was dismissed following a lengthy period of ill health absence. The Judgment

of the Inner House of the Court of Session provides useful guidance to Tribunals faced with incapacity dismissals. The Court of Session referred to the two main authorities (both of which date from the 1970s) which deal with cases such as this.

115. In **Spencer v Paragon Wallpapers Limited** [1976] IRLR 373 EAT it was held that in cases of ill health, what is required is a discussion of the position between the employer and the employee so that the situation can be weighed up, bearing in mind the employer's need for work to be done and the employee's need for time to recover their health.

116. In **East Lindsey District Council v Daubney** [1977] IRLR 181 EAT it was held that unless there are wholly exceptional circumstances, before an employee is dismissed on grounds of ill health, it is necessary that they should be consulted and the matter discussed with them and that in one way or another, steps should be taken by the employer to discover the true medical position. If the employee is not consulted and given an opportunity to state their case an injustice may be done. Though the steps that employers should take may vary, if in every case employers take such steps as are sensible according to the circumstances, to consult the employee and to discuss the matter with them, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done.

117. In the **Dundee City Council** case, it was said (in paragraph 27) that, "*Three important themes emerged from the decisions in **Spencer** and **Daubney**. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise however, that this is a fact that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant fact operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."* In short, the Employment Tribunal needs to be satisfied that a reasonable and fair process was followed. There is no dispute between counsel in the instant case that these are the principal issues which arise upon the claimant's unfair dismissal claim.

118. The issue of ill health retirement features in the instant case. In **First West Yorkshire Limited (trading as First Leeds) v Hague** [2007] UK EAT 0246-07 it was held that where an employee is long term absent on grounds of ill health, and their pension scheme contains provisions entitling them to an ill health pension on grounds of permanent incapacity, an employer will generally be expected to give consideration to ill health retirement before dismissing for incapacity. At paragraph 46, His Honour Judge Richardson observed that, "*We accept that it may be possible for an employee who has been dismissed without consideration of an ill health*

retirement provision to bring a claim for breach of contract or in some other way to assert the claim under the pension scheme. We do not need to reach any conclusion on this point, and we did not have before us the full terms of the scheme or Mr Hague's terms and conditions of employment. Indeed, if there were no such provision enabling him to make a claim it might be necessary to imply such a provision: see, by way of analogy (but no more) ***Brompton v AOC International Limited and Unum Limited*** *[1997] IRLR 639 and* ***Aspden v Webbs Poultry and Meat Group (Holdings) Limited*** *[1996] IRLR 521."*

119. HHJ Richardson went on to say at paragraph 47 that, "*The potential for an employee to bring a claim afterwards is no substitute for the orderly consideration of the matter prior to retirement by the company and its occupational health advisors with such outside advice as is necessary. If it is established that an employee is entitled to take retirement with an enhanced pension, dismissal will often be avoided altogether".*

120. The **Hague** case was distinguished in **Matinpour v Rotherham Metropolitan Borough Council** EAT 0537/12. The employee's contention in **the Rotherham MBC** case that there was a duty upon the respondent council to postpone dismissal to enable the possibility of ill health retirement to be explored, and that the failure to do this rendered the dismissal unfair, was rejected. In **Hague**, the employer's terms and conditions required it to consider ill health retirement. Such a feature was absent in the **Rotherham MBC** case.

121. The employee in the **Rotherham MBC** case sought to argue that consideration of the possibility of ill health retirement prior to dismissal was a general matter of good industrial relations practice and not an outcome of a specific contractual obligation. Mr Justice Langstaff (President) rejected that contention. He made the point that ill health retirement is not normally a decision for an employer but one for the trustees of the applicable pension scheme. Since permitting early retirement is costly to such a scheme, applications are admitted cautiously and considerable effort is made to ensure that they meet the applicable criteria.

122. The Employment Appeal Tribunal also held that the Employment Tribunal in the **Rotherham MBC** case had properly considered whether there was any basis upon which the council could reasonably have anticipated that the employee might be eligible for ill health retirement. It was plain that unless the circumstances were such that an employer ought to believe that an employee is, or may reasonably be, suitable for ill health retirement, the employer would come under no duty to delay dismissal simply to consider a matter that, on the information before it, there was no reason to think would arise. In this regard, it was held that the Tribunal properly accepted that the council had no cause to believe that the employee was a suitable candidate for ill health retirement as he was not suffering from any medical condition that made him unfit to do work of any kind or made him permanently unable to return to the particular he was employed to do. It could not therefore be unreasonable in the context of the reasonableness test in section 98(4) of the 1996 Act to fail to delay dismissal so that early retirement could be explored.

Discussion and conclusions

123. We now turn to our conclusions. We shall start with the complaint of unfair dismissal.

124. On any view, the respondent has discharged the burden of proof upon it to demonstrate a genuine belief that the claimant was incapable of undertaking work of the kind which he was employed by the respondent to undertake. The claimant was employed as a prison officer. This is demanding and stressful work. As at 29 November 2019, the respondent had obtained two occupational health reports both of which said that the claimant was unfit for work due to the severity of his symptoms. Indeed, the report of 19 November 2019 opined that he was unfit to work at present in any capacity due to his current symptoms (pages 108-110).

125. The respondent had reasonable grounds upon which to sustain the belief that as at 29 November 2019 the claimant was incapable of working as a prison officer or indeed in any capacity. That there were reasonable grounds to sustain that belief is apparent from there being two occupational health reports to that effect.

126. The difficulty for the respondent, however, is that there was a clear failure to comply with the policy. We have referred to the flaws in the respondent's approach already in paragraphs 55-57. The respondent breached its own policy in several ways:

    126.1. It sought to convene an informal review on 1 November 2019, that being within the 14 consecutive calendar days of absence which have to pass before an informal review may take place.

    126.2. The respondent then did not convene an informal review at all. That stage was by-passed. The respondent moved straight to a formal attendance review meeting. This was held on 8 November 2019 which was only 17 days following the commencement of the claimant's absence on 22 October 2019. This is impermissible under the policy which provides that a FARM should not take place until 28 consecutive calendar days have passed.

    126.3. Following the FARM held on 8 November 2019, the claimant was then referred to Mr Walters as decision maker to decide upon continued employment. This is contrary to clause 2.76 which provides that a FARM shall take place after 28 consecutive calendar days of absence and another FARM where the sickness absence has lasted three months. (There is some ambiguity in the policy as clause 2.84 provides that the three months' review stage is a minimum standard and which implies or infers that a further FARM can be held less than three months after the first one).

    126.4. Clauses 2.83 and 2.84 of the policy provide for there to be a first FARM followed by a further FARM. It is clear from the sequence set out in the policy at clauses 2.83 to 2.88 that an employee is not expected to be referred to a decision maker until after at least a second formal FARM following the first FARM.

127. The Tribunal therefore agrees with Mr Ali that the respondent has acted in breach of its policy. No good reason was advanced by the respondent for so doing. It is difficult to see any justification for failing to adhere to the timescales in the policy in circumstances where the first occupational health report of 5 November 2019 (pages 100-101) said that, *"At the present time I am unable to predict a return to work date in the next four weeks"* and postulated an uncertain prognosis. The second occupational health report of 19 November 2019 (pages 108-110) was describe as interim and recommended that management monitor the claimant's condition and review the position in four weeks' time (mid-December 2019). Given these opinions, it fell outside the range of reasonable management responses to move straight to dismissal just 10 days later and not wait for further opinion around four weeks after 19 November 2019.

128. Had the respondent not done so, and had acted within the provisions of its own policy, then it would have been on much stronger ground as the occupational health report of 18 December 2019 (pages 124-124) opined that the claimant was unfit for work at the present time with no foreseeable timescale for him to be able to return to work, that treatments for the claimant's unusual condition were *"somewhat limited"* and there was support for referring the case to the pension medical advisor for consideration of ill health retirement.

129. The situation was little improved, from the claimant's point of view, on 13 January 2020 and indeed as late as 26 May 2020. We refer to the occupational health report of 13 January 2020 at pages 132 and 133 and the ill health retirement pension medical report of Dr Saravolac at pages 187 to 191.

130. There was additional substantive unfairness to the claimant in that, unbeknown to him until the hearing of 29 November 2019, Mr Walters' assessment of his fitness for work was by reference not only to the neuralgia but also his prior medical history. Such an approach is plainly outside the range of reasonable responses in circumstances where the employee has been led to believe that the slate has been wiped clean about previous absences. That was the position in which the claimant found himself on 20 September 2019. He was told that the attendance review process upon the hernia condition was being closed with no further action. The claimant received sick excusal in relation to the absence in September 2019 attributable to the assault upon him by the prisoner. Only the neuralgia was discussed at the first FARM as confirmed in Leonie Lovell's letter of 8 November 2019. (The first entry refers to a discussion of the claimant's current condition (at page 105) but to no others). The letter of 12 November 2019 from Mr Walters (pages 106 and 107) contained no warning that Mr Walters would take into account pre-October 2019 absences.

131. There is ample evidence that Mr Walters did just that and took into account pre-October 2019 absences. We have made reference to his mention of absences over the entirety of the claimant's service period in the FARM notes at pages 115 to 118. Historical sickness absence was expressly referred to by Mr Walters in the letter of 2 December 2019 (pages 120 and 122). The attendance review meeting of 29 November 2019 was in fact

adjourned for the purpose of enabling Mr Walters to check upon the claimant's historic absence record. Mr Walters says in paragraph 31 of his witness statement that he did just that and took it into consideration.

132. Such an approach is plainly outside the range of reasonable management responses. Firstly, the employee had been led to believe that the slate had been wiped clean as at 20 September 2019 and that any further non-attendance would be considered upon its own merit without reference to the historical record. Secondly, the employee was not told that anything other than that the post-22 October 2019 absence was going to be taken into account by Mr Walters. On any view, such an approach is manifestly unfair.

133. Before the Tribunal, the respondent's case was run up on the premise of only the post 22 October 2019 absence being taken into account. In the Tribunal's judgment, this was the correct basis upon which for the respondent to have sought to run its case.

134. However, the Tribunal is fortified in its finding that the respondent strayed into an area which impermissibly fell outside the range of reasonable responses by considering historic absence based upon what is pleaded on the respondent's behalf in its notice of appearance and in what was said before Employment Judge Little at the case management summary. The Tribunal has mentioned already the table which features in paragraph 7 of the notice of appearance. Plainly, the respondent was seeking to rely upon historic absence. Further, Employment Judge Little recorded that the respondent advanced a case before him that "*what happened in October and November 2019 was the culmination of a process which had begun in September 2018 and was not a "knee-jerk" reaction to the claimant being diagnosed with the impairment. The precise reason for the claimant's dismissal was described as medical inefficiency".*

135. Mr Ali fairly recognised that it was permissible for the respondent to look at historic absence in order to assess the likelihood of the claimant's return. That however is a fundamentally different thing to the respondent's decision to dismiss the claimant because of historic absence. In our judgment, that is precisely what Mr Walters did. The letter of 2 December 2019 (page 120) confirming the decision taken on 29 November could not be clearer. In the second paragraph, Mr Walters says that, *"Your sickness prior to this absence was around 95 days and looking further into your historical absences you have had in total around 481 days in your 13 years' service".* Historic absence was not being used here as a guide as to the prospect of return from the post 22 October 2019 absence but rather as a reason for the dismissal of the claimant in and of itself. The Tribunal agrees with Mr Ali that this was fundamentally unfair.

136. When the decision to dismiss the claimant was taken on 29 November 2019, there was nothing to put the respondent on notice that the neuralgia made him unfit to do work of any kind or made him permanently unable to return to the particular work. However, the policy clearly envisages that where the respondent considers there to be a breakdown in the employee's health, the issue of ill health retirement ought to be considered. The Tribunal refers to clause 2.127. This the respondent failed to do. Further, the absence of any medical evidence that the claimant was a

candidate for ill health retirement is very much a product of the respondent's procedural failings. Had matters progressed in line with the timescales within the policy the issue of ill health retirement would have been four- square before the decision maker. This is because Dr Dar said on 18 December 2019 that he would be supportive of referring the claimant's case to the pension medical advisor for formal consideration of ill health retirement. Therefore, we agree with Mr Ali that this was a further breach of the respondent's policy which disadvantaged the claimant because the parties were then deprived of the benefit of medical evidence addressing the issue of the permanence of incapacity.

137. The Tribunal agrees with Mr Ali that the respondent failed to act within the range of reasonable responses in proceeding to dismiss upon the basis of an impression that the claimant did not wish to stay in his role. In paragraph 21 of his witness statement Mr Walters says that he treats "*cases that could result in the end of employment very seriously. They are important decisions that need to be handled fairly."* These words may ring hollow in the claimant's ears in circumstances where, we have found, Mr Walters acted upon an impression which he formed of the claimant's wish to end his employment in circumstances where the claimant was presenting with an excruciatingly painful condition the treatment for which appears to have confounded those with the relevant medical expertise and was described by Mr Bhattacharya as *"quite unique".* The impression was without foundation in any case as the claimant and Mr Feeney were advocating for the claimant to stay in post.

138. By reference to the **Dundee City Council** criteria the Tribunal therefore finds the procedure to have been followed as falling outside the range of reasonable management responses in the circumstances and that the consultation with the claimant and the steps to discover the medical condition similarly fell outside the range of reasonable managerial prerogative. The claimant was therefore unfairly dismissed by the respondent.

139. The Tribunal's judgment, this respondent, acting within the range of reasonable management responses, could have fairly dismissed the claimant at a later date. By application of the policy, the following timescale ought to have applied:

139.1. Around 8 November 2019 – informal attendance management review after a little over 14 consecutive calendar days of absence.

139.2. Around 19 November 2019 – first FARM after 28 consecutive days of absence.

139.3. Around 18 February 2020 – second FARM around three months after the first FARM in accordance with the postulated timescales in clauses 2.76 and 2.84.

139.4. Around 30 April 2020 – final formal attendance management review meeting.

140. Had this timescale, in accordance with the policy, been followed then the respondent would have been in receipt of the occupational health reports of 18 December 2019 (pages 123 and 124) and 13 January 2020 (pages 132 and 133). In the Tribunal's judgment, it would fall outside the range

of reasonable responses to dismiss an employee with such a rare condition as this without seeking advice from an expert in neurology or neurosurgery. The respondent is therefore likely to have had available a letter similar to that from Mr Bhattacharya of 9 January 2020 at page 126. That, coupled with the second report from Dr Dar of 13 January 2020 would have enabled the respondent reasonably to conclude there to be no realistic prospects of a return to work for the claimant. The occupational health reports of 18 December 2019 and 13 January 2020 and the letter from the treating neurosurgeon of 9 January 2020 would then have been discussed at the second FARM. In those circumstances, it would plainly have fallen within the range of reasonable managerial prerogative for Miss Lovell to have referred the matter to Mr Walters for a decision.

141. The question of ill health retirement may then have been raised in compliance with the policy at the second FARM on or around 18 February 2020. In the Tribunal's judgment, there is nothing within the claimant's contract of employment, the policy or within the applicable case law which requires the outcome of the ill health retirement policy application to be reached before a decision is taken to dismiss the employee. In the Tribunal's judgment, the matter being flagged by Dr Dar, the claimant may then have made the ill health retirement pension application at that stage. However, the respondent would then have complied with the policy but will still have been possessed of sufficient medical material to justify the dismissal of the claimant. It is upon this basis that the Tribunal concludes that the claimant's employment would have ended at the end of April 2020 had the respondent complied with its procedure.

142. The Tribunal now turns to the disability discrimination complaint. As has been said, there is no issue that the claimant is a disabled person within the meaning of section 6 of the 2010 Act and that at the material time the respondent had knowledge of the disability. The respondent therefore advances no defence of lack of knowledge in answer to the claim.

143. The dismissal of the claimant is plainly unfavourable treatment. On any view, any reasonable employee would consider such a step to be to their disadvantage. The reason for the dismissal was the claimant's ill health absence record. That ill health absence record was (in relation to the post-22 October 2019 period) something that arose in consequence of the disability. The claimant was absent from work after 22 October 2019 because of the symptoms brought on by the neuralgia which is conceded by the respondent to be a disability. The claimant has therefore discharged the burden upon him to show that he was unfavourably treated for something that arose in consequence of his disability.

144. The respondent seeks to justify the dismissal of the claimant as a proportionate means of achieving a legitimate aim. The pleaded legitimate aim is ensuring satisfactory levels of attendance among the workforce sufficient to maintain good order and discipline at HMP Lindholme. No issue was taken by the claimant that this is a legitimate aim. Plainly, it is an aim which is legal and not discriminatory in itself and presents a real objective consideration. On any view, the maintaining of good order and discipline at the prison is a real and objective consideration and is one which, we have no doubt, is conscientiously pursued by Mr Walters. Indeed, Mr Walters said as much. The impact of the claimant's and others'

absences was plainly a matter of acute anxiety for him but was a consideration which he did not wish to burden the claimant with.

145. The real issue therefore is whether it was proportionate to dismiss the claimant on 29 November 2019 in order to achieve the aim. The Tribunal reminds itself that it is not enough that a reasonable employer might think that the action is a proportionate means of achieving the legitimate aim. This is an objective consideration. The Tribunal has to weigh in the balance the interests of the claimant against the interests of the respondent in order to determine whether the decision to dismiss the claimant was appropriate with a view to achieving the objective in question and be reasonably necessary to that end.

146. The difficulty for the respondent is that it failed to comply with its own procedure. Had it done so, then the claimant, as we have found, may have fairly been dismissed later. It is difficult to see how it can be proportionate and objectively justifiable in pursuit of the achievement of an aim to short circuit an employer's own procedures which are there for the safeguard of the employee. The evidence advanced by the respondent fell far short of seeking to explain why, in order to achieve the legitimate aim, it was reasonably necessary to dismiss the claimant by acting precipitously and outside of the respondent's own timescales. There was no evidence advanced by the respondent that there was a real need upon the part of the employer's undertaking to act so quickly in order to achieve the aim. The absence of evidence must be weighed against the evidence from the claimant that the respondent's discriminatory conduct resulted in the loss of his job.

147. Had the respondent adhered to timescales within its policy then it may well have been on firmer ground upon its justification defence. Notwithstanding the criticism levelled at him by Mr Ali, we accept Mr Walters' evidence in paragraph 46 of his witness statement that an indefinite and continuous sickness absence could not be supported given that 42 members of staff were unavailable for work or full duties.

148. Prison is of course well known to be an unstable and dangerous environment. The continued retention of members of staff incapable of performing such an important role and the prevention by such of the recruitment of replacements persuades the Tribunal that had the respondent adhered to its own policies and procedures the dismissal of the claimant would have been justified as a proportionate means of achieving the legitimate aim. The aim of the maintenance of good order and discipline simply cannot be achieved without the governor having available to him or her safe staffing levels. Such an aim is thwarted by the retention of staff who regrettably are unfit for the role.

149. All of this being said, the respondent's precipitous actions deprived the claimant of important procedural safeguards and the respondent's actions in dismissing the claimant on 29 November 2019 were therefore disproportionate. We cannot accept Miss Mellor's submission that the unfavourable treatment of the claimant for something arising in consequence of disability becomes proportionate by taking into account the compensation payment of almost £34,000. In the Tribunal's judgment, this does not make proportionate the respondent's otherwise

disproportionate actions in prematurely dismissing the claimant contrary to the timescales in its own policy.

150. With hindsight, the respondent's failure to follow its own procedure simply delayed the inevitable. In the Tribunal's judgment however, the respondent's actions removed significant procedural safeguards which the claimant should have enjoyed. For all the parties knew in November 2019, the position may well have improved over the next few weeks. Indeed, the respondent's occupational health report of 19 November 2019 tentatively suggested that such may be the case by reference to the recommendation for a review in four weeks' time and the labelling of the report as an interim one.

151. Given the Tribunal's findings upon the claimant's unfair dismissal complaint, it is not open to the respondent to argue that the respondent's actions on 29 November 2019 were proportionate in any case. Objectively, the respondent's actions were not proportionate. The discriminatory effect of dismissing the claimant on 29 November 2019 which circumvented the timescales and safeguards within the policy had a disproportionate impact upon the claimant and is not brought back into the balance as proportionate simply because of the countervailing factor of the respondent paying a significant lump sum to the claimant where (for all the parties knew in November 2019) medical opinion may have favoured the claimant with the salvaging of the claimant's career. This would have brought with it remuneration in excess of the compensation payment.

152. What has to be justified is the respondent's actions at that particular time. For the reasons just given, the Tribunal finds that those actions cannot be justified in the circumstances.

153. The matter shall now be listed for a remedy hearing. The parties shall, within 21 days of the date of promulgation of this Judgment, write to the Tribunal with dates of availability to attend the remedy hearing over the ensuring four months' period. At the same time, should the parties consider that the matter may benefit from a case management hearing before the Employment Judge, then they shall say so.

Employment Judge Brain

Date 10 February 2021