THE EMPLOYMENT TRIBUNALS

Claimant: Mr I T Pattison

Respondent: The Secretary of State for Justice

Heard at: Newcastle Hearing Centre (by CVP) **On:** 25, 26, 27 and 28 May 2021
with deliberations on 6 and 7 July 2021

Before: Employment Judge Morris
Members: Mr J Adams
Mr R Dobson

Representation:
Claimant: Mr P Kerfoot of Counsel
Respondent: Mr M Brien of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that the respondent unlawfully discriminated against him by treating him unfavourably because of something arising in consequence of his disability contrary to sections 15 and 39 of the Equality Act 2010 is not well-founded and is dismissed.

2. The claimant's complaint that, contrary to section 21 of the Equality Act 2010, the respondent failed to comply with its duty under section 20 of that Act to make adjustments is not well-founded and is dismissed.

3. The claimant's complaint that his dismissal by the respondent was unfair, being contrary to Section 94 of the Employment Rights Act 1996 with reference to Section 98 of that Act, is not well-founded and is dismissed.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant was represented by Mr P Kerfoot, of Counsel, who called the claimant to give evidence and Mr P Hannant, trade union representative, to give evidence on his behalf. The respondent was represented by Mr M Brien, of Counsel, who called three employees of the respondent to give evidence on his behalf: namely, Ms K Gibson, Clinical Director of Westgate Unit (where the claimant had worked) within HMP Frankland; Dr J Bailey, Head of Psychological Services; Mr G O'Malley, Acting Deputy Director of Long-term High Security Estate.

3. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. The Tribunal also had before it a bundle of agreed documents comprising in excess of 800 pages, which was added to during the hearing. The numbers shown in parenthesis below refer to the page numbers or the first page number of a large document in that bundle.

The claimant's complaints

4. The claimant's complaints were as follows:

    4.1 His dismissal by the respondent was unfair contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

    4.2 His dismissal was discriminatory contrary to section 39(2)(c) of the Equality Act 2010 ("the 2010 Act") in that:

        4.2.1 the respondent had treated him unfavourably because of something arising in consequence of his disability as described in section 15 of that Act, that unfavourable treatment being dismissing him; and
        4.2.2 the respondent has failed, contrary to section 21 of the 2010 Act, to comply with the duty to make adjustments imposed upon him by section 20 of that Act.

The issues

5. The parties had produced a list of issues running to three pages, which being a matter of record need not be set out fully in this part of these Reasons but are summarised below.

6. First, however it is appropriate to note that the following concessions and agreements are recorded in that list of issues:

6.1 The claimant was dismissed.

6.2 The sole or principal reason for the dismissal was capability.

6.3 At all material times the claimant was, by reason of arterial fibrillation, a disabled person within the meaning of section 6 of the 2010 Act; and the respondent had knowledge of that disability.

6.4 The respondent dismissed the claimant because of something arising in consequence of his disability, the something being his use of anticoagulant medication.

7. The remaining issues that fell to be determined by the Tribunal can be summarised as follows:

7.1 Did the respondent act reasonably in all the circumstances in treating capability as a sufficient reason to dismiss the claimant, having regard to equity and the substantial merits of the case?

7.2 Was the dismissal fair in the circumstances having regard to the size and administrative resources of the respondent?

7.3 Was the claimant's dismissal a proportionate means of achieving a legitimate aim? In particular,

7.3.1 was the dismissal an appropriate and reasonably necessary way to achieve the respondent's aims;
7.3.2 could something less discriminatory have been done instead; and
7.3.3 how should the needs of the claimant and the respondent be balanced?

7.4 Did the respondent operate a provision criterion or practice ("PCP") that the claimant had to attend work to carry out his post?

7.5 Did the PCP put a person with the claimant's disability at a substantial disadvantage compared to someone without the claimant's disability?

7.6 Did the PCP put the claimant at that substantial disadvantage compared to someone without his disability, in that the respondent did not allow him to carry out a prisoner-facing role given the small but significant risk of a cerebral bleed if he was to sustain a head injury?

7.7 Would the following adjustments have avoided the disadvantage to the claimant:

7.7.1 permitting the claimant to wear a helmet or other form of protection;
7.7.2 enabling prisoner contact to take place behind a protective measure such as a screen;
7.7.3 the claimant carrying out assessments via video link?

7.8 Were those adjustments ones which it was reasonable for the respondent to take to avoid the disadvantage to the claimant?

Consideration and findings of fact

8. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the Hearing and the relevant statutory and case law, including that referred to by the representatives, (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

8.1 The respondent is responsible for Her Majesty's Prison and Probation Service ("HMPPS") within which is Her Majesty's Prison Frankland at which adult male high security (category A) prisoners are detained. Within HMP Frankland, although physically separated from it, is the Westgate Unit, which is a purpose built high security residential unit and treatment centre for prisoners with dangerous and severe personality disorders, albeit it represents a step towards their reintegration. Westgate can accommodate up to 86 prisoners most of whom are serving sentences for serious violent crimes. Within Westgate the prisoners undertake various activities and engage in therapy provided by HMPPS Psychological Services, which are managed separately from the prisons in which the services are provided. Prisoner movement within the Unit is described as being predictable (such as at mealtimes and going to activities) and unpredictable when prisoners might be undertaking cleaning or painting, going to the lavatory, collecting medication or leaving a session or when a disruptive prisoner is being returned to his cell.

8.2 Given the prison population of the Westgate Unit a number of measures are in place that are intended to ensure a safe working environment, so far as that is possible in such an environment. These include the following: CCTV cameras and alarms being positioned throughout the Unit; there is a good staff/prisoner ratio; a risk assessment is conducted before therapists conduct therapy sessions; prisoners are searched before and after each session; therapists such as the claimant are accompanied by another member of staff during therapy sessions. That said, the Tribunal accepts the evidence of Dr Bailey that such precautions cannot prevent unpredictable events no matter how rare they might be. As she put it, "In prisons it is hard to avoid physical conflict if it is going to happen".

8.3 The claimant commenced employment at HMP Frankland on 30 October 2006 as a senior therapist. He was well-regarded for his therapeutic skills and, for a time, was head of an accredited offending behaviour programme dealing with high-risk violent psychopathic offenders, known as the Chromis Programme. That Programme was decommissioned in 2018.

8.4 The claimant has a generic job description (819) for a Band 8 therapist, which was last amended in 2013, the Summary in which provides that the job holder "will provide clinical specialist assessment and treatment intervention for a complex needs prison population such as those with Dangerous and Severe Personality Disorders, supporting operational staff and other clinicians in their approach to psychotherapy". It continues that the "job holder will be working with complex/high-risk prisoners" providing a range of therapies" and "This is a prisoner facing role with both line management and clinical management responsibilities". The job overview is that this "is a non-operational, prisoner facing job with functional management and clinical management responsibilities". This is borne out by a lengthy, non-exhaustive, list of required responsibilities, activities and duties some of which relate to supervision and training of staff while others focus upon working with prisoners.

8.5 In light of this job description, the Tribunal accepts the evidence of the respondent's witnesses that the provision of therapy to the prisoners on the Westgate Unit is central to the claimant's role, as is evident from his job title of "Senior Therapist". Ms Gibson summarised the claimant's role as including: overseeing the staff well-being strategy; providing therapy on an individual and group basis; holding a caseload of prisoners; development and assessment with prisoners; providing input into parole and category A processes; attending significant reviews with prisoners. Mr O'Malley quantified this as being the claimant attending a morning briefing meeting and a management briefing, each for some 30 minutes each morning, and undertaking his well-being role for approximately one hour each month; the remainder of the claimant's time, he said, would be spent undertaking clinical work. Importantly, however, the claimant's role also included being involved in the day-to-day life of the Unit such as attending community meetings with up to 20 prisoners at a time, community events and other activities in which all clinical staff are expected to be involved. In accepting this evidence, the Tribunal rejects that of the claimant that the provision of the therapy sessions only took up some 10% of his time, and the submission of Mr Kerfoot that the claimant was best placed to explain his duties and that the respondent's witnesses had described more what the claimant should have done from documents rather than what he was doing "on the ground". Importantly, the Tribunal has accepted below that the claimant's managers who prepared the risk assessment were best placed to know the role to which the claimant would be returning had he been permitted to do so.

8.6 The Tribunal also accepts the evidence of the respondent's witnesses that while the claimant had had a supervisory role as part of the Chromis Programme, which had accounted for quite a lot of his time, when that Programme was decommissioned the time that he had spent providing supervision was replaced by him providing therapy, not least because he was not qualified to the level required to provide supervision in respect of various therapies.

8.7 In summary, the Tribunal finds that if the claimant had returned to his role on the Westgate Unit he would have been likely to have contact with prisoners throughout the day and not just in therapy sessions, which was the focus of his evidence. In that connection, the Tribunal understands and accepts the evidence of Mr O'Malley that although towards the end of his employment the claimant was minimising the amount of prisoner contact in his role, as he did in evidence before this Tribunal, it was apparent in some of the earlier Occupational Health ("OH") reports (for example on 31 December 2018 and 27 November 2019) that the claimant had reported to the advisers that he was "working in contact with inmates where there is a risk of injury" and that in his role "he provided mental health support to prisoners …. and support to the staff".

8.8 The Tribunal is satisfied that the above is the claimant's job description and not the Staff Performance & Development Report (272) that the claimant stated in evidence was his job description. On the contrary, the Tribunal accepts the evidence of the respondent's witnesses that the purpose of that Report is, as it is described, staff performance and development, the particular focus of which is the development priorities for the particular employee in the forthcoming year.

8.9 In relation to the Report for the year commencing 31 May 2018, one of the specific areas of development for the claimant is said to be to take a lead role in the support and development of clinical staff at Westgate Unit as the Well-being lead (275). The claimant's evidence was that that role and other management responsibilities represented 90% of his role with the result that he undertook very little therapy. The Tribunal does not accept that evidence and prefers that given by Ms Gibson including that all of the Band 8 therapists were leads in areas such as referral, assessment, treatment and involvement. They and the claimant were to take on responsibility for those strategies but also carry out their clinical roles such as undertaking assessments and delivering therapy.

8.10 In January 2015 the claimant took partial retirement and continued in his therapist role on a 0.6 full-time equivalent basis.

8.11 In November 2015, the respondent received advice from OH relating to staff on anticoagulant therapy (313). In respect of prison officers it is stated, amongst other things, "Whilst taking the anticoagulation medication he/she is not fit to carry out their full operational duties including C&R." "If this medication is to be taken for life then the officer must be declared permanently unfit for full officer duties and may be eligible for medical retirement" (314). In respect of non-prison officer employees it is stated, "Non-prison officer staff who are on anticoagulants need to be assessed on a case by case basis …. It is a management's decision to decide if an employee can continue working whilst taking anticoagulant medication and this will depend on their risk assessment" (315).

8.12 This advice from OH was considered by the respondent's HR Department ("HR") which, approximately one month later in December 2015, produced

a document, "Reporting Health Conditions", which was circulated in a Notice to Staff in January 2016 (383). It is said that the notice is "particularly for the attention of staff who work with prisoners. "Working with" in this context means any staff member who spends a **significant and regular amount of time with prisoners** [*emphasis as in original document*], for example prison officers, OSG's, chaplains, instructors, psychologists, probation staff working in prisons and governor grades – this list is not exhaustive". According to this Notice, the conditions which such staff should always report include, "If they are taking anti-coagulant therapy (including Warfarin, Rivaroxiban, Dabigatran, and anti-platelet agents like Clopidogrel, Ticagrelor and Pasurgrel) – due to the serious risk of intracranial bleeding after even a minor head injury" (384). The claimant was taking Rivaroxiban and Clopidogrel.

8.13 The claimant placed emphasis on the document that had been produced by OH and the distinction it draws between prison officers and non-prison officers but the Tribunal considers the principal document in this connection to be that produced by the respondent's Director of Human Resources and circulated to staff of the respondent for implementation. That document does not draw that distinction but relates to all staff who spend a significant and regular amount of time with prisoners, including psychologists such as the claimant. Unlike the OH advice in November 2015, the document produced by the respondent's Director of Human Resources does not provide for what action should be taken in such circumstances (other than making a referral to OH for advice) or the possible consequences for an employee taking such medication. Thus, the Tribunal is satisfied that it is for the respondent to decide, on a case-by-case basis, what steps or action should be taken in light of all the circumstances of any particular case in light of OH advice taken at the time and any other relevant information.

8.14 On 13 August 2018 the claimant suffered a heart attack and was absent from work for over seven months. The respondent has a comprehensive Attendance Management Policy (768) one section of which deals with periods of continuous absence which are defined as being an absence which reaches 14 consecutive calendar days. In these circumstances, the claimant's absence claim fell to be considered in accordance with that policy. No issue was taken by the claimant as to whether this policy was followed appropriately, which the Tribunal is satisfied it was.

8.15 During his absence the claimant attended a number of OH appointments either in person or over the telephone. The report arising from a consultation on 17 September 2018 (65), which is said to be an interim report, advises amongst other things as follows:

8.15.1 The claimant had had two blood clots and was now on anticoagulant treatment.

8.15.2 He remained unfit for work in any capacity.

8.15.3 He had a long-term cardiac condition that may give rise to short-term setbacks on an unpredictable basis in terms of both frequency and severity.

8.15.4 He was likely to be considered a disabled person.

8.16 On 25 October 2018 the claimant met with his line manager, SE, at which he reported feeling better (70). A further interim OH report was produced on 26 November 2018 (77) in which it was stated, amongst other things, that it was generally considered that people on anticoagulant medication "should not undertake work, where there is a relevant risk of physical confrontation".

8.17 SE held an informal absence meeting with the claimant on 10 December 2018 (79) at which, amongst other things, the claimant asked her "to find out more about what would be available to him at work should he sustain an injury (in terms of medication, staff training etc.)". He also asked "whether the Governor of Frankland would support his return if there were ongoing risks to his health".

8.18 An OH report was produced on 31 December 2018 (83). Having received a copy of the report the claimant asked that amendments should be made to it. A very slightly amended OH report dated 8 January 2019 (85) records, amongst other things, the claimant having reported "concerns when working with inmates [*where*] there is the potential risk of injury" and that "He is being supported by his GP that they [*i.e. the claimant*] will not be able to sustain a demanding role at the Prison Service"; there were no workplace adjustments that the doctor was able to advise in order to support the claimant "in sustaining regular and effective service"; the claimant "being on anticoagulant medication for the heart condition and working in contact with inmates where there is a risk of injury is an additional concern for him"; it was "unlikely for him to be able to resume work and sustain regular and effective service. I advise that the case is considered for ill-health retirement." The only difference between these two reports is that the later report records that the previous occupational health physician had raised, in the previous report dated 26 November 2018, the concern about being on anticoagulant medication and working with inmates where there is a risk of injury.

8.19 The claimant attended a formal absence review meeting with SE on 9 January 2019 (88) at which Ms Gibson was also present and the claimant had representation from his trade union, DF. The content of the latest OH report was discussed and there was a particular focus on the possibility of ill health retirement ("IHR") in respect of which the claimant requested further information. Towards the end of the meeting is recorded, "Ian accepted that although he is disappointed by the outcome of the OHP report findings, he feels this probably is the best way forward given the alternative options." (90). IHR continued to be the focus of subsequent email correspondence; for example, on 10 January 2019 the claimant wrote to SE commenting "the difficulties with the IHR option is that it is now the only option, there are no alternatives realistically", and that he

hoped it would be "better than the PILON option or a No Deal, fingers crossed!" (127). Similarly, on 14 January 2019 the claimant wrote to SE noting that emails from HR and his civil service pension ("MyCSP") clearly indicated that he was eligible for IHR, which was why he presumed that "we are now pursuing this option to the exclusion of all others" (126).

8.20 On 16 January 2019 the claimant informed SE that, in fact, he was ineligible for IHR because he had already partly retired and taken his pension. In an email from SE to HR that day she noted that she thought that the claimant "will be furious" at this development and that it seemed to her that they should "now proceed with the medical inefficiency route?" (92).

8.21 The claimant now maintains that he never requested IHR. Given the above contemporaneous evidence, the Tribunal does not accept that evidence; indeed, it is satisfied that at the beginning of January 2019 the claimant was keen to take IHR, and at that time as at all material times he had access to advice from his trade union officials.

8.22 A further informal absence review meeting was held between SE and the claimant on 29 January 2019 with Ms Gibson and Mr Hannant in attendance (100). At this meeting it is recorded that the claimant was "no longer content with the conclusions of the OHP report (indicating he is unlikely to return to work)". In a subsequent comment the claimant suggested that he was never content with the report and had requested changes that had not been made. In these circumstances, a further referral to OH was made by SE (134) in which she sought clarity in respect of the statements in the report of 8 January 2019, which are recorded above. SE explained that the claimant's "role requires considerable prisoner contact. The Westgate Unit on which he works houses prisoners with complex needs (i.e. high risks of offending behaviour, high levels of psychopathic, personality disorder etc)". SE also stated that in light of the claimant in a recent meeting having "raised the issue work-related stress over the course of his career impacting upon his current condition, we would therefore like to know how the potentially stressful demands of his role might impact upon his condition".

8.23 On 6 February 2019 the claimant was invited to a formal absence review meeting that was initially to take place on 22 February (141). That meeting was postponed due to delays in receiving the OH report, which was received on 27 February 2019 (157). That report contains an important summary of the position at that time and records, amongst other things, as follows:

8.23.1 "He is strongly motivated about work and his confidence is good. I had a long chat with him about Policy in relation to anticoagulant medication and prisoner's contact, as he feels that he would be fit to resume his full duties as risks will be manageable."

8.23.2 "In my opinion he continues to be not fit for prisoners' contact as per Policy on anticoagulant medication. This will be the case until he [*dis*]continues his anticoagulant medication."

8.23.3 "He will be fit for alternative duties, restricted from face to face prisoners' contact."

8.23.4 "I think it would be reasonable to offer him temporary re-deployment in a role, restricted from face to face prisoners' contact, until August 2019, subject to review afterwards. Should his anticoagulant medication be stopped then, he will be fit to resume his full duties."

8.24 The rescheduled formal absence review meeting took place on 18 March 2019. It was conducted by Dr Bailey and the claimant was accompanied by Mr Hannant (199). At the meeting there was a wide-ranging discussion of the claimant's circumstances, the respondent's policies and the fact that there was no alternative permanent role providing no prisoner facing duties to which the claimant could be redeployed. The claimant stated that as 90% of his previous work did not involve prisoner contact he could not see a reason why he could not return to that 90% role to which Dr Bailey replied, "Because ultimately the Westgate Unit involves prisoner contact". Dr Bailey identified that there were some duties that the claimant could undertake but not involving access to prisoners. She outlined an option of a 13-week phased return to work during which there would be a further OH referral approximately midway through to evaluate if a full return to the claimant's substantive role was achievable. She explained in oral evidence that, at this meeting, her focus was on getting the claimant back to some form work.

8.25 The HR adviser who was present at the meeting explained that the focus of the meeting was on tasks that the claimant could "complete whilst on a phased return to your previous permanent post as a Therapist". Towards the end of the meeting Dr Bailey summarised the present situation as being that it was not that a way could not be found to get the claimant back to work but if in the long term the claimant's medication was still in place there would need to be a discussion as to whether there was a role that could be offered or voluntary regrade into a role that would best suit him and the business needs, or dismissal. They were at the point of dismissal but she asked if the claimant would want to move forward with a phased return to work away from the Westgate Unit with a mid-point review. The claimant indicated that he did and that his preference would be to work in the psychology department (which is based within HMP Frankland) or an outside building or Forest House, which is also outside HMP Frankland. This was agreed.

8.26 At the conclusion of the meeting it was noted that after the review the fairly stark choices would be, "Able to return to full duties" or "Refer back to [*Dr Bailey*] for a further formal meeting", in connection with which Dr Bailey reminded the claimant "that as a Psychology service roles are prisoner facing." (201).

8.27 Dr Bailey wrote to the claimant on 22 March 2019 recording the outcome of the formal meeting (223). Amongst other things it is recorded as follows:

8.27.1 The claimant had said that his consultant was not concerned that the medication he was taking should impact on his return to full contractual duties nor that it would create a personal risk should there be an injury at work.

8.27.2 Alternative roles had been explored but there were no available vacancies.

8.27.3 The phased return to work would be for up to 13 weeks to allow the claimant to return, in the interim, on non-prisoner facing duties.

8.27.4 By the end of the phased plan, the expectation would be that the claimant was back in his full contractual role including the fundamental duty of prisoner contact.

8.27.5 During the phased return a further OHP report would be put in place.

8.27.6 There would also be a further risk assessment to be put forward to Governor O'Malley and that the final decision on this would be his. Should his decision be that the risk was too high for the claimant to carry out duties that had prisoner contact, a further formal meeting would be held to consider all options including alternative roles, workplace adjustments and dismissal.

8.27.7 Dr Bailey "suggested that you contact your GP or consultant for full advice on the medication that you take and how this may impact on you at work and their view on any risk element of any injury to you whilst on the medication to allow you to fully inform OH for the input of the new report".

8.28 The claimant returned to work on the agreed phased return basis on 26 March 2019 in relation to which he confirms he was sent his return to work plan on 27 March 2019. On 26 March he met SE and Ms Gibson to discuss options for work that he might undertake. These included developing a LTHSE [*Long Term and High Security Estate*] training plan, a training catalogue for governors in LTHSE, supervising Healthy Sex Programme reports, delivering Monitoring and Evaluation training to staff and completing Frankland administration tasks. His hours of work would gradually increase towards his full contracted hours and he would be based at Forest House, which is an administrative office near to HMP Frankland but is outside the prison perimeter. The training would mean travelling to and from Wakefield prison. The claimant was reminded not to enter prison areas or have contact with any prisoners during his return to work. The claimant did not comply with this restriction, however, as he entered the Westgate Unit on 28 March 2019 (251). He was once more told that he must not enter prisoners' areas but (as he informed Mr O'Malley at the appeal hearing on 20 May 2020) he again ignored this "on several occasions" (717) when visiting Wakefield prison. SE wrote to the claimant on 15 May reiterating that he must not enter prisoner areas. During his phased return to work, review meetings were held with the claimant on 26 March, 2 May, 9 May (by telephone), 22 May and 6 June 2019.

8.29 A further OH report was received on 30 May 2019 (284). The doctor reported that the claimant was fit for work but "there is an issue relating to the small but significant risk of a cerebral bleed if Mr Patterson were to sustain a head injury due to the anticoagulant medication he is on to thin his blood in the context of his role working with offenders. The risk of this is reduced as he would not be undertaking Control and Restraint activities within his role, but it is a management decision whether the risk is acceptably reduced". The doctor advised "that physically confrontational duties with the risk of injury to the employee should be avoided" and recommended that the claimant "is placed in a role where he/she would not be at risk of physical assault or trauma (particularly head injury) but Mr Pattison's employment is finally a matter for his employer's own risk assessment and whether he is willing to accept a residual risk with full knowledge of what it entails. If Mr Pattison is employed in such a role and does suffer a head injury, no matter how minor, immediate medical advice should be sought".

8.30 In light of this advice Dr Bailey contacted HR and Mr O'Malley to request that regrading opportunities for the claimant should be looked into both at HMP Frankland and further afield in the wider HMPPS region (Tees and Wear) and the Probation Service. She also requested a risk assessment (292). The risk assessment was undertaken by managers in the Westgate Unit as they were most familiar with the duties of the claimant in his role as a therapist in the context of the risks and business needs of that Unit.

8.31 By letter of 10 June 2019 (311) Dr Bailey invited the claimant to a further formal absence review meeting on 2 July 2019.

8.32 The risk assessment to consider the claimant's "ability to return to work at HMP Frankland as Senior Therapist" is undated but was produced in advance of that meeting (338). Amongst other things, it is recorded as follows:

8.32.1 "His role primarily involves the delivery of treatment interventions or the clinical oversight (treatment management) of interventions. Both aspects involve prisoner contact as the TM role requires the delivery of the intervention to maintain skills and competence."

8.32.2 The elements of his role that did not require prisoner contact (staff training, service evaluation and development, and CPD work "would not constitute 0.6 FTE".

8.32.3 Each holder of a Band 8 post, such as the claimant, "is the lead clinician for a wing and holds a clinical case load". The unit management team "were unable to identify or create a post which would be non-prisoner contact".

8.32.4 Staff supervision and staff training were not suitable for the claimant "as he is not a qualified CBT therapist and there are staff who are more qualified therefore deemed more suitable for that work nor could he facilitate programmes which is a requirement for traditional TM roles".

8.32.5 The two members of staff to one prisoner ratio for individual interventions would offer some degree of protection for the claimant if the prisoner became agitated but the fact that the member of staff in addition to the claimant could be any member of the team (i.e. psychologist, nurse or officer) and would not always be an operational member of staff would reduce the element of protection for the claimant in the case of an assault.

8.32.6 It was accepted that "the risk of assault is very low, however the risk of injury from a prisoner disturbance or the response to a prisoner disturbance is higher although still a relatively small risk. If Ian was in a prisoner facing role, he would be expected to be the lead clinician on a wing and attend the meetings relevant to that role which includes wing meetings. In wing meetings there are approximately 20 prisoners present. Historically, the units have been stable with little distribution [*disturbance?*]/incident. Managers on the unit reported this has changed over the last 12 months as the population on the unit is now considered to be more chaotic, impulsive and volatile. There was a number of incidents which included incidents at height, cell fires, dirty protests, mobile phone finds, assaults, serious self-harm, and increase in positive MDT all demonstrate a more unstable residential environment."

8.32.7 "A key consideration the management team raised is the response time if Ian was injured on the unit. If an ambulance is required, the unit is approximately 0.5 mile from the main gate and due to the security category of the prison there is a procedure for the emergency vehicle once it has entered the prison. Upon entry, the vehicle is then escorted to the unit by an OSG and Dog handler. There approximately eight vehicle gates on route from the main gate to the unit. Both of these considerations will slow the rate of response of the emergency vehicle. I am not in a position to comment regarding what this delay would mean for Ian in regards to injuries to him, I wish only to raise this as an additional concern for Ian's safety."

8.32.8 "It would be possible to avoid main [*prisoner*] movements as these are routine, however there are frequent and irregular prisoner movements from one area of the prison to another (such as from healthcare to workshops). It would not be possible to predict or manage these."

8.32.9 "It is important to note that all the posts within [*the psychology*] team are required to have contact with prisoners."

8.33 An analysis of violent incidents within HMP Frankland during the first six months of 2019 is annexed to the risk assessment (342). It shows that of 62 violent incidents only three had taken place on the Westgate Unit, only one of which related to an assault on an officer; no non-operational staff had been the victim of a violent incident during the year so far.

8.34 The Summary of the risk assessment (341) is as follows:

8.34.1 "All of the OHassist reports have raised concerns regarding Ian working in prisoner facing roles."

8.34.2 "The risk of Ian being the victim of an assault is considered to be very low. The risk of Ian having an accident at work is also considered low. Although the probability is low, there is significant risk of cerebral bleed if Ian were to sustain a head injury."

8.34.3 "Westgate has no roles which are non-prisoner contact."

8.34.4 HMP Frankland psychology team have no vacancies or roles which are non-prisoner contact."

8.35 The formal absence review meeting duly took place on 2 July 2019 (359). It was conducted by Dr Bailey and the claimant was accompanied by Mr Hannant. There was a wide-ranging discussion of the claimant's situation particularly in light of the risk assessment and the most recent OH report. At no point during the discussion did either the claimant or Mr Hannant mention any adjustments that might reduce the risk. From Dr Bailey's perspective there were no adjustments that could be made that would have effectively protected the claimant from injury since, to fulfil his role, he would have needed to move around the Unit coming into contact with prisoners on a daily basis. She also noted that none of the OH reports had recommended any workplace adjustments, thus the only effective way to eliminate the risk to the claimant was redeployment but despite an extensive search during June and July 2019 for alternative roles across the Prison Service in the North of England and in the Probation Service there was no suitable alternative employment that did not require prisoner contact.

8.36 After a short adjournment Dr Bailey informed the claimant that she could not support a return to his full contractual duties which could put him at risk of serious or catastrophic injury, which could prove fatal, due to the continuing risk of an assault or accident. The claimant indicated that he was willing to take the risk but Dr Bailey was clear, from an employment perspective, that it was not his risk to take. In the circumstances, she had decided that the claimant should be dismissed on grounds of medical inefficiency.

8.37 Dr Bailey confirmed her decision to the claimant in her letter of 8 July 2019 (369). She gave her reasons for her decision including that the OH report had stated that the claimant would be on anticoagulant medication for the remainder of his life; that carried a risk of excessive bleeding in the event of injury, the particular concern being bleeding in or around the brain as a result of a head injury; prisoner contact was a fundamental part of the claimant's role and there was a substantial risk meaning that he could not be allowed to return to his contractual role.

8.38 The claimant was offered a right of appeal, which he exercised by submitting the appropriate appeal form on 15 July 2019, his grounds being that a procedural error had occurred and the decision was not supported by the evidence/information (389).

8.39 During the formal absence review meeting the claimant had raised a number of concerns about the way in which he felt he had been treated, which Dr Bailey said could be taken forward as a grievance. The claimant submitted a formal grievance on 25 July 2019 (751). His main issue was that he felt that his managers did not want him to return to his role at Westgate, making that as difficult and stressful as possible, and had been instrumental in attempting to expedite his dismissal. On the grievance form the claimant indicated that on grounds of age and disability he had been both discriminated against and bullied.

8.40 EC, the Deputy Director of LTHSE, was appointed to hear both the claimant's appeal against his dismissal and his grievance. On 5 September 2019 he met the claimant who was accompanied by Mr Hannant (462A). The claimant's grounds of appeal were explored as was his grievance and the meeting was adjourned to enable EC to make further enquiries. A particular point that the claimant raised at this hearing for the first time was that he would wear a helmet if they wanted him to (462C). EC subsequently decided that he could not finalise the claimant's appeal until he had further medical advice through an additional OH report. He wrote to the claimant accordingly on 20 September 2019 (469).

8.41 SE made a further OH referral on 2 October 2019 (502). In it she described the claimant's role as a Senior Therapist at the Westgate Unit and explained that he was disputing the contents of previous OH reports, most recently that dated 30 May 2019. In the context of policy guidance in respect of risks from anticoagulant medication, she asked 10 questions that had been suggested by EC and HR. Questions 1 to 3 related to the claimant's medication, questions 4 and 5 requested an updated medical opinion, questions 6 and 7 asked whether there were reasonable adjustments, including the use of protective equipment or an adjustment to the working environment, that could be made to permit the claimant to continue in employment and question 8 enquired as to whether there was any consultant medical advice from the claimant's doctor that would identify less of a risk that could be managed in the workplace.

8.42 Somewhat frustrated at the delay, the claimant obtained the 10 questions from HR and provided his answers to HR and EC under cover of his email dated 27 November 2019 (567).

8.43 An OH report was received on 27 November 2019 (575). That was a holding report as the doctor explained that with the claimant's consent she would request a medical report from his GP.

8.44 EC was transferred to assist with urgent Covid-19 response measures and Mr O'Malley was appointed in his place as acting Deputy Director of LTHSE. He therefore took over the hearing, in parallel, of the claimant's appeal and his grievance. Mr O'Malley was well-placed to consider the claimant's appeal against his dismissal, possibly uniquely so, given his background and experience in both the psychological service within and management of HMPPS establishments; including in both respects

working at Frankland and getting to know the claimant over many years. He had commenced his career with HMPPS as a forensic psychologist in July 1997 from where he had progressed his psychologist career before becoming Head of Psychological Services at Frankland from 2000 to 2007. He left psychological practice in 2007 and took a cross-hierarchical move into prison management. His career progressed from Head of Residential Services at Southampton through Deputy Governor and Governor posts at several HMPPS establishments before becoming Governor at Frankland in 2018.

8.45 The final OH report is dated 19 March 2020 (664). Amongst other things the report refers to the following:

8.45.1 The doctor had reviewed a report from the claimant's GP dated 21 January 2020.

8.45.2 She expressed her opinion that the claimant was "fit to return to work with adjustments" and suggested that "he carries out the therapy sessions with offenders through a protective wall if this can be accommodated."

8.45.3 She advised that "physically confrontational duties with a risk of injury to the employee should be avoided; also that the employee is placed in a role where he would not be at risk of physical assault or trauma (particularly head injury)."

8.45.4 She also stated that if the claimant did "suffer a head injury, no matter how minor, immediate medical advice should be sought."

8.46 By letter of 20 April 2020 Mr O'Malley invited the claimant to conclude his appeal hearing on 1 May 2020 by telephone conference (667). The claimant requested a face-to-face hearing so the hearing was rearranged for 20 May 2020 (669). Again the claimant was accompanied by Mr Hannant. As EC had decided to do, Mr O'Malley divided the hearing into two parts: the first considering the claimant's grievance; the second, his appeal against his dismissal. The record of the combined hearing is extremely detailed and extends over 69 pages (669 to 738). Given that it is a matter of record and the majority of it was not expressly referred to during the Tribunal hearing, it would be disproportionate to detail its content at any length. Suffice it to say that the Tribunal has read and fully considered the whole record paying particular attention to those sections to which reference was made at the hearing.

8.47 At the appeal hearing Mr O'Malley summarised what he referred to as being "the bare bones" of the risk assessment that all the OH reports expressed concern regarding the claimant working in a prisoner facing role in some way or another, that the probability of injury to the claimant was low but the risk of harm was very high (678). The claimant explained that he had never felt unsafe in 22 years at Frankland and noted that they had dynamic security in place on Westgate, a 2-to-1 policy, pre- and post-session searching and a higher staff/prisoner ratio. He commented that he did not particularly like the protective wall suggestion and that he did not understand what that meant (726).

8.48 The issue of risk was clearly important to both the claimant and Mr O'Malley and was considered at some length. The claimant agreed with Mr O'Malley that all the OH reports had raised concerns regarding him working in prisoner-facing roles. Mr O'Malley noted that the risk of the claimant being the victim of an assault was considered to be very low and that the risk of him having an accident work was also considered low. He asked the claimant to comment, however, on the point that although the probability was low there was a significant risk of cerebral bleed if he were to sustain a head injury. The claimant repeated a point he had made earlier that according to his cardiologist and cardiac rehab team it would be the equivalent of falling off a ceiling height roof or being involved in an RTA to cause a head injury that would cause an intracranial bleed.

8.49 At this point, Mr O'Malley had two principal considerations in mind: first, there were no alternative roles to which the claimant could be safely redeployed in HMP Frankland and beyond, not just across the Prison Service also the Probation Service; secondly, he wished to continue the claimant's employment. In these circumstances, Mr O'Malley raised as a more operationally viable alternative the claimant returning to work in an alternative role; for example, an administrative role at Frankland and not on the Westgate Unit. He asked the claimant whether that would be something that he would consider as a reasonable adjustment as that would meet the spirit and letter of the medical advice. It would enable him to discharge his responsibility to comply with the medical advice but would also give the claimant a return to work at Frankland prison. He explained that it would also give the claimant two years' pay protection. The claimant responded that morally it would not sit right with him as his IT skills were not brilliant and he would feel as though he was taking on a role that should more likely be given to somebody else. He appreciated that it would be a way for him to be back into Frankland and see out the rest of his time there, which Mr O'Malley agreed that he would like for the claimant; he would still be part of the Frankland team which is where he had started (728). Indeed, in evidence Mr O'Malley explained that he had asked for an administration vacancy at Frankland to be created for the claimant with the intention of recruiting an additional staff member to make up the 0.4 part of the full-time equivalent role, and had asked that the vacancy should be held until after their meeting.

8.50 Mr O'Malley asked if there were any other roles that could be considered that were non-operational, non-prisoner facing to which Mr Hannant responded that he did not know what other roles were currently available. Mr O'Malley explained to the claimant that he could not give him what he absolutely wanted, which was a return to a prisoner-facing role at Westgate.

8.51 The claimant stated that he appreciated what Mr O'Malley was saying about risk. He thought it was manageable but he appreciated that he was "the Governor of the establishment and would have a totally different view and have a duty of care" (730).

8.52 Mr O'Malley summarised the position as being that he thought that they were not able to sustain the claimant in a prisoner-facing role or in a prisoner-facing area because of the consistent and compelling medical evidence in a lot of OH reports. He noted that he would not forgive himself. He acknowledged that the claimant was talking about very low probability situations but prisons are dangerous places. They were talking about the dangerous and severe personality disorder unit, one of only a couple across the whole Country, which was within a high security prison. He considered it would be inexcusable for him to seek to justify the low-risk event of something happening when he knew all of the medical advice and had it all at his disposal. He would have very much liked the claimant to come back in an administrative role and be part of the Frankland team but he respected the claimant's position, which only left him with the default position of dismissal on the grounds of medical inefficiency (731).

8.53 The claimant mentioned the issue of the 10 questions that had been raised with OH. Mr O'Malley accepted that this had given rise to delay but expressed his belief that EC had tried everything possible to support the claimant and keep him in the service by seeing if there was a solution. He noted, however, that he had never needed to ask OH 10 questions because they were trained already to look at medical issues and risk within the workplace and whether the claimant could come to work on adjusted duties (733).

8.54 By letter of 26 May 2020 (739) Mr O'Malley confirmed to the claimant his decisions in respect of his appeal against dismissal and his grievance. As to the former, he highlighted the following:

8.54.1 The claimant had indicated that he did not like the idea of a protective wall but did suggest wearing a helmet. However the OH report advised that he should be "placed in a role where he would not be at risk of physical assault or trauma".

8.54.2 HMP Frankland is one of very few high security prisons in the Country accommodating their most dangerous and volatile men and he had drawn the claimant's attention to the reality that his role as a therapist was based on the Dangerous and Severe Personality Disorder Unit within that high security context. The claimant had, however, told him that he would not consider any alternative role unless it was based on that unit.

8.54.3 The risk assessment indicated that the claimant's role required him to work with 20 prisoners at any one time and that the environment, described as stable in the past, had become more chaotic and the population on the unit more impulsive and volatile.

8.54.4 The claimant had declined to take the administrative role with two years' pay protection explaining that it was not his area of expertise and he did not wish to deny the role to someone who was more suited to it.

8.54.5 As the claimant had indicated that he wished to work his 13 week notice period rather than receive pay in lieu of notice, his last day of service would be 19 August 2020.

8.55 As to the grievance, at the hearing Mr O'Malley and the claimant had agreed nine key items of grievance. For the reasons stated in his letter Mr O'Malley dismissed the majority but upheld three of the claimant's grievances as follows:

8.55.1 The claimant should have been involved in Enabling Change training (741).

8.55.2 Arrangements should have been made to enable him to attend a Chromis meeting (742).

8.55.3 A back room of the visitors' centre was a wholly inappropriate location in which to hold the claimant's exit interview (743).

8.56 On 1 June 2020 the claimant submitted an appeal against the outcome of his grievance (767L), which was considered by RV, Executive Director of LTHSE. He met the claimant, who was accompanied by a trade union representative, DF, on 12 October 2020. RV partially upheld the claimant's grievance appeal in the following respects (767Q):

8.56.1 The claimant's line managers could and should have identified that he was partially retired and, therefore, was not eligible for IHR, which could have significantly reduced the stress caused to the claimant during that process; including a referral being made to OH as part of that process.

8.56.2 A full risk assessment should have been carried out prior to the claimant's return to work in March 2019 and it was not acceptable that this was delayed until the end of his phased return to work in July. It would not have been appropriate, however, for the managers conducting the risk assessment to request medical reports from outside of the OH service.

8.56.3 The treatment of the claimant on the day his service concluded fell short of the standards expected within HMPPS (for which he sincerely apologised) including, it was wholly inappropriate for his exit interview to be conducted prior to a decision regarding his employment but also by a member of staff with whom he had never had contact, and it was extremely insensitive for managers not to allow the claimant to collect his belongings and say goodbye to his colleagues.

8.57 In respect of the third of the above points Mr O'Malley wrote an apology to the claimant on 19 November 2020 (767T).

8.58 As to the second of the above outcomes, it is not the function of this Tribunal to find fault with the findings of what appears to have been a fairly thorough grievance process. For completeness, however, in that it has a bearing upon this case, the Tribunal records that for the reasons given by Dr Bailey (principally her focus being to get the claimant back to some work, which he would do at Forest House and the risk assessment was to inform the decision as to the claimant's return to his substantive role at the Westgate Unit) the Tribunal is not satisfied that not conducting the risk

assessment until it was conducted has a bearing upon the issues before this Tribunal.

Submissions

9. After the evidence had been concluded the parties' representatives made submissions, which painstakingly addressed in detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from its findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made and the parties can be assured that they were all taken into account by the Tribunal in coming to its decision.

10. That said, the key points made by Mr Kerfoot on behalf of the claimant included as follows:

    10.1 There were two questions that were central to all three claims: did the respondent have reasonable grounds to believe that the claimant was incapable of performing his role and did the respondent fail to make reasonable adjustments which could have avoided the dismissal.

    10.2 The respondent did not have reasonable grounds to believe the claimant was incapable of performing his role as he could have returned to his original role without adjustments because he was capable and the risks were not as great as the respondent believed.

    10.3 The respondent had failed to make reasonable adjustments, which could have avoided the claimant's dismissal. Even if the claimant was wrong and the respondent was reasonable in his opinion that the risk was too great, reasonable adjustments would have mitigated that so the dismissal was not reasonable, there were alternatives and it was not proportionate.

    10.4 The claimant was best placed to determine the extent of his prisoner-facing duties whereas the respondent's evidence was more about what the claimant should have done by reference to documents. The job description was generic whereas the SPDR reflected his actual duties but the focus of both is on management, which the claimant said did not leave him more than a couple of hours to undertake therapy.

    10.5 Therapy sessions are the most risky time but the risks were limited: the claimant was accompanied by another member of staff; sat near the door and near the alarm; prison officers were outside and their response time was less than one minute; neither the claimant nor any other therapists had ever been assaulted; the claimant had never felt unsafe in therapy sessions; the respondent had noted that the prison population had changed but there was no evidence that that had increased the risk during therapy; there was no data to establish a causal link between a dangerous unit, increasing volatility and increase in risk to staff especially during therapy. In any event therapy only constituted about 10% of his role.

10.6 The OH reports had changed: that in January 2019 referred to avoiding prisoner contact whereas that in March 2020 referred to avoiding confrontational duties with the risk of injury. Only the therapy sessions are duties that have the potential to be confrontational: prisoners moving around the prison would not comprise confrontational duties for the claimant. Additionally, the claimant said that he could avoid prisoner movements and tries to move during the patrol state. In respect of unplanned movements the claimant would wait with an officer until the prisoner passed.

10.7 The risk assessment had said that the risk was very low"; how much lower could that be? All staff accept that and the claimant did too. The risk assessment concludes that risk of accidents is higher than risk of assault and that would apply in any workplace: for example tripping. The likelihood of injury is as low as it can be because the prison is so well managed. It might be different for operational staff, hence the different policy.

10.8 So it does not matter how vulnerable the claimant is because the risk is so negligible. The claimant accepts that he was more vulnerable than others but his GP and cardiologist had suggested that quite a significant blow would be needed to cause an injury leading to intracranial bleed. To work out whether the respondent had reasonable grounds needed a balance of likelihood against, the quantification of the consequences: i.e. the outcome risk. That was not conducted to the extent that the respondent should have done and therefore it was not known how much higher the risk was to the claimant compared with others. The risk was inconsequential because the risk was virtually negligible.

10.9 Prior to the attendance review meeting Mr O'Malley had already concluded, before considering the evidence, that he was not prepared to take the risk. Mr O'Malley had said to Mr Hannant when the claimant returned to work in March 2019 that if it was his decision he would not employ the claimant again with contact with prisoners while he was on anticoagulant medication. At the attendance review meeting, Dr Bailey also expressed that view; she was swayed by the opinion of Mr O'Malley and felt bound by it. Mr O'Malley came to the appeal hearing with a closed mind. As a witness he was confrontational and defensive with clearly prepared answers and referring the Tribunal to multiple page references. His evidence should be treated with caution. He knew he would be questioned and was on the back foot.

Unfair dismissal

10.10 The respondent did not have reasonable grounds for his belief. The claimant could and should have returned to work. He was capable and the risk was low enough. Additionally, the dismissal was not within the range of reasonable responses because there were alternatives: i.e. the reasonable adjustments. Not the alternative vacancy but the helmet and screen, which were raised the time although it was accepted that providing therapy by video was not raised at the time.

Reasonable adjustments

10.11 There were reasonable adjustments that would have avoided the disadvantage and allowed the claimant to return to Westgate. The Tribunal is required to consider, first, whether any of the adjustments would effectively have protected the claimant (the law only requiring the prospect that it would be successful) and, secondly, whether to make the adjustment was reasonable or would amount to a disproportionate burden for the respondent. The claimant has the evidential burden but the respondent has the legal burden.

10.11.1 The helmet would obviously protect the claimant otherwise prison officers would not wear one. Not complete protection but reducing the risk to an acceptable level. The respondent could not say because he did not conduct a risk assessment. The witnesses suggest that it would increase the risk of an assault but that needed testing and it was not; Mr O'Malley accepted that it was only an assumption. There is no evidence of prisoners assaulting others with vulnerabilities such as pregnant women. Without Investigation the respondent is in difficulties in discharging the burden that the helmet had no prospect of avoiding the disadvantage.

10.11.2 The respondent's witnesses had given inconsistent evidence regarding the protective wall. Mr O'Malley had said that if would not protect the claimant from, for example, a 6 feet 4 inch tall prisoner and that money was not a consideration whereas Ms Gibson said that the cost would be prohibitive but it would protect the claimant and Dr Bailey also raised resources and the impact on the treatment provided by the claimant. He well described the wall by reference to those in the Segregation Unit that are designed to protect and would have protected the claimant.

10.11.3 The provision of therapy by video would also have protected the claimant because he would not be in Westgate.

10.12 Thus, all three adjustments would protect the claimant and the question therefore becomes whether any of them were reasonable, feasible or would amount to a disproportionate burden for the respondent.

10.12.1 The helmet was proportionate the only question was whether it would affect therapy. The claimant knows the prisoners and his evidence is clear that exposing vulnerabilities to those who are vulnerable could increase the effect of the therapy; and the helmet could be used with another adjustment. The respondent did not conduct an assessment of the effect of the helmet on therapy so cannot say.

10.12.2 The claimant suggests that one wall could have been erected in the one treatment room that was close to the office because prison officers congregate outside. To take one room out

of eight was not unreasonable. The claimant says that treatment is provided through screens in other sections so there was no reason why it could not be at least trialled on Westgate. Without a trial the respondent cannot discharge the burden that it would unacceptably affect therapy.

10.12.3 The claimant accepted that video might not work but had worked in the healthy sex programme. It could have been explored but was not, which is a problem for the respondent.

10.13 There were alternatives and therefore the dismissal was discriminatory and unfair.

Discrimination arising from disability

10.14 Any one of the reasonable adjustments was far more proportional. Once it is found that a reasonable adjustment could have been made, that answers the question of proportionality too.

11. The key points made by Mr Brien on behalf of the respondent included as follows:

Unfair dismissal

11.1 The respondent had reasonable grounds for the claimant's dismissal as he was not capable because he was unsafe in his role. In the decision in Converform (Darwen) Ltd v Bell [1981] 195 it was stated that risk of illness can amount to a ground for fair dismissal if the nature of the employment is such that the risk is of such importance as to make it unsafe for the employee to continue in the job. That applies in this case given the claimant's medication and his role being prisoner facing on a unit housing high-risk prisoners.

11.2 The claimant accepted Mr O'Malley's assessment that the OH advice had been "astoundingly consistent". The report of 19 March 2020 contained four main points: the claimant's medication carried a risk of excessive bleeding, the particular concern being in or around the brain; prisoner confrontation should be avoided; the claimant should be placed in a role where he would not be at risk of physical assault or trauma; his deployment was finally a matter for the employer's own risk assessment; no matter how minor a head injury, immediate medical advice should be sought. On that advice alone, the Tribunal should be more than satisfied that the respondent had reasonable grounds.

11.3 In support, the risk assessment should be read in full but, in summary, the risk of assault was considered to be very low, the risk of accident was also considered low but there was a significant risk of a cerebral bleed if the claimant were to sustain a head injury. The respondent was alive to that and had to guard against it.

11.4 Regard should be had to the claimant's actual role. He had referred constantly to his previous role with Chromis (for example in his reference to providing therapy only taking 10% of his time), but that had been decommissioned in 2018. In reality he had little time between decommissioning and his return to work before he became absent. The clue was in his job title. He was employed as a senior therapist although having an additional role in relation to well-being. Unsurprisingly that took time initially but the claimant's line manager knew what he did as did Ms Gibson and Dr Bailey. In any event the amount of therapy is not the issue because the risk of cerebral bleed remained no matter how often the claimant encountered prisoners; whether that was in therapy, group meetings or during prisoner movement, which the claimant accepted could be unexpected with 86 prisoners being on the unit.

11.5 There were potentially catastrophic consequences and, therefore, clearly reasonable grounds to believe that the claimant was incapable on the grounds of it being unsafe for him to continue in his role.

11.6 For the claimant's representative to suggest that did not matter how vulnerable the claimant was is a gloss on the Health and Safety at Work Act and ultimately wrong in law, and wrong in this context of whether it was safe for the claimant to continue in his role. To suggest that the risk was so negligible that it was effectively non-existent ignores the practicality of what the claimant was doing day-to-day and the risk assessment that although the risk was low it could give rise to serious harm. If the claimant had been injured the Health and Safety Executive would have asked why the respondent had not done something.

11.7 Understandably, the claimant wanted to return to work, particularly after IHR was ruled out. He said he was content to take the risk but that is not the question. It is a question for the employer and it was too great a risk to take, which was supported by OH and the risk assessment.

11.8 The claimant had not pursued greatly the issue of whether there had been a fair procedure but pointed to the lack of medical evidence obtained by the respondent. In that respect, OH had never suggested that further specialist advice was needed and the claimant had been advised to obtain input from his GP or consultant on several occasions but did not do so. If the evidence was really there that he had been advised that to cause injury would require a blow of force, it beggars belief that it had not been submitted by the claimant at any point; particularly after the claimant had been encouraged to do so in the absence review meeting, in the letter from Dr Bailey and by EC. There was no failure on behalf of the respondent if there was evidence that the claimant could have provided. Ultimately, the final OH report had the benefit of a report from the claimant's GP and the consultant felt sufficiently informed to make the assessment.

11.9 In summary, the respondent had reasonable grounds for his decision which was supported by the evidence and, procedurally, the investigation

was entirely reasonable not least given the six full OH reports and three interim reports since the claimant commenced his medication in 2018.

Discrimination arising from disability

11.10 The same points can be made regarding this complaint. The only difference is that in unfair dismissal the range of reasonable responses applies whereas an objective test applies in relation to section 15: see Griffiths.

11.11 The real issue is whether the dismissal was a proportionate means of achieving a legitimate aim; the aim being staff safety and the provision of effective treatment to prisoners.

Reasonable adjustments

11.12 It was accepted that the issue with regard to the three adjustments was whether there was a prospect of protecting the claimant.

11.13 There had been some criticism of the respondent for not investigating the delivery of therapy by video but that had never been suggested by anyone as a viable means, and was never suggested to the respondent's witnesses in the hearing.

11.14 It had been suggested that it was obvious that the helmet would protect the claimant but why was that so when there was no idea what type of helmet and no evidence that it would protect him, the burden of proof being on the claimant? If the Tribunal thinks that the helmet would offer sufficient protection it was not feasible because it would identify the vulnerability of the claimant and have an effect on the treatment he was to provide. The evidence of Mr O'Malley, who has experience as a governor and psychologist, was clear and Ms Gibson and Dr Bailey were equally clear that it would act as a 'blocker' to therapy and that fundamental to therapy is the issue of trust. The Tribunal can be satisfied on the evidence that the helmet would not provide sufficient protection and would have an effect on therapy, and it was not supported by OH or the risk assessment.

11.15 The screen would only provide protection in the one-to-one situations and not in respect of other risks on the residential unit including the group therapy meetings, passing prisoners in the Unit, prisoner movement and prisoner disturbances. The claimant has not discharged the burden of demonstrating that there was a prospect that the screen would allow him to continue in his role. As with the helmet, Ms Gibson and Dr Bailey considered that the screen would be 'a therapeutic car crash'.

11.16 It had been submitted that Mr O'Malley had a closed mind when conducting the appeal hearing but he was not challenged on that and, given the policy and his knowledge of the effect of anticoagulant medication, it is not surprising that he made his earlier comment to Mr Hannant. Dr Bailey and Mr O'Malley's evidence was clear and consistent

regarding what was discussed and the fact that it was she and not he who made the decision. Additionally Mr O'Malley offered the alternative role and asked what the claimant wanted to do, which was wholly inconsistent with him having a closed mind. In terms of section 15 there were less discriminatory means that were offered to the claimant, which he declined.

The Law

12. The principal statutory provisions that are relevant to the issues in this case are as follows:

12.1 Unfair dismissal - Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, …

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,…..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

12.2 Disability discrimination - Equality Act 2010

"15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

"20 Duty to make adjustments

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

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

"39 Employees and applicants

(1) An employer (A) must not discriminate against an employee of A's (B)-

…….

(a) *by dismissing B;*

…….

(5) A duty to make reasonable adjustments applies to an employer."

"136 Burden of proof

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

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

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

Application of the facts and the law to determine the issues

13. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

14. There is a degree of overlap between the complaints presented by the claimant that the Tribunal has considered and each of those complaints was born in mind throughout our deliberations. That said, the Tribunal considers that it is appropriate to address first the claimant's complaint that the respondent failed to comply with the duty to make adjustments as our decisions in respect of that complaint will inform our decisions in respect of the other two complaints of discrimination arising from disability and unfair dismissal.

15. That approach would be consistent with an aspect of the decision of the Court of Appeal in Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 where, at paragraph 26, it is stated as follows:

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part-time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified."

16. Similarly, in the Equality and Human Rights: Code of Practice on Employment (2011) ("the Code") is that it is stated at paragraph 5.21, "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it would be very difficult for them to show that the treatment was objectively justified"; this reflecting an aspect of the above quotation in Griffiths.

Failure to make adjustments

17. The following propositions (in no particular order) can be said to emerge from relevant case law in the context of the above statutory framework and the Code to which the Tribunal has had regard:

    17.1 It is for the disabled claimant to identify the PCP of the respondent on which he relies and to demonstrate the substantial disadvantage to which he was put by that PCP.

    17.2 It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; he need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment

proposed to enable it to engage with the question whether it was reasonable. There must be before the tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: Project Management Institute v Latif [2007] IRLR 579.

17.3 There must be a causal connection between the PCP and the substantial disadvantage contended for: as was said in the decision in Nottingham City Transport Ltd v Harvey UKEAT/0032/12, "It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."

17.4 The test of reasonableness is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA.

17.5 Making a reasonable adjustment may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce.

17.6 "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP: Griffiths.

17.7 It is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169.

17.8 It can be a reasonable adjustment if there is a prospect that the adjustment would prevent the claimant from being at the relevant substantial disadvantage without there needing to be a good or real prospect: Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10. Thus, it is not for the claimant to prove that the suggested adjustment will remove the substantial disadvantage, it is sufficient if the adjustment might give the claimant a chance that the disadvantage would be removed and not that it would have been completely effective or that it would have removed the disadvantage in its entirety: see Griffiths and South Staffordshire and Shropshire Healthcare NH Foundation Trust v Billingsley UKEAT/0341/15 in which it is stated as follows:

> "Thus the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment

which she proposes is to be treated as reasonable under Section 15(1) of the 2010 Act."

17.9 Notwithstanding the above, in Romec Ltd v Rudham [2007] UKEAT 0069/07/1307 it was held that the essential question for an employment tribunal is whether the adjustment would have removed the disadvantage experienced by the claimant. In that case, in remitting the issue to the same tribunal, the EAT directed that if the tribunal concluded that there was no prospect of the suggested adjustment succeeding, it would not be a reasonable adjustment: if, however, the tribunal found a real prospect of the adjustment succeeding it might be reasonable to expect the employer to take that course of action. Thus, an employer can lawfully avoid making a proposed adjustment if it would not be a reasonable step to take Royal Bank of Scotland v Ashton [2011] ICR 632. Similarly, the EHRC Code of Practice, at paragraph 6.28, provides that one of the factors that might be taken into account when deciding what is a reasonable step for an employer to take is, "whether taking any particular steps would be effective in preventing the substantial disadvantage".

17.10 Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step: Latif.

17.11 The question of whether it was reasonable for the respondent to have to take the step depends on all relevant circumstances, which will include the following:

17.11.1 the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

17.11.2 the extent to which it is practicable to take the step;

17.11.3 the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;

17.11.4 the extent of the respondent's financial and other resources;

17.11.5 the availability to it of financial or other assistance with respect to taking the step;

17.11.6 the nature of its activities and the size of its undertaking.

17.12 If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step that the respondent should have taken.

18. In the context of the above general position, the Tribunal moves on to consider the claimant's complaint in this case.

The PCP

19. The Tribunal reminded itself that it first must identify the PCP that the respondent is said to have applied: Environment Agency v Rowan [20OH] IRLR 20. That is not contentious. In paragraph 4.1 of the agreed list of issues the claimant relies upon the following PCP: "… the claimant had to attend to work to carry out his post".

The duty

20. As indicated above, section 20(3) of the 2010 Act provides that the duty to make adjustments arises where an employer's PCP "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled". At paragraph 4.2 in the agreed list of issues the disadvantage is said to be, "The respondent did not allow the claim to carry out a prisoner facing role given the small but significant risk of a cerebral bleed if the claimant was to sustain a head injury." The Tribunal is satisfied that the respondent's PCP did put a disabled person with the claimant's disability at such a substantial disadvantage as such a person could not comply with the PCP. More particularly, the Tribunal is also satisfied, for the same reason, that the PCP put the claimant at that substantial disadvantage. That being so, section 20(3) continues that the employer is under a duty "to take such steps as it is reasonable to have to take to avoid the disadvantage".

The adjustments

21. As set out in paragraph 4.3 the agreed list of issues, three such adjustments have been contended for by the claimant in this case, which the Tribunal addresses in turn below.

Permit the claimant to wear a helmet or other form of protection.

22. On the basis of the evidence before the Tribunal as summarised in the above findings of fact, the Tribunal accepts that a helmet would afford a degree of protection for the wearer, which is why helmets are worn by prison officers and others in appropriate circumstances. The only direct evidence in this connection, however, was from Mr O'Malley to the effect that even prison officers wearing a helmet can and do sustain a head injury, and a helmet would offer no protection against a direct assault. The Tribunal accepts that evidence and also the evidence from the respondent's witnesses that the claimant wearing a helmet would give the appearance of obvious physical vulnerability and might cause the more dangerous psychopathic prisoners to target him.

23. A further factor is that it is to be inferred that OH did not consider the use of a helmet to be a reasonable solution to avoid the disadvantage in that the claimant said that he mentioned it to the OH consultant but she responded by referring to the use of the protective Perspex screen and did not take forward the idea of a helmet, and it is the protective wall and not the helmet to which she makes reference in her report.

24. In the above circumstances, the Tribunal finds that permitting the claimant to wear a helmet or other form of protection would not have avoided the substantial disadvantage caused to him by the PCP.

Enable prisoner contact to take place behind a protective measure such as a screen.

25. An aspect of the answer to this issue is precisely what is the "protective measure" contended for by the claimant. In the OH report of 19 March 2020 the reference is to "a protective wall" whereas in the dismissal appeal meeting with Mr O'Malley the claimant stated that the OH consultant "said Perspex screen" (688). With reference to the former, Ms Gibson accepted that a substantial wall could be effective in affording protection to the claimant, in which she drew comparisons with the walls used in the Segregation Unit and Visitor Centre at HMP Frankland. Mr O'Malley, however, was clear that (with reference to the latter) a Perspex screen would not protect the claimant. The Tribunal accepts the distinction between a substantial wall and a Perspex screen and, therefore, the different bases upon which those opinions were expressed. It also accepts that a Perspex screen would not avoid the disadvantage while a wall would avoid the disadvantage to an extent but only in the context of the one-to-one therapy sessions. It would not avoid the disadvantage in respect of all other aspects of the claimant's role in which he had wider prisoner contact such as attending community meetings with up to 20 prisoners, community events and other activities, and generally being in the Westgate Unit. That being so, the Tribunal is not satisfied that a wall or screen would avoid the disadvantage generally. The Tribunal interjects at this point that it uses the terminology "one-to-one" in the sense of the claimant engaging in therapy sessions with a on a one-to-one basis: it does not overlook that as the claimant would always be accompanied at such sessions they could be described as being "two-to-one"

Carry out assessments via video link.

26. The Tribunal is satisfied that it could be said that if the claimant were to work 'off site', that would avoid the disadvantage. But the PCP is, "… the claimant had to attend work to carry out his post" and working 'off site' to carry out assessments would not reflect the wider functions of the claimant's post.

27. There remains, however, the possibility that the claimant could, in theory, work in his office within the Westgate Unit conducting therapy sessions with prisoners elsewhere in the Unit or possibly even elsewhere in HMP Franklin. As with the protective wall/screen, however, that would only overcome the disadvantage during therapy sessions and not in relation to working within the Unit generally.

28. Thus, once more, the Tribunal is not satisfied that carrying out assessments via video link would have avoided the substantial disadvantage.

<u>The reasonableness of the steps</u>

29. Lest the Tribunal's decisions in respect of whether the adjustments contended for by the claimant would have avoided the substantial disadvantage to which the claimant was put by the PCP had been to the contrary, it has considered also the

issue at paragraph 4.4 in the agreed list of issues of whether those adjustments were ones which it was reasonable for the respondent take to avoid the disadvantage to the claimant.

30. A principal consideration in this respect is whether any of the three adjustments contended for by the claimant would have enabled him to deliver to prisoners the therapy that he was employed to provide. On the evidence available to it, the Tribunal is satisfied that they would not; further, they would have had a significant negative impact upon the therapy provided by the claimant to those prisoners. The evidence of all three of the respondent's witnesses was that any one of the adjustments would have had a deleterious impact upon the delivery of therapy. Dr Bailey said she had experience of delivering therapy through a screen when that was the only possibility in the Segregation Unit and she knew how unhelpful they are, they were "not a therapeutic vehicle" indeed they "were a car crash", while a helmet would have acted as "a blocker to therapy". The Tribunal accepts that evidence of the respondent's witnesses. In relation to the use of video-conferencing, the Tribunal accepts the evidence of Ms Gibson that it would be "an absolute nightmare" and, importantly, would not provide prisoners with therapy to the intensity that they needed: she accepted that it would avoid harm to the claimant but would not help prisoners. A more technical point arises from Mr O'Malley's evidence that HMP Frankland employs mobile blocking technology, which would make it difficult for video links to work reliably in the residential units.

31. An additional consideration is that Mr Kerfoot submitted that the helmet could be used with another of the adjustments but, as the Tribunal has already found, it is satisfied that that would expose the potential vulnerability of the claimant, and the risk continues. In this connection, with regard to the helmet, the claimant said that he could wear it or not wear it as he saw fit. That being so, it might be said that the claimant could dispense with the use of the helmet during therapy sessions, enabling therapy to be delivered appropriately, but wear it when undertaking other aspects of his role (for example, attending meetings) and moving around the Unit. The Tribunal is satisfied, however, that that would not overcome the issues it has already identified and that it cannot be said that the helmet would afford the claimant the protection he requires in those situations.

32. A further consideration for the respondent and the Tribunal is whether, if this approach were to be adopted of using a helmet alongside another of the adjustments, the claimant could be relied upon always to wear it. There is evidence before the Tribunal that he could not in that he could not be relied upon to adhere to the conditions in his return to work plan that he must not enter prisoners' areas. During his return to work period he informed SE that he had "popped in" to Westgate (251), which was directly contrary to what had been agreed, and sought to excuse this by saying that Westgate was in patrol state, meaning that the prisoners were in their cells at the time. Despite it then being reiterated to the claimant that he must not enter prisoners' areas, he entered Wakefield prison, according to him, "on several occasions" (717) and "four or five times" (718) while it was not on patrol state (426). He also entered the Westgate Unit again on 18 May 2019.

33. Another aspect of the reasonable adjustment question relied upon by Mr Kerfoot was whether a trial should have been conducted in respect of any or all of the three adjustments contended for by the claimant. As to the helmet, the Tribunal is satisfied that the very trial had the potential to put him at risk of the consequences described above, and all three adjustments would be subject to the disadvantages in the provision of the therapy that the claimant was employed to do in his substantive role, which is also described above, even during the trial period. Finally, given how rarely the data suggests that such risks of assault and accident are likely to occur, any trial period would have needed to be for far longer than would have been reasonable.

34. In relation to exposing the claimant to risk there is also the issue that in both of the OH reports dated 30 May 2019 and 19 March 2020 advice is given that if the claimant were to "suffer a head injury no matter how minor, immediate medical advice should be sought". Although it is not quite the same point, the Tribunal considers that it is certainly relevant that in the risk assessment the trouble is taken to describe what is described being a "key consideration" of the "response time if Ian was injured on the unit". The assessment goes on to describe the process through which an ambulance attending upon the claimant would have to pass (which is set out above) and would, the Tribunal is satisfied, give rise to delay. This is clearly relevant to all three adjustments contended for by the claimant given the potential catastrophic consequences of anything that could have happened occasioning him a head injury.

35. In relation to all aspects of the above, it is a fact that the respondent has a statutory duty imposed by section 2 of the Health and Safety at Work etc Act 1974 "to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees". As the claimant said at his appeal meeting with Mr O'Malley, he appreciated that as Governor of the establishment he had "a duty of care". This statutory duty has a general relevance but also specifically in the context of the claimant having stated that he was prepared to take the residual risk of returning to work on the Westgate Unit. As Ms Gibson said, she and SE were not prepared to take that risk as they considered the claimant's "life to be more important"; Dr Bailey similarly said, "It was a risk I was not prepared to take – it was my responsibility despite the fact that he was prepared to take it. I felt that I could not support him putting himself in areas that increased his risk of injury"; likewise, Mr O'Malley noted that a blow to the head could result in intracranial bleeding that could put the claimant's life at risk and, "This was a risk that I was not prepared to take. The Tribunal understands and accepts that evidence of the respondent's witnesses and, in doing so, rejects Mr Kerfoot's submissions that it did not matter how vulnerable the claimant was because the risk was so negligible and that the risk was inconsequential because the risk was virtually negligible.

36. In conclusion of this aspect of the claimant's claim, the Tribunal is satisfied that the claimant's complaint under section 21 of the 2010 Act that the respondent failed to comply with the duty under section 20 of the 2010 Act is not well-founded.

Discrimination arising from disability - section 15 of the 2010 Act

Unfavourable treatment

37. In relation to this complaint, the parties were agreed that there are two issues as set out in the agreed list of issues. As to the first issue, as set out above, the respondent has accepted "that it dismissed the claimant because of something arising in consequence of his disability, where the something is his use of anti-coagulant medication".

38. Those issues therefore do not need to be taken much further. Suffice it to say that applying the guidance in Pnaiser v NHS England [2016] IRLR 170 and Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14, the Tribunal is satisfied that the claimant's dismissal was unfavourable treatment, the cause or reason for that treatment was his use of anticoagulant medication and, therefore, the unfavourable treatment was something arising in consequence of the claimant's disability.

Justification

39. It is to the second of the agreed issues, therefore, that the Tribunal turns its attention namely, "was the treatment a proportionate means of achieving a legitimate aim?" If so, in such circumstances it is provided in section 15(1)(b) of the 2010 Act that there will not be discrimination.

40. In this connection, the Tribunal adopts the two stage approach suggested at paragraph 4.27 of the Code (albeit there relating to the question of indirect discrimination) namely:

> "Is the aim ….. one that represents a real, objective consideration?
>
> If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?"

41. The Tribunal has also had regard to the guidance contained in the Code that the aim pursued should be legal, not discriminatory and must represent a real, objective consideration, which can include reasonable business needs and economic efficiency. To be proportionate, it should be "an 'appropriate and necessary' means of achieving a legitimate aim" which should not be achievable "by less discriminatory means". Finally, as to the meaning of "disadvantage", "It is enough that the worker can reasonably say that they would have preferred to be treated differently."

42. The Tribunal also applies the decision in Hardys & Hansons v Lax [2005] IRLR 726 that in considering the principle of proportionality, our task is to strike an objective balance between the reasonable needs of the respondent against the discriminatory effect of its measure in order to assess whether the former outweigh the latter; that is an objective test. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases unfair dismissal.

43. As set out at paragraph 3.2 in the list of issues, the respondent states that its aims were as follows:

    43.1 The need to provide a safe working environment.

    43.2 Ensuring the safety of all staff working in the prison.

    43.3 The need to promote trust in prisoner therapy sessions.

44. The Tribunal is satisfied that those were the aims of the respondent albeit that in light of the evidence of the respondent's witnesses the third of the above aims might be better described as being to ensure the delivery of effective therapeutic treatment to the prisoners on the Westgate Unit. The Tribunal is further satisfied, in terms of the Code, that each of those aims "represents a real, objective consideration".

45. A further point of relevance drawn from the Code is that, as set out above, it is stated at paragraph 5.21, "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it would be very difficult for them to show that the treatment was objectively justified". This provision in the Code is of obvious relevance in this case given that the Tribunal has already found that none of the adjustments contended for by the claimant would have avoided the substantial disadvantage to which he was put by the PCP, and even if its decision in that respect had been to the contrary, it would not have been reasonable for the respondent to make those adjustments. In short, it is repeated that the Tribunal is satisfied that there was no failure on the part of the respondent to make reasonable adjustments.

46. Moving on to the question of proportionality, the Tribunal first repeats certain of its findings made above: the claimant not having disputed that his absence was managed in accordance with the respondent's Attendance Management Policy; the unavailability of alternative employment within both the Prison Service and the Probation Service to which the claimant could have been safely redeployed so as to avoid dismissal; Mr O'Malley having requested the creation of an administrative post for the claimant (and the holding of that post vacant until after the appeal meeting), and the claimant having declined that post.

47. In light of those and other findings set out above, the Tribunal has considered the matters set out paragraph 3.3 of the agreed list of issues. It has first balanced the needs of the claimant and the respondent: his to continue in the employment that he had undertaken for in excess of 13 years; the respondent's to achieve the aims set out above. In all the circumstances, the Tribunal is satisfied, on the evidence available to it as summarised in the findings of fact above, that the dismissal of the claimant was an appropriate and reasonably necessary way in which to achieve the respondent's aims as set out above. Further, that it would not have been possible for something less discriminatory to have been done instead.

48. At paragraph 4.26 of the Code it is stated that "it is up to the employer to produce evidence to support their assertion". Thus, it is for the respondent to establish that "treatment is a proportionate means of achieving a legitimate aim". In this

case, on the basis of the findings summarised above, the Tribunal is satisfied that the respondent has done that.

49. In conclusion of this aspect of the claimant's claim in respect of discrimination arising from disability, for the reasons set out above, the Tribunal is satisfied that the claimant's complaint that the respondent discriminated against him by treating him unfavourably because of something arising in consequence of his disability as described in Section 15 of the 2010 Act, and discriminated against him contrary to Section 39(2)(c) of the 2010 Act by dismissing him is not well-founded.

Unfair dismissal

50. The issues in respect of the claimant's complaint that his dismissal by the respondent was unfair are contained in the first section of the agreed list. In this regard the Tribunal considered and applied section 98 of the 1996 Act and the relevant precedents in this area of law as more fully set out below.

51. The first aspect of that section 98 is what was the reason for the dismissal and was that a potentially fair reason under section 98(1) of the 1996 Act? As set out above, there is no question that the claimant was dismissed and he accepts that the sole or principal reason for his dismissal was capability. In any event, on the evidence before the Tribunal it is satisfied that the respondent has discharged the burden of proof upon it to show that the reason for the claimant's dismissal was related to capability, that being a potentially fair reason.

52. Having thus been satisfied as to the reason for the dismissal, the Tribunal turned to consider the second aspect of that section of whether the respondent acted reasonably in dismissing the claimant for the reason of capability with reference to section 98(4) of the 1996 Act. That requires consideration of three overlapping elements, each of which must be brought into account:

    52.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

    52.2 secondly, the size and administrative resources of the respondent;

    52.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

53. In this regard the Tribunal reminded itself of the following important considerations:

    53.1 Neither party now has a burden of proof in this respect.

    53.2 Our focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter.

    53.3 The Tribunal must not substitute its own view for that of the respondent. This principle has been maintained over the years in decisions including Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 (re-confirmed in

Midland Bank v Madden [2000] IRLR 288) and J Sainsbury plc v Hitt [2003] ICR 111. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not*."

53.4 The decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness, which applies equally in cases of ill health dismissal such as this, including as to the procedure an employer has followed regarding such matters as engaging in discussions with the employee and obtaining up-to-date medical advice, both of which elements we address below.

53.5 Our consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision.

53.6 The 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited and Post Office v Foley [2000] IRLR 827), which will apply to our decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see, in the context of an ill health dismissal, Pinnington v City and County of Swansea EAT 0561/03, applying J Sainsbury plc v Hitt [2003] ICR 111.

54. The Tribunal acknowledges that while East Lindsay District Council v Daubney [1977] IRLR 181 is accepted as being a leading authority on medical investigation in the context of a fair capability dismissal, the well-established principles in British Home Stores Limited -v- Burchell [1978] IRLR 379 (albeit there in the context of a conduct dismissal) that were more recently endorsed in the decision of the Court of Appeal in Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903 apply equally in the case of a dismissal for ill-health. That was made clear in the decision in DB Schenker Rail (UK) Ltd v Doolan (Unfair Dismissal: Reasonableness of dismissal) [2010] UKEAT/0053/09/1304 where it is stated, "the Tribunal is required to address three questions, namely whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did. These factors are contained in subparagraph 1.4.1 to 1.4.3 of the list of issues. As set out below, the Tribunal has brought each of those questions into account in making its decision.

55. Against the above background, addressing in turn those three well-established principles in the order in which they are set out in the agreed list of issues the Tribunal is satisfied on the basis of the evidence before it as follows:

Genuine belief

55.1 With reference to the agreed issue at paragraph 1.4.1, at the time the respondent (in the shape of Dr Bailey) took the decision to dismiss the claimant and (in the shape of Mr O'Malley) upheld that decision on appeal, the Tribunal is satisfied that they did genuinely believe that the claimant's capability was such that his employment with the respondent should be terminated. They were satisfied, as is the Tribunal on the evidence before it, that the risk and consequences for the claimant if he were to continue in his role as a therapist at the Westgate Unit was such that he could no longer safely be employed in that role.

Reasonable grounds

55.2 Further, they had in in their respective minds reasonable grounds upon which to sustain that belief. The claimant was taking anticoagulant medication and the respondent has a specific policy that applies to all staff in those circumstances. That policy was issued in a formal Notice to Staff in January 2016 (383). As the Tribunal has found, it is that policy that is applicable in these circumstances rather than the OH advice on which it was based, which was given to the respondent in November 2019; and upon which the claimant primarily relied, as did Mr Kerfoot in submitting that the respondent had a different policy for operational and non-operational staff. That is correct in respect of the OH advice, which does differentiate between prison officers and non-prison officer staff who are on anticoagulants, but the respondent's policy applies to all staff who work with prisoners, including psychologists such as the claimant; with specific reference being made to anticoagulant medication such as the claimant had been prescribed. The respondent's policy is that all such staff who spend a significant and regular amount of time with prisoners should be considered, on a case-by-case basis, and what steps or action to be taken should be determined in light of all the circumstances of any particular case in light of OH advice and any other relevant information.

55.3 The Tribunal is satisfied that that is what occurred in this case. The respondent referred the claimant for OH advice and obtained three interim and six full reports. Each of those reports was detailed as to the claimant's condition, his current capacity for work, the prognosis, and other relevant advice. In this connection, in evidence, Mr O'Malley referred to "the bedrock" of the contract between HMPPS and its OH advisers. He explained that they were trained to look at medical issues and risk within the workplace and whether an employee could come to work on adjusted duties. As such, without being asked particular questions the advisers will, as a matter of course, provide a summary of the employee's medical condition, current capacity to return to work and prognosis and advise as to reasonable adjustments that might be made and in relation to the potential for returning to work. Furthermore, he explained that the contract

also requires OH to obtain specialist advice and medical evidence that is considered to be relevant and necessary. This "bedrock", he said, rendered superfluous the 10 questions posed at the request of EC and HR in relation to the referral made by SE on 2 October 2019. The Tribunal accepts that evidence.

55.4 The Tribunal is satisfied that the OH reports gave broadly consistent (and in some cases identical) advice as to the risks to which the claimant would be exposed as a result of taking his medication (particularly of intracranial bleed if he were to suffer a head injury) if he were to return to his substantive role as a therapist within the Westgate Unit. Mr Kerfoot submitted that the OH reports had changed between January 2019, which referred to avoiding prisoner contact and March 2020, which referred to avoiding confrontational duties with the risk of injury. The Tribunal accepts that there is a slight difference of wording between the OH reports in that the report in February 2019 referred to the claimant "not being fit for prisoners' contact" and it being necessary for him to be "restricted from face to face prisoners' contact" whereas reports both before and after that report (for example, in November 2018, April 2019 and March 2020) all refer to physical confrontation or physically confrontational duties. In general terms, however, the Tribunal is satisfied that there was no material difference between the OH advisers as to the risk the claimant faced if working with or in the vicinity of prisoners (not least given the particular category of prisoner on the Westgate Unit) whether those risks might be described as being in relation to duties that were prisoner facing or duties that might potentially be confrontational.

55.5 The other aspect of medical evidence is that the claimant maintained that as part of the investigation the respondent should also have obtained input directly from his GP and treating consultant. In this respect, the Tribunal notes that at the formal attendance review meeting on 18 March 2019, as confirmed in Dr Bailey's letter of 22 March 2019, she suggested that the claimant should contact his GP or consultant on the medication that he was taking and how this might impact on him at work, and their view on any risk element of any injury to him whilst he was on the medication (224). Additionally, EC suggested that the claimant should be asked to bring up to date GP or consultant information to the OH appointment to allow the physician to consider fully his argument that the medication he was on was less of a risk than Warfarin and that the head trauma risk was far less than it had been assessed to be (484). One way or another (whether because of these specific suggestions or because of Mr O'Malley's point that the contract with OH requires consultants to obtain specialist advice and medical evidence in any event) it appears that such medical advice was made available to OH in that in the letter to SE of 7 February 2020 it is confirmed that a report from the claimant's GP had been received and, in the report of 19 March 2020, it is confirmed that a report from the GP dated 21 January 2020 had been reviewed (664). Indeed, at the appeal meeting the claimant informed Mr O'Malley that his GP had sent OH three reports, "I know that because I got them" (686). A final point in this connection is that OH never suggested that further

specialist medical advice was needed whether from the claimant's own treating physicians or otherwise. In the above circumstances the Tribunal considers to be misplaced the claimant's contention that the respondent should have obtained medical evidence directly from his GP or treating consultant.

55.6 In light of the above, the Tribunal is satisfied that, as is stated in East Lindsey District Council v Daubney [1977] IRLR 181 EAT, reasonable steps had been taken on behalf of the respondent "to discover the true medical position".

55.7 Also in regard to the element of establishing reasonable grounds, the respondent rightly undertook a risk assessment that was completed by relevant managers who were very much aware of the role to which the claimant would be returning and the environment within which he would be working. In that regard, the Tribunal does not accept the evidence of the claimant that 90% of his post did not involve prisoner contact. As stated in our findings of fact, that is simply inconsistent with the focus of the claimant's Job Description, in respect of which the Tribunal accepts the evidence of the respondent's witness, which was corroborative. As set out more fully above, key elements of the risk assessment included as follows:

55.7.1 The claimant's role primarily involved the delivery and clinical oversight of treatment interventions both of which involve prisoner contact (the remaining elements that did not require such contact would not constitute the claimant's 0.6 role) and the management team had been unable to identify or create a role with non-prisoner contact, not least because all the posts within team were required to have contact with prisoners.

55.7.2 Staff supervision and staff training were not suitable for the claimant as he was not a qualified CBT therapist.

55.7.3 The two members of staff to one prisoner ratio for individual interventions would offer some degree of protection for the claimant but the additional person would not always be an operational member of staff, which would reduce the protection for the claimant in the case of an assault.

55.7.4 The claimant's role involved more than therapy, including attending wing meetings with approximately 20 prisoners present.

55.7.5 Over the last 12 months the population on the unit had become more chaotic, impulsive and volatile and the residential environment more unstable.

55.7.6 The response time of any emergency vehicle, if needed, would be delayed by the security measures at HMP Frankland.

55.7.7 Routine prisoner movements could be avoided but there were frequent and irregular prisoner movements, which it would not be possible to predict or manage.

55.8 Fundamentally, the risk assessment concluded that the risk of the claimant being the victim of an assault was considered to be very low, the risk of him having an accident work was also considered low but, significantly, although the probability was low, there was significant risk of a cerebral bleed if the claimant were to sustain a head injury. In this regard, in evidence, the claimant's focus was on the former aspects of low risk of occurrence rather than on the latter aspect of significant consequential risk. The Tribunal accepts however, the approach of the respondent that although the probability of the claimant suffering a head injury was low the potential consequences of such an injury were high.

55.9 On the basis of the evidence before it, the Tribunal is satisfied that the above represents a well-informed, fair and reasonable assessment of the risk to the claimant. Furthermore, that also reflected, at least initially, the view of the claimant that he could be at risk working in the Westgate Unit. This is apparent from the claimant asking SE at their informal absence meeting on 10 December 2018 "to find out more about what would be available to him at work should he sustain an injury (in terms of medication, staff training etc.)" and "whether the Governor of Frankland would support his return if there were ongoing risks to his health". It is similarly apparent from the OH report dated 8 January 2019, which records that the claimant had reported his "concerns when working with inmates [*where*] there is the potential risk of injury" and that he was being supported by his GP that he would "not be able to sustain a demanding role at the Prison Service" and "being on anticoagulant medication for the heart condition and working in contact with inmates where there is a risk of injury is an additional concern for him". Similarly, towards the end of the meeting between the claimant and SE on 9 January 2019 it is recorded that although disappointed at the outcome of the OH report, the claimant felt that IHR was probably is the best way forward given the alternative options" and, in the subsequent exchange of emails he stated that IHR was the only option as there were no alternatives realistically.

55.10 In all the above circumstances, the Tribunal is satisfied that those taking the decision to dismiss the claimant on behalf of the respondent had reasonable grounds for their respective beliefs that the claimant could not continue in his employment as a senior therapist with HMPPS. In this connection it is repeated that at his appeal meeting with Mr O'Malley, the claimant stated that he appreciated that as Governor of the establishment he had "a duty of care".

<u>Procedural fairness</u>

55.11 The question at issue 1.4.3 in the agreed list is whether the respondent otherwise acted in a procedurally fair manner. The Tribunal first notes that the claimant did not take particular issue with this question of procedural fairness except as to the lack of medical evidence obtained by the

respondent directly from his treating physicians, which the Tribunal has addressed above.

55.12 In regard to procedure: relevant managers (particularly SE and Ms Gibson) had met with the claimant at several informal attendance management meetings that are recorded above; Dr Bailey met him at the formal absence review meeting on 18 March 2019 (following which there were review meetings on 2 April, 2 May, 9 May, 22 May and 6 June) and at the second formal meeting on 2 July 2019; EC and Mr O'Malley met him at the appeal meetings on 5 September 2019 and 20 May 2020. There is no suggestion that at those meetings the managers did other than conduct meaningful discussions with the claimant regarding his circumstances. Moreover, at all the formal meetings the claimant was represented by his trade union and had the opportunity to explain his position to the respondent's managers.

55.13 Additionally, as considered above, the respondent had obtained appropriate medical evidence and conducted the risk assessment.

55.14 On a point of detail, Mr Kerfoot submitted that Mr O'Malley had come to conduct the appeal meeting with a closed mind and in giving evidence he had been on the back foot and defensive. That is not the Tribunal's assessment. On the contrary, it finds nothing sinister with a witness being well-prepared and having thought about potential questions and the answers that he might give

55.15 In summary, therefore, in light of the above findings, the Tribunal is satisfied that the respondent did "act in a procedurally fair manner".

56. Moving on from the three principles set out in DB Schenker Rail (UK) Ltd, the final issue is the reasonableness or otherwise of the decision that the claimant should be dismissed. In paragraph 1.4.4 of the agreed list of issues that is expressed as being whether the dismissal of the claimant was within the range of reasonable responses in respect of which the Tribunal has reminded itself of the relevant case law as set out above.

57. Key findings that the Tribunal has already made that are relevant to this question include the following: the clear and detailed findings of the risk assessment; the potential consequences to the claimant if he had sustained a head injury; the absence of any adjustments that could reasonably have been made to allow him to return to his role of therapist in the Westgate Unit; the lack of suitable alternative roles across both the Prison and Probation Services; the claimant's refusal to accept the alternative administrative post that was created for him with two years' pay protection.

58. Considering all of the evidence before the Tribunal in the round it is satisfied that the decision in this case fell comfortably within the range of reasonable responses of a reasonable employer acting reasonably in the circumstances.

59. In the above circumstances, therefore, the Tribunal is satisfied that the claimant's complaint that his dismissal by the respondent was unfair is not well-founded.

60. Having found none of the claimant's complaints to be well-founded the Tribunal nevertheless wishes to record that it is far from unsympathetic with the claimant's position. Ill health dismissals (like redundancy dismissals) can rarely, if ever, be said to be attributable to any fault on behalf of the employee. That certainly applies in this case and, additionally, the claimant experienced false prospects of IHR and delays during the process. None of those matters, however, has a direct bearing upon the agreed list of issues that the Tribunal has determined or on its consideration of those issues in accordance with the statutory and case law framework. In relation to the complaint of unfair dismissal, for example, as long ago as 1977 it was said in the case of W Devis & Sons Ltd v Atkins [1977] ICR 662 HL that the test of fairness directs "the tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice".

Conclusion

61. In conclusion, the unanimous judgment of the Tribunal is as follows.

61.1 The claimant's complaint that the respondent unlawfully discriminated against him contrary to sections 15 and 39 of the 2010 Act 2010 is not well-founded and is dismissed.

61.2 The claimant's complaint that, contrary to section 21 of the 2010 Act, the respondent failed to comply with its duty under section 20 of the 2010 Act to make adjustments is not well-founded and is dismissed.

61.3 The claimant's complaint that his dismissal by the respondent was unfair, being contrary to sections 94 of the 1996 Act with reference to section 98 of that Act is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9 August 2021