EMPLOYMENT TRIBUNALS

Claimant: Mr J Close

Respondent: The Secretary of State for Justice

On: 3 and 4 March 2021,
5 March 2021 (in chambers)

Before: Employment Judge D N Jones
Mrs L Anderson-Coe
Mr D Fields

This hearing was conducted remotely, by video (V), because of the restrictions arising from the pandemic Covid19.

REPRESENTATION:

Claimant: Mr B Henry, counsel
Respondent: Mr P Smith, counsel

JUDGMENT

1. The dismissal of the claimant was unfavourable treatment because of something arising in consequence of his disability and was not a proportionate means of achieving a legitimate aim.

2. The respondent breached its duty to make adjustments to the claimant, as a disabled person, by failing to defer the decision to dismiss him and to await the surgery which would have allowed him to return to duties.

3. The dismissal of the claim was unfair.

REASONS

Introduction

1. This is a claim for unfair dismissal and disability discrimination in respect of the dismissal by way of a breach of the duty to make adjustments and discrimination arising from disability.

2. At a case management hearing on 12 October 2020, Employment Judge Davies identified the issues. At that stage there was a dispute about whether the claimant was disabled and, if so, whether the respondent knew or ought to have known of that. On receipt of an impact statement and medical records, the respondent conceded that the claimant was disabled as of 18 March 2020, but not before. By that stage the condition and its recovery were likely to last 12 months because the claimant had not had the surgery seven months after the injury was sustained. The claimant did not invite a finding that he had been disabled prior to that date, but accepted the concession and the basis on which it was made.

3. It was agreed at the commencement of this hearing that the tribunal would only deal with liability, because the claimant was waiting confirmation of an MRI scan which would confirm whether he could join the police. That would materially affect his claim for future losses.

The Issues

Discrimination arising from disability

4. The claimant having been unfavourably treated by the respondent by reason of the dismissal, and that having been because of sickness absence which arose from the disability, was the treatment a proportionate means of achieving a legitimate aim?

Breach of the duty to make adjustments

5. It being accepted that the respondent applied a provision, criterion or practice (PCP) of requiring the claimant to return to work or be at risk of dismissal under its Attendance Management Policy and that this PCP placed the claimant at a substantial disadvantage to those who were not disabled, did the respondent fail to take steps which it would have been reasonable to take to avoid the disadvantage by delaying a decision or awaiting the outcome of the surgery?

Unfair dismissal

6. It being accepted that the reason for the dismissal was capability, by reason of long-term absence, did the respondent's managers act reasonably in treating that as a reason to dismiss the claimant in all the circumstances having regard to the size of the employer and its administrative resources equity and substantial merits of the case?

Evidence

7. The tribunal heard evidence from the claimant, Mr Beeston, Governing Governor and Mr P Foweather, formerly Director of Yorkshire Prisons.

8. The parties produced a bundle of documents of 399 pages.

Findings of fact

9. The respondent is responsible for prisons and young offenders' institutions in England and Wales and this is managed and administered by a non-executive agency, NOMS and HM Prison Service.

10. HMP & YOI Moorland is a prison and young offenders' institution in Doncaster with capacity for 1000 prisoners. It has 435 staff, of whom 185 are prison officers at full complement.

11. The claimant was employed as a Band 3 Prison Officer by the Respondent at HMP &YOI Moorland. He commenced his employment there on 31 March 2015 as an Operational Support Grade (OSG) and in November 2017 became a Prison Officer.

12. The claimant sustained a dislocated shoulder during refresher control and restraint (C and R) training on 7 August 2019. He was taken to the Accident and Emergency department at the Scunthorpe General Hospital where he was sedated and the shoulder was reset. The claimant commenced sick leave and remained off work until his dismissal on 18 March 2020.

13. NOMS operate an Attendance Management Policy in respect of sickness absence. It specifies the obligations upon both the employee and the employer, in respect of recording sickness, obtaining occupational health advice, informal and formal reviews.

14. A review meeting took place by telephone on 28 August 2019 with Custodial Manager J Miller, to whom the claimant reported, and by way of a home visit on 16 September 2019. At this time a return to work was not feasible as the claimant was awaiting a scan and treatment. He wore a sling and was unable to drive.

15. An occupational health report dated 28 August 2019 from Ms Grey, occupational health advisor, advised that the claimant remained in pain and discomfort. He had intermittent numbness in the right dominant upper limb and was having difficulty completing tasks with his left hand. He was awaiting an MRI scan on the 20 September 2019. His shoulder remained immobilised. In the opinion of Ms Grey, he remained unfit for work and no adjustments could be put in place at that time.

16. A formal attendance review meeting (FARM) took place on 1 November 2019, conducted by Mr Miller and attended by the claimant and his Trade Union representative OSG Midgley. The claimant informed Mr Miller that he had been diagnosed with two tears to his shoulder muscle. It would require open surgery and he was awaiting an operation.

17. An occupational health report dated 18 November 2019 from Ms Parselle, occupational health advisor, confirmed what the claimant said about his injury. She stated that the claimant was unable to use his right arm for any tasks and wore a sling constantly. In her opinion he was still unfit for work in any capacity. She could not give a recovery time until the surgery had been completed. She considered the condition was unlikely to be a disability because it had not, and was unlikely, to last longer than 12 months.

18. On 10 January 2020 an occupational health report was prepared by Dr Miranda, occupational physician. He advised that the operation had been delayed because of raised blood pressure observed at a preoperative assessment. The operation would take place when it was deemed safe but in the meantime the claimant should continue to use the sling. Dr Miranda reported that the claimant's surgeon expected a full recovery and had assured the claimant that he would be capable of resuming prison officer duties after he had recovered. Dr Miranda's opinion was that the claimant remained temporarily unfit for all work due to significant impairment and pain experienced in the right dominant shoulder. He could not provide a timescale for a return, but considered the recovery period post operatively would be 8 to 12 weeks. For the same reasons as Ms Parselle, he did not regard the claimant as disabled at this time. He said that, if the business could continue to support the claimant, he should be referred back 3 weeks after the operation for further assessment.

19. The claimant was invited to a formal assessment review meeting, by letter of 10 January 2020, to discuss his current fitness for role as an officer, whether he would be able to provide regular and effective service going forward, whether any adjustments could be made in the future, eligibility for medical retirement and dismissal on the grounds of medical inefficiency. The meeting took place on 23 January 2020 with Governor Beeston. Also in attendance were the claimant's line manager Mr Miller, HR Case Manager Ms Swinburn, and Ms Cunningham, note taker.

20. At the meeting, the claimant informed Governor Beeston that he had been advised not to return to work until after his operation and that he remained unfit for work. The claimant was awaiting a date for the operation. Mr Beeston asked the claimant when he would be fit to return. The claimant said he would be happy to do restricted duties but that he would have to use public transport, which would take 2½ hours travel time each way. The claimant said he had just gone on to half pay. There was a discussion about the operation. The claimant said that the delay had been a consequence of the MRI scan. He was asked if he had thought about private treatment but he said he could not afford it. The claimant said he could not do any writing because the dominant right arm was in a sling and he could not undertake escorting works because he would not be able to open the gates, but he could work in the gatehouse. The claimant believed he had informed Mr Beeston that he had a preoperative assessment due on 2 February 2020 and that surgery would be within four weeks of that. Mr Beeston disputed that. We think it unlikely that the claimant provided these dates. In his witness statement, at paragraph 33, he stated that he informed Mr Beeston that he had an appointment for a preoperative assessment, but he does not state when it would be. Moreover, after the notes of the meeting had been sent to him, he replied to correct part of them, by email of 27 January 2020. He

stated that the notes failed to record that he had said he had called every few weeks to chase up the operation. The claimant would have been likely to have drawn attention to the date of the preoperative assessment and the significance of surgery being within a month, if that had been discussed.

21. After a 20-minute discussion Mr Beeston adjourned the meeting for half an hour. Following the adjournment, he explained that the claimant was to be dismissed on the grounds of medical inefficiency, because the continued absence could not be sustained and there was no date for a further operation in the near future.

22. On the same day, the claimant applied for sick leave excusal, for the period between 8 August 2019 and 23 January 2020. This was approved, with the consequence that the claimant was entitled to, and received, full pay for an additional six months because the injury which led to his sick leave was caused on duty.

23. Mr Beeston confirmed the decision in writing. He informed the claimant that he would be awarded compensation for medical inefficiency at a rate of 100% and that he would receive pay in lieu of notice for his entitlement to seven weeks' notice. He also informed the claimant that he had considered whether to move the claimant to an alternative role or a different grade, but this would not facilitate an earlier return to work. Mr Beeston informed the claimant of his right to appeal against the decision.

24. The claimant appealed the decision by letter of 27 January 2020, which set out five grounds of appeal. As they fell within the criteria specified in the Attendance Management Policy an appeal was arranged with Mr Foweather. Under the Policy it was to be by way of rehearing and the dismissal was suspended pending the outcome

25. The appeal hearing took place on 18 March 2020, in the presence of the claimant, Mr Foweather, HR Case Manager Joanne Moore, and the claimant's Trade Union representative, Leanne Clark. The claimant informed Mr Foweather that he had been scheduled to have the surgery on 13 February 2020, but it had been cancelled on the day because the surgeon overran his list. He said it had been rearranged for 27 March 2020. Mr Foweather questioned the claimant about his previous sickness record between 2015 and 2019.

26. Mr Foweather upheld the decision to dismiss the claimant and sent it to him with reasons on 24 March 2020. He stated that the level of absence was concerning with further lengthy absence to continue and that there was a responsibility to ensure employees attended work regularly and provided full and effective service. He said the claimant's absence was no longer sustainable by HMPPS having taken into account the claimant's appeal submissions and representations at the hearing.

27. The date of dismissal was 18 March 2020, because the effect of an appeal, under the policy of NOMS, is to defer the date of the dismissal to the outcome of any appeal.

The Law

Unfair dismissal

28. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to the capability of the employee for performing work of the kind which he was employed by the employer to do, see Section 98(2)(a). By section 98(3)(a) "capability", in relation to an employee, means his capability assessed by reference to skill, attitude, health or any other physical or mental quality.

29. Under Section 98(4) of ERA "*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.*

30. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA.

31. Material considerations in a case where the reason for the dismissal was incapability by reason of illness include the nature of the illness, the likely length of the continued absence, the need of the employer to have the work done which the employee was engaged to do and, in all circumstances, can the employer be expected to wait any longer and, if so, how much longer, see *Spencer v Paragon Wallpapers Ltd [1977] ICR* 301.

32. It is not for the Tribunal to substitute its own view, but rather to review the decision-making process against the statutory criteria and, if it fell within a reasonable band of responses, the decision will be regarded as fair[1].

33. Section 15 of the Equality Act 2010 (EqA) provides:

> *(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.*

[1] Iceland Frozen Foods v Jones [1983] ICR 17.

> *(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*.

34. Section 20 of the EqA provides:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

35. By paragraph 2 of Schedule 8 of the EqA, "*A is not subject to a duty to make reasonable adjustment if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement*".

36. By Section 15(4) of the Equality Act 2006, a Code of Practice issued by the Commission for Equality and Human Rights (the Commission) is admissible in evidence and shall be taken into account by a tribunal in any case in which it appears to the tribunal to be relevant. The Commission produced a Code of Practice on Employment in 2011. At paragraph 6.28, the Commission listed some factors which might be taken into account in deciding what is a reasonable step for the purpose of the employer's duty under section 20 of the EqA. They are whether taking any particular steps will be effective in preventing substantial disadvantage, the practicability of the step, the financial and other costs of making the adjustment, the extent of any disruption caused, the extent of the employer's financial or other resources, the availability to the employer of financial or other assistance to help make an adjustment (such as advice to Access to Work) and the type and size of the employer.

Discussion, analysis and conclusions

Discrimination arising from disability (Section 15 of the EqA)

37. The issue was one of proportionality. It was accepted that the claimant was a disabled person by 18 March 2020, when his appeal was dismissed and the dismissal took effect. Although Mr Foweather did not know that the claimant was a disabled person on 18 March 2020, it is not disputed that he ought reasonably to have known that. It should have become apparent to his advisers that the opinion of the occupational health advisers and physician that the claimant was not a disabled person was being overtaken by the passage of time. Dr Miranda clearly envisaged that the claimant would receive operative treatment and recover within 12 months.

Mr Foweather did not believe the claimant would have his operation on 27 March 2020 and, after the surgery there was a recuperation period of 8 to 12 weeks, there was a good chance that the adverse effect on the claimant's abilities to undertake normal day-to-day activities would extend beyond the year and that would suffice to make a disabled person to whom the duty under the EqA applied.

38. In its amended response the respondent set out its legitimate aims with respect to which the decision to dismiss the claimant was to be justified. They are: to ensure consistent attendance at work of its staff in line with its Attendance Management Policy; ensuring that its employees can provide regular and effective service; ensuring the safe running of the prison establishment based upon appropriate staffing levels; and the need to have a fully operational workforce to ensure that it can deliver its services to the courts and public and meet its business priorities.

39. Mr Henry did not dispute that these were legitimate aims, nor that the dismissal of the claimant was appropriate to them. That is because whilst retaining the claimant in employment whilst he was not discharging his duties because he was ill, he was not providing regular and effective service, assisting the safe running of the prison establishment based upon appropriate staffing levels, ensuring consistent attendance environment under the Attendance Management Policy and providing with his service a fully operational workforce to deliver the service. Of course, dismissing him of itself would not meet these aims; but it was the means by which the respondent could free up a revenue stream in the form of his salary and employ an alternative member of staff in his place or, in the short term, provide for additional human resource by way of overtime or acting up allowances for those in the existing complement of staff. The unfavourable treatment of dismissal was therefore appropriate to the aims.

40. Was the dismissal of the claimant on 18 March 2020 proportionate; was it reasonably necessary to meet those aims? The Court of Appeal has provided guidance about the correct approach in a number of cases.

41. In **Hardy & Hansons PLC v Lax [2005] ICR 1565**, at paragraph 32, Pill LJ said: "*It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances*.

42. And Thomas LJ said. "*54. It is for the tribunal to determine whether the employer has shown that the proposal is justifiable irrespective of the sex of the person to whom it is applied. As it is the tribunal which must decide on justification without according any margin of appreciation to the employer, the tribunal must therefore set out a critical and thorough evaluation following the tests set out in Bilka-Kaufaus GmbH v Weber von Hartz (Case 170/84) [1987] ICR 110 when making its determination of the merits of the justification advanced. I agree with Pill LJ that this task requires considerable skill and insight. 55. Where the economics of the business of the enterprise or its working practices form part of the justification, then I would expect the reasons to set out at least a basic economic analysis of the business and its needs; the emphasis in Bilka-Kaufaus was on "objectively justified economic grounds". Although the extent of the analysis of the economics of the business and its working practices must depend on the nature of justification advanced and of the enterprise being considered, the analysis must be thorough and critical and show a proper understanding of the business of the enterprise*".

43. The law in respect of justification by reference to 'economics of the business' or put another way 'cost' has developed since these remarks and cost factors of themselves are not sufficient: **Heskett v Secretary of State for Justice [2021] ICR 110**. Mr Smith did not advance the case of justification upon the basis of cost, but the use of the claimant's salary to meet the need was integral to the case advanced by the witnesses. The budget of HM Prison Service is finite. That is a perfectly acceptable basis upon which justification can be advanced. The legitimate aims are not purely related to costs, although they are conditional upon funds for the provision of labour in the form of prison staff. Applying the test suggested by Underhill LJ in **Heskett**, at paragraph 89, looking at the full picture, a fair characterisation of the defence is not that the aim was solely to avoid an increase in cost. It was about meeting the need of providing a safe service and avoiding undue pressure on others.

44. All of that said, our task remains as described by Thomas and Pill LLJs, namely to undertake a thorough and critical analysis of the working practices, business considerations and, to the extent it is material, the economics.

45. After having closed their cases, Mr Smith sent a further authority, **O'Brien v Bolton St Catherine's Academy [2017] ICR 737** having appropriately copied it to Mr Henry. He relied upon a passage of Underhill LJ taken from paragraph 53, which is underlined here, in the following full citation, which provides its proper context: "*53. However the basic point being made by the tribunal was that its finding that the dismissal of the claimant was disproportionate for the purpose of section 15 meant also that it was not reasonable for the purpose of section 98(4) . In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so.*

On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat—what is sometimes insufficiently appreciated—that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the tribunal under section 98(4) to one of "quasi-Wednesbury " review (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223): see the cases referred to in para 11 above [5] . Thus in this context I very much doubt whether the two tests should lead to different results".

46. The evidence in chief in the witness statements of Mr Beeston and Mr Foweather dealt with the demands on the business in the following way. Mr Beeston said, "*I was also mindful of the fact that the prison was already short of staff and that I was responsible for operating a safe prison within existing resources. Therefore, if Mr Close remained on sick leave and/or was unable to provide the prison with regular and effective service this would put pressure on existing staff and prevent the prison from advertising and recruiting for his role*". Mr Foweather addressed this at paragraph 43 of his statement: "*In addition, I was conscious of the pressures faced by the establishment as a whole. This included pressure relating to recruiting and training prison officers who were able to: offer regular and effective service, alleviate the stress and anxieties that came with working in a prison environment from their colleagues and to assist with running a safe prison. Further, I was aware that if Mr Close remained on sick leave and/or was unable to provide the prison with regular and effective service this would stop the prison from recruiting a prison officer who may be able to provide regular and effective service to the prison*".

47. These observations were clearly relevant. However, they were in general terms, that is without a level of detail to explain whether the problems were acute and immediate at HMP YOI Moorlands or more widely, or the extent to which the situation of having one officer down, in the form of the claimant, could be managed for several more months. The justification must be in respect of the unfavourable treatment of the claimant under section 15 of the EqA, not of a PCP as in indirect discrimination claims. We had no doubt that Mr Beeston had the challenges he referred to. But the extent of any staff shortfall and its immediate, medium or longer term consequences with respect to the question in issue, was not clear. At the heart of this case is how long the respondent could reasonably be expected to wait and manage before the claimant could return to duties. The evidence in the witness statements did not particularly help with that, save to say that the longer the claimant was off work the greater was the risk that staffing pressures would not be redressed. But even that requires the qualification that the claimant was a trained prisoner officer with experience and knowledge of HMP and YOI Moorlands and any replacement for him would involve a delay, in terms of recruitment, training and developing a comparable level of knowledge and skill of the job. The advice was that by three months after his surgery, the claimant would be fit for all duties again. How long was it worth waiting for the claimant's surgery, in the light of such competing considerations?

48. To obtain a better insight, the Tribunal asked Mr Beeston some questions about the difficulties to which he had alluded. He informed us that the policy required 95% staff coverage to ensure a safe operating level. If the figure fell below that, a governor would seek a detachment of officers from another prison. In addition, he could invite staff to act up in a higher grade. On one occasion he had 10 staff acting up. He could also suspend temporarily certain activities. He said he had quite a lot of staff on secondment. In respect of recruitment, it would take on average six months for a prison officer to be recruited and then trained, the recruitment process taking about three months and the training taking a similar period. He said he might expect to get "legs on the ground" within four months or so. If a recruitment process had already been initiated before he made his request, he might obtain a replacement within 4 to 6 weeks. In respect of how long he would wait for an officer to recover from sickness, he said it was a fine line. He was asked about the effect of the pandemic on recruitment and he said there was a period of 3 to 6 months when trainees were not sent to the training college, so he used them in different roles such as OSGs pending training. He said that he would lose 3 to 4 officers a month, some promotions and some secondments, some resignations. He did not say how many were replaced per month, by way of recruitment or returning from secondment, so it was not clear if there was a net loss each month. The respondent did not specify the degree of the shortfall below the complement of 185 prison officers for the relevant period. The claimant had said that he worked in house-block 2, where there were 18 staff, including Mr Miller and that it had been adequately staffed, having sent prison officers on detached duties to assist other prisons. The respondent did not dispute this.

49. The tribunal allowed Mr Smith to ask supplementary questions of Mr Foweather relating to these matters at the start of his evidence. With responsibility for the Yorkshire and Humberside region, his knowledge was of the broader picture. He confirmed that safe staffing level was 95%. 85% of running costs related to pay and if 'not-effective costs' exceeded 20% it created a problem. Sick pay made up a good part of that. His budget was £150 million. He said all prison establishments struggled to manage within their budgets and this included HMP YOI Moorlands. He said that the Yorkshire and Humber region had a shortfall of 120 officers and that some jails in the southern region fared worse, with a 40% shortfall. That was relevant because of pressure to send prison officers to those establishments on detached duties to achieve a safe level of 95%. In cross-examination, he said that he did not think that HMP YOI Moorlands had a good staffing level but it was better than the worst. He said he made his decision by consideration of the service as a whole, not Moorlands. He had regard to the business nationally. He said there had been massive recruitment campaigns but attrition was a problem with people leaving to work for the police and Amazon. He said that if the claimant could have retained the claimant in non-operational duties it would have been a massive win, but that was not viable.

50. We must also consider, and balance, these business needs and pressures with the effect of the unfavourable treatment on the claimant. He was dismissed with the consequential loss of job and income, and a career he had trained for, having started work as an agency worker in the prison service in 2012, becoming a permanent OSG in 2015 and a prison officer in 2017.

51. Because the claimant was not a disabled person at the time of the original hearing before Mr Beeston but became one by the time of the appeal hearing, our focus for this legal complaint must be upon the decision-making process of Mr Foweather. In his evidence, he said that he did not have regard to the fact the claimant was a disabled person, because that was unknown to him at the time, but that he had considered reasonable adjustments for the purpose of restricted duties. Both he and Mr Beeston had considered this with the claimant in some detail, but the occupational health advice had been clear, that this was not possible.

52. On 18 March 2020 at the appeal hearing, the claimant said that his operation was to be on 27 March 2020 and this had followed a cancellation on 22 February 2020. In response, Mr Foweather said that all non-urgent operations had been cancelled. (In evidence, he said he had learned this from a news report on the radio that morning). In response, Ms Clark, the claimant's trade union representative, informed Mr Foweather that the claimant's case was an urgent one. The claimant added that because it was not to be done in a mainstream hospital, but one which solely conducted operations, that it would be a month or two when they started cancelling non-elective surgery. He said he had an appointment letter, although Mr Foweather did not see it. The claimant's medical records confirmed that his surgeon regarded the operation as urgent.

53. Mr Henry submitted that in the circumstances there was an alternative course available which would avoid discrimination and that would be to defer the decision. He said Mr Foweather could not have known whether the operation would go ahead or not and if the claimant received surgery then, he would have been back at work within 6 to 8 weeks to discharge restricted duties and full duties within 8 to 12 weeks. At the appeal hearing the claimant had told Mr Foweather that he would be back to full duties 16 weeks after the operation, but this is not what was reported in the occupational health advice, which referred to a maximum of 12 weeks recovery.

54. Mr Foweather concentrated on the claimant's previous record of absence and referred to this in his decision letter. In his evidence he had said this was not a material consideration, but that he could not wait any longer and did not believe the operation would go ahead on 27 March, albeit he did not spell that out in the outcome letter. There had been an extensive discussion about the earlier sickness record at the appeal hearing and it did appear to play a far larger part in Mr Foweather's decision than he suggested in evidence. We would not regard the early record of absences to have had any particular significance in this case. Although there had been a number of absences, the claimant had not presented as a particular problem. One absence followed a bereavement and other family problems and another concerned an injury on duty after the claimant was hit by a prison gate. Whilst we would not suggest it was inappropriate, in principle, to consider an attendance record at such a hearing, it did not appear to be relevant in this case, when the claimant's recent absence had been the consequence of an injury on duty. That is doubtless why Mr Beeston said in evidence that he did not regard it as of any assistance and why Mr Foweather marginalised its significance to his decision in his evidence.

55. We agree with Mr Henry that balancing the extent of the hardship to the claimant of dismissal on the one hand and the business needs of the respondent on

the other, it would have been appropriate to defer the decision until after 18 March 2020. For an important decision of this type to turn upon the accuracy of a news report in a fast-moving crisis arising from the pandemic was not appropriate. The position in respect of what surgical operations would or would not proceed required clarification. Mr Foweather did not know whether or not the urgency of the claimant's operation would allow it to proceed on 27 March 2020. He should have made further enquiries and deferred for a short period to see if the operation would proceed.

56. Matters sped rapidly in the following days with the nation plunged into a national lockdown on 23 March 2020 which brought the most severe restrictions on movement and activity in the country's history. The operation did not go ahead. Mr Foweather said in evidence that with the benefit of hindsight he could have postponed his decision; but it might be said that hindsight vindicated his approach. Had he waited a fortnight there would have been more uncertainty about when the operation would happen.

57. We are nevertheless satisfied that the balance favoured allowing further time, albeit not indefinitely because of the pressures on the service. Given the state of uncertainty in the following weeks, we consider the respondent should have waited until clarity was provided by the NHS as to when the claimant's operation would proceed. The Government had announced that it hoped the lockdown measures would be eased in late spring or early summer. We are satisfied that it would have been appropriate to defer any decision to dismiss until that time.

58. It is now known that the claimant's operation took place on 20 August 2020 and he enjoyed a good recovery. This could not have been known to Mr Foweather on 18 March 2020, nor would it have been known to him if he had deferred for a fortnight or for a further two or three months. It is reasonable to infer the position would have been clarified by the NHS some time before the operation when the lockdown was eased in July 2020. We consider it would have been appropriate to wait until then to clarify the timeframe, in the unusual circumstances arising from the lockdown. It would then have been clear that the operation could take place soon with the expectation of a return to duties within the timeframe provided by Dr Miranda. The alternatives of recruitment of a replacement had its own unquantifiable difficulties such as the timescales of bringing in a new inexperienced officer who would have to learn prison craft and become familiar with the particular establishment to reach the level of service provided by the claimant and other difficulties of retention had to be balanced against this delay. The revenue released from the dismissal of the claimant to support overtime and acting up duties would have eased the situation, but that would have been a short-term remedy. Even then, Mr Henry submitted that the resource released would be reduced by 7 weeks of notice pay and compensation of £4,500 to which the claimant became entitled. That was a further valid consideration.

59. We recognise the deferment of a decision and awaiting surgery until 20 August 2020 would have been a significant delay which would add to the problems Mr Beeston and Mr Foweather had to manage. Mr Foweather and Mr Beeston did not say they could not operate the prison safely for this period in the absence of the claimant, nor that it would fall below the safe operational level of 95%. That said, we do not suggest that the respondent would have to demonstrate and establish such a

critical situation before justifying a dismissal of a disabled person who had been on sick leave for some considerable time. The authorities are clear that the identification of an alternative measure to the impugned discriminatory treatment, in this case deferment of the decision, is not determinative of the test of proportionality, but only one factor. The question is, was dismissal *reasonably* necessary. We have found it was not.

60. There were circumstances which should have been taken into account in evaluating what was proportionate; put more colloquially, getting it in proportion. The prognosis was that the claimant would enjoy a complete recovery. Mr Foweather queried that and pointed to the occupational health reports which he said were qualified as to the prognosis. We did not accept that. The occupational health advisers and physician were clear. Insofar as any medical treatment involves a risk, nothing can be guaranteed. Nevertheless, the opinions of the occupational health professionals came as near to that as possible, specifically under the heading "manager questions". For example, in the report of 10 January 2020, Dr Miranda said, "*Once he has had the operation, he will take approximately 8 to 12 weeks to recover sufficient functions effectively to perform C and R duties in a safe and effective manner. He would benefit from a phased return to work over a period of five weeks when he has completed a C and R refresher course"*.

61. Additionally, the injury was sustained on duty. Mr Foweather queried whether the injury might have been connected to a previous shoulder injury such that the injury on duty aggravated it. This had been referred to in the report of Dr Miranda, but it did not have any significance to the decision Mr Foweather had to make. The respondent has a scheme, 'sick leave excusal', to extend sick pay for those who have been injured on duty for up to 6 months in addition to the standard policy of five months of full pay and five months of half pay. The claimant qualified for sickness leave excusal. The Attendance Management Policy allows discount of the same period with respect to the trigger points at which meetings and sanctions arise in respect of unsatisfactory attendance. That is distinct and separate to the 'continued absence' procedure which applied to the claimant's case and Mr Henry accepted that, which was a departure from the case as first pleaded. Nevertheless, it is a recognition on the part of the respondent that an inability to serve arose from serving. We do not suggest a disapplication of the period of absence as if it were the unsatisfactory attendance procedure, but by giving it some consideration. We were not satisfied it weighed at all in Mr Foweather's deliberations.

62. The sick pay scheme which we have described envisages an employee may continue to receive sick pay for up to 16 months, if sick leave excusal applies, or 10 months if it does not. That is not a yardstick against which to measure reasonable periods of absence before which termination of employment is appropriate. But it implicitly foresees a situation in which an employee might remain in employment for up to 16 months. One might expect this to be more likely to arise in respect of those who have the protected characteristic of disability, to whom additional duties arise in employment.

Breach of the duty to make adjustments

63. The issue was what would have been a reasonable adjustment to avoid the acknowledged substantial disadvantage to which the claimant was placed as a disabled person by the PCP of requiring the claimant to work or risk dismissal under the respondent's continuous absence policy.

64. For the same reasons we have rejected the defence of justification in the discrimination arising from disability complaint, we have concluded that it would have been reasonable to defer a decision initially for a fortnight and then until the early summer when it would have become clear that the claimant's operation could proceed in August. Had that been done the substantial disadvantage would have been avoided.

65. We have had regard to the Commission's Code of Practice. We recognised the delay would put pressure upon the other staff and managers. But we are satisfied that any disruption could be managed as there was a large workforce and covering for the absence of colleagues on secondment, sickness or detachment was an operational necessity; the question is how long it could be reasonably sustained. The Code draws attention, specifically, to the size and resource of the employer, in this case a State Department. There are cases in which the evidence establishes that even a large organisation such as this cannot sustain such lengthy periods of absence without significant disruption. This was not one of them.

Unfair dismissal

66. Although the approach is different, as explained in **O'Brien,** we are satisfied that it was not reasonable in all the circumstances, including having regard to the size and administrative resources of the respondent, to dismiss the claimant for capability reasons on 18 March 2020.

67. We have considered with care the judgment of the decision-makers and the reasonable needs of the prison service, to which we must give due respect. The tribunal recognises the enormous challenges of managing custodial institutions of this type. The experience and training required of prison governors and the commitment to provide the best service to the public, of which Mr Beeston and Mr Foweather were admirable examples, lead us to tread with great caution in criticising the very difficult judgements they have to make in cases such as this.

68. Nevertheless, equity and the substantial merits of the case, to which the statute requires us to have regard as well as all the circumstances, would include the termination of employment of those with protected characteristics under the EqA. It would be an unusual case in which a dismissal which was discriminatory was not also unfair.

69. That duty did not apply when Mr Beeston was considering the case on 23 January 2020. Although he was sceptical about the claimant's reluctance to volunteer more enthusiastically for alternative duties, it is fair to point out that the medical evidence did not entertain such possibilities. In the event that was irrelevant, as Mr Beeston acknowledged in evidence. What was relevant, was the

uncertainty as to when any operation would take place. We have not accepted the evidence of the claimant that he had explained to Mr Beeston at the meeting that he was expecting a further preoperative assessment and that an operation would take place within four weeks. Mr Beeston discovered that the previous operation had been cancelled because of the claimant's high blood pressure reading and there was no clarification as to when that situation would improve.

70. The situation had changed by the time of the appeal. It was a full rehearing. There was then a date for the operation and, for the reasons given, Mr Foweather did not have sufficient information upon which to base a sound decision and reject what he had been told by the claimant and his representative. His decision-making was affected by factors of no particular relevance such as the claimant's earlier history of attendance and the pathology of the shoulder condition. He did not have regard to the claimant as a disabled person and the duties which would flow from that.

71. In **Royal Bank of Scotland v McAdie [2008] ICR 1087** the Court of Appeal rejected an argument that an employer could not fairly dismiss an employee who had become unfit to work because of illness for which the employer was, in one way or another, responsible. But it approved the comments of the Employment Appeal Tribunal in the same case that, in common sense and common fairness, this is relevant to whether and, if so, when it would be reasonable to dismiss an employee such that it may be necessary for the employer to go the extra mile, either in search for alternative work or putting up with a longer period of sickness than would otherwise have been reasonable. We consider that a reasonable employer would have allowed the further period for the claimant to receive the restorative surgery, when taken together with the other factors which we have addressed.

72. For these reasons the dismissal was outside a reasonable band of responses and unfair.

Unanimity

73. All three members of the Tribunal were in agreement on the findings and conclusions which we have set out above.

Employment Judge D N Jones
Date: 18 March 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

18 March 2021