EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104873/2017 Hearing at Edinburgh on 18, 20, 23, 25, 27 August and 6, 8 and 10 September 2021; Members' Meeting on 22 October 2021

Employment Judge: M A Macleod
Tribunal Member: A Matheson
Tribunal Member: E Farrell

William Main	Claimant In Person
The Scottish Ministers	Respondent Represented by Mr R Turnbull Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail and are dismissed.

REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal on 7 October 2017 in which he complained that he had been unfairly dismissed, discriminated against on the grounds of disability and religion or belief and subjected to detriments and unfairly dismissed on the grounds that he had made protected disclosures to the respondent and others.

2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. After considerable case management, the case proceeded to a Hearing on the Merits, which was listed to commence on 11 August 2021, but which did not in fact proceed until 18 August 2021. Thereafter the hearing continued on 20, 23, 25, 27 August and 6, 8 and 10 September 2021. A Members' Meeting took place on 22 October 2021 at which the Tribunal convened to deliberate upon our decision, assisted by written submissions which had been presented by the parties following the conclusion of the evidence in this case.

4. The claimant appeared on his own behalf at the hearing, and Mr Turnbull, solicitor, appeared for the respondent.

5. The parties presented a joint bundle of productions, running to two volumes, and the claimant added, without objection from the respondent, a further bundle of documents of his own, which on closer inspection contained some material already within the joint bundle.

6. The respondent called as witnesses:

   - Susan Amanda Brookes;
   - Heather Keir;
   - Catherine Topley; and
   - Caroline Johnston.

7. The claimant gave evidence on his own account, and also called as witnesses:

   - Denise Strathie, and
   - Russell Turnbull.

8. Evidence in chief was given by each of the witnesses other than Ms Strathie and Mr Turnbull by way of written witness statements, which were taken as

read. The claimant's witness statement was presented in the form of 3 separate documents, which were headed as follows:

- Background Witness Statement;
- Witness Statement: Public Interest Disclosure; and
- Witness Statement 23/08/19; Equality Act 2010 Section 14(2E) Religion or belief, and the subject of References.

9. The claimant was allowed a number of reasonable adjustments by the Tribunal in the course of the hearing, to take account of his underlying condition of anxiety and depression. The hearing was listed to take place in a pattern of Monday-Wednesday-Friday to allow the claimant the opportunity to have a break between hearing days; the claimant was permitted to make a recording of the public parts of the hearing, namely all parts other than those during which case management discussions took place; the claimant was offered the opportunity to have breaks during the course of the hearing day, and on occasions when the Tribunal noted that he was becoming anxious or tired, breaks were granted without his requiring to request them; and despite the wish of the respondent to press on to conclude the hearing by presenting oral submissions, the claimant's preference for written submissions was granted by the Tribunal.

10. This case has a complex and lengthy procedural history. It is not necessary to provide the detail of all of this history but at this stage the Tribunal considers it important to note the following for the record:

    1. The claim was presented to the Tribunal in 2017, but the hearing did not commence until August 2021, nearly four years later, an exceptional period of time. Prior to this hearing commencing, 4 previous hearings had been listed and postponed, each on the application of the claimant. It was made clear to the claimant that no fault was attributed to him about these postponements, but it was emphasized to him and to the respondent that this hearing required to proceed.

2. The claimant submitted a number of applications to postpone or adjourn this hearing, but did not provide any satisfactory medical evidence in support of those applications, which were refused with detailed reasons being given on each occasion.

3. The first scheduled day of this Hearing, 11 August, required to be postponed at the instigation of the Tribunal, after it was noted that one of the allocated lay members had a potential conflict of interest. She was asked to recuse herself, and did so, and a new lay member was convened. The second scheduled day was then adjourned following the non-appearance of the claimant, owing, he maintained, to his ill health. However, following considerable correspondence, the hearing proceeded on Wednesday 16 August and thereafter parties were able to attend and utilise the scheduled dates to allow the hearing to come to a conclusion within the allotted time.

4. The claimant raised a number of applications, over a lengthy period of time, for both witness orders and documents orders. These were each dealt with as they arose, with reasons given for their being granted or refused. At the conclusion of the evidence, the Tribunal allowed the claimant a further opportunity to make application for witness orders, which he did. The Tribunal's determination in relation to that application was conveyed with detailed reasons to the parties shortly following the conclusion of arguments.

5. The claimant requested, both before and during the hearing before us, that the Tribunal issue an Order requiring the respondent to produce the first DIPLAR report. This application was opposed by the respondent. The claimant was of the view that a second report was substituted for the first version, and he was suspicious that this was done in order to cover up wrongdoing on the part of the respondent. We were unable to find that there was any relevant basis for that request. The production of the DIPLAR report was of importance to the claimant, but in our judgment it had no bearing on the conclusions which we had to reach in this case. As a result, and recognising that granting the Order would be

likely to introduce further delay to these proceedings at a very late stage in the process, we concluded that it would not be in the interests of justice to grant the application.

11. The Tribunal was able to make the following findings of fact, based on the evidence led and the information presented. It should be emphasized that the Tribunal has not set out the findings in relation to every fact asserted by both parties in this case, but only those facts which we considered relevant to the issues actually before us in this case. The claimant was particularly anxious, it appeared to us, to set before us evidence about a large number of issues and concerns which he felt exposed the respondent's management to criticism, in general terms and unrelated to his own case as it was placed before us, but we sought, and seek in our findings, to narrow the focus of the case to those matters which were relevant to our determination of the issues in this case.

12. In particular, the parties had agreed that the hearing would only address the question of liability, and would leave the issue of remedy to a separate hearing, if required. Accordingly, no findings are made in relation to the events following the claimant's dismissal insofar as relating to the losses he alleges he has suffered as a consequence of his dismissal.

Findings in Fact

13. The claimant, whose date of birth is 13 January 1970, commenced employment with the respondent on 27 July 1997 as a Residential Prison Officer. The claimant's full name is William Stewart Main, but he is known as Stewart, and is referred to as Stewart in correspondence by the respondent.

14. The claimant's first post was in Her Majesty's Prison (HMP) and Young Offenders' Institution (YOI) Cornton Vale ("Cornton Vale"). In July 2002, while the claimant was still employed there, Susan Brookes took up post as Governor of Cornton Vale, where she remained until 2006, having previously worked at HMP Glenochil.

15. Ms Brookes subsequently held a number of posts within the Scottish Prison Service, and on 1 October 2013 she transferred from HMP Edinburgh to HMP & YOI Polmont ("Polmont").

16. On 17 October 2014, while the claimant was working as a Residential Prison Officer in Blair Hall in Polmont, a young prisoner, known herein as "Prisoner X", died in custody. Prisoner X was a young man who took his own life.

17. The claimant was deeply affected by this prisoner's death. He was involved in the Death in Prison Learning and Audit Review ("DIPLAR") which took place as a result, by discussions on 23 January 2015, chaired by Heather Keir, who was at that time the Deputy Governor at Polmont. He became distressed during the course of the discussions on that date, and was offered the support of the Critical Incident Response Strategies ("CIRS") programme, which was for the assistance of employees, and which he took up.

18. On 26 January 2015, the claimant did not attend for work, and made no contact with the respondent to explain his absence. His managers became concerned about this, and contacted his partner, Denise Strathie. At that time, the claimant had two young children with Ms Strathie, and had an older daughter, from whose mother he had been separated when his daughter was young.

19. Ms Brookes' evidence about this matter was that when it became clear that the claimant had not attended for work, without any notification to the respondent, and that he had been distressed at the meeting of 23 January 2015, the respondent became concerned as to his health; and that a relative of the claimant, possibly his mother-in-law, had telephoned the respondent to express concern that he may have his daughter with him and about his wellbeing; and that his partner, Ms Strathie, was unable to explain where he was that day, it was necessary for the respondent to contact the police in order to establish whether or not he had come to harm. The police attended the prison in order to gather information about this matter.

20. Ms Brookes emphasized that she did not have information to the effect that the claimant had done anything wrong, but her concern was for the wellbeing of her employee, and also his daughter.

21. Both the claimant and Ms Strathie were very critical of the respondent as to their actions on that date, and the claimant in particular was highly offended at the suggestion that he may have been a risk to his daughter.

22. Our view of these different positions was that the respondent was seeking to act in a responsible manner, trying to ensure that they found out as much information as possible about the claimant's whereabouts, as part of their duty to care for him as an employee. The claimant's reaction was one which, in our view, failed entirely to take into account his employer's perspective. He insisted that his mother-in-law did not contact the prison, but Ms Brookes was only able to say that it was a relative of the claimant's, who may have been his mother-in-law, but it was possible that it was someone else. We found no reason to doubt the evidence of Ms Brookes on this matter, and considered that the respondent was not open to criticism for their actions at this time.

23. As it turned out the claimant had driven some way from his home, on his own, owing to feelings of anxiety and distress. He could not be reached by anyone, including his partner, who spoke to him in the evening and found him to be very upset, to the point where he hung up the phone on her. Eventually, she spoke to him again, when he said that he had travelled to Oban, and persuaded him that he should drive home that night, which he did.

24. Ms Brookes' evidence in her witness statement was that when Russell Turnbull, the claimant's then line manager, had contacted the claimant, he was told that the claimant had had a falling-out with his daughter and had driven to Fort William.

25. The precise details of these events are unclear to us. The claimant does not address this issue specifically in his witness statements.

26. It is clear to us that there was no risk to the claimant's family in his actions, as he was on his own throughout, but that the respondent had to make efforts to try to identify where he was, and they were in the possession of information which suggested that there was some concern from his family as to his wellbeing and the consequent potential risk to his daughter, were she to be with him. As a result, we can find no basis for criticism for the respondent in seeking to alert the authorities to his absence in order to try to assist in finding him. In any event, this does not appear to us to form part of the claim before us. It was, however, clearly an incident which caused the claimant a degree of anger and upset when he discovered what had been said about him, and therefore we address it for that reason. The claimant appears to consider that the respondent has, in effect, accused him of abuse. No such accusation appears in any evidence before us.

27. The claimant was absent from work from that date (27 January 2015) until the termination of his employment, which took effect on 18 October 2017. On 10 February 2015, his absence was certified by his doctor for a period of 2 weeks, with the reason given as "stress" (371).

28. On 17 February 2015, the claimant met his line manager Russell Turnbull, who lived close to him, and told him that he was feeling better. Mr Turnbull completed a contact sheet (967) in which he said that the claimant had said that *"he is feeling better he is getting his personal issues sorted and will return when he feels fit. There are no work related issues regards his period of sick."*

29. On 28 May 2018, as part of these proceedings, the respondent's solicitor wrote to the Employment Tribunal to confirm that the respondent admitted that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010. The condition which the claimant relies upon as a disability is that of Post-Traumatic Stress Disorder (PTSD).

30. The respondent maintains and relies upon a Managing Attendance and Absence Policy and Procedure (MAAPP)(1150-1197), in dealing with long-term absences from work such as the claimant's.

31. Section 8 of MAAPP (1184) provides that *"the overriding objective of the capability process is to enable employees to continue to work within the SPS."* The Capability Process itself (1185ff) states that if the employee is evidently not going to return to work within 3 months of the commencement of non-attendance, a referral will be made to Occupational Health Advisers, to ascertain if the employee is capable of fulfilling their full contractual role and providing regular and effective service within a reasonable time scale. The policy also requires that reasonable adjustments should be considered by referral to Occupational Health, if required, and that redeployment within the organisation should also be considered in order to assist the recovery process. In the event that redeployment within the organisation is not at that stage an option and there remains no reasonable prospect of the employee returning to their full contractual role or providing regular and effective service, a Medical Retirement application would be facilitated in terms of the Principal Civil Service Pension Scheme (PCSPS) guidelines.

32. The claimant was referred to the respondent's Occupational Health Advisers, OH Assist, and was seen on 11 February 2015 by Pauline Gardner, Occupational Health Adviser. Her report (931ff) confirmed that the claimant was suffering from stress and anxiety which had come on suddenly some weeks before. It was reported that the claimant said that he perceived that he could have personal stress which may be contributing to his symptoms.

33. Ms Gardner stated that *"Based on available evidence and assessment today, in my clinical opinion Mr Main is currently unfit for his normal contractual role at this stage due to his current symptoms. I would recommend a further referral is carried out in 4 weeks to allow Mr Main to seek counselling support and allow his symptoms to improve."* She went on to say that she had recommended to the claimant that he seek counselling in respect of his symptoms, and that she was unable to predict a time scale for recovery of his current symptoms, though she considered that with support and the addressing of his personal issues they would resolve in time. She also said, at the conclusion of her report, that in her opinion there were no adjustments which would support a return to work at that stage.

34. Ms Gardner spoke with the claimant again on 17 April 2015. Her report (929) confirmed that in her clinical opinion the claimant was currently unfit for his normal contractual role at that stage due to current symptoms, and recommended a further referral within 3 to 4 weeks. She concluded that the claimant was improving, and that he would be in a position to return to some form of work within the next three to four weeks after undertaking further supportive therapy. She said, further, that there were no adjustments required at that stage.

35. A further assessment took place on 8 June 2015, by Dr Robert Phillips, Consultant Occupational Physician. Dr Phillips reported (926) that *"the barriers to a return to work currently are flashbacks of circumstances related to recent suicide of a young offender at work. Mr Main is 'trapped in the past' as he describes his circumstances… Current adjustments are not possible, a further OH assessment is needed to determine adjustments for an earlier return to work."*

36. Dr Phillips advised that with treatment and further time, he was optimistic of a successful return to work, but that at that time, further treatment was required in the form of cognitive behavioural therapy (CBT). He estimated a return to work in 6 to 9 weeks, and suggested that temporary redeployment with restricted hours was likely to help following treatment and time. He said he was optimistic of a return to work for future regular and effective service.

37. The claimant was seen on 16 July 2015 by Dr Stephen Glen, Consultant Occupational Physician, whose report (923) stated that:

"As management are aware, this gentleman suffered a significant stress reaction at work approximately 10 years ago that he attributes to work-related issues. He received treatment at the time with appropriate interventions, and was able to resume his role, although he claims that he never full recovered his normal psychological well-being."

38. Under the heading "Capability for Work", Dr Glen stated:

"He does not feel capable of returning to a residential work role, as he attributes this type of work to the onset of his past and present psychological illness, and feels that a return to the same environment is only likely to result in recurrent psychological symptomatology. He feels that he could cope with a return to work if he could be transferred to a non-residential role. This is obviously for the gentleman to discuss with management, but if it could be accommodated, it may assist his effective return to work."

39. Dr Glen stated that in his opinion the claimant had developed a psychological sensitivity to working in a residential role due to his history of past psychological issues associated with his perception of the pressures of the role. He said he was pessimistic about his capability to return to a residential role in the future. He went on to say that the claimant would require an appropriate course of CBT of at least 10-12 sessions before he was likely to recover from his current Anxiety Disorder, but if a role within a non-residential capacity were available, that might help to expedite a return.

40. On 27 July 2015, the claimant's GP signed a fit note (985) in which it was stated that *"you may be fit for work taking account of the following advice".* It was then noted that if available, and with his employer's agreement, he may benefit from a phased return to work, amended duties, altered hours and workplace adaptations. The GP went on to state: *"Pt may be fit for work if there are workplace adaptations and his role is changed to remove him from the stressful working environment… Pt needs comprehensive assessment by occupational health before he returns to work…. Needs cbt and support from mental health professionals to aid work return."*

41. This was said to be the case from 27 July until 3 August 2015.

42. The claimant attended for work on 28 July 2015, reporting himself to be fit for work. Ms Brookes was concerned that he was returning to duty too soon, and for financial reasons (as his sick pay was about to be reduced from full to half pay). There had been no agreed supports put in place, nor any defined timescale for a phased return to work. She decided that he should

remain off and be subject to the normal absence processes until there was a further assessment by Occupational Health that he was fit to return to work.

43. During a later telephone call by Gordon Crinean as part of the ongoing communications with the claimant during his absence, on 30 November 2015, it was noted that the claimant said (952) that *"when he started the capability process he thought he was ready to return but now sees that this was not the case.*"

44. The claimant's line manager, Russell Turnbull, was absent from 10 April 2015 due to ill health, and returned to work on 7 August 2015. Mr Turnbull met with Heather Keir, Deputy Governor, at some point thereafter in August 2015, when he attended her office following his return to work meeting with his manager. It should be said that Heather Keir's evidence about the date upon which this discussion took place is unclear, as set out in paragraphs 15 and 16 of her witness statement to this Tribunal. In paragraph 15 she asserts that the meeting took place on or around 12 August 2015; and in paragraph 16, referring to what she had said in evidence at the Fatal Accident Inquiry, she said that "I now remember that it was on or around 7 August 2015 that Russell came into my office and told me…"

45. We have concluded that the discussion between Ms Keir and Mr Turnbull must have taken place at some point in mid-August after Mr Turnbull had returned to work on 7 August, but beyond that we cannot with any certainty identify the date upon which the discussion took place. Mr Turnbull himself was unable, in his evidence, to recall any of these dates.

46. Notwithstanding the lack of clarity about the date, the evidence was that Mr Turnbull had mentioned to Ms Keir that the claimant had told him, when he had met him on an unspecified date outside his house, that SPS prison officers had been abusive to the young offender who had committed suicide in 2014 (which we understand to be a reference to Prisoner X).

47. Mr Turnbull's evidence before us – and it should be borne in mind that no witness statement was made available from Mr Turnbull in advance of his

evidence – was that the claimant told him who the 3 staff involved in the alleged mistreatment of Prisoner X were, but that he had said to him "If you tell anyone, I will deny it". Mr Turnbull, nevertheless, considered that he had an obligation to pass on this information.

48. It is not clear from the evidence of Ms Keir or Mr Turnbull whether the names of the 3 alleged perpetrators were passed on during this conversation, but the concerns certainly were. Immediately following the meeting, Ms Keir walked to Ms Brookes' office and told her about the concerns which had been passed by the claimant to Mr Turnbull. Ms Brookes considered that since there was no other evidence to support the allegations, and that it had not come from the claimant or through any formal channel, it would be appropriate to wait until the Capability Interview with the claimant to discuss and encourage him to disclose the details of his concerns.

49. We should note that Ms Keir indicated that in the Fatal Accident Inquiry it was recorded that her evidence at that stage was that Mr Turnbull had told her initially about the claimant's concerns in April or so that year, some 6 months after the prisoner's death, but she said to us that that was an error about the timing of that conversation by her, in response to an unexpected question in the court hearing. On balance, and given our view of Ms Keir's evidence, we were prepared to accept that the first time on which she was told by Mr Turnbull that the claimant had any concerns about the behaviour of fellow prison officers towards Prisoner X was in August 2015, and not in April 2015.

50. We accepted that Ms Keir did not mention the names of the alleged perpetrators to Ms Brookes, and that Ms Brookes did not know the identities of those accused by the claimant until much later. Ms Brookes also considered that the manner in which the information had been conveyed to her and to Ms Keir was such that Mr Turnbull was simply making them aware of the issue, but not at that stage suggesting on behalf of the claimant that particular actions should be taken. Further, she understood

that Mr Turnbull did not have the claimant's permission to pass this information on, but had chosen to do so anyway.

51. On 17 August 2015, Ms Brookes took the decision to invite the claimant to a Capability Interview, and wrote to him for this purpose on 17 August 2015 (857). She confirmed that at the interview they would go through the claimant's sickness absence record, and how it had been managed. She said she hoped that at the meeting the claimant would be able to provide assurance that there was a reasonable prospect of his returning and providing the respondent with regular and effective service. She indicated that if this were not the case the respondent may have to consider terminating his employment. The meeting was scheduled for 25 August 2015 in her office at Polmont.

52. The claimant did not attend the meeting on 25 August 2015, and accordingly Ms Brookes wrote again rescheduling the meeting to take place on 3 September 2015 (414). She told him that the respondent wished to be as supportive as possible in considering any options regarding a transfer within the establishment, but that this was impossible to do without his engagement and input. She stressed that early engagement was vital.

53. On 25 August 2015, Eddie Cruse, the claimant's then POA representative, came to see Ms Brookes, agitated and concerned that the claimant was not being permitted to return to work despite having reported fit. Mr Cruse referred to the allegations about the misconduct of prison officers towards Prisoner X, but declined to name any staff names. He said that the claimant was unhappy at Ms Brookes' involvement in the Capability Process, given their previous interactions at Cornton Vale and dealing with his previous absences.

54. Mr Cruse asked that the claimant be allowed to return to work, but Ms Brookes advised that she did not consider it appropriate that he should be allowed to return at that stage, given that it was not clear that he was fit to return and there was a risk that the claimant's situation could be made worse.

55. There is no evidence of any “collusion” between Mr Cruse and Ms Brookes in this discussion. Mr Cruse confirmed that he would be advising the claimant as to the range of possible outcomes from a Capability Review and ensuring that he was fully informed so he could make the best decision about his future. There is nothing improper in the conversation as it was relayed to us. It seemed to us to represent a routine interaction between a union representative and a senior manager, both acting in what they considered to be the appropriate way.

56. Ms Brookes advised that since these were serious allegations, it would be necessary to report them to the Police and to the Headquarters of the respondent. At that stage, the allegations were very vague, and no names of the alleged perpetrators had been given to Ms Brookes.

57. Ms Brookes did report the allegations, however, to the Police and to Headquarters.

58. The claimant emailed Ms Bowie on 31 August 2015 (422), copying the email to Michael Matheson MSP. He confirmed in that email that he would not be attending the Capability Interview on 3 September 2015, and attaching his Section 11 Application. A Section 11 Application is a form completed and submitted by an employee who argues that their sickness absence was caused by an injury at work. The claimant had previously completed such applications (for example at 84-86). A successful Section 11 Application would allow his pay to be protected during sickness absence.

59. In his email, the claimant complained that the dossier (the set of papers sent to him by Ms Brookes in preparation for the Capability Interview) was “incomplete, inaccurate and biased towards dismissal”. He said that his POA (Prison Officers’ Association, the trade union of which the claimant was then a member) officer had concurred with him about this, though he would no longer be representing him.

60. The claimant’s Section 11 Application, submitted on 31 August 2015, ran to 6 pages (498ff). It was headed “Section 11 Application – sick absence from 26/01/2015-03/08/2015 and 28/08/2015 – ongoing”.

61. He opened the document by stating that that absence was wholly attributable to the cumulative experiences of the past 7 years in his Residential Officer's role in the Under 18 unit in Blair House, in Polmont.

62. He said that the stress had resulted from his exposure to *"grossly inappropriate and fear inducing behaviours by staff who have explicitly stated and implied that I was untrustworthy and a 'grass'."* He went on at length to make allegations of ongoing bullying against himself and others, and of "cronyism" and failures by management and senior management.

63. He then drew attention to the event which *"finally broke my resilience",* namely the death of Prisoner X in October 2014 in Polmont. He set out the history of his dealings with this prisoner, and noted that after his conviction, a national newspaper published a story about the trial, in terms he regarded as sensationalised, which exposed details which related to his office which *"exposed deviance"* – by which we understand he meant that the story focused on a sexual aspect of the alleged offences committed by the prisoner – and which he felt was unhelpful in looking after his interests. The claimant went on:

"I am acutely aware that after this expose a member of staff working in Blair House, who had read the article in the morning papers, chose to subject the young man to a highly unprofessional in cell interview. An interview carried out by himself and a member of staff from another work area within Blair House. The staff mentioned above openly informed me that they had made the young man feel deeply uncomfortable, they boasted in a grossly inappropriate manner that they had 'terrorised him'. Gloating that they had only just failed to get a sufficient enough reaction from him, in terms of his violent retaliation, which could have justified a removal to a more secure area. After they disclosed this to me I informed them of my concerns relating to Prisoner X's welfare and then made them aware of concerns I had raised with the Intelligence Unit, and requested that they complete a narrative in relation to their visit to his cell. They then informed me that there were no entries in the young man's narratives, other than what they

had begun to write, and I then suggested they get Prisoner X's Personal Officer to update the same narrative as I had a bad feeling."

64. He concluded that narrative, and then stressed that he had been unable to approach senior management in Polmont with this information because, in his view, they were a clique which had abused their power in the workplace over him, and had colluded with his POA representatives and engineered all of his significant distress by institutionalised bullying over the previous 10 years.

65. Ms Brookes never spoke to Michael Mathieson MSP about this communication, nor about the claimant at all.

66. On 9 September 2015, Ms Haswell wrote to the claimant (458) to confirm that the management team had advised her that he had raised a matter which may fall within the SPS Whistleblowing Policy, and accordingly she was responsible. She confirmed that the Governor had made Police Scotland aware of the possibly criminal nature of the allegations made. She advised him to provide personal details to Theresa Medhurst, Interim Director of Strategy and Innovation, who would then contact him to discuss his concerns.

67. On the same date, Ms Haswell wrote to Ms Brookes, Ms Medhurst, Ms Bowie and Tom Fox (460) to confirm that she would be approaching Liz Fraser, HR, and Caroline Johnston as potential candidates to take the Capability Process forward. Ms Fraser responded the following day (459) to confirm that they were happy to assist, and suggested that the Polmont HR Team provide them with the background papers so that a Capability Meeting could be set up.

68. In light of the ongoing correspondence, Ms Brookes made the decision not to proceed with the Capability Interview on 3 September 2015, and wrote to the claimant on 8 September 2015 (456) to explain why. She confirmed that *"In view of the concerns you raised regarding the capability process, the completeness and accuracy of your capability dossier and your statement regarding your state of health and capacity to undertake work, I*

took the decision that it would be in the best interests of both yourself and the SPS to suspend temporarily the current Capability process in order to seek further OH Assist advice…"

69. She went on to remind the claimant that the respondent required his input into the capability process in order to ensure that a supportive approach could be taken, and said that once OH advice had been received, a further meeting would be arranged.

70. She then said: *"In reviewing your emails this week I note that you have expressed concerns regarding criminal activity within the SPS. Due to this I have passed these emails to Rosie Haswell, HR Business Partner, EACH, who as policy owner of the SPS Whistleblowing Policy will write to you separately outlining the scope and purpose of the policy and inviting you to a meeting to discuss these concerns more fully."*

71. On 3 September 2015, the Police visited Polmont and met with Ms Brookes. They advised her that they had received no specific allegation from the claimant, that they felt that they already had access to evidence about staff contacts in their investigation into Prisoner X's death and that they did not feel that further investigation was necessary, either by them or by the respondent.

72. Ms Brookes wrote to the claimant again on 10 September 2015 (854) to advise that she had requested that his case be managed independently from the establishment for the meantime. She said that she had taken this decision *"because you have expressed concerns regarding my impartiality in undertaking your capability hearing. Whilst I need to be clear that I do not agree with your position, in the interests of transparency, fairness and defensibility for the organisation I am content to allow Caroline Johnston, Governor in Charge and Liz Fraser, HR Business Partner from HMP Edinburgh to take your case forward on my behalf until an outcome is reached."*

73. Ms Brookes took no further part in the claimant's Capability Process, and did not discuss it with Ms Johnston or Ms Fraser.

74. On 18 September 2015, the claimant sent an email to Michael Mathieson MSP which he now relies upon as the basis of his protected disclosures. Although a copy of that email is not produced before this Tribunal, the claimant's evidence was that he enclosed and referred to the terms of his Section 11 complaint highlighting what he considered to be misconduct in the way in which officers dealt with Prisoner X.

75. On 9 October 2015, the claimant wrote to Ms Bowie (477) raising a number of matters, one of which was that he had been informed by a colleague (unnamed) that a *"a rumour is circulating in the YOI that Members of Staff working at the front desk of the establishment have been told not to allow me access to the establishment… I am currently still unwell and accept now that I was maybe a bit premature in my aspirations to return to my workplace. However, I had intended to come in to use the staff gym soon as more exercise is beneficial for my current illhealth but if this is the case I would have liked to have saved myself from further humiliation by having been informed of this decision. Who, if anyone, authorised this?"*

76. Before us, the claimant repeatedly asserted that he had been "banned" from entering Polmont. It is understood that this is what that assertion related to.

77. Ms Brookes' evidence on this matter was that Ms Bowie had informed her that the claimant had been accessing the staff gymnasium in the staff facility at Polmont. It would not, she said, be normal practice for staff who were absent to access areas of the establishment with prisoner contact without agreement, but access to front of house facilities such as the staff facility were not usually regarded as a concern. She said that there had been a misunderstanding about this, of which she was unaware, and that following consultation with Headquarters the matter was adjusted so that the claimant could have access to staff facilities.

78. On 1 December 2015, Ms Brookes wrote to Headquarters (490), in the persons of Rosie Haswell and Michael Stoney:

"Dear both,

Marion is busy organising a meeting for Rosie, Jim O'Neill, solicitors and myself for early January in order that I can brief on the FAI case circumstances. At that stage Mick you will need to take decisions about what internal action/investigation if any SPS wishes to take forward in respect of the concerns which Mr Main has raised about the actions of staff in Polmont.

To my knowledge Mr Main has still not named individuals, however the event he appears to be making reference to took place on the 13th and concerns a discussion which is logged in [Prisoner X]'s CIP [Community Integration Plan] apparently with officers F Kennedy, G Young and P Napoli.

My concern as Governor is that until we get greater clarity on this issue, I potentially have staff who may be working with YP in ways that would be inappropriate.

For this reason, and to ensure as best I can safety and defensibility I have requested today that Derek McLeod undertake some basic work behind the scenes to look at each of these members of staff, and whether we have any other intelligence that would suggest they are behaving in ways we would not support. This will be undertaken by the Intelligence manager.

It is of course entirely possible that these staff have done nothing wrong, and it remains the case that there is nothing in [Prisoner X]'s case file that would suggest that they have behaved improperly. However, for my peace of mind, to ensure that we keep an open mind to Mr Main's information, and to inform any subsequent decision making in the New Year about a way forward I thought it would be useful.

In the event that the information gathered raises any immediate concerns I will brief you both.

Sue"

79. Mr McLeod passed his findings to Ms Brookes on 17 December 2015 (495). Ms Brookes passed these on to Headquarters for their consideration but in

her view there was nothing in the information to support the claimant's allegations.

80. A further interim report was provided by Dr Noel McElearney on 23 December 2015 (922). It was confirmed that the claimant had started his therapy sessions, but that the two sessions were used to assess suitability for various treatments and so as yet he had not actually been given any therapy. Dr McElearney said that he understood that the claimant was to have EMDR (Eye Movement Desensitisation and Reprocessing) but that the therapist had decided to move it to the new year.

81. On 29 February 2016, the claimant was assessed by Dr McElearney in person, and his report (of the same date) (920) described his mental health as "stable", confirming that he had had further therapy sessions which had "gone as far as they can". He reported that the therapist said that the claimant could return to work when he was signed off, advice with which Dr McElearney agreed.

82. He confirmed that the claimant had the capacity to participate personally in formal processes, including the SPS Capability Process, Redeployment process and an internal investigation into allegations made by the claimant.

83. Dr McElearney was asked for his opinion as to the claimant's capability to fulfil his full contractual role as a Residential Officer at Polmont. He replied that *"Mr Main is capable of but would prefer not to undertake a Residential Officer role at HMYOI Polmont and therefore is seeking to redeploy, but would be capable of and willing to return to that role pending redeployment."* He went on to say that no adjustments would be needed to allow the claimant to return to his contractual role.

84. Following receipt of this report, the claimant was invited to meet with Heather Keir, Deputy Governor, and Melanie Bowie, HR Business Partner, on 8 March 2016 in the Deputy Governor's office in Polmont. Ms Bowie circulated a note of that meeting by email of the same date to Ms Keir, and thence to Rosie Haswell and Iain McCulloch, Head of HR Operations (560). Prior to that meeting, Mr McCulloch emailed Ms Bowie on 7 March (538) to

say that he had discussed the claimant's case with Catherine Topley, then Director of Corporate Services. He said that *"We are both of the view that returning him to Polmont at this point would not be in his best interest. As it stands, he has raised serious allegations against colleagues at Polmont and the situation has caused, or contributed, to a significant period of absence for him. I understand OHAssist have indicated he is fit to return to duty but redeployment is an option that should be considered… it is clear that his perception is that relationships with certain colleagues are poor. We believe returning him to Polmont may have a negative impact on his mental health, given his perception."* He confirmed that the matter would be discussed with Mick Stoney (Michael Stoney, the respondent's Director of Operations), in the hope that he would agree to the claimant transferring to Glenochil following the expiry of his then current sick line on 14 April.

85. In the notes of the meeting with the claimant on 8 March 2016 (561), it is noted that:

- *"I [Ms Keir] outlined to Mr Main that in relation to the aforementioned investigation he had made some serious allegations regarding Polmont and in particular in reference to the Governor and the actions of some of his colleagues. Mr Main acknowledged this.*

- *I outlined that we understood that these issues had been cited by Mr Main as being the main cause of the current extended period of absence from which he was currently looking to return to work.*

- *I outlined that while there was no attribution of blame in relation to these allegations, the organisation had a responsibility towards Mr Main's ongoing wellbeing and that we had a duty of care to ensure that his health was not further compromised by returning him into the same environment that he had previously worked in and in which these accusations centred. As such I confirmed that he would not be returning to Polmont as a Residential Officer but that he would be transferred to HMP Glenochil.*

- *Having been notified that he was to be transferred to HMP Glenochil on his return to work Mr Main indicated that he was gobsmacked.*

- *When asked whether he was surprised at the news he checked that it was a permanent move. When it was confirmed that the transfer was permanent he didn't think it was a good organisational response and not a good response for him or his family.*

- *He acknowledged that he didn't have the best of relationships within Polmont already and that the current situation would not make that worse. He stated that he was prepared to return to his work here (Polmont)…*

- *Mr Main stated that he had a good support network in Polmont and that in Glenochil he would be starting from scratch again. When questions (sic) about this statement given that fact he had minutes earlier stated that Polmont and especially with some that had recently exited Polmont – he didn't expand further on this point…*

- *I suggested that as this news was a surprise to him, Mr Main may wish to take some time to consider the news at home…*

- *Mr Main stated that he would try and go to Glenochil.*

- *Mr Main's demeanour during the conversation was initially of shock and then anger and accusational. He ended the conversation by saying he had to leave and was escorted from the establishment by the Dep Gov and myself."*

86. The claimant was very upset at what he considered to be a complete failure to consult him about a possible move to Glenochil, and at the suggestion that he should be moved from Polmont to Glenochil, where he did not want to go. Following the meeting, he was escorted from the building by Ms Keir and Ms Bowie.

87. The decision was confirmed by Ms Bowie in a letter to the claimant on 6 April 2016 (549). The claimant replied by email on 8 April 2016 (557). He

said that he had received the letter and his joining instructions for Glenochil; *"I write to you now to confirm that I tried to get a mindset to go to Glenochil but my principles are stopping me from being 'shanghai'd' into a move purported to be in my best interests. Also I never confirmed that I was returning to work on that date, I did say 'I am looking forward to getting back to work'. You then told me that on reporting fit on that date I was to report to HMP Glenochil…*

I consider the organisations actions Harassing and Bullying particularly as I am currently in the process of disclosing extremely delicate matters relating to HM YOI Polmont in the Publics Interest under PIDA.

Nothing should be happening to my detriment, and I consider this to be detrimental to my psychological wellbeing, and I ask you to forward this email to Governor Theresa Medhurst for her feedback, as well as Mrs Barclay.

I repeat to you again I have done no wrong. I don't' care if the SPS as an organisation is unhappy with my future disclosures I am going to do the right thing regardless of personal cost to me. Mrs Brookes obviously does not want me around I wonder why. I have not said one thing I cannot justify. Shame on all of you."

88. As it turned out, the claimant never actually commenced working at Glenochil and never returned to work prior to the termination of his employment.

89. On 25 March 2016, the claimant attended Falkirk Police Office in order to give a witness statement to Police, in the person of DC Kirsteen Ramsay (542ff). Essentially the witness statement sets out the claimant's concerns about the treatment of Prisoner X by Officers Young and Napoli in particular.

90. On 7 July 2016, Dr Katarzyna Wladyslawska, Occupational Physician, provided an interim report (910) in which she confirmed that the claimant's symptoms deteriorated following a meeting with management in April 2016,

and that she had decided to commission a report from the claimant's GP in order to understand his condition, treatment plan and prognosis to be able to address the questions put to her.

91. A meeting was arranged to take place with the claimant on 28 July 2016, with Rosie Haswell, HR Business Partner, and Jennifer McKay, EACH Case Manager. Notes of that meeting appear at 905.

92. It was explained to the claimant that the purpose of the meeting was to discuss the interim report dated 7 July 2016, and to discuss any questions the claimant might have about pay. When asked about the "perceived triggers" referred to in the report, the claimant advised that *"he has no confidence in Polmont senior management because of issues at Cornton Vale with the same senior management team. That said, Mr Main stated that Polmont would be his preferred establishment because of the network he has there; however, he mentioned twice that he did not want to return to Residential."*

93. It was noted that *"Mr Main explained that he felt his move to Glenochil was decided without consulting him. It should be noted that it is a term of employment that operational employees may be required to work at any SPS establishment on a temporary or permanent basis, and that reasonable notice would be given of any move. However, Mr Main said he felt emasculated because he felt his concerns were not addressed and he felt subject to intimidation, which he claimed was physical, verbal and psychological. Mr Main claimed that he was referred to as a 'grass' at work."*

94. He confirmed that he wanted to return to work at Polmont in a D band role which was not Residential, and that his desire to return there was partly to prove to himself that he was not giving in to the perceived intimidation or others. Ms Haswell *"reflected back what Mr Main had said, expressing concern about the negative emotions he associated with both SPS and Polmont and querying whether coming back to SPS might have a negative impact on his mental health."*

95. It was agreed that paperwork would be sent to the claimant to allow him to consider whether he would wish to be redeployed, subject to the advice of Occupational Health. He said he was concerned about moving somewhere new, such as Glenochil, and what he would have to disclose about his illness, wanting a stress-free experience.

96. The meeting concluded with confirmation that a further Occupational Health report would be sought once the claimant's GP had provided the report being requested of him, and that they would meet with the claimant again following receipt of the OH report.

97. On 26 September 2016, Dr Wladyslawska wrote again, to provide a final report based on an assessment which took place on that date (899). She confirmed that they had received a report from the claimant's GP, Dr Reid, who confirmed that while the claimant appeared to be coping well with day to day life away from work, his anxiety and stress increased on discussing work related issues or considering going back to work, and that it was suggested that he could cope better with a different role.

98. She went on to relate that *"Despite his residual symptoms he believes that his current condition is good enough to consider a return to a different, not residential role at work. He states that he cannot accept any work at Glenochil, he believes that the decision to move him to the Glenochil is the 'punishment' and he is not prepared to work in that location. He would prefer to return to Polmont and work in a different role."*

99. Dr Wladyslawska then set out her opinion about his capability for work: *"In my opinion Mr Main's current psychological condition is stable enough to undertake work. Given the significant perceived trigger factors related to his regular residential officer work he is not recommended to return to the same work demands/environment to avoid worsening of his condition when exposed to the same stressors.*

He is likely to cope better with less stressful and less mentally demanding work. We discussed his previous work experience and skills and the

appropriate seems to be a role of support officer or similar (working one to one or with small groups of prisoners).”

100. She said that it was expected that with ongoing use of medications his condition should continue to be reasonably well controlled, particularly with the avoidance of significant stressors..

101. When asked whether the claimant would be fit to return to work within three months, she replied that *“In my opinion Mr Main should be ready to return to work but given his mental health condition is likely to require redeployment to less stressful role.”* She expressed the view that he would be unlikely to be able to undertake Residential Officer role in any location, and could not see any adjustments which could be put in place to enable him to do so.

102. She concluded the report by stating that *“It is expected that with avoidance of Residential Officer duties in the future he should be able to cope in SPS environment and perform less demanding roles without significant adverse impact on his mental wellbeing. However it is not possible to exclude worsening of his psychological condition in the future.”*

103. The respondent’s investigation into the claimant’s “Whistleblowing Allegations” was produced in September 2016 (641ff). The investigating managers were Chris Thomson, Employee Relations and Reward Manager, and Sean McFedries, SPS Controller, HMP Kilmarnock. They confirmed in their introduction that the report was related to structural and cultural issues, as well as an allegation about a specific incident of alleged wrongdoing.

104. They confirmed that they had investigated allegations in two categories. The first category related to alleged cultural, environmental and management issues at Polmont:

A. *“A lack of management accountability within HMYOI Polmont.*

B. *Where SPS has failed to address issues raised by Officer Main in relation to its duty of care and where Officer Main had been bullied and*

harassed as a result of this, including collusion between management and Trades Union officials for this purpose.

C. *The impact of poor management in the establishment resulting in high levels of prisoner-on-prisoner violence which is embedded in the culture within Blair House.*

D. *Inconsistencies of first and second line management resulting in a 'failure to adequately resource and lead' Blair House resulting in a compromise of SPS' duty of care.*

E. *A culture of 'cronyism' in SPS impacting negatively on the introduction and operation of progressive plans within Blair House and HMYOI Polmont."*

105. The second category covered concerns directly related to the death in custody of a young offender:

F. *"Concerns through an intelligence report by Officer Main regarding the personal safety of this young offender which were not addressed.*

G. *Inappropriate behaviour of staff in the management of this young offender immediately prior to his death in custody.*

H. *Inappropriate behaviour of staff dealing with the death in custody."*

106. The investigators noted that the claimant was willing to participate in the investigation in a limited way, and accordingly investigations had to be carried out using HR records and data, and other documentary evidence relating to the matters raised by the claimant.

107. The investigators set out their findings, and concluded that there was no evidence to suggest that Polmont was poorly managed, that the level of violence was particularly high in a prison context or that there was a failure in the respondent's duty of care as a result of poor or inconsistent management; that there was no evidence to support the conclusion that there was "cronyism" within Polmont; and that there was no evidence to support the allegation that the respondent had failed to address issues

raised by the claimant relating to its duty of care, or that the claimant was bullied or harassed as a result of this, or that there had been any collusion between senior management and the Trade Unions.

108. With regard to allegation F, it was stated that *"It is the conclusion of the Investigating Managers that this allegation is not supported by the evidence, which demonstrates that steps were taken to address Prisoner X's personal safety in light of concerns about the nature of his offence and the reaction of other prisoners."*

109. So far as allegations G and H were concerned, it was found that:

"As per the evidence adduced above, it is the conclusion of the Investigating Managers that there is no evidence available to support Officer Main's allegation that there was an 'inappropriate in-cell interview' involving Prisoner X on 16 October 2014, nor any inappropriate interaction between staff and Prisoner X on this date. Given that Officer Main declined to provide further information it was difficult to pursue Officer Main's assertions (allegation H) about Officers discussing Prisoner X's death in 'graphic' detail this allegation further. It is noted that the SPS followed its Critical Incident Response process after this incident, which does afford those affected a forum to discuss distressing events."

110. The respondent convened a meeting with the claimant on 18 November 2016 in order to discuss the terms of the OH report. The claimant attended, and met with Jennifer McKay and Rosie Haswell. Notes of the meeting were produced (692).

111. It was noted that *"Mr Main advised that his anxiety was due to the length of time he had been absent on sick leave, the method of his transfer to Glenochil and the unresolved issues regarding the on-going FAI into the death in custody in Polmont. Mr Main advised that it was not SPS as an organisation which was causing him difficulty. He spoke about the idea of returning to work and being able to provide for his family as providing a 'light at the end of the tunnel'.*

Mr Main expressed his concern about returning to work after such a lengthy period, noting that he finds levels of concentration difficult. He expressed anxiety about returning to a Residential Officer's role…

Mr Main spoke at length regarding the issues he had previously experienced while working at Cornton Vale and Polmont. He advised that he had applied for a Support Officer role at Polmont but had not met the criteria for role and had not passed the sift process…

Ms McKay explained the redeployment process to Mr Main, advising that the SPS could not create a role for an employee but that, if he completed the paperwork, Mr Main would be placed on the redeployment list, and that the EACH team would forward any suitable roles to him for consideration..."

112. When Ms McKay reiterated the concerns about placing him back in Polmont, on the basis that the respondent could not knowingly put him back in a situation which could be detrimental to his mental health, the claimant said that he had survived there from 2005 to January 2015, that he was determined to return to Polmont as he had done nothing wrong, and was not intimidated by anyone. Ms Haswell acknowledged that the intention to transfer the claimant to Glenochil could have been better communicated to him, but repeated that the reason for that move was concern for his mental health.

113. The claimant completed the redeployment form at the meeting, and it was agreed that he would be placed on the redeployment list from 18 November 2016.

114. On 22 December 2016, the investigators Mr Thomson and Mr McFedrie presented an Addendum to their Investigation Report into the claimant's whistleblowing allegations (697). In their conclusions, they said that the claimant's additional allegations were that two members of SPS staff, Officers Gregor Young and Paddy Napoli, had behaved inappropriately to Prisoner X immediately prior to his death in custody.

115. They concluded their addendum report as follows:

"On the basis of the evidence above, it is the conclusion of the Investigating Manager that there are issues with the reliability of Officer Main's account, and that there is no evidence available to support the additional allegation made by Officer Main that Officers Napoli and Young conducted an inappropriate in cell discussion with Prisoner X or that they claimed to have done so."

116. Dr Wladyslawska provided a further report on 23 January 2017, following another referral from management (885). She affirmed her advice in her report of 26 September 2016, and repeated that she considered that he could return to work if redeployed in a less stressful role than his contractual role. She also reiterated that it was not possible to exclude worsening of his psychological condition in the future.

117. She said that it was expected that with the help of appropriate adjustments, the claimant should be able to return to an alternative role at Polmont. She explained that *"Mr Main indicates that majority of his previous colleagues left Polmont. It should be possible to find the area in Polmont where he will not be working with the same people that caused him stress in the past. He achieved reasonable stability of his psychological condition and is functioning quite well in his everyday life. His mental resilience should be sufficient to function in adjusted role at Polmont."*

118. She went on to express the view that even with all appropriate measures put in place, there may be a risk of worsening his condition, owing to "ongoing psychological vulnerability". However, she said that given the claimant's determination to resume employment she would be optimistic and a trial of his return to work should be allowed in order to see how he was coping.

119. On 8 March 2017, the claimant attended a further meeting with Ms McKay and Ms Haswell. Notes were taken (730). Ms Haswell said at the outset that the purpose of the meeting was to discuss the clarification received from Dr Wladyslawska in her reports, and to consider the next step in the capability process.

120. The claimant stressed that he was content to return to a role in Polmont, consistent with the view of the Occupational Health doctor in her report, as the majority of the staff with whom he had had difficulties had left Polmont. Ms Haswell said that the OH report did not mention senior management, which "undermines the validity of the report". The claimant said that he felt there was a dominant clique within his working area, and that that was part of the fabric of the place. The reason he could not return to a residential role was because of the staffing group in that area.

121. Ms Haswell then addressed the Capability Process: *"She advised that the redeployment process would be extended to cover this meeting. During the redeployment period any suitable roles for Polmont had been checked and there had been no suitable roles advertised that met Mr Main's criteria and for which his skills/qualifications were a match."*

122. She told the claimant that a Capability Hearing would now be arranged, and Caroline Johnston, Governor in Charge at HMP Edinburgh would be asked to consider this matter with Liz Paton, HR's Edinburgh Business Partner. The claimant raised concerns that Ms Johnston had previously worked with Mrs Bowie, HR Business Partner at Polmont, before they had both joined the SPS; and that she had previously considered aspects of his capability as she was to hold his capability meeting when he was at Polmont 18 months before. Ms Haswell undertook to check whether there was any conflict of interest with Ms Johnston relating to his capability. The claimant said that if he were dismissed he would take the respondent to an Employment Tribunal.

123. The remainder of the notes produced to the Tribunal were partly redacted, for reasons which were not explained to us in evidence.

124. The claimant explained, further, that he was finding the whole process very stressful, and that he would be unable to attend a capability interview. He referred to employees who remained in the workplace within Polmont despite serious ongoing allegations of misconduct, whereas he was excluded because of his protected disclosures

125. Following the meeting, the claimant emailed Ms McKay and Ms Haswell at 2340 hours on 9 March 2017 (733):

"I have wrote to you both to respectfully request that my Capability Hearing is not heard by Mrs Johnstone the current Governor of HMP Edinburgh; at our meeting on Wednesday I raised concerns that I now realise are most likely hearsay shared by a colleague some time ago.

However, when you stated that Mrs Johnstone would again be tasked to hear my case I became alarmed unfortunately due to my constant over vigilance when it comes to self preservation within our organisation. Nonetheless, I believe that the discussion around my Capability for Work would be best dealt with by a Governor who has no previous link to my case, and as I will not be able to attend this meeting for the reasons I have already given, I would like you to consider this request to allow me to have confidence in the process.

I thank you both for your efforts in supporting me at this time."

126. The claimant emailed Ms Haswell again on 10 March 2017, thanking her for her prompt reply (a copy of which was not produced to us), and asking her to consider his request on the "De Novo" principle. He drew this from the prisoner adjudication process, where the adjudicator is "ideally" appointed with no previous knowledge of the case before them. He pointed out that Ms Johnston was appointed to handle his Capability Hearing previously but that that was put on hold at the time. He stressed that he did not doubt Ms Johnston's integrity but asked that a new appointment be made to allow him to have a fair hearing.

127. Ms Haswell replied on 24 March 2017 (736) to confirm that she had spoken with Ms Johnston, who confirmed that she had not seen the claimant's personnel files and therefore reassured him that Ms Johnston would give the claimant a fair hearing.

128. The claimant persisted with his objections to Ms Johnston in his email of 28 March 2017 (739). While certain redactions have been made to

that email as produced to us, it is clear that the claimant suggested that Ms Brookes had, at some point, acted as a mentor to Ms Johnston, as the previous Governor of HMP Edinburgh.

129. Ms Haswell responded on that date (738): *"I am not aware of Mrs Brookes being Mrs Johnston's mentor. You are correct in your assertion that Mrs Johnston was chosen for a reason; she was chosen as a Governor who has had no prior involvement in your case and who would be able to give you a fair hearing. SPS remains of the view that Mrs Johnston is a suitable and objective person to chair your capability hearing. While there is no provision under MAAPP to request an alternative adjudicator, I will forward your request to the Head of HR and will let you know the outcome."*

130. The claimant wrote again to Ms Haswell on 26 May 2017 (773), in the course of which he asserted that there had been no respect shown to him in his objection to Ms Johnston as the chair of the Capability Hearing, and then alleged that her profile had recently appeared on his Facebook page, whereupon he had explored her profile and found that some of her Facebook friends were people who, due to his historic disclosures, would wish him no good. He reiterated his request that Ms Johnston be replaced as chair of his Capability Hearing.

131. Ms Haswell replied (772) on 30 May to say that she had spoken with Ms Johnston about this matter, who assured her that she had not viewed the claimant's profile on Facebook, nor did she know that the claimant was on Facebook. She confirmed that she remained confident that Ms Johnston would give the claimant a fair hearing.

132. On 12 May 2017, Rosie Haswell wrote to the claimant (879) proposing that the Capability Process should proceed on the basis of the report of 23 January 2017, and asked the claimant to confirm that he considered that report to contain the up to date position, and that nothing in relation to his medical condition or ability to work had changed since that report. The claimant replied within an hour on the same day to confirm that he agreed with those points, and that nothing had changed since his

previous contact with the Occupational Health Advisor. He said he would like the Capability Process to proceed.

133. The claimant was invited to a Capability Interview on 12 July 2017, chaired by Caroline Johnston, who was at that time Governor in Charge of Cornton Vale. The invitation was in Ms Haswell's email of 30 June 2017 (798). Ms Haswell prepared a report, entitled "HR Business Partner Review & Recommendations" (786ff), which set out, at some length, the history of the claimant's absence and his absence management. Reference was made therein, at paragraph 5, to the fact that the claimant had raised concerns about the conduct of colleagues leading up to the death in custody of Prisoner X, and considered himself to have blown the whistle on his colleagues. It was noted that the allegations were investigated and insufficient evidence was found to have supported his allegations.

134. The report went on to set out the contents of the OH reports, and the meetings conducted with the claimant as part of the Capability Process, a well as the details of the redeployment process, about which it was said, at paragraph 23, that *"Mr Main has been on the redeployment list since 18 November 2016. In that time, over 120 jobs have been advertised but no suitable permanent role has been found for Mr Main; those that have met his criteria he has not wished to be considered for, and the rest have either not met his criteria or have required skills or qualifications that he does not have. However, as at 27 June 2016, he has submitted an application for a temporary (18-24 month) F Band Communications Manager development opportunity at Calton House."* Given that the report was dated 27 June 2017, it appears that the reference to 27 June 2016 must have been an error and should have been 27 June 2017.

135. The recommendation stated that it remained open to the Governor to consider terminating employment with the appropriate notice period, but that he had a live application for redeployment to the development role in the Communications Team at Headquarters. If that were successful, his employment would continue for the duration of that contract, at the expiry of which he would be returned to the capability process.

136. The claimant submitted a written representation to the hearing by email of 7 July 2017 (805).

137. It is important, at this point, to set out the evidence in relation to the redeployment process followed by the respondent in this case.

138. The claimant completed a redeployment pro forma on 18 November 2016 (876), in which he identified four places in which he would wish to apply for posts, namely Polmont, SPS College, Headquarters and Fauldhouse, in that order.

139. The Redeployment Process, of which an extract was produced at 877, provided that an employee would be allowed 3 months to address the option of redeployment within the organisation. It said that *"If at the end of the 3 month period the employee has not been successful in obtaining a suitable redeployed post and there remains no reasonable prospect of the employee returning to their full contractual role or providing regular and effective service, a Medical Retirement application will be facilitated as per Principal Civil Service Pension Scheme (PCSPS) guidelines."*

140. A redeployment list was produced to the Tribunal (778ff) in which a number of posts were listed, against the claimant's views as to their appropriateness. The list was said to contain information which was accurate as at 26 June 2017.

141. It was noted on the list that the claimant did not want to be considered for roles in Glenochil, Castle Huntly or Glasgow, and as a result a large number of the posts identified as potentially suitable for him were noted not to be suitable due to their location.

142. On 22 February 2017, the claimant was sent details of a post as Resourcing Adviser at SPSC, but he confirmed that he did not wish to be considered for that post.

143. On 28 February 2017, the claimant was sent details of a post as MSBSO at Headquarters, and on 14 March 2017 he confirmed that he did not wish to be considered for it.

144. On 7 March 2017, the claimant was sent details of a post as Security Officer at Headquarters, but he declined to be considered for it.

145. On 8 March 2017, the claimant was sent details of a post of Criminal Administrator at Polmont, for which he was not suitable as he did not meet the essential criteria.

146. On 27 March 2017, the claimant was sent details of a post as Spin Co-ordinator, but he confirmed on 29 March 2017 that he did not wish to be considered for the post.

147. On 18 April 2017, the claimant was sent details of two posts, Management Reporting Assistant in Headquarters and Finance Reporting Assistance, in Finance Headquarters, but he did not wish to be considered for either post. Similarly, he did not wish to be considered for a post of ISS Admin and Support in Headquarters, sent to him on 19 April 2017.

148. On 8 May 2017, the claimant was sent details of temporary post as Health and Wellbeing Administrator, but did not wish to be considered for that post.

149. On 9 May 2017, the claimant was sent details of a Parole Co-ordinator at Polmont but declined to be considered.

150. On 5 June 2017, the claimant was sent details of an ICM Administrator post, at Polmont, but did not wish to be considered for it.

151. On 17 May 2017, the claimant was sent details of a post of Resourcing Manager, temporary, at SPSC. He emailed confirming that he wished to be considered for the post, on 23 May, but withdrew his interest in the post the following day by email.

152. On 7 June 2017, the claimant was sent details of a post of Business Improvement Administrator at Polmont, but confirmed on the following day that he did not wish to be considered for the post.

153. On 8 June 2017, the claimant was sent details of a post of Communications Manager at Headquarters. He indicated that he wished to

be considered for that post, and it was noted, at that point, that the claimant would meet with the recruiting manager in the week commencing 3 July 2017 to discuss the role. He was not successful in obtaining this role.

154. On 19 June 2017 the claimant was sent details of a post as FCO part time at Polmont, but he confirmed on 21 June 2017 that he did not wish to be considered for this post.

155. On 30 June 2017, the claimant was sent details of a G band post and also a Finance and Business Performance Administrator post (792). He responded that day to confirm that he was not interested in the G band post, but was interested in the Finance and Business Performance Administrator post.

156. On 17 July 2017, the claimant noted interest in a Business Support Officer post.

157. Correspondence in relation to possible redeployment opportunities continued, but the claimant was unable to secure alternative employment prior to the expiry of his notice period.

158. He did not attend the Capability Hearing. Ms Johnston proceeded to consider the report prepared by Ms Haswell dated 23 July 2017, together with the accompanying folder of papers; together with the claimant's written statement.

159. Ms Johnston set out her decision and the reasons for it in her letter to the claimant of 19 July 2017 (823).

160. In her letter, she addressed first the claimant's objections to her as chair of the Capability Hearing. She stressed that she had never worked with Ms Bowie before joining SPS, had had no prior involvement in his case, had never seen the papers in the case; and had never been mentored by Ms Brookes. She noted that further representations had been made about this matter, and in response stated:

"I am unable to comment further on the alleged hearsay evidence from your Trade Union representative, as you have not provided any additional information to confirm what the hearsay evidence referred to is. I am unable to comment further on the allegation that my impartiality is questioned based on hearsay evidence from 'known associates' of mine, given that you have not explained what that hearsay evidence is or who the 'known associates' are. In relation to my relationship with Melanie Bowie, the Capability file contains a letter from Ms Haswell to you dated 19 May 2017 in which Ms Haswell confirmed I had not worked with Ms Bowie prior to joining SPS."

161. She went on to emphasize that she was not asked by Ms Brookes to chair the Capability Hearing, and that she had no prior involvement in his case. She concluded that she had reviewed his case independently and impartially.

162. Ms Johnston then advised that:

After full and careful consideration of the information provided to me, I have concluded that there appears to be no reasonable prospect of you being able to undertake your full contractual role either now or in the foreseeable future, and, as a result, I have decided to terminate your employment. As you are entitled to a 13 week notice period, the termination will take effect from 18 October 2017."

163. She then set out her reasons for this decision at some length, narrating the history of the claimant's absence and the advice given in the OH reports provided at different stages.

164. She referred to the decision taken to move the claimant to Glenochil in April 2016, which had been discussed at a meeting of 8 March 2016, with the Polmont Deputy Governor and HR Business Partner. She said that *"This decision was taken on the grounds that SPS had a responsibility towards your ongoing wellbeing and a duty of care to ensure that your health was not further compromised by returning you to an environment which, we understood, had caused your current absence. Given the*

Occupational Health advice which had been received up until that point, SPS was concerned that you may have been psychologically vulnerable if you remained in Polmont. You were transferred to HMP Glenochil with effect from 27 April 2016 (although given your continued absence you have never taken up post at Glenochil). You indicated that you were unhappy with the decision to move you to HMP Glenochil and requested that your line manager at HMP Glenochil be asked not to contact you; you also requested that your career file not be kept at HMP Glenochil. As a result, the management of your absence then transferred to the Employee Absence, Conduct and Health (EACH) Team; your career file was also sent to the EACH Team."

165. Ms Johnston set out the further advice thereafter received from OH, and observed that the claimant had been submitting Fit Notes to cover his absence, and was currently deemed by Occupational Health to be unfit for his contractual role. She also confirmed that an application for ill health retirement on medical grounds was being processed at that time.

166. Ms Johnston pointed out that the claimant had been absent for a significant period of time, and referred to the most recent OH report from January 2017, which had confirmed that the claimant was unlikely to be able to undertake a Residential Officer role at any location, and that even with all appropriate measures the claimant may be at risk of worsening his condition.

167. She stated that the respondent had attempted to find a suitable alternative role for him, whether at Polmont or elsewhere within the organisation, but no suitable vacancies, for which he met the essential criteria and which he was interested in, had been identified, despite his being on the redeployment list for almost 8 months (although she acknowledged that his interest in the Business Improvement Officer role was still under consideration).

168. In the circumstances, Ms Johnston stated that she considered that termination of his employment on capability grounds was appropriate, with

13 weeks' notice during which period he would continue to be managed under the redeployment process. If a suitable role were identified within the 13 weeks, notice would be withdrawn. She informed the claimant of his right to appeal against the decision to terminate his employment.

169. Ms Johnston did give consideration to whether she could await the Fatal Accident Inquiry, which the claimant had identified as one of the factors in causing him to be off sick from work, before dismissing him, but since she understood that the FAI would not take place until the following year, she decided against waiting. She considered that the respondent had given the claimant considerable leeway in the capability process – in her evidence, she stated that she had never seen anyone given so much time to show an ability to return to work or consider alternative roles. In addition, she had little confidence that the claimant would be able to return to work and maintain regular and effective service.

170. Following his dismissal, the claimant presented the grounds of an appeal against that decision on 8 August 2017 (808). He submitted that he had been kept out of the workplace for 18 months despite Occupational Health reporting that he was fit and stable to return to work. He set out the history of what he described as the injustice he had suffered at the hands of the respondent. He had already confirmed by email dated 7 August 2017 (813) that he had no objection to the members of the Absence Dismissal Appeal Board (ADAB), and that he did not intend to attend the ADAB hearing on 10 August 2017 as he found the idea of his career coming to an end too traumatic.

171. The ADAB decided, following consideration of the claimant's appeal, to uphold the decision of Ms Johnston to dismiss the claimant, and confirmed that decision in a letter dated 15 August 2017 (1025). The reasons for that decision were explained in a document entitled "ADAB – Response to Points of Appeal" (1013ff).

172. Shortly before the claimant's employment formally came to an end, Ms Brookes wrote an email to Jim O'Neill and Annette Hannan (1033)

following receipt of a copy of the statement given by the claimant to the Procurator Fiscal in connection with the FAI into the death of Prisoner X (which was produced at 1118 undated). In the statement, the claimant set out at some length his version of the events leading to the death of Prisoner X. Parts are redacted, but towards the end he stated that at the DIPLAR meeting on 23 January 2015, he voiced his concerns surrounding his intelligence submission and other past death processes.

173. Ms Brookes noted the terms of the statement, and said that this was the first time she had seen any written information from the claimant detailing his concerns about the behaviour of other staff, though she had been aware of his having raised concerns in his absence and internal complaints processes. She said that there was no information which would corroborate the claimant's allegations or act as a flag to initiate an investigation. She noted that the fact that staff spoke to Prisoner while other individuals were not in circulation was not unusual.

174. She confirmed that while she noted the claimant's comments about the DIPLAR meeting, there had been some concerns noted about the post-incident procedures followed in relation to Prisoner X, but *"the Deputy Governor and I are both clear that Mr Main did not offer information at that time which would suggest that other members of staff had behaved inappropriately, neither from memory were any of the intelligence entries specific in this regard. The first informal indication of this was given by First Line Manager Russell Turnbull, some considerable time later, on his return to duty following a lengthy absence; and subsequently came to light formally as part of routinely following through Human Resource procedures in respect of Mr Mains own absence from duty."*

175. On 19 October 2017, the respondent, in the person of Nicola Brunton, HR Administrator, provided a reference for the claimant to the Staff Bank Office at Falkirk Community Hospital (1035). The letter confirmed his start and finish dates with the respondent, that he was located at Glenochil and that his job title was that of Residential Officer. The letter went on: *"It is SPS policy to provide only basic historical and personal data in response to*

reference requests and as such we are unable to comment on the individual's suitability for the position applied for."

176. The claimant raised the names of two comparators with whom he wished to compare his treatment by the respondent.

177. Firstly, the claimant compared himself to Graham Dawson, a prison officer who was being treated with warfarin, a blood thinning medication. As a result, he was at risk of injury from the respondent's Control and Restraint training, and potential incidents within the prison environment. In November 2014, a vacancy arose in Polmont for a Business Improvement Manager, which was non-operational, and would avoid the need for prisoner contact. The concern on the part of the respondent was that if an incident occurred whereby Mr Dawson suffered a traumatic injury, the effect of the warfarin would be to lead to a greater risk of severe bleeding, and accordingly redeployment to a suitable vacant post was considered to be an appropriate way of dealing with that risk.

178. Secondly, the claimant compared himself to Jo McKinlay, who was a Unit Manager in the Operations function in Polmont. She was diagnosed with cancer, and required surgery. In 2014, she suffered a recurrence of her cancer and underwent a mastectomy. Thereafter she was able to return to work for a period of months before having reconstructive surgery, and after her recovery from that surgery she was able to return to her operational role. Between the mastectomy and the reconstructive surgery, she was unable to have contact with prisoners due to the risk of injury. However, she was able to carry out non-prisoner facing duties of her role, and the Head of Operations at the time was able to take on the prisoner facing responsibilities. This was done on the basis of Occupational Health advice. Ms Brookes' evidence was that it was clear from that advice that her illness was temporary and that she could be supported for a time before being able to return to her contracted role.

179. The claimant also, during his evidence, made reference to a number of other circumstances in which he considered he had been less favourably

treated than others. He repeatedly referred to an officer who had been charged with rape. We refer to him as DC, rather than giving his full name, simply because he was not named as a comparator in the Scott Schedule. The claimant's concern was that having been charged with rape, DC was permitted to return to work at Polmont with no conditions, whereas he himself was never allowed to do so, despite being innocent of any accusations. Our conclusion on the evidence was that DC was charged with rape, was tried through the criminal process and was acquitted – the claimant insisted the charge was "not proven", but in our judgment it is appropriate to find that he was acquitted – and, being free of any conviction, it was legitimate to allow DC to return to duty. The circumstances he was in were, in any event, quite different to those of the claimant.

180. A Fatal Accident Inquiry into the death of Prisoner X took place in Falkirk Sheriff Court before Sheriff John K Mundy, and his determination was issued in August 2018 (1068ff).

181. The claimant received the benefit of separate legal representation, from a Mr Dar, Advocate. The respondent was represented by its solicitor, Mr Scullion.

182. It is unnecessary for these purposes to narrate in detail the terms of the determination or the evidence which led the learned Sheriff to his conclusions, but it is useful to note that certain findings and observations were made in the course of the determination which are set out here:

21. "During a discussion with a colleague, Russell Turnbull, then a First Line Manager at HMP YOI, Polmont, sometime in 2015 after the DIPLAR meeting, when Mr Main was on sick leave, Main said that two prisoner officers, Patrick Napoli and Gregor Young, both from Blair Hall, had entered X's cell on the morning before his death to terrorise him."

183. The learned Sheriff made no finding as to the exact date upon which the information was provided by the claimant to Russell Turnbull, or in turn by Russell Turnbull to the respondent.

"…the initial allegation [by the claimant] was that the interview occurred on 16 October 2014 following a publication of an article in the Scottish Sun. shortly prior to the inquiry hearing it became clear from a Note lodged in court on behalf of Mr Main for the purpose of a preliminary hearing that the allegation was in fact that the inappropriate interview had occurred either on Monday 13 or Tuesday 14 October 2015. Much of the inquiry was taken up with this issue… In light of the concerns expressed by Mr Main regarding the SPS and in particular his concerns relating to the death of X in custody, it was entirely appropriate that Mr Main was separately represented at the inquiry. Ultimately, the question for me was whether the concerns expressed by Mr Main were relevant to the circumstances in relation to which I required to make my determination in terms of section 6 of the 1976 Act." (1080)

184. At paragraph 13 of the Note following determination, the learned Sheriff found that, with regard to the date of the inappropriate interview, *"In his evidence Mr Main accepted that the content of the application was at variance with his evidence. His explanation was simply that his recollection had been wrong. He had got the dates wrong…"*

185. The determination recorded the evidence of Mr Turnbull at paragraph 27. It is confirmed therein that Mr Turnbull said that he was approached by the claimant about a year prior to November 2016 and told by him that on the morning before Prisoner X's death, two prison officers, Patrick Napoli and Gregor Young, had entered his cell to terrorise him. Further, it is recorded that Mr Turnbull remembered the claimant saying that he would never formally make a statement about this matter. He also confirmed that he had passed this information to Heather Keir, and that he had also attended the DIPLAR meeting on 23 January 2015, where the allegation by the claimant was not mentioned.

186. At paragraph 48, the determination found:

"When the evidence is scrutinised and Mr Main's account tested, I am unable to be satisfied on the balance of probabilities that the allegations he

makes about what occurred on 13 October 2014 are established. The weight of evidence is to the contrary. The weight of evidence is to the effect that the prison officers who came into contact with X in the days prior to this death did what they could do take steps in the interests of his personal safety and wellbeing on the basis of the information they had about the charges he faced and the consequent risk to the prisoner. It is possible that Mr Main did speak to Napoli at around the time of the visit to the cell by Kennedy, Young and Napoli, and may have mentioned the intelligence regarding X's vulnerability to assault, but even if that did happen, I cannot be satisfied on the evidence, and when Mr Main's evidence is tested, that Napoli had said that he was going to or had 'terrorised' X."

Submissions

187. Both the claimant and Mr Turnbull for the respondent presented lengthy and detailed submissions to the Tribunal, which were fully taken into consideration in our deliberations. We make reference, where appropriate, to submissions made, in our Decision section below, but do not at this stage seek to repeat the terms of the submissions in this Judgment.

188. We should note that we found Mr Turnbull's submissions to be extremely helpful in its structure and content, in the way in which it sought to identify the issues and in the perceptive analysis of the legal issues before us.

189. The claimant's submission was less structured and more narrative-based, but reinforced to us the strength of feeling with which he approaches this case, which was itself helpful.

Observations on the Evidence

190. In this case, we heard evidence from 4 witnesses for the respondent, namely Susan Brookes, Heather Keir, Caroline Johnston and Catherine Topley; and for the claimant, from 3 witnesses, namely the claimant himself, Russell Turnbull and Denise Strathie.

191. It is appropriate to set out our assessment of each of the witnesses as they appeared before us. Although evidence in chief was taken by way of witness statements, the respondent's witnesses and the claimant in particular were subject to lengthy cross-examination which enabled the Tribunal to observe their evidence.

192. Ms Brookes was the first witness, and gave evidence over the period of a day and a half. She presented as an impressive witness, with very considerable experience at senior levels in the Scottish Prison Service, and her demeanour throughout was calm and patient. The claimant questioned her courteously but persistently, and on occasions accused her of having lied, either during her evidence or in the course of his employment. Faced with such accusations, Ms Brookes responded firmly but respectfully towards the claimant, and in our judgment demonstrated a considerable degree of sympathy and even compassion towards him.

193. We suspect that nothing will ever convince the claimant that Ms Brookes was not acting with the aim of forcing him out of the organisation, but we found her to be a straightforward witness who sought to assist the Tribunal in its purposes. Indeed, we would go so far as to say that it was quite clear to us from Ms Brookes' demeanour in her evidence that she bore the claimant no ill-will, and indeed recognised his sincerity and the depth of his feelings.

194. Ms Keir, equally, was a good witness, careful to answer as accurately as possible the questions put to her. She accepted that she had erred in her evidence before the Fatal Accident Inquiry, as to when Russell Turnbull had first told her about the claimant's concerns about the treatment of Prisoner X, but gave a credible explanation for that error – that she had found it an unexpected question and had remembered the wrong date at the time – which was consistent with her and Ms Brookes' own evidence before us.

195. Ms Topley's role was perhaps slightly less significant, but again she presented well and sought to assist the Tribunal in her evidence. We considered that she was speaking honestly and straightforwardly to us.

196. Ms Johnston, who was the dismissing officer in this case, was another impressive witness. She, like Ms Brookes, was clearly a very experienced senior manager with a history of high-level appointments in the service. She was calm and untroubled by the claimant's repeated assertions that she should not have been permitted to hear his capability hearing, on the basis of his suspicions about her prior relationship with Ms Brookes, and in our judgment explained clearly and fully why she believed herself to be well-qualified for that role in this case. In the end, it was clear to us that the claimant himself was impressed by Ms Johnston, and his attitude to her was markedly different at the end of his questioning to the start. He acknowledged that if there were some form of plan to dismiss him from the organisation, she had no knowledge of it.

197. We considered that Ms Johnston demonstrated herself to be a senior manager whose independence was unimpeachable, and who took the decision she considered honestly to be the correct and just one in all the circumstances.

198. Mr Turnbull and Ms Strathie both gave evidence in a manner which we considered to be helpful and straightforward. Mr Turnbull emerged from his evidence as an experienced Prison Officer with an excellent understanding of the prisoners under his charge and the difficulties which arise in carrying out such a function. We believed him to be truthful in his evidence. Ms Strathie plainly had no direct involvement in these events but was supportive of Mr Main, and expressed a strong sense of injustice on his behalf. Her manner and her honesty commended themselves to the Tribunal.

199. The claimant had the difficult task of both representing himself and giving evidence over an extended period of time. We considered that he did so as well as he could in all the circumstances. There is no doubt that the

passage of time has hardened his resolve and deepened his sense of grievance at the way the respondent had dealt with him while in employment. His constant desire to invite the Tribunal to conduct a wide-ranging and historic review of the management of the Scottish Prison Service led him to draw conclusions which, in our judgment, could not be justified by the evidence, and in particular to suspect, and in time to believe with some conviction, that there was a conspiracy being pursued within the Service to defeat his allegations and force him out of the organisation. So far as we could establish, the claimant believes that the Scottish Government, senior management not only within Polmont but at the highest levels of the Scottish Prison Service, the Prison Officers' Association and even, at times, the administration of the Employment Tribunal were colluding in order to disadvantage him.

200. At times it was difficult to follow the claimant's logic, both in evidence and in formulating his questions. We were left with the impression that the claimant has been deeply affected by the events which led him to lose a job which he regarded as an important and responsible role, to the extent that he is now capable of only viewing the sequence of events leading to his dismissal from his own perspective, and in particular as part of a plan to remove him from the organisation.

201. The claimant handled the pressure and intensity of a lengthy Employment Tribunal hearing well, and as a result, we were able to conclude the hearing within the scheduled dates. While at times he became affected by emotion, he was generally calm in his evidence, though clearly believing passionately that he has been the victim of injustice. That perspective led us to the view that the claimant's evidence required to be treated with some caution, and could not be regarded as wholly reliable. His memory of events, some tracing back to the early years of this century, has been affected, in our judgment, both by the passage of time and by his desire for justice.

202. We do not suggest that the claimant's evidence, when we did not find ourselves able to believe it, was such as to suggest that he was deliberately

lying. The claimant considers himself to be one who upholds and honours the truth. The Tribunal, however, has to weigh up the evidence as it is presented to us against the relevant issues before us, and our conclusion was that while we could generally believe the claimant's evidence on the facts, we did not find the totality of his evidence to be entirely reliable.

The Relevant Law

203. Section 43A of the Employment Rights Act 1996 ("ERA") provides:

"In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

204. A qualifying disclosure is defined in section 43B as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:*

a. *That a criminal offence has been committed, is being committed or is likely to be committed;*
b. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;*
c. *That a miscarriage of justice has occurred, is occurring or is likely to occur;*
d. *That the health or safety of any individual has been, is being or is likely to be endangered;*
e. *That the environment has been, is being or is likely to be damaged; or*
f. *That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."*

205. Section 47B prohibits a worker who has made a protected disclosure from being subjected to any detriment by any act, or any deliberate failure to

act, by his employer done on the ground that the worker made a protected disclosure.

206. Helpful guidance is provided in the decision of **Blackbay Ventures Ltd (t/a Chemistree) v Gahir [2014] IRLR 416** at paragraph 98:

"It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.

1. Each disclosure should be identified by reference to date and content.

2.. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to

understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a number of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s43B(1) and under the 'old law' whether each disclosure was made in good faith and under the 'new' law whether it was made in the public interest.

7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

8. The employment tribunal under the 'old law; should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."

207. In addition, reference was made to the well-known decisions in **Kuzel v Roche Products Ltd [2008] EWCA Civ 380, Fecitt & Ors v NHS Manchester [2012] ICR 372** and **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT**.

208. In, **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure:

"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f). Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in Cavendish Munro did not meet that standard.

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

209. In an unfair dismissal case, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

"Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was 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 employers 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 the equity and substantial merits of the case."

210. **DB Schenker Rail (UK) Ltd v John Doolan 2011 WL 2039815** is an EAT decision in which Lady Smith clarified that the well known test in **British Home Stores Ltd v Burchell [1978] IRLR 379** can apply to capability dismissals, and accordingly a Tribunal must consider:

i. whether the respondents genuinely believed in their stated reason;

ii. whether they had reasonable grounds on which to conclude as they did; and

iii. whether it was a reason reached after a reasonable investigation.

211. The EAT has made it clear that the decision to dismiss on the grounds of capability is a managerial, not a medical, one.

212. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes of this case is sub-section (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."

213. Section 21 of the Equality Act 2010 provides as follows:

"(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…"

214. The Tribunal also took account of the authorities to which the parties referred us in submissions.

Discussion and Decision

215. In this case, the issues before us require to be set out in order that we may approach the claimant's case appropriately.

216. The claimant's case is set out in his ET1 and in the Scott Schedule subsequently presented to the Tribunal, which, though drafted by an unqualified party representing himself, may be taken to set out comprehensively the claims made by him in this case.

217. Proceeding on that basis, we consider that the issues in this case are as follows:

1. Unfair Dismissal

a. What was the reason for the claimant's dismissal?

b. Was that reason a potentially fair reason for dismissal?

c. Did the respondent genuinely hold the view that the claimant was not capable of providing regular and effective service?

d. Did the respondent have reasonable grounds for that view?

e. Did the respondent carry out a reasonable investigation?

f. Did the respondent follow a fair procedure?

2. Automatically Unfair Dismissal

a. Did the claimant make a protected disclosure, or protected disclosures, in terms of section 47B of the Employment Rights Act 1996?

b. If so, was the reason, or if more than one, the principal reason, for the claimant's dismissal that he made a protected disclosure, or protected disclosures, contrary to section 103A of the Employment Rights Act 1996?

3. Detriments

a. Did the claimant make a protected disclosure, or protected disclosures, in terms of section 47B of the Employment Rights Act 1996?

b. If so, did the respondent subject the claimant to a detriment or detriments because he made a protected disclosure or protected disclosures?

4. Disability Discrimination

a. Was the claimant at the material time a person disabled within the meaning of section 6 of the Equality Act 2010?

b. Did the respondent treat the claimant less favourably than the comparators to whom he compared himself on the grounds of disability, contrary to section 13 of the Equality Act 2010?

5. Discrimination on the Grounds of Religion or Belief

a. Did the claimant hold a belief which amounts to a philosophical belief within the meaning of the Equality Act 2010?

b. If so, did the respondent treat him less favourably than the comparators with whom he compared himself on the grounds of religion or belief?

6. Was any of the claimant's claims presented outwith the statutory time limits? If so, does the Tribunal have jurisdiction to hear them?

218. The Tribunal deals with each of these issues in turn.

1. Unfair Dismissal

a. What was the reason for the claimant's dismissal?

b. Was that reason a potentially fair reason for dismissal?

219. Before addressing this issue, we note that these questions are important for the determination of the claimant's automatically unfair dismissal claim, but we have sought to deal with each claim separately and will deal with the issues under that heading when we address it.

220. The reason which the respondent gave for having dismissed the claimant was set out in Ms Johnston's letter of 19 July 2017 (823):

"After full and careful consideration of the information provided to me, I have concluded that there appears to be no reasonable prospect of you being able to undertake your full contractual role either now or in the foreseeable future, and, as a result, I have decided to terminate your employment. As you are entitled to a 13 week notice period, the termination will take effect from 18 October 2017."

221. Accordingly, the respondent's stated reason for dismissal was that the claimant was not capable of carrying out his full contractual role. Capability is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 (ERA), which provides that a reason falls within that subsection if it *"relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do."*

222. It should be noted that the reason given by the respondent related to the claimant's capability, due to illness, to perform his contractual role, rather than his qualifications, which have not been called into question at any stage.

223. The claimant's complaint is that his capability may not have been the real reason for his dismissal. He remains strongly convinced that he was dismissed because he made protected disclosures, which we address below. At the same time, he appeared to recognise, particularly when questioning Ms Johnston, the dismissing manager, that presented with the information she had, she had little choice but to terminate his employment. For him, that did not justify her decision, as it meant that she had not been provided with the full file of information held by the respondent about him, and as a result, in essence, his argument was that she did not have sufficient information upon which to make a judgement.

224. It is our strong finding that the claimant's assertions that there was some form of conspiracy among senior management to have him dismissed is without foundation in the evidence which we heard. Not one substantial piece of evidence was brought forward by the claimant to demonstrate that

there was any form of collusion to ensure that he was silenced and removed from the organisation.

225. We considered Ms Johnston to be entirely honest, genuine and sincere in her assertion that the only basis upon which she decided to dismiss the claimant was that he was no longer capable of providing regular and effective service to the respondent. She was adamant that she was not pressurised into making any decision to that effect, but that she was independent of any influence, and took her own decision. Having been a Governor in Charge herself, we found her evidence entirely credible when she said that she was not subject to any attempts to influence her, nor would she have allowed any such attempts to do so. We were left with the impression that the claimant did not dispute that after a period of time questioning her before us.

226. Where the claimant did not depart from his original position was in believing that Ms Brookes was seeking to have some influence over the capability process in order to ensure that he was dismissed. Ms Johnston, as we have found, denied credibly that that was the case. Ms Brookes in her evidence made clear that she did not discuss with Ms Johnston the capability process at all, and that she stepped back from it once the claimant's allegations against her had been made plain in the Section 11 application.

227. The claimant sought to have us believe that there was a personal connection between Ms Johnston and Ms Brookes, but this was based purely on the fact, which was not disputed by either of them, that for a time they worked together as Governor and Deputy Governor. The claimant's assertions seemed to be based on his belief that Ms Brookes had acted as mentor to Ms Johnston, but there was no basis in evidence for that belief. It does not rise above the level of a suspicion on the claimant's part. He seemed to think that it was inevitable that a Governor would act as mentor to a Deputy Governor, but in our view that was not the case. Both Ms Brookes and Ms Johnston denied it, and we believed their evidence to be true.

228. The claimant's persistent objections to Ms Johnston's participation in the capability hearing seemed, in addition, to be based on his own researches on the internet to establish whether individuals are linked on social media sites. Again, we found this to be a pattern of the claimant's conduct which was borne out of a strong suspicion that senior managers must be acting in concert to protect themselves and the organisation. It was our conclusion that his suspicions in this regard were baseless, and that it would hardly be surprising that senior managers within the SPS would know or know of each other, given the limited number of prisons in Scotland. That does not, of itself, mean that Ms Johnston could not objectively assess the claimant's case and take a fair decision.

229. The claimant also asserted that the respondent wished to have the claimant dismissed so that when the Fatal Accident Inquiry was convened, they could refer to him as "the dismissed officer". In our judgment, there is simply no basis upon which we could find this to be the case. None of the witnesses from the respondent had this put to him in evidence, but in any event, there was no evidence at all which could suggest this to be their motivation. It is not at all clear that the claimant was referred to in those terms at the Fatal Accident Inquiry, but even if he were, it would, in our judgment, be an unusual way for an employer to defend itself by aiming criticisms at one of those for whose actions it was ultimately vicariously responsible. The claimant has focused on his treatment at the FAI as being significant to this case but we are unable to support this conclusion on the evidence in this hearing.

230. The claimant raised the terms of the reference which he was given dated 19 October 2017 (1035). He maintained that this demonstrated that capability was not the real reason for his dismissal. The terms of the reference are sparse, providing only the details of his start and finish dates with the respondent, and his job title and establishment at which he was based. The evidence before us was that this is the standard reference now given by the respondent in terms of their policy, and the letter itself confirmed that it was SPS policy only to provide such information. They

also said that they were unable to comment on his suitability for the position for which he had applied.

231. Essentially, as we understand it, the claimant relies on the fact that the letter did not say he was dismissed on the grounds of capability as pointing towards there being a different reason for his dismissal. Since Ms Johnston confirmed that she was not involved in the drafting of the reference, and that it was the respondent's policy to provide only such a brief and factual reference, the terms of this letter do not undermine the conclusion that capability was the true reason for the claimant's dismissal. Accordingly, we reject the claimant's interpretation of the reference letter in these circumstances.

232. Accordingly, we find that the evidence clearly demonstrates that the reason for the respondent's decision to dismiss him was related to his capability.

c. Did the respondent genuinely hold the view that the claimant was not capable of providing regular and effective service?

d. Did the respondent have reasonable grounds for that view?

e. Did the respondent carry out a reasonable investigation?

f. Did the respondent follow a fair procedure?

233. Since we have found that Ms Johnston took the decision to dismiss the claimant herself, without any outside influence, it is the genuineness of her view which we must consider. There is no basis in the evidence upon which we could doubt that Ms Johnston genuinely believed that the claimant was incapable of providing regular and effective service due to his long-term illness, and it was clear to us that she approached the matter carefully and objectively. Her evidence to us was that she came to the decision with an open mind, and treated the matter with the seriousness it deserved.

234. We had to consider, next, whether the respondent had reasonable grounds upon which to reach the view that the claimant was no longer capable of carrying out work of the kind for which he was employed by the employer to do.

235. As at the date of dismissal, the respondent had a number of OH reports to which to refer. The claimant accepted that the final report available, dated 23 January 2017, represented the up to date position in relation to his health.

236. The terms of that report (885) confirmed that the claimant's GP had suggested that he may cope better with a different role to that for which he was employed. The report went on to express the OH Consultant's view that *"It is expected that with avoidance of Residential Officer duties in the future he should be able to cope in SPS environment and perform less demanding roles without significant adverse impact on his mental wellbeing. However, it is not possible to exclude worsening of his psychological condition in the future."*

237. The report did go on to say that with the help of appropriate adjustments the claimant should be able to return to "alternative role" at Polmont.

238. The conclusion we reach about this report, as did Ms Johnston, was that although there were some suggestions that the claimant might be able to return to work at some stage, and at Polmont, he would not be able to return to the role for which he was contractually employed, namely that of a Residential Officer. He would be, it was thought, in a position to return to an alternative role, but not to his contracted role.

239. It was of great significance, in our view, that the respondent took into account both the length of the claimant's absence – he had gone off sick in January 2015 and this last report was issued in January 2017, and by the date of the capability meeting, he had been absent for some 2 and a half years due to illness – and also the statement that it was not possible to exclude worsening of his psychological condition in the future. That last

statement sounded a note of great caution which, in our view, a reasonable employer was bound to regard as very significant.

240. The claimant's absence was uninterrupted apart from one occasion when he reported fit to attend work on 28 July 2015 without the support of OH or Human Resources, an act which he subsequently came to accept was not justified. He recognised that his belief that he was ready then to return to work was not in fact sustainable, and that he needed to remain absent for much longer.

241. It is clear, therefore, that at the date upon which Ms Johnston required to consider the matter, it was eminently reasonable for her to conclude that the claimant had been incapable of providing regular and effective service due to his genuine and quite serious illness, for over 2 years, and that at no stage was there any evidence, medical or otherwise, which would have justified the conclusion that he was fit to return to work in Polmont as a Residential Officer. He himself made clear on a number of occasions that he was not prepared to do so, partly, as we understood it, because of the effect upon him of further stress in a demanding frontline role, and partly because it would have exposed him to contact with some of those prison officers whom he had previously accused of misconduct in relation to Prisoner X and also of bullying in relation to himself and others.

242. We have therefore come to the conclusion that the respondent did have reasonable grounds upon which to conclude that the claimant was unable, and would be unable for the foreseeable future, to return to work in his contracted role and provide regular and effective service to the respondent.

243. It is then necessary for us to consider whether the respondent took reasonable steps to offer the claimant alternative employment in order to attempt to avoid dismissal. Given that the claimant was not at any stage in a position to resume his contractual role, the respondent had to consider whether he was fit to attend to any alternative roles. It is clear that the claimant wished to be restored to Polmont in a non-residential role,

particularly applying his strengths and experience in mentoring and assisting young offenders. However, at no stage, on the evidence which we have seen, was such a role available to the respondent. They are not required to create a role for the claimant.

244. Over time, the claimant was notified of a large number of vacancies open within the Scottish Prison Service. He was not prepared to consider vacancies in particular locations, some of which were distant from his home and some which he did not consider suitable. He did, however, reluctantly, engage in the redeployment process, and expressed an interest in some positions. Again, the respondent required to consider whether or not he was qualified for or suitable for such positions.

245. It is true that the respondent did not offer the claimant any alternative employment, but in our judgment that was a reasonable position for them to adopt, on the basis that many of the roles which were being put forward for his consideration involved a change of role which would require to be tested with him before they could offer it to him. There is no suggestion by the claimant before us that the respondent failed to carry out their redeployment process on the basis of the vacancies which they had available. It seemed to us that the respondent put a lot of effort into ensuring that the claimant was suitably notified of vacancies which might offer him a route back to employment. However, in the end, through no fault of either party, no suitable vacancy could be identified.

246. We have the strong impression that the claimant believed that the length of his absence, and thereby the redeployment process, was unfairly extended so as to disadvantage him. We do not accept that. In the experience of this Tribunal, the length of the claimant's absence before dismissal was effected was extraordinary, and that did not in any way work to his disadvantage. The claimant was able to consider carefully a large range of options to allow him to return to work, but for a variety of reasons was unable to take any of them up. To suggest that an earlier dismissal would have been fairer in the mind of the claimant is not realistic, and we reject it.

247. It is also clear that the claimant regards his move to Glenochil to be a critical point in the process, and that what followed thereafter was rendered futile by the attitude of his employer in forcing him to move to Glenochil against his will.

248. We require to consider this issue in relation to the claimant's detriment claim, but in the context of the unfair dismissal claim we are of the view that it bears little or no relation to his dismissal. At the point when the decision was made to move the claimant to Glenochil, he was still on long-term absence from work. He did not in fact move to Glenochil, as he did not return to work after the decision was made. It did not affect that fact that he remained, and continued to remain until his dismissal, unfit to return to work as a Residential Officer within the respondent's business.

249. Accordingly, while we understand that this was a significant matter for the claimant, which we address further below, we do not regard this decision as a significant one in the context of the claimant's dismissal.

250. We require to consider, then, whether the respondent carried out a fair and reasonable investigation into the claimant's medical condition to allow them to reach a fair decision to dismiss him. In our judgment, they did. They referred the claimant to Occupational Health at an early stage in his absence, and continued to refer to them for their opinions throughout the process. The claimant may argue that they did not precisely do what Occupational Health advised them to do, but it is important to recall that the decision to dismiss a person on capability grounds is not merely a medical one but a managerial one.

251. The respondent was acutely conscious throughout this process of the claimant's sensitivity, and the fact that OH advised them on a number of occasions that even if he were able to return to work at some stage they could not exclude the possibility of his psychological condition returning to affect him on his return. What the respondent understood from that was that there was always going to be a risk to the claimant returning to the work

environment, which is a stressful and demanding one owing to the nature of the prisoners and circumstances with which they have to deal.

252. At the point when the claimant was dismissed, he accepted explicitly that the final OH report, from January 2017, remained an accurate reflection of the situation.

253. Even though the claimant said that he was willing to return to work, it has to be remembered that he attempted to return to work on 28 July 2015, but was not permitted to do so since there was no medical support for that return; and that he subsequently came to realise that he had not been fit to return to work at that date. Furthermore, his absence was covered throughout by medical certificates from his GP confirming, consistently, that the claimant was unfit to return to work. In those circumstances, we consider that the respondent had ample justification for being cautious as to the claimant's return to work, particularly given the stated risk of greater harm coming to him on his return to duty.

254. We consider that the respondent followed a fair procedure in dismissing the claimant. He did not attend at the capability review meeting, but he did not protest that it was unfair for it to proceed in his absence; indeed, he made it clear that he was not willing to attend, but did not seek to prevent the hearing proceeding.

255. The claimant did complain that Ms Johnston should not be the manager to hear the capability review meeting, but we found those complaints to be without any foundation in fact. He believed that Ms Johnston, having worked with Ms Brookes, had thus been mentored by her, notwithstanding the absence of any evidence to this effect, fortified by the clear denials before us by both Ms Brookes and Ms Johnston. It is plain that senior managers within the Scottish Prison Service have mobile careers, in which they tend to move to a different location within a number of years. That was certainly the case for Ms Brookes and Ms Johnston. Identifying a senior management within the organisation who had not encountered or worked with Ms Brookes would have been very difficult. The respondent

considered the claimant's objections, but in our judgment they were entitled to reject them, and nothing in the evidence came close to suggesting, in any event, that Ms Johnston acted other than independently and with considerable integrity and fairness towards the claimant.

256. Similarly the claimant was given the right to appeal against his dismissal, and exercised that right.

257. We were therefore left to consider whether or not the claimant's dismissal, having determined these matters, could be said to be fair in all the circumstances. In our judgment, it was. At the point when the claimant was dismissed, despite a lengthy and, in our view, fair redeployment process, he was not fit to return to his contractual role, and there was no reasonable prospect that he would do so. They were unable to secure alternative employment for him, notwithstanding such a comprehensive redeployment exercise. As a result, at the point of the claimant's dismissal, having been absent from work for well over 2 years, it was reasonable, in our judgment, for the respondent to terminate his employment and to bring this very long absence to its inevitable conclusion.

258. We have therefore, after careful deliberation, reached the conclusion that the decision to dismiss the claimant, in all the circumstances and at the time the decision was taken, was fair and reasonable. The claimant's claim of unfair dismissal therefore must fail, and is dismissed.

a. Did the claimant make a protected disclosure, or protected disclosures, in terms of section 47B of the Employment Rights Act 1996?

b. If so, was the reason, or if more than one, the principal reason, for the claimant's dismissal that he made a protected disclosure, or protected disclosures, contrary to section 103A of the Employment Rights Act 1996?

259. The Tribunal then turned its mind to the question of whether or not the claimant was dismissed unfairly on the grounds that he had made protected disclosures.

260. We considered, firstly, whether or not the claimant had made a protected disclosure, or protected disclosures, in terms of the definition set out in section 43B of the Employment Rights Act 1996.

261. In his Scott Schedule (38ff), the claimant specified (38) that the disclosure was made on 18 September 2015 to *"Justice Minister Michael Mathieson, my local MSP Falkirk."* This was the email in which he sent to the MSP a copy of his Section 11 application, with the details relating to his concerns about the alleged mistreatment of Prisoner X.

262. Firstly, we must establish whether the disclosure amounted to a disclosure of information. Summarising that the disclosure related to the alleged mistreatment of Prisoner X, we consider (and the respondent conceded in their submissions) that the disclosure is one of information which satisfies the first leg of the test.

263. Secondly, did the claimant believe this disclosure to have been in the public interest, and thirdly, was that belief reasonably held? In our judgment the answers to these questions are yes, and yes. The claimant placed the matter in the hands of his MSP because he believed that his concerns called into question the conduct of prison officers in relation to a young offender. We accept that this is therefore a matter of public interest. The Scottish Prison Service is a public service, and if a young offender were to be mistreated prior to his suicide it is clearly in the public interest to disclose that. We consider that the belief of the claimant that this disclosure was in the public interest was one which was therefore reasonably held.

264. Fourthly, did the claimant believe that a criminal offence had been committed? As we understand it, he believed that the prison officers had "terrorised" Prisoner X, which led to his taking his own life. It is not entirely clear to us what "terrorising" Prisoner X actually meant in this case. The claimant was not present in the cell when the alleged mistreatment took

place. We do not know whether it was specifically believed by the claimant that a physical assault had taken place, or that some form of psychological abuse was carried out. The claimant himself appears to rely on what he was, allegedly, told by the officers on their return from the cell, but that remains rather unclear.

265. On the basis that the word “terrorised” is intended to convey a sense that the officers placed Prisoner X in a situation where he was fearful for his own safety, whether physical or otherwise, or threatened him with violence either by themselves or by other officers or prisoners, we have concluded that the claimant did believe that a criminal offence had taken place.

266. Fifthly, was that belief reasonably held? Mr Turnbull, solicitor for the respondent, submitted that it was not, on the basis that there must be information which tends to show that specified malpractice occurred, and in this case there was none. He pointed to the determination following the FAI in which it was found that the claimant’s allegations could not be upheld, on the balance of probabilities.

267. It is our view that the findings of the FAI should be treated with caution in this particular regard. The claimant, when he made the disclosure, did not have the benefit of the FAI findings, nor indeed of the findings of the Whistleblowing Investigation carried out on behalf of the respondent following his disclosures. There was some information which allowed the claimant to make the disclosure, which was that he was told that the officers had terrorised the prisoner shortly before he committed suicide. We entirely accept and understand that that allegation was not upheld either by the internal investigation or the FAI, but that does not mean that there was no information provided by the claimant on which it might be said that a disclosure of information took place and that he reasonably believed it to be true.

268. We note that the internal investigations found that there was insufficient evidence to uphold the allegations made by the claimant, and that the FAI determination did not conclude on the balance of probabilities

that what he alleged had happened had happened. However, we do not conclude that that of itself means that the claimant's disclosure was not based on a belief which was reasonably held. The claimant plainly thought it was a belief reasonably held because he continues to insist upon it to the date of this hearing.

269. We consider that this is a very finely-balanced matter, but have concluded that it cannot be said that the claimant disclosed information based on a belief which was not reasonably held at that time.

270. Accordingly, we have concluded, with some hesitation, that the claimant did make a protected disclosure to Michael Mathieson MSP on 18 September 2015.

271. Was the reason, or if more than one, the principal reason, for the claimant's dismissal therefore that he had made that protected disclosure?

272. The evidence demonstrates that the dismissing officer, Ms Johnston, was aware that the claimant had made this disclosure, and was aware of the nature of the disclosure.

273. She denied that the knowledge that the claimant had made such a disclosure had any bearing on her decision.

274. It is very difficult for a claimant to prove, in such circumstances, that the reason for dismissal was that he had made a protected disclosure.

275. We have considered the evidence in its totality and have reached the conclusion that the reason for dismissal was the reason given by the respondent, namely that he was no longer capable of rendering regular and effective service to them, for the following reasons:

- We found Ms Johnston's evidence to be entirely convincing, and honestly delivered, when she said that the reason was only that of capability, and not related in any way to the disclosure;

- We also found her evidence to be consistent with the medical opinions given in relation to the claimant's fitness to return to work at all times. The fit notes which were supplied by the claimant throughout his absence consistently told the respondent that the claimant was not fit to return to work. The Occupational Health reports similarly cast doubt on the claimant's ability to return to work;

- We accepted that not only did Ms Johnston give a positive reason for dismissal which was unrelated to the disclosure, but also that she gave clear evidence in which she denied that the disclosure was in any way relevant to her decision;

- We noted that almost two years passed between the making of the disclosure and the claimant's dismissal, a period which it is very difficult for the claimant to bridge, particularly given that Ms Johnston's knowledge of his case did not stretch back to that period;

- The respondent did not, in the meantime, ignore the claimant's concerns, but carried out a detailed investigation by independent managers with training in interview skills, and those investigations did not support the claimant's assertions;

- In addition, we now have the benefit of the FAI determination, in which the learned Sheriff, having heard the evidence of the claimant and others, concluded that the claimant's assertions could not be upheld;

- There is no basis for suggesting that the respondent was unwilling to address the claimant's concerns, or that they somehow brushed the matter under the carpet;

- While we are aware that the claimant is highly critical of the respondent's approach to the FAI during the course of the hearing, in particular suggesting that there was an attempt to conceal information by the respondent, that matter relates to a period following the claimant's dismissal, and in our judgment does not

provide a sound basis for finding that the respondent's attitude to the claimant was strongly influenced by the making of the disclosure.

276. We have therefore come to the conclusion that the reason for dismissal was that which was stated by the respondent, namely that the claimant was, at the date of dismissal, no longer capable of providing regular and effective service to the respondent, and that there is no basis upon which it can be found that the claimant was dismissed due to having raised a protected disclosure. There was nothing in the respondent's conduct prior to and on dismissal which could allow us to find that they regarded the disclosure with such negativity that it caused them to decide to move the claimant on from the organisation. The evidence very clearly points to the respondent's decision being based on capability as being the real and genuine reason for dismissal.

277. This claim must accordingly fail, and is dismissed.

a. Did the claimant make a protected disclosure, or protected disclosures, in terms of section 47B of the Employment Rights Act 1996?

b. If so, did the respondent subject the claimant to a detriment or detriments because he made a protected disclosure or protected disclosures?

278. The Tribunal has already determined that the claimant did make a protected disclosure under section 47B.

279. The detriments which the claimant complains of were:

- That Catherine Topley transferred the claimant to another establishment against his will and against OH advice; and

- That the respondent issued a reference which was generic but unacceptable in its terms, and was issued from Glenochil where he had never worked.

280. With regard to the first detriment, this is a reference to the decision taken by the respondent, while the claimant remained absent on long term sick leave, that he should be transferred to Glenochil from Polmont as a Residential Officer. The notes of the meeting of 8 March 2016 are set out on 561.

281. We must firstly establish whether or not the claimant is justified in describing the transfer to Glenochil as a detriment.

282. There are two aspects to this. The first is that the claimant, as has already been determined, never actually transferred to Glenochil, in the sense that he never returned to work for the respondent after 8 March 2016. He was referred to by the respondent as having Glenochil as his base – for example, in the reference letter which was sent from Glenochil – but he did not physically work there at all after that date.

283. However in our judgment what the claimant was complaining about was the decision to move him to Glenochil, rather than the move itself, and there is no doubt that the decision was made to this effect by the respondent.

284. The second aspect is whether that decision could then be regarded as a detriment to the claimant.

285. He makes a number of complaints about it.

286. The claimant complains that it was a decision which was imposed unilaterally upon him, without consultation. We have some sympathy with this view. The meeting of 8 March 2021 was not one where he expected to be told that he would be moved to Glenochil; indeed, to the contrary, he was expecting to be told when he could return to Polmont. The tone of the notes which we have at 561 is of an employee being notified of a decision, rather than an open discussion about whether that decision should be taken. His

reaction certainly confirms that: *"Having been notified that he was to be transferred to HMP Glenochil on his return to work Mr Main indicated that he was gobsmacked."* It was, further, noted that his demeanour was that of shock, and then anger, and that he became accusational.

287. The claimant sought to suggest before us that he was surprised and annoyed by the suggestion that he should move to Glenochil, and in particular because there were officers at Glenochil whom he did not wish to work with, because he was to be restored to a Residential Officer role among sex offenders and because he regarded it as a punishment that he was being moved rather than the perpetrators whom he had accused.

288. While we accepted that he was upset and annoyed at being told he was to move to Glenochil, the notes do not confirm that he gave any of these reasons as the basis for his response. In fact, he said that he did not think it was a good organisational response, nor a good response for him and his family; that he would be required to start from scratch again in a new establishment and that in fact he had a strong relationship with some staff at Polmont. Further, he said, towards the end of the discussion, that he would try to go to Glenochil. He did not dismiss the idea completely out of hand.

289. The claimant subsequently notified the respondent that he was not prepared to move to Glenochil. Since he did not return to work, the matter, in effect, rested there.

290. It is plain that the claimant's complaint here was that he was being "forced out" of Polmont against his will, and that that amounted to a detriment on the grounds of having made a protected disclosure.

291. He also regarded it as a detriment because the OH advice, contained in their report of 29 February 2016 (920), stated that *"Mr Main is capable of but would prefer not to undertake a Residential Officer role at HMYOI Polmont and therefore is seeking to redeploy, but would be capable of and willing to return to that role pending redeployment."* It was said, earlier in the

report, that his therapist had advised that he could return to work once he was signed off.

292. In other words, the claimant considers that the respondent was ignoring the medical advice which it was receiving, and doing so deliberately so as to frustrate his wish to return to Polmont.

293. Having considered all of these matters, we have come to the conclusion that this decision did not amount to a detriment to the claimant, for these reasons:

- The decision was never implemented, and he never had to move to Glenochil;
- In the redeployment process, it is plain that positions at Polmont were considered and indeed placed before the claimant, and accordingly the respondent had not closed its mind to his return to Polmont;
- The respondent did not, in our judgment, ignore the medical advice they were receiving. The report of 29 February 2016 fell into the context of a number of reports by OH which had expressed concern about the possibility of recurrence of his psychological symptoms, and about the likelihood of his being able to return to Residential Officer role in Polmont, notwithstanding the terms of that report on 29 February;
- Further, the respondent had a series of fit notes received from the claimant's GP, which stated unequivocally that he was not fit for work. The most recent of those at the date of that meeting was from 16 February 2016, and covered a period from 15 February to 14 April 2016 (980). There was no suggestion in that fit note that the claimant could be fit for work in the event that certain adjustments could be put in place. That fit note, and the others before and after it, amount to medical advice, and accordingly, the conclusions of the OH report must be read in that light;

- The decision on capability of any employee is not merely a medical decision but a managerial one. The respondent was, by March 2016, aware that the claimant had been absent from work since January 2015, and had been in poor mental health during that time. He had already attempted once to return to work in July 2015, without success, an attempt which he himself came to see was ill-judged. The reason why the respondent was concerned not to return the claimant to Polmont was because he had complained about the treatment he had received from fellow officers in the past, in the form of bullying, and the possibility that his symptoms might return could not be excluded;

- Having heard the claimant's evidence, it is not entirely clear to us what his view would have been had he been told to return to work in Polmont as a Residential Officer. He says he was upset by the move to Glenochil, and insisted that he could return to Polmont, notwithstanding the misgivings and serious concerns he had expressed about colleagues and senior management who were still there. However, although OH said that he was fit to return to Polmont in a Residential Officer role, he said he was unwilling to do so. In our judgment, that placed the respondent in a difficult position, trying to understand what role would be acceptable to him. In our judgment, the respondent's view that caution should be taken in any decision to return the claimant to work was eminently justified.

- We were prepared to accept, in light of all of the evidence, that the decision to return the claimant to work at a different location was consistent with the medical evidence which they had, and appropriate in light of the claimant's concerns and allegations made, as a means of seeking to protect and support his mental health.

- In his evidence, the claimant was asked by the Employment Judge whether, had he been moved back to Polmont in March 2016, he could know what the outcome of that move would have been; but he was unable to answer the question. It seemed to us that by that

stage, the claimant was so mistrustful of the respondent's organisation that it is perfectly possible that any decision to return him to Polmont would itself have been the subject of challenge by the claimant.

294. Accordingly, we came to the view that the decision to move the claimant to Glenochil was one which was not only understandable on the part of the respondent, but also designed to support the claimant in his return to work due to the psychological difficulties which he had undergone and whose recurrence could not be excluded. It did not amount to a detriment, in our judgment, on the basis that it was a decision taken for his own benefit.

295. Even if we are wrong about this, and the decision amounted to a detriment, we would not be prepared to find that it was a detriment visited upon the claimant on the grounds that he had made a protected disclosure. We concluded that the reason for the decision was two-fold: to help the claimant return to work after an absence of some 14 months due to ill health, and to seek to protect him from the possibility of further psychological harm in returning him to the place where not only had he made allegations against colleagues and senior management which amounted to a protected disclosure but where he had witnessed the sequence of events leading to the suicide of a young prisoner for whom he had sought to care. It is very clear to us that the suicide of Prisoner X caused the claimant great distress, partly because of the way he felt that events led to his suicide and partly because of the way in which his body was handled following his death. It is plain that the prisoner's body was treated in a very upsetting and undignified manner, and that that was accepted by the respondent. They were concerned that returning the claimant to that scene may revive memories which would be psychologically difficult for the claimant to handle.

296. While we are aware that the claimant vehemently disagrees with this assessment, we are unable to find that the reason why it was decided by the respondent to move him to Glenochil was in order to punish him for

having raised a protected disclosure. It was a decision which was ultimately taken in his interests and for his benefit.

297. The claimant, we noted, repeatedly said in evidence to us that the respondent should have been aware that over a period of approximately 10 years he had attended work and provided regular and effective service at Polmont while suffering from PTSD, and that they should have been aware that moving him back to Polmont at that point did not carry the risk to his health that they have suggested.

298. However, in our view, that did not tell the whole story, nor place matters in their appropriate context. While it may have been the case that the claimant was suffering from a psychological condition for some years before 2014 and yet still able to attend work, the decision to move him to Glenochil took place after the death of Prisoner X, which was clearly a highly significant event for the claimant and for the institution. Accordingly, by the time the decision was made, the claimant had been absent for a lengthy period following that significant event. The circumstances in which they made their decision were therefore quite different to the circumstances in which the claimant was previously able to attend work while suffering a mental health condition. We understand that the claimant wished to diminish the potential risk to him of moving him back to work at Polmont, but the respondent had to have regard to all of the information and circumstances before them, and in our view, they did so appropriately.

299. We should note, however, that the manner in which that decision was conveyed to him was unhelpful. While it cannot be said that he was not consulted at all – the meeting of 8 March 2016 was one where he was told about the move but plainly he was able to respond to it thereafter and it was not ultimately implemented – he was left feeling shocked and angered at the decision, and that could have been ameliorated by more sensitive handling of the matter at that point.

300. The second detriment upon which the claimant relies is the provision of a reference by the respondent which he regarded as proving that capability was not the real reason for dismissal.

301. In our judgment, the claimant has not demonstrated that the reference was anything other than the standard reference issued by the respondent in line with their own policy. While such references, which in the knowledge of the Tribunal are becoming very common, particularly in large employers, may not be regarded as particularly helpful and are clearly extremely cautious, there is no reason or basis in evidence before us to find that this was an unusual form of reference for the respondent to have issued.

302. It does not in our judgment amount to a detriment to have issued such a reference. The claimant has read into it an implication that he was not dismissed on the grounds of capability but for some other reason. We do not consider that to be a sustainable interpretation of the terms of the reference. No reason is given for the termination of his employment, and there is no evidence before us that any other departing employee would receive a different form of reference.

303. Accordingly, we are not persuaded that the claimant was subjected to a detriment in this regard.

304. Even if this were said to amount to a detriment, however, we would not be persuaded that the reason why it was done was because the claimant had raised a protected disclosure. The reference was not issued by any of the witnesses to this Tribunal, but by an HR assistant. There is no evidence that she knew, when drafting this reference, that the claimant had made a protected disclosure, and there is nothing in the terms of the reference to suggest that that was in any way an influence upon her. In any event, the terms of the reference are said to be consistent with SPS policy, and since there is no evidence that other references were not done in the same way, it cannot be said that the claimant's disclosure was in any way relevant to the terms and issuing of this reference.

305. Although not specifically nominated as a detriment by the claimant in his Scott Schedule, he gave evidence, and questioned witnesses, about what he described as the decision of the respondent to "ban me from the establishment".

306. We were a little unclear as to the point at which such a ban was said to have taken effect, but it appeared to be some months after he attended at Polmont in July 2015. None of the respondent's witnesses were able to recall any decision being made to "ban" the claimant from the establishment. His grievance appears to relate to a point when he attended at Polmont so that he could use the staff gym facilities, and he was told by security staff at the gate that he was not to be allowed in.

307. It seemed to us that this was a matter which loomed large in the claimant's mind, but which did not strike any of the respondent's witnesses as being quite accurate. An individual who is absent on long term sickness absence may be thought to be at risk to their mental health if they are allowed, during the course of that certified sickness absence, to return to the working environment. It is an unusual situation which in our experience almost never arises when an individual is unfit to attend work. While it is clear that his use of the gym would not be inconsistent with the reason for his absence, his attendance at his place of work might well be. We understand that the gym would only be used by staff and that there was therefore no risk that he would encounter any young offenders there. However, the claimant had raised concerns about his relationships with some of his fellow prison officers, and had made complaints about historic bullying. In these circumstances, we do not regard it as unreasonable for the respondent to be particularly cautious about allowing the claimant to return to the premises at that time.

308. We are not persuaded that the claimant was "banned" from Polmont, but we do consider that during a long term period of sickness absence there is nothing improper about the claimant's employer being unwilling to allow the claimant to return to the workplace.

309. In any event, we are unable to sustain a submission which suggests that any employee has the right to have freedom to visit and move freely throughout their workplace at a point where they are certified as unfit to be at work, and while investigations were being carried out into the disclosure made and concerns raised by him.

a. Was the claimant at the material time a person disabled within the meaning of section 6 of the Equality Act 2010?

b. Did the respondent treat the claimant less favourably than the comparators to whom he compared himself on the grounds of disability, contrary to section 13 of the Equality Act 2010?

310. The respondent has admitted that at the material time the claimant was a disabled person within the meaning of section 6 of the 2010 Act. The claimant's assertion was that he suffered, and suffers, from Post Traumatic Stress Disorder. The respondent appears to admit that the claimant was a disabled person by reason of depression and anxiety. Without wishing to minimise the importance of either diagnosis, we consider that in essence there is no practical difference between the two positions and so we accept that the claimant was a disabled person within the meaning of the 2010 Act.

311. The claimant's complaint is one of direct discrimination on the grounds of disability under section 13 of the 2010 Act.

312. The claimant complains that he was treated less favourably than Officer Graham Dawson and Unit Manager Jo McKinlay, in that they were both redeployed into Polmont without any application process being followed.

313. The respondent's witnesses provided explanations as to the reason why Mr Dawson and Ms McKinlay were treated in the way that they were.

314. Mr Dawson's anticoagulant treatment prevented him from exposure to the level of risk of injury which direct prisoner facing activity would have brought, and accordingly, there being a suitable post available for him at Polmont, he was allowed to move into that post.

315. Ms McKinlay was afflicted by cancer in such a way that she required surgery on a number of occasions. The progress of that surgery was such that there was a period between the mastectomy and the reconstructive surgery when she was unable to fulfil all the responsibilities of her role, but by sharing them with her Operations Manager she was able to provide limited service while awaiting the final surgery. As anticipated, when Ms McKinlay had undergone reconstructive surgery and had a period of recovery, she was able to return to her full role.

316. In both cases, the decisions made by management were taken with the clear support of OH advice.

317. The respondent submitted that the circumstances of Mr Dawson and Ms McKinlay were both materially different to those of the claimant, and accordingly that they were not good comparators for the claimant.

318. It is our view that this submission is correct in law. Mr Dawson's circumstances were such that a suitable vacancy arose for him at the point when a decision on his future required to be made, and he was able to take up that appointment. A role was not created for him. The claimant was not able to take up a vacancy at a similar point in his absence, since there were no suitable vacancies in 2015, and in any event, there was no evidence that he was, in the view of OH, ready and fit to return to work at that point, nor ultimately at any stage.

319. Similarly Ms McKinlay's return was supported by the medical evidence, and was based on a clear timetable, which meant that any decision made were of limited effect. The function of the redeployment operated for Ms McKinlay was to assist her to return to work once her surgery was complete, and to put her skills and experience to use while she was able to use them in between the two surgeries. The claimant was in a

wholly different position. He remained absent and certified unfit for work for more than 2 years, and at no stage was there identified a suitable vacancy which he was able to take up, despite a lengthy and comprehensive search in which he was fully consulted.

320. We have therefore concluded that the claimant's claim of direct discrimination must fail on the basis that he had failed to identify suitable comparators.

321. His reference to DC – whom we have not named due to the nature of the charge he faced and because he was not named by the claimant as a comparator in his claim – was also unhelpful because the circumstances in which he found himself were entirely different to those in which DC was placed. DC was charged and tried of a serious offence. That fact, of itself, does not justify his dismissal from the organisation. The interests of natural justice would require an employer to allow the criminal court process to take its course, and then to respond to the verdict as it arose. In this case, DC, having been acquitted, was returned to work at Polmont. The claimant is plainly offended that DC was allowed to return to work at Polmont, whereas he was not, but it is not a sound comparison. DC was able to return to work because he was free of any conviction, and required to be treated as an innocent man who had not been proven guilty of the charge he was under. He was fit to return to work, so far as we are aware, and did so. The claimant, while entirely innocent of any criminal act – and it was not at any stage suggested that it was otherwise – was not certified as fit to return to work, and accordingly he cannot properly compare himself with DC.

322. It should be noted that the claimant made mention in his questioning of witnesses of a number of names of individuals with whom he worked, or about whom he had heard accusations, but without any clear evidence supporting his assertions about them. It would not in the circumstances be fair to record the names of such individuals, when no warning had been given to the respondent that the claimant wished to hold up their cases in comparison to his, and when no contrary evidence has been put to the Tribunal to clarify the true circumstances in which they found themselves.

Much of what the claimant seemed to be putting to the witnesses amounted to no more than hearsay, and we were not prepared to make any findings in fact about these matters without further clear and definitive evidence.

323. In their submissions, the respondent dealt with the question of whether the claimant suffered any less favourable treatment, and if so, whether it was on the grounds of his disability.

324. The claimant argued that the decision to dismiss him, taken by Caroline Johnston and Catherine Topley, amounted to an act of discrimination, on 12 July 2017.

325. The Tribunal accepted the evidence of Catherine Topley that she did not have any involvement in the decision to dismiss the claimant.

326. Ms Johnston's evidence was to the effect that the claimant was dismissed not because of his disability but because of the lengthy absence from work and the evidence about his capability to return to work in his contractual role. We accepted this to be the case. The claimant has, by his own evidence, been a disabled person for some 13 years prior to his dismissal. He repeatedly stressed that he had been able to function for about 10 years as a Residential Officer notwithstanding that he had a disability. He was not dismissed by the respondent until the point when, in July 2017, they came to the conclusion that he was no longer able to provide regular and effective service in his contracted role, a view with which the claimant actually agreed.

327. We noted that the respondent argued that they did not know nor could they reasonably be found to have known that the claimant was a disabled person at the time when he was dismissed. We do not accept that. It is our conclusion that the respondent ought reasonably to have known by the date of the decision to dismiss him that he was suffering from a depressive illness, with serious psychological effects upon him, which had lasted since the point when he started his lengthy sickness absence in January 2015, and from which he appeared, in their view, to have made little progress in recovery. In July 2017, they were no longer prepared to

consider that he would be in a position to return to work, and attempts to bring him back to the workplace had failed, owing to the severe nature of his illness. In our judgment, the OH reports repeatedly confirmed that he was suffering from an ongoing illness which was preventing him from returning to work. As early as July 2015 OH said that the "disability provisions of the Equality Act may apply" (924).

328. Ms Brookes, though not participating in the decision to dismiss, described the claimant in her witness statement as a "troubled man", and that his conviction that the allegations he had made were true "might be related to his mental health problems" (paragraph 215). In our judgment, that provides sufficient basis to find that the respondent knew or ought reasonably to have known that the claimant was suffering from a condition which had a significant adverse long term effect on his ability to carry out normal day to day activities, in terms of section 6 of the 2010 Act.

329. It may be appropriate, at this juncture, to deal with the claimant's reaction to this statement by Ms Brookes. It is plain that the claimant was deeply upset to be described as "troubled", and in his submissions to the Tribunal he suggested, at paragraph 16, that she had not only alleged that he was a "troubled individual", but also "not of good character", and that Ms Keir had said that he was not fit to work with Young Offenders.

330. In our judgment, the claimant has, perhaps understandably, misinterpreted what was said about him. Both Ms Brookes and Ms Keir demonstrated themselves in their evidence before us to be concerned about and, to some extent, sympathetic towards the claimant. To describe him as troubled seemed to us to be saying no more than that he was distressed by the circumstances in which he found himself and disturbed by the events which he felt had taken place surrounding the death of Prisoner X, and that would be an accurate representation of how the claimant has come to view these matters. We do not think it denigrates or insults the claimant to describe him in this way, but it reflects the depth of feeling which he has experienced about the events which have led to his dismissal.

331. We do not consider that it was said of the claimant that he was not of good character. Again, this may be the view that the claimant takes of how Ms Brookes spoke of him but she did not say that in her witness statement nor in her evidence before us. Indeed, she was at pains to say that she did not blame the claimant for making the allegations he did, though she did not accept that they were well-founded. We do not believe that any of the respondent's witnesses sought to or did describe the claimant as not being of good character.

332. As to the reference to the claimant not being fit to work with young offenders, we interpret that as meaning that the claimant was not fit – that is, well enough – to return to his previous employment. We did not consider that what was meant by that was that he was not fit – in the sense of being suited to or capable of the work – in a pejorative sense.

333. We consider this to be an unfortunate consequence of the undoubted loss of trust which the claimant experienced in his employer, but we did not subscribe to the claimant's view of what was being said about him.

334. However, we did find that the respondent knew or ought reasonably to have known that at the date of his dismissal he was a disabled person within the meaning of the Act.

335. We do not find, however, that the respondent dismissed the claimant on the grounds of his disability. It is a subtle distinction to make, between determining that the claimant was dismissed due to capability and finding that he was dismissed on an unlawful and discriminatory basis, but we consider that Ms Johnston was entirely genuine in saying that her priority was to deal with the matter openly and fairly, and to consider the medical and other evidence presented to her. We found that she did so, and that she did not treat the claimant less fairly that she would have treated a person in the same circumstances not suffering from a disability; it is plain that the length of the absence sustained by the claimant was so significant, and the medical evidence about his ability to return to his contracted role so

clear, that the decision to dismiss was one which would have been reached whether the claimant was suffering from a disability or not.

336. The next allegation made by the claimant is that there was a failure of a duty of care by Ms Brookes towards him as a disabled person in September 2015.

337. At that stage, we do not consider that the claimant's disability ought reasonably to have been known by the respondent, and by Ms Brookes in particular. We accept that the OH assessments up to that point had not specifically said that the claimant was suffering from a disability within the meaning of the Act, and were suggesting that with treatment his condition may improve. Since he had not been absent nor suffering from that episode of his condition for more than a year in September 2015, we do not consider that it would be fair to find that the respondent ought to have known that he was disabled at that point.

338. Nevertheless, we understand that this allegation avers that Ms Brookes failed to take steps to protect the claimant when he reported to her that there were serious concerns about the actions of prison officers towards Prisoner X before his suicide in 2014.

339. Ms Brookes' evidence was that she did not know of the detail of these allegations until Russell Turnbull spoke to Heather Keir on the day of his return to work following sickness absence, in mid-August 2015. At that meeting, Mr Turnbull told Ms Keir that the claimant had told him that prison officers had been abusive to Prisoner X who had committed suicide thereafter.

340. Mr Turnbull's evidence before us was that the claimant told him who was involved but that if he passed this information on he would deny it.

341. The claimant is now critical of Ms Brookes for not having acted in September 2015. The difficulty for the claimant is that his version of events - that Ms Brookes knew of the names of the alleged perpetrators in April 2015

but took no action – is not supported by any other witness, and indeed is contradicted by each of Mr Turnbull, Ms Brookes and Ms Keir.

342. Ms Brookes' position is that Ms Keir did not tell her the names of the perpetrators at that time; however, she suspected who was involved and that informed her further actions. There was a concern on the part of the respondent that the claimant had not informed her directly, but had made a comment in a passing conversation in the street with Mr Turnbull. It was not clear to them that the claimant wished this matter to be investigated. That concern, which the claimant would not accept as valid now, was justified, in our view, by the fact that he told Mr Turnbull that he was not to act upon this information, and if he did it would be denied.

343. We found the claimant's position on this very difficult to understand, and we have come to the conclusion that his memory of what he told to whom at different times has become confused due to the passage of time and the stress of dealing with these important matters before the FAI and the Tribunal.

344. The truth is that the claimant did not tell the respondent the names of the perpetrators for a considerable period of time. He repeatedly put to the respondent's witnesses that there must surely have been a good reason for this. While they were understandably reluctant to speak for him, they understood that the claimant was concerned to name the individuals concerned

345. In our judgment, Ms Brookes did not fail the claimant in her duty of care towards him. He was absent on sick leave and remained so for a very long time; he was encouraged to provide further details about his concerns, but was very reluctant to do so; Ms Brookes emailed Michael Stoney, Director of Operations, to tell him that the claimant required further support; she spoke to the Police directly after inviting them to visit the establishment; she suspended the capability process and then stepped away from it when the claimant made direct allegations against her; and asked for an independent manager to deal with that capability process without any

further interference from herself. Further she arranged for the claimant's whistleblowing concerns, when they were submitted, to be fully investigated by managers who had no prior involvement in the matter.

346. The third allegation under section 13 of the 2010 Act was that the respondent failed to make a reasonable adjustment for the claimant by offering him a job at the same level despite having offered positions to Graham Dawson and Jo McKinlay.

347. We understand this to be a criticism of the failure to offer the claimant alternative employment, rather than a section 20/21 reasonable adjustments claim. In this light, we have already found that we do not consider that there was any failure to offer the claimant a position amounting to less favourable treatment on the grounds of disability by comparison with the two comparators identified by the claimant.

348. In our judgment the claimant's claim that he was treated less favourably on the grounds of disability must therefore fail, and is dismissed.

a. Did the claimant hold a belief which amounts to a philosophical belief within the meaning of the Equality Act 2010?

b. If so, did the respondent treat him less favourably than the comparators with whom he compared himself on the grounds of religion or belief?

349. The claimant sought to argue that his dismissal and his medical retirement amounted to discriminatory acts on the grounds of his religion or belief.

350. The Scott Schedule refers to the claimant's "personal belief system", and in the ET1, he stated that "I live by my beliefs and principles of humanity, fairness, equality and sense of modern morality." In the Preliminary Hearing of 22 January 2018, the claimant said that he was not

relying upon a religious belief, but on a personal set of values, including honour, integrity, truthfulness and frankness.

351. Very little was said about this in evidence. The claimant clearly considers himself to be an honourable man, particularly in contrast with some of his former colleagues whom he regards with considerable suspicion, and reliant upon the truth and a sense of morality.

352. In order for the claimant's belief to amount to a philosophical belief, it must have a status, seriousness, cohesion and cogency which makes it similar to a religious belief; it must be important, and be worthy of respect in a democratic society (**Grainger plc and others v Nicholson [2010] IRLR 4 (EAT)**).

353. We are not persuaded that the claimant's belief system, which he describes as personal, has been clearly enough delineated to amount to a philosophical belief. Principles of fairness, equality, humanity and a sense of modern morality are broad concepts, capable of numerous interpretations from different perspectives. A reference to modern morality is entirely unclear, in our view, as to whether it refers to certain societal norms which were not adhered to, say, 100 years ago.

354. While we do not dismiss the claimant's assertions that he is a morally-minded person with high personal standards of conduct, we cannot find that he has demonstrated to us a coherent system of belief which is more than a collection of concepts, in order to meet the test set out in the Equality Act 2010.

355. Accordingly, we do not consider that the evidence presented to us provides us with a basis for finding that the claimant demonstrated a coherent set of beliefs upon which he may rely in seeking to argue that he was discriminated against on the grounds that he held those beliefs.

356. The claimant's dismissal, in any event, was not an act which we considered was taken on the grounds of the claimant's beliefs. Perhaps the best way to view this is to repeat that the Tribunal has found that the

claimant was not dismissed on the grounds that he had made a protected disclosure, an example of his beliefs about the actions of his former colleagues and his employers. We considered that the reason for the claimant's dismissal was his capability, and that there were good grounds for that decision, unrelated to the claimant's own beliefs.

357. It was not put to the respondent's witnesses, and Ms Johnston in particular, that she had dismissed him because he had evinced any form of philosophical belief. Having said that, it was clear to us that Ms Johnston conducted herself with respect and courtesy towards the claimant and reviewed the evidence before her without regard to any philosophical belief which he might have had, but on the objective evidence before her. It is not clear to us on the evidence that she was aware that he was seeking to put forward a system of belief upon which he was seeking to rely. Ms Johnston never met the claimant in person.

358. We agree with the respondent's submission that the claimant's dismissal and medical retirement had nothing to do with any system of belief which he had, and in any event he has not demonstrated to our satisfaction that the respondent were or should have been aware of his beliefs to the extent that they were influenced by them.

359. Accordingly, we are unable to find any basis for the claimant's complaint that he was dismissed on the grounds of having a philosophical belief. This claim must fail.

Was any of the claimant's claims presented outwith the statutory time limits? If so, does the Tribunal have jurisdiction to hear them?

360. Having reached the conclusions which we have reached on the merits of the claimant's claims, we do not consider it necessary to deal with this issue at length.

361. We have not concluded that the claimant's claims should be dismissed for want of jurisdiction. It is not clear to us that it would not be just

and equitable for the Tribunal to allow the claimant's claims to proceed even if they were out of time.

362. Firstly, it is plain that for a considerable period of time the claimant has been quite unwell. While he has been enabled to present his Tribunal claim in 2017, and to conduct a complex correspondence in the litigation, the evidence suggests that there were times when his illness may have prevented him from pursuing his legal rights.

363. Secondly, it is clear that the claimant has been, for some time, in dispute with his trade union, the POA. During this hearing, he wished to raise, repeatedly, his concerns about their failure to support him, in particular during the FAI. That rendered them unavailable to assist him with his claim.

364. Thirdly, no prejudice has accrued to the respondent, as is apparent by their comprehensive defence to the claims, and their conduct of this hearing notwithstanding that it took place some four years after the claimant initially presented his claim. The respondent was able to provide a large volume of documents relevant to the claimant's claims, and was also able to present evidence in detail through the witnesses whom they called. We do not consider that it would be appropriate to suggest that the balance of prejudice would fall heavier on the respondent in the event that we did not dismiss the claims on the grounds of jurisdiction.

365. Fourthly, having conducted such a comprehensive hearing, and requiring the claimant to undergo what was plainly an ordeal for him, it would not be in the interests of justice to deny him a full reasoned decision on his claims on the grounds that some or all of them may have been presented out of time. The claimant has doggedly pursued justice for a very long period of time with remarkable persistence, and in our judgment, it would not be fair to him to exclude his allegations on a jurisdictional ground. The evidence has been led; the parties have made their submissions; the Tribunal has therefore considered it right and proper to proceed to address the whole of the evidence and all of the claims made.

366. Accordingly, we do not consider that the claimant's claims or any of them are outwith the jurisdiction of the Tribunal. We have, accordingly, dealt with them carefully and fully.

Conclusion

367. It is our conclusion, therefore, that the claimant's claims all fail, and are therefore dismissed.

368. It is appropriate for us to acknowledge the effort put in by the claimant and by Mr Turnbull for the respondent in reaching this stage. We are well aware that our findings and determination will disappoint the claimant, and that he may well feel that all his efforts were for nothing. We would urge him not to reach that view. We formed the view that the claimant, while not altogether convincing to us, is a man of deep conviction and emotion who carried himself with great dignity and some restraint during the course of the hearing before us. He showed courtesy and respect to the Tribunal, to Mr Turnbull and to the witnesses whom he was questioning. He demonstrated a level of good humour which was remarkable given the seriousness of the issues being discussed, but which was of assistance in the proceedings. He had prepared carefully and at length, and while not everything he wanted to ask about had a direct bearing on the issues for us to determine, he worked his way through his questions and was not deflected from his task.

369. For an unrepresented claimant who has clearly been emotionally affected by the events under discussion, it was little short of remarkable that he was able to commence and ultimately conclude the hearing before us, particularly given that it was clear at the outset that he was doubtful that his health would be sustained throughout. It is our hope that he is able to close this chapter now, and enjoy his family life.

370. It will be apparent that we have not made findings in fact based on all of the evidence or questioning which we heard. It is not the job of a Tribunal to narrate every piece of evidence which it hears, but to discern those facts which are relevant only to the claims which are before us.

371. The claimant clearly believes that the Scottish Prison Service is not a safe place for whistleblowers to make disclosures about concerns they have with certain practices; he is convinced that there was a degree of collusion between senior management, the trade unions and the Scottish Government in order to avoid dealing with the concerns he was raising and keep these matters out of the public eye; and he is not prepared to accept that any of the senior managers who gave evidence before us were truthful or sincere in what they said.

372. It is simply not within the scope of this Tribunal to reach any view about these broad-ranging opinions held by the claimant. They were not relevant to whether or not he himself was unfairly treated or discriminated against. That others may have justifiable complaints against the respondent has no direct bearing on our decision. That the claimant is in dispute with his trade union is a matter between him and them; the trade union is not a party to these proceedings, and was not present to defend itself against the claimant's accusations.

373. We have not narrated at any length the events about which we heard in the early years of the claimant's employment with the respondent. It was entirely unclear to us how these events related directly to the claimant's dismissal and allegations of discriminatory conduct. It is not necessary for the Tribunal to relate everything which exists in the background to the claim, and accordingly we have sought to maintain a degree of brevity and focus by proceeding to narrate the evidence from the point where it seemed to us to become relevant.

374. We concluded, ultimately, that the claimant's perspective on all of the events which we have heard about is one which is unique to himself. He is an intelligent and emotional man who plainly has a strong sense of injustice. However, we have been unable to sustain his complaints on the basis of our very careful deliberations upon the very significant volume of evidence which we have heard.

375. We owe Mr Turnbull a debt of thanks, too. As we said at the end of the hearing, he appeared to develop a remarkable rapport with the claimant, which meant that while there was a strong and vigorous dispute being conducted before us, he was able to maintain good relations, and considerable mutual respect, with the claimant. That was of considerable assistance to the Tribunal. He conducted his client's case with skill, professionalism and restraint, and his submissions were a model of clarity and logic.

Employment Judge: Murdo Macleod
Date of Judgment: 12 November 2021
Entered in register: 15 November 2021
and copied to parties