EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Ms Raheem	Secretary of State for Justice

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT	Birmingham	**ON**	22 – 25, 28 February 1 March 23 & 24 March (In chambers) 2022
EMPLOYMENT JUDGE	Harding	**MEMBERS**	Mrs Shenton Mrs Evans

Representation
For the Claimant: Mr Ezike, Solicitor
For the Respondent: Mr Feeny, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1 The claim of a failure to make reasonable adjustments contrary to sections 21 and 39 of the Equality Act 2010 fails and is dismissed.
2 The claim of harassment related to disability contrary to sections 26 and 39 of the Equality Act 2010 fails and is dismissed.

3 The claim of indirect discrimination based on the protected characteristic of disability contrary to sections 19 and 39 of the Equality Act 2010 fails and is dismissed

4 The claimant's claim of automatically unfair dismissal contrary to section 103A of the Employment Rights Act fails and is dismissed.

Case Summary

1 The claimant was a probationary prison officer. The respondent's case is that the claimant was dismissed because she failed her probationary period following numerous performance and conduct issues coming to light, many of which were dealt with formally during the probationary period, resulting in warnings being issued. The claimant's case is that false complaints were made against her because she had raised concerns about what she considered to be mistreatment of prisoners. Her case is that she made Public Interest Act disclosures about the mistreatment of prisoners and that she was dismissed because she had raised these concerns. The claimant also pursues claims of a failure to make reasonable adjustments, harassment related to disability and indirect discrimination based on the protected characteristic of disability. For the purposes of these claims it was conceded by the respondent that the claimant was disabled at the relevant time by virtue of dyslexia, depression and anxiety. Complaint is made by the claimant about the length of time disciplinary and grievance processes took and the manner in which the claimant's final probationary review meeting and appeal against dismissal were conducted.

The Issues

2 The issues had been carefully set out by Employment Judge Dean at an earlier case management preliminary hearing. We reviewed this list with the parties at the start of this hearing. The only clarifications made to the list were:

(i) that the respondent conceded that the claimant was a disabled person, as defined, at the relevant time,

(ii) it was confirmed that the respondent disputed that any of the asserted disclosures were qualifying disclosures,

(iii) it was accepted that all disclosures, bar one, were made to the respondent and,

(iv) the asserted substantial disadvantage for the purpose of the reasonable adjustments claim was clarified, namely that delay in conducting grievance and disciplinary processes was said to have aggravated the claimant's anxiety and depression.

The issues as set out by Employment Judge Dean were as follows:

Failure to Make Reasonable Adjustments

1. Did the Respondent apply the following provision, criterion or practice ("PCP"):
a. Delays in holding disciplinary hearings.
b. Delay in considering grievance.

2. Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:
a. The Claimant struggled with the delay in conducting the disciplinary hearing, this made her anxiety and depression worse.
b. The Claimant struggled with the delay in considering the grievance, this made her anxiety and depression worse.

3. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at any such disadvantage?

4. If so, were there any steps that were not taken and that could have been taken by the Respondent to avoid any such disadvantage? The Claimant suggests:
a. The Respondent should have followed its policy and procedure and conducted the disciplinary hearing in a timely manner.
b. The Respondent should have followed its policy and procedure and considered the grievance in a timely manner.

5. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

Indirect Discrimination

6. Did the Respondent apply the following PCP to the Claimant?
a. On 20 October 2020, Teresa Clarke failed to properly consider the Claimant's appeal against dismissal.

7. Did the above amount to a PCP?

8. Was the PCP was discriminatory in relation to a protected characteristic of the Claimant?

9. Was the Claimant put at a particular disadvantage by the PCP in relation to others who do not share her protected characteristic(s)?
a. The protected characteristic relied upon is her disability, specifically depression and anxiety.

10. Was the PCP a proportionate means of achieving a legitimate aim?

a. The efficient running of the prison.
b. The need to keep the public safe by delivering a secure and effective service.
c. The effective management of staff.
d. Complying with internal procedures proportionately and efficiently.

Harassment

11. Did the Respondent engage in the following conduct?
a. On 3 June 2020, Governor Thirlby and Governor West refused to make a reasonable adjustment of allowing a different staff member to carry out the end of year probation or the Claimant to attend remotely, and referred to the Claimant as a liability.

12. If so, was any of that conduct unwanted?

13. Did the unwanted conduct relate to the protected characteristic of disability and/or race? [*Note: there was not, in fact, a race claim before us.]*

14. If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In an "effect case", the following factors must be considered: the perception of the Claimant; the other circumstances; and whether it was reasonable for the conduct to have that effect.

Automatic Unfair Dismissal

Protected Disclosure

15. Did the Claimant make a disclosure of information?
a. On or around 31 October 2018 to 1 November 2019, the Claimant disclosed to Governor O'Neill that CM Motum had been treating prisoners badly.
b. On 16 May 2019 the Claimant sent an email to Lorraine Howes disclosing wrongdoing at Swifen Hall.
c. On 23 May 2019 the Claimant sent an email to Deputy Governor Steadman reporting CM Motum's unnecessary and excessive use of control and restraint.
d. At a meeting held on a date between 24-31 August 2019 the Claimant disclosed information about ill-treatment of prisoners by officers and violence from prisoners.
e. On 6 September 2019 the Claimant informed IMB members that officers mistreated prisoners.

f. On 11 September 2019 the Claimant emailed Lorraine Howes again about wrongdoing at Swifen Hall.
g. On 12 September 2019, the Claimant reported wrongdoings in the prison to AJ Khan.
h. On 14 September 2019 the Claimant sent an email to Alan Hammill reporting the wrongdoings in Swifen Hall.

16. Was any disclosure made in the Claimant's reasonable belief in the public interest?

17. Was any disclosure a qualifying disclosure in that the Claimant reasonably believed the disclosure tended to show that:
a. The health or safety of any individual has been, is being or is likely to be endangered [section 43B(1)(d) of the Employment Rights Act 1996]; and
b. Information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed [section 43B(1)(f) of the Employment Rights Act 1996].

Dismissal

18 Was the reason or principal reason for dismissal because the Claimant had made the protected disclosure(s)?

Evidence and Documents

3 There was an agreed bundle of documents running to 1735 pages. Unfortunately, the bundle had been poorly put together. Documents were not in the order that is to be expected. For example, the documents at the beginning of the bundle comprised a document headed "claims and evidence" from the claimant, followed by two case management orders issued at preliminary hearings, with the ET 1 only making an appearance at page 33 of the bundle. Documents were frequently not in chronological order, the same document often appeared in several different places and entire email chains were repeatedly included when only one email would have sufficed. This was a somewhat surprising state of affairs given that both parties were represented. It made navigating the bundle in the time that we had extremely hard, a point which we raised with the parties early on in the hearing. For the respondent witness statements were provided for Ms Teresa Clarke, West Midlands Prison Group Director, Mr C O'Neill, Head of Function, Mr I West, Governor HMP and YOI Swinfen Hall and Mr D Harding, Prison Group Director. We also had a witness statement from the claimant.

Findings of Fact

4 Most of our findings of fact are contained in the section that follows, although further findings, particularly when they form the basis of conclusions, will appear in the conclusions section of the judgment also.

5 From the evidence that we heard and the documents we were referred to we make the following findings of fact:

5.1 The claimant's employment with the respondent began on 18 June 2018 and ended 17 June 2020. When she first started working for the respondent she underwent Prison Officer Entry Level Training (POELT) at a residential training unit. Some concerns arose during training about the claimant's performance and a support plan was put in place to try to assist the claimant with these.

The respondent's probation policy

5.2 Under the respondent's induction and probation policy prison officers are subject to a 12 month probationary period which can, exceptionally, be extended, page 171. The policy states that as soon as practicable all employees in their probationary period must meet with their manager to open a Staff Performance and Development Record (SDPR), page 1722. The policy provides that a probationer can be awarded one of 3 possible performance ratings, which are outstanding, good and must improve, page 1721. A rating of good is required in order to pass probation, page 1722. An interim review is required to be completed within 6 months and if an employee receives a must improve rating then probation must be extended, page 1722. Employees who receive an outstanding or good rating will have their appointment confirmed. For those employees whose appointment is not confirmed or terminated at 6 months a final review must be completed within 12 months from the date of taking up the appointment and a recommendation made as to whether the appointment should be confirmed, extended or terminated. The policy sets out that where employees are assessed as must improve at the end of the year and the line manager states that the performance level is unacceptable the expectation is that this will lead to dismissal. The policy states that in exceptional circumstances an extension may be given, page 1723. The policy states that the extension should be for no longer than 6 months and it is reiterated that for performance purposes a good marking is required to pass probation.

The respondent's grievance policy

5.3 The respondent's grievance policy states that where a member of staff raises a formal grievance a grievance meeting must be held with the

complainant within 20 working days of receipt of the written complaint, page 1732. It further states that if the member of staff wishes to be accompanied and the trade union representative or colleague is not able to attend on the proposed date another date must be arranged within 5 working days of the original date, wherever possible. At paragraph 3.7 of the policy it is said that wherever possible the manager must inform the complainant of their decision within 10 working days of the meeting. If the member of staff appeals the policy states that a meeting should be arranged, wherever possible, within 20 working days of receipt of the notification of intention to appeal, paragraph 4.10, page 1733.

The respondent's managing poor performance policy

5.4 The poor performance policy provides that where there are performance concerns there should be a stage one meeting at which a written warning can be issued and a review period set, page 1666. If performance does not improve the next stage is a stage two meeting at which a final written warning can be issued and once again a review period will be set. If performance does not improve there will be a third and final meeting at which consideration will be given to dismissal, page 1666. The policy makes clear that employees have the right to appeal warnings that are issued.

The respondent's disciplinary policy

5.5 The respondent's disciplinary policy states that commissioning managers must ensure that investigations are conducted within a 28 day working timeframe unless there are acceptable and justifiable reasons for delay. It will then be for the commissioning manager to make a decision on whether disciplinary action should be taken and any decision regarding disciplinary action must be taken within 2 weeks of receipt of the investigation report, paragraph 5.1, page 1612. The policy stipulates that in the event that a decision is taken to pursue disciplinary action employees must be notified of this within 2 weeks of the receipt of the investigation report and they must be invited to indicate whether they accept that the allegation is true or wish to contest it, paragraph 5.13, page 1613. The policy states that if the member of staff does not respond to the notification within 2 weeks disciplinary proceedings may take place on the basis of the evidence available, paragraph 5.16. The disciplinary hearing must be held within 6 weeks of the notification to the employee, paragraph 7.1, page 1167, and decisions must be given orally at the end of the hearing. The policy states that in cases of alleged misconduct where dismissal is not an option, and where a member of staff accepts the findings of the investigation and does not wish to contest the charge, they can opt to have their case dealt with by way of the fast track process, paragraph 5.18. It is explained that if the member of staff chooses to use

the fast track process the formal disciplinary hearing will be replaced with a fast track hearing. Under the fast track process no witnesses will be called and the investigating officer will not be called to give additional evidence in support of or against the allegation, paragraph 5.21.

Commencement of operational duties

5.6 The claimant started operational duties at HMP and YOI Swinfen Hall on 29 October 2018, meaning that her probation period was originally due to come to an end on 28 October 2019 and her halfway review date was 29 April 2019. She initially started work on G wing. The prison manages around 600 prisoners.

Incident with CM Motum 2 November 2018

5.7 On 2 November 2018 there was an incident with a prisoner in a cell. Custodial Manager (CM) Motum, the claimant's line manager, was involved. A prisoner had been discovered with a mobile phone in his cell and a struggle had then developed between the prisoner and two prison officers. CM Motum went to assist. On balance, whilst we did not find this an entirely easy issue to resolve, we prefer the account of events contained in the use of force form filled in by CM Motum shortly after the incident, page 171, to the account of events provided by the claimant. Accordingly, we find that as CM Motum entered the cell a struggle had already developed between the prisoner and Officers Larsen and McDonald. The prisoner was offering substantial resistance and CM Motum quickly took control of the prisoner's left arm. There was an initial struggle for about 30 seconds to 1 minute with the prisoner at first partially on his bed before being moved to the floor in order to better control the situation. The prisoner continued to resist and make threats. CM Motum kept hold of the prisoner's left arm and was eventually able to put it into a secure lock whilst his colleagues applied secure locks to the prisoner also. The prisoner was then removed from the cell. We do not, therefore, find that CM Motum knelt on the prisoner's back or grabbed him by the neck during the incident.

5.8 We rejected the claimant's account for the following reasons. The claimant initially told us in evidence that what she saw going on in the cell was CM Motum kneeling on the prisoner's back whilst the prisoner was lying face down on the bed with two other officers, restraining one arm each, and another officer restraining the prisoner's legs. However, later on in evidence her account of the incident changed. She stated that the prisoner was kneeling down on the floor whilst leaning on the bed and CM Motum had grabbed his neck. We considered that this inconsistency fundamentally undermined the claimant's account of events.

5.9 That said, we infer and find that the claimant was quite shocked by what she saw (it was her first "real life" control and restraint incident), the incident remained in her mind and over time it gradually became more serious than it actually was. We make this finding not only because this this was the claimant's first experience of a control and restraint incident, but also because of the persistence with which the claimant later made reference to what she termed the "cruel control and restraint" on the part of CM Motum. What we find, therefore, is that over time the claimant convinced herself that the incident had involved some inappropriate behaviour on CM Motum's part.

Asserted Protected disclosure 1

5.10 It was the claimant's case that, one or two days later, she verbally reported this incident to Governor O'Neill. Governor O'Neill's evidence, as set out in his witness statement, was that he "could not remember" this conversation. However, he clarified in cross examination that what he meant by this was that in his belief the conversation did not take place. We prefer the evidence of Governor O'Neill for the following reasons. We have found that the incident as described by the claimant did not occur, see above, and it is unlikely that the claimant would have had a conversation with Governor O'Neill about CM Motum kneeling on the prisoner's back that day when that did not happen. We took into account also that the claimant was never able to tell us exactly what it was that she said to Governor O'Neill, which undermined her credibility on this issue. Finally, we took into account that in an email the claimant sent a few months later the claimant referred to this alleged incident and said that she took no action about it at the time, see paragraph 5.42 below. That, clearly, is completely inconsistent with the claimant having reported it to Governor O'Neill at the time.

Concerns about the claimant are raised

5.11 In the weeks that followed the claimant starting her operational duties a number of members of staff made requests to management not to work with the claimant, complaining that they did not feel safe working alongside her. Concerns were also raised by the local Prison Officers Association (POA) who reported to the respondent that members were complaining that they felt unsafe working alongside the claimant. The POA approached Governor West directly twice about this. Governor West acknowledged that there were concerns with the claimant but pointed out that he had a duty to support and train her and he said that it was not appropriate for the POA to take the stance that they would not work with the claimant. He reassured the POA that the claimant would be given support to improve.

5.12 Around late November/early December 2018 CM Motum, who as set out above was then the claimant's line manager, referred the claimant to occupational health because at a review meeting the claimant had told CM Motum that she had dyslexia and was being treated for anxiety and depression. Occupational Health produced a report dated 17 December 2018, pages 233-235. It was stated in this report that the claimant had been diagnosed with anxiety and depression in 2014 and had been on medication for this continually since then, page 233. It was said that she had also taken part in many types of talking therapies and that her medication was managing things well and her condition was stable. It was stated that the claimant was fit to remain at work on full duties and no adjustments were needed, page 233. It was stated that the claimant had said she was dyslexic and struggled with completing paperwork and would benefit from more time to do this, as well as instructions being given in a clear and simple manner. The occupational health advisor opined that the claimant's dyslexia, anxiety and depression were likely to be considered to be a disability.

5.13 On 16 December 2018 Ms Stephanie Morrow, the G wing Custodial Manager, emailed Mr Motum as well as the prison's deputy governor, Jasmine Steadman, and the prison's governor, Ian West, complaining about the claimant, pages 227 – 228. She stated that she was raising concerns regarding security, professional standards and misconduct on the claimant's part. She stated that the claimant was carrying out inadequate checks on prisoners, and gave an example of this. She stated that the claimant's supervision of prisoners on association was inadequate and again gave an example of this. She reported that she had been told that the claimant had come into work on a rest day to speak to prisoners. She stated that the claimant had a disturbing attitude towards the offence of rape alleging that the claimant had said that all women are evil and rapists are only rapists if they are serial rapists. She reported that on 15 December 2018 the claimant had made inappropriate contact with a prisoner, by patting him. Ms Morrow described the claimant as lacking in awareness of "security matters/risk of hostage/leaving other staff vulnerable". She stated that the claimant had not understood or taken on board advice on boundaries with male prisoners, she reported that the claimant had said white staff did not know how to speak to black people (although she described that as an unsubstantiated rumour) and she ended her email stating that there was a risk to the claimant's own personal safety and those around her.

5.14 By this point in time corruption prevention intelligence reports were also being filed by colleagues about the claimant and the respondent started to compile a log of these, page 1500. The incidents reported included that on 10 November 2018 the claimant had locked two prisoners in one cell despite being told not to do that, that on 11 December 2018

she had spent a lot of time with a prisoner at his cell door, that on 14 December 2018 she had spent a lot of time with a prisoner and disclosed sensitive personal information about herself to prisoners, that on 15 December she brought a sandwich in to work and attempted to give it to a prisoner and, also on 15 December 2018, that she had grabbed a prisoner's shoulder and held his hand whilst rubbing his back.

The first (informal) Performance Management meeting

5.15 Deputy Governor Steadman and CM Motum decided to hold an informal performance review meeting with the claimant. During this meeting the claimant was advised to ensure that personal boundaries with prisoners were not crossed and that professionalism was maintained at all times, page 238. She was told that physical contact with prisoners, such as patting or stroking them, was not appropriate and she was also told it was not appropriate to disclose personal information about herself. She was told that it was not appropriate to give prisoners food which she had bought herself and she was told that there had been a large number of intelligence reports made about her and Deputy Governor Steadman expected to see a reduction in the number of reports, page 238.

5.16 Deputy Governor Steadman acknowledged that the claimant was dyslexic and had asked for additional time to complete paperwork and she said that CM Motum would look into obtaining Dragon dictation software to assist the claimant. This was, in fact, put in place by the respondent on 6 January 2019, page 232.

5.17 On 19 December 2018 Deputy Governor Steadman wrote to the claimant to record what had been discussed with her during the meeting on 17 December, page 238.

Complaint 21 January 2019

5.18 A written complaint about the claimant was made by Ms Lesley Foster on 21 January 2019, pages 319 - 320. We do not know Ms Foster's role other than that she worked on G wing. Ms Foster complained that she had had to complete several incident reports due to the claimant's conduct on the wing and failure to carry out her duties and she asserted that the claimant was compromising her safety and the safety of other staff. She stated that she was not on her own and other staff on the wing felt the same. Ms Foster stated that if the claimant was staying on G Wing she wished to be moved.

The incidents on 25 January 2019

5.19 On 25 January 2019 there were two incidents whilst the claimant was on duty which the respondent considered to be “key compromise incidents”. This term refers to any incident where a prison officers keys might be put at risk. The claimant was present during both incidents. The respondent investigated the first incident and decided there was insufficient evidence to take action against the claimant, or indeed anyone else who was involved in, or witnessed, that incident.

5.20 The second incident started with the claimant unlocking the cell door of a prisoner, despite having been instructed not to unlock the door. This led to the prisoner running out of his cell and assaulting a prison officer, grabbing him around his neck and trying to pull him to the floor whilst attempting to take his keys off him. Other prisoners then accessed the safety netting leading to a loss of control and a period of serious disorder. Negotiators had to be called in and the incident took many hours to resolve, page 489.

5.21 Incidents of this nature are viewed extremely seriously by the respondent. If a prisoner managed to take a set of keys from an officer this would give the prisoner the capability to unlock every prison cell, door and gate within the prison.

5.22 Deputy Governor Steadman decided that this second incident required a disciplinary investigation and when Governor West was informed of this he decided to place the claimant on restricted duties pending the outcome of the investigation. He did this because he considered that there was an emerging pattern of concerns relating to the claimant and a period away from operational duties was required for her own safety as well as that of others. The claimant was informed of this on 28 January 2019, pages 361 - 362. The claimant was moved to the Offender Management Unit, which is located in the prison grounds.

5.23 The disciplinary investigation was commissioned on 29 January 2019, page 341, and Governor Cope was appointed to investigate. The investigation was originally due to be completed by 8 March 2019, pages 500 and 502. This timescale was extended until 13 March 2019 because changes to the investigation terms of reference were made, pages 500 to 503. A further extension was made until 20 March 2019 because of annual leave, pages 504 and 505. Mr Cope interviewed the claimant on 4 March 2019 and he also carried out interviews with 2 other officers, page 495.

Stage 1 performance management meeting

5.24 Entirely separately to the disciplinary investigation the claimant attended a stage one performance management meeting on 12 February 2019, pages 377 – 382, which was conducted by Head of Residence, Mr

Chris O'Neill. Mr Overton was also present and the claimant was supported by a colleague, Ms Coultas. This was the claimant's first formal performance meeting. There was a review of what had been discussed at the previous meeting. Amongst other matters the claimant acknowledged that it was inappropriate for prisoners to call her auntie and she acknowledged that she should not be seen to be spending too long talking to prisoners at their cell doors. It was suggested to the claimant that she should be concentrating on the basics of "jail craft" such as locking and unlocking doors, patrols and observations before taking on discussions with the prisoners. The claimant stated this was something she had now taken on board and she said that she was spending less time with prisoners. She was asked about a specific incident on 21 January 2019 when she had been told not to unlock prisoners during serving of food but she had allowed prisoners out who were then passing the food amongst themselves. She stated that she was asked by a prisoner if he could just hand something to another prisoner and she did not see anything wrong with this at the time as it was only packets of rice. She was asked if she had ever shared personal information with prisoners and she admitted that she had, acknowledging this was inappropriate, page 380. There was a discussion about the risk of prisoners conditioning the claimant, for example by learning personal information about her or asking her to do small things for them, such as fetching them food, which, it was explained, could then escalate into more significant things. The claimant acknowledged this. It was acknowledged that there had been no further reports of inappropriate physical contact between the claimant and prisoners but Mr O'Neill told the claimant that the other objectives had not been achieved, pages 380-381.

First Performance warning

5.25 The claimant was informed by Mr O'Neill at the end of the meeting that he had decided to issue her with a first written warning in respect of her performance. She was not informed verbally of her right to appeal. A letter was prepared by the respondent confirming the outcome of the meeting and informing the claimant of her right to appeal. This letter was dated 12 February 2019, pages 373-374, but on balance we accept the claimant's evidence and find that she did not receive a copy of this letter until around the end of April 2019. We do so because the claimant sent an email on 23 April 2019 to the respondent saying she had yet to receive the written warning and she sent a further email about this on 7 May, page 668. The claimant was informed in this letter that once she had returned to wing based duties following the conclusion of the disciplinary investigation her performance would be reviewed over a four-week period. She was informed that she would be set specific targets during this period and would have weekly review meetings. She was informed of her right to appeal against this decision.

5.26 The claimant did not appeal the warning either after the performance review meeting, at which she had been informed verbally that she was being issued with a warning, or immediately after she received a copy of the letter. The claimant had been sent a copy of the poor performance policy with the letter inviting her to attend the meeting, page 637, and accordingly we think it more likely than not that the claimant was aware that she had a right to appeal any warning before the meeting took place and certainly was aware of this before she received the letter confirming the outcome of the meeting.

5.27 The claimant was then off sick until 18 February 2019. As set out above, an investigatory interview into the second key compromise incident was carried out with the claimant on 4 March 2019.

Claimant returns to operational duties

5.28 On 25 March 2019 the claimant was returned to operational duties from the Offender Management Unit, albeit she was not returned to G wing. She was moved to B wing to give her a fresh start. It was at this point, therefore, that the performance review period started following the decision made at the stage one performance management meeting in February 2019. However by this point a 6 week monitoring period had been decided upon, not 4 weeks as was initially discussed with the claimant, meaning that the review period was due to end on 3 May 2019. This was set out in an action plan that was drafted for the claimant, pages 429 - 430, and it was also confirmed that the first 2 weeks of the 6 week period would be spent with the claimant shadowing the staff on B wing, as opposed to carrying out operational duties herself, page 429.

Invitation to disciplinary hearing

5.29 The investigation report into the key compromise incident which had taken place on 25 January was finalised on 20 March, page 496, and forwarded to Deputy Governor Steadman. On 26 March 2019 Deputy Governor Steadman wrote to the claimant inviting her to attend a disciplinary hearing in relation to this incident, pages 535-536. The claimant was informed in the letter that if she accepted the allegations were true and did not wish to contest them she could opt to have her case considered under the fast track process. She was informed this would involve being invited to a hearing to discuss the findings of the investigation report and to enable the claimant to present mitigating evidence. Alternatively, the claimant was given the opportunity of fully contesting the allegations at a disciplinary hearing. The claimant was further informed that following either the full disciplinary hearing or the fast track hearing the options available to the respondent were to take no

further action, to take informal action or to take formal action up to and including a written disciplinary warning. The claimant was asked to inform the respondent by no later than 9 April 2019 whether she wished to opt for the fast track process or a full disciplinary hearing.

The first stage sickness warning

5.30 As set out above, the claimant had been off sick between 13 February and 18 February 2019, which along with a period of sickness absence in October 2018 triggered a first stage sickness warning under the respondent's absence policy. This was issued to the claimant on 1 April 2019, pages 553 – 554. The claimant did not appeal this warning, although she did have the right to do so, page 1684, paragraph 2.5.2.

Further performance concerns about the claimant

5.31 On 28 March further concerns about the claimant had been reported by email by Governor O'Neill. These included that the claimant had to be stopped from opening a cell door twice, on one occasion to allow a prisoner to pass a radio to another prisoner, page 560. On 4 April 2019 Deputy Governor Steadman emailed Mr Overton asking him to hold another meeting with the claimant to advise her that her case would be referred to the Governor as there were concerns about her suitability for the role, page 558.

5.32 On 14 April 2019 Custodial Manager Overton (the claimant's then line manager) raised numerous concerns about security breaches on the part of the claimant, as well as performance issues, in an email which he sent to Governor West and Deputy Governor Steadman pages 607 – 610. These included that she had taken a set of security keys out of the prison on 11 March 2019 and that she had failed to complete the necessary paperwork in relation to a vulnerable self-harm/suicidal prisoner. He reported that there had been a further key compromise incident on 2 April 2019 when the claimant had withdrawn her keys from the TRAKA system but then carried them unsecured into the prison (they should have been secured to her keychain), and that she did not have her keychain with her. He also reported that the claimant had failed to carry out control and restraint effectively on a prisoner leaving a fellow officer unsupported during a confrontation. He reported that on 13 April 2019 she had ignored his advice and unlocked a prisoner for unauthorised cleaning duties and he reported that in his belief the claimant was conditioned by this prisoner as she was always at his door and going out of her way to do his errands. He reported that a prisoner continued to refer to the claimant as auntie and he said that when he asked the claimant why the prisoner used that term the claimant replied that it was a mark of respect. He reported that on 13 April the claimant had left an office door insecure and open and when

challenged about it she claimed that she had left the door open for CM Overton, which was not true. He reported that on the same day food for the prisoners on the wing had run out at lunchtime. He said that when he asked the servers what was going on they had told him that they were instructed by the claimant to give out larger food portions to prisoners as she was not happy with the portion size, and this had led to them running out of food. He reported that whilst he was sorting this out he noticed the claimant collecting cakes and bread and taking them to a prisoner who had already had food.

Claimant placed on restricted duties for a second time

5.33 Governor West decided that, once again, the claimant should be placed on restricted duties whilst these matters were investigated. He held a meeting with the claimant on 18 April 2019 to inform her of this and on 24 April, after a period of annual leave, he emailed the claimant a written summary of their meeting, pages 642 - 643.

Invitation to second performance review meeting

5.34 Mr Overton also wrote to the claimant on 18 April 2019 inviting her to attend a poor performance meeting, pages 636-637. He referred to the stage one poor performance review meeting that had taken place on 12 February and the review period which was due to come to an end on 3 May 2019. He noted that due to operational concerns the claimant had now been placed on restricted duties and he said that he was, therefore, moving her to the next stage of the managing poor performance process. He proposed a meeting with her on 2 May 2019 to discuss her performance at work and he stated that he wanted to discuss with her in particular; professional boundaries with prisoners, seeking advice and support, control of prisoners, incident management, professional standards, following instructions and security awareness. He informed the claimant that the meeting might result in a final written warning and that she had the right to be accompanied by a trade union representative.

Stage 2: Performance review meeting 8 May 2019

5.35 In fact the stage two performance review meeting to discuss these concerns with the claimant took place on 8 May 2019, pages 694 – 699. This was because, having agreed to attend the meeting on 2 May 2019, the claimant had subsequently booked annual leave for this date. Deputy Governor Steadman and CM Overton conducted the meeting for the respondent. The claimant had support from a union representative, Mr Seagar. At the very start of the hearing Mr Seagar stated that the claimant was refusing to attend the meeting on the grounds that stage one of the process was being disputed and stage two could not therefore proceed,

page 694. This situation was brought to an end by Deputy Governor Steadman ordering the claimant to attend the meeting.

5.36 It was explained to the claimant at the start that the meeting was a stage two performance review meeting. The claimant requested that the meeting be recorded on the basis that she disputed the minutes from the last performance review meeting as, she said, her explanation on certain points was not recorded in the minutes and additional parts had been added in. The claimant indicated that she wanted to appeal the first performance review meeting and it was pointed out to her that under the process there is 10 days in which to appeal. The claimant was asked why she had agreed to attend the hearing on 2 May and then booked annual leave and she stated that this was because she had requested Mr Seagar to be present but had not had a response to her emails.

5.37 The issues that had been raised by CM Overton were then discussed with the claimant. The claimant was asked about taking a set of keys out of the prison on 11 March and she stated that she knew keys were not to leave the establishment and she understood that this was a serious issue. She stated that due to the stress of the investigation at this time she was struggling with her mental health. She accepted that there had been a second key compromise incident on 2 April 2019 when she drew keys from the TRAKA system and failed to secure them, but stated that this was down to being stressed about the investigation. There was discussion about reports of an incident on 7 May 2019, when it had been reported that a contractor had been found in the yard of the prison having been left on their own by the claimant, who was his escort. The claimant admitted that she had left the contractor unattended but stated she was not aware she had to stay with him at all times. She was asked about a matter which had come to light that morning, which was that a staff member had the claimant's computer password. The claimant confirmed this was the case stating that she had given the colleague her password so that she could access her emails while she (the claimant) was on leave. The claimant denied that she had ever been called "auntie" whilst working on B wing. She also denied that she had unlocked a prisoner from his cell for unauthorised cleaning duties despite having been told not to do so. She stated that she had been told she could use anyone for cleaning duties and that as she knew this particular prisoner from G wing she felt comfortable with him. She accepted that she had taken extra food to a prisoner but stated that this was because the servery workers were bullying him and not giving him enough food. It was pointed out to the claimant that the servery workers used equipment to measure out food portions.

5.38 CM Overton informed the claimant that there had been no improvement in her performance and that it continued to be a major

concern. It was explained to the claimant that her case would go to Governor West for him to take a decision as to her suitability for the role of prison officer.

5.39 At some point between 8 May and 13 May, we were not told exactly when, (the letter was not in the bundle), Governor West wrote to the claimant inviting her to attend a disciplinary hearing with him on 28 May 2019. This was in respect of the incident that had occurred on 25 January 2019. The claimant informed him that she was unable to attend this hearing and so on 13 May Governor West wrote again to the claimant inviting her to attend a disciplinary hearing with him on 31 May, page 758.

Asserted protected disclosure 2

5.40 We accept the claimant's evidence and find that on 16 May 2019 she sent an email to Lorraine Howes who works for the respondent's Corruption, Crime and Policing Unit. The email of 16 May was not in the bundle of documents but we accept the claimant's evidence not just because it was conceded by the respondent that the email had been sent but also because when the claimant emailed Ms Howes again on 11 September 2019, for which see more below, she referred to having emailed Ms Howes in May 2019, page 993. The claimant's witness statement, paragraph 5, only dealt with what was written in this email in relatively broad terms but we accept the claimant's evidence and find that she wrote that there was, at Swinfen Hall, unnecessary and excessive restraining of prisoners, occasions where prisoners were deprived of their entitlements such as showers, food and phone calls, unnecessary and excessive punishment of prisoners, officers using prisoners to physically assault other prisoners, officers physically assaulting prisoners in their cells and officers encouraging and promoting violence amongst prisoners. We accept the claimant's evidence that this is what she wrote in the email of 16 May because this was conceded by the respondent and because some corroboration for the claimant's evidence was provided by the subsequent email to Ms Howes in which the claimant stated that she had written to Ms Howes in May "regarding some of the atrocities that were going on", see below. We accept the evidence of Governor West and find that he did not know about this email. We do so because the claimant did not suggest in her evidence that this email was copied to Governor West. It was not put to Governor West in cross examination that he knew about this email, and Governor West, in answer to a question from the tribunal, denied that he knew about it.

5.41 In May 2019 there was email correspondence between the claimant and Deputy Governor Steadman as to what had been discussed during the meeting in December 2018. The claimant denied that there had been a discussion about being referred to as auntie and she said that the

conversation was about the fact that it had been reported that she had patted some of the prisoners and this was unprofessional. CM Motum was subsequently asked whether he recollected a discussion about the claimant being called auntie.

Asserted Protected disclosure 3

5.42 This led, on the 23 May 2019, to the claimant sending an email to Deputy Governor Steadman, page 804, in which she said she would not rely on Mr Motum's testimony because he had wrongly accused her of keeping her hands in her pockets during a fight between two prisoners on G wing and had also wrongly accused her of leaving a cell door open on G wing on her first live day. She further stated that all these accusations were due to his cruel C and R on a prisoner when he was found with a phone in his cell. She stated that if Ms Steadman needed the date and time of this incident she would be more than happy to help. She further stated that she would report the allegation the following day when she had the information and that she took no action at the time because this was a member of staff with years of experience who should know their role and responsibilities. On balance, we accept the evidence of Governor West and find that he did not know about this email. It was not put to Governor West in cross examination that he did know about the email, and given that the claimant's comments were made in the context of the claimant suggesting that CM Motum's recollection of what was discussed during the first performance meeting in December 2018 might not have been accurate, and the claimant said in her email that she would be reporting this incident the following day, there would have been no pressing reason for Ms Steadman to pass this information on.

Fast track disciplinary hearing 30 May 2019

5.43 The disciplinary hearing with Governor West took place on 30 May, pages 821 - 829. Just before the hearing was due to start Mr Willetts, the trade union representative assisting the claimant, informed Mr West that the claimant wished to proceed via the fast track process as opposed to a contested disciplinary hearing. As set out above this meant that the claimant was not contesting the disciplinary charge. Accordingly, this is the basis on which this hearing proceeded. During the hearing, pages 821 - 826, the claimant accepted that she had unlocked a prisoner on 25 January 2019 contrary to instructions. The claimant stated that her mental health had no effect on her performance as a prison officer but the process of the investigation had contributed to errors that she had made. Governor West said that it was crucial that going forward the claimant learn from the mistakes that she had made and the claimant acknowledged this. At the end of the meeting Governor West informed the

claimant that he was going to issue her with written formal advice and guidance which would be on her record for a 12 month period.

5.44 This outcome was confirmed to the claimant in writing on 30 May 2019, pages 819 - 820. In his letter Governor West confirmed that he found the allegation proven that the claimant had, contrary to direct instructions, unlocked a prisoner who had then attacked another prison officer and attempted to forcibly remove his security keys following which a number of prisoners had then accessed the landing netting leading to concerted indiscipline and the prison being put into command mode. He set out that this was action or negligence in the course of duty which could have caused, or caused, damage or injury to the service or individuals.

5.45 He confirmed in the letter that the written formal advice and guidance would remain on the claimant's record for 12 months and that the claimant was required to adhere to reasonable instructions given to her by any manager. He also stated that the claimant should undertake conditioning, corruption and manipulation training within the next 3 months. He set out that the claimant's line manager would appoint a mentor for the claimant and that she should meet with this person weekly. The claimant was informed of her right to appeal. The claimant did not appeal this decision.

Incident 14 June 2019

5.46 On 14 June there was a serious incident at the prison involving two prisoners taking another prisoner hostage and attacking him. The prison was placed in command mode (i.e. lockdown) whilst the incident was dealt with. Just as the incident started a number of members of the prison's administrative staff, who are white, were allowed to leave the prison. The claimant also attempted to leave at the end of her shift and she was told that she could not do so. She telephoned Governor West, who at the time was in the command centre managing the incident, and asked to be allowed to leave the prison. He refused to allow her to leave because during a lockdown all operational grade staff are required to stay in the prison. The claimant then entered the command suite, interrupting Governor West, and demanded to be allowed to go. Governor West responded that this was not the right time or place to discuss the matter and he asked her to leave. She refused. Others intervened and asked the claimant to leave. She refused. Eventually Teresa Wright, the respondent's communications officer, was able to usher the claimant out of the command suite and the claimant could then be heard shouting "he's a racist". Ms Wright at this point decided to allow the claimant to leave the prison because she did not think the claimant was in a fit state to provide any operational assistance if needed. We prefer the respondent's account of events because Governor West's verbal evidence in relation to this

incident was strikingly detailed and because, just a few days after the incident, Governor West sent an email to CM Overton asking him to discuss with the claimant how a prison functions in command mode, especially in respect of serious incidents, and he went on to comment that he considered that the claimant's behaviours on Friday were likely attributable to a complete lack of understanding of incident management procedures, page 902. This email, therefore, corroborated the respondent's version of events.

5.47 Governor West decided not to take formal disciplinary action against the claimant in respect of this incident but, as set out above, he did ask the claimant's then line manager, CM Overton to meet with the claimant to discuss it, page 902.

Extension to claimant's probationary period

5.48 The claimant's probationary period was, by this point, due to come to an end on 17 June 2019. It had originally been due to end in October, as set out above, and no evidence was led by the respondent as to why the probationary period had been shortened. Accordingly, we cannot make any findings about this. On 17 June Governor West wrote to the claimant noting that she was currently subject to poor performance procedures which were yet to be completed. Governor West informed the claimant that he was therefore extending her probationary period by 3 months from the date of the letter and that if her performance, attendance or conduct was not satisfactory during this period employment might be terminated, page 905. This meant that the claimant's probationary period was now due to end on 17 September 2019.

Probation review meeting 19 June 2019

5.49 The claimant's probation review meeting took place with Governor West on 19 June and the claimant's probation was discussed in detail, pages 915 - 918. The claimant stated that she was not going to try to defend her actions. She stated that it was better before she was placed on restricted duties. She said that she had been diagnosed with dyslexia and when asked by Governor West whether she was using the Dragon software she stated she was not as she did not need it, page 916. Governor West told the claimant that the amount of incidents attributed to her were wholly disproportionate for any member of staff and that they were working in a high risk environment where the repercussions could be catastrophic.

5.50 Governor West acknowledged that the claimant had not had an SPDR opened by her first line manager, CM Motum, and that this was a procedural error. This also meant that the claimant had not received the

required monthly reviews. He told the claimant that if these issues had not arisen he would have made a decision to terminate the claimant's employment that day but because process had not been followed he had decided to extend the claimant's probation by 3 months in order to give her an opportunity to demonstrate that she was a good officer.

5.51 Governor West asked the claimant where within the prison she felt she would be best placed to work. On balance, we accept the respondent's evidence and find that the claimant indicated that she could not return to G Wing and did not want to work on F wing. After discussion it was agreed that the claimant should be moved to J wing and that she would be managed by CM Madeley. Before us the claimant disputed that she had said she did not want to work on G or F wing and disputed that it was agreed she would move to J wing but we considered that the notes of the interview, which recorded that this was said, were likely to be accurate. There was a note taker present to take notes and the notes were detailed as to what was discussed. It was made clear to the claimant that if matters did not improve her employment would be terminated.

The claimant resumes operational duties

5.52 On 19 July 2019 the claimant resumed operational duties, this time on J wing (the third wing that the claimant had worked on, having worked on B wing and G wing previously).

Asserted protected disclosure four

5.53 In late August 2019 there was an emergency meeting held at the prison which prison officers, Governors, Governor West and two members of the Independent Monitoring Board attended. The Independent Monitoring Board is a statutory body set up under the Prisons Act 1952 which organises for volunteers to have a presence in prisons. About 300 people were present in total at the meeting. Governor West called the meeting because a prison officer had been stabbed by a prisoner. We do not find that during the course of this meeting the claimant said to Governor West that the reason prisoners were resorting to hurting officers was because of anger as a result of ill treatment from prison officers. Nor do we find that she said that prisoners spent most of their time with prison officers and prison officers should be role models and that if prisoners were not being deprived of their entitlements or mistreated they would not resort to violence. We prefer the evidence of Governor West that none of this was said. We do so because we considered it to be very likely, as Governor West himself told us, that had this been said he would have remembered "incendiary" comments of this nature, which he did not. Moreover we considered it inherently unlikely that the claimant would have made comments of this nature at what was, effectively, an all staff

meeting. Additionally, the context of the meeting is such that if comments of this nature had been made then, once again, Governor West would have remembered these comments and done something in response, and he did not.

5.54 On 4 September 2019 the claimant filed a Mercury intelligence report in which she reported that CM Morrow and CM Robicano had left a J wing door unlocked, page 971. It was accepted that no formal disciplinary action was taken in respect of this incident.

Incident 6 September 2019

5.55 On 6 September 2019 two prisoners reported that the staff office door on J wing had been left unlocked and they had gone into the office and it was empty. A review of the CCTV footage by the respondent (which covered the door to the office but not the interior of the office) showed that the claimant entered the office at 11:16 AM and that it was unlocked when she did so. Over the minutes that followed five prison officers came out of the office and two prisoners. At 11.24AM a prisoner entered the office and about 20 seconds later the claimant left the office leaving the prisoner in the office. He left about 10 seconds later and a matter of seconds after that the two prisoners who had reported the office as insecure and empty entered the office together, leaving again within a matter of seconds and approaching prison officers on the landing.

5.56 This was considered to be a serious breach of security by the respondent because the office contained confidential and sensitive staff and prisoner information. That day Deputy Governor Steadman wrote to the claimant placing her on what she termed “suspension without prejudice”, pages 980 - 981. The claimant was informed in the letter that the allegation to be investigated was that she had left the J wing office door open with a prisoner unsupervised. She was informed that a decision had been made to suspend the claimant rather than place her on alternative duties because there had been multiple security breaches. Of course, at the point when she was suspended, the claimant was just 11 days away from the end of her extended probationary review period.

5.57 On 11 September 2019 Deputy Governor Steadman commissioned a disciplinary investigation into the above incident, pages 989 – 991

Asserted protected disclosure 5

5.58 It was the claimant’s case that on 6 September 2019 she spoke to two members of the Independent Monitoring Board when they were present on the wing to carry out interviews with prisoners. It was not disputed, as set out above, that the Independent monitoring Board is

separate from the respondent. The claimant stated in her witness statement that she reported the ill-treatment of prisoners by officers to the IMB, see paragraph 8 of her witness statement. Based on this evidence we are prepared to find, on balance, that the claimant said to the two IMB members that there was mistreatment of prisoners by officers. However, we can make no more findings as to what it was, if anything, that the claimant said because the claimant provided no further evidence on this point.

Asserted protected disclosure 6

5.59 On 11 September 2019 the claimant emailed Ms Lorraine Howes, who as set out above was part of the respondent's Corruption, Crime and Policing Unit, page 993. She explained that she was a prison officer in Swinfen Hall prison. She wrote in her email that she had contacted Ms Howes sometime in May "regarding some atrocities going on (e.g. bullying of prisoners, discrimination, using prisoners to bully other prisoners) in the establishment". She stated that she was "more than happy to provide evidence of these wrongdoings" as things were getting out of hand. Ms Howes responded that she had forwarded the claimant's email onto a colleague who was regional lead for counter corruption at Swinfen Hall.

Asserted protected disclosure 7

5.60 On 12 September 2019 the claimant emailed Mr Khan, Assurance and Intelligence Manager, Security and Intelligence Unit**.** She wrote, page 992, that she was a prison officer in Swinfen Hall prison and that she had a lot of concerns to raise about the activity of some prison officers, the CMs, the governors, the deputy governor and the governing governor in the establishment. She stated that she had been challenging these malpractices which has subjected her (sic) to institutional discrimination and bullying in the establishment. She stated that she was more than happy to provide evidence of these malpractices. Mr Khan emailed the claimant in response saying that he thought she had the wrong person as he had nothing to do with HMP Swinfen Hall. Mr Khan followed up on this email again on 19 September querying why she had sent the email to him and suggesting that she try to contact the Prison Group Directors (PGD) office to raise her concerns, page 1001. Mr Khan subsequently forwarded the claimant's email to the PGD office himself, page 1005.

Asserted protected disclosure 8

5.61 On 14 September 2019 the claimant emailed Mr Hammill, page 994. He is a National Offender Management Non Executive Director and the nominated person for allegations of widespread and systemic abuse of prisoners. She again explained that she was a prison officer at Swinfen

Hall prison. She stated that she had a lot of concerns about the activities of staff in the establishment which she had been challenging and subjected her to institutional racial discrimination and victimisation (sic). In this email the claimant then went on to give examples of incidents that she said she had witnessed. For example she stated that on 27 August 2019 at approximately 10:30 there was violence between prisoners which she had stopped by shoving a prisoner and challenging him. She stated that she was shocked to find that CM Morrow and others who had witnessed the incident agreed that the prisoner should be promoted to enhanced prisoner status and that she then challenged this decision. She also explained that she had read in the observation book about an incident where a prisoner was stabbed with a pin on his back about 70 times by another prisoner for being rude to a prison officer. She stated that prisoners were deprived of entitlements like showers and phone calls and that prisoners who were servers on the wing were encouraged to punish vulnerable prisoners due to the nature of the offence they had committed by serving them a very small portion of food. She stated that prisoners were unnecessarily punished, for example by keeping them on basic IEP for longer than was necessary. She alleged that she had witnessed her former line manager kneeling on a prisoner's back during a control and restraint situation in G wing. She stated that she had brought these matters to the attention of the CMs, the governors and the governing governor and because of this she had been subjected to institutional race discrimination and victimisation.

5.62 Mr Hammill emailed the claimant back asking if she had made a formal complaint to her line manager and if so what was the outcome, and he also asked the claimant to contact him to arrange a time to have a discussion. On 16 September the claimant emailed Mr Hammill to say that she had not yet made a formal complaint, page 997, and on 17 September Mr Hammill emailed the claimant again stating that it was very important that she follow the HMPS formal staff complaints process in the first instance and that it was only once this process was exhausted that he might be able to become involved, page 997.

Invitation to disciplinary investigation interview

5.63 On 20 September 2019 Ms Theresa Wright wrote to the claimant inviting her to attend an investigatory interview with her to take place on 27 September 2019. The claimant was informed that the purpose of the interview was to investigate an alleged incident, namely whether the claimant had left the office door on J wing open with a prisoner unsupervised on 6 September 2019, pages 1016 – 1017. The claimant was informed in the letter that once the investigation was finished Deputy Governor Steadman would make a decision as to what happened next, which could include taking no further action, taking informal action, dealing

with the matter through a formal performance procedure or holding a formal disciplinary hearing.

Claimant's grievance 20 September 2019

5.64 On 20 September 2019 the claimant raised a grievance, pages 1017-1023. She asserted that she was being "institutionally racially discriminated, bullied and victimised" by nine named individuals and some others whose name she could not remember. The named individuals included Governor West. She stated this was happening because she had refused to conform to the staff wrongdoings, for example bullying of prisoners and unnecessary and inappropriate use of force on prisoners. She stated that she was constantly accused of leaving cell doors open and leaving staff offices insecure and had been racially discriminated against by Governor West. She complained that she had been restricted from her duties twice for unjustifiable reasons and had been investigated for an error that other officers had made but not been investigated for. She stated that she was now suspended for an incident that did not happen. She stated that she had reported 4 officers who had left 2 gates on J wing insecure whilst prisoners were out on the landing but no action had been taken and that she had raised a concern about staff on J wing promoting a prisoner who is a bully. She stated that she was being treated like she was stupid and worthless because of her mental illness.

5.65 The claimant's grievance was received by the respondent on 23 September 2019, page 1048, meaning that under the respondent's grievance policy the respondent had until 13 October to meet with the claimant and until 4 November 2019 to provide a response, page 1048. On 16 October 2019 Mr Carl Hardwick, Governor of HMP Drake Hall, wrote to the claimant inviting her to attend a grievance hearing on 31 October 2019, pages 1056 – 1057. The claimant was unable to attend this hearing because she was attempting to arrange representation from the Prison Officers Association, who were not willing to represent her. Before us the claimant accepted that the delay in holding the grievance investigation meeting that then followed was because of the difficulties the claimant was encountering arranging representation. The meeting in fact took place on 17 December 2019.

5.66 On 22 September the claimant emailed Teresa Wright saying that she was not fit to attend the investigatory interview concerning the incident on 6 September and that she would forward a doctor's note. She also requested to see the CCTV footage of the incident before the interview, page 1036.

5.67 The claimant was referred to occupational health; we do not know exactly when, the referral was not in the bundle of documents. However,

in the afternoon of 23 September CM Madeley contacted occupational health to enquire if additional questions could be added to the referral, and he was told to email these, page 1039. CM Madeley emailed the additional questions that day, which included whether there were any reasons why it would not be suitable for the claimant to attend an investigatory interview and whether there was anything further that could be done to support her in attending such a meeting, page 1039.

5.68 On 25 September Ms Wright wrote to the claimant acknowledging that she had now been referred to occupational health and stating that she would await the outcome of this. She also stated that the CCTV footage would be available for the claimant to view at the interview, page 1036.

5.69 On 26 September 2019 the claimant submitted a sicknote which stated that she was not fit for work because of stress at work. She was signed off until 21 October 2019, page 1030.

5.70 It was confirmed to the claimant on 1 October 2019 that an occupational health appointment, which would be a telephone interview, been made for her for 4 October 2019, page 1481 and page 1038.

5.71 On 3 October the claimant requested that the CCTV footage relating to the incident on 6 September be copied and posted to her, pages 1041-1042. She was told by Ms Wright that this would not be possible and it would need to be viewed during the interview, page 1041.

5.72 The occupational health appointment on 4 October did not take place because the claimant failed to attend, page 1328, and it was then rearranged to 11 October 2019. Whilst the claimant spoke to occupational health on 11 October occupational health subsequently contacted the respondent to say that they were unable to produce a report because the consultation did not proceed as the claimant had informed them that the reason she had been given for the referral differed to those that occupational health had within the referral form itself. This led to a further occupational health appointment being made for the claimant on 31 October 2019, which the claimant was informed of on 18 October, page 1060. The respondent also queried with occupational health why they had not conducted the consultation on the 11 October, complaining that the claimant had now delayed potential probationary measures and a separate (disciplinary) investigation, page 1054.

5.73 The consultation with occupational health on 31 October 2019 did not go ahead. The respondent was informed by occupational health that it did not go ahead because when the practitioner called and spoke with the claimant she stated that the referral was pointless, page 1062.

5.74 Mr Madeley re-booked the occupational health appointment for 6 November 2019 and emailed the claimant to inform her of this, page 1065. He also informed the claimant that the respondent had been told that the previous appointment did not go ahead because the claimant had said it was pointless. The claimant emailed Mr Madeley on 1 November agreeing that she had said the appointment was pointless; she described the referral as “like beating a child and asking the child why he is crying”. She wrote that she was constantly bullied and racially discriminated against by “all of you” for carrying out her job within the rules and she stated she would only participate in a referral if the content of the referral letter corresponded with hers and that she would only respond to relevant questions, page 1065.

Extension to disciplinary investigation timescales

5.75 In the meantime, on 23 October Ms Wright, who had been holding off having the investigatory interview with the claimant pending occupational health advice, see above, emailed the claimant to say there would be an extension to the investigation into the incident on 6 September 2019 until 21 November 2019, pages 1082-1083. The claimant wrote back querying the reason for the extension and Ms Wright explained that she would still like to hear the claimant’s version of events in relation to the alleged incident and had therefore extended the original timeframe with the hope that this could take place, page 1082.

5.76 On 6 November Occupational Health spoke to the claimant. It was subsequently reported to the respondent that the claimant had raised concerns about the referral differing to the original referral, and Occupational Health stated that in their view a face to face assessment would be better, page 1070. On 19 November 2019 Ms Wright wrote again to the claimant inviting her to attend an investigatory interview on 25 November 2019, pages 1077 – 1079. The claimant was once again informed that the incident under investigation was that on 6 September she had left the J wing office open with a prisoner unsupervised. The claimant was once again informed that the possible outcomes following the investigation ranged from taking no further action to holding a formal disciplinary hearing. Ms Wright also confirmed to the claimant that she was aware a number of attempts had been made to refer her to occupational health without success and consequently she was still required to provide her version of events at interview, page 1081. The claimant confirmed that she would attend the investigatory interview, as long as it was in the conference centre and not the prison, and she also requested to be given a copy of the CCTV footage of the incident to keep, page 1080. Additionally, she asked if the investigatory interview would be recorded. Ms Wright confirmed by email to the claimant that the interview would take place in the conference centre, that the investigatory interview

would be recorded and that the transcript would be made available to the claimant. She also stated that the claimant would be able to view the CCTV footage during the interview but would not be able to take a copy of the footage to keep, page 1080.

Investigatory interview 25 November 2019

5.77 At the start of the interview the claimant confirmed that she was fit to attend the interview and that she was happy to proceed without union representation, pages 1084 - 1087. Ms Wright placed a disc into the recording equipment to record the interview and pressed record on the recording equipment but in fact, as it turned out, nothing was recorded on the disc.

5.78 Ms Wright then played the CCTV footage to the claimant. The claimant agreed that she entered the office at 11:16 AM and that it was unlocked when she did so. She agreed that over the minutes that followed five prison officers came out of the office and two prisoners. She agreed that at 11.24 AM a prisoner entered the office and about 20 seconds later she left the office leaving the prisoner in the office. He left about 10 seconds later and a matter of seconds after that 2 prisoners entered the office together. Ms Wright suggested to the claimant that as it could be seen that 5 prison officers had left the office before she did this would mean there was no member of staff left in the office at the point when she left. The claimant stated that she believed another prison officer, Mr Moppett-Beatlestone was also on J wing that morning and that he could have been in the office.

5.79 At this point in the interview Ms Wright noticed that the recording equipment had stopped and so she rebooted it and placed a new CD in the machine. Ms Wright and the claimant then continued to watch the remainder of the CCTV footage, which in total covered the period from 11:16 AM to 11:31 AM.

5.80 The claimant denied that she would have left a prisoner on his own in the office. She acknowledged that 5 prison officers could be seen leaving the office but she again stated that she believed that Officer Moppett-Beatlestone was on the wing that day. Ms Wright agreed to investigate this. The claimant repeated that she believed that Officer Moppett-Beatlestone had been in the office when she left it. The claimant also asked if it would be possible to see CCTV footage before the incident, from the time when the day staff came on duty, and after the incident to see who eventually locked the office door. Ms Wright agreed she would look into this.

Invitation to stage one grievance meeting

5.81 On 25 November 2019 Governor Hardwick wrote to the claimant inviting her to attend a grievance meeting to take place on 6 December 2019, pages 1008 – 1009. Governor Hardwick noted that the claimant had indicated a while earlier that she was unable to find a POA representative to come with her for the grievance meeting and he stated that as the respondent had not heard anything from the claimant since then and time was going on he would like to go ahead with the process. The claimant was informed of her right to be accompanied and she was told that Governor Hardwick would give his decision within 10 working days of the meeting. In fact, the meeting did not take place on 6 December, once again because the claimant could not find a trade union representative who was available who would represent her, page 1101. The meeting was rearranged to take place on 17 December 2019.

5.82 The grievance meeting duly took place on this date. At the start of the meeting the claimant acknowledged that Governor Hardwick had attempted to meet with her on a number of occasions but due to ongoing issues about the claimant not being supported by the POA their meeting had been delayed, page 1101.

Investigation report into incident on 6 September 2019

5.83 As part of her investigation Ms Wright held interviews with two of the prison officers who were on shift with the claimant and she had email correspondence with a third officer. She also interviewed the two prisoners who had reported the office as insecure and empty and she obtained the TRAKA print out for Officer Moppett-Beatlestone, which recorded the time that he had come on shift. This confirmed that he had started his shift after the incident had occurred. Ms Wright completed her investigation report on 19 December 2019, pages 1139 - 1146. She set out in her report that a prisoner could be seen to enter the office at 11.24.10, that the claimant could be seen to leave the office at 11.24.34, that the prisoner could be seen to leave the office 10 seconds later at 11.24.44 and that 11 seconds after that, at 11.24.55, two prisoners entered the office and then left the office and alerted three prison officers at 11.25.03. She noted that these two prisoners had confirmed in their interviews that when they entered the office at 11.24.55 the office was vacant, which is why they alerted staff. She concluded that as the claimant had left the office 19 seconds before the two prisoners had entered and they had confirmed nobody else was in the office it was reasonable to conclude that the claimant had left the office leaving the original prisoner unsupervised in it. This, she concluded, was a clear breach of security. She acknowledged that the claimant had suggested that Officer Moppett-Beatlestone had been in the office but she confirmed that the TRAKA report showed that he had not drawn his keys to the prison until 12:04 PM, forty minutes after the incident had taken

place. She concluded he could not, therefore, have been on J wing at the time of the incident. She recorded also in her report that interviews with the claimant had been put on hold whilst the respondent attempted to take occupational health advice. She recommended that the matter proceed to a disciplinary hearing.

Invitation to disciplinary hearing

5.84 On 31 December 2019 Ms Steadman wrote to the claimant, pages 1152 – 1153, informing her that she was required to attend a disciplinary hearing in relation to the allegation that there had been a breach of security and performance duties on 6 September 2019. The claimant was informed in the letter that if the allegations were true and the claimant did not wish to contest them at a formal disciplinary hearing then she could opt to have the case considered under the fast track process. The claimant was further informed that following either process the range of outcomes included taking formal action by giving her a disciplinary warning up to and including a final written warning. The claimant was informed of her right to be accompanied. The claimant was requested to inform the respondent by 14 January 2020 whether she wished to attend a full disciplinary hearing or opt for the fast track process. A copy of the investigation report was enclosed with the letter. The claimant had also been sent, by this time, under cover of a separate email a copy of the notes of the investigatory interview that took place with her on 25 November 2019, page 1150. The claimant subsequently made a number of changes to the interview notes.

5.85 The claimant responded to Deputy Governor Steadman by email dated 4 January, in which she stated that she had received the investigation report but there was missing evidence, namely a CD of the full CCTV footage for that morning, page 1160. The claimant did not, as the respondent had requested, make her choice as to whether she wished to attend a full disciplinary hearing or a fast track hearing. She emailed Ms Wright on 9 January asking for a copy of the CD and she emailed Ms Steadman again on 13 January asking for a CD of the CCTV and the recording of the investigation meeting, page 1165. Deputy Governor Steadman responded that she had arranged for a CD of the CCTV footage to be available for the claimant to collect, page 1166. Ms Wright responded to the claimant on 15 January, in relation to her request for a copy of the recording of the investigation meeting, pointing out that, as was set out in the investigatory interview notes, which had already been sent to the claimant, the recording had not worked, page 1168.

First stage grievance outcome

5.86 On 20 January 2020 the claimant was sent a copy of the first stage grievance outcome, which was that her grievance was rejected, page 1169.

Grievance appeal

5.87 On 20 January 2020 the claimant submitted an appeal against the grievance outcome, pages 1172-1176. She complained that she had been intimidated by Governor Hardwick and undermined by the way he had handled her grievance. She complained that she had been ridiculed by him and she felt he was biased. She stated that she felt unfairly treated and considered stupid by him and that as a result of this she was not able to focus enough to give her evidence. She stated that she would like all the individuals who she had mentioned in her grievance to be investigated for gross misconduct, page 1172.

5.88 The respondent received the grievance appeal on 23 January 2020. As we will set out below no action was taken in respect of this appeal for many months.

Invitation to disciplinary hearing

5.89 By the end of January the claimant had still not indicated to the respondent whether she wished to attend a full disciplinary hearing or a fast track disciplinary hearing in relation to the incident on 6 September 2019. On 31 January 2020 Governor West wrote to the claimant pointing out that no response had been received from her in this regard and stating that in order to progress with bringing the matter to a conclusion he had arranged for a disciplinary hearing to take place on 28 February 2020, pages 1191 -1192. The claimant was informed that at the hearing the evidence would be presented and she would have an opportunity to present her case. The claimant was informed that the respondent would be calling Ms Wright as a witness and she was asked to inform the respondent straightaway if there was any reason why she could not attend the hearing. In the absence of having heard from the claimant the respondent, therefore, set this up as a full disciplinary hearing as opposed to a fast track hearing.

5.90 The claimant responded to this letter on 10 February 2020, pages 1209 – 1210. She stated that she would not be attending the disciplinary hearing scheduled for 28 February 2020 because the respondent was withholding the CD of the CCTV footage of the alleged incident on 6 September and was withholding the recording of the investigation meeting on 25 November.

5.91 In fact this was not true. The claimant had viewed the CCTV footage of the 6 September incident at the investigatory meeting with Ms Wright, see above. The only request that the respondent had not been able to fulfil was that the claimant had also requested to see the CCTV footage for most of that shift, and this no longer existed because it had been overwritten. She had also already been informed that there was no recording of the investigation meeting of 25 November, paragraph 5.85 above.

5.92 The claimant stated that the second reason she was not attending the hearing was because of the "shameful practices" that she had witnessed in the prison and the "pains that you have all put me through during my entire time in the job" which, the claimant stated, had left her with a profound distrust "of you all". She complained that the respondent had:

- Doctored CCTV footage of the false allegation made against her on B wing in April 2019,
- Destroyed CCTV footage of another false allegation against her on J wing on 6 September 2019,
- Tampered with recordings of the investigation meeting with Ms Wright on 25 November 2019,
- Manipulated the notes of investigation meetings with Ms Wright and CM Cope,
- Manipulated the first and second poor performance meeting minutes,
- Used two prisoners on J wing to set the claimant up to say that she had left a prisoner unsupervised in the staff office on 6 September.

5.93 The claimant stated that she was happy to attend the disciplinary hearing providing that it did not take place in the prison, it was not chaired by Governor West and the disciplinary hearing was properly recorded. The claimant stated that as an alternative Governor West could use the above outline of incidents as her defence in her absence.

5.94 Governor West responded to the claimant by email on 11 February stating that the claimant had virtually unfettered access to all the CCTV evidence and that she simply needed to inform Ms Wright when she would like to view it. He stated that she would not be able to have her own copy of the CCTV footage because of data protection concerns and he asked her to reconsider her decision not to attend the disciplinary hearing, page1213.

Disciplinary hearing 28 February 2020

5.95 The claimant did not attend the disciplinary hearing. Governor West decided to proceed in the claimant's absence, pages 1230 – 1246. Governor West heard from both Ms Wright and Ms Steadman and asked them a number of questions. He also heard from the claimant's line manager, CM Madeley.

5.96 The claimant's grievance appeal, which had been sent to Ms Clarke, pages 1528 – 1537, in which the claimant made specific complaints against Governor West, was still outstanding at this point as a result of a failure to action the grievance appeal when it was received. This failure, however, also meant that Governor West was unaware of the appeal and was therefore unaware that it was outstanding.

Disciplinary outcome

5.97 On 9 March 2020 the respondent emailed to the claimant the outcome of the disciplinary hearing, which was that the allegation had been found proven and that she had been issued with a 2 year final written warning, pages 1248 – 1250. The claimant was informed of her right to appeal. The claimant did not appeal.

5.98 On 15 March 2020 Governor Thirlby wrote to the claimant stating that now the investigation had concluded he would like to meet with her to discuss how to get her back to work. He suggested a meeting on 18 March in the conference centre outside the prison, page 1255.

5.99 The claimant responded by email on 16 March saying she would not be attending the meeting, page 1257. The respondent responded that the investigation was concluded and there was, therefore, no need for the claimant to remain on suspension and she was required to return to work, page 1256.

Claimant's return to work meeting 18 March

5.100 The claimant did not attend this meeting. It was agreed at the meeting that the claimant would be asked to return to work on 30 March.

5.101 On 26 March 2020 Deputy Governor Steadman emailed the claimant stating that she was expected to return to work on Monday, 30 March 2020, page 1264. It was set out in the email that if the claimant did not return to work she would be considered to be absent without authority and subject to disciplinary proceedings.

5.102 The claimant emailed the respondent on 27 March 2020 stating that she was currently in isolation, as advised by her GP due to her asthma, (the first lockdown had just started) and therefore she could not return to

work on 30 March. Ms Steadman asked the claimant to produce evidence of a letter from the NHS/PHE advising of the need for self isolation, page 1270. The claimant produced a screenshot of the last page of a letter which stated that the recipient of the letter had been identified as someone at risk of severe illness if they caught coronavirus and that they were advised to stay at home for a minimum of 12 weeks, page 1277. The first page of the letter, which would have contained information as to who the letter was addressed to, was not produced by the claimant.

5.103 Just over 3 weeks later on 22 April 2020 the claimant forwarded a sicknote from her GP in which the claimant was certificated as not fit for work for the period 13 April to 13 May 2020 because of anxiety and depression, page 1290.

5.104 On 22 April 2020 the respondent emailed the claimant stating that her probation remained outstanding and needed to be addressed, page 1291. The respondent booked an occupational health appointment for the claimant to take place on 14 May and informed the claimant of this on 23 April, page 1300. A telephone consultation took place on this date and occupational health subsequently contacted the respondent to say that they were requesting a medical report from the claimant's GP, page 1301E. On 23 May 2020 the claimant contacted the respondent to say that she was of the view that the information that the respondent had provided to occupational health was not accurate and until it was amended she was not consenting to a medical report from her GP being released, page 1305.

Invitation to probationary review meeting

5.105 On 3 June 2020 Governor Thirlby emailed to the claimant an invitation to attend her end of probationary period review meeting with Governor West, pages 1308 – 1309. The claimant was informed that the meeting would be held at the conference centre and the claimant was given eight different dates in June to choose from for when the meeting would take place. The claimant was asked to inform the respondent which date she wished to attend by no later than 12 June. She was further informed that if she did not agree any date then the meeting would go ahead in her absence. Governor Thirlby also explained in the letter that he had asked occupational health to contact the claimant via the usual referral process to understand her capability to attend the meeting in person. She was informed that a telephone appointment with occupational health had been scheduled for 5 June.

5.106 There was no formal consultation with the claimant that day by occupational health, the claimant refused to consent to the appointment, page 1325. However, we accept the respondent's evidence and find that

occupational health did confirm to the respondent that the claimant was fit to attend the probation review meeting. We accept the respondent's evidence because there were contemporaneous emails from the respondent reporting that this is what they had been advised, pages 1313 and 1324. We do not therefore find, as the claimant asserted, that occupational health advised the respondent that she was unfit to meet with her managers but otherwise fit to participate in the meeting.

5.107 On 10 June the claimant emailed the respondent saying that 12 June was inconvenient for her to attend a probation review meeting because she had "other commitments" and she requested to attend the meeting via telephone because, she said, it would make no difference whether she was in person or attending via telephone. She also requested to record the meeting, page 1314.

5.108 On 11 June the claimant emailed Governor Thirlby stating that the threat to conduct the meeting in her absence was unnecessary and that she would liaise with her union representative about the date and let the respondent know. She stated that she believed occupational health would have reported to the respondent that she was fit to attend the meeting if it was not conducted by any of the team from Swinfen Hall prison. She also stated she would not be attending the probation review meeting in person without her union representative also being present in person, page 1313.

5.109 Governor West, in conjunction with Governor Thirlby, decided that Governor West would continue to be responsible for the probation review meeting. We accept the evidence of Governor West and find that they made this decision because under the respondent's probation policy it is the Governor who is responsible for deciding whether to confirm an officer in post at the end of their probation period, page 1723.

5.110 That same day Governor Thirlby emailed the claimant, pages 1313 – 1314, pointing out that he had provided her with eight separate dates for a meeting, noting that she had still not provided the respondent with a date and further pointing out that it had been confirmed to the respondent by occupational health that the claimant was fit to attend the meeting. Governor Thirlby also noted that the claimant had requested that she be permitted to attend the meeting via telephone and he stated that this would not be permitted given the guidance from occupational health. We did not understand it to be disputed that it was Governor Thirlby's decision, taken in conjunction with Governor West, that the claimant should be refused permission to join the meeting via telephone. We accept the evidence of Governor West and find that they took this decision because there was, in their view, no viable reason why the claimant could not attend in person. Occupational health had confirmed she was fit to attend, the claimant had intended to attend if her trade union

representative was at the meeting and they also felt attending the meeting would be an important first step for any return to work. On 12 June the claimant emailed Governor Thirlby to say that if the occupational health assessor had given him a verbal report that she was fit and well to attend the meeting with no conditions then the verbal report was false, page 1324.

5.111 The respondent was then informed that a trade union representative, Mr Sarell, would be representing the claimant and Governor Thirlby spoke to Mr Sarell and agreed a date with him of 16 June for the meeting, page 1320. He informed the claimant by email that the meeting would take place on the 16 June with Mr Sarell in attendance, page 1321. The claimant emailed Governor Thirlby straight away saying that she no longer wished Mr Sarell to represent her as she was not taking part in the meeting, page 1320.

End of probation review meeting 16 June 2020

5.112 Present at the meeting were Governor West, Governor Thirlby and CM Madeley, as well as a note taker, pages 1326 – 1331. CM Madeley was asked to present the contents of the contact and support log that had been compiled in respect of the claimant for 2019 and 2020 which documented the claimant's time on J wing. It was explained that after an initial good start concerns were raised on the 24 August 2019 that the claimant had left the office door open on J wing and that she was seen "palming" her keys which were visible to prisoners. It was said to Governor West that Governor Thirlby and CM Madeley had attempted to discuss the incident with the claimant but she had rejected any responsibility for it. CM Madeley raised concerns about the claimant's willingness or ability to adhere to rules and gave as an example an incident when he had challenged her regarding her uniform. He stated that she had been wearing a "bum bag" which she was asked to remove and having initially complied she then asked the following day if she could wear it underneath her coat and then followed that by asking if she could wear it at the bottom of her back. He stated that on 6 September 2019 she once again left the J wing staff office door open and on this occasion several prisoners entered the unoccupied office.

5.113 There then followed detailed discussions about the chronology of events since the claimant had been suspended and discussions about what had been done to secure her return to work.

5.114 CM Madeley stated that this in his view the claimant was not able to keep prisoners and staff safe, that she did not meet the requirements of the role and was not eligible to pass probation. CM Madeley also stated that staff had commented that the claimant was a "liability" to work with

and she put other members of staff in an unsafe position, page 1331. Governor Thirlby stated that he agreed she did not meet the expectations of the role.

The claimant's dismissal

5.114 On 17 June 2020 Governor West wrote to the claimant, pages 1336 – 1337, to inform her that he had decided to dismiss her on the grounds that she had failed her probationary period. She was informed that she had a right of appeal.

5.115 We accept the evidence of Governor West and find that he concluded that the claimant had an exceptionally poor performance and conduct record. Governor West took into account that for the period between July 2018 and April 2019 there were 32 separate intelligence reports filed about the claimant, pages 1581 – 1584. In Governor West's experience this was exceptional; he had never known of a single officer being cited in so many reports. He took into account that the claimant had been found guilty of two misconduct charges, one of which had been admitted, and received warnings in respect of these. Governor West considered that these incidents demonstrated a lack of adherence to basic security measures, which he considered to be a serious matter. He took into account that there were multiple intelligence reports filed about the claimant's conduct in the period after April 2019 and he took into account that she had received warnings under the poor performance process. In Governor West's view these demonstrated that the claimant did not have a satisfactory grasp of prison procedure or offender management, a serious matter given the environment within which the claimant worked. He took into account that she had received support and guidance including being allocated to different wings of the prison to give her a fresh start and having a nominated mentor, Maggie Coultas. He took into account that the claimant had also received a warning under the attendance management process. He concluded that the claimant posed a serious risk to herself and others and was not able to learn from her mistakes. For all of these reasons he concluded that the claimant had failed to demonstrate she was capable of passing her probation.

The claimant's appeal against dismissal

5.116 On 18 June the claimant queried by email what was happening with her grievance appeal and she also complained that Governor West had not given her details of the reason for her dismissal. She asked for an in-depth explanation of the reason, page 1343. Mr West responded to this email stating that, as he had said in his letter, the claimant was dismissed based on the evidence produced for her end of probation review, page 1342.

5.117 On 24 June the claimant emailed the respondent appealing the decision to dismiss her, page 1354. She stated that she would submit a note giving the grounds of her appeal by 1 July. On 28 June she submitted her grounds of appeal which included that factual evidence of allegations had been destroyed and she was declined access to evidence which was against prison policy, that procedures were not applied correctly and occupational health advice was ignored, that her grievance was dealt with unfairly, she was discriminated against for not conforming to wrongdoings and was constantly falsely accused of leaving doors insecure, pages 1361 – 1362.

The claimant's grievance appeal

5.118 Back in April 2020 Ms Emery, Ms Wright's PA, had confirmed to a colleague, Kath Williams, that the claimant's grievance appeal had not yet been heard, page 1345. The claimant's email of 18 June prompted Ms Williams to contact Ms Emery again asking what had happened to the appeal, page 1345. Once again Ms Emery confirmed that the appeal had not been heard. Ms Williams pointed out that the claimant was entitled to appeal. Ms Emery said she would look into it. On 24 June the claimant emailed again about her grievance appeal stating that it was upheld more than 5 months previously, page 1349. Governor West queried this with Ms Wright on 25 June 2020. He stated that the claimant had been told that no decision had been made on her grievance appeal and that he would like to "put it to bed", page 1349.

Appeal against dismissal

5.119 Ms Clarke, Governing Governor based in the Prison Group Directors Office, was appointed to deal with the claimant's appeal against dismissal. An appeal pack comprising the appeal notification and 107 pages of supporting documents was provided to Ms Clarke on 30 July 2020. This included a log which detailed all of the reported incidents concerning the claimant and all of the measures that the respondent had taken to support her, intelligence reports that had been submitted about the claimant, and details of the warnings that had been issued.

5.120 On that day Ms Wright instructed her PA, Ms Emery, to email the claimant to find out when she would be available for an appeal meeting. Ms Emery emailed the claimant that day asking her to provide dates of when she would not be able to attend the hearing. The claimant did not respond. Ms Emery then emailed the claimant on 3 August suggesting 12 August as a potential date for the meeting, page 1385. The claimant responded that she would let Ms Emery know by 7 August if the proposed date and time was suitable, page 1389. The claimant again asked for an

update on her grievance appeal. She was told by Ms Emery that the respondent had not received an appeal against Governor Hardwick's decision, page 1388. Of course this was incorrect. The claimant re-sent Ms Emery a copy of her grievance appeal on 5 August pointing out that it had been signed for by the respondent on 23 January 2020, page 1398.

5.121 On 10 August the claimant emailed the respondent saying she had yet to find a representative and it was unlikely she would attend the (dismissal) appeal hearing without union representation, page 1401. On 12 August she emailed the respondent to say she would not be dialling in to the appeal hearing (it was to be heard by telephone) because she did not have a union representative, page 1402.

The Appeal Hearing

5.122 Ms Clarke decided to reschedule the appeal hearing in order to give the claimant a further opportunity to attend, and it was rescheduled for 20 August 2020, page 1420. The meeting was conducted by teleconference, pages 1436-1447. The claimant was supported during this meeting by Mr Anthony Parkes, who was described as a disability mentor. Ms Clarke asked the claimant what she would like to add in respect of her first ground of appeal; which was that the process was not correctly applied. The claimant complained that she was not shown the complete CCTV footage in respect of the incident on 6 September 2019. She stated that it was untrue that she had accepted that she had breached security and that another member of staff was in the office at the point when she left it.

5.123 Ms Clarke then moved on to discuss the claimant's second ground of appeal, which was that the penalty was unduly severe. In respect of this the claimant stated that two days before she was suspended, on 4 September 2019, five officers left a gate unlocked and she had reported this but no action was taken against them. Yet when she was wrongly accused of leaving prisoners unsupervised in the office she was suspended. She also stated that she was being penalised for reporting officers wrongdoings. She was asked what she had reported and she stated that she had reported to Deputy Governor Steadman that CM Motom had knelt on a prisoner's back during a restraint. She was asked how she knew that Ms Steadman took no action in respect of this allegation when she reported it and the claimant's response was that she did not know if Ms Steadman had done anything and CM Mottram had already left the prison at that time, page 1440. The claimant complained that she had been put on restricted duties and she also asserted that because she had advised a prisoner to make a complaint she was subjected to a poor performance process.

5.124 Ms Clarke clarified if the claimant had anything more to add in respect of this ground of appeal and she stated she was ready to move on. The final ground of appeal was that the decision to dismiss was unreasonable. The claimant stated in relation to her first performance warning that she did not receive the written warning until 27 April, just a matter of weeks before the second poor performance meeting, meaning that she had not been able to appeal the first warning. She complained that she had then asked at the second meeting to appeal the first written warning and had been told she could not, which was unfair. She complained also that the respondent had failed to provide her with the CCTV footage in relation to the incident of 6 September. She acknowledged that she had been given access to some of the footage but asserted it was incomplete. She stated that the five officers and the two prisoners had lied and the decision to issue her with a warning was based on these false testimonies.

5.125 In terms of Ms Clarke's approach to the appeal we find that she did not consider it appropriate to reopen or re-investigate any of the matters for which the claimant had received a warning. She made this decision on the basis that these were matters which had all been dealt with locally at the time, none had been appealed and there was no evidence to suggest that these warnings were issued inappropriately. She took the view, therefore, that her part in the process was not to act as an appeal authority against the disciplinary outcomes or the performance warning outcomes. As the appeal authority against the end of probation review outcome her role was to consider the decision taken by Governor West to dismiss the claimant against the background of the warnings that the claimant had received. This approach meant that Ms Clarke did not consider the evidence relating to the incident on 6 September 2019 and specifically she did not, as the claimant asserted, prefer the evidence from the two prison officers and the two prisoners in relation to this incident over the evidence of the CCTV footage.

5.126 Ms Clarke concluded that the claimant's appeal should be rejected. Ms Clarke concluded that there was a lot of evidence that the claimant's performance and conduct had fallen significantly short of the standards required for prison officers. In particular the claimant had received two disciplinary warnings and, moreover, these were not isolated incidents. Numerous intelligence reports had been made against the claimant because colleagues felt she was a danger to herself and others. Ms Clarke noted that the reports received about the claimant were from a range of officers on all three wings of the prison that she had worked on. Ms Clarke took into account that the claimant had also received performance warnings and one attendance warning. Given this background she concluded that Governor West's decision was a fair and reasonable one.

5.127 Ms Clarke wrote to the claimant on 28 August 2020 to inform her that her appeal had been rejected, pages 1521-1522. We do not find that Ms Clarke failed to consider the appeal properly. During the meeting the claimant did not actually put forward to Ms Clarke many grounds on which Governor West's decision should be considered to be unreasonable or unfair, other than attacking the appropriateness of the earlier warnings, suggesting that dismissal was too severe and suggesting that all the complaints about her were made up because she herself had raised issues. Ms Clarke not unreasonably rejected these points taking into account that the warnings had not been appealed, there was a volume of evidence supporting the view that the claimant was not performing or conducting herself well in the role and the sheer number of complaints lodged by many different individuals across three different wings of the prison indicated, in her view, that there was substance to the complaints.

5.128 Ms Clarke also noted in her letter that the claimant had raised that her grievance appeal had not been concluded and she apologised for this. She told the claimant that she had appointed Mr David Harding, Prison Group Director of the North Midlands, to hear her grievance appeal.

The grievance appeal

5.129 Following a delay as a result of Mr Harding being on annual leave the claimant was written to, we know not when, and invited to attend a grievance appeal hearing to take place on 29 October 2020. The hearing duly took place on this date, pages 1553 – 1564.

5.130 Mr Harding reached his decision in respect of the claimant's grievance appeal on 5 November 2020, which was that the appeal was rejected, page 1570 - 1572. Amongst other matters he had investigated the claimant's complaint that when she had reported colleagues for leaving gates unlocked no action had been taken. He noted that he had been informed that the Custodial Manager had been tasked to speak to the claimant because it was believed that the timing of the event that she had reported coincided with a shift handover from night state to day state. This was relevant because the gates that the claimant had observed as being open would normally be open during night state but closed during day state. He recorded that he was told that it had been intended to discuss this with the claimant but she was then suspended in respect of the incident on 6 September. Mr Harding recorded that he was dissatisfied with this explanation and therefore sought further information from the prison in relation to how it had handled repeat offences of leaving gates and doors open over the previous two years. He recorded that the information that he was provided with showed that 74 members of staff had received sanctions of varying degrees of severity for leaving

gates/doors unlocked and based on this he concluded that the claimant had not been treated disproportionately compared with others. The claimant was informed of the outcome to her appeal, although we were not told when this was done.

Claimant's belief in mistreatment of prisoners

5.131 It can be seen from the above that the claimant, on a number of occasions, alleged that there was widespread mistreatment of prisoners at the prison. We were not in a position to make findings of fact as to whether any of these alleged incidents of mistreatment occurred (apart from the incident we have dealt with at paragraphs 5.7 – 5.9 above) primarily because neither the claimant nor the respondent led any cogent evidence on what was asserted to have happened, to whom and when. We do find, however, on the balance of probabilities that the claimant believed there was mistreatment of prisoners mainly because of the consistency with which the claimant raised this issue both with the respondent and before us. Indeed, it is notable that, the incident with CMO Motum aside, the respondent did not challenge that this was the claimant's belief.

Were false allegations made about the claimant?

5.132 Before us the claimant's case was that most, if not all, of the complaints that were made about her were false allegations made because she was raising issues concerning mistreatment of prisoners. We do not find that the attendance, performance and conduct issues raised about the claimant were false for the following reasons. Firstly, some of the issues raised about the claimant were accepted by her. The claimant has at no stage disputed that the attendance warning was correctly issued. The claimant admitted that she had unlocked a prisoner's door against instruction on 25 January 2019 (although she later denied any intention to let the prisoner out of his cell), paragraph 5.43, and this incident, of course, formed the basis of the first disciplinary warning. She also opted for the fast track process in respect of this incident, meaning that she did not contest the disciplinary charge, paragraph 5.43. She admitted many of the matters which formed the basis of the first performance warning; for example she accepted that it was inappropriate for prisoners to call her auntie, paragraph 5.24, and she acknowledged that she should not be seen to be spending too long talking to prisoners at their cell doors, paragraph 5.24, she accepted that she had allowed prisoners out on 21 January whilst food was being served, having been told not to let the prisoners out (although she also gave an explanation for this), paragraph 5.24 and she had accepted that she had inappropriately shared personal information with a prisoner, paragraph 5.24 above. She admitted other matters; for instance taking her keys out of the prison on 11

March 2019 and on 2 April 2019 taking her keys out of the TRAKA system but failing to secure them to her key chain, paragraph 5.37.

5.133 Additionally, what was striking about this case was the number of people who raised issues about the claimant. We were not taken to all of the relevant documents, we were invited to read a selection of them, but even on this selection there were at least 17 different prison officers who had raised concerns either verbally or in writing about the claimant and in addition at least 6 formal complaints made by prisoners. There were over 80 reports or emails submitted about the claimant many of which were corruption prevention intelligence reports. Significantly also these reports came in from all three of the wings of the prison where the claimant worked. Plus the unchallenged evidence of the respondent was that the Prison Officers Association also raised concerns about the claimant to the respondent on behalf of its members on at least two occasions.

5.134 It was inconceivable, in our view, that such a large number of people would be minded and/or persuaded to make false reports about the claimant, particularly when those people were spread out over three different wings of what is a very large establishment. Moreover, certainly so far as the majority of these people were concerned, there was absolutely no evidence before us to suggest that these individuals knew of the claimant's complaints.

5.135 Lastly, on our findings, the claimant's first disclosure was made on 16 May 2019. Yet by the time of the claimant's stage two performance review meeting, which was held on 8 May 2019 (i.e. prior to any of the disclosures) the claimant had already been informed that her performance was of major concern and that her case would need to go to Governor West for a decision as to her suitability for the role, paragraph 5.38 above. It follows from this that many of the reports about the claimant were made, therefore, before the claimant had raised any of her concerns.

Did the claimant's anxiety/depression cause her to make mistakes at work?

5.136 It was not the claimant's case that her dyslexia/anxiety and depression directly impacted on her abilities to do the job. In fact on a number of occasions she asserted these disabilities did not affect the way in which she did her job. Her case was more nuanced than that; it was that the periods when she was under investigation substantially exacerbated her anxiety and depression and that caused her to make mistakes during the periods when she was under investigation.

5.137 We do not find as a fact that the claimant's anxiety and depression was exacerbated during the periods that she was under investigation and that this worsening of her condition caused her to make mistakes at work

for the following reasons. Apart from asserting that her anxiety and depression were worse the claimant led no evidence on this at all. She did not describe to us how her anxiety and depression affected her daily life during this time and she did not explain to us how things had become worse. There was no evidence from a medical specialist that this was the case nor any GP notes recording that the claimant was contemporaneously reporting this to be the case. Moreover, even if the claimant's depression and anxiety had been made worse when she was under investigation, it was not clear that her anxiety and depression would have had any effect on many of the types of issues of concern that arose about the claimant; allowing prisoners to call her auntie, for example, or bringing food into work for prisoners of failing to follow a verbal instruction not to unlock a particular prisoner's door. Additionally, and significantly, performance/conduct issues about the claimant arose with regularity even during periods of time when the claimant was not under investigation, for example from October 2018 through to the end of January 2019, which was the period prior to the first investigation. Even if we had found as a fact that there was some exacerbation of the claimant's anxiety and depression we would not therefore have found that this caused the claimant to make mistakes at work.

The Law

Failure to make reasonable adjustments

6 The reasonable adjustments duty is contained in Section 20 of the Equality Act and further amplified in Schedule 8. In short, the duty comprises of three requirements. If any of the three requirements applies, they impose a duty to make reasonable adjustments. Section 21 provides that a failure to comply with one of the three requirements is a failure to comply with the duty to make reasonable adjustments by A (A being the employer or other responsible person) and amounts to discrimination, Section 21(1) and (2).

7 The first requirement is the requirement set out at Section 20(3) and is as follows:

> "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."

8 In relation to the duty to make reasonable adjustments the approach that a Tribunal should take was set out in the judgment of HHJ Serota QC in **Environment Agency v Rowan [2008] IRLR 20**, repeating the guidance given in **Berriman v Smiths Detection – Watford Ltd** [**2005] ALL ER (D) 56 (Sep)**

EAT and followed by HHJ McMullen QC in **Ferguson v Barnet Council [2006] All ER (D) 192 (Dec) EAT**. That approach requires us to identify:

(a) the relevant arrangements (PCP) made by the employer
(b) (not relevant on the facts of this case)
(c) the identity of non-disabled comparators (where appropriate), and
(d) the nature and extent of the substantial disadvantage suffered by the Claimant (as a result of the arrangements).

9 Only then can an Employment Tribunal go on to consider whether any proposed adjustment is reasonable; in particular, to determine what adjustments were reasonable to prevent the PCP placing the Claimant at a substantial disadvantage.

10 What amounts to a provision, criterion or practice is to be given a very wide meaning. It can include policies, the terms on which employment is offered, arrangements for dividing up work, who gets what job, the essential functions of the job, job descriptions and liability to be dismissed if a person is incapable of doing the job, **Archibold v Fife Council**. Paragraphs 4.5 and 6.10 of the 2011 Code of Practice on Employment state that a PCP may include any formal or informal policies, rules, practices, arrangements or qualifications and may include one off decisions.

11 In **Nottingham City Transport Ltd v Harvey UKEAT/0032/12** it was said that a practice has an element of repetition to it, and if it relates to a procedure, it is something that is applicable to others as well as the claimant. In **Ishola v Transport for London [2020] EWCA Civ 112** the Court of Appeal confirmed that the words provision, criterion or practice carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Paragraph 38; “practice here connotes some form of continuum, in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or “practice” to have been applied to anyone else in fact. Something may be a practice or done “in practice” if it carries with it an indication that it will or would be done again in future if the hypothetical similar case arises. Therefore, although a one-off decision or act can be a practice, it is not necessarily one”. Paragraph 39; “in that sense **Starmer** (a reference to **British Airways Plc v Starmer)** is readily understandable. Whilst it was a one-off decision it was one that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future the position is different. That is not a practice. It is in that sense that **Harvey** refers to the requirement for an element of repetition”. That element of persistence or repetition may, however, be found within the four walls of how the employer is found to have treated the individual complainant, **Williams v Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19.**

Indirect Discrimination

12 A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) A cannot show it to be a proportionate means of achieving a legitimate aim.

13 The guidance set out in paragraphs 10 and 11 above as to what constitutes a PCP is equally applicable here.

Harassment related to disability

14 Harassment is defined as follows:

26(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic and

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(4) In deciding whether the conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

15 Accordingly, there are three different elements to the statutory test to be considered. In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, a case bought under the Race Relations Act, it was explained that it is a healthy discipline for a tribunal specifically to address each of the three elements and to

ensure that clear factual findings are made on each in relation to which an issue arises.

(1) *The unwanted conduct*. Did the respondent engage in unwanted conduct?

(2) *The purpose or effect of that conduct*. Did the conduct in question either:
(a) have the *purpose* or
(b) have the *effect*
of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her ?

(3) *The relationship of the conduct to the protected characteristic.* Was that conduct related to the claimant's protected characteristic?

16 It follows that if the tribunal concludes that there was unwanted conduct related to a protected characteristic which has the *purpose* of violating the dignity of the claimant, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, the conduct would, as a matter of law, constitute harassment. As to what is meant by purpose, in **Dhaliwal** this was equated with intent, paragraph 14.

17 So far as *effect* cases are concerned, in the case of **The Reverend Canon Pemberton v The Right Reverend Inwood [2018] EWCA Civ** 564 Lord Justice Underhill reformulated the guidance that he had given, whilst sitting in the EAT, some years previously in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, albeit the three stage approach remains good law. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b).

18 The conduct must be "related to" the relevant protected characteristic. This is a question of fact, **Warby v Wunda Group Plc [2012] EqLR 536**. This stands in stark contrast to the use of "because of" elsewhere in the Act. There is, therefore, no requirement for a causative link. It is enough if there is a connection or association with the prohibited ground. Often with harassment complaints the nature of the conduct complained of consists, for example, of overtly racial abuse. If such conduct is proved on the facts then it follows that the conduct will be related to the protected characteristic. Sometimes it will not be obvious from the face of the comment or conduct that it is related to a protected characteristic. Then the focus is on the alleged perpetrator's conduct and whether that conduct, objectively, is related to the protected characteristic, **Unite the Union v Nailard [2016] IRLR 906.** Whilst the mental processes of the alleged harasser will be

relevant to the question of whether the conduct complained of was related to the protected characteristic (see for example **Bakkali v Greater Manchester Buses (South) Ltd UKEAT/0176/17**) it is not determinative. The question of whether the conduct related to the protected characteristic has to be judged objectively and the alleged perpetrator's perception of whether the conduct related to a protected characteristic cannot be conclusive of the question.

19 The provisions concerning the reversal of the burden of proof apply to harassment complaints. Section 136:
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Public Interest Disclosure

20 Section 43A of the Employment Rights Act 1996 states that:
"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."

Qualifying disclosure

21 Section 43B defines a qualifying disclosure as being:
(1) In this Part a "qualifying disclosure" means 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 the information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

22 Each of the categories of information in subparagraphs (a) to (f) is referred to as a "relevant failure", section 43(5) ERA. As was explained in **Williams v Brown UKEAT/0044/19** Section 43B requires five questions to be answered; (i) did the claimant disclose information, (ii) did the claimant believe her disclosure was made in the public interest (a subjective test) and (iii) if so was that belief

objectively reasonable. Fourthly, if so did she believe that the information disclosed tended to show any of the matters specified at 43(1)(a)-(f) (i.e. a subjective test), and (v) if so was that belief (objectively) reasonable.

A disclosure of information

23 In order for there to be a disclosure of information there must be a disclosure that entails the conveying of facts; **Cavendish Munro Professional Risk Management Ltd v Geduld [2009]UKEAT 0195_09_0608.** There may be a distinction to be drawn between "information" which forms a disclosure and an "allegation", but care needs to be taken with this; this distinction is not part of the statutory test and a communication may contain both an allegation and information. By way of example as per **Geduld**, a disclosure would be “a hospital ward has not been cleaned for two weeks and there are needles on the floor”. An allegation would be "you are not complying with health and safety legislation.”

24 It was further explained in **Twist DX Ltd and Ors v Dr Nial Armes and ors UKEAT/0030/20**; that the test to be applied in deciding the first of the five section 43B1 questions - i.e has there been a disclosure of information - is to consider whether the information disclosed has sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection 1.

Public Interest

25 As the Court of Appeal explained in **Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979**, the purpose of the amendment to section 43(B)(1) of the 1996 Act by section 17 of the 2013 Act was to reverse the effect of **Parkins v Sodexho**. The words “in the public interest” were introduced to prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature *and* (my emphasis) there are no wider public interest implications.

Para 37: if a disclosure relates to a breach of the worker’s own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest. The following factors will normally be relevant to decide whether a disclosure was in the public interest:

(a) the numbers in the group whose interests the disclosure served.
(b) The nature of the interests affected and the extent to which the interests are affected by the wrongdoing disclosed. A disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect.

(c) The nature of the wrongdoing disclosed. Disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people.
(d) The identity of the alleged wrongdoer. The larger and more prominent the wrongdoer (in terms of staff, suppliers, clients etc) the more obviously should a disclosure about its activities engage the public interest.

26 The claimant's motive in making the disclosure – if she made a qualifying disclosure the reason why she did so - is different from the question of whether, subjectively, the claimant believed her disclosure was in the public interest. As was explained in **Martin v (1) London Borough of Southwark and (2) The Governing Body of Evelina School** EA-2020-000432 (previously UKEAT/0239/20) a claimant could reasonably believe that a disclosure is in the public interest even if her motive for making the disclosure was predominantly to advance her own interest, paragraph 27.

Burden of proof in dismissal cases

27 Section 103A states that:
" An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

28 How a tribunal should approach the task of identifying the principal reason for dismissal was considered in detail by the Court of Appeal in the case of **Kuzel v Roche Products Ltd [2008] IRLR 530 CA**. This establishes that, in a Section 103A case where the employee has one years service (now 2 years, of course), the employee must produce some evidence to suggest that her dismissal was for the principal reason that she made a protected disclosure. The burden then shifts to the employer to show that the principal reason for dismissal was a potentially fair reason. If the employer proves its reason, then the claim under 103A ends there.

Submissions

29 Mr Feeny, for the respondent, produced written submissions and supplemented these with oral submissions. He submitted that the claimant had not proved that any of her disclosures were qualifying disclosures. It was not accepted by the respondent that the claimant had a reasonable belief that any of her disclosures were in the public interest. In relation to disclosures 3, 6 and 7 it was said that these were no more than allegations and did not amount to a disclosure of information. It was submitted that there was factual dispute in relation to disclosures 1 and 4, as to whether these disclosures had occurred, and it was asserted that disclosure 5 was made to an organisation separate from the respondent and the conditions set out in section 43G were not met. In any event, Mr Feeny submitted, it was clear that the claimant's dismissal was not

because she had made protected disclosures. There was no evidence, he submitted, that Governor West knew of the protected disclosures and even if he did there were multiple factors which indicated that the claimant's performance/conduct issues were the reason for her dismissal. These included that Governor West had what Mr Feeney described as the "perfect opportunity" to dismiss the claimant at the disciplinary hearing on 28 February 2020 but did not do so, issuing her with a final written warning instead. Moreover, as early as June 2019, Governor West had indicated that he was considering dismissing the claimant, which was prior to some of the asserted disclosures having been made. In any event, Mr Feeny submitted, it was abundantly clear that Governor West had numerous and substantial grounds to justify his decision to dismiss the claimant. Many of the incidents of concern were either admitted by the claimant or were objectively verifiable. The claimant was also someone who had an unprecedented number of corruption prevention intelligence reports filed concerning her and she had received disciplinary warnings and performance warnings. The first disciplinary warning was in relation to an incident that was admitted by the claimant and the second disciplinary warning was not appealed by the claimant. Accordingly, Mr Feeny submitted, Governor West was plainly entitled to proceed on the basis that the warnings were valid.

30 For the purposes of the indirect discrimination claim and the claim of a failure to make reasonable adjustments Mr Feeney reminded us of what was said by the Court of Appeal in **Ishola** in relation to what is meant by a PCP. He submitted that none of the claimant's asserted PCP's could, in law, amount to a PCP, as there was no element of repetition to them; they were all individual one-off decisions. In relation to the harassment claim he submitted that there was factual dispute in respect of one element of the complaint and that, in any event, none of the conduct complained of was in any way related to disability.

31 Mr Ezike, for the claimant, submitted that the claimant was a credible witness. In relation to the harassment claim he submitted that there was no reason why the claimant was not given an opportunity to attend the probation review meeting remotely; this was a reasonable adjustment which the respondent ought to have considered. The conduct in refusing to allow her to attend the hearing remotely was unwanted and there was no reason for the claimant to be present physically at the hearing. In relation to the protected disclosures he submitted that the claimant had been clear and consistent that she did complain about CM Motum's behaviour. He submitted there was a pattern of behaviour against the claimant with many people raising concerns about her and yet if the claimant raised complaints these were not recorded and there was no investigation. He told us that the claimant was not suggesting that she made no errors but that it seemed as if she could do no right. He suggested there had been no credit given to the claimant when things did go well. He submitted that the claimant had not made protected disclosures in order to try and protect her own position.

32 He submitted that Governor West must have known about the disclosures because he was the Governor of the prison at the time. Other peoples complaints about the claimant seem to filter their way through to the Governor so why would the issues the claimant had raised not have done so? He submitted we should ask why the claimant had been treated so unfairly and that there must be a reason behind her treatment. In relation to the indirect discrimination claim he submitted that it was obvious that the delay with the grievance process would have caused the claimant considerable difficulty.

Conclusions

33 The respondent conceded that the claimant's dyslexia, depression and anxiety were disabilities at the relevant time.

Failure to make reasonable adjustments

34 The first claim of a failure to make reasonable adjustments was that the respondent had a PCP of there being delays in holding disciplinary hearings and the substantial disadvantage contended for was that the claimant struggled with the delay that occurred in her disciplinary case and this made her anxiety and depression worse.

35 We firstly considered whether the claimant had proved that the respondent had a PCP of there being delays in holding disciplinary hearings.

36 The claimant's case was not put on the basis that the timescales provided for within the disciplinary policy were in themselves too long. In fact, the process is inherently quite lengthy; investigations are to be conducted within a 28 day working timeframe. It is then for the commissioning manager to make a decision on whether disciplinary action should be taken and any decision regarding further action must be taken within 2 weeks of receipt of the investigation report. In the event that a decision is taken to pursue disciplinary action employees must be notified of this within 2 weeks of the receipt of the investigation report, the disciplinary hearing must be held within 6 weeks of the notification to the employee, and decisions must be given orally at the end of the hearing, paragraph 5.5. But the claimant's complaint was not about these timeframes; her complaint was that the respondent did not follow these timeframes in her case, hence the proposed reasonable adjustment on the part of the claimant being that the respondent should have *followed* its disciplinary policy, see paragraph 2.4 (a) above.

37 The claimant's complaint was, therefore, that the respondent had a PCP of there being delays in holding disciplinary hearings which meant that the prescribed timescales were not followed. There was no suggestion on the evidence that there was a "provision", for instance contained in the disciplinary policy, to the effect that there would be delays in holding disciplinary hearings.

Neither was it suggested by the claimant that there was a criterion to this effect. Accordingly, the issue for us to decide was whether the claimant had proved that there was a practice of delay in holding disciplinary hearings. As set out above this involves an element of repetition, in the sense that it is the way in which things generally are or will be done, **Ishola**, albeit that element of persistence or repetition may be found within the four walls of how the employer is found to have treated the individual complainant, **Williams**. We concluded that the claimant had not proved that there was such a practice. We did so for the following reasons.

38 Outside of the claimant's case, there was nothing within the evidence to suggest that there was a practice on the respondent's part of delaying disciplinary hearings. To the contrary, to the extent that the disciplinary procedure could be taken as setting out the practice that the respondent was expected to adopt, it is evident that there was a focus on moving people through the process within certain set timescales.

39 Significantly, in our view, there was no evidence led with regard to delays that had happened in other disciplinary cases in respect of other employees and no questions asked of the respondent's witnesses about this either. Accordingly, it seemed to us, in order for the claimant to prove that there was a practice of delaying disciplinary hearings, this evidence would need to have come from the four walls of how the respondent treated the claimant, as per **Williams**.

40 The claimant underwent two disciplinary processes during her employment. We considered it convenient to examine the timeframes in the second disciplinary case first of all.

41 The second disciplinary process related to the incident on 6 September 2019. A disciplinary investigation was commissioned in relation to this incident on 11 September, paragraph 5.57 above, and on 20 September the investigating officer, Ms Wright, wrote to the claimant inviting her to attend an investigatory interview to take place on 27 September 2019, paragraph 5.63 above. The claimant responded on 22 September saying she was not fit to attend the interview, paragraph 5.66 above. The respondent referred the claimant to occupational health in response to this and Ms Wright told the claimant that she would await the outcome of the occupational health referral before interviewing her, paragraph 5.68 and paragraph 5.75. There followed numerous attempts by the respondent during October and early November 2019 to obtain an occupational health report in respect of the claimant but, in the main as a result of a lack of cooperation from the claimant, the consultation did not take place, paragraphs 5.67, 5.70, 5.72, 5.73 and 5.74.

42 Accordingly, on 19 November Ms Wright wrote to the claimant inviting her to attend an investigatory interview on 25 November 2019, paragraph 5.76 above. The interview took place on that day. Ms Wright carried out some

additional investigations after this interview and then completed her investigation report on 19 December 2019, paragraph 5.83. On 31 December the commissioning manager, Ms Steadman, wrote to the claimant informing her that she was required to attend a disciplinary hearing. She asked the claimant to make an election, as to whether she wished to attend a full disciplinary hearing or opt for the fast track process, by no later than 14 January 2020, paragraph 5.84 above. The claimant failed to make this election, as requested, and so on 31 January Mr West wrote to the claimant inviting her to attend a disciplinary hearing with him on 28 February, paragraph 5.89. That disciplinary hearing took place (without the claimant), paragraph 5.95 above, and on 9 March the claimant was emailed with the outcome of that hearing, paragraph 5.97.

43 It seems to us that in order for the claimant's complaint (that the respondent had a practice of delay in holding disciplinary hearings) to be factually accurate there would have to be delays *on the respondent's part*. In relation to this second disciplinary case there were not. The only delay of any significance that occurred in this case was the delay between 27 September and 25 November. This was a delay that, ultimately, was not within the respondent's control. It was caused by the claimant stating that she was unfit to attend an investigatory interview, the respondent consequently seeking occupational health advice on her fitness to attend, and the claimant then refusing to engage with occupational health. Further delay was then caused by the claimant failing to make her election between the fast track process and the full disciplinary hearing.

44 The first disciplinary case related to the incident on 25 January 2019. The investigation in respect of this matter was commissioned on 29 January 2019, paragraph 5.23 above, there were two two week extensions to the investigation because of a change to the terms of reference and annual leave, paragraph 5.23 above, interviews were held in March 2019, with the claimant interviewed on 4 March and the investigation report was finalised on 20 March 2019, paragraph 5.29.

45 On 26 March 2019 Ms Steadman wrote to the claimant inviting her to attend a disciplinary hearing and asking her to notify the respondent of whether she wished to have her case considered under the fast track procedure. The claimant was given until 9 April to respond, paragraph 5.29 above.

46 As we have set out above, evidence was not led by either the claimant or the respondent as to what happened in the weeks immediately following that letter but we do know that at some point between 8 May and 13 May Mr West wrote to the claimant inviting her to attend a disciplinary hearing with him on 28 May 2019, see paragraph 5.39 above. The claimant informed Mr West that she was unable to attend the hearing and so she was invited to a further hearing to take place on 31 May, although it in fact took place on 30 May, see above. At the conclusion of this hearing Mr West informed the claimant that he was issuing her

with written formal advice and guidance for a 12 month period, paragraph 5.43 above.

47 On the evidence before us, therefore, there was a delay of about 4 weeks in the investigatory stage of the disciplinary process, albeit there was an explanation for this, and unexplained delay of about 3 weeks in holding the disciplinary hearing with the claimant (as set out above the disciplinary hearing should have been held within 6 weeks of the notification of disciplinary action, paragraph 5.5 above). The first part of the delay was caused by a change in the terms of reference for the investigation and annual leave, delay which clearly was caused, in other words, by one off reactions to particular circumstances, which is the antithesis of a practice. We do not know what caused the remainder of the delay. But a delay of about 3 weeks in this single disciplinary case is not in any event sufficient to establish *a practice* of delay, the necessary element of repetition is missing.

48 Accordingly we conclude that the claimant has not proved that the respondent had a practice of delays in holding disciplinary hearings, and consequently this complaint fails.

Complaint Two

49 The second claim of a failure to make reasonable adjustments was that the respondent had a practice of delay in considering grievances and the substantial disadvantage contended for was that the claimant struggled with the delay and it made her anxiety and depression worse.

50 We firstly considered whether the claimant had proved that the respondent had a PCP of there being delays in considering grievances.

51 There was no suggestion that there was a “provision”, for instance contained in a policy document, to the effect that there would be delays in considering grievances. To the contrary, the grievance policy set out timescales by when each stage of the grievance process was expected to be completed; 20 days to hold the meeting with the complainant and a decision 10 days after that wherever possible, paragraph 5.3 above. Neither was it suggested by the claimant that there was a criterion to this effect. Accordingly, the issue for us to decide was whether the claimant had proved there was a practice of delay in considering grievances.

52 Once again, there was no evidence led with regard to delays that had happened in other grievance cases in respect of other employees and no questions asked of the respondent’s witnesses about this either. Accordingly, it seemed to us, that, in order for the claimant to prove that there was a practice of delay in considering grievances, this evidence would need to come from the four walls of how the respondent treated the claimant, as per **Williams**.

53 We did not understand the main focus of this complaint to relate to the first part of the grievance process because, although there was some delay, it was relatively minor. The claimant's grievance was received by the respondent on 23 September, meaning that under the terms of the policy the respondent had until 13 October to meet with the claimant and 4 November 2019 to provide a response, paragraph 5.65 above. On 16 October Mr Hardwick wrote to the claimant inviting her to attend a grievance hearing with him on 31 October 2019, paragraph 5.65 above. Accordingly, the meeting was arranged to take place 18 days later than it should have been. There was then delay in actually holding the hearing, but the claimant accepted before us that this was because of difficulties that she encountered arranging representation; it was not delay on the respondent's part. As a result of this the meeting did not in fact take place until 17 December. The claimant was sent a copy of the first stage grievance outcome on 20 January 2020. This should, under the terms of the policy, have been provided within 10 working days (wherever possible), meaning that it should have been provided by the end of December and so there was approximately 20 days of delay at this point.

54 The main focus of this complaint, as we understood it, related to the claimant's grievance appeal which was, undoubtedly, subject to wholly unreasonable delay. The claimant lodged her appeal on 20 January 2020, paragraph 5.87 above, the appeal hearing took place on 29 October 2020, paragraph 5.129, and the outcome was provided to the claimant some time after 5 November 2020, we know not exactly when, paragraph 5.130, some 10 months after the claimant had lodged her appeal.

55 We concluded these facts were not sufficient to prove that the respondent had a practice of delay in considering grievances. This was not a case where the claimant could point to a number of grievances that she had raised with delay occurring in each from which it could, perhaps, be inferred that there was such a practice. To the contrary, as set out above, the claimant only raised one grievance. The first stage of that grievance suffered only relatively minor delay and whilst the appeal stage took a wholly unreasonable amount of time that appeared, on the evidence before us, to simply be a particular omission that happened in the claimant's case.

56 For the avoidance of doubt, even if were wrong on that, and the claimant had proved that there was a PCP of delays in considering grievances we would have concluded that the claimant had not proved that this PCP caused the substantial disadvantage contended for, namely that the delay aggravated her anxiety and depression. The claimant led no evidence that this was the case. Her only evidence in respect of the delay in dealing with the grievance appeal was that it took over 10 months and this was against prison policy (paragraph 88 of the claimant's witness statement). In fact, the claimant's evidence before us was that it was the disciplinary and performance investigations that aggravated her

depression and anxiety, not the respondent's handling of her grievance. Moreover, had it been the case that the delay in dealing with the grievance was making the claimant's anxiety and depression worse, then very likely in our view, the claimant herself would have taken steps to chase up what was happening with it. Yet the claimant did not query what was happening with her grievance appeal until 18 June 2020, the day after she had been informed that she had been dismissed, paragraph 5.116, having raised it some 6 months earlier on 20 January 2020, paragraph 5.87. For these reasons, even if the claimant had proved the PCP in question, this claim would have failed on this basis.

Indirect discrimination

57 The asserted PCP for the purposes of this claim was that on 20 October 2020 Teresa Clarke failed to properly consider the claimant's appeal against dismissal. It seemed to us that the way that this PCP was framed was the very opposite of a practice (or a provision or criterion). The complaint was about how the claimant's particular appeal had been handled, it was not that there was a practice on the respondent's part of not properly considering appeals against probationary dismissals (or appeals against dismissal more generally). That is not a PCP, it is no more than one off decision in an individual case. Neither, in any event, have we found as a fact that Ms Clarke failed to consider the appeal properly, paragraph 5.127. Accordingly, even if this was capable in law of amounting to a PCP, the claimant has not proved on the facts that this PCP was applied to her.

58 Additionally, and for the avoidance of doubt, there was no evidence at all led as to the respondent's approach in respect of other employees to appeals against dismissal at the end of probationary periods and no evidence as to how the respondent handled appeals against dismissals more generally. The claimant, of course, could not prove a practice of failing to properly consider appeals against dismissal from within the four walls of her own case as she only had one appeal against dismissal. Accordingly, there was no evidence from which we could conclude that there was a practice of failing to properly consider appeals against dismissal.

59 In evidence the claimant said on a number of occasions that her specific complaints about the handling of her appeal were that Ms Clarke did not uphold her appeal and that Ms Clarke should not have accepted the evidence from, as the claimant put it, the five prison officers and the two prisoners in relation to the incident on 6 January 2019, she should have considered only the CCTV footage.

60 Analysing this complaint in this way, we have not found as a fact that Ms Clarke preferred the evidence from the two prison officers (it was in fact two prison officers not five) and the two prisoners in relation to the 6 September incident, paragraph 5.125. We have found that Ms Clarke approached the appeal on the basis that the warnings which had been issued to the claimant were in

place and it was not her role to re-open them, particularly as none had been appealed, paragraph 5.125. She did not, therefore, weigh up the evidence in relation to any particular incident and re-consider whether it was right to issue a warning. Accordingly that complaint fails on the facts.

61 It is, of course, factually correct that Ms Clarke rejected the claimant's appeal but, we concluded, the claimant had not proved that rejecting her appeal was a provision, criterion or practice. The claimant did not seek to suggest that it was a provision or criterion and, as we have already explained, there was no evidence led to suggest that the respondent had a practice of rejecting appeals against dismissals at the end of probationary periods, or more generally. Additionally, it seemed to us, by the very nature of an appeal process, a decision to reject an appeal is a decision taken on the individual facts of a particular case. That is the very antithesis of a practice.

Harassment related to disability

62 There were 3 asserted acts of unwanted conduct; (i) that Governor Thirlby and Governor West had refused to allow a different person to carry out the end of year probation review meeting, (ii) the same two individuals had refused to allow the claimant to attend the end of year probation review meeting remotely, and (iii) the same two individuals had referred to the claimant during this meeting as a liability.

63 It was accepted by the respondent that Governors Thirlby and West refused to allow someone other than Governor West to carry out the probation review meeting, see paragraph 5.109 above.

64 On balance we concluded that insisting that Governor West chair the meeting was unwanted conduct, given the claimant's stance at the time that she did not want anyone from the prison conducting the meeting, paragraph 5.108, and given that having a request turned down for something that you want is likely to be unwanted. We did not consider that the actions of Governor West and Governor Thirlby could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her and neither did we conclude that the claimant had proved that it had that *effect* on her. The claimant, in fact, led no evidence at all as to the effect on her of this conduct. For these reasons this complaint fails. However, for the avoidance of doubt, and on the assumption, contrary to our primary conclusion, that the burden of proof had reversed, we would have concluded that the conduct of Governor West and Governor Thirlby was not in any way related to disability. The reason for the conduct was that under the respondent's probation policy it is the Governor who is responsible for deciding whether to confirm an officer in post at the end of their probation period, see paragraph 5.109. The concept of conduct "related to" a protected characteristic goes wider than the "reason why" but there still requires to be

some connection between the conduct and the protected characteristic. Here, the conduct was not caused by the protected characteristic of disability and there was nothing to suggest on the evidence before us that it was associated with disability in some other way.

The refusal to allow the claimant to attend the meeting remotely

65 It is correct, on our findings of fact, that Governors Thirlby and West refused to allow the claimant to attend the meeting by telephone, paragraph 5.110 above. We concluded that the claimant had proved that insisting that she attend the meeting in person was unwanted conduct because having a request turned down for something that you want is likely to be unwanted. We did not consider that the actions of Governors West and Thirlby could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her and neither did we conclude that the claimant had proved that it had that *effect* on her. The claimant, in fact, led no evidence at all as to the effect on her of this conduct. The only mention made about this incident in the claimant's witness statement was that the claimant asserted that failing to allow her to attend via telephone was a failure to make a reasonable adjustment, paragraphs 94 and 95. Moreover, at the time the only reason given by the claimant for wanting to join remotely was that it was inconvenient for her to attend in person because she had other commitments, paragraph 5.107. It seemed to us that having a request turned down which would have created "inconvenience" falls far short of conduct that creates the proscribed environment. For these reasons this complaint fails.

66 However for the avoidance of doubt, and on the assumption, contrary to our primary conclusion, that the burden of proof had reversed, we would have concluded that the conduct of Governors West and Thirlby was not in any way related to disability. The reason for the conduct was that Governors West and Thirlby had been advised that the claimant was fit to attend the meeting, paragraph 5.110. Fitness to attend (as opposed to unfitness) cannot sensibly be said to be associated or connected with the claimant's dyslexia or depression and anxiety. Accordingly, on our conclusions, the conduct was not caused by the protected characteristic of disability and there was nothing to suggest on the evidence before us that it was associated with disability in some other way.

Governor West and Governor Thirlby referred to the claimant as a liability during the meeting

67 This complaint essentially fails on the facts. On our findings neither Governor West nor Governor Thirlby described the claimant as a liability during the meeting. On our findings the only person to use this word during the meeting was CM Madeley who stated that staff had commented that the claimant was a "liability" to work with and she put other members of staff in an unsafe position, paragraph 5.114.

68 Once again, for the avoidance of doubt, even had the burden of proof moved across to the respondent in respect of this complaint we would have concluded that the respondent had proved that this was not conduct that was related to the claimant's disabilities. This comment was made because of concerns on the part of the claimant's colleagues about her performance and conduct at work and their potential impact with regard to risks to colleagues and prisoners. As we have set out above, it was not the claimant's case that her dyslexia/anxiety and depression directly impacted on her abilities to do the job. Her case was that the periods when she was under investigation substantially exacerbated her anxiety and depression and that caused her to make mistakes during those periods. We have not found as a fact either that the periods under investigation exacerbated the claimant's anxiety or depression or that, if there was any such exacerbation, this caused the claimant to make mistakes at work, paragraphs 5.136 and 5.137. Accordingly, on our findings, the claimant's performance/conduct at work was not caused by or related to her disabilities and it follows from this that the respondent has proved that the comment made about the claimant's performance/conduct (in particular that she was a liability) was not related to disability.

Section 103A

The asserted protected disclosures

Disclosure 1

69 This has failed on the facts. We have not found that the claimant made a verbal disclosure to Governor O'Neill on or around 3 November 2018, paragraph 5.10 (note: the claimant accepted that the date of this disclosure in the list of issues was wrong).

Disclosure 2

70 The respondent accepted that the claimant sent an email to Ms Howes, an employee of the respondent, on 16 May 2019, paragraph 5.40. Accordingly, the first issue for us to consider was whether the claimant had proved that this email was a qualifying disclosure, as defined.

71 As to that, the respondent conceded that this email amounted to a disclosure of information that in the claimant's reasonable belief tended to show that health and safety has been, is being or is likely to be endangered, see the respondent's written skeleton argument, and accordingly the only remaining issue for us to decide was whether the claimant had proved that she reasonably believed this disclosure was in the public interest. That, in turn, comprises two questions; a subjective test, what did the claimant believe, and an objective test, was this belief objectively reasonable?

72 This was not an entirely straightforward issue for us to resolve because the claimant had not provided any direct evidence in her witness statement to the effect that she did believe that her disclosures were in the public interest, nor why she believed this. Accordingly, it was necessary for us to consider whether we could infer this on the balance of probabilities, on the evidence that was before us.

73 The respondent submitted that it would not be possible for us to infer this because this disclosure (and many of the others) appeared to have been made in response to various processes initiated against the claimant. This disclosure, the respondent pointed out, had been made eight days after the second poor performance meeting had been held with the claimant.

74 But, as set out above, the claimant's motive in making the disclosure – if she made a qualifying disclosure the reason why she did so - is different from the question of whether, subjectively, the claimant believed her disclosure was in the public interest. See **Martin**, a claimant can reasonably believe that a disclosure is in the public interest even if her motive for making the disclosure was predominantly to advance her own interest.

75 We have already found as a fact that the claimant had the belief that prison officers were mistreating prisoners, see paragraph 5.131 above. Considering the nature of the interest in question, for which see the paragraph 76 below, it would be hard to see how it would not - in the claimant's belief - be a disclosure made in the public interest; it is after all not just in the interests of the prison population as a whole that they are not mistreated by prison officers but also in the interests of wider society that prisoners are properly treated. Given the timing of some of the disclosures we think it likely that on occasion these issues were raised as a smokescreen, but the fact that the claimant had in mind a self-serving motive is not inconsistent with the claimant also believing the disclosure was in the public interest.

76 As to whether that belief was objectively reasonable this disclosure, in summary, was about what the claimant believed to be systemic (our word) mistreatment of prisoners at Swinfen Hall. The numbers of people in this group were significant, around 600, paragraph 5.6**.** Additionally, prisoners are in a vulnerable position, particularly in relation to prison officers who control and manage them day-to-day, and, moreover, prison officers are fulfilling an important public function whilst looking after and managing prisoners. Accordingly, the disclosure was about an important matter and was about a matter in respect of which there are, inherently, broader societal implications. Added to this the disclosure, in the claimant's belief, was about, at least in part, deliberate wrongdoing. Disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing, **Chesterton**. For these reasons we concluded that the claimant has proved that she

reasonably believed the disclosure was in the public interest and it follows that the disclosure was a qualifying disclosure. The respondent conceded that in the event that we found this was a qualifying disclosure, it was also a protected disclosure.

Disclosure 3

77 This is the claimant's email of 23 May to Ms Steadman, paragraph 5.42. As set out above the claimant wrote in this email that she said she would not rely on Mr Motum's testimony (who was making accusations against her) "due to his cruel C and R on a prisoner when he was found with a phone in his cell". She also wrote that if Ms Steadman needed the date and time of this incident she would be more than happy to help. The respondent disputed that this was a qualifying disclosure; in the respondent's submission the relevant part of the email was no more than an allegation and did not convey sufficient information to tend to show a relevant failure. In other words, the respondent's position was that this asserted disclosure failed the first question to be asked, see **Williams**. We concluded that the claimant has proved that she disclosed information which tended to show a relevant failure, namely that health and safety was being, or was likely to be, endangered. Whilst the information conveyed is minimal the relevant part of the email does contain facts; that there was a specific incident involving CM Motum and a prisoner when a prisoner had been found with a phone in his cell. It can, moreover, readily be inferred from the reference to "cruel" control and restraint that this is information which tends to show that health and safety was being or was likely to be endangered. We did not understand the respondent to dispute that if we were to find this was a disclosure of information that tended to show a relevant failure, that the claimant reasonably believed this to be so.

78 The respondent also submitted that given that the purpose of the email was to allege bullying on the part of CM Motum in the context of stage two of the claimant's poor performance procedure that the disclosure cannot have been in the public interest because it was made for the claimant's own personal motives. For similar reasons as we set out at paragraphs 75 and 76 above, we conclude that the claimant has proved that she reasonably believed this disclosure was in the public interest. We were mindful that this disclosure was about one incident, whereas the earlier disclosure was about what the claimant believed to be widespread abuse, but the context of this was still about what was perceived to be abuse of a person in a vulnerable position by someone whose public duty it was to look after that person day to day, and that we considered was sufficient for the claimant to prove the requisite belief in the public interest. Accordingly, the claimant has proved that she made a qualifying disclosure. The respondent did not dispute that in the event that we found this to be a qualifying disclosure that it was also a protected disclosure.

Disclosure 4

79 This fails on the facts, paragraph 5.53 above. We have not found that this verbal disclosure was made.

Disclosure 5

80 Disclosure 5 is the asserted verbal disclosure made to two members of the IMB. However, as we set out at paragraph 5.58 above, at no point did the claimant actually tell us in evidence what it was that she actually said to the IMB, other than that she said there was mistreatment of prisoners by officers. That, we concluded, was not a disclosure of information. It was no more than an allegation, in the sense that it did not actually convey any facts. It does not have sufficient factual content and specificity so as to be capable of tending to show one of the matters listed in subsection 1 of Section 43, **Twist DX Ltd.** Accordingly, the claimant has not proved that she made a qualifying disclosure.

Disclosure 6

81 This disclosure is the email that the claimant sent to Ms Howes on 11 September 2019. In this she wrote that she had contacted Ms Howes sometime in May "regarding some atrocities going on (e.g. bullying of prisoners, discrimination, using prisoners to bully other prisoners) in the establishment" and that that she was "more than happy to provide evidence of these wrongdoings", paragraph 5.59 above.

82 On balance we concluded that the claimant had not proved that she made a disclosure of information. What she wrote is no more than an allegation, in the sense that it does not actually convey any facts. It does not have sufficient factual content and specificity so as to be capable of tending to show one of the matters listed in subsection 1 of Section 43. Indeed, that this was no more than an allegation was demonstrated, in our view, by the claimant's offer to provide "evidence of these wrongdoings", paragraph 5.59, which rather emphasised that the facts of the asserted wrongdoings were not contained within the email.

83 Accordingly, the claimant has not proved that she made a qualifying disclosure.

Disclosure 7

84 This is the email to Mr Khan sent on the 12 September 2019, paragraph 5.60 above. What the claimant wrote in this email is that "she had a lot of concerns to raise about the activity of some prison officers, the CMs, the governors, the deputy governor and the governing governor in the establishment" and that she had challenged these practices and been subjected to "institutional discrimination and bullying in the establishment. On balance we once again we concluded that the claimant had not proved that she made a disclosure of

information. What she wrote does not have sufficient factual content and specificity so as to be capable of tending to show one of the matters listed in subsection 1 of Section 43. Writing that she had concerns about the “activities” of various members of staff does nothing to convey what relevant failure those activities tended to show. Once again, it is notable that, later on in this email, the claimant stated that she can provide “evidence of these malpractices” thus emphasising that the facts of the asserted malpractices were not contained within the email.

85 Accordingly, the claimant has not proved that she made a qualifying disclosure.

Disclosure 8

86 This was the email of 14 September 2019 to Mr Hammill, paragraph 5.61, in which the claimant gave multiple examples of what she said were incidents of abuse of prisoners that she had witnessed. The respondent, rightly in our view, conceded that this email did amount to a disclosure of information and it was conceded that in the reasonable belief of the claimant it tended to show a relevant failure. The only area of dispute between the parties was as to whether the claimant reasonably believed that the disclosure was in the public interest. Other than confirming that the point was not conceded, however, the respondent made no submissions as to the basis on which it contested this issue.

87 Once again, the claimant had not provided any direct evidence in her witness statement on this issue but for the same reasons as we set out at paragraphs 75 and 76 above we concluded that the claimant has proved that she reasonably believed this disclosure was in the public interest. We therefore concluded that the claimant had proved that she made a qualifying disclosure. The respondent conceded that if that was our finding then this disclosure was also protected.

88 Note: on the list of issues it had been set out that the claimant’s case was that her disclosures were qualifying disclosures under both 43B(1)(d) - that health and safety of any individual has been, is being or is likely to be endangered – and 43B(1)(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. Whilst section 43B(1)(f) was referred to on the list it was not, in fact, as we understood it relied on by the claimant; there was no reference made to it by Mr Ezike during the entirety of the hearing. However, and for the avoidance of doubt, in respect of those disclosures where we have found there was a disclosure of information by the claimant we would not have found that the claimant had proved that she reasonably believed that the disclosure tended to show that information about a relevant failure was being or was likely to be deliberately concealed because none of the disclosures made reference to concealment of information or anything of that kind.

The dismissal

89 The claimant started work for the respondent on 18 June 2018 and her effective date of termination was 17 June 2020. Whilst neither party addressed us on this (Mr Feeny simply said that there might be a "nice point" as to the burden of proof to be applied and then moved on to a different issue, Mr Ezike did not address us on it at all) it seemed to us that, applying the approach in **Pacitti Jones v O'Brien [2005] IRLR 889** the claimant had, in fact, acquired two years service at the point when she was dismissed. Accordingly, as per **Kuzel**, it is for the claimant to produce some evidence to suggest that her dismissal was for the principal reason that she made protected disclosures and the burden then shifts to the employer to show that the principal reason for dismissal was a potentially fair reason.

Knowledge of Disclosures

90 On our findings and conclusions the claimant has proved that she made three protected disclosures; one on 16 May 2019, one on 23 May 2019 and one on 14 September 2019. None of these disclosures were made to Governor West. The one on 14 September 2019 was made by email to Mr Hammill, the 16 May disclosure was made to Ms Howes and the 23 May disclosure to Deputy Governor Steadman. There was absolutely no evidence led by the claimant (or indeed the respondent) to suggest that Governor West was made aware of the disclosure to Mr Hammill. Neither was Governor West questioned about this during cross examination. In the circumstances we do not find that Governor West had any knowledge of this disclosure.

91 The disclosure on 23 May was sent by the claimant to Deputy Governor Steadman. Governor West was not a recipient of this email. Before us Governor West denied that he had any knowledge of this email and we have accepted this evidence, paragraph 5.42. The disclosure on 16 May was sent to Ms Howes. We have not found as a fact that Governor West knew about this email, paragraph 5.40 above.

92 Accordingly, on our findings, Governor West had no knowledge of the protected disclosures and as he was the person who made the decision to dismiss the claimant this means that the protected disclosures cannot have been the principal reason for dismissal (it was not suggested that there was a **Jhuti** type exception on the facts of this case).

Reason for dismissal

93 However, for the avoidance of doubt, and contrary to our primary finding set out above, we were prepared to analyse this claim on the basis that Governor

West did have knowledge of the protected disclosures and on the assumption that the claimant had done enough to move the burden of proof across to the respondent.

94 We would have concluded that the respondent had proved that the principal reason for the claimant's dismissal was that she had failed her probationary period; in particular because of her very poor performance and conduct and also because she had received a warning under the attendance process, paragraph 5.115. We reached this conclusion for the following reasons.

95 Firstly, on our findings, the claimant's first disclosure was made on 16 May 2019. Yet at the claimant's stage two performance review meeting, which was held on 8 May 2019 - i.e. prior to any of the disclosures - the claimant had been informed that her performance was of major concern and that her case would need to go to Governor West for a decision as to her suitability for the role, paragraph 5.38 above. This is clear evidence, therefore, that prior to any of the disclosures being made the respondent had formed at least a provisional view that the claimant's performance was such that she was likely not suitable for the role.

96 Secondly, as set out at paragraph 5.50 above, Governor West informed the claimant during the probation review meeting that took place on 19 June 2019, that he would have dismissed her at that point had there not been procedural errors made with the handling of her poor performance issues. That, in our view, was significant in two respects. Firstly, the first two protected disclosures had been made just a matter of weeks prior to this meeting. Had Governor West been minded to dismiss the claimant for making protected disclosures he surely would have done so at this point regardless of the procedural errors. Secondly, the third disclosure was not made by the claimant until 14 September 2019. Clearly, therefore, this third disclosure cannot have influenced any of Governor West's decision making in June 2019. Yet as at June 2019 Governor West was already of the view that the claimant's performance concerns were so significant that, procedural errors aside, he would have dismissed at that point. Similarly, the claimant is also told at this meeting that if matters did not improve her employment would be terminated.

97 Thirdly, the claimant was, of course, disciplined by Governor West in February 2020 in relation to the incident on 6 September 2019, paragraphs 5.95 and 5.97 above. By the time of the disciplinary case, therefore, all three protected disclosures had taken place. The respondent, and Governor West specifically, treated the incident on 6 September as misconduct (not gross misconduct) for which the maximum penalty under the respondent's disciplinary procedure was a final written warning. Had Governor West been minded to dismiss the claimant for having made the disclosures he would surely have either treated this incident as gross misconduct and dismissed the claimant for it, or dismissed her on the

basis of repeated misconduct. Yet he did neither of these things. Instead he retained her in the respondent's employment.

98 Fourthly, Governor West *had* to make a decision in June 2020 on the claimant's probation. Her probationary period (with extensions) had come to an end, no more extensions were possible, and so a decision had to be made. Unlike most stages of a performance or disciplinary process, where there will be a range of possible outcomes, which could include an informal warning, a formal warning, a final formal warning, an extension to the monitoring period, and so on, up to and including dismissal, Governor West only had a binary choice; either the claimant had passed her probation and would be confirmed in post as a qualified prison officer, or alternatively she had failed her probation which would lead automatically to her dismissal. He therefore had to make a decision on the claimant's performance and conduct to date with only two possible outcomes before him.

99 Closely linked to this, there was what can only be described as an overwhelming amount of evidence before Governor West concerning the claimant's poor performance and her conduct. The sheer volume of information that was before Governor West makes it very likely, in our view, that this was the principal reason for dismissal. In the short time that the claimant had been with the respondent she had received two disciplinary warnings (one of which was in relation to an incident which the claimant, essentially, had admitted, and the other of which the claimant had not appealed). These were of concern not just because of the fact of the warnings but also because Governor West considered that they demonstrated a lack of adherence to basic security measures, paragraph 5.115, which for obvious reasons would be a matter of great concern for the respondent. She had also received one formal warning in relation to poor performance and her case had been referred to stage two of the process in May 2019 for Governor West to make a decision on her employment, paragraph 5.38. Additionally, she had been the subject of repeated complaints and concerns being raised including what Governor West described as an unprecedented number of corruption prevention intelligence reports, paragraph 5.115. This demonstrated, in Governor West's view, that the claimant did not have a satisfactory grasp of prison procedure or offender management; again given the environment within which the claimant worked, a serious matter for obvious reasons, paragraph 5.115.

100 Faced with all of this Governor West decided that the claimant posed a serious risk to herself and others and was not able to learn from her mistakes, paragraph 5.115. Given the environment within which the claimant worked, and the role that she was required to carry out, it is entirely unsurprising, in our view, that having formed these conclusions about the claimant Governor West decided that the outcome had to be that the claimant was dismissed on the grounds that she had failed her probation.

101 For these reasons we conclude that the respondent has proved that the principal reason for dismissal was that the claimant had failed her probationary period; in particular because of her poor performance and conduct. It follows that the claimant's claim of automatically unfair dismissal under section 103A of the ERA fails and is dismissed.

Case No:1310590.20
Employment Judge Harding
Dated: 13 April 2022