EMPLOYMENT TRIBUNALS

Claimant: Mr J Singh Purewal

Respondent: Secretary of State for Justice

Heard at: Birmingham (partly in person and partly by CVP)

On: 26 – 29 July and 1 August 2022

Before: Employment Judge Meichen, Mrs J Malatesta, Mr D Spencer

Appearances
For the claimant: in person
For the respondent: Mr Lyons, barrister

JUDGMENT was sent to the parties dated 3 August 2022. The claimant's claims were dismissed. Written reasons were subsequently requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided. Oral reasons were given at the end of hearing and so these written reasons are based on the transcript of the reasons given orally.

REASONS

Introduction

1. This was the final hearing to determine the claimant's claim that the respondent failed in its duty to make reasonable adjustments for him as a disabled person.

2. The tribunal was provided with a bundle of 509 pages.

3. The claimant gave evidence and was cross examined. He also provided witness statements from three additional witnesses but only one of those was called to give oral evidence. Where a witness was not called to give oral evidence we took that into account when deciding what weight to attach to their statement.

4. The respondent provided four witness statements and all of the respondent's witnesses were called to give evidence and were cross examined.

The issues

5. The issues for us to determine were agreed by all parties at the start of the hearing. The issues had originally been set out by EJ Kelly in her Order following a case management hearing on 15 July 2021. It seems that the claimant was treated as having raised a discrimination arising from disability claim but he then clarified at the case management hearing that he did not wish to pursue that claim. It does not appear that a judgment was issued dismissing that claim and so we will do that. The claimant explained that he wished to withdraw his race discrimination claim at the start of this hearing and he was content for a judgement to be issued dismissing that claim. We agreed to do so. The respondent conceded that the claimant was a disabled person at all material times i.e. November 2019 to October 2020 by reason of the disability relied upon by the claimant which was depression and anxiety. The respondent also accepted that they had knowledge of the claimant's disability for the entirety of the relevant period. This meant the issues for us to determine were as follows:

    5.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

        5.1.1 To require residential/front line officers to remain working as residential/front line officers.
        5.1.2 To only allow a short/two week phased return to work.
        5.1.3 To expect employees to arrange their own counselling and CBT.

    5.2 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:

        5.2.1 The claimant could not return to work due to his mental state and his employment ended.

    5.3 If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

    5.4 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

        5.4.1 To move the claimant from a residential/frontline position on L wing to another non residential/non front line officer position.
        5.4.2 To offer the claimant a phased return to work of longer than the two weeks offered.
        5.4.3 To provide the claimant with counselling and CBT.

5.5 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

5.6 Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

6. As can be seen the list of issues uses the terminology "residential/frontline position" contrasted with "non-residential/non-frontline position". We clarified during the evidence what the distinction is. A residential/frontline position means a position working on a prison wing and a non-residential/non-frontline position means working with prisoners but elsewhere within the prison. The distinction is therefore primarily one of location.

The law

The burden of proof

7. Section 136(2) Equality Act 2010 ("EA") sets out the applicable provision as follows: "*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".* Section 136(3) then states as follows: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

Failure to make reasonable adjustments

8. The duty to make reasonable adjustments is in section 20 EA. The relevant duty in this case is at subsection (3):

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

9. The claimant's case is that the respondent discriminated against him by failing to comply with that requirement. The respondent accepts that if the requirement arose it had the duty to make reasonable adjustments.

10. The duty requires positive action to avoid substantial disadvantage caused to disabled people. To that extent it can require an employer to treat a disabled person more favourably than others are treated (Archibald v Fife Council [2004] ICR 954). It should be noted that *"the purpose of the legislation is to assist the disabled to obtain employment and to integrate them into the workforce"* (O'Hanlon v HM Revenue and Customs UKEAT/0109/06).

11. Schedule 8, Part 3, paragraph 20 Equality Act provides, so far as relevant:

> **20 Lack of knowledge of disability, etc.**
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

12. The correct approach to reasonable adjustments complaints was set out by the EAT in Environment Agency v Rowan [2008] ICR 218:

a. What is the provision, criterion or practice ("PCP") relied upon?

b. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

13. As to the identification of the PCP the EHRC Employment Code ("the Code") makes it clear the phrase is to be broadly interpreted. The Code says (paragraph 6.10): *"[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."* In Ishola v Transport for London [2020] ICR 1204 the Court of Appeal observed that: "*The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee."*

14. As to substantial disadvantage section 212 Equality Act 2010 defines "substantial" as meaning "more than minor or trivial". It must also be a disadvantage which is linked to the disability. That is the purpose of the comparison required by section 20. Simler P said in Sheikholeslami v University of Edinburgh UKEATS/0014/17/JW that:

"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.

…. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

15. In relation to knowledge the burden is on the respondent to prove it did not have actual or constructive knowledge of (in this case) the substantial disadvantage. The EAT has held (in Secretary of State for Work and Pensions v Alam 2010 ICR 665) that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

    (i) Did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

    (ii) If not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

    It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments

16. The Code states at para.6.19:

    "For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment…"

17. As to adjustments, an important consideration is the extent to which the step will prevent the disadvantage. We should consider whether a particular adjustment would or could have removed the disadvantage: Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT.

18. In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 the Court of Appeal said: *"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."*

19. Accordingly it is unlikely to be reasonable to make an adjustment that involves little or no benefit to the disabled person in terms of removing the disadvantage.

We have to consider whether on the evidence there would have been a chance of the disadvantage being alleviated. Our focus should be on whether the adjustment would, or might, be effective in removing or reducing the disadvantage that the claimant is experiencing at work as a result of his disability and not whether it would, or might, advantage the claimant generally.

Time limits

20. Section 123 Equality Act 2010 states:

> *123 Time limits*
> *(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
> *. . .*
> *(3) For the purposes of this section—*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

21. In Humphries v Chevler Packaging Ltd EAT 0224/06 the EAT confirmed that a failure to act is an omission and that time begins to run in a reasonable adjustments claim from when an employer decides not to make the reasonable adjustment.

22. The Court of Appeal considered the question of time limits in reasonable adjustments cases in Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA. In particular the Court considered the position in claims where the employer was not deliberately failing to comply with the duty, and so the omission was not due to conscious refusal. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point (see S.123(4) EqA). The first of these is when the person does an act inconsistent with doing the omitted act. The second option requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. That requires an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. This is not the same as inquiring whether the employer did in fact decide upon doing it at that time. Sedley LJ noted that *'claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained*

that no point will be taken on time for as long as it takes to address the alleged omission'.

23. In determining when the period expired within which the employer might reasonably have been expected to make an adjustment, the tribunal should have regard to the facts as they would reasonably have appeared to the claimant, including what the claimant was told by his or her employer (Mears Group plc v Vassall EAT 0101/13). This means the period within which the employer might reasonably have been expected to comply has to be determined in the light of what the claimant reasonably knew and in particular when it should have been reasonably clear to the claimant that the respondent was not intending to make the adjustment (Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA).

24. If the allegations of failure to make reasonable adjustments are out of time then we only have jurisdiction to hear them if they were brought within such other period as we think just and equitable.

25. We should remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. We should consider the balance of prejudice. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. The tribunal has a wide discretion but there is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

26. Relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

27. Having said that however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore we should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This was emphasised by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

Findings of fact

28. The claimant was employed by the respondent as a prison officer from December 2004 until October 2020 following his successful application for ill-health retirement ("IHR").

29. The claimant was based at Winson Green prison in Birmingham.

30. For the entirety of the claimant's employment the claimant worked as a residential prison officer meaning he was based on the wings. The tribunal is in no doubt that this was a challenging work environment. There were issues with drug use, gang culture and violence. The claimant's job could be risky, difficult and stressful.

31. By 2019 and after such a long time working on the wings the claimant obviously felt ready to move. This is demonstrated by an email which the claimant sent to Carl Baker on 18 October 2019. In that email the claimant requested a move away from the wings. The claimant described wanting a new challenge and he also said that moving away from the wings would benefit him physically and mentally. This was a reference to the fact that the claimant firmly believed that working in a different area of the prison would be less risky and stressful.

32. It is accepted by the respondent that there were other areas of the prison in which prison officers could work away from the wings. These included the workshop, legal services, reception, visits and the safe custody department.

33. On 6 November 2019 the claimant was assaulted at work by a prisoner.

34. The claimant initially returned to work for a few days but on 9 November 2019 he informed his line manager Neil Oakley that he had been signed off sick due to his mental health.

35. The claimant was subsequently diagnosed with anxiety and depression and he did not return to work.

36. The respondent has correctly conceded that the claimant was disabled by reason of his condition from November 2019 and they accept that they were aware of that disability.

37. Prior to the claimant going off sick Mr Oakley emailed him to attempt to arrange a discussion to speak about the circumstances of the assault. Mr Oakley was concerned that the claimant may not have followed the correct procedure for unlocking the prisoners. Due to the claimant's sickness absence that discussion never took place and so the claimant was not able to give his response to any suggestion that he may not have followed the correct procedure.

38. It seems clear that the immediate trigger for the claimant's anxiety and depression was the assault which occurred on 6 November. It is equally clear

however that the claimant had come to find working on a wing generally to be stressful.

39. Mr Oakley quickly arranged for the claimant to see occupational health because of the circumstances of his sickness absence and the claimant attended an appointment with occupational health on 14 November. In that meeting the claimant informed occupational health that he found working on the wing to be stressful, and that he believed there was a lack of support from colleagues and management.

40. This first occupational health report recorded that the claimants symptoms were related to his perceived difficulties at work and those needed to be addressed by management. The claimant was assessed as not fit for work. This was to remain the occupational health view for the entirety of the claimant's absence.

41. On 21 November 2019 the claimant attended a welfare meeting with his line manager Mr Oakley and Governor Pete Smith. The claimant stated in that meeting that he did not want to work on the wings and he wanted to move department.

42. That proposal was given very short shrift by Mr Oakley and Governor Smith. They simply explained that the claimant was a residential officer and that is where he is located. The claimant was informed that if any other position arose then he could apply or be considered.

43. The tribunal did not hear any evidence from Governor Smith. In the tribunal's view Mr Oakley was unable to give any adequate explanation as to why he could not have relocated the claimant as a means of getting him back to work or indeed why he had not even investigated or considered that possibility before rejecting it.

44. What Mr Oakley did offer the claimant was a phased return and amended duties for a time limited period. Amended or light duties in this context meant not working directly with prisoners.

45. It was initially suggested that the claimant would undertake a phased return with amended duties for a period of a few weeks but this was later extended to 3 months and then at the end of that period there would be a review. Exceptionally the amended duties could be extended beyond three months but the respondent made it clear that the claimant would be expected to return to his role working on the wings at some point.

46. The proposed adjustment of a phased return and amended duties for a limited period did not work. It did not achieve its intended purpose of getting the claimant back to work.

47. The claimant's anxiety about working on the wing meant that he could not consider returning to work unless the respondent could guarantee that he would not return to working on the wing. The claimant made that crystal clear to the

respondent from an early stage, for example during the welfare home visit with Mr Oakley and Governor Smith on 15 December 2019.

48. The respondent dutifully commissioned a number of occupational health reports during the claimant's absence. In total we believe there were 7 reports. As we have already mentioned the occupational health view remained that the claimant was unfit to return to work. However it is equally clear that occupational health correctly recognised that the respondent's duty to make adjustments for the claimant was likely to be engaged and that there were potential steps which the respondent could take to enable the claimant to return to work.

49. Importantly, in the occupational health report dated 6 January 2020 occupational health stated that a return to work could be helped if the claimant was offered a different position not on the wings as his depressive symptoms were linked to the stress he experienced on the wings. Occupational health specifically requested that management should hold a discussion with the claimant to explore the possibility of a move.

50. The claimant's position that he wished to return to work but not on a wing also remained consistent. For example in the occupational health report dated 23rd of March 2020 it is recorded that the claimant had indicated that he would like to return to work as prison officer but working in another area as he felt he would not be able to return to work on the wings due to his previous experiences and feeling that this would be unmanageable for him.

51. Despite the suggestion made by occupational health and the claimant clearly explaining that a relocation could enable him to return to work the possibility of permanently relocating the claimant was in the tribunal's view never seriously engaged with by the respondent.

52. The respondent's position is demonstrated by the formal attendance review meeting which the claimant attended on 12 February 2020 with Governor Paul Newton. Following that meeting Governor Newton sent the claimant a letter on 19 February in which he set out what had been discussed at the meeting. The claimant's union representative had made the point at the meeting that the claimant had been located on wings throughout his whole prison career. This was part of an argument designed to persuade the respondent to move the claimant. Governor Newton's response to the claimant's request to be permanently relocated was confirmed in his letter. It was as follows *"I will not relocate you to an area such as visits".* That conclusion was obviously definitive and indeed expressed bluntly.

53. It is notable that Governor Newton expressed his decision not as something that he could not do but rather something he would not do. However Governor Newton did not explain why he had decided that the claimant would not be relocated either in his letter to the claimant at the time or in his witness statement for the tribunal.

54. This was a surprising omission. It is a very important issue because at the time the claimant was clearly suggesting a permanent relocation as a means of getting back to work and occupational health had also proposed that as an adjustment that could assist. Also, the principal adjustment that the claimant contends for in this tribunal case is a permanent relocation.

55. The only solution that Governor Newton offered at the time was to repeat the proposal for the claimant to have a phased return and amended duties for a time limited period before the situation would be reviewed - but with the expectation that the claimant would then return to working on the wings.

56. It was however already clear and known to the respondent that these proposed adjustments would not achieve their intended purpose as the claimant felt he could not return to work unless he received an assurance that he would not be expected to return to the wings. It is therefore unclear why Governor Newton was simply repeating the same thing which was already known to be unworkable.

57. In his witness statement Governor Newton said that it was important that all prison officers can work operationally anywhere in the prison and following a phased return potential job rotation could be considered once an employee was providing regular and effective service. The problem with Governor Newton's approach as the tribunal sees it is that it does not give adequate consideration to disabled employees who may need a permanent change to their duties, job role or work location as a reasonable adjustment. It should not be a requirement for such an employee to give regular and effective service before consideration for an adjustment is given. The reason for that is that a disabled employee is unlikely to be able to give regular and effective service until the adjustment is made. This was effectively the position the claimant was in.

58. Given the lack of any explanation from Governor Newton in the documentary evidence and in his witness statement as to why he had decided that the claimant would not be permanently relocated the tribunal attempted to explore that issue with Governor Newton in his oral evidence. The tribunal found this part of Governor Newton's evidence to be evasive and he did not answer the question on a number of occasions. This led to the issue being further explored by the respondent's counsel in re-examination. It was unsatisfactory that such important evidence only came out in this way.

59. In the end Governor Newton gave two reasons for not relocating the claimant permanently. Firstly he said that this would have been seen to be unfair by the claimant's colleagues. Secondly he said that it would have meant the claimant was not carrying out his job description as he was a residential prison officer. The tribunal found Governor Newton's reasons for not relocating the claimant to be highly concerning and we shall explain why in our conclusions.

60. Following the February meeting the claimant was referred again to occupational health and at that stage one of the options being considered was whether the claimant would be eligible for IHR. The claimant was referred by occupational health for a course of CBT on 19 February and the occupational health view

was that IHR was not at that stage appropriate as the claimant's treatment was ongoing.

61. Sadly the CBT treatment does not appear to have been successful and on 13 May 2020 the claimant advised occupational health that despite being on medication and having had both counselling and CBT he was now feeling worse and was struggling to even think about work or talk about it. The occupational health view at this juncture was that the claimant was unlikely to return to work and it was unlikely that any workplace adjustments would help.

62. On 23 May 2020 the claimant applied for IHR. He was required to fill in a detailed application form. The claimant said that he was not able to return to his current position as he would not cope and he also said that it was unlikely that he would be able to return to any position within the prison without a significant risk of his health deteriorating again. The claimant said that he did not believe that he would be suitable to return to any position within the prison due to the impact it would have on his well-being.

63. Therefore it seems clear to the tribunal that the claimant's condition had deteriorated significantly and his own position had changed from being one where he could consider a return to work if it meant working away from the wings to one where he did not believe he could return to work in any position in the prison.

64. The medical advice that was obtained by the respondent in relation to the claimant's application for IHR was that the claimant should be considered as permanently incapable of doing his own or a comparable job and no adjustments were identified that could enable the claimant to return to work. However the Doctor also found that the claimant should not be considered as having total incapacity for undertaking gainful employment on a permanent basis. That conclusion was reached taking into account that the claimant would not reach his pension age until 2052.

65. On 5 October 2020 the claimant raised a detailed grievance. The claimant complained of discrimination because of his race. He also complained that the reasons for his sickness absence had not been acknowledged but rather dismissed. He said that he had been met with nothing other than pressure to return to work without necessary changes being made. He set out the problems he had experienced working on the wings, the anxiety which he had experienced and the psychological impact that working on the wings had had on him. The claimant pointed out that other colleagues had been relocated to positions not on the wings and he gave specific examples. The claimant expressly said that he considered that the respondent had failed to make reasonable adjustments and he demonstrated his awareness of his rights under the Equality Act, in particular by citing various sections from that Act.

66. The claimant's grievance was not upheld.

67. The claimant appealed but the appeal was not upheld either.

68. The claimant attended a meeting to discuss his application for IHR on 13 October. It was made clear to the claimant that in light of the medical advice he was eligible for IHR although at the lower tier. The claimant confirmed that he wished to accept the offer of IHR and resign. The claimant's employment then terminated for that reason.

Conclusions

69. The respondent accepts that it had the first PCP relied upon by the claimant of requiring residential/frontline officers to remain working as residential/frontline officers. We consider this concession was rightly made.

70. The second PCP relied upon by the claimant was that the respondent only allowed a short/two-week phased return to work. We find that the respondent did not have that PCP. We think in fact that this allegation arose from a misunderstanding on the part of the claimant. When it was initially suggested to the claimant that he could have a phased return it was suggested that that could be for two or three weeks. However it was the respondent's usual practice for a phased return to be reviewed at the end of that initial period and it could then be extended if appropriate. We are satisfied that that was what the respondent was proposing to do with the claimant. In fact it was later explained to the claimant at the meeting on 12 February that his phased return could be as much as three months and then further extended if there were exceptional circumstances. We therefore do not find that the respondent had the second PCP as alleged.

71. The third PCP relied upon by the claimant was that the respondent expected employees to arrange their own counselling and CBT. We find that the respondent did not have that PCP either. The claimant's complaint here is really that he considers that the respondent did not act promptly enough to arrange his CBT. However the respondent's usual practice was to wait until CBT had been suggested by occupational health. That is what happened in the claimant's case and when occupational health made that recommendation in their report of 19 February we consider that Mr Oakley acted reasonably promptly to arrange the claimant's CBT so that it was set up by 18 March. We therefore do not think that there was any expectation on employees to arrange their own counselling or CBT - rather the respondent took steps to arrange such matters when they were suggested by occupational health. That is what happened in the claimant's case. We therefore find that the respondent did not have the third PCP as alleged.

72. This means that the claimant's claim insofar as it relates to the second and third alleged PCPs must be dismissed.

73. We should also mention that we consider that the respondent's practices around arranging a phased return to work, CBT and counselling could not be said to put the claimant at the claimed substantial disadvantage of not being able to return to work and his employment ending. As we shall explain the claimant was put to this disadvantage by the respondent's requirement for him to remain working as a residential/front line officer and not their practices

around arranging a phased return to work, CBT and counselling. Further, the suggested adjustments were to offer the claimant a phased return of longer than two weeks and provide CBT/counselling. We have found that the respondent did those things. It was not the length of the phased return which put the claimant at the disadvantage – it was the fact that he was required to return as a residential/front line officer at the end of it. Arranging the CBT/counselling sooner could not have avoided any disadvantage since the claimant's condition did not improve at all after he had CBT/counselling, in fact it seems to have got worse. For these reasons we did not find any potential failure to make reasonable adjustments in relation to the second and third alleged PCPs in any event.

74. We next consider whether the first PCP put the claimant at a substantial disadvantage in comparison with a non-disabled person. The substantial disadvantage relied upon by the claimant was that he could not return to work due to his mental state and his employment ended. The medical evidence and our findings make it clear that the claimant could not return to work due to his mental state and it is equally clear that this ultimately led to the claimant's employment ending. We are satisfied that that was a substantial disadvantage and that the claimant was put at that substantial disadvantage by the first PCP in comparison with a non-disabled person. It was a disadvantage that was linked to the claimant's disability, because it was the claimant's anxiety which led to him feeling that he could not return to work on the wings and therefore his employment ending.

75. The claimant was entirely clear and consistent from the very start of his absence that the barrier to him returning to work was the requirement for him to work on the wings. He clearly and consistently said that he could not return to work unless he could be assured that he would not be required to work on the wings. This is plainly why occupational health suggested in January 2020 that relocating the claimant away from the wings could assist with getting back to work. The respondent knew that the claimant could not return to work due to his mental state and they knew his mental health was what led to his employment ending in IHR. Through their communications with the claimant and the medical evidence they received there cannot be any doubt that the respondent knew that the claimant was likely to be placed at the disadvantage.

76. Somebody without the claimant's disability would not have experienced this disadvantage. That point is well illustrated by the fact that the claimant did not experience the disadvantage and was able to continue working on the wing until he became disabled in November 2019. The claimant's depression and anxiety then affected his mental state such that he could not contemplate a return to work on the wings because of the stress and anxiety it would cause him. This led to his employment ending. That was the nature of the substantial disadvantage which the claimant was put to by the first PCP in comparison with a non-disabled person.

77. We next have to consider what steps could have been taken by the respondent to avoid the disadvantage. The claimant suggests that he could have been moved to work in a different location away from the wings. The claimant

correctly points out that he made this request repeatedly during his absence. He clearly suggested this on a number of occasions as a means of getting back to work. As we have explained already it was also a suggestion that was made by occupational health and specifically described by them as an adjustment which could assist with getting the claimant back to work. Therefore the contemporaneous evidence, including medical evidence, strongly suggests that moving the claimant on a permanent basis away from the wings could have avoided the disadvantage - in other words it could have enabled claimant to return to work and continue, rather than end, his employment. We accept that evidence and we think a permanent move away from the wings could have avoided the disadvantage.

78. We find that it would have been reasonable for the respondent to take that step. The principal reason why we find that it would be reasonable for the respondent to take that step is that it is very likely in our view to have worked to avoid the disadvantage. In light of the fact that the claimant had repeatedly expressed that the barrier to return was working on the wing and occupational health recommended a move we consider that that step would have been effective in preventing the substantial disadvantage i.e. it could well have enabled the claimant to return to work and ultimately remain in employment.

79. We consider that the respondent did not produce any cogent evidence or argument to suggest that it would not be reasonable to make the adjustment of permanently relocating the claimant away from the wings.

80. We should emphasise that the concept of making reasonable adjustments is important because the making of adjustments enables disabled people to remain in work. In this case the claimant became a disabled person and then was not able to remain in work. This was a very bad outcome for everybody. It's a bad outcome for the claimant because he lost his job and indeed his career in the prison service. It is a bad outcome for the respondent because they have lost the services of an experienced employee. And it is a bad result for society because a disabled person who had been working is now not working. The respondent had a duty to make reasonable adjustments to try and avoid that very bad outcome.

81. In that context Governor Newton's reasons for not relocating the claimant and indeed not even seriously considering or investigating the possibility were unsatisfactory and unreasonable.

82. Regarding the claimant's colleagues potentially viewing a relocation as unfair we are firstly unsure of why Governor Newton held this view. We imagine that the prison officers working in Winson Green prison are a professional and responsible workforce. We do not see why any responsible and professional workforce would see the making of a reasonable adjustment to enable a disabled person to remain in work as unfair.

83. On the contrary, we think that a professional and responsible workforce would see the making of reasonable adjustments for disabled colleagues as a very

positive thing for an employer to do, particularly where the alternative is that an experienced disabled colleague left their employment.

84. Making reasonable adjustments is not unfair – it is fair and it is a legal requirement. If it was genuinely the case that prison officers would view the making of an adjustment as unfair and this may lead to problems then we would suggest that the appropriate course for the respondent to take would be to properly train its workforce as to the respondent's responsibilities under the Equality Act and of the vital importance of making reasonable adjustments for disabled employees. This would ensure that the respondent's staff do not mistakenly view the making of adjustments as unfair. A failure to train and create awareness of rights and responsibilities under the Equality Act cannot amount to a reasonable basis for not implementing an adjustment.

85. Regarding the fact that relocating the claimant would have meant the claimant not performing his job description this misses the entire point of reasonable adjustments. A reasonable adjustment will frequently entail a permanent change to an individual's duties or job description. That is the very nature of many reasonable adjustments.

86. It appears to the tribunal that Governor Newton's views were coloured by his belief that many prison officers were as he put it "hiding" i.e. working in what were seen as more desirable locations in the prison away from the wings. The evidence does not suggest however that the claimant was hiding or attempting to hide. He had worked for some 14 years on the wings and it is clear that his stress and anxiety levels had reached the stage where he could not return to the wing. In those circumstances occupational health were in our view entirely right to confirm to the respondent that the claimant was disabled and that the adjustment of him being permanently relocated should be considered. The sad reality of this case however is that the possibility of a relocation was dismissed out of hand initially by Mr Oakley and ultimately by Governor Newton.

87. In attempting to justify that decision the point which was emphasised by Mr Lyons in closing submissions was that the respondent had proposed a reasonable adjustment of a phased return and amended duties for a limited period. Our finding is that this was not in fact a reasonable adjustment. The reason why it was not reasonable was because it did not work. It did not avoid the disadvantage of the claimant being unable to return to work. That disadvantage still existed and therefore the respondent had a duty to consider and make other adjustments.

88. We think the fact that the respondent only proposed a phased return and amended duties for a limited period demonstrates that their approach was rigid and inflexible and not geared towards the claimant's particular needs arising from his disability.

89. No doubt there are many cases where a phased return and amended duties for a limited period will assist in getting a disabled person back to work, but it will not work in every case. It did not work in this case. The respondent was aware it wouldn't work because the claimant told them but nevertheless they rather

dogmatically repeated the same offer over and over rather than considering alternatives. We think they should have seriously considered alternatives and had they done so they could reasonably have implemented the proposed adjustment of permanent relocation.

90. There was no evidence or argument presented to us that a permanent relocation would have been impracticable or costly. The claimant has demonstrated that it was perfectly possible for prison officers to work in different locations in the prison other than the wings. We find it would have been entirely reasonable for the respondent to permanently relocate the claimant as he requested and this would have been likely to get him back into work. The respondent therefore failed to make reasonable adjustments for the claimant.

91. We now have to consider time limits in relation to the claim which has succeeded. We consider that the respondent should have made the adjustment by March 2020 at the latest. This takes into account the length of the claimant's absence and what had been brought to the respondent's attention by both the claimant and occupational health by that stage. It is relevant that the claimant knew in February 2020 that the respondent was not going to make the adjustment. We also have to acknowledge that the claimant's condition appears to have deteriorated after March 2020 - he then changed his focus from trying to get back to work to getting IHR and his position was reflected in the medical advice from around May which was more negative about the prospect of the claimant returning to work and the possibility of adjustments. It would not therefore make sense to suggest it would have been reasonable for the respondent to make the adjustment after March. We therefore think it's clear that the period in which the respondent might reasonably have been expected to make the adjustments lasted until March 2020 at the latest.

92. Having said that however we consider this is in fact a case where the respondent made a conscious decision to refuse to make the adjustment and they clearly communicated that to the claimant. The ultimate and conclusive decision on the adjustment was taken by Governor Newton at the meeting on 12 February 2020 and confirmed by him in his outcome letter to the claimant of 19 February 2020. Governor Newton directly and frankly said to the claimant both orally and in writing that he would not relocate him.

93. Applying section 123(3)(b) of the Equality Act a failure to do something is to be treated as occurring when the person in question decided on it. The decision in this case was taken in February 2020 and therefore time must run from that date

94. The relevant time limit the claimant to start proceedings in relation to this claim is three months. Therefore the claimant should have initiated proceedings in May 2020. In fact the claimant did not contact ACAS until 6 January 2021 and he did not bring his claim until 4 February 2021. The claim is therefore around eight months out of time. Even if we considered the latest time of when we thought the respondent should have made the adjustment (March 2020) the claim would still be around seven months out of time.

95. We therefore only have jurisdiction to uphold this claim if we consider that time should be extended on a just and equitable basis. We have reminded ourselves that this gives us a broad discretion to extend time and we should take into account any relevant factor. We have to consider whether the claim was brought within such other period as we think just and equitable.

96. We should note that the tribunal had foreseen that this issue may arise and in advance of closing submissions we raised it with the parties in particular so that the claimant could address us on whether there should be a just and equitable extension as he had not addressed that point directly in his evidence. Both parties were therefore able to address us fully on the matter in closing submissions.

97. The respondent pointed to the general prejudice of having a claim against it which has been presented outside of the statutory time limits. Further the delay was significant and the reality was that the claim had not been presented until nearly a year from the relevant decision having been taken in February 2020. Mr Lyons further submitted that all of the relevant factors (discussed further below) would weigh against the grant of an extension.

98. The claimant asked us to take into account his illness at the relevant time and also the efforts which he had made to return to his job.

99. The tribunal's considers that the relevant factors are these:

(i) The delay of around eight months is substantial.

(ii) The reason for the delay has not been explained by the claimant. The claimant did not present any evidence explaining why he had not brought his claim in time and although he asked us to take into account his illness he did not go as far as to suggest that his illness in any way prevented him from bringing claim in time. He did not suggest that he was unaware of his rights and, as we explain below, the evidence in fact shows he was plainly aware of them yet he still chose not to bring a claim.

(iii) We find that there was no good reason for the claim not to have been brought in time or earlier. Despite his illness the claimant was certainly capable of bringing his claim in time and his illness would not have prevented him from doing so. In the relevant period the evidence shows that the claimant was fully engaged with various processes concerning his employment including attending meetings, making his detailed application for IHR and submitting his detailed grievance. In the tribunal's view the claimant could if he had wished to do so have focused his energies on submitting a tribunal claim.

(iv) The claimant was advised and assisted by his trade union throughout the process and he therefore had access to professional advice.

(v) It is likely taking into account the contents of the claimant's grievance that that advice covered alleged breaches of the Equality Act and the possibility of bringing a tribunal claim. In any event in our view the claimant's grievance

clearly shows that he was aware of his rights under the Equality Act and in particular that he had a potential tribunal claim for failure to make reasonable adjustments. The claimant still chose not to bring a claim in time or any earlier.

(vi) There is a public interest in the enforcement of time limits in employment tribunals.

(vii) We accept there is a general prejudice against the respondent if we accept a claim against it out of time.

(viii) We also accept the point that the delay has been significant in that the claim form was not submitted until February 2021 but the decision complained of was in February 2020. This is far outside the statutory time limit and it should be acknowledged that the allegation was somewhat stale even by the time the claim was submitted in view of the delay and the facts that the claimant's grievance had already been dealt with and his employment terminated in October 2020. It is possible that this staleness contributed to the lack of clarity which we observed in Governor Newton's evidence as to why he had not made the adjustment. These are further indications of prejudice to the respondent.

(ix) We do not think there is a prejudice against the claimant in enforcing the time limits in these particular circumstances. This is because we find that the claimant made an informed and we think tactical decision to focus on submitting his application for IHR rather than a tribunal claim in circumstances where he knew he had a potential claim (as demonstrated by his grievance). In the tribunal's view he made the decision that that was the outcome which would be best for him rather than initiating legal proceedings. It seems that the claimant subsequently changed his mind at a very late stage as he brought a tribunal claim in February 2021 despite the fact that he had by then successfully applied for IHR and his employment had ended in October 2020. In these specific, and unusual, circumstances we concluded that the disadvantage to the claimant of losing his valid claim of failure to make a reasonable adjustment did not amount to a prejudice which would swing the balance in favour of exercising the discretion in his favour. The disadvantage suffered by the claimant is purely a result of his own tactical decision and his very late change of mind.

(x) In our view the claimant's efforts to get back to work are a further factor which would count against the claimant. In the period up to March 2020 the claimant had attempted to facilitate a return to work in particular by proposing that he be relocated away from the wings. However as we have explained by the end of February it had become clear that those efforts would not succeed as the respondent had definitively stated its position that the claimant would not be relocated. At that stage the claimant's position changed and his view became that he could not return to work in any capacity and he therefore focused exclusively on IHR. The claimant did not make any efforts to get back to work after March 2020. To put it bluntly it must then have been entirely obvious to the claimant (and his professional advisers) that any claim relating to a failure to make the adjustment of relocating the claimant should have been brought within three months of Governor Newton's decision in February 2020. The claimant's grievance shows he knew of the duty to make adjustments. Yet the claimant

delayed bringing his claim until 4 February 2021, which was nearly 4 months after his grievance and indeed after his employment had terminated.

100. The tribunal has concluded that all of these relevant factors weigh against the granting of an extension. We find that there is no basis to grant an extension on just and equitable grounds. The claim was not brought within such other period as we think just and equitable.

101. Therefore we do not have jurisdiction to uphold the claimant's claim. The result is that the claimant's claim for failure to make reasonable adjustments must be dismissed.

Employment Judge Meichen

13 October 2022