EMPLOYMENT TRIBUNALS

claimant: Ms Lucy de Matteis

respondent: Secretary of State for Justice

Heard at: Cambridge Employment Tribunal

On: **12, 13 & 14 September 2022**
Deliberations: 21 October 2022

Before: Employment Judge Michell
Mr Thomas Doyle
Mr Chris Grant

Appearances:

For the claimant: Ms L Redman (counsel)
For the respondent: Mr A Line (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the claimant's claims of direct sex discrimination and victimisation under the Equality Act 2010 are not well founded. Her claims are therefore all dismissed.

REASONS

(1) INTRODUCTION

Claim and issues

1. The claimant has been employed by the respondent as a prison officer at HMP Littlehey ("the prison") since 29 January 2007. In an ET1 presented to the tribunal on 14 May 2021, the claimant brought a claim of direct sex discrimination (s13 Equality Act 2010 (EqA)) and/or victimisation (s27 EqA). Liability is denied by the respondent in the ET3.

2. A case management hearing took place on 22 February 2022, before EJ Laidler. Mr Line appeared for the respondent. Mr Paul Jackson, solicitor, appeared for the claimant. At that hearing, the issues were helpfully clarified and agreed. They were as follows:

Sex discrimination (s13 EqA)

1. *Did the following amount to less favourable treatment:*
    a. *The claimant's suspension, with effect from 1 September 2020, by Governor Andy Juden ("**Allegation 1**").*
    b. *Governor Andy Juden's decision to treat the disciplinary allegations as amounting to potential gross misconduct, as set out in his letter dated 22 October 2020 ("**Allegation 2**").*
    c. *Not conducting a disciplinary investigation into a complaint against Governor Tony De Matteis, whilst subjecting the claimant to a disciplinary investigation and process (which resulted in the report of Governor Chris Gyles' dated 25 September 2020) ("**Allegation 3**").*
    d. *The imposition of a final written warning by Governor Andy Juden, lasting three years, as a result of the disciplinary hearing on 2 December 2020 ("**Allegation 4**").*
    e. *The alleged failure to take disciplinary action against the alleged conduct of Governor Andy Juden towards prisoner AB in the disciplinary hearing (in relation to which the claimant raised a grievance on 12 February 2021) ("**Allegation 5**").*
    f. *The alleged failure to deal with the claimant's grievance dated 12 February 2021 ("**Allegation 6**").*
    g. *Governing Governor Phelps allegedly trying to deter the claimant from pursing her legal rights, the gist of her words being "you do realise you've still got to work here", on 4th March 2021 ("**Allegation 7**").*
    h. *Upholding the disciplinary outcome on appeal, through Gary Monaghan's letter dated 8th April 2020 ("**Allegation 8**").*

2. *If so established, was the less favourable treatment because of the claimant's sex? The claimant compares herself to:*
    a. *In relation to Allegation 3 Governor Tony De Matteis*
    b. *In relation to Allegation 5 Governor Andy Juden.*
    c. *In relation to Allegation 4, a male prison officer, Officer KJ, who the claimant alleges worked on K Wing at the prison.*
    d. *In all other cases, a hypothetical comparator.*

Victimisation (s27 EqA)

3. *The claimant alleges, and the respondent accepts, that the following amount to protected acts within the meaning of s. 27(2) EqA:*
    a. *The claimant's grievance dated 12 February 2021.*
    b. *The claimant contacting ACAS and engaging with the conciliation process (Day A being 23 March 2021, and Day B being 14 April 2021).*

4. *Was the claimant subject to a detriment because of these protected acts? The claimant relies on the following allegations:*
    a. *The failure to hold a hearing of her grievance dated 12 February 2021 ("**Allegation 9**").*
    b. *Governing Governor Phelps allegedly trying to deter the claimant from pursuing her legal rights, the gist of her words being "you do realise you've still got to work here", on 4 March 2021 ("**Allegation 10**").*
    c. *Upholding the disciplinary outcome on appeal through Gary Monaghan's letter dated 8 April 2020 ("**Allegation 11**").*

The hearing

3. The hearing was conducted remotely, to which there was no objection. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.

4. For the most part, despite problems with sound from time to time, we got through the hearing without many technical issues. We heard evidence from the claimant, and from her union representative Duncan Williams. For the respondent, we heard evidence from Chris Gyles, Governor Andrew Juden, Gary Monaghan, and Governing Governor Olivia Phelps. We were also referred in those witnesses' statements, and by counsel, to various pages from bundle comprising 809 pages.

5. The case had originally been listed for five days. Unfortunately, when the matter came before us, only three days had been allocated. Nevertheless, with the assistance of counsel, we got through the evidence within the allotted 3 days. With the agreement of counsel, we made provision for exchange of written submissions, and of supplemental written submissions. The tribunal has duly considered those documents in its deliberations.

(2) FACTUAL FINDINGS

6. The prison is a category C male prison. By 2020, there were approximately 145 female and 306 male prison staff members. So, approximately a third of the workforce was (and still is) female.

The 13.7.20 incident

7. On 13 July 2020, the claimant was working in the prison. Prisoner AB had received a warning from another prison officer as a result of a minor incident. AB was concerned about that warning, because he was about to have a parole interview, and was worried that the warning might interfere with his prospects of obtaining parole.

8. The claimant and the prisoner were together in a room. Various other people were present, too. There was a box in the room, of about the same size as the kind of box in which home deliveries are made. The claimant told prisoner AB that if he got into the box, "we'll forget about the warning". Prisoner AB duly got into the box.

9. At some point during these events, the claimant's father, who is a governor at the prison, entered the area.

10. We accept that in telling the prisoner to get into the box, the claimant did not intend to cause him distress. Her remark was meant as 'banter'. We also accept that from time to time, there will be 'banter' between staff and prisoners, and that it is often harmless or positively useful to morale etc.

11. However, that was not how prisoner AB took the comment on that occasion.

The complaint and investigation

12. On 16 July 2020, prisoner AB completed a discrimination incident reporting form, in which (amongst other things) he complained that the claimant had told him to "get in a box" and that in so doing she was "imposing power".

13. Accordingly, on 21 July 2020, Gov Juden commissioned Gov Gyles to conduct a formal investigation into the allegation against the claimant.

14. During that investigation, various individuals who were present in the room at the time were asked to recall what was said and done, and by whom. Various (often conflicting) accounts were given during a series of interviews in August 2020 as regards (amongst other things) what Gov de Matteis said, did, and might have seen. No one suggested that he had heard his daughter telling the prisoner to get into the box, or that (if he saw the prisoner in the box at all) he knew how the prisoner had come to be there. Gov de Matteis during his interview on 11 August 2020 said that he could not recall seeing or hearing anything untoward. He said he only saw the box on the floor.

15. The claimant was interviewed on 10 August 2020. She accepted that she had told prisoner AB to get into the box. When she was asked whether it was right to ask him to do that, she said "*if I was being serious and was serious about getting him in the box and [giving him] a warning or whatever, then yes, that would be wrong - but that wasn't how it was meant. I wasn't actually wanting him to get in the box and then the warning would disappear*." She claimed she had a "*very good rapport*" with the prisoner.

16. Prisoner AB asserted during his interview on 30 July 2020 that the claimant had produced the box in her hands, had put the box on the floor, and repeatedly told him to stand in the box. (We note that various details he gave about the incident did change from time to time) He stated that although this may have been an attempt at banter, he did not perceive it as a joke he said he felt bullied and humiliated by this, and that he felt pressured to get into the box. He also said that he and the claimant: "*keep their distance on the wing and are not overly friendly with one another and therefore he is confused as to why she thinks it would be appropriate to have this type of joke with him*".

Suspension

17. The respondent's procedure provides that suspension "*must only be used in exceptional circumstances*". But Gov Juden made enquiries as regards the best course of action to take whilst the investigatory process was continuing. He was advised by a more experience Governor that it was appropriate to suspend the claimant, given the seriousness of the allegations against her. Accordingly, on 1 September 2020, the claimant was suspended by him "on full pay and without prejudice" whilst the investigation proceeded.

18. The claimant did not appeal the suspension decision.

19. Gov Juden told us, and we accepted, that he genuinely believed suspension was appropriate action to take in the light of the allegations against the claimant. This was because of the advice he had received, and because he considered the claimant's conduct to be extremely serious. (He said in evidence he had not encountered anything like it in 30 years of service.) He also told us, and we accepted, that he would have done precisely the same thing if the individual under investigation had been male.

Conclusion of investigation

20. In his report dated 25 September 2020, Gov Gyles noted the various "disparities" in individuals' accounts of events. But, as noted above, there was no dispute that the claimant had told prisoner AB that if he got into the box the warning would be forgotten about. Gov Gyles decided there was no evidence to suggest the claimant had acted as she did "in relation to a protected characteristic" (i.e. race). But he concluded that the incident "*could be viewed as an abuse of power*", even if "*done in the name of banter*". He found that the claimant "*submitted a resident to a humiliating experience that was an unnecessary action on her behalf*". He recommended that the allegation be explored at a disciplinary hearing. Given his findings, we consider that recommendation was wholly unsurprising.

21. The claimant does not make any allegation of discrimination in relation to Gov Gyle's investigation, findings or recommendations as part of her tribunal case.

22. Gov Juden wrote to the claimant on 22 October 2020, requiring her to attend a disciplinary hearing to answer the allegation that she had got prisoner AB "*to get*

into a box in order for a warning to be rescinded". He explains in his letter that the allegations, if proven, "*would constitute gross misconduct*". He also sets out the various steps open to him, including "*formal action up to and including ending your employment*".

Disciplinary hearing- 2.12.20.

23. The disciplinary hearing took place on 2 December 2020. During the hearing, at which prisoner AB was in attendance, the claimant apologised to him: "*because obviously I have made you feel humiliated and degraded… I didn't mean to make you feel like that. And nobody deserves to be made to feel like that. So I am sorry*".

24. AB appeared extremely nervous about being present/giving evidence. Given the formality of the occasion, this was perhaps unsurprising. The prisoner had failed to bring certain paperwork with him, so Gov Juden passed him his own copy. However, Gov Juden's paperwork included some material which it was not appropriate for the prisoner to see. So, when Gov Juden gave him the paperwork, he told him that him must not turn beyond a certain point in the papers, or he would give the prisoner 'a backhander'. Gov Juden may also have made a hand gesture at the same time -although any such gesture could not have been any form of real threat, given the distance between himself and prisoner AB.

25. As Gov Juden candidly accepted in his evidence, such behaviour by Gov Juden was not at all well advised. It might have been taken by prisoner AB as a threat- and had it been, Gov Juden might well have found himself on the wrong end of a serious disciplinary charge. However, as we find, prisoner AB did not feel threatened. He took Gov Juden's comment as the joke it was intended to be, and it served to relax him and to (as Gov Juden put it) "*lighten the mood*". He brought no complaint, informal or otherwise, in respect of the actions of Gov Juden.

Final written warning

26. Following the hearing, Gov Juden considered that the claimant's conduct amounted to gross misconduct. Even though she had not meant to do so, she had caused prisoner AB concern and upset, and (as he saw it) had taken advantage of the imbalance of power that exists between prisoner and prison officer. However,

he considered that the claimant's apology was "extremely relevant" to sanction. It was one of the most important reasons why he chose to impose a final written warning, rather than to dismiss the claimant. The warning was for a three-year period, which is usually the maximum timespan imposed -albeit in particular circumstances up to five years' lifespan is allowed.

27. Gov Juden told us, and we accepted, that the sex of the claimant played no part in his decision. The fact she was a woman was irrelevant.

28. As part of her tribunal case, the claimant relies on male officer KJ as her comparator. That officer had apparently printed an identification card out on the wrong size of paper. (Such a card is necessary for prisoners to be able to move from one particular area of the prison to another.) According to the claimant, the prisoner was told by officer KJ that he would be put on report if he removed the card. However, there is no evidence that the prisoner in that case was or felt humiliated. We do not know the reasons why the wrong size of paper was used, or why prisoner was told he would be put on report. As the claimant says herself in her witness statement, "*I don't know if this was done in a light hearted or playful way or in a bullying or malicious way*". It might have been for a valid reason. And, crucially, the prisoner did not make a formal complaint.

29. More generally, the claimant asserts in her witness statement that "*even suggesting that asking someone to stand in a box when we were joking and fooling around constituted gross misconduct appears ridiculous. Male colleagues were never treated in such an excessively punitive way or had their playfulness mischaracterised as cruelty or abuse. It is simply ridiculous.*" As to this, we observe that, at the time, the claimant did not seek to assert that prisoner AB was being disingenuous in expressing upset at the claimant's behaviour. And there was no evidence before us to support the generalised complaint that male colleagues were effectively given carte blanche whilst female colleagues were sanctioned for 'horseplay' or 'banter'. (Indeed, the very limited statistics before us showed a slight skew in favour of female staff members.)

<u>Appeal & grievances</u>

30. The claimant appealed the imposition of the final written warning under cover of a letter dated 21 December 2020.

31. The claimant then raised two grievances in relation to Gov Juden's behaviour. The first, dated 29 January 2021, did not contain any allegations of sex discrimination. But she did complain about what she saw as inconsistency in treatment between herself and Gov Juden- she asserted that he "*should be challenged for the similar behaviour he had just found me guilty of*", which "*was not only threatening, but made me feel extremely uncomfortable*". In the second grievance, dated 12 February 2021, the claimant again complained of what she saw as the disparity between how she and Gov Juden had been treated. This time, she asserted that the disparity amounted to sex discrimination.

Meeting with Gov Phelps 4.3.21

32. The claimant met with Gov Phelps on 4 March 2021.

33. Gov Phelps was aware that the claimant had submitted an appeal against the disciplinary outcome, and that her grievance related to how the disciplinary hearing had been conducted. She took HR advice, read the grievance procedure, and from that understood that where a grievance overlapped with an ongoing appeal, the appeal should be dealt with first.

34. We do not accept that Gov Phelps put any pressure on the claimant during that meeting to drop her grievance, or to not "*pursue her legal rights*". We say this firstly because Gov Phelps struck us as being entirely credible in her evidence on this point. Secondly, because the emails passing between herself and the claimant shortly after the meeting (at p503 of the bundle) are strongly supportive of her. They indicate that, far from trying to deter the claimant, she explained to her that once the appeal had concluded, it was open for the claimant to continue with her grievance. In particular:

    a. Gov Phelps' 4.3.21 email reads: "… *Following our conversation this morning, we agreed I would not be registering this grievance due to the ongoing appeal process that you are undergoing. Once this has completed you can review whether you still feel you need to take any further action*…"

b. The claimant's 8.3.21 response reads "… *after seeking further advice, I can now see that agreements may not be the most appropriate action to take and using the reporting wrongdoing procedures may be a more appropriate action going forward. I will revisit this once my appeal hearing has concluded*".
c. Gov Phelp's 15.3.21 reply reads: "… *I will be more than happy to talk to you going forward, once things are more settled for you*…".

35. Those emails undermine Mr. Williams' complaint in his statement that the claimants' 29 January 2021 grievance "*still hasn't been heard... you can draw your own conclusions. It is unlikely to have been an oversight*".

36. In her written submissions to us, Ms Redman argued that the claimant was "*so intimidated by Gov Phelps that she did not contact her again to reopen the grievance*". That submission was at odds with the evidence the claimant herself gave to us- which was that, because she had instigated tribunal proceedings, she decided to proceed with her tribunal claim rather than pushing for the grievance to be dealt with.

37. We do not accept that Gov Phelps made any threat (implicit or otherwise) to the claimant. She may have said something about the need to move forward, given that she was to remain working at the prison. But in the tribunal's judgment, there was nothing wrong in saying such a thing -indeed, there was good sense behind it.

38. Gov Phelps also had a line management discussion with Gov Juden as regards his conduct during the disciplinary meeting. She gave him words of advice. She told us, and we accepted, that she would have acted in precisely the same way had governor Juden being female

39. After various logistical difficulties in arranging a hearing, the appeal eventually took place on 1 April 2021. Mr Monaghan was tasked with dealing with it. During the hearing, the claimant did not raise any issues relating to sex discrimination in

relation to alleged disparity between herself and Gov Juden. This, despite the fact that she had the assistance of Mr. Williams. (In his evidence to us, Mr. Williams said he would not advise someone not to mention it, if they felt they'd be discriminated against in any way.)

40. Mr Monaghan in his decision letter dated 8 April 2021 found that the penalty was appropriate in the light of the claimant's behaviour. He concluded that dismissal could have been a "genuine possibility" and that the imposition of a 3 year final written warning was, if anything, "*leaning on the side of leniency*". As regards the claimant's contention that disciplinary action ought to have been taken against Gov Juden, he considered is important to note that the comment was "*made in jest*", was taken as such by prisoner AB, and that the prisoner had not made any complaint about it.

41. He also observed to us that a prisoner is not limited in making an internal complaint. A prisoner can, for example, also complain to the ombudsman, or their MP. Prisoner AB made no such complaint against Gov Juden.

42. As set out above, Mr Monaghan's decision is put as both an act of direct sex discrimination and of victimisation. However, in her evidence, the claimant made it clear that she was no longer asserting sex discrimination on his part. That concession was somewhat rowed back from later in the hearing.

43. Mr Monahan told us that he had not seen the 12 February 2021 grievance when he came to his decision. That evidence was not challenged, and we accepted it. Similarly, it was his unchallenged evidence (which we accepted) that he was not aware that the claimant had engaged with ACAS as a precursor to bringing a tribunal claim by the time of his letter.

44. It was put to him by Ms Redman that his decision was based on sex. He said he entirely disagreed. He explained that the prisoner had been humiliated and degraded by being made to stand in the box, and in the context of potential rescission of the warning (whether or not the warning could in fact have been rescinded). That, and the other matters in his decision letter, was why he reached his conclusions.

(3) MATERIAL LAW

Direct discrimination

45. Following the guidance given by the EAT in **Barton v. Investec Henderson Crossthwaite Securities Ltd**, as developed and refined by the Court of Appeal in **Madarassy v. Nomura International plc** and **Home Office (UK Border Agency) v. Essop**, the burden of proof in a discrimination claim falls into two parts.

46. Firstly, it is for the claimant to prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that the respondent's discriminatory treatment of them was because of disability. They must show that to be the answer to 'the reason why' question that arises in such claims. That is 'Stage 1'.

47. If the claimant does not prove such facts, she must fail.

48. Secondly, where the claimant has proved facts from which it could be inferred that the respondent has treated the claimant less favourably on proscribed grounds, then the burden of proof moves to the respondent.

49. It is then for the respondent to pass 'Stage 2' and prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

50. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on proscribed grounds.

51. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the relevant protected characteristic was not any part of the reasons for the treatment in question. If the respondent can do this, the claim fails.

52. As regards 'unreasonableness' of the respondent's conduct and discrimination, the ET is not entitled to draw an inference of discrimination from the mere fact that the

employer has treated the employee unreasonably and the employee has a protected characteristic. **Law Society v. Bahl.**

53. The issues of whether treatment is "because of", and the appropriate comparator, sometimes cannot be resolved without deciding both together (**Shamoon v Chief Constable of the Royal Ulster Constabulary**[1]). The central issue is: why was the claimant treated as she was? Following **R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors**[2], discrimination may be inherently discriminatory or subjectively so. In the latter case, where there is doubt as to the "factual criteria that have caused the discriminator to discriminate", the subjective processes of the alleged discriminator should be explored.

54. The discrimination need not be conscious. Sometimes a person may discriminate on these grounds as a result of inbuilt and unrecognised prejudice of which he or she is unaware. **Law Society v. Bahl[3].** However, as regards 'unconscious discrimination', *per* Elias J:

"*127. ... it is a significant finding for a tribunal to hold that they can read someone's mind better than the person himself, and they are not entitled to reach that conclusion merely by way of a hunch or speculation, but only where there is clear evidence to warrant it*".

55. As regards 'unreasonableness' of the respondent's conduct and discrimination, the Tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably and the employee has a protected characteristic. (**Bahl**. *Per* Elias J at para 94:

" *Employers often act unreasonably... it is the human condition that we all at times act foolishly, inconsiderately, unsympathetically and selfishly and in other ways which we regret with hindsight. It is, however, a wholly unacceptable leap to conclude that whenever the victim of such conduct [has a protected characteristic] then it is legitimate to infer that our unreasonable treatment was because [of that characteristic]. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim [has a protected characteristic]. In order to establish unlawful*

[1] [2003] ICR 337, HL.
[2] [2010] IRLR 136, SC.
[3] [2003] IRLR 640, EAT (para. 82).

discrimination, it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way".

56. The requirement necessary to establish less favourable treatment is not one of less favourable treatment than that which would have been accorded by a reasonable employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the same employer in the same circumstances towards another employee, actual or hypothetical, whose relevant circumstances are not materially different. **Bahl** (para 93).

57. In determining whether there has been direct discrimination, it is necessary in all save the most obvious cases for the ET to determine what was in the mind of the alleged discriminator, making appropriate inferences from the primary facts which it finds. **Bahl** (para. 84).

Victimisation

'On grounds of'

58. The test is, what motivated the victimiser? A leading case on the current law of direct discrimination and victimisation is **Chief Constable of Greater Manchester v Bailey**.[4] There, Underhill LJ held at para 12:

> *"Both sections use the term "because"/ "because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue… establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in **Nagarajan v London Regional Transport** … referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, **Nagarajan**, at p. 513B" (underlining added).*

[4] [2017] EWCA Civ 425

Relevance of 'reasonableness'

59. The mere fact that an individual has done protected acts and been dismissed or exposed to some other form of 'bad treatment' does not, without more, provide the necessary causal connection. See further above,

Burden of proof

60. The reversal of burden of proof applies to a claim for victimisation. EqA s.136 provides that it applies 'to any proceedings relating to a contravention of this Act'. Once the claimant has established sufficient facts which in the absence of any other explanation point to a breach having occurred, in the absence of any other explanation the burden shifts onto the respondent to show they did not breach the provisions of EqA. However, as the CA explained in **Greater Manchester Police v Bailey**:[5] "*It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act: see **Madarassy**… per Mummery LJ…*".

Detriment and reasonableness

61. As May LJ held in **De Souza v. Automobile Association**[6], the test of 'detriment' is to be viewed from the perspective of the victim, but always through the lens of reasonableness:

"*… before the employee can be said to have been subjected to some "other detriment" the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work…"*

62. This approach was approved in **Shamoon v. Chief Constable of the Royal Ulster Constabulary**,[7] where the House of Lords also opined that a sense of grievance which is not justified will not be sufficient to constitute a detriment.

[5] [2017] EWCA Civ 425.
[6] [1986] ICR 514, CA.
[7] [2003] ICR 337.

(4) APPLICATION TO FACTS

Direct sex discrimination

63. **Allegation 1**: We do not consider that the claimant's suspension had anything to do with sex. Serious allegations had been made against her. AB claimed that he felt humiliated and degraded by being made to stand in the box, in the hope of the warning being rescinded. The claimant did not dispute that -even though unwittingly- she had caused prisoner AB upset. Gov Juden received advice to the effect that the claimant's suspension was appropriate in those circumstances. We think he is probably right. (Indeed, Mr Williams also accepted in questioning from the tribunal that if a prisoner had felt humiliated by an officer's actions, suspension was legitimate.) We in any event consider that a hypothetical male prison officer facing the same allegations would also have been suspended.

64. It was argued that the suspension, if valid, should have commenced at an earlier stage. We understand that criticism has some merit at first blush- even though 'unfairness' of itself does not much help the claimant, for the reasons set out above and set out by Mr Line. But we accepted the respondent's evidence to the effect that material gathered during the investigation made suspension seem all the more appropriate. Moreover, in any event, we do not consider that any delay in suspending the claimant can sensibly be said to have been on grounds of sex.

65. Although it is not part of the claimant's case, we think some criticism of the length of the period during which the claimant was suspended is possible. However, bearing in mind the dates of the investigation's progress, it is perhaps not surprising that the suspension lasted for a considerable time. Moreover:
    a. As Mr Line points out in his submissions, and as set out above, we are not concerned with simple 'unfairness' in process.
    b. in any event, we see nothing to indicate that the fact or the length of the suspension had anything to do with the claimant's sex.

66. **Allegation 2**: Given the nature of the disciplinary allegations, and the findings of the investigatory report, we do not consider it at all inappropriate for Gov Juden to have treated those allegations as *potentially* amounting to gross misconduct. In any event, we do not consider that choice to have had anything to do with sex.

67. **Allegation 3**: We do not consider there was anything wrong with Gov Juden not conducting a disciplinary investigation into a complaint against Gov De Matteis, whilst putting the claimant through a disciplinary investigation and process. The claimant's case before us is founded upon the contention that Gov De Matteis in effect saw inappropriate behaviour on the claimant's part, but chose to do nothing about it (and therefore ought to have been disciplined). However, although there were various accounts from him and others regarding what he saw and did at the time, no one -the claimant included- asserted that he had heard the claimant telling the prisoner to get into the box, or that he knew why the prisoner was in it (even if -contrary to what Gov Juden said when he was questioned- he actually saw him in it). He is not a helpful or appropriate comparator for the claimant.

68. **Allegation 4**: We do not consider that the decision of Gov Juden to give the claimant a final written warning, or the duration of that warning, to have had anything to do with sex. (As noted above, we also observed that the limited statistics which were before us do not suggest a general bias against female officers, either in terms of disciplinary action or disciplinary sanctions.)

69. The claimant's reliance upon prisoner officer KJ as a comparator does not, in our view, assist her. The evidence about the 'KJ incident' is sketchy at best (not least, because the respondent can no longer get details about it, and the claimant does not know them). No complaint was made against KJ by the prisoner at the time. And there is, in our judgment, an obvious material difference between instructing a prisoner to get into a box for no legitimate reason, and instructing a prisoner to wear a piece of paper (even one which had been printed off oversized in error) which is needed for identification purposes.

70. **Allegation 5**: As set out above, Gov Juden accepted that his behaviour at the disciplinary hearing was inappropriate, and that such behaviour might have ended

up in disciplinary action being taken against him. However, the obvious and very important distinction is that prisoner AB did not take exception to what Gov Juden said or did. Instead, as set out above, we find that it assisted in relaxing the prisoner, who had been nervous and uncomfortable beforehand. The fact that he did not cause the prisoner any discomfort or cause him to generate a complaint fully explains why no disciplinary action was taken against him. As Gov Phelps said, sex had nothing to do with it. The two cases are materially distinguishable.

71. **Allegation 6**: We do not consider that there was any "failure" to deal with the claimant's grievance, or that any delay had anything to do with sex. The emails between the claimant and Gov Phelps of 4-15 March 2021 make clear that the reason for not dealing with the grievance in February/March 2021 was by agreement, and because of the crossover between the grievance and the appeal. The claimant herself acknowledged she could see the grievance "*may not be the most appropriate action to take*", and that she would revisit the matter once her appeal hearing had concluded. In her evidence to us, she explained she chose not to do that, but to proceed with the tribunal claim instead. Neither her sex, nor any protected act on her part, caused a failure to deal with the grievance.

72. **Allegation 7**: We do not consider that Gov Phelps in anyway tried to "*deter the claimant from pursuing her legal rights*". Indeed, the 4-15 March 2022 emails between her and the claimant suggest quite the opposite. We accepted Gov Phelps' evidence that nothing she said to the claimant at the meeting on 4 March 2021 amounted to an attempt at 'deterrence'. We are fortified in that finding by the content of the emails referred to above. We in any event find it difficult to understand how the comments the claimant asserts were said can realistically have been 'on grounds of sex'.

73. **Allegation 8**: We do not consider that Mr Monaghan's letter of 8 April 2021 upholding the disciplinary outcome on appeal can be said to have been in anyway motivated by sex - or indeed, by any protected act. We accepted Mr Monaghan's evidence to the effect that he considered the appeal, but did not uphold it because

he considered the final written warning was an appropriate sanction. Sex had nothing to do with it.

Victimisation

74. **Allegation 9**: As set out above, the "failure" to hold a hearing of the claimant's grievance was by agreement, and because of the overlap between the grievance and the ongoing appeal. It had nothing to do with any protected act.

75. **Allegation 10**: Similarly, we find there was nothing said by Gov Phelps on 4 March 2021 which had the purpose or effect of deterring the claimant from pursuing her legal rights -still less, by reason of a protected act.

76. **Allegation 11**: The appeal outcome in our view had nothing to do with any protected act, either. Mr Monaghan did not know the claimant had done a protected act. And in any event, we consider the only reason why he upheld the disciplinary outcome was because he believed that outcome to be correct, for the reasons he articulated before us.

77. **Conclusion:** for the reasons set out above all, of the claims brought under sections 13 and 27 of the Equality Act 2010 are not well founded, and are dismissed.

Employment Judge Michell
Date: 23 October 2022
Sent to the parties on:
3 November 2022
For the Tribunal: