



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Ms J. Armitage

Secretary of State for Justice

Held at: Exeter

On: 13-17, 20-24 November 2023

Before: Employment Judge Smail

Mr I Ley

Mr J Ruddick

Appearances

Claimant:

Miss C. Brooke-Ward (Counsel)

Respondent:

Mr O. James (Counsel)

The Judgment rejecting the Claimant's claims having already been sent to the parties, and following request, the Tribunal now provides in writing, having given them orally at the conclusion of the hearing, its –

REASONS

INTRODUCTION

1. By a claim form presented on 19 July 2022 the Claimant claims disability and sex discrimination. She was employed as a prison officer between 5 June 2002 and 5 October 2022 when she was dismissed for medical inefficiency. She worked at HMP Dartmoor from sometime in 2006.
2. The ACAS conciliation period was between 12 May 2022 and 22 June 2022.
3. The Claimant was previously named Ms Pilbro.
4. It is a significant feature of this case that the Claimant does not challenge the dismissal. She was signed off work from 8 November 2021 to 5 October 2022 (11 months). She was on alternative duties in the post room and on the gate between 30 September 2021 and 8 November 2021. She does not claim unfair

dismissal or a discriminatory dismissal. She does say that had proper reasonable adjustments been made from 10 March 2020, there would not have been the need to be dismissed for medical inefficiency.

5. It is further significant that she does not challenge the fitness bleep test required to be passed periodically to remain a prison officer. This was failed on 27 September 2021. She does not claim as a reasonable adjustment that the requirement to pass the fitness test be disapplied.
6. She wanted to be medically ill health retired following her dismissal but so far at least she has been unsuccessful in that. Before being dismissed for medical inefficiency she was offered the possibility of an alternative role with 2 years pay protection. This also would have meant that had she improved in health, she could have returned to prison officer duties. She turned this down at the formal attendance meeting at which she was later dismissed on 5 October 2022. She received £57,000 compensation for leaving on medical inefficiency. This was length of service related and represented the maximum payment available to the Claimant. It had nothing to do with how the inefficiency arose. Credit would have to be given for this against any compensation for financial losses.
7. It has been agreed that at this liability stage we do not address the question as to whether making the adjustments the Claimant contends for would have meant, medically speaking, that she could have remained a prison officer going forward, as a matter of causation. If appropriate, that is left for remedy. We do have to consider, however, what adjustments was it reasonable for the Respondent to make.

The Hearing

8. We have heard evidence on behalf of the Claimant from the Claimant herself; Mr Mark McKay who was the Claimant's line manager from June 2021 as well as her representative from the Criminal Justice Workers Union; and Mr Andrew Harding. On behalf of the Respondent, we have heard evidence from Sarah Heyes (Custodial Manager); Steve Mead (the Governor); Emily Franco-Allen (Health and Safety); Nicki Furness (People Hub Manager); Fiona John (HR Performance Manager) and Jonathan Marchant (Custodial Manager). The latter had been the Claimant's line manager until June 2021. We also read the evidence of Assistant Governor Kathryn Fry who dealt with a number of the Claimant's grievances. She could not attend by reason of illness. We had a bundle of documents which ended up being 450 pages in length.

THE ISSUES

9. The agreed issues between the parties are as follows:

Time/limitation issues

1. Given the date:
 - a. of receipt by ACAS of EC Notification: 12 May 2022
 - b. issue by ACAS of the certificate by email: 22 June 2022

- c. the claim form was presented: 19 July 2022

any complaint about something that happened before 13th February 2022 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

2. The Claimant accepts that this is the relevant date for her claims.

3. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

- a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
- b. If not, was there conduct extending over a period?
- c. If it was conduct extending over a period, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- d. If it was not conduct extending over a period, or the claim was presented more than three months after the end of that period, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - i. Why were the complaints not made to the Tribunal in time?
 - ii. In any event, is it just and equitable in all the circumstances to extend time?

Equality Act Claims

Protected Characteristic

4. The Claimant relies on the Protected Characteristic of:
- a. Disability; and
 - b. sex.

Disability

5. The relevant time for assessing whether the Claimant has a disability (namely, when the discrimination is alleged to have occurred) is March 2020 until 19th July 2022.

6. The Respondent accepts that the Claimant had a disability in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following impairment(s):

- a. Plantar fasciitis;
- b. Anxiety and insomnia

7. The Respondent further admits that it was aware of the Claimant's disability at all material times.

The Claimant's Claims

Section 20: Failure to make reasonable adjustments

8. The Respondent accepts [para 7.1 GOR] that it had the following PCPs and that they placed C at a substantial disadvantage [para 7.4 GOR].

- a. Shift rotations and the requirement to move around wings;
- b. The requirement to work consecutive shifts as a wing officer;
- c. The need to stand and walk for periods of time.

9. Did the Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely:

- a. The need to have an in-date disability passport before adjustments would be implemented;
- b. Not to implement reasonable adjustments at the detriment to other staff.

10. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that she was left to work consecutive shifts, without sedentary duties interspersed as suggested which caused her pain, fatigue, stress and anxiety. In addition, both her impairments were exacerbated to the point the Claimant could no longer work as a prison officer.

11. Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage set out above?

12. Did the Respondent take such steps to avoid the disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

- a. To be allocated duties comparable to RES4 (Ops group)
- b. Where necessary only be allocated to E wing
- c. Not include the Claimant in shift rotations
- d. Not to work consecutive shifts on the wings
- e. allow the Claimant to wear non-issue footwear.

13. All adjustments are said to be required for Plantar Fasciitis and adjustments (a)-(c) are for Stress and anxiety.

14. Would it have been reasonable for the Respondent to have taken those steps at any relevant time?

15. What is the time limit point: when does the Claimant say time started to run, does the Respondent agree?

16. The Claimant says the conclusion of her grievance would be the time for jurisdictional purposes pursuant to s123(4)(b) of the EqA 2010.

17. Alternatively, shortly following receipt of her grievances which were appear to have been received by Katherine Fry on 16.2.22.

18. In the alternative, the Claimant says there a number of “notional acts” pursuant to s.123(4)(a) namely:

- a. 10.3.2020 – passport
- b. 26.3.2021 – passport
- c. 27.9.2021 – wing rotation
- d. 27.4.2022 – grievance outcome

19. The Respondent notes that the Claimant’s case was previously recorded as being that those adjustments should have been implemented from 10 March 2020, as they were in place before this date and there were continued failure to implement them after this date.

Section 26: Harassment related to Sex or Disability

20. When the Claimant was asked by Fiona Johns if she was menopausal at a meeting on 7 March 2022.

21. Was that conduct unwanted?

22. If so, was the conduct related to:

- a. Sex;
- b. Disability: the Claimant says she was emotional and crying during this meeting and this was a result of her emotional stress and anxiety and so the comment was related to that impairment.

23. Did the conduct have the purpose of:

- a. violating the Claimant’s dignity; or
- b. creating an intimidating, hostile, degrading, humiliating. or offensive environment for the Claimant?

24. If not, did the conduct have the effect of:

- a. violating the Claimant’s dignity; or
- b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Section 27: Victimisation

25. It is agreed the Claimant carried out the following protected acts:

- a. 7th November 2021
- b. 8th February 2022

26. Did the Respondent carry out any of the treatment below:

- a. Initially failing to acknowledge, investigate or consider the Claimant’s grievance dated 07/11/2021;
- b. asking if she was menopausal in the meeting of 7th March 2022;
- c. Delaying sending the outcome of her grievance dated 08/02/2022;

d. Omitting to deal with the Claimant's grievance appeal at all.

27.If so, was this a detriment?

28.If so, was this because the Claimant had done the protected acts?

Remedies

29.If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

Discrimination or victimisation

30.What financial losses has the discrimination caused the Claimant?

31.Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

32.If not, for what period of loss should the Claimant be compensated for?

33.What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

34.Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that? Exacerbation of injuries in particular the plantar fasciitis.

35.Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result? The Claimant is not bringing a claim relating to her dismissal.

36.The Claimant seeks aggravated damages. The Claimant contends the Respondent acted in a high-handed, malicious, insulting or oppressive manner in committing the discrimination or in the manner in which the matter was handled. The Claimant is to provide particulars of this, if the claim is being proceeded with.

37.Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it by? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

38.The Claimant says the Respondent unreasonably:

- a. delayed with both grievances.
- b. Omitted to deal with the Claimant's grievance appeal;

39.Should interest be awarded? How much?

Financial Penalty

40.If the Tribunal determines that the Respondent has breached any of the Claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

10. At the end of the case, the Claimant's position was clarified as being that her duties on a daily basis should have been to exhaust what previously were RES4 (Ops group) duties, namely domestic visits, escorts to hospital visits and other external visits, treatments and the segregation unit, all before being allocated to work on a 2-floor wing such as E wing. Throughout, her position has been that she should have been afforded regular breaks or opportunities to be seated. That was best achieved by being given sedentary duties.

THE LAW

11. Sex and disability are protected characteristics under section 9 of the Equality Act 2010.
12. Section 20 of the Equality Act 2010 sets out the duty to make reasonable adjustments. By subsection (2) the duty comprises of the following three requirements. We are concerned with the first only which is provided for at subsection (3). The first requirement is a requirement where a provision, criterion or practice (PCP) 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 avoid the disadvantage. Substantial here means more than minor or more than trivial.
13. Harassment is defined by section 26 of the 2010 Act. An employer harasses an employee if the employer engages in unwanted conduct related to a relevant protected characteristic, and that conduct has the purpose or effect of violating the employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. In deciding whether conduct has that effect, each of the following must be taken into account: (a) the perception of the victim; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.
14. Victimisation is defined by section 27 of the 2010 Act. A person is victimised if he or she is subjected to a detriment because they have done a protected act. A protected act includes alleging what amounts to a breach of the Equality Act 2010.
15. Burden of proof is important in discrimination cases. By section 136 subsection (2) if there are facts from which the court could decide, in the absence of any other explanation, that the employer had contravened the provision concerned, the court must hold that the contravention occurred. By subsection (3), subsection (2) does not apply if the employer shows that the employer did not contravene the provision. What this means is that the employee must establish facts which amounts to a prima facie case of discrimination. If the employee does that, the burden transfers to the employer to show that discrimination played no role whatsoever in the relevant decision making: Igen v Wong [2005] IRLR 258 (CA).
16. Time limits in Equality Act cases are provided for under section 123:

(1) [Subject to section 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.

(2) -

(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.

FINDINGS OF FACT ON THE ISSUES

17. The Respondent operated a system of disability passports designed to record any reasonable adjustments required for a member of staff. Mr Marchant stated that the disability passport was treated not as the Respondent's document but as being owned by the worker: 'It was Jane's passport.'

18. The version of the passport that was in operation prior to March 2020 was last identified between July and October 2019. The adjustments were recorded as being:

(a) To remain on Res 4, (meaning Res 4 Ops group);

(b) To be allowed to wear non-prison issue specialist footwear to help with the condition;

(c) To be allocated escorts or visits where reasonably possible to allow Jane to sit if feet became too painful;

(d) Not to be allocated November patrol unless no reasonable alternative (November Patrol, as we understand it, means escorting prisoners to work

areas and monitoring them during the working day in those areas, and going to fetch them for appointments. This involves the most walking).

- (e) Only to be allocated wing officer in and around other tasks as necessary, not to be allocated wing officer for more than one full day in a row.
- (f) To be reviewed every 3 months.

19. The Claimant's case is that prior to the disbanding of Res 4 Ops Group, her adjustments were effective. The problem was thereafter.

20. On 2 January 2020 the Claimant, and others affected, were written to inviting them to express a preference for which wing they would be based at in advance of the disbanding. Nicki Furness explained that Res 4 would be merged into Res 1, 2, and 3. (Res stands for residential unit). The Governor had decided that there needed to be more variation of work for staff, to assist with key working and to assist with managing the apprenticeships new officers would need to complete in future. All reception and segregation staff were being moved to where that role now sits and all other roles such as escorts, visits, Medical Treatment (i.e. the Claimant's role) had been merged into the other Res wings. The Claimant opted for E wing as that would help manage her disability. We understand that E wing has only 2 floors (some wings have 5 floors) and fewer cells.

21. The Governor's view was that it was not an efficient use of prison officer time to have one group dedicated to the non-Wing work. It was more efficient to have those duties shared with wing work.

22. Nicki Furness, the People Hub Manager, explained that the Res 4 Operations Group prior to March 2020 consisted of 15 to 20 staff who were not assigned to any wing. Instead, Res 4 staff would be scheduled to undertake escorts, visits and mandatory drug testing which was not completed by women (urine samples). It was difficult to fill staff schedules with that work alone. There was time to fill before and after visiting hours which were Fridays, Saturdays and Sundays only. Escorts depended on the needs of prisoners to attend hospital. This was unpredictable. Appointments could be cancelled or finished quickly. That would leave a lot of additional time on shift to fill.

10 March 2020 Passport

23. We accept the evidence of Mr Marchant that there was a change in the terms of the passport agreed on 10 March 2020. The terms were to be ratified at an attendance meeting but were intended to take effect immediately. It is likely that the change in allocation required a review of the passport. The changes were agreed by the Claimant. Those changes were:

- (a) To relocate to Res 4 E wing;
- (b) To be issued suitable alternative footwear from the prison to help with the condition;
- (c) To be allocated escorts or visits where reasonably possible to allow Jane to sit if feet become too painful;
- (d) To avoid allocating November Patrol unless no reasonable alternative, part day only;
- (e) Only to be allocated wing officer in and around other tasks as necessary, not to be allocated wing officer for more than one full day in a row if not detailed E wing;
- (f) To be reviewed every 12 months by Jane and line manager unless circumstances dictate otherwise.

24. There is an Occupational Health report from Dr Miranda dated 5 February 2020. He wrote

Ms Pilbro is currently attending work and is in receipt of a disability passport following the declaration of a chronic medical condition and a review by occupational health in July 2019.

She reports having been diagnosed with a condition causing inflammation of a sheet of soft tissue within the soles of her feet resulting in varying degrees of pain throughout the day. The condition is known as plantar fasciitis and was diagnosed in 2008. She tells me that she has trialled various treatments with moderate degrees of success in managing her symptoms. Ms Pilbro stated that there has been some improvement, even though slow and steady, following calf strengthening exercises recommended by her physiotherapist.

She described how her current work plan allows her to have periods at work where she is not continuously on her feet, in order to gain some relief. She said that she required a delay to her last fitness test due to her symptoms but now feels confident of passing her next assessment. She underwent a physiotherapy assessment in Oct 2019, who recommended that she have 3 further sessions of treatment.

A review of her personal circumstances did not indicate the presence of a severe functional impairment of her ability to perform activities of daily living.

Current Capacity for Work

In my medical opinion, Ms Pilbro is fit for work, with reasonable adjustments.

Her condition is unlikely to ever resolve and she would benefit from suitable footwear that allows sufficient flexibility and permits the inclusion of orthotic wedges if required. I have

suggested to Ms Pilbro that she first obtain a copy of the HMPPS approved footwear catalogue and then seek a referral to a podiatrist via her GP to discuss features that would help minimise any aggravation of her symptoms. This may require her trialling several varieties for a period of weeks before a suitable pair can be identified.

An urgent referral to OH is advised in the event that she perceives any impairment to her ability to pass the fitness test.

Current Outlook

Further improvement in her condition is unlikely.

Ms Pilbro's condition is likely to prevent her carrying out the duties of a prison officer if she were required to be standing/mobile for the full duration of her shift and in the absence of suitable footwear. She opined that while she perceives herself capable of all the duties of a prison officer (including control and restraint), she would benefit from periodic sedentary duties. The duration and scheduling of such duties is at her management's discretion, given the needs of the business. Other reasonable adjustments have already been detailed in this report.

25. On 17 February 2020 the Claimant was signed off following 6 sessions of physiotherapy with the conclusion that there were no duties that the Claimant could not perform, however breaks from prolonged walking were recommended.
26. At one point it was proposed to allocate the Claimant to G wing in March 2020. This triggered a letter from Michael Walker, we assume acting as a Union rep (at that point C was in the POA). Mr Marchant replied that he was awaiting confirmation of the passport proposals dated 10 March 2020. G wing has 5 floors and has more cells and prisoners than E wing. We see from the detail roster that the Claimant worked only on a few occasions on G wing.
27. Most unfortunately the Claimant witnessed a second suicide in custody (hanging) on 21 May 2020. She had earlier witnessed one in February 2009 and suffered from PTSD ever since. She was off work from 2 June 2020 until 12 October 2020 (5 months). She then returned to work on restricted duties for approximately 6 weeks.
28. Ms Sarah Bryan provided an occupational health report on 11 June 2020. The Claimant was suffering from severe symptoms of anxiety and moderately with depression, following witnessing the suicide. She was not fit to return to work. A phased return to work was planned with non-prisoner facing tasks.
29. Ms Nash provided an occupational health report on 24 July 2020. The Claimant remained unfit for work with psychological symptoms. EMDR therapy had been delayed about which the Claimant was unhappy. After three to four sessions of EMDR it was likely that the Claimant could return to work on restricted duties as envisaged by Ms Bryan.
30. A 6 week return to work plan started on 12 October 2020.
31. On 29 October 2020 the Claimant brought a grievance about delay in support following witnessing the suicide. Complaint was made, in particular, about Governor Payne.

32. The Claimant returned to prison officer duties in December 2020. The detail roster records a mixture of treatment support, external escort, professional visits along with E wing duties. There is occasional duty on another wing.

26 March 2021 passport

33. In January 2021 the duties were essentially E wing based. This coincided with the third national lockdown. Covid played a role over the period of this case. The need for escorts was reduced in periods of lockdown.

34. On 28 January 2021 Nicki Furness asked for an updated plan in respect of the Claimant. On 11 February 2021 Mr Marchant told the Claimant that he would need to re-refer to OH to provide an updated passport. This followed the Claimant emailing him reminding him that she occasionally needed sedentary jobs in between wing work as stated in her passport.

35. On 2 March 2021 Dr Liu of Occupational Health reported as follows –

Current Health Issues: Mrs Pilbro is currently at work and managing her full contractual duties. As you may recall, she has a long-standing history of plantar fasciitis and that her OH report last year recommend adjustments in particular to the rotation of duties to allow her to cope better in work. Mrs Pilbro told me over the last several months, she was placed on duties that requires her to spend a lot of time on her feet for most of the rotation. This in turn resulted in her experiencing worsening foot pain in keeping with the presentation of her underlying diagnosis. A change in her footwear did not have the desired benefit.

Current Capacity for Work: From a medical perspective, and considering the duration of her foot symptoms, I am of the opinion that her foot condition is one that is likely to continue in the foreseeable future. It is common for individuals with this condition to experience worsening pain on the soles of feet when walking for long periods. However, symptoms are highly variable among patients and depend on what they can or cannot tolerate before needing to rest. At this stage, I am unable to offer any further medical advice at this time that would have a significant effect on her condition. Considering all of the above, I would recommend a pragmatic approach through a discussion between herself and management on what she can tolerate in terms of duties and to consider a rotation of duties during her shift or in between shifts. I understand management may have their views on what is operationally feasible and may not be compatible with what Mrs Pilbro have in mind. Therefore, dialogue to arrive at a mutually agreeable position for both parties will maximise the chance of her sustainability in work. Any adjustments at work should be considered on a permanent basis given the long term nature of her medical condition. In summary, Mrs Pilbro is medically fit to perform her duties as a prison officer. However, if adjustments above through dialogue is deemed unreasonable and not feasible for management, there may be a stage whereby her foot symptoms become intolerable resulting in sickness absence.

Managers Questions

Will Jane's condition prevent her carrying out 100% of Prison Officer duties without workplace adjustments the long term?

As mentioned in the body of the report, Mrs. Pilbro's medical condition does not mean she is not able to climb stairs or perform physical activity. However, it does mean that she is likely to struggle with the frequency of these duties and may not be in line with operational requirements. This is likely to be long-term.

Will Jane's disability prevent her from carrying out regular duties on a wing with several staircases?

There is no straight forward answer to this question as it does depend on what one would mean by "regular". As mentioned, what one can or cannot tolerate is highly variable among individuals with the condition and dialogue with Mrs. Pilbro would help understand what she is able to do.

Will Jane's disability hinder her responding to incidents in other areas of the prison?

Her condition does not prevent her from running and, sometimes moving up or navigating several flights of stairs to respond to incidents.

36. On 16 March 2021 Mr Marchant wrote to the Claimant to say he had redrafted her passport with view to discussion with herself and her union. He mentioned that the Governor was keen to ensure all staff were able to provide a full and effective service and had been meeting with managers to discuss any outstanding reports and current workplace adjustments. His draft was intended to embrace both the Claimant's medical needs and the needs of the establishment.

37. On 26 March 2021 the passport was amended, and ostensibly agreed, as follows:-

- a) Currently allocated to Res 4 E-wing but should not be detailed regular shifts to the detriment of other regular staff allocated to E-wing.
- b) When not detailed E-wing, to be allocated escorts or visits where reasonably possible to allow Jane to sit if feet become too painful. Other sedentary duties such as treatments and IDTS [supervising a medical queue] can also be considered.
- c) Only to be allocated wing officer to another unit in and around other tasks as necessary.
- d) To be reviewed every 6 months unless circumstances dictate otherwise.

38. On 26 March 2021 Mr Marchant sent to the department called 'Detail', which organises the roster, the revised Passport and asked 'if possible can there be a mix of tasks during her week so not all of her time is spent on E wing. This helps recovery from fatigue and varies her duties between wing work and sedentary work (escort, purple visits [video visits] treatment).' Mr Marchant was asking for rotation of duties on a weekly basis.

39. Over March and April 2021 there are regular references to Key Worker duties. These involve liaising with individual prisoners and updating the computer records as to their needs. The prison officer is sat in front of the

computer. In March this accounted for 8 part days out of 18. There was one full day on reception, a few visits and one constant watch. In April, there were 7 part days of key worker duties out of 11 working days. The likelihood is that if it was rostered it was happening. The Prison Officer would conduct the work at least in part seated. This duty did break up her shift allocation.

40. We note that the inspection by HM Chief Inspector of Prisons, conducted on 22 and 29-30 September 2020, recorded as a key concern that key work had at the beginning of Covid been halted. As at September 2020, at the time of the inspection, many prisoners had not had contact with their key worker for more than a month and in some cases longer. Few prisoners said anyone had recently asked about their welfare. The lack of key work prevented prisoners from receiving regular support with their individual 'step-up' plans to aid rehabilitation through their sentence. There was a lack of managerial oversight of key work and there was no clear plan to ensure that key working increased to support all prisoners at Dartmoor. As Mr James submitted, this still shows that key work was going on in September 2020. We are presently looking at March/April 2021, however, when the position is likely to have improved following the criticisms in the report. We find that key work was going on as rostered, and it was breaking up the Claimant's shift with sedentary duties.
41. We remind ourselves also that rest days regularly came in 3s. In addition, there was annual leave. Occasionally the Claimant performed night duties on the wing. She did 4 days in May 2020 and 7 days in August 2021. She had no difficulty with night duties. The prisoners, of course, were locked up, and she could sit extensively.
42. In May 2021 she worked 10.5 days. She had key worker duties on 3 afternoons; a day predominantly of professional visits; 2 days of IDTS treatment duties; and a day of performing external escort duties. So 7 out of 10.5 days with significant amounts of sedentary duties.
43. In June 2021 she had 10 rest days, 10 annual leave days, 8 sick days. She worked 2 days. On the first she had key worker duties in the afternoon and on the second day she had constant watch duties.
44. The Claimant saw Mr Ball, Consultant Orthopaedic Surgeon, on 7 June 2021. He reported on 15 June 2021 that

From what I know from speaking to you and exposure to this condition I would tend concur with what your occupational health doctor has said, which is while you have this genuine condition and it is affected by the work of being on your feet much of the day, it should be manageable to do your job within the limits of the condition. Apparently, they have suggested such things as varying your activities through the day so some sedentary or alternating heavy shifts on the prison wings with lighter shifts escorting patients to hospital or supervising visits. There is also a wing with fewer landings than the others, which it would appear to be a sensible idea for you to work on and which you did actually apply to work on. What is frustrating is that while I and your other doctor can see a way forward to manage this

condition and keep you doing a useful and productive job at work, these simple and pragmatic suggestions, which to be honest anyone could come up with, with a bit of common sense and does not require a medical degree, are not being applied. What I would do, is urge the employer to make another concerted effort to try' and enable you to do your job despite the symptoms you have, clearly that is what you want to do as you are continuing to turn up for work despite conditions which sound from my end as if they have not been optimised as much as they could.

Mr Ball was of course relying on information from the Claimant. He endorsed what Occupational Health was saying. He did not have the roster detail as we do. From that detail, at this point in time, certainly following the email of Mr Marchant dated 26 March 2021, (the same day as the passport), variable duties with extensive sedentary work were in fact being provided.

45. On 29 June 2021 the Claimant asked to be line managed by Mr McKay who was a manager on E-wing. Mr Marchant worked on the safer custody suite. This was readily agreed by Mr Marchant. The Claimant wrote –

‘Thanks Jon and thank you for all your help over the last few years, much appreciated, Jane [smiley face emoji].’

That represented some level of acknowledgment at least.

46. In July 2021 there were 11 rest days, 5 days annual leave, and 15 days worked. 6 days with key worker duties for approximately half a day. 2 half days of constant watch. One and half days of IDTS duties, with one of those days with an hour or so of treatment responsibilities. Two thirds of a day of professional visits, followed by an hour or so of treatments. Half a day of segregation duties. Of the 15 days worked, 10 days had substantial sedentary duties.
47. On 22 July 2021 Mr McKay emailed Detail asking them to give consideration to providing the Claimant with a variety of jobs to promote well-being in view of the upcoming fitness test. It seems they did this from the roster detail that we see.
48. In August 2021 there were 7 nights worked and 7 days worked. There was half a day external escort with professional visits that same day. There was half a day IDTS, half a day external escort, half a day key worker duties, a half day constant watch, and an hour constant watch on another day. Of the 7 days worked, there were sedentary duties on 5 days.
49. In September 2021 there were 18 days worked as a prison officer. Key worker duties were for approximately half days on 7 days. 2 half days for visits. Just under half a day of constant watch on one day. Half a day of professional visits. Half a day of external escort. The last day of the month was in the post room because regrettably the Claimant had failed the fitness test on 27 September 2021. However, of 18 days worked as a prison officer, there were sedentary duties on 12 days. Again, compliant with a regime of providing flexible work.

50. On 10 September 2021 the Claimant had emailed asking for more sedentary jobs in between wing work to allow her the best possible chance of passing the fitness test. She enclosed her March 2021 passport. She said she does not seem to get them very often. We find the roster detail suggests that there was a variety of duties including sedentary ones.

51. There is no challenge to the fitness test in this case. It is not said that by way of reasonable adjustment the fitness test should be disapplied. Following the failure, until the Claimant went off sick on 8 November 2021, the Claimant did 15 days in the post room and 2 days on the gate. Those were not prison officer jobs. She was recalled on 2 days, 5 October and 1 November to work on key worker and then visits duties, with a bit of treatment also.

52. It was envisaged when she failed the fitness test that she retake it in due course,

Proposed March 2022 shift rotation

53. On 18 October 2021 Zoe Berry, Head of Business Assurance, wrote the following about the proposal to rotate the Claimant to G wing in March 2022.

As discussed - Jane's WPA passport is due a review.

I know there are concerns from Jane at present about her forthcoming operations and her adjustment needs.

Having taken advice, staff are expected to complete full range of duties (as per the Officer job role) and if not being able to complete this puts them / or others in danger then we must consider our options.

The passport has previously been supported *where possible* but we have concerns that E Wing in itself is a risk as we increase in Main prisoners – this creates a more unknown induction population with less staff required (as per the profile) and therefore has more need for robust alarm responses.

For this reason we have considered the rotation and made an adjustment from A to G Wing. This is the final outcome.

G Wing is *likely* to become a VPU [Vulnerable Prison Unit] *if* we move to non-integrated – this is obviously uncertain, however, reasonable adjustments can still be made - for example: locate on 3s [i.e. the 3rd floor of 5] so the potential for moving up/down landings is reduced. This would be done via the O1 [the Operations chief on the day] as People Hub are not resourced to check an individual's daily duties and amend. The skills sets for G are more varied – escorts, treatments, visits, day centre (when running), therefore, there is scope to be on different duties (where possible as per passport).

The other more 'out there' recommendation was a request [to move to] Channings Wood [a prison in Torbay] as the units there are only 2 landings. As a mobile grade this is a reasonable adjustment to be considered but is not mandatory and would potentially be waiting on a vacancy.

The OH confirms Jane is fit for Officer duties and we feel the above move would be more reasonable, hopefully Jane's treatment will be successful and the rotation is not due until March 2022 (post-surgery).

We have also just received a letter that Jane's doctor has approved for 2 weeks off pre surgery – this can be requested by the consultants but the Establishment does not have to provide it as SL with pay – manager to decide. We have 0 covid cases and have not been near outbreak status for a year so are not classed as high risk at present.

I recommend having a meeting with Jane to discuss as I know this will not be the outcome expected and it is likely to cause anxiety that we can support through EAP and other avenues. Nothing is being actioned to manage Jane out of a job. This is about us following policy, supporting where possible but also about realistic outcomes for the individual and the business need.

54. The Claimant appealed this proposal submitting that she should remain on E or F wing. In the light of the appeal Zoe Berry recommended that C get a caseworker.

Post 8 November 2021 when the Claimant was signed off sick

55. She consulted Mr Ball on 15 November 2021. This was in advance of the operation which was due on the left leg on 22 November 2021. Mr Ball wrote:-

As I have said before, I think there is a complex interaction here between her weight, which is still excess and which we have talked about more than once before, her job, which is very demanding, on the feet, and calf tightness. Objectively there is still a positive silfverskiold test justifying the gastric release, but I think psychosocially there are more complex things going on which she is considering whether or not to continue in her profession as a prison officer. She recently failed the bleep test and it sounds as if she was stopped at 5.3 despite just having the stamina to go to 5.4 which would have been a pass, so she is quite resentful of the personal trainers who were marking the bleep test and says they basically forgot how to count. So as I say I think there is a bit of a complex interaction coming with regard to myself, the success or otherwise of surgery, and the ability to continue in work or not. Nevertheless, we have discussed the pros, cons and risks including the significant chance of no improvement, the patient wishes to go ahead and I still feel she meets the criteria for it. She has signed her Consent form today and I have answered all her questions.

56. So, not being able to do the job of prison officer was being discussed between her and her surgeon.

57. There was an occupational health report following the operation. On 23 December 2021 Dr Smallcombe wrote –

At this time, she has not noticed any appreciable difference in her plantar fasciitis symptoms, although it is still very early days following her surgery.

Current capability for work and outlook:

In my opinion, Ms Armitage is currently unfit for work in any capacity. However, I am optimistic that she will be able to return to work when her fit note expires. It is difficult

to comment at this stage whether she will be able to return to operational duties, with adjustments, or if she will need to return in a restricted role. Her aim is to return operationally but I would recommend a review appointment in 3-4 weeks to re-assess her to ensure that she has recovered her mobility and that she is able to engage with control and restraint. Any adjustments needed will be considered at the review appointment. A phased return to work over 4 weeks is recommended on her return, commencing on 50% of normal hours in weeks 1 and 2, increasing to 75% in weeks 3 and 4.

It is still very early after surgery to be able to comment on prognosis. Much will depend on how successful the surgery is. Full recovery is likely to be in the order of 3-6 months in successful cases. She is then waiting for surgery to the right side for the same problem.

58. There was an occupational health report on 8 February 2022. Dr Smallcombe wrote –

Ms Armitage has been sick absent from work since having surgery for plantar fasciitis on 22nd November 2021. Please refer to previous reports for further background to this case and continuity of case management. Ms Armitage informs me that she is making progress. However, in order to improve her condition, she is undertaking exercises that appear to have aggravated arthritis in her big toe and her underlying Morton's neuroma. As such, she has considerable discomfort on standing and walking for relatively short periods of time. She is also still experiencing discomfort in the arch of the foot which goes up into the calf. She reports that she is experiencing some symptoms of stress in relation to an ongoing grievance and also due to a perceived lack of support prior to and during this period of sickness absence. She has a fit note in place until 16th February 2022.

Current Capacity for Work

In my opinion, Ms Armitage is currently unfit for work. This is likely to be the case for the next 2-4 weeks. On her return to work, she will not be fit to work operationally and she will not be able to undertake the fitness test. This is for a minimum period of 3 months. She will need to avoid long periods of standing and walking. A risk assessment approach is recommended to identify suitable duties for her. She will also require a 4 week phased return to work, commencing on 50% of normal hours in weeks 1 and 2 and then increasing her hours to 75% in weeks 3 and 4. She is likely to benefit from a stress risk assessment to help to identify and address any work stressors. The acceptability of the above recommendations is ultimately a management decision. If adjustments cannot be supported or an alternative role cannot be found for her, then management might wish to consider progressing her case to her pension provider for consideration of ill health retirement.

Current Outlook

The outlook for Ms Armitage is guarded. Much will depend on her progress over the next 3 months with ongoing physiotherapy and after a sufficient time lapse after surgery to be able to evaluate its efficacy. It is possible that she will experience future sickness absence in relation to this health problem, particularly as she might need surgery on the other side. Management might wish to consider a new referral in 3 months to establish fitness for full duties.

59. That was a physical report. A psychological one followed on 10 February 2022.

There was severe anxiety and severe depression. She was unfit for work and Ms Tara Jones-Pitts could not suggest when she might be fit to return.

60. On 30 March 2022 Dr Dar reported as follows

Ms Armitage indicates that she does not see herself being able to resume her duties both in terms of her plantar fasciitis and because of the way that she perceives she has been treated at work. She is keen to explore ill health retirement and as there is no foreseeable return to work for her, she can go forward with a formal application.

I have explained to Ms Armitage that ultimately it is up to the Pension Medical Advisor to determine whether she meets the criteria for this.

61. This of course was when the staff rotation to G wing would have taken place. A return to work was not going to happen.

62. An Occupational Health report dated 30 August 2022 was from Dr Geoghegan. He stated that the Claimant was unfit for work. He could not give any indication when that might change. There were no adjustments which would allow a return to work at this time. She may remain unfit for work for the foreseeable future. He did not feel that the Claimant would be able to return to a full range of duties as a prison officer in the near future. Given her difficulties with her mobility, Ms Armitage was unfit for the annual fitness test and unfit for her current duties including the standing and walking required.

Footwear

63. Emily Franco-Allen told us that suitability of footwear for the Claimant had been the subject of correspondence since 2018. The last correspondence she had with the Claimant was in April 2020. The Claimant had asked for mid-boot Keuka Stratton. The boots were approved. The Claimant was referred to the business hub so that they could arrange to order the boots for her. There was no reversion back from the Claimant. We find that the Claimant was provided with suitable footwear from at latest this time. From May 2021 that same boot became standard footwear. There was no failure on the part of the Respondent to provide the Claimant with suitable footwear. The trail ends with April 2020. Insofar as the foot condition worsened, that was not down to the footwear.

Victimisation and the grievances of 7 November 2021 and 8 February 2022

64. On 7 November 2021 the Claimant raised a grievance following failing her fitness test. She raised a number of points many of which were general in nature; she claimed that her plantar fasciitis disability had not been supported for over 1 year; more specifically she complained that her fitness test was not deferred by more than 1 week; a failure by Sarah Heyes, Custody Manager and her new line manager, to refer her to physio; there was no risk assessment following her failure of the fitness test; Sarah Heyes had not sat down with her to renew the passport which was due for consideration on 26 September 2021; a move was proposed to A/G wings when she acknowledged – and this is significant – that E-wing allowed her to manage her disability. She suggested others with medical needs had been accommodated. The grievance was addressed to Governor Dodds. He acknowledged the grievance on 8 November 2021 but suggested it should be sent to the manager the grievance was against or Tim Bolt, the functional Head, or Zoe Berry.

65. The Claimant went off sick on 8 November 2021 and so did not read the email from Governor Dodds. This meant no further progress with that grievance until the grievance of 8 February 2022 came in. In that grievance the Claimant wrote-

Governor, on the 8/11/21 I put a grievance in to Governor Dodds highlighting the lack of support from your managers. Also in my opinion managers are making it difficult for me to do my job. I have had no acknowledgment that my grievance was received or been investigated whilst I have been absent. I also asked if I could meet to resolve some of the issues before my return to work. This also has not happened. I was due to return to work on the 21/1/22. My line manager could not tell me where I was going to be working on my return. I informed her that I was stressed and nervous about returning to work as I have no confidence in anything changing. I have now been signed off by the doctor with stress and anxiety. This is due to my worries about returning to work and the lack of support and victimisation I experienced. I am still suffering from PTSD following my involvement with two deaths in custody due to two prisoners hanging themselves. This has caused me to have long term insomnia, stress and anxiety. On both occasions the prison service failed with their duty of care to me. All of which has a massive impact on my mental health today. I am currently receiving counselling through Pams Assist and have been prescribed medication by my doctor and signed off work. I hope that you will support me in anyway you can. I have spoken to my doctor and he is of the opinion that my mental and physical health gives me an undefined time limit of when I could return to work.

Going forward I would like your personal support in discussing my options, in particular ill health retirement which I feel is my safest and best option.

Please see original grievance to follow. Please could you reply by email to my personal email as receipt of this grievance many thanks Jane.

We see that the Claimant was floating ill health retirement.

66. Governor Mead picked up the need to deal with both grievances. Management action was taken in February 2022 to progress the grievances. They were dealt with together by Governor Kathryn Fry.

67. A meeting was held on 7 March 2022 at HMP Channings Wood in Torbay. Fiona John of HR was in attendance, as was Mark McKay in his union representative capacity. The first half of the meeting, it seems, concerned the Respondent's alleged lack of assistance to the Claimant following her witnessing two suicides in custody, the first in 2009 and the second on 21 May 2020. This case does not concern those matters, sympathetic as the Tribunal is.
68. The second half of the meeting recorded the Claimant's position that she was not given sufficient sedentary jobs. She related that the operation on 22 November 2021 had not lead to any improvement. The Claimant now wanted to end her service by way of ill health retirement.
69. The outcome of the grievance is 'partially upheld' but there are no express findings of what the Respondent did wrong. As far as is relevant to us, there was no finding of a failure to make reasonable adjustments. The resolution sought by the Claimant was ill health retirement, but that was not within the Respondent's gift.
70. The Claimant says she did not receive the outcome until 27 April 2022 and she appealed the outcome 'for a true account to be noted, and to be taken seriously'.
71. The 8 February 2022 grievance was dealt with at the same time. As to the outcome sought, the position was as follows:-

When asked what outcome Jane would want from this, she said she has proved she has asked for support and with chronic pain and not able to be on her feet for prolonged periods, physically and mentally she has had everything kicked out of her. She could not cope now to return to work as this is untenable and would like IHR. Fiona John advised that this was not in our gift and Mark McKay advised that this was a Pension Scheme decision.

Mark McKay [her union rep] concluded medical inefficiency as she is unlikely to return as she has not had the help in a reasonable timeframe.

72. Whilst Kathryn Fry was not able to give evidence in person, she did submit a witness statement. She wrote on that on 22 March 2022 she sent both of the responses to SSCL (shared services). That is corroborated in the bundle. This is the central HR system whereby all grievances and outcomes needed to be logged. Fiona John and Zoe Berry were copied in. She assumed that the outcome would be sent on. That was reasonable on her part.

Victimisation

73. As to the victimisation issues. The reason the grievance of 7 November 2021 was not re-acknowledged until February was because the Dodds email was not read by the Claimant because she went off sick. It was not a deliberate delay. There is an innocent explanation for the delay. It was not

done because she had raised a grievance.

74. Similarly, the delay in receiving the outcomes was because it had been assumed that shared services would send it out. There was no deliberate decision not to inform the Claimant of the outcome of the grievances as soon as possible.
75. The Claimant also appealed the outcome in respect of the 8 February 2021 grievance. On 6 June 2022 Mr Robertson met the Claimant and Mr McKay. The following day he collated the appeals and asked they be dealt with in a timely manner. He was by inference critical of delays in organising the appeals by the Respondent. On 15 June 2022 Zoe Berry agreed to arrange the hearing of the grievance appeals outside the policy timeframe owing to the Respondent's errors. It looks as though it was intended that Mr Robertson hear the appeals. On 14 September 2022 the Claimant put in another grievance to complain about the delay in hearing the appeal.
76. Richard Luscombe replied on 28 October 2022 apologising that it had been explained to the Claimant that given she had presented a claim to the ET (on 19 July 2022) a grievance appeal was no longer the appropriate forum. The Employment Tribunal would be. By then also the Claimant had been dismissed on 5 October 2022.
77. We accept that the reason the Respondent did not progress the appeal from after 19 July 2022 was that the case was going to the ET. It is our experience that many employers exhaust internal processes before the case is heard by an ET. The Respondent could have heard the appeal first. However, it is an arguable position not to. There was no detriment at that stage to the Claimant because she had left and the matter was progressing to the Tribunal. That was the reason for the decision. There was also a delay between her appealing on 30 April 2022 and the presentation of her claim to the ET on 19 July 2022. Mr Robertson picked up on the delay and commented on the Respondent's lack of organisation. On 15 June 2022 Zoe Berry referred to administrative fault on the part of the Respondent. We accept that the Respondent shows administrative difficulties was the reason not intentional victimisation for that period of delay. The Claimant was not prejudiced in truth. She was not seeking adjustments; her agenda then was ill health retirement.

'Are you menopausal'

78. The grievance hearing on 7 March 2022 went on for several hours, longer than anticipated. The Claimant was on occasions emotional. At some point in the meeting Fiona John, we find, asked Mr McKay to put his finger in his ear and asked the Claimant 'are you menopausal?'. Mr McKay tells us, and we accept, that the Claimant was aghast at the question and was upset by the comment. We accept also that the Claimant said that the menopause was not a factor and that she had been 'through all of that' or words to that effect.
79. Complaint about this comment is not made in the grievance appeals.

80. Fiona John had responsibility for issues relating to menopause, a 'menopause ally'. She had participated in a course on the subject and was aware of support structures that were available. That is why she asked the question.
81. On the other hand, there had been extensive occupational health involvement in this case. Plantar fasciitis and stress and anxiety were frequently cited. Nowhere is there any reference to the menopause. With no medical indication, the question was gratuitous, as further suggested by the invitation to Mr McKay to put his fingers in his ears.
82. The comment was clearly unwanted. Could it be reasonably regarded as violating the Claimant's dignity? This was a long meeting in which many upsetting matters were discussed including post traumatic stress disorder following the witnessing of deaths in custody. Governor Fry and Fiona John were a sympathetic audience. The comment was not sufficient reasonably to be regarded as violating the Claimant's dignity, in our judgment. She was asked the question: give the answer. Similarly, that one off question in an otherwise sympathetic meeting could not reasonably be regarded as creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
83. Mrs John did not make the comment because the Claimant had brought grievances. There was no victimisation. Further, we find there was no harassment.

The Claimant rejected the offer of an alternative role at the prison

84. We repeat what we noted in the introduction to the Judgment above. The Claimant wanted to be medically ill health retired following her dismissal but so far at least she has been unsuccessful in that. Before being dismissed for medical inefficiency she was offered the possibility of an alternative role with 2 years pay protection. This also would have meant that had she improved in health, she could have returned to prison officer duties. She turned this down at the formal attendance meeting at which she was later dismissed on 5 October 2022. She received £57,000 compensation for leaving on medical inefficiency. This was length of service related and represented the maximum payment available to the Claimant. It had nothing to do with how the inefficiency arose. Credit would have to be given for this against any compensation for financial losses.

CONCLUSIONS

Reasonable Adjustments

85. In the Grounds of Resistance the Respondent admitted at paragraph 7.1 the following PCPs

7..1.1 Its prison officers are sometimes required to work consecutive shifts as a wing officer;

7.1.2 Its prison officers generally need to stand and walk for periods of time;

7.1.3 Its prison officers generally are required to move around wings, and have rotating shifts.

The use of phrase 'rotating shifts' here is not the same as a periodic shift rotation when prison officers may be moved wings. It means days v nights and shifts starting at different times and different duties across days.

86. At paragraph 7.4 of the Response, it is defined what is meant by substantial disadvantage:

It is accepted that the three admitted PCPs placed the Claimant at a substantial disadvantage due to her plantar fasciitis, in that this causes pain to her feet when walking long distances or being on her feet for an extended period of time.

87. As we know, at the end of the case the Claimant's position was that she should have been allocated the escorts, visits, treatments, observation duties across the prison before then being allocated E-wing.

88. The starting point to this aspect of the case is the decision to disband the old Res 4 Ops group and to allocate every prison officer to a wing. This decision took effect in March 2020. The basis was one of efficient deployment of staff. It had been the case that the schedules of those on the Ops Group had been difficult to fill. It was an operational decision open to the Respondent's management to take.

89. The Occupational Health evidence until towards the end, when the Claimant was contemplating leaving, was to the effect that she could perform all duties of a prison officer provided there was variety of duty. So on 5 March 2020 Dr Miranda wrote:

I suggest that her management permit her to continue having periods where she can perform sedentary work-related duties, interspersed with duties on the wings when required. The nature and duration of these periods can be discussed and agreed during a management meeting keeping in mind the needs of the business.

90. Dr Liu wrote on 2 March 2021 -

Considering all of the above, I would recommend a pragmatic approach through a discussion between herself and management on what she can tolerate in terms of duties and to consider a rotation of duties during her shift or in between shifts. I understand management may have their views on what is operationally feasible and may not be compatible with what Mrs Pilbro has in mind. Therefore, dialogue to arrive at a mutually agreeable position for both parties will maximise the chance of her sustainability in work. Any adjustments at work should be considered on a permanent basis given the long term nature of her medical condition. In summary, Mrs Pilbro is medically fit to perform her

duties as a prison officer. However, if adjustments above through dialogue is deemed unreasonable and not feasible for management, there may be a stage whereby her foot symptoms become intolerable resulting in sickness absence.

91. It was not being said that the Claimant needed to perform sedentary duties only. Mixed duties were envisaged. Further, the Claimant herself said she could manage her disability on E-wing. That was also the position of Mr McKay.
92. The duties agreed in the passports and moreover set out in the roster detail were in keeping with what occupational health proposed. The passport contents were agreed. We have tracked the duties that were performed across the period as appear on the roster detail and as a matter of fact they reflected what was agreed.
93. The Claimant's counsel in her concluding submissions has listed multiple occasions when the Claimant worked consecutive days on the wings. That was not a breach of what had been agreed. The Claimant, we repeat, herself said she could manage her disability on E-wing. But, aside from a few days, sedentary duties were regularly allocated alongside the wing work.
94. The Respondent shows through its carefully considered passports, its regular referral to Occupational Health and its provision of various duties that it made reasonable adjustments designed to accommodate the Claimant's disabilities. It shows that it did all that was reasonable.
95. The Respondent shows that it was not reasonable for the Claimant to exhaust all the prisons non-wing work prison officer duties before working on the wing because working on E-wing was itself such as to enable the Claimant to manage her disability, as she herself acknowledged.
96. The problem was that this foot condition worsened notwithstanding the adjustments made. The deterioration was such that it was the Claimant's position that she could no longer perform the duties of a prison officer. The evidence does not suggest that any failure to make adjustments caused the deterioration. None of the existing medical evidence makes that claim. Had liability been established, the Claimant would have had to trawl medical opinion to see if anyone was willing to make that proposition.
97. In that event, there is still a duty on a Respondent to offer adjustments by way of alternative employment to keep the employee in work. This they did. It was the Claimant who made sure she left the prison. She turned down work short of prison officer grade, even on a 2 year pay protected basis.
98. It was not a PCP that there had to be an in-date passport. E-wing allocation and variable duties continued notwithstanding 'expiry of the passport'.
99. It was not a PCP that adjustments could not be made to the detriment to others. That said others had to have variation of duties, too.
100. The periodic shift rotation system was not the subject of the

Respondent's concession. A periodic rotation system of 6 months or a year or whatever the period would not necessarily have disadvantaged the Claimant. It depends on what duties were proposed. We see Zoe Berry's reasoning for the proposed rotation in March 2022 but of course we did not get there. The Claimant had resolved to leave by then and push for early ill health retirement.

101. Time limits no longer arise as relevant because the Claimant's substantive claims have been unsuccessful. As to time limits: by March 2022 the Claimant was not looking to return to work with adjustments. The grievance outcomes she sought was ill health retirement. The claims of failure to make reasonable adjustments were out of time. The Claimant's last day of work was 8 November 2021. Any failure to make an adjustment must have been before then. It would not have been just and equitable to extend time for any alleged failures made before 8 November 2021 to an ET1 presented on 19 July 2022 when there had been a positive decision not to return and to seek early ill health retirement in February/March 2022. The matter of time limits is academic, however.
102. The Respondent shows by its agreed passports, its regular reference to Occupational Health and the varied duties allocated as per the Detail Roster, bearing in mind also the Claimant's own statement that she could manage her disability on E-wing, that it made all reasonable adjustments.
103. The reasoning rejecting the claims of victimisation (paras 72-77) and harassment (paras 78-82) appear earlier in these Reasons.

Employment Judge Smail
South West Region
26 January 2024

Reasons sent to the parties on
07 February 2024 By Mr J McCormick
