EMPLOYMENT TRIBUNALS

Claimant: **Mr A Mullinger**

Respondent: **Ministry of Justice**

HELD at Middlesbrough in person

ON: 3rd, 4th, 5th and 6th June 2024

BEFORE: Employment Judge Aspden
S Moules
S Wykes

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr McLean, counsel**

JUDGMENT having been sent to the parties on 1 July 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimant was employed by the respondent from March 2019 as a prison officer. The respondent dismissed him by notice given on 17 April 2023. The claimant began early conciliation with ACAS on 14 July 2023. ACAS issued an early conciliation certificate the same day. The Tribunal received the claimant's claim form on 11 August 2023.

2. The claimant makes the following complaints:
   2.1. A complaint that the respondent discriminated against him contrary to section 39 of the Equality Act 2010 by failing to comply with a duty to make reasonable adjustments.

2.2. A complaint that the respondent discriminated against him contrary to section 39 of the Equality Act 2010 by dismissing him. The claimant contends that his dismissal was discrimination within section 15 of the Equality Act.

2.3. A complaint that the respondent unfairly dismissed him contrary to the Employment Rights Act 1996.

3. At the start of the hearing we discussed with the parties the basis of those complaints and the issues that we needed to decide to determine the complaints.

Failure to make reasonable adjustments

4. In our discussions at the start of the hearing we established that the parties agree the following:
   4.1. At all times material to this claim, the claimant was a disabled person by virtue of the condition of epilepsy.
   4.2. The respondent knew the claimant was so disabled from 26 January 2023.
   4.3. A requirement to undertake the full range of contractual duties associated with the role was a provision criterion or practice of the respondent's.
   4.4. That requirement put the claimant at a substantial disadvantage in relation to his employment in comparison with persons who are not disabled because he was unable to carry out the full range of contractual duties associated with his role due to epilepsy.
   4.5. The respondent knew the claimant was likely to be placed at that disadvantage.
   4.6. Therefore, the respondent was under a duty to take such steps as it was reasonable to have to take to avoid the disadvantage.

5. The claimant's case is that the respondent failed to comply with that duty.

6. The issue for the tribunal to decide to determine liability is whether the respondent took such steps as it was reasonable to have to take to avoid the disadvantage.

7. The claimant says the respondent should have taken the following steps to avoid the disadvantage:
   7.1. Allowing the claimant to continue to undertake restricted duties in a Band 2 Operational Support Grade role.
   7.2. Redeploying the claimant to another suitable administrative role.
   7.3. Waiting until a 6-month seizure free period had lapsed.
   7.4. Assigning the claimant a buddy/staff chaperone.

8. Another issue for the tribunal to decide is whether the tribunal lacks jurisdiction to deal with this complaint on the ground that the claim is out of time.

Discriminatory dismissal – section 15

9. In our discussions at the start of the hearing we established that the parties agree that the respondent treated the claimant unfavourably (by dismissing him)

because of his inability to undertake a full range of contractual duties, which was something arising in consequence of his disability of epilepsy.

10. The issue for the tribunal to decide to determine liability is whether dismissing the claimant was a proportionate means of achieving a legitimate aim.

11. The respondent expresses the aim(s) pursued as follows: 'the requirement to manage staff, ensuring the proper operation of the prison by having staff fulfil all elements of their roles, the need to ensure staff are fully fit to work, particularly given the risks attached to working in a prison, and to ensure the health and safety of all staff and service users.'

12. The claimant also puts his claim of section 15 discrimination on additional basis. He contends that:

    12.1. the respondent dismissed him because of his sickness absences and consequent sickness record;
    12.2. those absences and record arose in consequence of (a) his epilepsy; and (b) an impairment affecting his left foot;
    12.3. the impairment affecting his foot (caused by flat feet, plantar fasciitis and Achilles tendonitis) was also a disability.

13. The issues for the tribunal to decide in determining that claim are:
    13.1. whether the respondent dismissed the claimant because of sickness absence and/or the claimant's resulting sickness record;
    if so
    13.2. whether the sickness absence/record that materially influenced the decision to dismiss arose in consequence of the claimant's epilepsy;
    13.3. whether the claimant was disabled by virtue of an impairment affecting his foot;
    13.4. whether the respondent knew or could reasonably be expected to know the claimant was disabled by virtue of that impairment;
    13.5. whether the sickness absence/record that materially influenced the decision to dismiss arose in consequence of the claimant's foot impairment;
    13.6. whether dismissal was a proportionate means of achieving a legitimate aim as set out above.

14. For reasons that will be apparent from our conclusions, we have not felt it necessary to decide the issues referred to at 13.3; 13.4 and 13.5.

Unfair dismissal

15. The issues for the tribunal to decide to determine liability are:

    15.1. What was the reason, or the principal reason, for dismissal?

    15.2. Has the respondent shown that was a potentially fair reason falling within ERA section 98(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held? The respondent's case is that it dismissed the claimant for 'capability'. That would be a reason within ERA s98(2)(a).

15.3. If so, in all the circumstances (including the respondent's size and administrative resources), did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal?

Evidence and facts

16. We heard evidence from the following witnesses for the respondent:

    16.1. Ms Davies, the claimant's line manager.

    16.2. Mr Ormerod, who took the decision to dismiss the claimant. Mr Ormrod was the governor of Holme House at all material times.

    16.3. Mr Walters, who deal with the claimant's appeal against dismissal. He was Mr Ormerod's line manager.

17. We also heard evidence from the claimant.

18. We were referred to various documents in a file prepared for the hearing.

19. We were provided with an agreed chronology which set out a number of facts which the parties agreed upon. We have annexed the agreed chronology to these reasons. Our findings of fact set out below supplement those agreed facts (and in some places emphasise or summarise those agreed facts).

20. The claimant had a seizure in November 2022 while on annual leave. He had various tests to ascertain the cause. In January 2023 the claimant was formally diagnosed with epilepsy and prescribed medication. The claimant told his line manager, Ms Davies, about his diagnosis on the same day.

21. The claimant worked at Holme House. At the time when the claimant was diagnosed with epilepsy, Holme House was experiencing very high levels of sickness absence and had a very high levels of individuals on restricted duties. Consequently, Mr Ormerod was under pressure to reduce those numbers.

22. When the claimant told Ms Davies of his diagnosis she decided he should be placed on restricted duties. These involved him working as a Band 2 operational support grade (OSG). In that role he was not doing the full range of duties of a Band 2 OSG because Ms Davies decided the claimant: should not have prisoner facing duties and access to keys; he should not work alone; and he should not work night shifts. Ms Davies recommended the claimant work on the pedestrian/vehicle gate and communications only. We accept the evidence the claimant gave us set out in his witness statement as to what that entailed.

23. Whilst on restricted duties the claimant was to work in his current shift pattern but was given flexibility over start and finish times because he could not drive at the time due to his epilepsy diagnosis and so was using public transport. It is not clear to us whether he was given that flexibility right from the outset or whether it came about as a result of the first occupational health report but nothing turns on that.

24. This arrangement working as a Band 2 OSG was approved by Ms Lincoln who appears to have been deputising for the deputy governor in that respect.

25. A form was filled in at that time by Ms Davies. That form is also used for phased returns but it distinguishes between phased return and restricted duties. Restricted duties are described in that form in the following terms: 'where staff limit the key work to be done on a time bound basis usually limited to a maximum of three

months. In order to be able to recover to give regular and effective service without aggravating any illness or injury the restricted duties request will be reviewed fortnightly.' The claimant's electronic signature appears on the form but there is no evidence he was given time to read it or provided with a copy. We accept his evidence that there was no discussion at this time about how long he would be kept on restricted duties for.

26. The claimant was referred to the respondent's occupational health advisors for an assessment. The claimant told us he spoke to two advisors from occupational health in total about his epilepsy, one initially on 26 January and one subsequently on 13 February and we accept that was the case. The claimant was told the second occupational health referral was needed because someone more senior needed to be involved.

27. Although the claimant only spoke to two advisers, it seems that three reports were produced by three different advisors all of whom claimed (if those reports are taken at face value) to have spoken to the claimant. The first report was in the name of Zoe Blanchard an occupational health advisor. Her report is dated 26 January. She did not say in her report when she spoke to the claimant. Then there is a report from a Dr Hilary, an occupational physician who said in the report he spoke to the claimant on 26 January. Then there was a third from a Ms Wilmshurst, an occupational health advisor. Her report was identical to the first part of Dr Hilary's report and said that she spoke to the claimant on 26 January. If, as we accept, the claimant spoke to two advisors, they cannot all be right about having spoken to the claimant.

28. We find it more likely than not that the claimant's first conversation was with Zoe Blanchard, the occupational health advisor, as she produced the first report in time dated 26 January. In that report she said the claimant was taking medication and that the claimant had not had any seizures since the one in November. She said the claimant was fit for work with adjustments. The adjustments she recommended included flexible hours due to being unable to drive due to epilepsy, avoiding any prisoner facing contact, ensuring that all risk assessments were untaken, avoiding any loan working, avoiding any duties which could cause flashing lights within the workplace. She had been asked to advise about the timescale for the claimant's return to full duties and she said 'I would suggest being seizure free for six months before returning back to full duties'. In that regard it is clear from her report she was talking about full prison officer duties.

29. When he saw this report the claimant believed the advisor was saying it should be medically possible for him to return to duties as a prison officer as long as he did not have any more seizures by the end of May 2023 by which time he would have been seizure free for six months.

30. Ms Davies saw the report.

31. Regarding lone working, the claimant told us that notwithstanding what was said in the occupational health report, in practice in the OSG role he was left to work alone from time to time. We accept that was the case. Ms Davies suggested she was unaware of that. We find that unlikely. She may not have known exactly when the claimant was working alone but we find that she knew there were likely to be occasions when he would be.

32. We were told that one of the reasons the respondent believed the claimant should not work alone was for his own safety, in that somebody would be around if he had

a seizure. Nevertheless, Ms Davies did not tell any of the claimant's colleagues of his condition or what to do if he had a seizure. When asked why that was, Ms Davies said that it was confidential and it was not for her to disclose. However, any confidentiality concerns could easily have been overcome by asking the claimant whether he would be willing for any information to be disclosed to staff or what staff should be told about the risk of a seizure. Neither Ms Davies nor anyone else did that. Ms Davies suggested to us it was unnecessary for other staff to know about the claimant's problem because everybody had some training in first aid and they would know to put the claimant in the recovery position in he had a seizure. We found Ms Davies' evidence on this matter unconvincing. We find it more likely than not that the reason Ms Davies did not take any active steps to ensure the claimant's colleagues were aware he might have a seizure and what they should do if he had a seizure is that she was relaxed about the risk of the claimant having a seizure.

33. At some point before 13 February the claimant's union rep, Mr Storey, warned the claimant that the respondent would not allow him to continue on restricted duties long term and that it was likely he would be regraded from a prison officer role to a role he was currently able to manage. We find the claimant understood that to mean that it was likely the respondent would regrade him to either Band 2 OSG or Band 3 admin role. The claimant also understood that to mean it was possible he would be able to return to his Band 3 prison officer role in the future, and in any event his salary as a Band 3 prison officer would be maintained up to two years even if he did not return to that post. That is what the claimant understood. He also understood the respondent's reasons why they may wish to regrade him and appreciated why that may happen.

34. The claimant spoke to somebody from occupational health on 13 February. As recorded above, a report was produced and signed by Dr Hilary an occupational health physician. That report had a section addressing the claimant's 'current health issues'. In that section Dr Hilary said: the claimant had had a single seizure; he was taking medication to prevent further seizures; he was in the process of increasing the dose going up by one tablet every two weeks; and he was still getting episodes when he felt as if he was about to have a seizure, but he can take measures to stop this going any further; once the claimant had reached the necessary dose of medication this was likely to stop happening; and the claimant was having an MRI scan to rule out lesions as a cause. Dr Hilary went on to deal with the claimant's current capacity. He said the claimant was not fit to work as a prison officer but he was fit for restricted duties. He said if that could not be sustained he was fit for work as either an OSG or in an administrative role. He said the adjustments suggested in the earlier report remain appropriate and a risk assessment of any alternative employment was suggested.

35. Dr Hilary also addressed the 'current outlook'. He referred again to the claimant slowly increasing the dose of medication to prevent seizures, explaining this was being done slowly to minimise the sedative effect. He went on to say:

> *'Once he is established on a dose of the medication that controls his condition it would be sensible to have a period of time to ensure that he remains well and is not likely to have further seizures -perhaps six months. In the longer term he is likely to be able to return to the prison officer role, and I would expect this to be within two years.' He said I have not arranged for the review but you might*

consider referring him again once ha has been stable on the medication for at least six months and feels ready to return to the prison officer role.

36. There was no change to the claimant's work arrangements after that report.

37. It was the respondent's practice to hold weekly attendance reviews where the prison governor or the deputy governor spoke with line managers about those who were absent from work or on restricted duties. HR were involved in those meetings. The claimant was discussed at these weekly meetings. He had been discussed previously because he had had a previous record of a number of absences. Mr Ormerod had been party to some of those discussions. The claimant was discussed now because he was on restricted duties. Mr Ormerod could not remember which of these meetings he had been at whilst the claimant was on restricted duties but he was aware the claimant was on restricted duties.

38. The claimant was absent from work on 4 and 5 March. He reported the reason for his absence as being due to migraine and dizziness. We find that that absence arose in consequence of the claimant's epilepsy, one of the features of which was that the claimant got headaches and migraines.

39. On or before 7 March a decision was made to ask the claimant to attend a meeting. We were told the decision to hold that meeting was made by either Mr Ormerod or the deputy governor.

40. At this stage the claimant had been on restricted duties for just over seven weeks. The meeting was arranged for 14 March. The claimant was invited to that meeting by a letter dated 7 March. The letter was in Mr Ormerod's name. He said 'I am writing to invite you to a meeting to discuss the prognosis for a return to full duties.' He said 'at the meeting you will have the opportunity to put forward any additional or new facts which you wish me to consider.' In the letter he went on to say 'I will consider whether your record of sickness absence can be supported at this time, whether you should be dismissed or whether you would accept a re-grade/downgrade as an alternative to dismissal if this option was offered to you.' He went on to say 'I recommend you read the absence management policy and procedures, copies enclosed.'

41. The claimant was provided with copies of his sickness record and his occupational health records including those from 2022 which concerned a foot problem. In addition the claimant was sent a copy of the attendance management policy that we have seen at pages 164 to 193 of the bundle. On any reasonable reading of the attendance management policy it is framed as being about people who are, or who have been, absent from work on sick leave.

42. Mr Ormerod's evidence was that, when he invited the claimant to this meeting and during the meeting itself, he was following the attendance management policy. When asked which part(s) of the policy he thought he was following in calling the meeting and conducting it, the only part Mr Ormerod identified was a flow chart (at 199) in relation to making adjustments. That part makes no reference to dismissal. That flow chart was part of a management guide to how to consider reasonable adjustments. The guide did not form part of the attendance management policy (although it was referred to at the end of the policy) and was not sent to the claimant.

43. The claimant was not sent anything described as a capability policy. At this hearing Mr Ormerod was unable to say if the respondent has one. If it does we find that

Mr Ormerod is not (and was not at the time of the events with which we are concerned) familiar with its contents. The claimant was not sent any information about efficiency compensation at this time.

44. The letter asking the claimant to attend the meeting did not say anything that indicated to the claimant that Mr Ormerod had concerns that epilepsy presented any difficulties with the claimant's ability to work in an OSG Grade 2 role as he had been or some other administrative role. Nor had Ms Davies suggested to the claimant that she or anyone else had any concerns about his ability to perform the OSG role he had been performing with certain adjustments or to do some other role in the organisation. On the contrary, we accept the claimant's evidence that she had led him to believe he would be re-graded and that there was no risk of dismissal.

45. The claimant believed the purpose of the meeting arranged for 14 March was to discuss whether restricted duties could continue or whether he was being re-graded. Although the letter referred to considering whether the claimant should be dismissed, the claimant did not believe there was any real risk of that happening given what Ms Davies had led him to believe and the fact that the only sickness absence he had had since his diagnosis was on 4 and 5 March and the foot problems that had caused absences in the past had been remedied.

46. The meeting took place on 14 March. Present were Mr Ormerod, Ms Davies, the claimant, Mr Storey (the claimant's union rep) and a note taker, Ms Bell. We were referred to the notes produced by Ms Bell. They are not verbatim, but we find that nothing has been omitted that is of significance.

47. Mr Ormerod introduced the meeting. He described it as a formal attendance management review meeting. He said the purpose was 'to consider if you are likely to or if fit to return for full duties in the near future, and if not what action we would then need to take to resolve the situation.' He added 'If you are not able to return to full duties I need to consider if we as a business can support the absence and if there is the potential option for a re-grade or if you should be dismissed from service.'

48. We make the following observations and findings about this meeting.

    48.1. The meeting started with a relatively long summary by Mr Ormerod of the claimant's past absences. Mr Ormerod went on to refer to concerns of his which included the claimant not being able to draw keys and work alone.

    48.2. When the Mr Storey referred to the possibility of an admin role, Mr Ormerod said 'I still have my concerns'. He then referred to key carrying and lone work and flagged the claimant's previous absences, saying 'it's a high sick record.' He also referred to display screens.

    48.3. Ms Bell told Mr Ormerod there were vacancies in admin Band 3. There was no further discussion about what those jobs entailed or the claimant's ability to perform them, nor what adjustments might be made to enable the claimant to perform them.

    48.4. When Mr Ormerod raised the claimant's previous absences, the claimant and Mr Storey (and Ms Davies) said his foot problem was now resolved. In response to that Mr Ormerod referred to certain other absences, including the recent absences for migraines. The claimant said he got migraines with his condition.

48.5. Addressing Mr Ormerod's reference to having concerns about carrying keys and lone working the claimant and/or Mr Storey said the claimant could take certain measures to prevent a seizure coming on and that this had been reflected in the second occupational health report. Mr Ormerod did not seek to discuss that further with the claimant.

48.6. Mr Ormerod adjourned to speak to someone in HR. He then returned and told the claimant he would be ending his employment. By way of explanation, Mr Ormerod said: 'Your sickness absence is very high and there are a high level of days on restricted duties. It doesn't demonstrate good and effective service.' Referring to the claimant's epilepsy, Mr Ormerod said 'you would need a buddy, you can't draw keys and need flexible working. If this was a few weeks then this could be sustained. However, I can't sustain this long term due to the length of time the doctors have reported.'

48.7. Over all the meeting lasted somewhere between 30 and 45 minutes, including the recess for Mr Ormerod to speak to a case manager. The claimant described this meeting as being one in which he was being talked to by Mr Ormerod, with Mr Ormerod telling him what he could not do, rather than it being a discussion. That is borne out by the notes taken and the meeting's relatively short duration. We accept that the claimant's characterisation of the meeting is accurate. We find Mr Ormerod did not consult with the claimant in any meaningful sense about the possible options that were open to him or that he was contemplating.

49. The claimant was formally given notice of dismissal in a letter dated the same date as the meeting. The letter referred to concerns about lone working, flexible working hours and not being able to carry keys. In that letter Mr Ormerod also said he had concerns over the sickness absences the claimant had had. He said 'the concerns I have will still remain even if you re-grade. I have concluded that I am no longer able to support the restricted duties and as such your employment will be terminated.' He referred to a right of appeal.

50. We find that the fact that the claimant was absent from work due to migraine on 4 and 5 March 2023 materially influenced the decision to dismiss the claimant. We say that for the following reasons:

50.1. The meeting was arranged just two days after the claimant's sickness absence.

50.2. The letter arranging the meeting referred to sickness absence. The respondent also referred the claimant to the attendance management policy, which was about sickness absence, and enclosed information about the claimant's sickness record.

50.3. Mr Ormerod referred to the claimant's sickness absences being a concern during the meeting. He specifically referred to the absences on 4 and 5 March. He referred to the claimant's sickness absence again when explaining why he was dismissing the claimant and in the letter of dismissal.

51. At the time Mr Ormerod dismissed the claimant there were vacancies in admin roles. There is no suggestion the claimant was not qualified or could not be trained to carry out any of those roles. The claimant was willing to be re-deployed into such a role. At least some of the vacant admin roles were based in the business hub. To get into the business hub, one needs keys. Staff collect (draw) keys at security

so that they can let themselves into the business hub and then carry the keys with them during the working day, returning the keys to security at the end of the working day. It takes approximately 5 to 10 minutes to get through security, draw keys and walk to the business hub. Once in the hub it is possible to get about without keys. Some tasks carried out by some in admin roles involve leaving the business hub. Mr Ormerod said staff also need keys to get out of the building in the event of an emergency. However, we were told that the respondent has unsupervised prisoners in the building who do not have keys. We infer that some arrangements must be in place to ensure they can get out in an emergency. We were told that other staff who work in the business hub have flexible work arrangements.

52. The respondent has had other people with epilepsy or who have had a seizure working in OSG roles on restricted duties.

    52.1. One of the individuals, referred to as 'B', had a seizure that was not caused by epilepsy. B is an OSG. They carried out restricted duties for six months after their seizure while medical investigations were carried out. During that period they carried out duties in the gate area that did not require them to carry keys.

    52.2. C has epilepsy and we were told had 'recently' had a seizure and is undergoing medical investigations. They were temporarily regraded to a Band 2 OSG and are carrying out temporary restricted duties while investigations are ongoing.

    52.3. D has epilepsy and has been temporarily regraded to a Band 2 OSG. At the time of this hearing they were carrying out temporary restricted duties in the Gate and Comms areas. In that role they were not drawing keys or lone working. D's epilepsy is no longer controlled by medication.

53. Mr Walters' evidence is that the circumstances of both C and D are kept under review and 'may change depending on overall levels of staff absence and restricted duties'.

54. The claimant appealed his dismissal saying reasonable adjustments had not been fully explored and suggesting he had been treated differently than other staff.

55. The appeal was handled by Mr Walters. It was a short meeting, no more than half an hour. Mr Walters referred in that meeting to the claimant's past sickness record.

56. The claimant's appeal was dismissed on 15 May 2023. That was confirmed in a letter. Mr Walters gave as his reason 'you were unable to provide me with a definitive timescale on when you will be able to full duties.'

Legal framework

Equality Act

57. It is unlawful for an employer to discriminate against an employee by dismissing them or by subjecting them to any other detriment: section 39 of the Equality Act 2010.

58. The Equality and Human Rights Commission has issued a Code of Practice containing guidance as to the application of the Equality Act 2010. By virtue of section 15(4) of the Equality Act 2006, the code shall 'be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant'.

Failure to make reasonable adjustments

59. Under section 39(5) of the Equality Act 2010 a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: Equality Act 2010 s21.

60. Section 20 of the Equality Act 2010 provides that the duty to make reasonable adjustments comprises three requirements, set out in s 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

61. The EHRC's Code of Practice says that, in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, the following factors may be relevant:
    61.1. the extent to which taking the step would prevent the substantial disadvantage;
    61.2. the practicability of the step;
    61.3. the financial and other costs of making the adjustment and the extent of any disruption caused;
    61.4. the extent of the employer's financial and other resources;
    61.5. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
    61.6. the type and size of the employer.

62. Other provisions of the Code that are relevant in this case include the following:

    62.1. Para 6.35: 'In some cases, a reasonable adjustment will not succeed without the cooperation of other workers. Colleagues as well as managers may therefore have an important role in helping ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality, employers must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act to argue that an adjustment was unreasonable because staff were obstructive or unhelpful when the employer tried to implement it.'

    62.2. Paras 6.36-6.38: '6.36 The Access to Work scheme may assist an employer to decide what steps to take. If financial assistance is available from the scheme, it may also make it reasonable for an employer to take certain steps which would otherwise be unreasonably expensive.

6.37 However, Access to Work does not diminish any of an employer's duties under the Act. In particular:
• The legal responsibility for making a reasonable adjustment remains with the employer – even where Access to Work is involved in the provision of advice or funding in relation to the adjustment.
• It is likely to be a reasonable step for the employer to help a disabled person in making an application for assistance from Access to Work and to provide on-going administrative support (by completing claim forms, for example).
6.38 It may be unreasonable for an employer to decide not to make an adjustment based on its cost before finding out whether financial assistance for the adjustment is available from Access to Work or another source.

62.3. 6.27: 'If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise.'

63. The duty to make adjustments necessarily requires the disabled person to be treated more favourably in recognition of their special needs: Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651.

64. The adjustment contended for need not remove entirely the disadvantage: Noor v Foreign and Commonwealth Office [2011] ICR 695, EAT. Nor must the claimant prove definitively that the adjustment will remove the disadvantage: provided there is a prospect of removing the disadvantage, the adjustment may be reasonable: Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075.

65. In Royal Bank of Scotland v Ashton [2011] ICR 632, the EAT emphasised that when addressing the issue of reasonableness of any proposed adjustment the focus has to be on the practical result of the measures that can be taken. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. It will not extend to matters which would not assist in preserving the employment relationship.

66. The duty to make reasonable adjustments involves taking substantive steps rather than consulting about what steps might be taken: Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664, EAT. However, an employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments.

Discrimination arising from disability

67. A person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of their disability and they cannot show either (a) that they did not know, and could not reasonably have been expected to know, that the employee had the disability; or (b) that the treatment was a proportionate means of achieving a legitimate aim: Equality Act 2010 s15.

68. Simler P in Pnaiser v NHS England [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under Equality Act 2010 s 15:

    68.1. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.

    68.2. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

    68.3. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

69. For an employer to show that the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment.

70. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment of whether the former outweigh the latter: Hardys & Hansons plc v Lax [2005] IRLR 726, CA. In doing so the Tribunal must keep the respondent's workplace practices and business considerations firmly at the centre of its reasoning (City of York Council v Grosset UKEAT/0015/16, upheld by the Court of Appeal [2018] EWCA Civ 1105, [2018] IRLR 746) and in appropriate contexts should accommodate a substantial degree of respect for the judgment of the decision-taker as to the respondent's reasonable needs (provided he or she has acted rationally and responsibly): O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547; Birtenshaw v Oldfield [2019] IRLR 946. To be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim: Birtenshaw v Oldfield [2019] IRLR 946.

71. The Code of Practice referred to above states at paragraph 21: '5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …'

Unfair dismissal

72. An employee has the right, under section 94 of the Employment Rights Act 1996, not to be unfairly dismissed (subject to certain qualifications and conditions set out in the Act).

73. Section 98 of the Employment Rights Act 1996 provides:

    '(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

    (a) the reason (or, if more than one, the principal reason) for the dismissal, and

    (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'

74. The reference to the reason, in section 98(1)(a), is a reference to the set of facts known to the employer, or beliefs held by the employer, which cause it to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. As Cairns LJ said in Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323.

75. Having identified the reason (or, if more than one, the principal reason) for the dismissal, it is then necessary to determine whether that reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

76. The potentially fair reasons for dismissal include, at subsection 2(a) a reason which

    '(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,'

77. Section 98(3) provides:

    (3) In subsection (2)(a)—

    (a)'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality…

78. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

79. Section 98(4) of ERA 1996 provides that: '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

    (b) shall be determined in accordance with equity and the substantial merits of the case.'

80. In assessing reasonableness, the Tribunal must not substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563. The objective

approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). This 'range of reasonable responses' test applies just as much to the procedure by which the decision to dismiss is reached as it does to the decision itself (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

81. The duty of the tribunal in deciding whether or not an ill health capability dismissal is fair was considered by the EAT in Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, [1977] ICR 301. Phillips J emphasised the importance of scrutinising all the relevant factors and said:

> 'Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?'

82. The relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'. Other relevant considerations may include the effect on other workers, what the respondent's own policies say and whether any alternative employment is available.

83. It is important that employers consult with an employee. In East Lindsey District Council v Daubney [1977] IRLR 181, [1977] ICR 566 the EAT said:

> *'Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done'.'*

84. Defects may be remedied on appeal if, in all the circumstances, the later stages of a procedure are sufficient to cure any earlier unfairness (Taylor v OCS Group Ltd [2006] IRLR 613).

Conclusions

Failure to make reasonable adjustments

85. As recorded above, it is not in dispute that the respondent was under a duty to make reasonable adjustments because the requirement to undertake the full range of contractual duties associated with his role put the claimant at a substantial

disadvantage in relation to his employment in comparison with persons who are not disabled.

86. The issue for the tribunal to decide to determine liability is whether the respondent took such steps as it was reasonable to have to take to avoid the disadvantage.

87. One of the things claimant says the respondent ought to have done as a reasonable adjustment is re-deploying him to a suitable admin role.

88. We accept that taking that step would have avoided the disadvantage to the claimant in that it would have allowed him to remain in employment.

89. We must therefore consider whether it was reasonable for the respondent to have to take that step. In this regard it is relevant that:

    89.1. There were vacancies in admin roles. Re-deploying the claimant to an admin role would not have entailed creating a job and thereby incurring extra costs that would not otherwise have been incurred.
    89.2. The claimant was willing to be re-deployed into such a role.
    89.3. There is no suggestion the claimant was not qualified or could not be trained.

90. The primary reason that was given for not taking this step was the need for the claimant to draw keys. The respondent's position is the claimant could have done such a role in the short term but there was a concern about the longer term.

91. The claimant accepts that, at the time of his dismissal, he could not work in a role that involved him carrying keys. That is not in dispute. Until the claimant was on an appropriate dose of medication there was a risk that he would have a seizure. If he lost consciousness there was a risk his keys could be taken from him by a prisoner (or a visitor, if he was in an area where visitors were present). Sometimes there were prisoners in the business hub. Some low risk prisoners could be in the business hub unsupervised.

92. However, we consider that steps could have been taken that would have enabled the claimant to work in an admin role without drawing keys.

    92.1. Rather than drawing keys on arrival, the respondent could have arranged for the claimant to be escorted between security and the business hub by a key holder at the start of his shift. The escort would only be needed for a very short time given that it only takes between 5 and 10 minutes to pass through security and reach the business hub. The respondent referred to the cost of making adjustments but have not provided any evidence of what it would cost them to take this step. In the absence of evidence to the contrary it seems to us the cost would not be at all significant. Nor would that necessarily have been a long term cost. The respondent knew that the claimant was receiving treatment and that it was expected that his epilepsy would be controlled once his medication had reached the appropriate level. In any event it is possible that arrangements could have been made via Access to Work for the provision or funding of a chaperone for the claimant. The respondent did

not explore that possibility, nor give the claimant the option to explore it. It is no answer to that to say the claimant did not ask: it is the respondent's duty to make adjustments. The EHRC Code says "it may be unreasonable for an employer to decide not to make an adjustment based on its cost before finding out whether financial assistance for the adjustment is available from Access to Work or another source".

92.2. Some tasks carried out by some in admin roles involve leaving the business hub and, therefore, require the staff member to have keys. However, there was no suggestion that such tasks formed a core element of any particular role and that tasks could not have been distributed amongst staff to ensure the claimant could carry out all of his duties within the hub. We find that that is something the respondent could reasonably have been expected to do.

92.3. To the extent that keys are needed to get out of the building in the event of an emergency, whatever arrangements are made for unsupervised prisoners could have been put in place for the claimant.

93. The other main reason relied on by the respondent for not offering to regrade the claimant into an admin role was a concern about lone working. Again, however, there were steps that it was reasonable to expect the respondent to take to address this concern.

93.1. The respondent could have explored the possibility of the claimant having a chaperone or work buddy provided or funded through Access to Work.

93.2. The respondent has not given a convincing explanation as to why the claimant could not have tethered his working hours to those of one or more other members of staff. There are various ways in which that could have been done, notwithstanding that staff may have flexible working hours. The respondent, in consultation with the claimant and other staff, could have taken steps to ensure the claimant was not the first to arrive or the last to leave. That might have required the cooperation of other staff. It would not necessarily have involved colleagues making any changes or any significant changes to their arrangements as the claimant himself could be flexible. However, even if other staff would have needed to make some adjustments, as the EHRC Code says "in some cases a reasonable adjustment will not succeed without the co-operation of other workers. Colleagues as well as managers may therefore have an important role in helping to ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality employers must ensure that this happens." The fact that the respondent accepts that the claimant could have carried out an admin role in the short term demonstrates that suitable arrangements could be made.

93.3. The fact that the claimant was at this time using public transport to get to work (and therefore had less flexibility over start and finish times) does not mean this was not achievable. In any event the respondent could have funded private transport on a temporary basis until the claimant's licence was reinstated or funding may have been available through Access to Work.

94. Another reason given for not re-deploying the claimant to an admin role was that he would have to use display screens. However, there was no evidence that the claimant using normal computer equipment was a risk to him. It seemed to us that in mentioning this Mr Ormerod was looking for a justification not to re-deploy the claimant.

95. We find that redeploying the claimant to an admin role was an adjustment that the respondent could have made at the time the claimant had the meeting on 14 March instead of dismissing him and it was reasonable for the respondent to have to take that step and not dismiss the claimant. Its failure to do so means there was a failure to comply with the duty to make reasonable adjustments.

96. That was not the only option available to the respondent. The claimant's case is that another adjustment the respondent could have made was re-deploying him into the OSG role, in effect allowing him to continue in what he had been doing, potentially with other duties that the claimant suggested he could do more.

97. We accept that the claimant could not carry out the full remit of responsibilities attached to an OSG role because he could not draw keys at this time. However, the respondent could have allowed him to continue in the adjusted OSG role, bearing in mind the following:
    97.1. Ms Davies had raised no concerns about the work he had been doing in the OSG role.
    97.2. The respondent had not explored whether any support could be obtained from Access to Work, for example by funding for a chaperone, and for transport to work to the extent that that might help with the claimant being able to get to work for early shifts. In any event, the respondent could have funded transport (eg a taxi) on a temporary basis as noted above or the claimants hours could have been adjusted as they had been in the period he was working on restricted duties.
    97.3. The evidence shows that the respondent has permitted some individuals to work in OSG roles with adjustments after having seizures (in two cases, regrading them into Band 2 OSG roles). We do not consider the fact that one of these individuals was not epileptic is significant. Mr McLean submitted we do not know if the circumstances of B, C and D are comparable with the claimant's circumstances. However, the respondent does know if there are relevant differences and if there are they could have told us. The respondent has not shown that their situations were not comparable to those of the claimant.

98. The respondent has referred to the cost of maintaining these arrangements. However, we have not been provided any costings. In any event, the evidence indicates that any adjustments needed to enable the claimant to carry out an OSG role were likely to be temporary. The respondent knew from the OH reports obtained that the cause of the claimant's seizure was known to be epilepsy, he was receiving appropriate treatment in the form of medication, the medication was expected to resolve the claimant's susceptibility to seizures, and it was expected to be just a matter of time before the claimant reached that point.

99. We accept the respondent did not know when the claimant would get to that point but nor did they seek additional medical advice to clarify matters. One piece of

information obviously lacking from the most recent occupational health report was how long it was likely to be before the claimant was expected to be on the optimum dose of medication. The respondent could have obtained further medical evidence about that but did not do so. We would expect any reasonable employer to have sought that information in order to assist it to reach a view on how long any adjustments were likely to be needed. The respondent could also have sought advice about the specific monitors the claimant would have to use in an OSG role if that was a matter of real concern and could have sought advice about what the claimant had said about his ability to take measures to prevent a seizure. None of those matters were explored by the respondent.

100. Allowing the claimant to continue in the Grade 2 OSG role albeit with some restrictions, and not dismissing him, are steps that would have avoided the disadvantage to the claimant. We have concluded that doing that on 14 March, rather than dismissing the claimant, is a step that it was reasonable for the respondent to have to take. The respondent's failure to take that step means there was a failure to comply with the duty to make reasonable adjustments.

101. We find the claimant's claim that the respondent discriminated against him by failing to comply with a duty to make reasonable adjustments well founded.

102. The discrimination occurred on 14 March 2023. The claim is therefore in time.

Discriminatory dismissal – section 15

103. It is common ground that the respondent dismissed the claimant because of his inability to undertake a full range of contractual duties and that this inability was something arising in consequence of his disability of epilepsy.

104. We have also found that the claimant's short absence from work in March 2023 arose in consequence of his epilepsy and that absence materially influenced Mr Ormerod's decision to dismiss the claimant.

105. We have found that earlier absences (unconnected with epilepsy) also materially influenced the decision to dismiss. The claimant says those absences (or at least some of them) arose in consequence of an impairment affecting his foot which amounted to a disability. Given that the claimant has already established that he was dismissed because of something arising in consequence of his epilepsy, it is unnecessary for us to consider whether the claimant was also disabled by virtue of an impairment affecting his foot.

106. The issue for the tribunal to decide to determine liability is whether dismissing the claimant was a proportionate means of achieving a legitimate aim. As noted above, the respondent expresses the aim(s) pursued as follows: 'the requirement to manage staff, ensuring the proper operation of the prison by having staff fulfil all elements of their roles, the need to ensure staff are fully fit to work, particularly given the risks attached to working in a prison, and to ensure the health and safety of all staff and service users.'

107. We accept that those are legitimate aims for a respondent to have.

108. In deciding whether dismissing the claimant was a proportionate means of achieving those aims, we must conduct a balancing exercise, weighing the impact of dismissal on the claimant against the needs of the respondent.

109. The impact of dismissal on the claimant was very significant: he lost his career in the prison service.

110. We acknowledge that keeping the claimant in work would have required at least some adjustments. Had the respondent regraded the claimant to an admin role, there is no evidence that the cost of doing so would not have been significant. Had the respondent allowed the claimant to remain in an OSG role we are more inclined to accept there would be some cost to the respondent as we were told that the claimant was in effect supernumerary, at least at the point at which he was assigned to OSG. However, we were not told what the costs would have amounted to if the claimant had been allowed to stay in OSG. Nor has the respondent explained why it was able to accommodate B, C and D in OSG but not the claimant. Nor did the respondent make further enquiries of medical advisers to better understand for how much longer the claimant might be unable to draw keys and work alone.

111. We have found that the respondent failed to comply with its duty to make reasonable adjustments. Had it complied with that duty the respondent would not have dismissed the claimant on 14 March 2023. Even if we had not reached that conclusion, the respondent has not shown why it could not have accommodated the claimant on medical suspension or sick leave instead of dismissing him at that time while seeking clarity as to when his medical condition was likely to be settled.

112. The respondent has not persuaded us that dismissal was a proportionate means of achieving its legitimate aims and therefore the claimant's claim under section 15 also succeeds.

Unfair dismissal

113. The respondent's case is that it dismissed the claimant for a reason falling within ERA s98(2)(a) ie because of his capability for performing work of the kind he was employed by the respondent to do.

114. The claimant was employed to work as a prison officer. It is not in dispute that, at the time of dismissal, the claimant was incapable of performing his prison officer role. We have found that Mr Ormerod dismissed the claimant for that reason. The decision to dismiss the claimant was also influenced by the claimant's past absences. However, the principal reason for dismissal was the claimant's inability to perform his duties as a prison officer. That reason is a potentially fair reason for dismissal as it falls within ERA s98(2)(a).

115. The question for us is whether the respondent acted reasonably or unreasonably in treating that sufficient reason for dismissing the claimant.

116. The procedure followed in dismissing the claimant was unreasonable. The claimant was invited to a meeting which, ostensibly, was about his record of sickness absence. The attendance policy he was provided with was about sickness absence and attendance. He was sent documents about his sickness absence. What the claimant was not told before the meeting on 14 March, however, was that the respondent had concerns about the claimant's ability to work in other positions. That simply was not signalled to the claimant ahead of that meeting. There was a reference to dismissal in the 7 March letter but the context of that reference related to sickness absence. No reasonable employer could have considered that this was sufficient to alert the claimant to the respondent's concerns and enable him to properly prepare to address them at that meeting. For example had he known ahead of this meeting that there were concerns about his ability to work in other positions, he could have gone back to his own consultant to obtain information about how soon he was expected to stabilize on medication; he or his union rep might also have raised the possibility of approaching Access to Work.

117. Furthermore, if, as Mr Ormerod suggested, he genuinely thought he was following the process in the attendance management policy, the claimant was not taken through any of the stages of warnings that are set out in that policy; Mr Ormerod simply jumped straight to dismissal.

118. Any reasonable employer would have explored alternatives to dismissal and properly consulted with the claimant about them.

119. In this case there were alternatives. We found there was a failure to comply with the duty under the Equality Act to make reasonable adjustments by not offering one of those alternatives.

120. There was also a failure to consult with the claimant about those alternatives. The meeting on 14 March did not constitute consultation.

121. Nor did the respondent take reasonable steps to understand the medical position regarding medication, specifically how long it was likely to take for the claimant to be stable on medication. No reasonable employer would have failed to get more definitive medical advice on that point or give the claimant an opportunity to get that advice.

122. In dismissing the claimant Mr Ormerod relied on assumptions about the claimant's ability to use display screen equipment with flashing lights. No reasonable employer would have made the assumptions that Mr Ormerod did. Any reasonable employer would have sought medical evidence if they had genuine concerns about that.

123. We find that, at the time of dismissal, Mr Ormerod sought to use the claimant's history of sickness absence to justify dismissing the claimant instead of making adjustments. That fell outside the range of reasonable approaches by a reasonable employer.

124. None of these failings were remedied by the appeal.

125. Taking into account all the relevant circumstances, we conclude that the respondent acted unreasonably in dismissing the claimant for the reason it did. Therefore, the claimant was unfairly dismissed.

Employment Judge Aspden

Date 22 August 2024

AGREED CHRONOLOGY

DATE	EVENT
11 March 2019	Claimant commenced employment with Respondent as a Band 3 Prison Officer at HMP Holme House, Stockton on Tees.
20-25 February 2020	Claimant absent from work. Claimant says this absence related to feet. Respondent's sickness absence records states musculoskeletal – other
24-25 February 2021	Claimant absent from work. Claimant says this absence related to feet. Respondent's sickness absence records states musculoskeletal – other
24 May – 3 June 2021	Claimant absent from work. Claimant says absence related to foot injury sustained as a result of musculoskeletal issues with feet. Respondent's sickness absence records states musculoskeletal – other
21-22 July 2021	Claimant absent from work for, he states, a non-disability sickness reason - diarrhoea
10 August 2021	Occupational Health Consultation Report [**p76-77**]. Claimant's diagnosis of bilateral plantar fasciitis and left side achilles tendonitis considered. Claimant assessed as fit for work undertaking his substantive role and contracted hours, and capable of the full remit of the job role.
11 November 2021	Occupational Health report [**p80-82**] which stated the Claimant was considered fit for work with no adjustments required. The report referenced the Claimant's history of poor mental health and stated its interpretation that the Claimant's low mood would likely be considered a disability under the Equality Act 2010.
25-30 January 2022	Claimant absent from work. Claimant says this absence related to feet. Respondent's sickness absence records state musculoskeletal – other
31 January 2022	Application for restricted duties, until OH advice received [**p86-92**] Granted.
2 February 2022	Occupational Health report [**p93**]. Report considers the Claimant's plantar fasciitis, achilles tendonitis and flat feet. The report states the Claimant has a reduced ability to stand or walk for any prolonged period. States that Claimant is fit to continue working in a reduced capacity and recommends that Claimant undertakes office-based administrative duties until future appointment with a hospital specialist. Report advises that it is unable to determine when symptoms will resolve or how it will impact on Claimant's ability to provide a full and effective service in the future.

Respondent's records: 3 March – 6 April 2022 Claimant's records: 31 March – 7 April 2022	Claimant absent from work. Claimant says this absence related to feet/hand. Respondent's sickness absence records states musculoskeletal – other.
1 April 2022	Occupational Health report [**p104-106**]. Report considered the Claimant's swelling to his left hand/wrist and right foot, which at that time had no formal diagnosis. The report concluded that the Claimant was unfit for full duties, due to ongoing symptoms which were likely to affect the Claimant's ability to undertake control and restraint safely. The report expressed the view that the Claimant was fit to undertake non-operational duties when his fit note expired. Phased return and DSE Assessment recommended.
4 April 2022	Application for restricted duties in line with OH recommendations [**p107-113**] Granted
27 April 2022	Occupational Health report [**p114-116**]. Report stated its view that the Claimant was fit to return to full duties subject to a control and restraint risk assessment.
7 June 2022	Application for restricted duties until the Claimant's medication started to take effect [**p117-122**] Granted
8 June 2022	Occupational Health report [**p123-125**]. Report expressed view that, in terms of physical health, the Claimant was fit to continue with risk assessed duties to see how the Claimant responded to treatment. In terms of mental health the report stated that safety critical roles were not appropriate and the Claimant was marginally fit for risk assessed duties with management support.
31 July 2022	Claimant absent from work. Claimant says this absence related to feet. Respondent's sickness absence records states musculoskeletal – other
26 September 2022	Claimant absent from work. Claimant says this absence related to feet. Respondent's sickness absence records states musculoskeletal – other
8 October 2022	Claimant absent from work (sickness)
20 November 2022	Claimant had a seizure while on annual leave. Claimant returned to work on 4 December 2022.
12-13 December 2022	Claimant absent from work (sickness – digestive system)
11 January 2023	Claimant formally diagnosed with epilepsy and prescribed medication. Claimant states he advised his line manager, Jude Davies, on this day.
16 January 2023	Application for restricted duties [**p126-139**] Claimant placed on restricted duties from this date. Claimant worked as a Band 2 Operational Support Grade ('OSG').
26 January 2023	Occupational Health report [**p140-143**]. Report covered the Claimant's recent seizure and epilepsy diagnosis. Report expressed view that Claimant was fit for work with adjustments, and suggested Claimant should be seizure free for 6 months before returning to full duties. Report

	stated that the Claimant's condition/impairment of epilepsy was likely to be considered a disability under the Equality Act 2010.
13 February 2023	Occupational Health report [**p145-147**]. Report covered the Claimant's recent seizure and epilepsy diagnosis. Report stated its view that the Claimant remained unfit for operational duties as a Prison Officer but was fit for restricted duties, alternatively that if that could not be sustained he would fit to work as either OSG or in an administrative role.
15 February 2023	Claimant undergoes an MRI to establish the cause of the epilepsy. The results show nothing significant. Follow up appointment arranged for 29 June 2023. Sleep Deprivation ECG booked for 20 July 2023.
4-5 March 2023	Claimant absent from work. Claimant states this was disability related. Respondent's sickness absence records state this related to nervous system – migraine/headaches.
7 March 2023	Claimant invited to Formal Attendance Review Meeting ('FARM') [**p150**].
14 March 2023	FARM took place [**p151-154**]. Claimant informed of his dismissal with notice via letter of the same date [**p155-156**].
3 April 2023	Claimant appealed dismissal [**p158-159**].
17 April 2023	Claimant's EDT
3 May 2023	Appeal hearing [**p160-161**]. Claimant's appeal dismissed on 15 May 2023 [**p162-163**].
14 July 2023	Claimant commenced ACAS Early Conciliation. ACAS certificate issued on the same day.
11 August 2023	Claim issued.