EMPLOYMENT TRIBUNALS

Claimant: Mr J Hope

Respondent: Secretary of State for Justice

Heard at: Midlands West

On: 9, 10, 11 and 12 July 2024

Before: Employment Judge Faulkner
Ms L Clark
Mr R White

Representation: **Claimant** - In person
Respondent - Mr T Perry (Counsel)

JUDGMENT having been sent to the parties on 16 July 2024, and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction

1. This case was principally about alleged discrimination arising from disability in respect of the Claimant's pay when absent from work, and alleged failures to make reasonable adjustments in respect of his duties. There were also complaints of harassment, and of unauthorised deductions from wages, the latter also being related to the Claimant's pay when absent.

2. The issues the Tribunal had to decide are set out in the Annex to these Reasons. They were identified at the case management stage by Employment Judge Rea, and modified by discussion with the parties at the start of this Hearing.

Hearing

3. Both parties prepared witness statements, all of which we read before hearing oral evidence. Neither the Respondent nor the Tribunal wished to ask questions

of the Claimant's additional witnesses (Chris Howard, Natalie Beardmore and Rebecca Walker) and so it was agreed that there was no need for them to attend. Similarly, neither the Claimant nor the Tribunal wished to ask questions of Christopher Wood (Head of Enhanced Support Service) for the Respondent and so he did not attend either. We thus heard oral evidence from the Claimant, Alice James (Governor at HMP Werrington), Louise Binns (formerly Deputy Governor at Werrington) and Simon Drysdale (formerly Governing Governor at Werrington), and by consent (without a statement, and briefly), from Sean Greatbatch (formerly a Custodial Manager at Werrington and the Claimant's line manager in 2020).

4. There was an agreed bundle of documents. We were asked by the parties to read some of those documents before hearing evidence, making clear that otherwise it was their obligation to take us to documents they wished us to consider. Page references below are references to the bundle and alphanumeric references relate to the witness statements, so that for example LB7 would be paragraph 7 of Ms Binns' statement. All of the findings of fact that now follow were based on the evidence we heard and were directed to, and were made on the balance of probabilities. We focused on those matters that seemed to us most material to the issues, though that does not mean that something not mentioned below was not taken into account.

Facts

Background

5. The Claimant has been employed by the Respondent since 2 September 2015, initially as an Operational Support Grade, at HM YOI Werrington. He disclosed his disability at the outset. In April 2019 he was appointed as a Youth Justice Worker (equivalent to a Prison Officer), again declaring his disability in the process of the application for that role.

Disability

6. The Respondent concedes that the Claimant's pilonidal sinus disease, a small hole between the buttocks which regularly becomes an open wound, was a disability at all relevant times. The Claimant confirmed that he did not rely on any other impairments. He has had around 25 procedures, some minor and some more major, over the last 12 years. The procedures leave the tissue in the area potentially vulnerable, so that it can take between a week and a month to recover, the more major procedures requiring district nurse visits to address the wound.

Disability leave

7. The Claimant drew our attention to an old version of the Respondent's Absence Management Policy ("AMP") (page 75) which principally dealt, as one would expect, with how the Respondent should handle absence due to sickness. At paragraph 2.13, that AMP excluded certain absences from determination of unsatisfactory attendance, including absence due to a serious underlying medical condition, as well as disability-related absences. The Claimant's first Occupational Health ("OH") report in December 2016 (pages 204 to 205) described him as having a serious underlying medical condition, and so the Claimant says that in accordance with this AMP the absences with which this

case was concerned (see below) should not have been treated as sickness absence. This AMP did not refer to disability leave. The Claimant says he got to know about that form of leave because he was told by managers to apply for it.

8. Both the Claimant and his other witnesses say that the Respondent's managers dealt with absence from work inconsistently, some giving warnings for it and some not. The Claimant says that those who were not part of the "boys club" or "clique", as he called it, were treated less sympathetically than those that were. Ms James did not accept this assertion, saying that the Respondent's system generated letters for absent employees automatically and that there were also weekly absence review meetings (see below) so that any practice such as the Claimant alleges could not have been concealed. We did not think it necessary to decide whether or not there was a clique or club at HMP Werrington, in order to determine the issues in the case.

9. The Claimant says that shortly after the December 2016 OH report, he was issued with a letter signed by the then Governing Governor, Peter Gormley, which said that any further leave taken by the Claimant related to disability would not count towards any formal attendance proceedings. He has since lost the letter and the Respondent does not have a copy either. The Claimant accepted in evidence that the letter did not promise that he would be paid in full whenever he was absent because of his disability, but says that it was his belief that if he was not taking sickness absence, his leave would be authorised and therefore paid. It is this letter that he relied on as the basis for his wages claim. The Respondent accepts that the letter was issued, but we were clear, based on the Claimant's own evidence, that it said nothing about pay during periods of absence; what it said was that absence related to his disability would not be taking into account in formal attendance management proceedings.

10. There was no copy of the Claimant's contract of employment in the bundle. In respect of disability leave, the Respondent relied on the AMP at page 392 onwards, dated from 2017, which replaced the earlier one and was agreed nationally. As can be seen at pages 411 to 412, it says:

Employees with a disability can apply for disability leave if they are fit for work but need time off to attend appointments for treatment, rehabilitation or assessment relating to their disability. The manager may apply disability leave if an employee is fit for work but is absent because they are waiting for an agreed reasonable adjustment to be implemented …

The manager must not apply disability leave if the employee is absent because they are not fit for work. Disability leave does not cover periods of sickness absence, whether or not the ill health is directly related to the employee's disability. Disability leave is for rehabilitation, assessment and treatment, but does not cover periods of hospitalisation or recovery.

11. The Claimant accepts that time off, which is the first ground on which disability leave may be granted, is different from absence, which is the second, but submitted that this AMP applies no specific limit on taking time off and does not say whether it covers being completely absent from work. The Respondent's Ability Manual (pages 110 to 112 are the relevant parts), written for anyone who has or manages someone with an impairment, was not adopted by HMPPS until November 2022 and so we say no more about it, because as a result it did not seem to us that it could be relevant to the Claimant's case. We simply noted that

it reflects the AMP as quoted above, which also says that disability leave would be paid.

12. The Respondent's case in the light of the more recent AMP was that disability leave provides the right to request paid time off for reasonable absences for rehabilitation, assessment and treatment, but is not intended to cover long-term absences. The Claimant says he was never given the new AMP, though Mr Drysdale says it was available on the intranet together with all other policies. The document itself, issued by the National Offender Management Service, did not indicate whether it was or not, though that was clearly the intention because it says it is for all staff in the Prison Service, and so we thought it overwhelmingly likely that the Respondent did post it on the intranet at Werrington shortly after issue, as Mr Drysdale said. The Claimant would therefore have had a more than reasonable opportunity to read it. Moreover, as he sought to make a case based on a claim for entitlement to disability leave, it was somewhat inconsistent to say that the AMP did not apply to him. His case was that periods when he says he was able to complete restricted duties were covered by the disability leave arrangements, as were his pre-operative absences (which he says were assessments), his operations (which he says were treatments) and his recovery periods (which he says constituted rehabilitation). We will come back to these arguments in our conclusions, but record here our finding that the 2017 AMP did apply to him.

Claimant's absences

13. All staff absences were discussed by the Governor, Deputy Governor, HR and line managers, at weekly absence review meetings, with clear indications being given to managers as to what action was required in each case. The Claimant's contract apparently provided for 5 or 6 months of full pay and 5 or 6 months of half pay when he was off sick.

14. There were three periods relevant to his Claim, when the Claimant was treated as being on sick leave but when he says disability leave should have covered the pre-operative assessments he went through, the operations he had and his recovery time including treatment at home. We address each in turn.

14.1. ***18 January to 13 April 2020***

This was a 55-day period, when the Claimant had several unplanned emergency operations. The Respondent says this could not have been disability leave as he was unable to attend work. On 4 February 2020 (page 227) OH said the Claimant was unfit for any work after surgery on 22 January, due to ongoing symptoms and side effects of the treatment, though the Claimant says he could have done limited duties working from home because whilst he had issues sitting down, this was only if it was for long periods. OH reported again on 5 March 2020 (page 231), saying that the Claimant was incapacitated from most normal activities, that even sitting was very difficult, and that he was unfit for any work until an operation due for 15 April 2020. It reported again on 28 March 2020 (page 233) to say that he was temporarily unfit for all work, though with a long-term prognosis of a sustained return to full duties.

14.2. ***13 February to 4 March 2022***

This was a 15-day period when the Claimant had an emergency operation followed by daily district nurse care. Again, the Respondent says it was not disability leave as the Claimant could not attend work. The operation was on 16 February, and the Respondent's record of the weekly absence management meeting at page 270 records in relation to the Claimant that he had a further operation on 2 March, which the Claimant did not dispute. Ms Binns says at LB44 that this period was treated as sickness absence, and not disability leave, because the Claimant did not report fit for duty and updates from the weekly absence management meetings said he had a sick note, had been rushed to hospital and was therefore unfit to attend work. The Claimant supplied sick notes, telling us he felt he had no alternative as otherwise he would have been treated as absent without leave and subject to disciplinary proceedings. He does not accept he was not fit to return to work until 4 March, as he says that the Respondent could have offered him administrative duties, though he did not specify what they would have been. We return to this below. The closest OH report to this period was on 14 March 2022 (page 256). It said that the Claimant had undergone surgery on 21 and 28 February, the wound did not appear to be closing, he was in a lot of pain, and so was fit to remain at work on current adjusted duties – light manual handling and administrative duties, if management could accommodate that.

14.3. ***23 to 31 August 2022***

The Claimant was off work during this short period due to an emergency operation and subsequent care. The Respondent relied on the same reason for not applying disability leave. Its record at page 270 says that on 24 August 2022 the Claimant called in sick following his operation due to being in severe pain. The Claimant told us he came back to work, was due to be put on gate duties, but what in fact happened (see also LB59), is that he was instead offered administrative duties in the "People Hub", for example scheduling shifts and planning training. He attended on 24 or 25 August to commence that work, but was sent home because he was in significant pain and could not sit down.

15. None of the Respondent's witnesses were involved in deciding that the first of the three periods, namely that in 2020, was sick leave and not disability leave (and thus none were responsible for the Claimant's pay being reduced on this occasion). Mr Drysdale was ultimately responsible for the decisions in relation to the other two periods.

16. The Claimant was given disability leave on 11 June 2021 (page 270) when he had an injection – this was because he would have been fit for work had he not been scheduled for the injection. He also took disability leave on 17 August 2022, though Ms Binns told us she does not know why. His absence in late October 2022 (see below) was also eventually classified as disability leave, because Ms Binns concluded that if he had not been having dressings changed by nurses, he would have been fit for work, albeit he was on amended duties at that point.

17. Ms Binns said that anecdotally based on her own experience – no data or similar evidence was produced to us – when staff get to their maximum sick pay entitlement, if the absence is genuine, they remain off, but those whose reasons for absence are less genuine return to work. The Claimant disputed that, saying that because of his family responsibilities he felt he had no choice but to return to work when his pay reduced. Ms Binns told us that not paying the Claimant in full

for the absences in question helped the Respondent achieve the aims it relies on because it was compliant with its policies, it was important to be clear on why staff were absent in order to maintain safe staffing levels, and there needed to be a resolution of the situation, either for the Claimant to return to work or to be replaced.

18. Mr Drysdale said that the two periods in 2022 were sickness absence, and not disability leave, because the Claimant was not fit for work, telling us that OH's advice on whether someone is fit or not fit for work is taken by the Respondent as definitive in 99% of cases, which we accepted. He agreed with Ms Binns that classifying leave as sickness leave (when this is appropriate under the Respondent's policy) creates an incentive for staff to return to work, which he says is important in terms of the service that is offered to the young people for whom the Respondent is responsible. He also said to us that if too much leave was classified as disability leave, the Respondent would never be able to get to the point of having a conversation about redeploying and/or replacing an officer, or at least be delayed in doing so. He further told us that staff absence was a major issue for the Respondent in 2022, as lots of people were still not back from leave after the Covid-19 pandemic, and at this point institutions such as HMP Werrington were under a lot of scrutiny about how long children were confined to their rooms. Managing absence and getting staff back to work as soon as possible was thus seen by the Respondent as crucial to an effective provision for the young people.

Reasonable adjustments

19. The Claimant made clear during his evidence that his case was that the Respondent failed to make reasonable adjustments during the three periods he was off sick as set out above, by failing to provide him with light duties or the opportunity to work from home, which thus led to him being on sick leave.

20. The Respondent accepts that as part of his normal duties, the Claimant would have had to apply restraint to young people as and when required – this was the provision, criterion or practice ("PCP"); Ms Binns told us that some of the children can be volatile. The substantial disadvantage on which the Claimant relied is that the PCP risked opening up his wound, increasing the likelihood of him requiring further medical treatment and absences from work. He told us that his wound was open on and off throughout 2018 to 2021, and therefore also closed for parts of that period, but that the Respondent knew or should have known of the risk he faced because on his assessment day for the role of Youth Justice Worker in 2019, those responsible for recruiting him had to send a consultant's letter to colleagues to get approval to recruit him, and the Claimant believes the letter referred to this risk. This was not challenged by the Respondent and so we accepted that there was such a letter and that it said something to this effect. The Claimant said in evidence that in essence he experienced the substantial disadvantage after flare ups in the condition and conceded that the Respondent would not know of a flare up unless he said something about it.

21. Ms Binns told us that she can see now that by its nature, applying restraint would risk the Claimant's wound opening up, but that she did not understand him to be at risk from 23 to 31 August 2022 (the only one of the three periods she could comment on directly), because she understood he was unfit for work such that the risk could not materialise. Given he was unfit for work, she did not

consider any alternative work for the Claimant in that period, other than the work in the People Hub referred to above.

22. We noted the following OH reports, having made clear we would only read those we were taken to before 2020 and all of those from then onwards, given the periods of absence relevant to the case:

22.1. On 21 December 2016 (page 204) it was said that the Claimant's skin condition may recur but was lower risk after a good operation and was not having a substantial impact on his daily duties.

22.2. On 19 June 2018 (pages 209 to 210) it was said that the Claimant's condition was unlikely to be classed as a disability, as it was not having a significant impact on his ability to undertake normal daily activities.

22.3. On 15 February, 1 March and 11 April 2019 it was reported that the Claimant was not fit for work in any capacity (pages 214 to 221).

22.4. On 26 July 2019 (page 224) it was said he should not carry out restraint.

22.5. On 4 February 2020 (page 227) it was said the Claimant was unfit for any work at that point, and on 17 February 2020 (page 229) that he was currently on sick leave but the long-term outlook for a full recovery was good.

22.6. On 5 March 2020 (page 231), it was reported that the Claimant was incapacitated from most normal activities and that even sitting was difficult, such that he was unfit for any work. On 28 March 2020 it was said he was unfit for all work (page 233).

22.7. On 29 May 2020 (page 236) it was said that the Claimant had an operation on 28 April 2020, and had developed a severe infection shortly after and again on 23 May 2020. He was declared unfit for work for 6 weeks.

22.8 On 8 September 2020 (page 239) it was said that the Claimant needed light duties and should avoid prolonged sitting for 2 weeks.

22.9. On 29 September 2020 (page 242) it was said that he had carried out control and restraint without incident.

22.10. On 25 November 2020 (page 244) his consultant wrote that he was unfit for normal duties and should remain at home until his wound had healed.

22.11. On 3 December 2020 (page 246) it was said that he was not fit to be in work at present, could not bend, was in continuous sharp pain, could not lift heavy items and his sleep was disturbed. On 8 December 2020 (page 249) it was reported that he was unfit for work due to ongoing significant pain and reduced functioning, and had difficultly mobilising and sitting. On 16 December 2020 the advice was that he was in severe pain, especially when sitting, and unlikely to return to work.

22.12. On 6 April 2021 (page 254) it was said that normal activities would be optimally beneficial for the Claimant, he had returned to full duties, but was phasing up to full hours over 5 weeks.

22.13. On 14 March 2022 (pages 256 to 258) the advice was that the Claimant was fit for work on restricted duties to avoid the risk of the wound reopening – light manual handling and administrative duties were mentioned.

22.14. On 13 September 2022 (page 259), it was said that he was on adjusted duties, with daily wound dressing required, and that if he was able to complete administrative duties from home until his wound had been redressed and then attend site afterwards, his recovery would likely be quicker. It is not clear whether OH was saying the Claimant should work from home or only when attended by the district nurses, though the former seems more likely.

Light duties

23. The first step the Claimant says the Respondent should have taken is to give him light duties, essentially administrative in nature. He accepts that his role was principally to work with young people, and that staffing levels affect what can be offered to them. It is also clear that it is only possible to work with the young people in person, though the Claimant repeatedly told us that many of his colleagues had light duties when they had not locked doors or gates properly. We had no evidence of the details of that but are content to accept that it was happening to some extent.

24. There were a number of occasions on which the question of light duties appears to have arisen:

24.1. According to LB53, the Claimant had lighter duties to support him in returning to work, from 29 July to 9 August 2019, in the communications room, which involved operating the gate and escorting vehicles around the site. Ms Binns says at LB54 that the Claimant could not have remained in this position indefinitely as he was surplus to the Respondent's requirements in respect of that work.

24.2. The Claimant told us that ahead of his absence starting on 8 January 2020, Mr Greatbatch said that the only way he could get light duties would be to go on sick leave and activate a formal attendance review meeting, though even then there would be no guarantee that light duties would be agreed. The Respondent was unable to challenge this evidence and therefore we accepted it.

24.3. From 15 to 26 September 2020, the Claimant undertook restricted duties after sick leave.

24.4. He had a phased return to work on full duties with adjusted hours from 5 April 2021 (LB39).

24.5. From 1 to 10 December 2021, he carried out some OSG (Officer Support Grade) duties.

24.6. From 3 to 16 January 2022, he worked on mentoring new officers (LB56).

24.7. The Respondent's record at page 270 stated on 24 February 2022, "no strenuous activity or heavy lifting for a period of 4 weeks". From 8 to 17 March 2022, he carried out OSG duties (see page 143).

24.8. As indicated above, in August 2022 he was offered administrative duties in the "People Hub", but was sent home on 24 or 25 August as he was in significant pain and could not sit down. The Claimant said in closing submissions (which came after the Respondent's) that he asked about a standing desk but was told none was available. We had no reason to dispute what he told us, but were conscious that the Respondent did not have opportunity to question him or its own witnesses about this matter.

24.9. The record at pages 266ff shows that in September and October 2022, the Claimant was engaged in what are known as CUSP duties (one-to-one meetings with children), escorting young people on visits or to clinics and the like. He says he was at more risk of harm in this period than on a normal shift, as he was alone with individual young people, whilst Ms Binns says that the Respondent considered these duties to entail a much-reduced risk because these were activities the young people liked doing. On balance, it seemed to us that most of this work would have been less prone to volatility for the reasons Ms Binns gave. What is clear is that none of this was administrative work. Again, the Claimant said that these were the only options made available to him and that he could have done administrative work such as mail monitoring.

24.10. Since moving to the Probation Service, the Claimant has a workplace passport, which records measures which will avoid him having to be on leave, such as a standing desk, and having leave for medical appointments.

25. Ms Binns told us that there were limited options for the Claimant to do administrative work as the Respondent was not short-staffed, and there were no administrative vacancies. For her part, Ms James said that control room work requires the person to be seated and, in any event, it was already a task allocated to others. Mr Drysdale's evidence was that administrative work could only be offered where there was a vacancy, though he was not involved in any of the decisions about whether adjusted duties could be offered to the Claimant.

Working from home

26. As Ms Binns says at LB58, in around August 2022, the Claimant asked to work from home on administrative duties. The Respondent considered getting him a laptop but could not source one before he reduced to nil pay. The Claimant says that it was Mr Drysdale who raised the possibility of him working from home, but Ms Binns did not contact him about it. Mr Drysdale agrees that he and the Claimant had a conversation in August 2022 in which working from home was mentioned, but denies saying that the Claimant would be permitted to work on this basis. He told us that the focus of the conversation was on getting the Claimant back to work so that reasonable adjustments could be discussed, and that some home-working could be looked at as part of that. The Claimant's email to the Head of Residential Services on 20 September 2022 (page 164) enquiring about working from home led us to conclude that Mr Drysdale had mentioned it as something to be thought about, but had not made any commitment to it, because if he had, the Claimant would have mentioned this in the email.

27. Mr Drysdale told us that what he had in mind when he mentioned the possibility of some home working was that the Claimant might do some online training. Otherwise, he could not think of what else could be done off site. He says that none of the duties the Claimant carried out in September and October

2022 could have been done from home, whilst Ms Binns says that whatever the Claimant might have done remotely, such as checking case note entries, would not really have met any business need, and would have been for a very limited time. As Ms Binns and Ms James pointed out, the AMP stipulates in any event a maximum of 12 weeks on restricted duties, though working up to that maximum is rare. As indicated above, OH said on 13 September 2022 that home-working should be considered.

28. Ms James described working from home as particularly difficult, given the nature of the Claimant's role and that the Respondent has dedicated administrative resource in place anyway. On administrative duties generally, she said that taking calls and monitoring mail is done by OSGs, so that to put the Claimant on those duties would have meant taking colleagues off them, and OSGs could not have been assigned to perform the Claimant's duties. OSGs are paid £10,000 per year less than Youth Justice Workers. Working on things such as attendance lists would have required the Claimant to be present on site.

Harassment

Calls whilst off sick

29. The AMP provides at paragraphs 2.16 and 2.25 (see pages 400 and 401) that managers are expected to agree keeping in touch arrangements with absent staff, although no particular frequency of contact is specified. The Claimant says that during each of the three periods of absence in question, he was called by his manager (Mr Greatbatch in 2020 and Daniel Tavinder in the two periods in 2022) usually twice a week, pushing him to return to work. When asked for more detail during oral evidence, he told us that he was asked why he was off, and that at the beginning and end of the call was asked when he would be returning to work. We accepted that the calls took place and that the Claimant was asked when he would be returning to work, most likely at the beginning and end of each call. The Claimant said he was singled out, others getting no calls at all if they were in the management clique, and even outside it he says he got the most, whilst Mr Greatbatch told us he made similar calls to 8 or 9 employees in 2020 and was following the AMP in doing so. The Claimant did not tell us how he knew he had been called more often than others, or provide details of anyone who he could point to as having been contacted less than him. As noted above, the AMP requires contact with absent employees, which is commonplace for many employers. We were not satisfied that the Claimant established his case that he was singled out in terms of the frequency of contact.

30. During his oral evidence, the Claimant alleged for the first time that in one call Mr Greatbatch said to him, "If I need to step on any of you to get higher [that is promotion], I will" and that he did not believe the Claimant's reasons for his absence. This was essentially what led to Mr Greatbatch being called to give evidence at the last minute. He denies both comments, saying that given the sick notes and other medical information, he had no reason to doubt the Claimant's explanation as to why he was not at work. He says his style is to be supportive, focusing for example on what an employee needs by way of assistance, such as an OH referral. We agreed with the Respondent that it was difficult to accept that Mr Greatbatch told the Claimant he did not accept the reasons for his absence, as they were so well-known and documented. We did not need to decide whether the other comment was made, as the context in which it was allegedly said remained wholly unclear to us and we did not see how

it was material to any of the issues we had to decide. The Claimant also says that Mr Greatbatch refused to accept he needed to shield during the Covid-19 pandemic, despite him providing a consultant's letter, until he got a letter from the government. Mr Greatbatch does not recall that comment, but we can accept that something like it was said given that government confirmation is what many employers, particularly in the public sector, would have required at the time.

December 2020

31. In December 2020, after he was discharged from hospital following an operation, the Claimant's sister took him to Alton Towers Gardens, where he was seen by another manager. Around 4 days later he was called by Mr Greatbatch and Ms James who told him he was being investigated for failing to follow Covid-19 rules. The Claimant attributes two comments to Ms James during this conversation. First, he says she told him that as he had breached shielding guidelines, he was not eligible to shield going forwards, though he cannot recall the words used in detail. He says the comment was related to disability because he had gone to the Gardens to help his mental health which had deteriorated due to his disability. Secondly, he says that when he said that he was in very low mood because of his condition and had contemplated ending his life, Ms James said, "I don't care what the doctor or nurse say, we are your employer and we are the ones paying you, not the doctors". The Claimant says he felt pressured to return to work as a result.

32. Ms James is not sure whether she made the second comment (Mr Greatbatch could not recall it either), adding that it is nevertheless true that the Respondent was paying the Claimant, not the doctors. As to the first alleged comment, she told us that if she made any comment to the Claimant about shielding at all, it would have been when it ended in 2021. She can also recall that she and Mr Greatbatch raised with the Claimant that it was unhelpful to post Facebook pictures of himself at the Gardens.

33. It was difficult to resolve both these conflicts of evidence, even on the balance of probabilities. As to the comment about shielding, it is clear that Ms James put to the Claimant that in the Respondent's view he was in breach of shielding guidelines, whether that was correct or not. It is something of a logical leap however to suggest that she went on to say he was no longer eligible to shield, as that would not have been the Respondent's decision to make and in some ways would have pre-empted the investigation that she told him would be taking place. On balance therefore we found that the first comment was not made. As to the second comment, we had Mr Greatbatch saying he does not recall it and Ms James saying she was unsure if she said it, whilst the Claimant told us he remembers it clearly because of the effect he says it had on him. We accept that someone being adamant about something and someone else being unsure is not necessarily a guide to where the balance of probabilities lies, but on that balance, given the clarity of the Claimant's evidence and given that Ms James said in terms in her statement that what she is alleged to have said was true, we found it more likely than not that the second comment was made.

October 2022 absence

34. The Claimant said that recording his absence in late October 2022 as sick leave was also harassment. This was done automatically by staff in the People Hub whenever someone was absent – it was assumed they were sick unless and

until the staff in the People Hub were told otherwise. The Claimant, who could see remotely that this is how his absence was recorded, raised this with Ms Binns who contacted HR about it (page 744). Someone in HR called Alison Longton replied (page 174) to say that disability leave was a slightly grey area, and it was at the Respondent's discretion whether to grant it if it was for a continuation of the Claimant's treatment arising out of complications, even if there was a possibility he was totally unfit for work.

35. Ms Binns wrote to the Claimant (page 173) forwarding this advice and saying there was a woolly area. There was then a further exchange and Ms Binns raised another question with the Claimant about the absence. The Claimant replied again to say that he did not see why it should not be disability leave, when he was receiving care at home. He made clear that he wanted the two days changed to disability leave. Ms Binns replied to say that the policy was vague, but that she would authorise disability leave for those two days. The Claimant thus accepts that the matter was resolved quickly, but says he should not have had to fight for it.

Other matters

36. We do not need to say anything about action taken against the Claimant under the AMP in terms of managing and warning him about his absence, as this was not part of the Claim. The Claimant left the Youth Justice Worker role on 30 October 2022 to take up a role in the National Probation Service. This involved a pay cut, though with some pay protection following his grievance appeal.

Grievance

37. After his transfer to the Probation Service, the Claimant presented a grievance, on 9 November 2022. We do not need to recount the grievance or appeal process in any detail as its conduct was not part of the Claim either, and so do no more than briefly summarise the position.

38. The Claimant asserted that he should be entitled to disability leave based on the 2016 letter and because he said he could have completed some work during the relevant absences, albeit from home. He referred to the OH report at page 259 that suggested this should be allowed where possible to allow him to get the treatment he required. He said that he felt pressured to return to work when his pay was reduced.

39. The Stage 1 decision manager was Chris Wood, who met with Ms Binns on 22 November 2022. Ms Binns said to him that because the policy was quite vague, she had given the Claimant disability leave for a short period in October 2022. Mr Wood met with the Claimant on 6 December 2022 and provided the outcome of the grievance on 16 December 2022. The grievance was not upheld, as Mr Wood thought the steps Ms Binns had taken were fair and based on specialist advice. The Claimant's appeal against that decision was heard by Mr Drysdale on 6 March 2023. Mr Drysdale sought further advice from colleagues after that hearing. He partially upheld the appeal in May 2023, related to pay protection in the Claimant's new role. We do not need to detail that further.

Time limits

40. ACAS Early Conciliation took place from 20 December 2022 to 20 January 2023, with the ET1 Claim Form being presented on 24 February 2023. The Claimant told us he did not present his Claim sooner, for example when he says he was harassed in 2020, because he had no idea about doing so, did not know where to turn, and was not in a union. He felt able to get advice and to bring a claim when no longer working at HMP Werrington.

Law

41. What is set out below is a summary of the law in relation to those matters that remained in dispute between the parties by the time we came to our deliberations.

Knowledge

42. Paragraph 20 of Schedule 8 to the Equality Act 2010 ("the Act") provides:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

43. There is no need to say anything about knowledge of disability as this was conceded in the Respondent's submissions. The burden was on the Respondent to show that it did not know or could not reasonably be expected to know that the Claimant was put to the substantial disadvantage on which he relied for his reasonable adjustment complaints. What was reasonable for the Respondent to have known is for the Tribunal to determine and depends on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries – in other words there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result – see the decision of the Employment Appeal Tribunal ("EAT") in **A Ltd v Z EAT 0273/18** on the question of knowledge of disability, though there is no reason to think the position is different in relation to knowledge of disadvantage.

Burden of proof

44. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

45. The burden is on the employer to establish the justification defence in the context of discrimination arising from disability. In relation to the complaints of failures to make reasonable adjustments, it is for a claimant to establish the PCP and the substantial disadvantage, for the respondent to show it did not have knowledge of that disadvantage, and then in relation to steps that could be taken to overcome it, it is for a claimant to suggest a step, though ultimately it is for the Tribunal to decide what would have been reasonable. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic, though it is also for a claimant to establish that any unwanted conduct had the requisite purpose or effect.

Discrimination arising from disability – justification

46. The Respondent did not contest that the treatment challenged by the Claimant was unfavourable, nor that it was because of something arising in consequence of his disability. We therefore say nothing about the law in relation to those matters. We drew the following principles from the relevant case law concerned with whether the unfavourable treatment was a proportionate means of achieving a legitimate aim (justification for short) – some of the case law referred to below concerned indirect discrimination, but the principles apply nevertheless:

46.1. As stated above, the burden of establishing this defence was on the Respondent.

46.2. We were required to undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

46.3. What the Respondent did must have been an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire [2012] ICR 704**, it was said, approving **R (Elias) v Secretary of State for Defence [2006] EWCA Civ. 1293**, and mirroring the decision in **Bilka-Kaufhaus GmbH v Weber Von Hartz [1987] ICR 110**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

46.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

46.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] UKSC 27**.

46.6. The EAT in **Homer [2009] IRLR 262**, stated that "… it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS

guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions".

46.7. In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action but whether what it did was reasonably necessary to achieving the aim.

Reasonable adjustments

47. Section 20 of the Act provides as far as relevant:

(*1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

(2) The duty comprises the following three requirements.

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

48. Section 21 provides:

(1) A failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

49. "Substantial" disadvantage in this context means "more than minor or trivial" – section 212(1) of the Act. The Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that put the Claimant at the alleged disadvantage. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP put the Claimant at the substantial disadvantage.

50. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it, and the size and type of employer – see the EHRC Code at paragraph 6.28. The

question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

51. A summary of the above can be found in **Environment Agency v Rowan [2008] IRLR 20,** in which the EAT restated guidance on how an employment tribunal should approach such a complaint, saying that tribunals must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer …

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

52. **Rowan** also held (at paragraph 61), subsequently approved in **Rider v Leeds City Council [2012] UKEAT/0243/11**, that what the duty envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. In **O'Hanlon v Revenue and Customs Commissioners [2007] ICR 1359**, the Court of Appeal said that it saw some force in the EAT's view in that case that the duty to make reasonable adjustments is intended to assist disabled persons to obtain employment and integrate them into the workforce.

Harassment

53. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic [here, disability], and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …

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

(a) the perception of B;

(b) the other circumstances of the case;

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

54. We were thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to disability.

55. It is clear that the requirement for the conduct to be "related to" disability entails a broader enquiry than whether conduct is because of disability as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to disability, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

56. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before us. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on him (he must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the conduct, and all the surrounding context.

57. That much is clear from section 26 and was confirmed by the EAT in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724.** The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient. Mr. Justice Underhill, as he then was, said in that case:

> *A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That … creates an objective standard … whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …*
>
> *…We accept that not every racially [as it was in that case] slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…*

58. It is plain that the Respondent can have harassed the Claimant even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c). Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be

recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met.

Equality Act time limits

59. Section 123(1) of the Act provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. For reasons which will be clear from our conclusions, there is no need for us to say anything about sections 123(3) or (4).

60. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**, though extending time does not require exceptional circumstances. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

61. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** Leggatt LJ in the Court of Appeal said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a Respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

Wages

62. Section 13 of the Employment Rights Act 1996 ("ERA") provides:

(1) "*An employer shall not make a deduction from the wages of a worker employed by him unless – (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised – (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

63. In **Weatherilt v Cathay Pacific Airways Ltd [2017] UKEAT/0333/16**, the EAT held that a tribunal "is required to determine a dispute on whatever ground as to the wages properly payable as a necessary preliminary to discovering whether there has been an unauthorised deduction. This must include a dispute as to the interpretation of the contract or the existence of an implied term. It would be surprising if the [tribunal] could not construe a provision of the contract to see whether it authorised a deduction when this very question is central to the operation of section 13".

Analysis

Wages

64. It was logical to begin with the complaint of unauthorised deductions from wages, in relation to which the core question was that posed by section 13(3) of the ERA, namely whether in any of the three periods in question, the Claimant was paid less than was properly payable to him. As indicated above, answering that question required consideration of the contractual position in order to ascertain whether he was entitled to full pay in those periods as he contended.

65. As already noted, the actual contract of employment was not put before us, but we were doubtful it would have added anything to the picture anyway, given that the Claimant's case was not that he was paid less than his contract provided for in terms of sick pay, but that each of the three periods should have been classed as disability leave and paid in full on that basis. Neither party suggested the contract itself said anything about disability leave.

66. The first document we were shown therefore was the older version of the AMP, in relation to which the Claimant relied on paragraph 2.13 which provided that certain absences would not count towards unsatisfactory attendance measures, including absences due to serious underlying medical conditions. There are two things to say about that. First, as we have already noted, this version of the AMP was superseded in 2017, and the Claimant had a more than reasonable opportunity to familiarise himself with the new one. In any event, secondly, we were not taken to anything in the older version of the AMP dealing with pay when an employee is absent. It dealt with action to be taken by the Respondent when an employee was absent, not their pay, and so could not found a contractual right to be paid beyond what was provided in the contract.

67. The second document the Claimant referred us to was the 2016 letter signed by Peter Gormley, but whilst he may have drawn conclusions from that letter about what he would be paid, they were not warranted on the basis of the letter because it is agreed that this was not what it addressed at all. It too dealt only with action to be taken (or not to be taken) during absence, not what the Claimant would be paid, and so it could not be the basis of a right to receive pay beyond what was stated in the contract either.

68. As to the 2017 AMP:

68.1. The part the Claimant relied on says that an employee can apply for disability leave if fit for work but needing time off to attend appointments for treatment, rehabilitation or assessment relating to their disability. Although the Ability Manual (which came after the events relevant to this case) clarifies that disability leave is paid, usually up to 40 days, the AMP does not cover periods when an employee is not fit for work, nor periods of hospitalisation, nor periods of recovery after hospitalisation.

68.2. It is not clear whether the AMP has contractual force. Its opening paragraphs do not say one way or the other. Our assumption was that it does not, but we considered the Claimant's case as though it does, not least because that is what the Respondent seemed to us to have assumed at this Hearing.

68.3. The Respondent may well have exercised its discretion in certain circumstances to go beyond what the AMP says about granting disability leave, where whether time off was for treatment, rehabilitation or assessment was debateable. We saw evidence of that in the exchange of emails between HR and Ms Binns in October 2022.

68.4. It seemed clear to us however that what is provided for in the AMP is time off to attend appointments – that is what it says – whether those appointments are for treatment, rehabilitation or assessment. What we were told of the Claimant's absences during the three periods in question did not relate to him attending appointments, but to having operations, preparing for them and recovering from them. That was on any account hospitalisation and recovery, which is explicitly excluded from the remit of disability leave by the AMP. When he did have what could properly be called appointments during working time, for a steroid injection or to see a district nurse at home, disability leave was applied. The three periods of absence with which this Claim is concerned were not for such appointments.

68.5. We also noted that the AMP says that employees may apply for disability leave; it does not say it will be granted.

69. We further noted:

69.1. In the 2020 period, near its start on 4 February, OH advised that the Claimant was unfit for any work; later, on 5 March, it said the same, namely that he would be unfit for any work until an operation on 15 April, which takes us to the end of this period. On 28 March, right near the end of the period, OH said he was temporarily unfit for all work.

69.2. In the much shorter period from February to March 2022, the Claimant had an emergency operation on 16 February and a further one on 2 March. The closest OH report to these dates, that of 14 March, gave different dates for the surgery, but of most relevance to us said that the Claimant's wound was not

closing, he was in a lot of pain, and was fit only for light and administrative duties. That was 10 days after the period in question but does shed light on the Claimant's position during it.

69.3. In August 2022, the Claimant had an emergency operation, tried to work in the People Hub, but could not do so because he was in pain, at least when sitting.

70. From that evidence, it can be seen that in the 2020 period the Claimant was not fit for work – OH said any or all work. The AMP explicitly says that in those circumstances, an employee is not to be given disability leave. It is not difficult to conclude that the same was the case in February and March 2022. As for August 2022, whilst it may be the Claimant could have worked in the People Hub with a rising desk, none was available, and therefore again he was unfit for work. The Claimant says he could have worked from home in these periods, which we will return to in relation to the reasonable adjustment complaints below, but even if correct that would not establish a contractual right to be paid in full in these periods, for disability leave, because it does not change the fact that he was unfit for the work that he was employed to do.

71. We add for completeness that the Claimant referred us to how others were treated when they were absent, but again this was in the context of how the Respondent managed (or did not manage) their absence, not what they were paid when absent.

72. For all these reasons, the Claimant did not establish a contractual right to full pay in these three periods. In the words of the statute, full pay was not what was properly payable in those periods. The complaints of unauthorised deductions from wages were accordingly not well-founded. There was no need for us to go on to consider any issue related to time limits.

Discrimination arising from disability

73. Of course, not having a contractual right to be paid in full during the three periods does not mean that the Claimant was not in some way discriminated against by not being so paid, and so we dealt next with the complaints of discrimination arising from disability.

74. There were two complaints of unfavourable treatment. The first was that the Respondent refused to grant disability leave to the Claimant in the three periods. The Respondent submitted that it was circular to say that the Claimant was not given disability leave because he was off sick, but that was precisely the Respondent's case. It says it did not grant the Claimant disability leave because it considered him to be taking sickness absence on each occasion. This was the other side of the coin to the second complaint of unfavourable treatment, namely that the Claimant was paid less than normal salary at these times.

75. The Respondent accepted that these were both instances of unfavourable treatment, that (on our analysis) in both cases the unfavourable treatment was because of the Claimant's sickness absences, that the sickness absences arose in consequence of disability, and that it had knowledge of the Claimant's disability. The sole issue to be determined therefore was whether not classifying the Claimant's absence in the three periods as disability leave, and not paying him full pay, was a proportionate means of achieving a legitimate aim, or – for

short – "justified". It was not suggested, nor could it be, that we should assess each of the three periods separately, the unfavourable treatment and the proposed justification being the same in relation to each. Moreover, given that not paying the Claimant was the concomitant of not treating the periods as disability leave, the justification defence could properly be considered in relation to both matters together.

76. The first question was whether one or both of the two aims Mr Perry confirmed the Respondent relied upon were legitimate. The aims were first, managing sick leave and secondly, ensuring the quality of the Respondent's services to service users, and ensuring a safe and appropriate working environment for its employees. We were amply satisfied that these were legitimate aims. That is a conclusion that barely needs explanation, though we would say that in relation to the second aim, in the particular context in which the Claimant worked quality of service and a safe environment would be of importance not just to the Respondent but to the young people in its care, their families, the government, and the wider public. As to the first, it is difficult to dispute that managing sick absence would be a legitimate for this employer as for any other.

77. The crucial question therefore was whether the unfavourable treatment was a proportionate means of achieving those aims. The burden of establishing this was on the Respondent, and it was not enough to say that it applied its disability leave policy: its application required justification. Summarising its case from our findings of fact, Mr Drysdale said two things. The first was that limiting pay was essential to getting staff – here, the Claimant – back to work from absence because in many instances a drop in pay acts as an incentive to return to work. The second was that if the absences had been classified as disability leave, the Respondent would not have been able to, or would have been delayed in being able to, get to the point of activating the AMP (which we understand it did – see for example page 159), and specifically at the end of the AMP process being able to consider redeployment of the Claimant or termination of his employment.

78. Was there a real need on the part of the Respondent, that is a real need to not pay the Claimant and not classify the leave as disability leave to achieve the aims in question? For the reasons already indicated above, we were amply satisfied that there were real needs on the Respondent's part to have a functioning workforce, to provide the required service, and to provide a safe environment, rather than these just being generally laudable and legitimate aims. We note also the absence issues Mr Drysdale identified in 2022 because of the lingering effects of the Covid-19 pandemic, and it is entirely reasonable to conclude that this was also an issue, or at least an emerging concern, in at least part of the 2020 period, which fell before Mr Drysdale was based at Werrington so that he could not comment on it directly.

79. Was not classifying the leave as disability leave and not paying the Claimant in full for the leave rationally connected to achieving the aims? It was in effect a control mechanism, either to get him back to work or, putting it bluntly, if necessary, being able to make progress towards replacing him (whether by his redeployment or otherwise), and so retain the required complement of staff. We readily accepted that not classifying disability-related sickness absence as disability leave, and thus not paying staff for it, acts as a strong incentive to attend work and to do so on a regular basis, thus helping the Respondent maintain a good service and provide a full complement of support for the

workforce. The Claimant's own evidence that he felt he had no choice but to return when not being paid confirms that point. As Mr Perry put it the other way round, disability leave would have avoided (or it might be added delayed) an assessment of whether the Claimant was fit for work. For these reasons it can be seen that the unfavourable treatment was rationally connected to achieving the Respondent's aims.

80. Was the unfavourable treatment no more than necessary to achieve the aims? A similar question is whether a lesser measure could have achieved it. The only alternative the Claimant could suggest – indeed this was his case – was that he should be paid in full. That would have worked against the aims. The same would have been the case had the Respondent elected to pay him for part of the three periods. Balancing the importance of what the Respondent needed against the impact on the Claimant of not being paid when off work, we found the Respondent's needs to be very strong for the reasons we have outlined. We recognise that the impact on the Claimant was very real – he was off work through no fault of his own and was not paid – but in our view, the Respondent's needs outweighed that regrettable impact. We were confirmed in that view by also weighing in the balance the generous sick pay arrangements the Claimant benefitted from and the fact that he did get some disability leave from time to time, some of which he was arguably not entitled to such as in late October 2022.

81. We have already noted that the Respondent itself has identified grey areas in the operation of its disability leave policy. It may wish to consider whether the Ability Manual and any other guidance for managers needs reviewing, but for our purposes each instance of unfavourable treatment was a proportionate means of achieving the legitimate aims. The complaints of discrimination arising from disability failed accordingly.

Reasonable adjustments

PCP

82. The Respondent accepted that in general terms it had the PCP (requiring Prison Officers, including Youth Justice Workers, to carry out front line duties including applying physical restraint to inmates). It nevertheless submitted that the Claimant's case as clarified during the Hearing, namely that the PCP was applied to him and put him at the substantial disadvantage during his three periods of absence, was not logical.

83. We did not agree. The Respondent had the PCP at all points during the Claimant's period of employment as a Youth Justice Worker. What he argued is that that the requirement to do the full range of duties, including restraint, risked his wound opening up and increased the likelihood of him requiring further treatment and being absent from work. One has to read the substantial disadvantage as a whole, and with some flexibility, especially as the Claimant is a litigant in person. Our understanding of the Claimant's case was thus as follows:

83.1. He was expected to do his full duties at all times (the PCP).

83.2. That created a risk to his health, and in the three periods in question led to him being absent (the substantial disadvantage).

83.3. The Respondent should have taken steps during those periods – namely giving him light or administrative duties or allowing him to work from home – to avoid him having to be absent, with the consequences that had for him, including in relation to his pay.

That seemed to us a wholly coherent complaint of failure to make reasonable adjustments.

84. We were not in any doubt that the PCP put the Claimant at a substantial (more than minor or trivial) disadvantage compared to those who were not disabled, who would not have been at risk of a wound opening up whilst carrying out restraint and thus would not have needed further treatment and absence.

85. As for whether the Respondent knew or should reasonably have known of the disadvantage, we need say only briefly that given all the medical evidence it had, it knew of the risk to the Claimant or certainly should have known of it. A discussion with the Claimant or with OH about the specific issues arising from the need to engage in restraint would certainly have revealed it, and in any event the Respondent had the 2019 medical letter of some description which the Claimant provided during the process of his recruitment as a Youth Justice Worker which was more than enough to alert it to this issue.

86. The crux of this complaint was therefore the steps the Respondent could have taken to avoid the substantial disadvantage and whether it was reasonable to take them. The Claimant identified two, namely working from home, and working on site on light duties (essentially administrative duties).

87. In principle, both would have helped. At home or carrying out administrative work, where no action to restrain young people was required, the Claimant would have been working and would have been paid for doing so. In practice however, they would not. As already highlighted, OH were very clear in the first two periods that the Claimant was not fit for any work or, put another way, unfit for all duties. The Claimant says he could have done administrative work, and suggested that the Respondent's referrals to OH did not ask about alternative work options for him. The referrals were disclosed to him during the course of this Hearing but they were not provided to us and neither party referred us to them. We were in any event more than content to conclude that had OH in either of these periods (or indeed the third) thought that alternative work would be suitable for the Claimant, of whatever nature, it would have said so. We say this because there are reports during other periods where light duties are referred to, indeed there was even a mention on one occasion of working from home. It is also inconceivable that an OH adviser would not have raised alternative duties had it been thought relevant, even if not mentioned in a referral, given that it is such a basic point to consider in relation to an absent employee.

88. As for August 2022, we set aside the Claimant's comment about the absence of a rising desk. We accept that a possible reasonable adjustment can be raised for the first time at a final hearing, but this is only permissible if it does not prevent a fair hearing. In this instance, and with no criticism of the Claimant intended, it was raised far too late in the proceedings for the Respondent to deal with it. It is clear based on what happened in practice that the Claimant could not have done administrative duties on site in this period, and given that he had to be sent home it must be doubtful that he would have been able to work effectively from home during that week either.

89. The complaints of failure to make reasonable adjustments failed on that basis, namely that the steps the Claimant contended for would not in practice have overcome the substantial disadvantage in the three periods in question. We nevertheless went on to consider the question of whether the steps were otherwise reasonable, namely whether they were practicable, their cost and the nature of the employment.

90. We did not think that working from home was a feasible option. The Claimant was not really able to say what he could have done. He might have been able to briefly catch up on emails or training but it is difficult to see what other work he could usefully have carried out:

90.1. Mr Drysdale indicated that perhaps the Claimant could have written up a report at home after a one-to-one meeting with a young person. There is a dispute about whether this was half an hour's work or more but, in any event, it would only be required following a meeting with a young person, which of course could only be done on site (and might in a worst-case scenario involve restraint).

90.2. Compiling attendance lists very obviously could only be done in person.

90.3. Working from home was raised by OH, but only in September 2022, after the third period with which this case is concerned. In August, the Respondent could not obtain a laptop for the Claimant to use for this very short period. We heard little about why, but can accept that for a public sector employer, particularly where security is of the utmost importance, this would not necessarily be straightforward.

90.4. Working from home would also have entailed the Respondent paying the Claimant in full for little, if any, return. Particularly as a public sector employer, that of itself would not have been reasonable.

90.5. We also noted that the Claimant's current workplace passport apparently does not refer to working from home, which confirms the Respondent's position that this would not facilitate a productive contribution.

91. As to light or administrative duties generally:

91.1. The list of issues refers to work in the control room but the Claimant said almost nothing about that during the course of this Hearing.

91.2. Without criticising the Claimant, who presented his case very ably, he was barely able to offer any specific suggestion of what he could have done.

91.3. He could not sit for long periods (we had to exclude any issues about the provision of a rising desk for the reasons we have given).

91.4. We accepted the Respondent's submission that effectively what was being said was that it should have found something for the Claimant to do, whether or not of value to the service. That is not a step that can be regarded as reasonable.

91.5. Putting the Claimant on administrative work in the three periods in question, even if he had been able to do it, may very well have led to the Respondent

displacing others who were already doing that work, which would also have gone beyond what was reasonable.

91.6. We were not told of any vacancies for jobs not requiring restraint of young people which the Claimant wished to apply for, and of course they were likely to result in a reduction in pay.

91.7. We accepted what the Claimant says Mr Greatbatch said to him about light duties in 2020 but that did not take his case any further forward in terms of whether any particular step was reasonable. It is only fair to the Respondent to also point out that it gave the Claimant what it regarded, sensibly we think, as lower risk work with young people. It was not unwilling to try to find other work for him to do.

92. For all of the reasons given, specifically that the steps the Claimant identified would not have assisted him given his state of health in the three periods, and that they were not reasonable steps for this employer as just explored, these complaints also failed.

Harassment

93. We deal with each complaint of harassment in turn.

Calls whilst off sick

93. Establishing whether conduct was unwanted does not usually present a particularly high barrier for a claimant, and so we were prepared to give the Claimant the benefit of doubt on that question. He did not want the regular calls, nor the enquiries about his return to work. It was unwanted conduct.

94. Was it related to disability? We were satisfied that the Respondent contacted everyone in a similar position. The question of whether conduct was "related to disability" is different to whether it was "because of disability", but we were not satisfied that just because the Claimant was off work due to his disability, and was being asked when he would return to work, the conduct was related to disability. It was in fact related to his absence.

95. Even if that were not the case, we were in no doubt that asking the Claimant, even regularly, when he was going to return to work did not have the purpose of violating his dignity or creating the requisite environment. Mr Greatbatch asked the same question of everyone, we can safely assume Mr Tavinder did likewise, and there was nothing in the Claimant's evidence to suggest anything inappropriate in how the enquiry was made, for example with aggression or disability-related language. We do not think the requests could reasonably be said to have the statutory effect either; it was routine and everyday work for the managers. This complaint failed accordingly.

96. The other comment we found Mr Greatbatch made – that a government letter was needed before the Claimant could shield – was not part of the list of issues and for that reason we would have been unwilling to find that a complaint of harassment was made out on this basis, In any event, the Claimant did not give any evidence about how the comment was made, and furthermore the comment itself – even if unwanted and related to disability – clearly did not have the statutory purpose, and could not reasonably be said to have the statutory effect

either, because Mr Greatbatch was simply reflecting what many employers, especially in the public sector, would have required or understood.

Alice James' comment in 2020

97. We found that one of the two alleged comments was made by Ms James, namely that the Respondent was paying his wages, not the doctors. The comment was clearly unwanted and the Respondent effectively conceded that it was related to disability; Mr Perry said in his submissions that he recognised there was some link to disability, and there clearly was.

98. It was not possible for us to ascertain whether the comment had the statutory purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, principally because Ms James told us she could not remember whether she said it. Mr Perry submitted that he could not say that the comment did not have this effect, if we found the comment was made. We agreed with his conclusion:

98.1. The Claimant clearly perceived the comment badly, feeling pressurised to return to work and that his employer did not understand the situation he was in.

98.2. As to the other circumstances, we do not know precisely how the comment arose in the course of the conversation, but the context for the Claimant was that he had just had an operation, was very unwell and was seeking to convalesce.

98.3. Was it reasonable for that conduct to have the statutory effect? We concluded that it was, both in the sense of violating the Claimant's dignity and creating an intimidating or hostile environment for him. The statutory words are strong, but in the context of the Claimant's genuine illness, the fact that the comment came from such a senior member of staff, the fact that it was said in front of his line manager, and the fact that it resulted in the Claimant feeling pressured to return to work whilst unwell and that his employer did not care about what he was going through, it was a reasonable effect.

99. This Claimant thus established that he was harassed by Ms James on this occasion.

October 2022

100. This complaint was about the Claimant's leave being classified, initially, as sickness leave, not disability leave. We accepted that this too was unwanted conduct, again on the basis that it is not a high bar to establish that this was the case. We also accepted of course that there was a sufficient connection to the Claimant's disability.

101. That said, the conduct clearly did not have the statutory purpose, because the initial recording of absence was done automatically simply on the basis that the Claimant was absent and, as far as Ms Binns was concerned, because she was doing no more than engaging in dialogue with the Claimant to ascertain what he was saying about the days in question. We did not accept that it had the statutory effect either. The Claimant may not have liked what was done, but the initial classification was not directed at him as just noted, his discussions with Ms Binns were private, constructive and polite, and on the second of the two days in question she granted his request for them to be classified as disability leave. Any

adverse effect on the Claimant was therefore transient. His case was that he should not have had to fight for the leave to be reclassified, but in our view, where there is a discretion – as there was here – it is not inappropriate for an employee to have to make their case for it to be exercised in their favour, and it is not immediately obvious to us that it should have been classified as disability in the first place.

102. This complaint failed.

Time limits

103. It can be seen from the conclusions set out above, that the Claimant established one of his complaints in principle, namely that concerning Ms James' comment in December 2020. ACAS Early Conciliation started on 20 December 2022, and so the complaint was a long way out of time. The remaining question was whether the complaint was brought within such further period as we thought just and equitable.

104. This was by any measure a long delay. Time limits are important, though in part at least delay is important to consider because of potential prejudice to the Respondent evidentially, which we come to below.

105. As for the explanation for the delay, the Claimant told us he did not present his claim sooner because he had no idea about doing so, did not know where to turn, and was not in a union. He felt able to get advice and to bring a claim once he was no longer working at HMP Werrington. That explanation fits the facts, in that ACAS Early Conciliation started shortly after he moved, but we were not satisfied that the explanation was at all adequate. We took into account that the Claimant was a litigant in person, but we also considered him to be a plainly intelligent man, who could very well have sought advice and/or explored the process for bringing a Claim much sooner than he did.

106. As to the balance of prejudice, the Respondent was able to call Ms James as a witness, and indeed Mr Greatbatch, albeit at the last minute. It is true however, as Mr Perry submitted, that Mr Greatbatch said he could not recollect whether the comment was made, and that Ms James said she was not sure whether she made it, so that it cannot be doubted there was some prejudice to the Respondent in terms of the quality of recall which was doubtless due at least in part to the lapse of a considerable period of time since the event. The Respondent also said that it had suffered prejudice because the contact records (on which page 270 was based) were not available for this period, but we doubted very much this was the kind of call that would have been recorded afterwards, and Ms James herself did not say that she was hampered in her recollection because the records do not exist. Further, we were not told that those records did not exist when the Claim was presented 18 months ago. As for the Claimant, there was prejudice to him if time was not extended, because he had established the substance of his complaint and not extending time would prevent him from obtaining a remedy, but that is always the case when an extension of time is sought, and so that of itself cannot be a determinative factor.

107. In summary, we had an explanation for the delay that was truthful but not adequate, a very long delay, and what we regarded as a fairly even balance of prejudice. On that basis, and assessing all of those factors together, we concluded that the Claimant did not bring the complaint to the Tribunal within

such further period after expiry of the time limit as we considered just and equitable, or put another way that it was not just and equitable to extend time. This complaint also failed as a result.

Summary

108. The Respondent did not make unauthorised deductions from the Claimant's wages in the periods 18 January to 13 April 2020, 13 February to 4 March 2022 or 23 to 31 August 2022 ("the relevant periods"). Accordingly, the complaints of unauthorised deductions from wages were not well-founded.

109. The Respondent did not contravene section 39 of the Act by discriminating against the Claimant because of something arising in consequence of his disability by not granting him disability leave and paying him less than his normal salary in the relevant periods, because the unfavourable treatment was a proportionate means of achieving the legitimate aims of managing sick leave and ensuring the quality of the Respondent's services to service users, and ensuring a safe and appropriate working environment for its employees.

110. The Respondent did not contravene section 39 by failing to make reasonable adjustments in the relevant periods by not assigning light duties to the Claimant or allowing him to complete administrative duties from home.

111. The Respondent did not contravene section 40 of the Act by harassing the Claimant related to disability by:

111.1. During the relevant periods, making phone calls to the Claimant pressurising him to return to work.

111.2. Recording the Claimant as being on sick leave on 27 and 28 October 2022.

112. The Respondent did contravene section 40 in harassing the Claimant related to disability, by Governor Alice James stating to the Claimant in December 2020, "I don't care what the doctor or nurses say, we are your employer and we are the ones paying you, not the doctors", but the Claimant's complaint was not presented within such further period after expiry of the statutory time limit as the Tribunal considered just and equitable.

113. All of the Claimant's complaints were therefore dismissed.

Employment Judge Faulkner
30 August 2024

Note: This was in part a remote hearing, in that the Claimant attended remotely throughout, some of the Respondent's witnesses attended remotely, and all parties attended remotely on 12 July 2024. The parties did not object to the case being heard in part remotely. The form of remote hearing was video.

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX – LIST OF ISSUES

The Claimant confirmed that the only disability he relies on is pilonidal sinus disease.

Time limits

1.1. Given the date the Claim Form was presented and the dates of Early Conciliation, the discrimination complaints relating to events before 21 September 2022 were not made within the time limit in section 123 of the Equality Act 2010. The Tribunal will decide:

1.1.1. Was the Claim made to the Tribunal within three months (plus Early Conciliation extension) of the act to which the complaint relates?

1.1.2. If not, was there conduct extending over a period?

1.1.3 If so, was the Claim made to the Tribunal within three months (plus Early Conciliation extension) of the end of that period?

1.1.4. If not, was the Claim made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1. Why were the complaints not made to the Tribunal in time?

1.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

Discrimination arising from disability (Equality Act 2010 section 15)

2.1. Did the Respondent treat the Claimant unfavourably by:

2.1.1. Refusing to grant the Claimant disability leave on the dates below? It is accepted that the Respondent did not grant him disability leave in those periods.

2.1.2. Paying the Claimant less than his normal salary on the dates below? It is accepted that the Respondent did pay him less than his normal salary in those periods.

2.2. Did the following things arise in consequence of the Claimant's disability:

2.2.1. The Claimant's sickness absences from 18 January to 13 April 2020, 13 February to 4 March 2022 and 23 to 31 August 2022? The Respondent accepts they did.

2.3. Was the unfavourable treatment because of any of those things? The Respondent accepts that not paying the Claimant his normal salary was because of his absences.

2.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent set out nine aims in its Amended Response but Mr Perry confirmed it relies only on two, namely managing sick leave and ensuring the quality of its services to service users, and ensuring a safe and appropriate working environment for its employees.

2.5. The Tribunal will decide in particular:

2.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims?

2.5.2. Could something less discriminatory have been done instead?

2.5.3. How should the needs of the Claimant and the Respondent be balanced?

2.6. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? The Respondent accepts it had this knowledge.

3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

3.1. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? See 2.6 above.

3.2. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

3.2.1. Requiring Prison Officers (including Youth Justice Workers) to carry out front line duties including applying physical restraint to inmates? The Respondent accepts it did.

3.3. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it risked opening up the Claimant's wound, increasing the likelihood of him requiring further medical treatment and absences from work?

3.4. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

3.5. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

3.5.1. Assigning him lighter duties, such as office work or observing inmates from the control room.

3.5.2. Allowing him to complete administrative duties from home.

3.6. Was it reasonable for the Respondent to have to take those steps and when?

3.7. Did the Respondent fail to take those steps?

4. Harassment related to disability (Equality Act 2010 section 26)

4.1. Did the Respondent do the following things:

4.1.1. Throughout the absences set out above at 2.2.1, make phone calls and send correspondence to the Claimant pressurising him to return to work? Sean

Greatbatch is said to have contacted the Claimant in 2020 and Daniel Tavinder in 2022.

4.1.2. In December 2020, did Governor Alice James in a phone call to the Claimant, say that he was not eligible for shielding in relation to Covid-19 and that it was the Respondent paying his wages, not the doctor?

4.1.3. Record the Claimant as being on sick leave in October 2022 even though he had already moved departments to the Probation Office?

4.2. If so, was that unwanted conduct?

4.3. Did it relate to disability?

4.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Unauthorised deductions

6.1. Were the wages paid to the Claimant in respect of the periods of absence set out above less than the wages he should have been paid?

6.2. Was any deduction required or authorised by statute?

6.3. Was any deduction required or authorised by a written term of the contract?

6.4. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

6.5. Did the Claimant agree in writing to the deduction before it was made?

6.6. The Respondent accepts that the complaint about the last deduction was presented in time.

6.7. Were the earlier deductions part of a series?

6.8. Otherwise, was it not reasonably practicable to present the complaints about those deductions in time and, if so, did the Claimant present the complaints within such further period as the Tribunal considers reasonable?