EMPLOYMENT TRIBUNALS

Claimant: **A**

Respondent: **Secretary of State for Justice**

Heard at: Southampton **On:** 30 & 31 July, 1 & 16 August 2024

Before: Employment Judge Hogarth
Mr Mark Richardson
Ms Melanie Metcalf

Appearances:
For the Claimant: Miss C, lay representative
For the Respondent: Mr Yeatman
Ms Russell

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed by the respondent. The claim for unfair dismissal is dismissed.
2. The claims for direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments are not well-founded. The claims are dismissed.

REASONS

Introduction and background

1. The claimant was dismissed from her employment as a prison officer at a Formal Attendance Review Meeting ("FARM") on 6 February 2023. She was given 8 weeks' notice, so her employment terminated on 6 April 2023. She was dismissed on the ground of "medical inefficiency" a term which refers to ill-health incapacity.

2. The claimant notified ACAS on 7 February 2023 for early conciliation. An early conciliation certificate was issued by ACAS on 21 March 2023 naming HM Prison and Probation Service as the prospective respondent.

3. By a claim form presented on 8 May 2023 the claimant brought claims for unfair dismissal and disability discrimination. The discrimination claims as set out in

Employment Judge Livesey's Case Summary of 28 March 2024 are direct disability discrimination (section 13 Equality Act 2010), discrimination arising from disability (section 15) and failure to make reasonable adjustments (sections 20 and 21).

4. The disability relied on by the claimant is Complex Post-Traumatic Stress Disorder – a form of PTSD arising from two or more contributing causes, often over a period of time. The Tribunal ("we/us") has little information about those causes, although the claimant told us that the immediate trigger for the events which led to her dismissal was an assault at work by a colleague.

5. The claims are contested by the respondent, although it has conceded that the claimant is disabled as a result of Complex PTSD.

6. At a telephone case management preliminary hearing on 28 March 2024, EJ Livesey listed the final hearing for 4 days starting on 30 July 2024. Among other things, the respondent's name was amended to "Secretary of State for Justice".

7. On 11 July 2024 an anonymisation order was made by EJ Ferguson under rule 50 of the Employment Tribunal Procedure Rules 2013. The order, sent to the parties on 29 July 2024, provides that there shall be omitted or deleted from any document entered on the register or which otherwise forms part of the public record anything likely to lead members of the public to identify the claimant or a person mentioned in her evidence. The order requires them to be referred to as A and X respectively.

8. I have followed that order in this judgment. In places I have avoided references to specific things that might enable A or X to be identified. For this purpose, I have used letters to refer to the witnesses who gave evidence at the hearing.

Form of hearing, appearances, witnesses and documentation

9. The hearing was conducted in person at Southampton Employment Tribunal before a panel of three members. It was listed for 4 days but I was not available on 2 August (a day for which I was not booked to sit). I explained to the parties that the panel would not sit on that day, but would aim to complete evidence and submissions on 1 August.

10. There was insufficient time on 1 August for deliberations and oral judgment (significant time having been taken up on 30 and 31 July on procedural matters), so the hearing was adjourned until 16 August 2024 for deliberations only. Judgment was reserved. I must apologise to the parties for the delay in producing this Reserved Judgment and Reasons.

11. The claimant was present throughout the hearing, represented by Miss C, and gave sworn evidence. No other witnesses were called on her behalf. The respondent was represented by Mr Yeatman, who called three witnesses: Mr A (custodial manager), Mr S (prison governor), and Mr L (prison group director), who all gave sworn evidence.

12. We were provided with an agreed 380-page Bundle, a bundle of witness statements (including one from a former colleague of the claimant who was not called) and an agreed list of issues. At the start of the hearing, we were provided with a copy of the anonymisation order made by EJ Ferguson, of which we were not previously aware.

Procedure

First hearing day (30 July)

13. The claimant asked for extra breaks as and when necessary. We agreed to accommodate that request. There were no other requests for adjustments.

14. Mr Yeatman informed us about the anonymisation order. He said reporting restrictions had been imposed and the respondent had sought a stay of proceedings pending the completion of an ongoing criminal investigation, which might have been prejudiced by them. However, on 11 July the respondent applied for an anonymisation order instead.

15. Mr Yeatman submitted that certain paragraphs of the claimant's witness statement included information covered by the order and he applied for an order striking out those paragraphs out of what he described as an abundance of caution. He said that their content was not relevant to the issues and there were risks because of the public nature of a final hearing. Miss C disputed whether there were any real risks (in the absence of any observers in the hearing room) that could not be managed by the Tribunal if they actually arose. She said that the contents of the relevant paragraphs were important background information and explained the trigger for the claimant's sickness absence. She said they were potentially relevant to the issues. Mr Yeatman then invited us to consider the list of issues to determine if the contents did have any relevance to them. He also explained that the agreed list of issues acknowledged the parties' respective cases and took account of some concessions.

16. We decided to consider Mr Yeatman's application after we had gone through the issues with the parties. The provisional hearing timetable set by EJ Livesey's Case Management Orders included reading time for us, and we thought it right to consider the application and read the key documents during a single adjournment. The parties helpfully indicated the key documents relevant to their respective cases, which enabled us to make best use of our limited reading time.

17. The parties confirmed that the list of issues was agreed as reflecting the state of the parties' respective cases, including the concession of disability by the respondent.

18. As for time issues, Mr Yeatman told us that it was only the reasonable adjustments claim that might be out of time. He said it was not entirely clear whether there was an issue, and this was a matter to which the parties would return later.

19. As for the unfair dismissal claim, we queried whether the issues should include an express reference to the fairness of the procedures adopted by the respondent, as well as the investigation referred to in the list. That was Issue 2.5 in the list in EJ Livesey's Case Summary of 28 March, which also referred to the claimant's assertion that her appeal against dismissal was pre-determined. The parties' representatives agreed that they saw this matter as covered by the general words of Issue 2.3 in the agreed list and that it was something we would indeed need to take a view on. We concluded that, for clarity, the list of issues (as set out below) should refer to the question whether a fair procedure was adopted by the respondent.

20. As for the reasonable adjustments claim, Mr Yeatman told us that the respondent disputed the PCPs relied on by the claimant and queried whether any proper PCPs had been identified. The pleaded claim as set out in the agreed list of issues did not describe a viable claim he said, and the respondent would resist any attempt to re-characterise the PCPs relied on by the claimant. It was too late to do that, he said, because the PCPs had not been elaborated upon by the claimant in the months between the presentation of her claims and the final hearing.

21. After an adjournment of about one hour, I informed the parties that we had decided not to strike out any words in the claimant's witness statement, but the matter would be kept under review. We felt that we did not have enough information to properly assess the relevance of the information in the statement to the issues. Also, the purpose of the anonymisation order was to avoid public identification of two individuals. There was no immediate risk of this: nobody other than the parties, their representatives and the witnesses were present. We thought it premature to decide on a course of action unless and until the point actually arose for decision. In our view it would probably be sufficient, if anything changed (for example if someone sought to access the claimant's statement), for the relevant paragraphs to be redacted.

22. As for the reasonable adjustments claim, we agreed with the respondent that the PCPs identified in the list of issues might prove problematical as they were somewhat vague, but we decided to stand over further consideration of the point until after we heard the evidence. The parties' submissions could address the matter in the light of the evidence. We agreed with Mr Yeatman that it might be too late for the claimant to rely on new PCPs, but she had not asked us to do that. However, clarifying the PCPs set out in the list of issues in the light of the pleadings might be appropriate. The Issues did appear to identify the adjustments which the claimant said should have been made.

23. Miss C confirmed that she was only going to call the claimant to give oral evidence. I informed the parties that that inevitably affected the weight we could give to a witness statement before us from a former colleague (assuming its content was relevant to the issues). The rest of the first hearing day was taken up with oral evidence from the claimant. She did not complete her evidence that day, so I gave her the usual warning about not discussing the case with anyone while on oath.

Second hearing day (31 July)

24. At the start of the second hearing day, we were informed by Mr Yeatman that he felt obliged to draw our attention to a matter that had arisen overnight. He had been informed by Ms Russell (his instructing solicitor) that she had heard the claimant discussing the case with Ms C on a train.

25. We heard evidence from Ms Russell, who said she boarded a train at about 7.27 and realised she was sitting near the claimant and Miss C who were sitting together. Miss C had her laptop out and the claimant referred to "point 31" and said "what do I say next?". She said she could hear the case being discussed. We then heard evidence from the claimant who said that while Miss C was working on the case on her laptop, she was messaging her family. She did not remember referring to "point 31" and said she was not talking about the case. She said she did read her statement, but had left Miss C alone. She repeated, in cross-examination, that she was not talking about the case and did not need to be told what to say about her statement. She might have spoken to someone on her phone. Miss C gave evidence that they were not discussing the case, and that she was producing a document for use at the hearing. Her position was that the claimant had not done anything wrong. Mr Yeatman submitted that it was a matter for us what to do in response to what we had heard. He invited us to conclude that the claimant had discussed the case with Miss C while she was on oath and there was coaching going on.

26. We adjourned to consider the matter and found that there had indeed been discussion of the case, as described by Ms Russell and that "point 31" referred to paragraph 31 of the claimant's witness statement. However, there was insufficient evidence of "coaching" for us to find that that occurred. In the circumstances we decided that the breach, and its potential effect on the credibility or quality of the claimant's remaining evidence, was limited. We considered it sufficient to communicate our finding to the claimant and Miss C with a warning and a brief reference to its potential effect on credibility. It appeared to us disproportionate to impose any more significant sanction.

The Issues

27. We were content (after the preliminary discussions summarised above) to accept the agreed list of issues, as set out below. This was subject to (a) further consideration of whether there were any time issues, (b) adding words at the end of Issue 2.3.3 to refer to a fair procedure (see paragraph 19 above) and (c) further consideration of the question whether the reasonable adjustments claim discloses a proper cause of action.

1. Time Limits

1.1 The effective date of termination was 6 April 2023 (the "EDT"). The claim form was presented on 8 May 2023. The Claimant commenced the Early Conciliation process with ACAS on 7 February 2023 (Day A) and the Early Conciliation Certificate was issued on 21 March 2023 (Day B). Accordingly, any act or omission which took place before 15 December 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Was the complaint of failure to make reasonable adjustments made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was the conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of the period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide: (a) Why were the complaints not made to the Tribunal in time? (b) In any event, is it just and equitable in all the Circumstances to extend time?

2. Unfair Dismissal

2.1 The parties agree the Claimant was dismissed with an effective date of termination of 6 April 2023.

2.2 The parties agree the reason for the Claimant's dismissal was capability (ill health), a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996.

2.3 Did the Respondent act reasonably in all the circumstances in treating the Claimant's incapacity as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.3.1 The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.3.2 The Respondent adequately consulted the Claimant;

2.3.3 The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position before deciding to dismiss the Claimant and otherwise followed a reasonably fair procedure.

The Claimant asserts an OH health opinion was not sought at the appropriate time and that the Respondent's failure to do so was a breach of its own policies.

The Respondent asserts the OH health opinion of 16 January 2023, prior to the decision to dismiss on 6 February 2023 was up to date.

2.3.4 The Respondent could reasonably be expected to wait longer before dismissing the Claimant;

2.3.5 Dismissing the Claimant was within the range of reasonable responses.

2.4 Was the decision to dismiss a fair response, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

3. Disability

3.1 The parties agree the Claimant was disabled at the material time, between April 2022 and the effective date of termination, 6 April 2023.

4. Direct Disability Discrimination

4.1 The parties agree the Claimant was subjected to the alleged treatment, namely dismissal.

4.2 Has the Claimant proven facts from which the Tribunal could conclude that the Claimant was treated less favourably than someone in the same circumstances was or would have been treated? The Claimant relies on hypothetical comparator. The hypothetical comparator relied on is:

4.2.1 A person without the Claimant's disabilities, whose relevant circumstances, including the level of absence and uncertain prognosis as to their return to work, are the same or not materially different from the Claimant;

4.3 If so, has the Respondent shown that there was no less favourable treatment because of disability. The Respondent contends the Claimant's dismissal was due to her capability (ill health), a conclusion the Respondent reached as a result of the Claimant's level of sickness absence and the uncertain prognosis as to her potential return.

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5. Discrimination Arising from Disability

5.1 The parties accept the alleged unfavourable treatment, namely the Claimant's dismissal by reason of incapacity, was brought about by the Claimant's sickness absence, which arose from the Claimant's disability.

5.2 Was the treatment of the Claimant (dismissal by reason of incapacity), a proportionate means of achieving a legitimate aim. The Respondent says that its aims were:

5.2.1 Absence management of its employees, namely, managing sick leave and ensuring adequate resources are available to maintain the services provided at the prison where the claimant worked and to protect the health and safety of employees, the local community and service users.

5.2.2 Running an effective workforce and an efficient service.

5.2.3 Protecting and effectively managing limited public funds/resources.

5.2.4 Applying capability and appeal policies consistently to all staff.

6. Reasonable Adjustments

6.1 Did the Respondent have the provision, criterion or practice (PCPs) alleged by the Claimant:

6.1.1 The requirement for employees to work on the Respondent's premises;

6.1.2 The requirement for employees to be at work.

6.2 Are the PCPs alleged by the Claimant capable of constituting a PCP under Section 20 of the EQA 2010. Namely, are the PCPs alleged applied to other employees or capable of being applied to others or are they a one-off decision and/or specific to the Claimant and her situation? Do they have a sufficient level of repetition about them to suggest similar facts would be treated in a similar way if it occurred again?

6.3 If so, did the alleged PCPs put the Claimant at a significant disadvantage compared to someone without the Claimant's disability? The Claimant states the significant disadvantage she faced by the PCPs is that she needed treatment and her

absence was to obtain treatment, that her absence exposed her to the risk of dismissal.
6.4 If yes, did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage described above.
6.5 Did the Respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? the Claimant says that the following adjustments to the PCP would have been reasonable:
6.5.1 Permitting the Claimant to work from home.
6.5.2 Permitting the Claimant paid leave in order to undergo treatment for her condition;
6.5.3 Permitting the Claimant unpaid leave in order to undergo treatment for her condition.
6.6 Did the Respondent implement any of the above adjustments. The Respondent has asserted the Claimant had approximately 10 months of paid sick leave, paid between April 2022 until 11 September 2022 at the Claimant's full pay and from 11 September 2022 to 13 February 2023 at half pay.
6.7 If any of the adjustments above were not implemented and/or not implemented to the extent the Claimant has alleged they should have been, was it reasonable for the Respondent to have made that adjustment/taken those steps.

28. In view of our determinations on the above issues, the more or less standard issues relating to remedy that would arise if the claimant succeeded on her claims do not arise. Accordingly, I have not set them out in the above list.

Findings of fact

Introduction

29. We heard sworn evidence from the claimant and from Mr A, Mr S and Mr L on behalf of the respondent. We find the following facts proved on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to and considering the factual and legal submissions made on behalf of the respective parties. Most of the facts were not in dispute.

30. Mr Yeatman submitted that where facts were disputed, the claimant's actions in discussing the case with Miss C (see paragraphs 24 to 26 above) entitled us to draw adverse inferences as to the claimant's credibility. He said that some of her witness statement was exaggerated, and that we should give more credence to contemporary written documents than to things stated subsequently by the claimant, whether in writing or in oral evidence.

31. We accepted that there was inevitably some force in his submissions on credibility (if and so far as it may be in issue), but we have not drawn adverse inferences simply because of the actions that he alluded to. It did not appear to us to be necessary to base any decisions in finding facts specifically on the claimant's credibility as a witness. In those circumstances it would in our view have been a disproportionate response to discount any of her evidence simply because of those actions.

32. As for Mr Yeatman's wider point, we have taken account of all the evidence (oral and written) in making our findings of fact. It is of course not unusual for courts and tribunals to give contemporaneous documentary evidence significant weight in resolving conflicts of evidence (assuming there is no reason to believe it is self-serving or unreliable for some other reason).

Background facts

33. The claimant was a prison officer employed in HM Prisons and Probation Service ("HMPPS"), formerly the National Offender Management Service ("NOMS"). HMPPS is an executive agency of the Ministry of Justice (MOJ) responsible operationally for prisons and for probation services. Its staff are MOJ civil servants, but in practice it is HMPPS which acts as their employer for most purposes. However, HMPPS is not a legal person independent of the MOJ, which is why the correct respondent in these proceedings is the Secretary of State for Justice.

34. The respondent's department, MOJ, is a large employer with considerable financial and administrative resources, being one of the larger UK Government departments. However, its financial resources as a public sector employer are not unlimited. This is because a limited amount of public money is made available to it by Parliament each year for public services under the annual appropriation arrangements.

35. In essence, those arrangements involve specific amounts being appropriated for each year to individual departments and certain other public bodies. The overall "pot" of public money is limited, so hard political choices have to be made in deciding on those specific amounts. Recipients, including MOJ, may not find it easy to fund everything they would like to do in carrying out their responsibilities. For example, the entry for MOJ in the Schedule to the Supply and Appropriation (Main Estimates) Act 2022 specified a sum (in excess of £10 billion) as the overall limit on "current expenditure" for 2022-23. That was a large sum but it limited the money available to MOJ to fund a very long list of activities and responsibilities set out in the entry, including the expenditure of HMPPS. Sometimes a limit of this kind is changed later in the year, but this does not mean the recipient's resources are unlimited.

36. The annual budgeting system for public services means that decisions have to be made by MOJ as to how much of its allocation of public money is available for each of its various activities. HMPPS has some operational independence from the rest of MOJ, so it is allocated part of MOJ's annual budget for its delivery of prison and probation services. HMPPS has to operate within the budgetary constraints set by MOJ, and so a proportion of its budget will be allocated to running prisons, and each of its prisons will end up with its own budget.

37. The result of the system described above is that the prison where the claimant worked ("the prison") will have an allocated budget each year and its managers are expected to keep within it in allocating resources to different aspects of running the prison, including salary and other costs of employing staff. That expectation means that there will inevitably be decisions from time to time as to the appropriate numbers of prison officers and other staff that are to employed to work at the prison. The challenge for managers is to fix those numbers at a level that will enable them to arrange for enough staff to be on duty at all times to run the prison safely and properly. It follows from the nature of a prison that some of those tasks have to be carried out by prison officers on a 24-hour basis, 7 days a week.

38. The Governor of the prison (Mr S) gave evidence about staffing at the prison at material times, which we accepted in finding the following facts. In practice, the resources available to fund the operation of the prison (including staff costs) were limited. For all sorts of reasons, including safety, he had to ensure that the prison was properly staffed by prison officers and other staff. But there was little flexibility in terms of the budgeted staff costs, which meant, for example, that he could not recruit extra staff to provide cover for sickness absences. There would at any time be a set number of posts held by prison officers. The budget was for 49 officers on the staff at the

material time (around February 2023) but he was short-staffed. He had to make some allowance in planning staff numbers for absences for holidays and other reasons. He operated on the assumption that at any time about 20% of his prison officers would be "non-effective" for whatever reason. In practice he could generally cope with 2 prison officers being absent sick at the same time. Accordingly, if a prison officer was absent on a period of long-term sick leave, this inevitably put pressure on the arrangements for staffing the prison. Immediately before she became ill the claimant was spending most of her time working in a team carrying out ROTL duties (explained below). Her absence meant that her remaining team colleagues would have to cover for essential work that she would otherwise have done. Her non-availability for shifts working in the prison as a conventional prison officer also contributed to staffing pressures for the prison managers.

39. We accept that Mr S's evidence on those matters demonstrates (among other things) that he was unable to hold a job open indefinitely for a prison officer absent on long-term sick leave. So we accept his statement that the needs of "the business" (i.e. running the prison) were such that at some point it would not be able to sustain the continuation of an absence any longer. On 6 February 2023 he decided that that point had come, after nearly 10 months absence and no prospect of a return to work in any capacity within what he regarded as a reasonable time. We note that his view that a job cannot be held open indefinitely for a sick employee is supported by the respondent's absence management policy, which sets out a framework for decisions to be made as to whether a period of sickness absence can be allowed to continue.

40. The claimant asserted that Mr S had more flexibility than he claimed in coping with the effects on staffing arrangements of her being on long-term sick leave. She said that for some time the prison had been over-recruiting prison officers and sending them to other prisons in the area. This was a point made by her Prison Officer Association ("POA") representative at the FARM on 6 February before she was dismissed. He was trying to persuade Mr S to conclude that the business could sustain the claimant's absence for longer, consistently with the employer's absence management policy.

41. However, Mr S's evidence was that the claimant was under a misapprehension about the "over-recruiting". He agreed that his prison had been over-recruiting prison officers. But that was because the position in the area was that for some reason his prison was able to recruit prison officers more readily than two other prisons. So they deliberately over-recruited before re-allocating some of the successful candidates to those prisons, under the mobility clauses in their employment contracts. This did not, he said, help him in staffing his own prison as the extra recruits did not form part of his complement of prison officers and could not be used to "backfill" gaps at his prison caused by absences. We accept this evidence, which was not contradicted by other evidence. It follows that the points made by the claimant and her representative on this matter do not, in our view, undermine Mr S's evidence about the constraints he was under in relation to staffing at the prison.

42. The staff employed to work for HMPPS at any prison will include a significant proportion of trained "prison officers". A prison officer has a different status to other prison staff. This status depends in part on the specific powers and duties of prison officers (which include the powers of a constable), but it also relates to the sorts of thing a prison officer does when working at a prison in their conventional "prison officer" role. This will usually involve direct interaction with and responsibility for the prisoners. We understand that in general there will be certain activities involved in

running a prison from day to day that are, and are expected to be, carried out only by prison officers and not by other staff. It follows from the nature of the conventional role of a prison officer that it cannot be performed while "working at home".

43. From time to time a particular prison officer may be assigned a role that consists of duties outside the conventional role of a prison officer. The claimant had such a role (as a "ROTL officer" - described below) when she became ill. A role of this kind will be temporary as the officer will at some point return to a more conventional prison officer role. But even when performing a special role, the officer may still be deployed at short notice to work in their conventional prison officer role, for example to help in an emergency or to cover any unexpected absence. The officer may also be expected to do some shifts in their conventional role.

44. We accept Mr S's evidence that an individual who no longer wishes to carry out the conventional role of a prison officer at a prison would not, in the end, be able to remain as a prison officer. Such a person might be able to move jobs and become an ordinary member of staff at a prison (or work for HMPPS in some other capacity), but they would lose their position and status as a prison officer.

The employer's terms of service and absence management policies

45. The claimant's "terms and conditions of service" confirm her appointment as a Prison Officer and contain many relatively standard terms for civil servants. The standard duties were described by reference to the job description on the NOMS intranet, but the terms made clear that she could be required to undertake other activities appropriate to her position. She would be working shifts, including night shifts. She could be asked to work more than her average weekly hours in cases of emergency, to ensure minimum staffing levels are maintained in her prison, and for other unavoidable or unforeseen operational reasons. Under the sick pay provisions, after 5 years' service she would be entitled to 10 months sick pay in a four-year rolling period. Of that, 5 months would be on full pay and 5 months on half pay (both to include any statutory sick pay entitlement).

46. The terms state that unsatisfactory attendance (whether for frequent or continuous absence) will result in her suitability for continued employment being reviewed. A mobility clause (common to civil servants) states that she could be transferred to any civil service post, in the UK or abroad. She was entitled after 4 years' service to not less than one week's notice of dismissal for each year of service, plus one week up to a maximum of 13 weeks.

47. The job description of a Prison Officer in the bundle gives a flavour of the role as being largely prisoner-facing. It includes "exercising the power of a Constable". The ability to do that is one key difference between prison officers and other prison staff.

48. The NOMS attendance management policy (dated 2017) in the bundle applied to the claimant at the material times. It deals with a range of matters connected with staff attendance. We were referred by the parties to specific provisions and mention below some of the key provisions relevant to these proceedings.

49. The basic requirement is to attend work unless unfit to do so (para. 1.3). There are policy principles (para 1.4) including "attendance will be managed fairly and effectively in a clear and transparent way. Action will be taken when health and well-being are at risk or when absence levels are unsatisfactory" and "NOMS is committed to managing

disability-related absences fairly and transparently and in line with the Equality Act 2010". Governors and other senior managers are required (para 1.10) to ensure the attendance management procedures are followed. Para 1.14 states that "During continuous sickness absence, review meetings must take place to provide an opportunity for the employee and manager to identify any help needed to enable the employee to return to work" Para 1.16 states that "... dismissal must only be considered as a final option where the level of absence cannot be supported".

50. Para. 2.9 requires line managers to make reasonable adjustments for disabled employees (in line with statutory requirements). In relation to referrals for advice from "Occupational Health" ("OH"), para 1.13 says "Line Managers must make a decision about what action to take based on the information available and make sure it is evidenced".

51. Following the start of sickness absence, the line manager must agree keep-in-touch arrangements with the employee (para 2.16, which also refers to separate guidance on how to keep in touch with employees). Under para 2.18 the line manager should consider a referral to OH and carry out an individual stress risk assessment if the absence is stress related (and it refers to separate guidance on supporting employees experiencing stress at work). Under para 2.25 the line manager must keep in touch, as agreed, during the absence.

52. In the case of continuous absence for more than 14 consecutive days, the employee and line manager are to work together to explore what the employee can do, or might be capable of doing with help and support, to return to work as soon as they are able (para. 2.73). There is provision for "informal reviews" (a type of relatively formal meeting it appears, despite the word "informal") on a monthly basis after 14 days' absence (paras 2.77 to 2.82). These are intended to be exploratory and are part of keeping in touch. Their aim is to establish if there is support that can be provided to help the employee return to work. After each review the line manager is to consider whether the absence can continue to be supported. If not, a FARM must be held.

53. Paras 2.83 to 2.88 deal with FARMs. A FARM is to take place after 28 consecutive days' absence, when the absence reaches 3 months and then every 3 months as a minimum. We note the words "as a minimum" make clear that they may take place at shorter intervals than 3 weeks. Annex B sets out what is to happen at a FARM. Under para. 2.86 the agenda for a FARM includes the manager doing (among other things) the following: discussion of medical advice, when the employee thinks they may be able to return to work and what support is needed for that, and whether a return "is likely within a reasonable timescale", as well as consideration of "whether the sickness absence can continue to be supported". The manager must explain that downgrade/regrade or dismissal may be considered if their level of absence cannot be supported. If a return is likely within a reasonable timescale or the continued absence can be supported, an informal review should happen after a month. Otherwise, the possibility of ill health retirement, or of downgrade/regrade or dismissal may need to be considered (para. 2.88).

54. Paras 2.89 to 2.100 deal with considering downgrade or regrade or dismissal. These options must be considered by the Governor when a return to work is not expected within a reasonable timeframe during a period of continuous absence (para. 2.90). A formal meeting must be held before a decision to utilise one of the options is made. At

the meeting the employee should have the opportunity to present any new information. Any downgrade/regrade requires the employee's consent (para. 2.97).

55. Para. 2.98 applies where the decision is dismissal. It provides:

> "2.98 The decision Manager must dismiss the employee if all the following apply:
> - the business can no longer support the employee's level of sickness absence;
> - downgrade or regrade is not appropriate without employees consent;
> - Where appropriate, there are no further reasonable adjustments which can be made which will help the employee return to satisfactory attendance and all other considerations have been exhausted;
> - Occupational Health advice from an OHP has been received within the last 3 months, unless the employee withheld their consent to an Occupational Health referral;
> - An application for Ill-Health Retirement would not be appropriate or has been refused .... "

The parties agreed that "OHP" refers to an Occupational Health Professional, namely a doctor/physician, and not a less qualified OH adviser of some other kind.

56. There is provision for one appeal. The grounds of appeal are limited by para. 2.104 to (a) procedural error, (b) the decision not being supported by the information/evidence available to the line manager or Decision Manager, (c) new information/evidence becoming available which should be taken into account when reaching a decision on downgrade, regrade or dismissal, (d) reduced compensation for dismissal. We note the second ground suggests that any new medical evidence after the dismissal decision (such as a doctor's report indicating an improvement in the employee's health) would need to be considered. The appeal takes place as a "full re-hearing of the case" so the appeal manager should consider the facts afresh (para. 2.111) before deciding "whether to uphold the appeal" (para 2.112).

Events before the claimant's sickness absence started on 11 April 2022

57. The claimant's employment as a prison officer lasted from 15 February 2015 until her dismissal took effect on 6 April 2023 at the end of her 8 weeks' notice period after Mr S decided to dismiss her for "medical inefficiency" (i.e. ill-health incapacity). Her continuous sickness absence had started on 11 April 2022 which meant that by the time her employment ended she had received the maximum sick pay available to her as a civil servant, namely 5 months of full pay and 5 months of half pay, before moving for a short period to "no pay" (ignoring holiday pay). She received 100% of the compensation potentially available to a civil servant who loses their job.

58. The claimant had worked at the prison in the conventional prison officer role (described above), helping in the day-to-day operation of the prison. But when she became unwell her predominant role was as a "ROTL officer". "ROTL" stands for "Release on Temporary Licence". Some prisoners were able to leave the prison for specific purposes, such as work, before returning. This was allowed for various reasons, including helping to prepare prisoners for more permanent release and resettlement in the community. The claimant's duties as a ROTL officer included liaising with organisations outside the prison where she worked. This was not a permanent role and the expectation was that she would return to the conventional prison officer role at some point.

59. The claimant was based at the prison site but would spend a proportion of her working time out of the office. We understood that in practice she might very occasionally work from home on a given day if, for example, she was out on business for most of a day. However, ROTL officers were not allowed to work from home as a regular or permanent arrangement, whether as a "reasonable adjustment" or for any other reason. This was in part because the "face to face" work of a prison officer required them to be present at the prison, unless out on business. There was always the possibility that ROTL officers might need to be diverted to conventional prison officer duties if required at short notice.

60. In addition to her ROTL officer duties, the claimant did some shifts on duty at the prison, carrying out the conventional prison officer role. We understood this usually involved something like a weekend shift every two weeks or so.

61. It is an important feature of being a prison officer that the individual must be available, able and willing to carry out all the functions of a prison officer, including direct interactions with prisoners. The respondent does not consider it acceptable for a prison officer to be permanently excused from shifts working in a conventional prison officer role. As stated above, someone who wished to do that, permanently, would be unable to remain as a prison officer.

62. We heard nothing but good from the respondent's witnesses about the claimant's conduct and performance at work over the seven years or so before she became ill in April 2022. She was clearly good at her job and well-liked by colleagues and her managers. She had a clean disciplinary record.

63. The claimant became seriously unwell following events at work on 10 April 2022 which we were told included an assault by another member of staff. We did not hear any details of anything that happened on 10 April and so we make no findings about that. She did not reveal to Mr A what had happened to her when she became unwell, beyond saying initially that she was unwell and hoped to return within a week and then, a few days later, that she was suffering from depression and anxiety. A sick note dated 14 April confirmed this. At a home visit she later told Mr A that something on 10 April had triggered her illness, but Mr A did not realise that referred to an incident at work. There was some dispute as to when exactly her managers knew or ought to have known about the trigger for her absence, and whether they should have asked her about this. But as those factual issues are not relevant to the issues before us we make no findings on them.

64. The claimant's diagnosis of complex PTSD as the main cause of her extended sickness absence indicates that more than one traumatic incident will have contributed to the mental health difficulties she experienced from 11 April 2022, but we have no specific information on the causes of her illness. Those are not, in our view, material to the issues before us. Clearly something acted as a trigger for an extended period of sickness absence relating to poor mental health.

Events in 2022 while the claimant was on sick leave.

65. The whole of the claimant's absence was covered by a series of sick notes from her GP signing her off work for successive periods of time. At no point between the start of her absence on 11 April 2022 and the conclusion of her appeal against dismissal in March 2023 was she fit to perform work for her employer of any kind in any capacity (i.e. in any role, and not just her ROTL officer/prison officer role).

66. During her sickness absence, the claimant's main point of contact was her line manager, Mr A. The emails in the bundle between Mr A and the claimant indicate that they were on good, and friendly, terms and that Mr A was doing his best to be supportive. The bundle contains a log he kept of his contacts with the claimant. This shows that up until 5 November 2022 he used phone calls and emails to contact the claimant, but after a call was not answered on that day he then used emails only. This change of practice was in response to a preference expressed by the claimant.

67. Mr A arranged an Occupational Health ("OH") referral on 26 April 2022 but on 14 May the appointment was cancelled. The claimant had had some counselling sessions by this time. Another OH referral was made by Mr A and an OH telephone appointment with the claimant took place on 6 June 2022. The assessment depended on information provided by her and was carried out by a "Wellbeing practitioner" (not an OHP). The resulting OH report refers to a recent diagnosis of Complex PTSD, related to past trauma and what the report refers to as "work-related stressors". She was under the care of her GP, local mental health services and a psychiatrist who had prescribed medication, which could take some weeks to take full effect. She was seeing a mental health practitioner weekly and was awaiting some trauma-based psychotherapy within a few weeks. She had severe levels of depression and anxiety. She was unfit for work, but keen to return. A phased return with supportive measures would be likely to be needed. A stress risk assessment was recommended on return. No prognosis was offered and another referral after 4 or 5 weeks was suggested. The report ended by stating that "at this time" the claimant's condition was unlikely to be considered a disability as it had not lasted 12 months and was not likely to do so.

68. A home visit arranged by Mr A with the claimant took place on 8 June. This was an "informal review meeting" under the absence management policy and he raised the matters he was required by the policy to discuss. She had a sick note covering the period to 24 July. She was expecting 12 sessions of psychotherapy. Mr A agreed to talk about a phased return and reasonable adjustments once she was fit for work. He reassured her that he expected the Governor (Mr S) to continue to support her.

69. An outcome letter was sent to the claimant on 8 June. In addition to noting briefly the main point discussed it stated: "*I am pleased to confirm that the Department will continue to support your sickness absence due to Complex PTSD and I will not consider dismissal or demotion at this stage. But I will review your absence regularly and may reconsider my decision at any time if it becomes unlikely that you will return to work in a reasonable period of time*".

70. That statement was in line with the absence management policy but came as a shock to the claimant. She had not previously realised that her job might be at risk under the employer's absence policy (leading potentially to a downgrade, regrade or dismissal) despite her being off sick for a genuine reason. She may well have been slightly misled by the generally positive and supportive discussions she had had with Mr A and by references in communications to supporting her absence. In our view many of those references were in fact to the employer allowing her absence to continue rather than providing relevant support for her difficulties. It would not surprise us if, initially at least, she did not understand this distinction.

71. On 13 June the claimant emailed Mr A to ask why there was already a second OH referral to see an OH doctor, when the last OH report referred to a 4 or 5 week gap. He replied twice to this email (presumably because her receipt of the first was delayed). The first said the Governor had requested an OHP referral and a case manager and that an "HR lady" told him (when he queried why this was necessary) that it was a

necessary step before a FARM likely to be held in August. He referred to his impression that in all the circumstances the Governor would support the claimant. He said the OHP would come back and say she was capable of returning to work and that they should continue to support her. The second reply was shorter but gave similar information. In both emails he said she was regarded as a valued member of staff.

72. On 18 June the claimant emailed Mr A to say she was really worried as the last thing she needed was to lose her job and none of what he said sounded positive. She felt things were going on behind her back and that she might have to come back to work when her fit note ran out, whether or not that was the right thing to do. This was causing her stress. She was doing her best to get treatment but felt she was at risk of being told she cannot do her job. In reply, Mr A agreed to a "catch up" after two weeks or so when he was back on day work and he sought to reassure her that the OHP was there to help. The Governor needed a better understanding of her health position so they could support her in the right way. He said it was not a good idea to put her on duty too soon as that could trigger anything.

73. No further informal review meetings took place. Mr A told us (and we accept) that he judged these to be difficult for the claimant given the nature of her illness and that she would prefer not to have them. He felt that he was in regular contact with her and was sufficiently informed of the matters he needed to keep under review. We are not aware of any relevant information that Mr A did not have but which would or might have been raised at a further informal review meeting. The policy required informal review meetings to take place, but it is understandable that Mr A did not consider there was a need for them and thought the claimant was likely to find them stressful. We have not identified any evidence to suggest that further informal review meetings would have helped the claimant in any way.

74. On 5 July 2022 a second OH telephone appointment took place between an "occupational physician" (a doctor) and the claimant. The OH report that followed described her health issues in similar terms to the previous OH report, and confirmed she was unfit for work. The gist of its contents is as follows: she had been advised that trauma-based therapy was needed and she was hoping it would start shortly; she had good and bad days with some symptoms of anxiety and low mood; she was keen to return but the doctor stated that this would be too soon and there was a risk of relapse or further deterioration; a phased return with restricted duties initially was advised. There was no definite prognosis but her absence was likely to continue "for the short to medium term". She was unlikely to become fit for work until she had the chance to deal with the underlying cause of symptoms and learnt coping strategies. A further referral after 3 or 4 sessions of trauma-focused therapy was recommended. With further therapy and support the condition was anticipated to improve to allow a return to work in the "medium to longer term". The condition was not seen as a disability because it had not lasted 12 months.

75. Mr A knew that the imminent FARM in August 2022 would worry the claimant and in various emails and phone calls he sought to reassure her that the Governor's intention was to support her and not to make a decision to dismiss. He was trying to be helpful and supportive and to keep her informed, but there was of course a risk that she would find the thought that she could in the end be dismissed for something not her fault alarming and upsetting. But he had little choice because failing to reassure her would have had a similar, if not worse, effect once she found out that dismissal was one of the options for her employer.

76. The claimant kept Mr A informed of her medical progress and treatment. She was keen to return but was signed off work until the middle of October. She was worried about

moving to half pay and asked for this not to happen. He agreed to raise this with management. A home visit in August was discussed. On 3 August Mr A told the claimant on a phone call that the Governor (who was new and she had not met) wanted to hold a FARM. She said she could attend on 8 August and would bring her POA rep with her. She wanted to return but was worried about returning soon as the therapy might impact on her well-being for a short time.

77. On 3 August Mr S sent a letter inviting the claimant to the first FARM on Monday 8 August in his office. This indicated that the main purpose was to discuss her absence and the OH reports, and he would need to decide whether "*your current period of absence is sustainable and the impact this is currently having on the busines*s". The "business" here was running the prison. The letter stated "*This meeting is not to consider dismissal or alternative duties at this time, but is to assess the likelihood and time frame of a return to work*". That statement was consistent with the absence management policy and was probably intended to reassure the recipient. That was not the result, however, as the claimant remained worried about her job.

78. The claimant appears to have been in regular contact with Mr J (her POA representative). Among other things, Mr J indicated to her that delaying the 5-month window for half pay was unlikely (but he could ask) and that the Governor was "a good man and very fair". A text exchange on 28 July between the claimant and Mr J indicates that Mr J had raised with Mr A the possibility of the claimant doing some work from home" like some other colleagues. However, Mr J told her later that working from home is not what "they" (i.e. the prison management) would wish for her. They wanted a gradual return to work once she was "fit and ready". On 7 August Mr A referred in an email to the claimant that "No 1" (i.e. Mr S) wanted her back at work as soon as possible after her sick note ran out on 24 September in some capacity or other, which could be "admin and not prisoner-facing".

79. The first FARM took place on 8 August. The claimant attended with Mr J as did Mr S and a note taker. Mr A attended by phone. We accept the minutes of the meeting and of the subsequent FARMs as a reasonably reliable record of what was said.

80. The minutes record that the claimant had had a 3-week assessment for her trauma therapy programme which had affected her badly; it would run for 12 weeks and end on 26 October; she had had one session; it was too early to tell whether she could return during treatment on a phased basis; Mr S agreed with Mr J that no decisions should be made on 8 August as it was important to get the return right; Mr S suggested another meeting in early September; Mr S suggested that her initial return would not be in a "prison-facing" role but might be "admin" and that the whole 12 weeks for a phased return should be utilised; Mr S said he was unable to extend the period of full pay but accrued leave on full pay could be used during her time on half pay.

81. An outcome letter followed. This reiterated that the purpose was to "*discuss her current situation and how we can best support you in your return to work*". It summarised the key points in the discussion very briefly.

82. On 12 August the claimant was sent a letter confirming that from 11 September 2022 she would be paid at half pay for so long as her entitlement to paid sick leave continues. In late August/early September Mr A was asked by Mr S to get "pension estimates" from HR in case of "medical inefficiency" (i.e. possible dismissal on the

ground of incapacity to work). The claimant was aware of this. Mr A told her that Mr S was just following procedure.

83. On 1 September, in a text to Mr J the claimant said that Mr A had told her the Governor was putting pressure on her to return when her sick note ran out (on 24 September), when she would only have had 6 of her 12 therapy sessions. She was worried that if she went back to work she might go sick again and asked where that would leave her. On 2 September another text said Mr A had rung and was more positive, saying they needed a plan for her return. He thought a return at the end of October after her last session (on 26 October) was probably acceptable. Mr J's response to the claimant was that Mr A was in an awkward position (between the Governor and the claimant). He also mentioned that he (Mr J) now understood that the Governor can ask for medical inefficiency dismissal at any time and does not need to wait longer than "what he considers reasonable". He was optimistic about the next decision, but Mr S would be pushing for a return date.

84. On 12 September 2022 an invitation to a second FARM on 19 September was sent to the claimant. This was similar to the first invitation save that it said towards the end "*The outcome of this formal attendance meeting may result in you being dismissed / downgraded / regraded if it is deemed that your current absence is unsustainable and there is no imminent return to work.*" Because 19 September was a public holiday for the Queen's funeral the second FARM was rearranged for 16 September.

85. The claimant had another OH assessment by telephone on 6 September 2022, conducted by an OHP (a doctor). The report records the following about the claimant's position: she was suffering from symptoms of psychological ill health with a diagnosis of Complex PTSD; she had had 3 sessions of trauma based counselling out of 12 planned due to complete by the end of October; she had disturbed sleep and anxiety and depression symptoms, but felt there had been some improvement; she scored as "moderately severe" for her level of anxiety and depression using an independent non-diagnostic tool; her fit note ran out on 21 September but was likely to be extended while her therapy continued. She was assessed as "unfit for work in any capacity". The prognosis was "uncertain at this stage". Her treatment was in its early stages but the hope was that she would make a full recovery. A new referral was suggested in 6-8 weeks, to evaluate her progress and work fitness. She was not classed as disabled.

86. Unlike her previous OH reports, this one had a section called "Manager Questions" which posed three standard questions which are answered as if by the claimant, saying that (a) she did intend to return to work, (b) the timescale was "towards the end of October 2022, dependent on progress with trauma-based counselling" and (c) she did think she was able to give regular and effective service. We are unable to tell whether those were the claimant's own answers or answers supplied by the doctor. But if they were the claimant's answers we consider it likely that the doctor did not dissent from them. That is because the purpose of an OH report is for the author to give relevant information and advice to the employer commissioning it.

87. In a text dated 9 September Mr J indicated that the OH report was as she would want, especially the reference to the end of October as a possible return date. He thought the Governor "would be mad to go against that". He warned her that in the worst case (not being ready at the end of October) "I think truly dismissal would be his only way forward". He suggested that she considered a formal return to work but taking the first

4 weeks as leave (using her accrued paid leave entitlement), which would have some advantages, including in relation to the Governor's figures for who is on sick leave.

88. The Second FARM took place on 16 September and followed a similar agenda to the first. Mr J was present to support the claimant. Mr A called in by telephone. Mr S started by saying there "is no outcome to be decided at this meeting" but there had been over 5 months' absence and the focus needed to be on a return-to-work plan. The claimant said she would prefer to wait to the end of her therapy. Mr S agreed that what he had heard from her at the meeting was positive, she would have an OH assessment on 16 October and she and Mr A needed to think how a phased return would work and what duties should be undertaken. Overall, the tone from Mr S and Mr A appears from the minutes to have been positive and supportive. Mr S reassured her that if she found her "phased return" duties too much she needed to talk to them, they are "here to support [the claimant] fully". It is clear from this at in practice Mr S had not intended to consider dismissal at this meeting.

89. An outcome letter was sent on 20 September. Among other things it recorded that the OH advice was to complete the course of therapy and then return to work. An OH had been scheduled for the end of October and "it is anticipated that we could commence a return-to-work plan". That would be over 6 to 8 weeks and "we would consider all roles to initiate this process". There would be a further meeting in November to assess how "your planned return to work" was proceeding. The outcome letter may have assumed that there would be a return to work, or an agreed return date, before the next FARM. If so, that was optimistic, given the "moderately severe" score for her symptoms and the limited information in the OH report about the "Current Outlook" and a timeframe for a return to work.

90. On 26 October Mr A sent the claimant "the proposed plan for returning". It is not clear what discussions (if any) preceded this. The claimant made some complaints to us about this not having been agreed with her, but we do not read the content as anything but a proposal. It might have been better for Mr A to say expressly in the covering email that he welcomed comments, but it was clear from the discussions at the second FARM that the plan would need to be agreed with the claimant, who could expect some input into it. The arrangements proposed were reduced hours on non-operational duties between 7.30 and 12.30 Tuesdays and Thursdays. at about 25% of full hours. The draft plan says that this was to take account of recovery time for ongoing treatment. She would do ROTL work, including health and safety checks on work placements and "admin duties linked to placements". She would not be part of "operational numbers" and would not be considered for "Control and Restraint interventions" or "night duties" until back to full operational capacity. We understood that to refer to the conventional prison officer duties she was previously expected to do in addition to ROTL officer duties.

91. We have no reason to believe that Mr A would not have considered suggestions from the claimant as to what the plan should say. On the face of it, starting at about 25% of normal full hours was in line with OH advice, and the whole thing was clearly based on it being the case that the claimant was (or was about to become) fit for work on a phased return basis. If that turned out not to be the case, then it would not apply. In the light of the discussions at the second FARM it is clear that Mr A was simply doing what Mr S had asked, by starting the process of devising a plan for a phased return.

92. On 27 October the claimant emailed Mr A with an update on her health following "my OC Health meeting today". This was a reference to a medical appointment, rather than an OH assessment. The email did not criticise the proposed return plan. She said OC health have stated "today" that they deemed her unfit to work and would review things in 4 weeks' time. She had been told she would need to complete "full trauma therapy" to commence when she finished her course of therapy. Her doctor had confirmed she should not return to work until her current course finished. She was planning to work reduced hours ("such as the ones proposed for next week") at the same time as her new therapy but was under the guide of OC Health and the GP and her therapist. She was keen to come back to work as always and was working hard to engage with services to get better. This would "obviously not be next week as I had estimated before but I need to put my mental health first and come back as healthy as possible".

93. The claimant had another OH assessment on 28 October carried out by an Occupational Health Advisor (not an OHP). It does not state it took place by telephone, but it is more likely than not that it did (like all the previous OH Reports). The report states that: the treatment she was having would end in mid-November and she had 3 sessions left; at the session the previous day it was suggested that she should have "deeper trauma therapy" to hopefully start in December; she was still feeling up and down; she was taking her medication and felt the therapy was teaching her coping mechanisms and she had noticed improvement in her ability to cope with day to day stressors. A psychological assessment gave a score of "severe". That was an increase on the "moderately severe" score recorded on 6 September 2022.

94. The report goes on to assess her as "currently unfit for work". It then mentions that the claimant was keen to return to work on 1 November as she felt at risk of losing her job. If so, a phased return over 4 weeks starting at 25% of her contractual hours was recommended, with no prisoner-facing duties for 2 weeks. The OH Adviser was probably not aware that a much longer phased return had already been suggested by the claimant's managers. Under "Current Outlook" the OH Adviser states "I am unable to advise on outlook at this time" and says that if symptoms deteriorate and begin to impact on working ability a referral for further advice was recommended. Finally, there is a statement that the claimant's condition "is likely to be considered a disability because it has lasted longer than 12 months or is likely to last longer than 12 months". This is the first statement in an OH Report to that effect: so 28 October was the first day on which the employer (in the person of the managers who received it) was informed by OH that the claimant was likely to be disabled. She had been absent for over 6.5 months when the advice as to her status as disabled was given.

95. That OH Report was supplemented on 2 November by another fuller OH Report prepared by an OHP (a doctor). It appears that Mr A had rung the doctor about the previous version. It is not clear exactly why, but it may have been seen by him as failing to give him the detailed information needed about the claimant's state of health, prognosis and capacity for work and a possible return date. He may also have been concerned about the new view that the claimant was likely to be disabled. It is likely that part of the reason was wish, either on his part or on the part of Mr S, to have an authoritative report from an OHP.

96. There is an email chain in the bundle covering about 5.5 hours on 1 November 2022 which starts with one from the claimant referring to missing a call from Mr A the day before. It says she had not "been feeling great over the past couple of days so not really feeling up to phone calls if that's ok". She was, though, happy to deal with

emails. Mr A then emailed to say another OHP referral had to be made for the end of the week. The claimant replied asking why, as "Nothing has changed in the last few days. All these appointments really aren't helping my mental state". Mr A's reply was that it was part of the process. He understood that the appointments "are not the nicest thing in the world". The claimant's response was longer and included the following: she asked for a copy of the process as she felt in the dark and things were being "sprung on me"; each time she had an appointment it caused her "to feel unwell in anticipation and anxious"; she had asked for the appointment to be "brought forward to tomorrow" as she did not want to be unwell for the rest of the week; she felt that "the constant pressures im getting from work are not assisting in my recovery and are causing me unnecessary stress"; the Governor had told her at the last FARM that she should take as long as she needs and to focus on getting better, but she felt "the way things are being dealt with at the moment are causing the opposite to this and are making me go backwards rather than improving." We note that this is the first occasion recorded in the bundle where the claimant begins to raise serious concerns about the processes being applied to her and their effect on her.

97. In response Mr A explained that he suggested the Friday to allow her a couple of days after her next therapy session; the previous "OHP" had recommended an assessment towards the end of her therapy sessions; the reason for the new OHP was that initial plans had changed as there was a structured supported plan put in place ready for her return to work; the new "OHP" would form part of her support back to work and would give a better understanding of any further needs from a practitioner's point of view. It is clear from this that Mr A thought that a doctor's report would ensure the return-to-work arrangements were properly informed by medical evidence.

98. The new OH report dated 2 November 2022 must have been based on a further telephone conversation between the doctor and the claimant, as the report refers to things the claimant had told her. A fuller account of "Current Health Issues" than the previous report of 28 October states that the ongoing therapy had 3 sessions left and she would be having more specialist trauma therapy via the NHS. It then says "*She feels that with therapy her mental health is improving, however, she continues to have significant anxiety surrounding work and on recent self-reporting questionnaires completed by my colleague on 28/10 her depression and anxiety were both within the severe category*". The report assesses the claimant as "*currently unfit for work in any capacity. There are no adjustments which would aid a return to work at present*." That is a clear statement that she could not return to work whatever adjustments might be made by the employer to her working arrangements. Possible return to work arrangements are then discussed in the report: that when her mental health improved and she was in a position to return, a phased return over 6 weeks would help, starting at 50% hours; that might need to be more gradual if she is struggling; a stress risk assessment was likely to benefit her, as would an initial return to non-prisoner facing duties, to aid in building confidence in returning to the prison environment.

99. The tenor of those two OH Reports must have been disheartening for the claimant, not least as they did not show the anticipated improvement by the end of October or, indeed, the expected completion of the claimant's course of therapy sessions. This was inevitably going to affect the attitude of Mr S at the next FARM, and subsequently, to her continued absence.

100. Mr A sent the claimant a copy of an attendance management policy on 5 November, on return from a short absence. The claimant queried whether it was the

current one as there was no reference to the Equality Act. She wrote that her "o h appointment went ok thanks, they said they would review in 6 weeks" and she stated she didn't "feel like chatting atm as still feeling unwell". On 6 November Mr A sent her what appears to have been the correct absence management policy.

101. Around this time Mr A obtained from the HR department an estimate of the amount that would be due to the claimant were she to be dismissed for "medical inefficiency" and awarded 100% of the maximum allowed. This was just under £15,000 calculated to 23 December 2022.

102. On 13 November Mr A emailed the claimant, asking if they could meet up face to face and suggesting some dates. The claimant's reply agreed a date and asked if there was a reason, as she was "feeling really anxious right now concerning work". Mr A's reply was he had not had a face to face for a while. He had the last OHP report and they could discuss the suggestions. They agreed to meet at the claimant's address. However, on 17 November the claimant asked to postpone for a week because "im still not feeling great at the mo and I need a break from talking about work as it is really affecting me". She also thought she might have "more of an update" a week later, which appears to refer to more medical news. Mr A agreed to that and said he would send through the proposed phased return plan starting on 25 November, with the first 3 weeks at 25% hours to help support her return. The meeting never happened.

103. These exchanges indicate that Mr A was still anticipating an early return to work on reduced hours and duties. But it was also apparent from the claimant's various emails to him that her state of mental health remained a cause for concern.

104. On 21 November Mr A sent another draft return to work plan, which was similar to the previous one in terms of the hours and duties for the first 3 weeks. It made clear it would last for 12 weeks. The summary of medical advice was updated to refer to the recent OH advice. On 24 November Mr A emailed the claimant to ask how her doctor's appointment went. She replied that she had been signed off for another 2 months, to be reviewed after that. She would be starting the new trauma therapy "in a couple of weeks" despite there normally being a long waiting list for it. Later in the same chain (on 30 November) Mr A said he had just sent out a letter about the next FARM on 12 December. The claimant replied a couple of days later saying "Okay for farm meeting".

105. On 30 November the claimant was sent an invitation to a third FARM on 12 December in Mr S's office. This was in similar terms to the invitation for the second FARM, including the reference to dismissal as a possible outcome if it was deemed that her current absence was unsustainable and there was no imminent return to work. It appears that this letter was not received and Mr S asked for it to be sent by guaranteed next day postal delivery.

106. The third FARM took place on 12 December. Mr A attended with Mr J. The minutes record that Mr S referred to the fact that the previous meeting had been positive in terms of outlook, but this had changed which was why the meeting was rearranged to 12 December; her first course of treatment had ended, after some delay in the last two sessions due to her, and the counsellor, contracting COVID; she was expecting to start the new course two days later, for which 3 appointments had been given between 14 December and 1 January. Mr S stated that the OH advice was she was unfit for work and her fitness note would expire on 22 January 2023; the OH advice was that she may meet the disability threshold; he thought "we may need to

explore our options with regards to re grade with pay protection, but we need to be moving forward to [the claimant] providing full and effective service" and he needed to be confident she will return; in January her absence would have been for 9 months; he agreed it made sense to wait until she completed the current therapy, but would be looking to schedule the next meeting soon afterwards. The claimant agreed with the last point and hoped she would be feeling better by then. Mr J referred to a possible return on 22 January. Mr S later confirmed that that would be a phased return over 12 weeks and that the claimant could use some annual leave to lengthen that period. Any return would be on full pay.

107. Mr S is then recorded as stating that if there is no potential for a return to full and effective service then she may want to consider ill health retirement or dismissal on the grounds of medical inefficiency. Those were the main options, he said. We read this as referring back to his previous suggestion that a re-grade was a possibility. However in his evidence Mr S confirmed that in fact ill health retirement was not an option available to someone in the claimant's circumstances as she did not qualify under the relevant rules. We understood this to refer to the fact that her OH reports never suggested that the claimant would not recover sufficiently to be able to work.

108. During the meeting Mr A confirmed that the claimant would move to zero pay on 11 February 2023. The meeting ended with Mr S saying it was of great importance that she maintained contact with Mr A and Mr J "so we have assurance that she is engaging and from a wellbeing perspective". The minutes of the meeting show that, as before, Mr S remained focused on both the likelihood of a return to work and on the claimant's health and wellbeing. But the general tone of his comments make it apparent that he was likely to re-consider his preparedness to allow the absence to continue, if she was not in a position to return after another 5 to 6 weeks.

109. An outcome letter sent on 20 December 2022. This listed topics that had been discussed, including "your current fitness for work in your role as a Prison Officer", "whether you will be able to provide full and effective service going forward" "whether there are any adjustments that could be made to support your return to work and to enable you to provide regular and effective service" and "dismissal on the ground of medical inefficiency". The letter summarised the key parts of the discussion including that the claimant had indicated that she would like to return after her fit note expired in January. Mr S had agreed to a full 12-week phased return and she could utilise annual leave. Another FARM would be scheduled after the anticipated return. Options he would have to consider if she had not returned by then were discussed. While "we will continue to support you" the business needed to operate and she needed to provide regular and effective service. If this was not possible "then all options would be considered at the next meeting up to and including the potential for dismissal in ground of medical inefficiency". A referral for another OH report would be made in advance of the next meeting and it was agreed that her manager would undertake a stress risk assessment to ensure that all appropriate measures would be in place to facilitate a successful return.

110. The meeting notes and the outcome letter suggest to us that the discussion was somewhat more definite and positive, in terms of the claimant's prospects of becoming fit to work on a phased return in late January, than the outlook as stated in the most recent OH report dated 2 November.

Events in 2023 leading to the claimant's dismissal

111. On 5 January 2023, Mr A emailed the claimant to say he needed to arrange another OH assessment and to ask if she had ideas about her phased return. He proposed 25% normal hours for 4 weeks from 22 January, 4 weeks at 50 % and then 4 weeks at 75%, with the ability to take annual leave to extend the effective length of the phased return. She would not have to carry out prisoner-facing duties for the first few weeks. If necessary, the hours could be reduced slightly if that would help her adjust.

112. On 14 January the claimant sent her employer a letter asking for reasonable adjustments, referring among other things to the pressure she was feeling under to return to work before she was fit to do so under threat of dismissal. She stated that the third FARM had had a negative impact on her recovery. She asked to be allowed to recover without pressure or risk of dismissal; for management to use discretion around issuing warnings; to consider reasonable adjustments such as adjusting the trigger point for dismissal and to take account of the fact her absence is directly related to disability. She also asked to be involved in discussions about a phased return plan, for her accrued leave to be paid in a lump sum and for future meetings to be held away from the prison. Mr A and Mr S appear to have considered making a substantive reply to this letter but none was sent, presumably because the next FARM was imminent and the matters raised could be discussed in person.

113. On 17 January the claimant sent Mr A a letter from her psychologist. This referred to her work situation and the impact it was having on her treatment. The nature of the treatment was such that it was “of the utmost importance that she feels safe and further stressors are managed”. The uncertainty about returning to work while in early stages of treatment were having a detrimental impact on her mental health and ability to fully engage with treatment. He recommended that the claimant “is afforded the space and time needed away from work to continue to meaningfully engage in this treatment to allow her mental health to recover”. Putting a time frame for full recovery was difficult but “I would expect at least a period of three to six months in order to focus on stabilising, understanding and managing symptoms”.

114. An email sent by Mr A on 23 January said that points she raised would be answered in the next FARM.

115. On 16 January a further OH report was prepared by an “Occupational Health Advisor” (not an OHP) following a telephone assessment with the claimant. As before, the assessment and report depended on the answers and information given by the claimant. The report refers to the opinion from the claimant’s psychologist, and records the claimant as “feeling very depressed lately due to pressure to return to work and she has a constant worry about losing her job. Ongoing symptoms include poor sleep pattern, low mood and lack of motivation.” The assessment was that she was unfit for work in any capacity and the author was unable to determine when she might be well enough for work as that would depend on how she responded to ongoing treatment. The standard assessment tool had scored her at “severe” in terms of her symptoms of depression and anxiety. The “Current Outlook” was “guarded” as her recovery depended on response to ongoing therapy. It was impossible to predict the frequency or duration of any further absences related to complex PTSD. As before, the report stated that her condition was likely to be considered a disability.

116. In his evidence Mr S agreed that under the absence management policy an OH report from an OHP ought to have been commissioned prior to deciding on dismissal at

the fourth FARM on 6 February 2023. However, there is no evidence to suggest that an assessment by an OHP (which would also have been based on a similar telephone call with the claimant) would have produced a report substantially different to that made by the advisor on 16 January. Nor is there any evidence that the description in the report of the claimant's state of health was inaccurate or that there was any further relevant medical information about her that was available but not mentioned to the OH Advisor or referred to in the report.

117. The position when the report was produced was that (a) the claimant remained seriously unwell and was unfit for work in any capacity and (b) the hoped-for improvement by the end of her then current fit note (22 January) had not materialised. There were no immediate prospects of the claimant's fitness for work changing in less than 3 to 6 months, at best, in the opinion of the claimant's own psychologist. This was the position stated in the report.

118. On 19 January Mr A emailed the claimant to ask if she was able to discuss the return-to-work plan. There is no record in the bundle of an answer or of any follow up by Mr A. It may be that the new OH advice meant it was no longer a live issue.

119. On 20 January the claimant was sent the invitation to her fourth FARM on 6 February in Mr S's office. This was in similar terms to the invitation to the third FARM, including the reference to the possible outcome being dismissal, downgrade or regrade. On 28 January the claimant asked in an email for the FARM to be held away from work. Mr A replied to say he would ask the Governor and suggested a phone call. The claimant said she did not "feel great about phone calls". Mr A's reply was that it was just for a catch up but he understood.

120. On 31 January Mr S emailed Mr A to say the FARM would be at a neutral venue and that the OH report contains no firm commitment to a return to work, just a loose reference to 3 to 6 months. He stated that he could not sustain the absence for another lengthy period with no confirmed return to work. He invited Mr A's thoughts on this: A's reply was that there was no clear date for a return, having previously been informed that 3 therapy sessions would conclude in January. Mr S responded saying that he was struggling to see how he could sustain the absence, but he would cover all the options and possible outcomes. He would need a firmer commitment around timescales, noting that "we have already had 2 agreed return dates that haven't materialised". That last comment is not, in our view, strictly accurate as the discussions at the previous two FARMs proceeded on the basis of an uncertain prognosis in the relevant OH reports. The return dates were in reality more hoped-for than agreed, certainly on the part of the claimant.

121. In a document dated 2 February, the claimant recorded her representations for the FARM meeting. She stated she had been concerned that at earlier meetings she had been unable to speak freely and get her points across. This was due to stress and anxiety about losing her job. She wanted to return and always had. She had been signed off for 3 months and needed space and time away to engage with the therapy and recover. She would be able to return (according to her prognosis) but constant pressure to return without treatment had had a detrimental effect on her recovery. This had lengthened her absence. She felt unsupported and the threat of dismissal had made her more unwell. If left alone with structured minimal contact as per the absence policy she would be nearer to recovery. The way she had been dealt with showed no regard for her welfare and no duty of care.

122. The claimant's list of points then quotes parts of the policy relating to informal review meetings and FARMs. She objected to the quantity of FARMs, OH meetings and general contact. Mr A had told her the OH assessments were part of procedure but she had not seen any such procedure set down. She said the OH meetings followed referrals by her employer and she had to repeat all the information each time, when nothing had changed. Even OH had asked why there was another appointment. She felt that someone with a physical condition would not have been treated in that way, and the meetings were distressing as she had to repeat everything.

123. The document states that she had not had structured contact, in content or frequency; this varied month by month and the points mentioned in the policy were not covered; the contact was excessive and well in excess of "the advised once a month"; she passed on any new news and there was no need for all the further questions; some of the contact had caused her serious harm. The document goes on to complain about the lack of discussion of reasonable adjustments at the FARMs. She needed help with everyday tasks but had not been aware what she could ask for. She repeated the points in her letter of 17 January. Since 17 January (when they had her fit note, the letter from the psychologist and her letter about reasonable adjustments) she stated she had had 4 phone calls, 26 emails, 4 OH contacts, 2 POA meetings and 3 letters. She mentioned that part of her PTSD related to a prolonged incident of significant trauma at work. She felt that she had been treated with a clear disregard for someone who was disabled.

124. The fourth and final FARM took place outside the prison on 6 February. The claimant was supported by a new POA representative (Mr H). This meeting followed the same general format as the previous two FARMs. The discussion led by Mr S was mainly about whether there was an acceptable timescale for a return to work, her fitness for work, reasonable adjustments and whether the claimant was able to give regular and effective service. He referred to the claimant's complaint in her document about the number of FARMs, explaining that each had been held after a possible return to work date in order to gain an understanding of where they were and to discuss any further reasonable adjustments.

125. On the timescale for a return to work there was nothing definite for Mr S to consider apart from the view of the psychologist (at least 3 to 6 months), although the claimant said she liked to think it might be sooner. Reasonable adjustments were discussed. The claimant suggested she might need adjustments while off sick, but Mr S made clear his view was that reasonable adjustments meant adaptations to facilitate a successful return through changes to the working environment or work pattern and that the proposals made through Mr A had been as flexible as they could be in terms of length of phased return. Mr H pointed out that the claimant was being persecuted because of NHS shortfalls as she had to complete one therapy before getting to what she really needed.

126. Mr S said that the 3 to 6 months' timescale meant that after 10 months absence, and 3 FARM meetings they were still discussing a return to work and that this meant dismissal had to be discussed as an option. 3 previous possible return dates had not been adhered to. The claimant said she was in the middle of the treatment she needed and that she had been advised the prison should have offered her trauma therapy. Mr S explained that they offered something for low level trauma but anything

more significant would have been triggered by an OH referral unless (as with the claimant) the employee was being treated through the NHS.

127. The claimant said she was unable to tell when she might be able to return, and agreed she was unfit to work in any capacity. Mr S said that that ruled out a re-grade and that as a result dismissal on the grounds of medical inefficiency was the only option for him as the absence could no longer be sustained by the business as a whole. He agreed with Mr H that he would be losing a valuable and experienced member of staff, but said that they had not had this value for 10 months. He said he had considered all options. There was some discussion of the practicalities of the dismissal, and the claimant was informed of her right to appeal.

128. An outcome letter confirming the decision and the main points discussed was sent by Mr S on 8 February. This stated that Mr S "was no longer able to sustain and support the ongoing absence" and so his decision was to dismiss on the grounds of "Medical Inefficiency" with the date of dismissal being 6 April 2023. It referred to her letter to Mr S and her requests for reasonable adjustments, but it repeated his view that reasonable adjustments needed to relate to achieving a return and not to sustaining an absence. It also referred to the "recent Occupational Health Physician (OHP)" report which she had felt was a fair reflection of her current absence. There was no definitive timescale. Because all the OH reports had stated she would be able to return to work at some stage, Ill Health Retirement was not an option. A return in any capacity for a phased return was not possible before the 3 to 6 -month timeframe, so "a re-grade or re-role with pay protection would not facilitate a return to work".

129. The reference in the letter to an OHP report was a mistake as the author was not an OHP.

130. An email sent by Mr S on 7 February to a redacted recipient refers to the FARM as going "OK" and to the claimant as having not offered "anything that wasn't in the last report or that she had included in her submission".

131. There was no evidence at the time of the FARM on 6 February to suggest the claimant was anything other than incapable of working at that time, or that her incapacity for work was likely to change in the short to medium term. Nor is there any evidence available to us that suggests either of those things. She was unfit to work in any capacity with an uncertain prognosis (in terms of a recovery sufficient to allow her to return to work of some kind) throughout the whole of her sickness absence.

Events in 2023 after the dismissal

132. The claimant considered she had been unfairly treated and approached ACAS on 7 February for Early Conciliation. She expressed her wish to appeal against her dismissal in an email to Mr S on 12 February. She also raised a grievance about her employer's failure to make reasonable adjustments, which referred among other things to the pressure placed on her to return to work and the lack of "structured minimal contact" and to her view that the adjustments she sought relating to her absence had not been properly considered or answered.

133. An appeal meeting by video was set for 14 March by Mr L in a letter to her dated 28 February. This said that at the meeting "we will look at why you were given dismissal under medical inefficiency – the facts and the paperwork". The options for him, other than agreeing with the decision or ordering a re-hearing of the case, referred

to a “disciplinary penalty” and “misconduct”, and so were incorrect. But they did communicate the idea that the decision could be changed.

134. In advance of the appeal meeting the claimant sent a letter dated 10 March to Mr L summarising her grounds for appealing. These referred to (a) breaches of the absence management policy through too much contact, a lack of structured contact and too frequent FARMs (b) the reason given (that the business could not sustain her absence further) being untrue because it was overstaffed, she was now not costing them very much and her continued absence was not affecting the running of the prison, (c) being treated unfairly compared with others on long term sick leave, (d) unprofessional comments and opinions possibly evidencing bias or discrimination, (e) failure to provide reasonable adjustments as requested by her, including the ability to have treatment without being pressured to return, (f) undue pressure to return from an early stage and too many contacts (with a list of what they were each month while she was absent). She felt this had made her mental health worse because of the fear of losing her job.

135. The bundle contained a transcript of a recording made of the appeal meeting. We accept this as accurate.

136. Before getting into the specific grounds of appeal, Mr L referred to the basic facts (that the claimant had been off for 10 months with no real prospect of return for another 3-6 months) and said that as a result she had “got quite a hill to climb”. His experience as a governor suggested that dismissal would be a reasonable decision to make. She had not carried out her side of the employment contract and remained unable to do so. We accept that Mr L was trying to be honest with the claimant from the outset and that what he was saying was, essentially, correct. But it is not surprising to us that the claimant saw this as indicating that he had more or less decided the appeal against her from the outset.

137. Mr L said that he had to decide whether the governor’s decision was reasonable. He went through some of the grounds of appeal with the claimant, who was clearly finding the meeting and articulating her thoughts difficult. She referred to her letter more than once as saying all the things she wanted to say. Mr H spoke for her at times when she was finding it hard to answer Mr L’s questions. He referred to the fact that it was not her fault the NHS had taken so long to provide the necessary treatment, and she had done her best to facilitate that and that it was unfair to sack her while she was receiving the treatment she needed. The waiting list was usually more than 3 years. Mr L’s response was that even though as a civil service employer they “go further for people”, they could not hold a job open indefinitely. They had to spend public money appropriately. He understood that mental health support in the community was problematic, which was really difficult. But the question for him was whether at the point the governor chose to dismiss that was reasonable.

138. Mr H also referred to the fact there was more than monthly contact with the claimant and that this was unstructured. There were also more FARM meetings than the quarterly meetings referred to in the absence policy. Mr L referred to the difficult balance between not enough contact and too much. He also saw that the claimant had asked for email contact rather than phone.

139. There was discussion of reasonable adjustments. Mr L said that being left alone to recover for a significant period was not something a business would do. He thought

the nationally agreed policy was for at least weekly contact. The claimant described how the unpredictable contacts from Mr A in particular had been difficult for her and affected her recovery as things kept coming out of the blue. Mr L confirmed with the claimant that she remained unfit for work and could not return. There was no evidence available to him to suggest that her state of health had improved significantly since the date of her last FARM.

140. Towards the end of the appeal meeting Mr H read out what the claimant had asked for at the end of her letter, namely for her job to be kept open. He ended by referring to the fact the prison service was finding it hard to keep good experienced officers and that it would not be unreasonable to keep the job open for a little bit of extra time for her to get the treatment that she had been waiting a long time for.

141. Mr L referred to the fact that they would not want someone to go into a stressful environment like being a prison officer. We infer this refers to someone mental health difficulties (like the claimant). He said "And if you have a pre-existing disposition to a bit of mental health, then coming into that environment just makes it tougher for ya". We do not understand what he was trying to say here or why he said this.

142. Mr L concluded by saying he would go away and consider the points in the claimant's letter and on the call and look at the documentation. That was in line with the employer's policy on appeals. The claimant said that he shouldn't think she had a problem with the prisoners or anything like that. She could not "talk about stuff" but it was not them that made it stressful for her. Mr L thanked her for that clarification. We view what she said as referring back to his reference to the difficulties someone with mental health problems would have being a prison officer.

143. An outcome letter dated 30 March 2023 was sent to the claimant by Mr L saying that he had decided not to uphold her appeal and that he had considered all her grounds and what she said at the meeting. The letter said (among other things) that-

a. maintaining contact was required under the relevant policy, to support her and to facilitate a return to work;
b. the absence could not be sustained after 10 months and with no indication of when she could return. Although she was not being paid, her continued absence meant the prison service were unable to recruit (we infer that this refers to recruiting to cover her absence from the complement of prison officers carrying out duties at her prison);
c. he could not comment on others' cases. Each case was treated on its merits.
d. the governor had not made unprofessional comments at the final FARM;
e. as for her request for reasonable adjustments, they were to support the employee to return to work successfully and could not be put in place on OH recommendations until a return date was agreed;
f. he did not find that the decision to dismiss was not supported by the information and evidence that was made available to the governor;
g. a fair process was followed and the decision to dismiss was made following the attendance management policy.

144. That letter marked the end of the line as far as the claimant's employment was concerned. Her only remaining option was to initiate ET proceedings, as she has done.

145. At the hearing the claimant told us that she was still not fit for work, some 18 months after her dismissal

Communications between the claimant and her managers

146. The claimant complained to us that the way in which her managers and others from her employer communicated with her while she was on sick leave was unsatisfactory and not in accordance with her wishes or the absence management policy. She criticised the volume and frequency of communications and the methods used. She also criticized the number of requests she faced for OH assessments and the number of FARMs held over approximately 6 months.

147. Without seeing all the written communications and full records of phone contacts it is not possible for us to make detailed findings about this. We have some of the communications in the bundle, Mr A's log of his communications (from 11 April 2022 until 28 January 2023) and oral evidence from Mr A, who was her main point of contact, from Mr S and from the claimant herself.

148. The claimant suggested to us that contact should have been minimal and that the FARMS should have been three-monthly. We do not accept that the absence management policy supports those suggestions. Her employer (acting through her line manager and others) was expected to keep in regular touch and the OH/FARM processes (once started) necessarily involved interactions in setting up the appointments, carrying them out, and communicating the results in writing. We also note that the 3 monthly FARMs mentioned in the policy are the minimum regularity allowed, not the maximum. It is not clear to us why she appears to have thought that the "advised" level of communications from an employer was once a month.

149. When the claimant began her sick leave nobody (including her) appreciated how ill she was or how long she was going to be absent, to the point where her condition would end up lasting so long that it she would be classed as disabled.

150. There is no evidence that Mr A ever specifically discussed, or sought to agree, how he should keep in touch or what her communication preferences were (and we find that he did not). To some extent this will have been due initially to lack of awareness as to the extent of her illness and how long she might be absent. Also he appears to have had a very good relationship with the claimant when she was working for him, and he must have felt they would have no practical difficulty in keeping in touch effectively using a variety of methods including meetings, phone calls, emails and post. The tone of the claimant's communications from and to Mr A for the first 3 or 4 months of her absence is not indicative of someone who was upset by, or complaining about, the communications she was receiving. Clearly, she became alarmed and upset once it became clear that, at some point, her job might be on the line, if her absence continued without a clear idea of a return date.

151. As for Mr S, he decided to hold four FARMs between August 2022 and February 2023, with the first held more than 4 months after the absence began. Under the letter of para. 2.83 of the absence management policy the first FARM might have been held after 4 weeks' absence. Having decided to hold them, he was required to communicate with the claimant to set them up, to conduct them in line with the policy and to write to her with the outcome. He was also required to inform her in the invitations of the purpose of the meeting and whether or not the possible outcomes included dismissal. He had no choice in those matters.

152. We can see from the documents in the bundle that Mr A respected the claimant's immediate communication preferences on the few occasions she expressed them. We accept his evidence that he tried to meet what he understood her preferences to be in terms of communications, as events unfolded. For example, after the informal review meeting he had with the claimant he did not hold any others, as he felt they were not necessary for hm to be fully informed and that she would prefer not to have them. When she made clear in early November 2022 that she did not want phone calls he appears to have respected that as his subsequent communications with her were by email, according to his communications log.

153. The communications we have seen from Mr A were friendly and supportive in tone. We have not seen anything in the bundle that appears to us to have been inappropriate in his communications with the claimant, in tone, content or method of communication. The same goes for frequency, although we can see that he could probably have reduced the frequency a little if he had thought that it was causing problems for the claimant.

154. We accept the claimant's evidence that she felt increasingly overwhelmed and upset by the communications she was receiving, and that she saw this as affecting her state of mind. But we have not been able to find that those acting for the respondent were acting inappropriately in the way they were interacting with her. Clearly the claimant's perception is, and was (certainly from November 2022 at least), that the communications from Mr A and others were unsatisfactory. It is, objectively, more likely than not that, as someone with severe or moderately severe symptoms of anxiety and depression, she did feel increasingly overwhelmed and was adversely affected by the communications she received in the four months or so before her final FARM. But, viewed objectively, we do not consider that, overall, they were unsatisfactory in themselves.

155. We consider that much of her perception, and of any adverse consequences to her caused by communications from her employer, will have been cause by the content of the communications she received once the FARM process started, rather than their tone. method of delivery or frequency. She clearly found the process unwelcome and upsetting. This applied in particular to the references to dismissal as an option in the invitations to the FARMS, in what Mr S said at the FARMs and in the outcome letters. However, all those things were driven by the employer's absence management policy and Mr S had no choice but to communicate to her matters that she unwelcome and upsetting.

156. Even if some communications from her employer were causing the claimant problems, Mr A was not to know that was happening unless someone told him or it had become apparent. Until then he would not have realised he might need to change what he thought were informal, friendly and supportive emails and phone calls. It was only from early November 2022 that the claimant's concerns about communications began to become apparent. From early January 2023 she made her feelings about the communications she had received very clear to her employer. However by then the chain of events that would lead to her dismissal at the final FARM was well-advanced.

157. We acknowledge that it can be difficult to be a line manager in Mr A's position, where an absent employee has become ill/disabled and is vulnerable. There is a fine line between the risk of being criticised for too few or inadequate communications and that of being criticised for too many or inappropriate ones. There is always a potential tension between the need for the employer to stay in touch, and to communicate or find out information, in line with their policies and the natural preference of some sick employees not to receive communications while they are ill. Mr A became aware from

early November 2022 (shortly after the first OH report to state she was likely to be regarded as disabled) that she did not want phone calls and he respected that.

158. In our view the problems faced by the claimant in terms of the communications she received were largely "situational" (the word Mr Yeatman used). She was clearly seriously unwell and in a fragile state, and after a few months absence pretty much anything received from her employer could have affected her. This was the case in relation to communications from Mr A which we have already discussed. But it was especially the case with the more formal communications from Mr S once the FARM process started. It would clearly be upsetting for her to be told that dismissal was an option or, indeed, likely or inevitable if the absence lasted for longer than her employer felt it could sustain. But Mr S was following the absence management policy and had no real choice as to how to interact with her or as to the content of the invitation letters, the discussion at the FARMs or the outcome letters.

Relevant law

(1) Time Limits

159. The position regarding time limits is set out in Issue 1 of the agreed list of issues and its content is closely based on the relevant statutory provisions. In this case it is conceded by the respondent that it is only some aspects of the reasonable adjustments claims that might be out of time, applying the tests in Issue 1.2.

160. It is clear law that if we conclude that any part of the reasonable adjustments claim is out of time that we can extend time to allow the claim to proceed if we consider it just and equitable to do so. That is a broad test which includes, but is not limited to, consideration of the reasons for the claim being made late and the nature of any delay in presenting the claims.

(2) Unfair Dismissal

161. Section 94 of the Employment Rights Act 1996 confers on employees with at least two years' service the right not to be unfairly dismissed. Section 98 (which deals with the fairness of dismissals) provides:

> **"98 General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability ... of the employee for performing work of the kind which he was employed by the employer to do, …
>
> . . . .
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

162. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). That is not in dispute in this case (see Issue 2.2 above) as the reason was incapacity due to ill health, which is a potentially fair reason under section 98(2). Second, the Tribunal must then consider, without there being any burden of proof on either party, whether the respondent acted reasonably or unreasonably in dismissing for that reason.

163. The test in section 98(4) was further clarified by the Employment Appeal Tribunal in *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, as follows:

(a) the starting point is always the words of Section 98(4) themselves;
(b) in applying that subsection, the Tribunal must consider the reasonableness of the employer's conduct and not simply whether the Tribunal considers the dismissal to be fair;
(c) in judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. There is a range of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
(d) the function of the Tribunal as an "industrial jury" is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band (or range) of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair.

164. In capability dismissals, there is a good deal of case law around dismissal of employees with long-term illness. In *Spencer v Paragon Wallpapers* [1977] ICR 301 the EAT stated: "*Every case depends on its own circumstances. The basic question which has to be determined in every case is whether in all the circumstances the employer can be expected to wait any longer and if so how much longer. Every case will be different depending upon the circumstances*." It was noted in that case that the relevant circumstances might include the nature of the illness, the likely length of the continuing absence, the need of the employer to have the work done which the employee was engaged to do, and so on. In *BS v Dundee City Council 2013* CSIH 91 it was noted by the Court of Session that there are three important themes: (a) where an employee has been absent form work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer; (b) there is a need to consult the employee and to take his views into account. If the employee is no better and does not know when they can return to work that is a significant factor operating against them; (c) there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

165. In *McAdie v RBS* [2007] EWCA, the Court of Appeal agreed with the view of the EAT that the fact an employer may have caused or contributed to the employee's long-term illness does not preclude a decision to dismiss on the grounds of incapacity resulting from that illness. It would seldom be necessary or appropriate for the Tribunal to enquire into the causes of the employee's ill health.

166. The Tribunal must be satisfied that the procedure followed in relation to the claimant's dismissal fell within the range of reasonable responses (*Whitbread plc v Hall* [2001] EWCA Civ 268). It should consider the process as a whole, including any appeal, when determining whether a dismissal was fair or unfair. In this case the

claimant exercised her right of appeal against dismissal, so the appeal is part of the disciplinary process the fairness of which falls to be considered under section 98(4). However, the mere fact that there was a procedural failing in an appeal process does not automatically displace the fairness of the original dismissal. In *London Central Bus Company Ltd v Manning EAT 0103/13,* a bus driver was dismissed on ill-health grounds. An employment tribunal found the dismissal unfair solely on the basis of a procedural defect at the appeal hearing. The EAT overturned the decision, holding that a procedural defect in the appeal process, while relevant, could only render a dismissal unfair if it denied the employee the opportunity of demonstrating that the reason for their dismissal was not sufficient for the purpose of section 98(4). That was not the case in relation to the particular defect, so the EAT substituted a finding that he was fairly dismissed.

167. Although it is common for employment tribunals to refer to dismissals being 'procedurally unfair' or 'substantively unfair', the case law on section 98(4) makes clear that there is no division between procedural and substantive fairness. The Court of Appeal made this clear in *Taylor v OCS Group* 2006 ICR 1602, stating: 'It may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) requires the employment tribunal to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.' Thus, in the Court's view, where an employee is dismissed, a tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee.

168. The Tribunal should take into account all the circumstances of the case in assessing the impact of a procedural defect. So, for example, where the decision to dismiss was a borderline decision (as between dismissal and some other action) procedural defects may have more impact on the overall fairness of the decision. Not every procedural defect will render a dismissal unfair. For example, in *D'Silva v Manchester Metropolitan University and ors EAT 0328/16* the EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair. The disciplinary panel that decided to dismiss for gross misconduct was chaired by a person who was already familiar with the employee and his previous actions. The claimant claimed unfair dismissal, arguing, among other things, that the panel chair's involvement in the disciplinary procedure was unreasonable since she would have been biased against him. An employment tribunal rejected the claim, noting that although H was the sole decision-maker she had had input and advice from a colleague in respect of whom D had raised no objection. The tribunal was satisfied she had approached her task with proper professional detachment, and it pointed out that anyone who conducted the disciplinary hearing would have had to be fully aware of adverse comments made about the employee by a previous employment tribunal. The tribunal also took into account that it was not a 'borderline' case. It concluded that the misconduct was serious and that, while the University's treatment of the claimant's objection to the panel chair was not ideal, it did not render the dismissal unfair. The EAT dismissed D's appeal.

169. It is therefore important for the Tribunal to look at procedural flaws in context and to consider their implications for the overall reasonableness of the employer's decision to dismiss. In *Sharkey v Lloyds Bank PLC EAT 005/15* Langstaff P observed

that it will almost inevitably be the case that in any alleged unfair dismissal a claimant will be able to identify a flaw, small or large, in the employer's process, and that it is therefore for the tribunal to evaluate whether that defect is so significant as to amount to unfairness. Langstaff P stated: 'Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.' Furthermore, it is important for tribunals to consider the reasonableness of the whole procedure, including the decision to dismiss, in the round. As the EAT held in *USDAW v Burns EAT* 0557/12, section 98(4) poses 'one unitary question' — whether the dismissal was fair or unfair having regard to the reason shown by the employer — and tribunals are required to answer it holistically. Thus, the tribunal must not treat the reasonableness of the decision to dismiss and the reasonableness of the procedure as if they are two separate questions, each of which must be answered in the employer's favour before the dismissal can be considered fair. It is not, however, an error of law for a tribunal to deal with the substantive and procedural elements of the decision to dismiss separately, provided that its approach leads to an overall determination as to the fairness or unfairness of the dismissal.

170. In all aspects of a case, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the range of reasonable responses open to an employer in the circumstances. That is sometimes referred to as the band of reasonable responses. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563)

(3) Disability Discrimination

171. As for the claim of *direct disability discrimination*, section 39(2) of the Equality Act 2010 places a duty on an employer not to discriminate against an employee by, among other things, dismissing the employee or subjecting the employee to a detriment.

172. Section 13 of the Equality Act 2010 (so far as material) provides:

> "**13 Direct discrimination**
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> ...
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."

173. In this case the relevant protected characteristic is disability. The concept of less favourable treatment presumes an actual or hypothetical comparator who does not have the claimant's disability but whose relevant circumstances are otherwise 'the same, or not materially different' from those of the claimant (section 23 of the Equality Act). In this case the claimant relies on a hypothetical comparator. When considering the reason for any less favourable treatment, the tribunal is considering the mental processes of the discriminator. Discrimination may be, and often is, unconscious and unintended, therefore the Tribunal's decision will often depend on what inference it is proper to draw from all the relevant surrounding circumstances. It is well established that an employer can be well meaning but still discriminate against an employee (*Amnesty International v Ahmed* (UKEAT 0447/08)).

174. As for the claim of *discrimination arising from disability*, section 15 of the Equality Act 2010 provides:

> **"15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

175. In this case it is common ground that the respondent treated the claimant unfavourably by dismissing her because of her lengthy sickness absence and that that arose as a consequence of her disability. This means that the claim turns on the question in section 15(1)(b), whether the respondent can show that the treatment was a proportionate means of achieving a legitimate aim.

176. Generally, one would expect the result of an ordinary unfair dismissal claim and a direct disability claim based on dismissal for incapacity caused by long term illness to be the same. But the tests are on their face different and, in this case, we consider it right to consider each claim.

177. As for the "*reasonable adjustments*" claim, under section 39(2) of the Equality Act a duty to make reasonable requirements applied to the respondent in relation to the claimant as a disabled employee. The respondent denies breaching that duty.

178. Section 20 of the Equality Act deals with the ingredients of the duty. In this case it is the first requirement as set out in subsection (3) that is in issue, which provides:

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

This requires the tribunal to first identify a "provision, criterion or practice" (a "PCP") that puts the disabled person as such a substantial disadvantage. If that can be done, a failure by an employer to comply with the requirement "to take such steps as it is reasonable to have to take to avoid the disadvantage" is a breach of duty which amounts to discrimination by the employer against the employee. In this case the respondent disputes whether the claimant has relied on plausible PCPs although Issue 6.5 does refer to relatively specific "reasonable adjustments" the claimant says should have been made.

179. The statutory duty requires an employer to take positive steps to avoid "the" substantial disadvantage to a disabled employee (*Archibold v Fife [2004] IRLR 651)*. This refers to the actual substantial disadvantage affecting the employee. A substantial disadvantage is one that is 'more than minor or trivial' (Equality Act, section 212(1)). That is a question of fact to be assessed on an objective basis. The comparison is with persons who do not have the claimant's disability.

180. The phrase "provision, criterion or practice" is construed widely and includes any formal or informal policies, rules, practices or arrangements. It can sometimes include a 'one off decision', but the concept of a PCP picks up the way something is done i.e. it covers things that would be applied again in future if the same situation

arose. This is to be distinguished from a one-off decision in the course of dealing with an individual which is unlikely to be repeated: (*Ishola v Transport for London [2020] ICR 1204 (CA)*).

181. The test of reasonableness is an objective test for the Tribunal to determine. What constitutes a step is also widely defined, and includes any modification or qualification to the PCP in question which would or might remove the substantial disadvantage caused by the PCP. This may in some circumstances include redeployment or the creation of a new post: (*Archibald v Fife [2004] IRLR 651*).

182. Finally, in relation to disability discrimination, I should mention the burden of proof. Section 136 of the Equality Act relates to any claim based on a contravention of a duty under the Act, including a duty on an employer not to discriminate against an employee. It provides as follows:

> **"136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

183. Thus, when this provision applies the burden of proof is initially on the claimant to establish primary facts from which the tribunal could decide in the absence of any other explanation that discrimination took place (stage 1). To that extent the burden of proof is on the claimant. The burden then shifts to the respondent to prove that the discrimination did not occur (stage 2). This is the point at which "any other explanation" becomes relevant.

184. Guidelines on the application of the burden of proof provisions are set out in *Igen Ltd (Formerly Leeds Career Guidance) and Oth v Wong [2005] ICR 931*. The EAT has recently confirmed its importance *(Field v Pye & Co [2022] EAT 68*). Section 136 is often especially relevant in direct discrimination cases, where claimants may simply not have access to the evidence that would fully prove an act of discrimination.

185. However, the rule in section 136 need not be applied in "an overly mechanistic or schematic way' in all cases (*Khan and anor v Home Office 2008 EWCA Civ 578, CA)*. The case law on section 136 shows that there are situations where the application of section 136 is unnecessary or inappropriate. One example is where positive findings of fact the Tribunal can make on the evidence (without reference to the rule), or the existence of agreed facts, mean there is no room for its application. Another example is in relation to claims for discrimination arising from disability, where an application of the shifting burden of proof will not be appropriate if the only live issue is the application of the "legitimate aim" test in section 20(1)(b) of the Equality Act, a matter that the employer has to show, in any event.

Conclusions

Time limits (Issue 1)

186. We have not identified any basis for concluding that there are time issues in this case for us to deal with. All the claims were, in our view, made in time. That is clearly

the position in relation to the claims relating to the lawfulness of the claimant's dismissal (the claims for unfair dismissal, direct discrimination and discrimination arising from disability). The claim form was presented within the period of 3 months (plus Early Conciliation extension) of the dismissal.

187. Mr Yeatman effectively left it to us to consider the point if we thought any relevant failure to act occurred out of time and did not involve a continuing act. We consider the PCPs and adjustments in issue in this case in our conclusions below. So far as anything relied on by the claimant relates to adjustments that she says should have been applied during her sickness absence, we consider that the relevant failure(s) by the respondent must either have taken place during the period of 3 months (plus Early Conciliation extension), ending on the day the claim form was presented or involved acts or omissions that continued over a period ending within that period. The claimant wanted her employer to disapply aspects of their absence management policy while she was absent, which Mr S declined to do (a position supported by Mr L on her appeal). The alleged failures (of they were failures) continued until Mr S dismissed her on 6 February 2023, which means the reasonable adjustment claim was made in time.

188. If we had concluded that the failures alleged were not continuing acts and occurred out of time, we would have extended time under the "just and equitable" test. That would have been based mainly on (a) the fact the claimant is a litigant in person, (b) her poor state of mental health in the months before the last FARM and subsequently and (c) her prompt actions in approaching ACAS the day after her dismissal and in bringing these proceedings following the rejection of her appeal. Also, from mid-January 2023 the claimant was, despite her poor state of health, trying to find ways to persuade Mr S (and then Mr L) to hold her job open, in the fear that she might not do herself justice when making her case orally at the final FARM and then the appeal meeting. It is in our view simply not credible to expect her to have initiated ET proceedings until after her appeal was rejected (as she did).

189. It follows from the above conclusions that the claims are not outside our jurisdiction on the basis of having been made outside the relevant time limits.

Unfair Dismissal (Issue 2)

190. The parties agree the claimant was dismissed with an effective date of termination of 6 April 2023 and that the reason for dismissal was capability (ill health), a potentially fair reason for dismissal under S.98(2) of the Employment Rights Act 1996. This means that in practice her unfair dismissal claim turns on whether the respondent acted reasonably in all the circumstances in treating the claimant's incapacity as a sufficient reason to dismiss the claimant (issue 2.3) and then whether the decision to dismiss was a fair response (i.e. was it within the range of reasonable responses open to a reasonable employer when faced with the facts) (issue 2.4).

191. Miss C ably identified a number of acts or omissions on the part of the respondent which, she submitted, meant they had not acted reasonably. As a result, she said, the claimant was unfairly dismissed. Mr Yeatman disputed some of the points made by Miss C and, further, submitted that even if some or all of her points were well-founded, the respondent had at all times acted within the range of reasonable responses and so did not unfairly dismiss her. I will now set out our view on each element of Issue 2.3 separately.

*Did the respondent genuinely believe the claimant was no longer capable of performing her duties (*Issue 2.3.1*)?*

192. We accept Mr S's oral and written evidence as to his belief in the claimant's ongoing incapacity for work as at the time he decided to dismiss her. In our view it was a genuine belief and he had reasonable grounds for that belief. Our view is based on the following facts and matters.

193. The claimant had been signed off work by her GP (owing to serious mental health difficulties resulting from complex PTSD) since 11 April 2022. At the time of the final FARM on 6 February 2023 the most recent OH Report available to Mr S (the one dated 16 January 2023, from an OH Advisor) confirmed the claimant was unfit for work in any capacity and gave no information as to when that might change, which it said would depend on her response to ongoing therapy. That assessment was very similar to that made in the previous OH Report dated 2 November 2022 from an OHP.

194. So on 6 February 2023 the claimant remained unfit for work, after approximately 10 months' absence without any significant improvement. Indeed, the tone of the medical evidence had, if anything, become less optimistic in terms of when she might become fit to work after the first FARM in August 2022. None of the previously hoped-for improvements in her condition had materialised and there was no immediate prospect of a recovery in less than 3 to 6 months, at best. That figure was supplied by the claimant's own psychologist in the letter forwarded to the respondent in mid-January 2023. The letter hints that a "full recovery" might take longer than that because the period of 3-6 months was "in order to focus on stabilising, understanding and managing symptoms", having first stated that it was difficult to put an exact time frame on a full recovery. The letter does not specifically address the question when a return to work might be possible.

195. None of the medical facts were in dispute at the time of the FARM on 6 February 2023. In our view there was no reason for Mr S to think that the claimant's incapacity for work was likely to be temporary. There was no prospect of any early return to work, on any basis (such as light duties and/or greatly reduced hours). The medical reports did not anticipate improvements in her condition within less than three to six months, at best, as stated in the psychologist's letter.). So the medical prognosis remained an uncertain and unencouraging, in terms of when she might become fit to return to work on any basis, even after almost 10 months' continuous absence.

196. For these reasons we concluded that at the time of the dismissal the respondent did genuinely believe that the claimant was unable to perform her duties as a prison officer (and that that was not going to change within a reasonable time), a belief based on reasonable grounds. Mr S had no evidence to suggest that his belief was anything but clear fact. We note that there is also no evidence before us to suggest (a) that there was any medical information missing from the evidence available to Mr S that could have made any difference to his decisions as to whether the claimant remained incapable of work and, if so, when that might change, or (b) that the prognosis in the medical evidence he had was anything but entirely accurate.

*Did the respondent adequately consult the claimant (***Issue 2.3.2***)?*

197. In our view "consultation" involves both giving someone an informed opportunity to express their views on something and being prepared to consider what they say. The "respondent" in this context refers primarily to Mr S and (in relation to the claimant's appeal) Mr L, as they both had a hand in discussing relevant matters with the claimant (assisted by her POA representative) before and at the final FARM and

then the appeal meeting. But it is clear from the documents in the bundle that Mr A was in regular contact with the claimant and was able to help explain the process and what was likely to happen at various points in it. To us this can all be seen as part of the consultations with an absent employee that the law expects before a decision to dismiss on ground of incapacity due to ill-health.

198. Before the decision to dismiss, the key matters on which consultation was needed involved anything relevant to the decisions Mr S had to make at the final FARM, including in the end deciding whether the time had come for dismissal because the business could no longer sustain continuation of an absence that was not likely to end within a reasonable period of time. These matters are indicated in the absence management policy (see para 2.98 in particular) and referred to briefly in the invitation letter.

199. The OH reports were shared with the claimant and, in any event, almost all of their content reflected things she had told the person assessing her health following routine questions put to her by them. She had ample opportunities to raise any concerns about the accuracy or content of the OH reports.

200. In our view the claimant also had ample opportunity to consider in advance what she wanted to say, and whether she had any evidence to offer, at the final FARM. She made use of that opportunity by collecting her thoughts in substantial written submissions, so that the decision maker (Mr S) would be sure to have what she wanted to say in front of him. These were cogent representations which suggest to us that, despite her illness, she was able to state her case, presumably with help or advice from her POA rep. She did this in writing because it had been made clear to her that dismissal was a possible outcome, and she was worried that she might not be able to do justice to her case at the meeting, which would be a stressful event for her.

201. Mr S raised at the final FARM the matters relevant to the decisions he had to make (as he had done at the previous ones). The claimant and/or her POA rep were able to express her views about those matters during the meeting, before final decisions were made. They did that, although on some points the claimant preferred to refer back to her letter as saying all she wanted to say. There is nothing in the evidence to suggest that she did not say what she wished to or that there was anything important that she could have said but did not say (either in her written representations or at the meeting).

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202. The claimant had the assistance of a POA representative at all material times. He was able to help her understand what she needed to say, as well as providing support at the meetings and, where needed, speak for her.

203. We also note, as stated above, that there was no missing medical information or evidence as to the claimant's state of health at the final FARM. There was no additional relevant medical information that Mr S should or could have considered when making their decisions.

204. Prior to the final FARM the claimant's line manager Mr A was also involved in keeping in touch with her, and she was able to raise concerns about anything with him. Mr S also led the discussions at the earlier FARMs at which the claimant was given the chance to say what she wanted in relation to the matters under discussion at those meetings. The FARM meetings took place fairly regularly over around 6 months. Both

managers were, one way or another, consulting the claimant in relation to her absence, her health and her prospects of returning to work.

205. We consider that that Mr S had regard to what she said at the FARMs. After each of the first three FARMs he decided to allow her employment to continue and to await developments in the hope of an improvement in her state of mental health and her prospects of returning to work. He decided differently after the final FARM on 6 February, but that was not, in our view, a result of insufficient information or consultation. He had the information he needed to make a proper decision on that day. The difficulty for the claimant was that, regrettably, in the period from 11 April 2022 to 6 February 2023 her condition had never improved to the point where either she was capable of any work (even light duties on reduced hours) or there was any real prospect on 6 February of that changing in the short to medium term. Her prognosis was always uncertain. This was not in any sense the claimant's fault, but it was the reality.

206. We understand that the claimant was not well during her sickness absence and that may well have affected her participation in the FARMs. However, there is no evidence to suggest either that the claimant was unable to pass on her views at those meetings directly, or through her POA rep, or that she or her POA rep failed to mention anything significant that she might have wanted to say to Mr S at those meetings.

207. We conclude, for all the reasons set out above, that the claimant was adequately consulted before the decision by Mr S to dismiss was made. She was given the chance at the final FARM, the earlier FARMs and on other occasions to express her views on matters relevant to the decisions made by Mr S. She did just than and Mr S had regard to what she said. He considered the claimant's views as expressed at and before the final FARM before making his decisions at that meeting.

208. Our conclusions on the consultation prior to the decision to dismiss are sufficient to answer the question posed by Issue 2.3.2 in favour of the respondent. This is not a case where the question is whether an appeal process needs to remedy potential deficiencies in the consultation in advance of the decision to dismiss.

209. However, in case there is any room for doubt on that point, we did consider whether the claimant was adequately consulted by the respondent (in the person of Mr L) in relation to her appeal against dismissal. We acknowledge that some of Miss C's criticisms about the way Mr L approached the appeal are well-founded (a matter dealt with in more detail below). However, for reasons explained below we do not consider those matters to amount to a decision to reject the appeal having been made before the appeal meeting.

210. In essence, what took place before, during and after the appeal meeting was broadly in line with what happened at the FARMs. The claimant was notified of the meeting and was aware of her appeal rights (and she had the support of an active POA rep to assist her). So, although the invitation letter had some incorrect content (for an ill health incapacity dismissal) we do not consider that the error was significant. Mr L followed his agenda at the appeal meeting. That would have been produced by or on the advice of the respondent's HR advisers. Mr L raised the matters relevant to his decisions and gave the claimant the opportunity to make her points in addition to the written submissions he had been sent by her. She made cogent submissions in writing as to the points she wanted to make and was then (with the help of her POA rep) able

to make representations and express her views during the appeal meeting. Mr L took time to consider his decision after the meeting and did so, culminating in a decision not to uphold the appeal for reasons set out in an outcome letter, which refers and addresses her main points while making the reasons for his decision clear. We consider that he had regard to the points made by her (or by her POA rep) before he made his decision.

211. Accordingly, we conclude that the claimant was adequately consulted before the appeal decision was made. There is no evidence that she was unable to make any significant points in her appeal that she wished to make or that there was missing information that Mr L did not have that might have made a difference to the outcome.

Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position before deciding to dismiss the claimant **(Issue 2.3.3, first part**)?

212. There is overlap between this issue and the previous one, so we focus here on the investigation of the claimant's case other than by consulting her.

213. The key question the respondent needed to investigate from time to time during the claimant's sickness absence was whether or not she was fit for work or likely to become fit for work within a reasonable time frame. In terms of her medical condition and prognosis, the respondent (acting through Mr S) obtained periodic OH reports on the claimant from Optima Health following assessments of the claimant, as set out in our findings of fact above. The assessments and reports were made by OH professionals or advisers. These reports were obtained in advance of each FARM and were relied on by Mr S in making his decisions.

214. There is nothing unusual about the respondent's reliance on the OH reports as the main source of medical evidence. In our view any reasonable employer would normally seek periodic OH reports to inform their decisions about an employee on long term sick leave. It is reasonable for a large employer like the respondent to expect their OH reports to include up to date medical information about the employee (assuming the employee co-operates). We would not expect the respondent to be separately and directly investigating a sick employee's medical situation, other than by inviting the employee to comment on the OH reports.

215. Miss C suggested in her closing submissions that the respondent could and should have got better information about the claimant's state of health and prospects before dismissing her, perhaps by directly contacting the claimant's doctors (with her permission).

216. Miss C also suggested that the respondent's information about the matters discussed and then decided at the last FARM effectively came from the claimant herself, who was unwell and not necessarily fully informed about details of her condition and her prognosis. She said this was unfair because the respondent's information was not correct and up to date.

217. In our view, there is no substance in either of those submissions, both of which suggested that the respondent was not fully informed about the medical position. Our reasons for that conclusion are as follows.

218. First, as stated above there is no expectation that an employer should directly seek information from third parties about an employee's state of health. Rather, it would be reasonable for the employer to expect the OH professionals or advisers assessing and reporting on a member of staff on their behalf to gather and refer to relevant medical information, as required. Apart from anything else, the employer would naturally want the author of an OH report (a) to consider all available medical information as part of their assessment of an employee's state of health and (b) to include in their report advice on any implications of any external information available to them, in terms of a possible return to work date and any adjustments needed to facilitate a successful return to work. That appears to have happened at the claimant's OH assessment on 16 January 2023 as the OH report was clearly made in the knowledge of the content of the psychologist's letter obtained by the claimant a few days before.

219. Secondly, and in any event, there is no evidence that there was further and different medical evidence about the claimant's health and prognosis that (a) existed or could have been obtained, but (b) was missing from the information given to Mr S before he dismissed the claimant. Nor is there any evidence that the information he was given in the last OH report or the psychologist's letter was inaccurate or incomplete in any way. We note that when asked whether there was, for example, more medical information (perhaps from her GP) that was missing, her answer was that the fit notes were the only documents she had.

220. We consider that it was reasonable, and sufficient, before each FARM (including in particular the last one) for the respondent to commission and then rely on an OH report as their main evidence of the claimant's state of health and prognosis (in terms of when she would become fit for work again). At the final FARM Mr S had the extra medical report from the claimant's psychologist. This confirmed rather than contradicted the information and advice in the final OH Report (which is not surprising as the assessor was informed about it and refers to it). The question whether the fact that the last OH report was not made by an OHP is significant is dealt with below.

221. The "investigation" required by a fair procedure also involved giving the claimant the opportunity, whether at the OH assessments, the FARMs and the appeal meeting or on other occasions, to pass on any new or different medical information (if she had any). She had that opportunity and was, in particular, able to tell Mr A things when she wanted to. She did this in in January 2023 when she sent the letter from her psychologist in advance of the final FARM. This is all in line with what we would expect a reasonable employer to do before a decision to dismiss is made.

222. In our view the respondent carried out a reasonable investigation (i.e. one within the range of reasonable responses by an employer in the claimant's situation) which had ensured that Mr S had up to date information about the claimant's health, fitness for work and prospects of a return to work. That information was sufficient to enable him to make proper decisions on the various questions he needed to consider at the final FARM, and the previous ones. This was based on information obtained by the author of the OH report from the claimant and on the claimant's own evidence from her psychologist. Mr S was entitled in the circumstances to rely on the information he had, having given the claimant the chance to comment on, correct or supplement it.

223. Miss C also referred us to what she described as a serious failure by the respondent to comply with the NOMS attendance management policy in that the author

of the 16 January OH Report was not a doctor. Exactly the same point arises in relation to the second part of Issue 2.3.3 (the fairness of the procedure adopted by the respondent in relation to the dismissal and subsequent appeal), and we deal with this question under the next section of these Conclusions. For reasons explained there we have concluded that the failure by the respondent does not make the procedure adopted by the respondent in this case unfair as being outside the range of reasonable responses. The same conclusion applies to the more specific question whether the failure means the respondent's investigation was inadequate. We do not consider that it does affect our conclusion that the respondent carried out a reasonable investigation within the range of reasonable responses for an employer. In our view the investigation carried out was well within that range.

*Did the respondent otherwise follow a reasonably fair procedure in deciding to dismiss the Claimant (***Issue 2.3.3, second part***)?*

224. In addition to the respondent's responsibility to investigate the situation before dismissal there is the wider responsibility to follow a reasonably fair procedure (i.e. a procedure within the range of reasonable responses open to employers in the circumstances of the case). In this regard, Miss C identified a number of respects in which she said the respondent fell short of what a reasonable employer should have done. We deal with her main complaints below, noting that in law the question whether the employer wrongly did, or failed to do, something and the question whether (as a result and taking everything into account) a dismissal is unfair are separate questions.

(a) *communications with the claimant*

(i) lack of structured contact

225. Miss C submitted there was a lack of structured contact with Mr A in particular during the claimant's sickness absence. It was never entirely clear to us exactly what she meant by this, although the gist pf the complaints is set out in paragraph 146 above. The claimant suggested that contacts should have been "minimal" under the absence management policy (perhaps once a month), but that is not our reading of the policy. The claimant told Mr S in January 2023, in advance of the final FARM, about her view that the communications had been inappropriate for various reasons. Her concerns in this area were not picked up in any of the OH Reports.

226. We have addressed the facts around communications in our findings of fact (see paragraphs 147 to 158 above). We concluded there that, overall, the communications we have seen were not inappropriate. Even if there is any doubt on that matter, we consider that the communications were within the range of reasonable responses by an employer. We did not accept that Mr A failed to respond to her concerns about his communications, so far as he was aware of them. His difficulty was that the respondent's policy requires regular contact with a long-term absentee, for all kinds of reason, including the need to monitor the situation and ensure the facts are known when key decisions were needed at the successive FARMs. It is also part of a manager's role to look out for the welfare of staff. An employee would be entitled to complain if their immediate manager had not been in touch regularly in advance of a decision to dismiss.

227. Mr A did not follow the absence management policy in terms of agreeing with the claimant as to how communications would take place. However, in our view this failure was not that significant in terms of the fairness of the procedure followed, given our findings about the communications in relation to the complaints made by the

claimant. We do not think that in practice the claimant was significantly prejudiced by this failure, as she did from time to time tell him when she did not want phone calls. Until the claimant began saying things about communications (such as a preference expressed in early November 2022 not to be called by phone) he had no reason to think that what he was doing (a mix of phone calls and emails) was inappropriate or unwelcome.

228. To a considerable extent the contacts the claimant had from Mr A were driven by the absence management policy as well as by a natural wish on his part to be supportive. In that regard he was being led by her responses to his communications, as he tried to keep in effective contact with the claimant (as expected under the absence management policy) without over-burdening her. He referred, for example, to responding to the claimant's wishes, after the informal meeting on 6 June, by using email more and often asking in advance if she would be able to take a phone call. He told us that if she said "no" then it was fine by him to use email. He was also trying, once the FARM process started, to allay some of her concerns about what might happen. And he was also trying to action things Mr S had decided need to happen as the FARM processes unfolded. In our view he was right to do those things. But he was in a tricky position as his reasonable attempts to allay her concerns appear to have had the practical effect of reinforcing them. In any event, as stated above we do not consider that the contacts the claimant had from Mr A were unreasonable.

229. Miss C suggested to Mr A that he should have had more informal review meetings with the claimant after the first one. His response was that that was not necessary because the claimant was following the correct process in terms of engaging with medical services and there were good communications between himself and the claimant. Miss C submitted, correctly, that monthly informal review meetings are mandated by the absence management policy (paras 2.75 & 2.76), but we note that that requirement does not apply in a month in which a FARM is held. We accepted Mr A's evidence as to his thinking, not least because he was clearly aware of the effect the absence management procedures might have on the claimant. We also agree with him that further "informal meetings" (which necessarily involve more than a hint of formality, despite their label) would not in fact have added value in terms of ensuring both that the respondent was more fully aware of any issues relating to the claimant's welfare and state of health or prognosis, and that the claimant became aware of matters she needed to know about. Neither the claimant nor the respondent, in this case, required informal meetings in order to become sufficiently aware of matters they needed to know about.

230. We had some sympathy with Mr Yeatman's submission that the criticism of a lack of informal review meetings did not sit well with the complaint about excessive communications. Informal review meetings would necessarily involve communications with the claimant to set them up, hold them and to record anything discussed and concluded at them. But it is the case that the absence management policy mandates such meetings, so there was a failure to follow the letter of the policy. We do not view this failure, in itself, as significantly prejudicing the claimant for the reasons given in paragraph 229 above.

231. Under the applicable law, failures of the kind mentioned in paragraphs 227 and 229 do not automatically make the procedure as a whole unfair. We consider that (as suggested by Mr Yeatman) there is some latitude open to an employer in applying its written policies in practice. Also, the practical impact of a failure needs to be considered. So, the failures in question are factors to go in the mix in assessing the

overall fairness of the procedure and the decision to dismiss, even though we did not view them as that significant in themselves in terms of their practical impact.

(b) the invitation letters regarding the FARMs, the FARMs and the outcome letters

232. The claimant's case included submissions that there were too many FARMs and that it was unfair for her job to be on the line in them. Clearly the decision to hold each FARM required formal interactions with the claimant from Mr S in relation to setting the meetings up, holding them and in recording in the outcome letters what happened and what was decided. Mr S explained to us that he decided to hold the second and each subsequent FARM, at points referable to what had been discussed (and decided by him) at the previous one. He felt he was following the absence management policy in seeking to establish what the claimant's state of health was (including how her treatment was going and the medical prognosis in relation to when she might be fit to return to work on any basis) and in exploring what a phased return over 3 months or more might look like. We accept that that was a reasonable approach and do not view the number or dates of the four FARMs as being unreasonable. FARMs were mandated by the absence management policy and Mr S had no practical option but to hold them as and when he considered it appropriate.

233. The whole point of the provisions in the policy about long term absences is to provide a mechanism for establishing the facts and supporting the employee back into work as soon as the medical situation allows. But it also makes clear that absences cannot continue indefinitely and that steps need to be taken (including the holding of FARMs) where there are doubts as to whether an employee will be able to return within a reasonable time. The FARMs were structured interactions with the claimant and inevitably involved OH assessments in advance (involving telephone conversations with the claimant) and correspondence. These things were inevitable, as was the more formal content of the invitation letters and outcome letters. In any event, as far as Mr S's contacts with the claimant were concerned (including the things discussed at the meetings) these were mandated by the requirements of the absence management policy.

234. Mr Yeatman acknowledged that the FARM process was potentially upsetting for the claimant (with possible knock-on effects for her mental health) but said that Mr S had no choice but to invite her to each FARM explaining the purpose of the meeting and, (except in the case of the first one) to inform her that dismissal was a possible outcome. He was then obliged to conduct each meeting in line with the respondent's policy and his HR advice about the meeting and then to send an outcome letter. We accept that the FARM process was stressful for the claimant and is likely to have adversely affected her mental health (not least because of the worry caused by the references in the second and subsequent invitations to the possibility of dismissal). But we also agree with Mr Yeatman's submission that the problems caused to her were largely situational, and were unavoidable if Mr S followed the procedure laid down in the policy. We consider that it was reasonable for him to do so (subject only to consideration of the issues in her "reasonable adjustments claim" discussed below). We do not consider it unreasonable for him to have done all those things mentioned in this paragraph prior to deciding to dismiss the claimant. On the contrary it was reasonable for him to do so and a failure to have done them could have impacted on the fairness of the procedure and the decision to dismiss.

235. It was unfortunate that before the third FARM the claimant was asked to undergo two OH assessments. That should not have been necessary, not least because the assessments inevitably involved some additional stress for the claimant. However, we do not see this as in itself having a significant impact on the overall fairness of the procedure.

(iii) misdirected or missing letters

236. Miss C referred to some letters which, wrongly addressed and/or not posted, were not received by the claimant. That involved mistakes made on the part of the respondent. However, there was no evidence that any such mistakes, though annoying to experience, adversely impacted on the claimant in any significant way. She must have been given the key information somehow (for example by Mr A in his contacts with her). We do not consider that any mistakes of this kind were significant in terms of their impact on the overall fairness of the procedure adopted by the respondent.

(b) *failure to follow the respondent's sickness absence policy as to the kind of OH report required prior to a decision to dismiss*

237. Miss C submitted that the failure by the respondent to commission an OH Report from an OHP in advance of the final FARM was a fatal error by the respondent which made the procedure and the decision to dismiss unfair. The OH report on 16 January 2023 was by an OH Adviser not an OHP. That was a breach of Paragraph 2.98 of the policy (pre-conditions for dismissal) which requires OH advice from an OHP to have been received within the last 3 months before a decision to dismiss, unless the employee withheld their consent to a referral. Miss C said this meant that the OH Report should not have been relied on by Mr S. when he dismissed the claimant. We understood Miss C to be putting the point forward as a formal error of process rather than as an error that resulted in Mr S not having accurate information about the claimant's health and prognosis on 6 February 2023.

238. Mr S conceded in his oral evidence that an error had been made. His witness statement does not mention the point when referring to the OH Report of 16 January 2023. It appears to us more likely than not that he was not aware of the error until some point during these proceedings.

239. Mr Yeatman's submission was that Miss C's submission was not correct because the absence management policy did not constitute binding regulations but was essentially guidance as to the respondent's policies. The 16 January Report was a document that could be relied on as far as it went, and the fact it was made by an OH Adviser was not, he said, fatal to the fairness of the dismissal if the decision-maker (Mr S) had all the relevant medical information. He said that there was no missing medical information, and that, in any event, the previous OH Report on 2 November 2022 was made by an OHP and was made only 4 days outside the 3-month period referred to in Paragraph 2.98 of the Policy.

240. We considered the parties' submissions on this point carefully. It was common ground that a mistake was made that breached the absence management policy. But does this make the procedure unfair, in all the circumstances of the case?

241. We agree with Mr Yeatman that a failure of this kind does not automatically mean the procedure was not a reasonably fair one. But the seriousness of a breach of policy (whether in itself or in combination with other procedural flaws) must depend on the facts and circumstances of the particular case.

242. In this case we have concluded that the impact of the error on the claimant of the error was not, in itself, significant. There was nothing in the evidence to suggest that the January OH report was inaccurate. It was one of a succession of OH reports which, despite showing some variations in the claimant's medical condition, were all consistent in demonstrating that she was seriously unwell, was unfit to work in any capacity and had an uncertain prognosis in terms of a return to work. There was no evidence of any improvement in the claimant's mental health or prognosis after 2 November 2022. On the contrary, the November OH report was if anything more positive in its prognosis (under "Current Outlook") than the January OH Report. Nor was there evidence of any missing medical information from that available to Mr S when he decided to dismiss the claimant on 6 February 2023. We could not identify from the oral or written evidence anything that an OHP might plausibly have done, considered or said in an OH Report on 16 January 2023 that (a) was different from what the maker of the actual Report did, considered or said, and (b) which might have made a difference to the outcome of the final FARM. There was no evidence that there was undiscovered information that would or might have been unearthed had an OHP carried out the OH assessment and produced the OH Report.

243. The problem faced by the claimant on 6 February 2023 was not that Mr S did not have accurate information about her state of health and prognosis. Rather it was that he had to make difficult decisions about what to do in the light of that information and the impact of her continued absence on "the business" (running the prison). The reality was that the claimant, after almost 10 months' absence from work, was still seriously ill and there was no prospect of any significant change in less than at least 3 to 6 months. That time frame was no more definite than any discussed at previous FARMs, after which improvements in her condition had not materialised despite the treatment or therapy that she received.

244. Mt Yeatman relied on the fact the previous OH report dated 2 November 2022 was made by an OHP and was only 4 days "late" in terms of the time limit in paragraph 2.98 of the policy. We do not see that as a significant factor in terms of assessing whether there was a breach of the policy or its impact. That is because Mr S relied on the January OH report in making his decision to dismiss in the light of the claimant's medical position as assessed on 16 January. He will have had the earlier OH reports in his mind as part of the context (a consistent picture of serious mental health difficulties) but he was not basing his decisions on the position on 2 November 2022. In our view this considerably lessens the force of Mr Yeatman's point that it was not unreasonable for Mr S to rely on it, as it was only 4 days outside the 3 months' condition in Paragraph 2.98 of the absence management policy.

245. For all the above reasons, we do not regard this breach of the respondent's absence management policy to have been a fatal mistake, making the procedure (and therefore the decision to dismiss) unreasonable or unfair. But it is a matter that goes into the mix in determining whether, overall, the procedure was fair as being within the range of reasonable responses for an employer.

(c) *other aspects of the procedure followed by the respondent up to the decision to dismiss*

246. Subject to the specific points set out above, we consider that the respondent's absence management policy was substantially followed. Indeed, in some respects the process adopted was arguably more generous to the claimant. So, for example a

decent interval after the claimant's absence started was allowed by Mr A and/or Mr S before the FARM process started in August 2022. The first FARM took place without the possibility of dismissal as an outcome. The later meetings did take place after a dismissal warning given in the invitation letter, but this was consistent with policy. It was Mr S's duty to check and evaluate the claimant's state of mental health with a view to supporting her to return to work, if and when she was fit to work and a return could be phased in over a reasonable period.

247. The current civil service rules as to sick pay applied to the claimant, which allowed the claimant 5 months' absence on full pay followed by 5 months on half pay (disregarding holiday pay). The decision to dismiss was taken shortly before her period on half pay ended, and the two months' notice she was given meant that she was able to take advantage of all the sick pay to which the civil service rules entitled her.

(d) *the appeal*

248. Miss C made a number of criticisms of the way in which Mr L conducted the claimant's appeal against dismissal. We agree with her that Mr L's actions fell short of the ideal in two respects. Mr L himself accepted this when he was giving evidence.

249. Miss C submitted that the appeal was pre-determined. We do not accept that characterisation of the position. That is because Mr L did raise and then consider the things he should have considered in dealing with the claimant's appeal against dismissal. The difficulty the claimant was in at the appeal was that the facts had not changed since the February FARM, so her appeal was necessarily limited to arguing that Mr S had made the wrong decision on those facts and that she should be given more time, perhaps until another FARM in 6 to 8 weeks' time. There was no new medical evidence to suggest that her prognosis was in fact any more positive at the time of the appeal meeting that it was on 6 February when she was dismissed.

250. The main fact Miss C relied on for her submission about pre-determination was that Mr L told the claimant at the outset of the hearing that an appellant has an uphill struggle at the appeal stage. That may have been an accurate statement about the sort of appeals Mr L dealt with (decisions by senior experienced officers acting with HR advice), but it was inappropriate for him to say something like that at the start of the meeting. It could not fail to give the claimant the impression that the was at a disadvantage because he had already more or less decided the case.

251. However, we do not consider that this action in itself made the appeal process unfair. That is because we concluded that Mr L did properly consider the matters relevant to the appeal.

252. Miss C also criticised Mr L's reference during the meeting to someone "with a bit of mental health", suggesting she said that he did not take mental health issues seriously. That was also an inappropriate thing to say to the claimant and was an error of judgment by Mr L. We did not understand the point he was trying to make or why he made it. We accept that a comment like that might have suggested to the claimant that he thought she should not have been a prison officer because of "a bit of mental health" and that that would be upsetting for her. It may be that he had some idea that it was interactions with prisoners that had been one cause of her difficulties that led to her absence. However she clarified with him towards the end of the appeal meeting that that was not the case, which he appeared to accept.

253. In terms of the fairness of the appeal process in this case, we do not see his comment as having a significant impact, in itself, on the fairness of the appeal

procedure. This is because it does not in our view significantly undermine our conclusion that Mr L did consider the right matters before he made his decision on the appeal after the meeting.

254. A further criticism was that Mr L moved too quickly to hold an appeal hearing, some 6 days after the claimant made her wish to appeal clear. This was rapid, but there is no evidence that this had any particular impact on the claimant as regards her ability to make her written and oral representations (with the support of her POA rep) about the decision to dismiss her, which was the focus of her appeal. Neither the claimant nor the POA rep made any objection to the appeal meeting and she appeared to be content at the meeting that in addition to what she and the POA rep said, her written representations (based on those made to Mr S before the final FARM and on those made about the reasonable adjustments she was seeking) included all the things she wanted to say.

255. Our conclusion is that the appeal process was reasonably fair, as being within the range of reasonable responses.

Overall fairness of the procedure

256. It is not unusual for any process leading to a decision to dismiss to have some procedural flaws. That was the case with the claimant's dismissal as demonstrated by the various points described above where we agree with Miss C that some mistakes were made.

257. In addition to considering their individual impact on the fairness of the procedure we have considered them together. We have concluded that the procedure adopted before the decision to dismiss was, overall, reasonably fair because in our view it fell well within the range of reasonable responses by an employer. The individual and collective impact on the claimant of the flaws that we have identified was in our view modest. That is because the decision to dismiss was made on the basis of accurate and complete information about the claimant's state of health and prognosis and the claimant (supported by her POA rep) had, and made use, of a reasonable opportunity to make her position known to Mr S on the matters he had to consider and decide. The flaws in the process, even taken together, did not have any significant impact on the matters Mr S had to decide.

258. Our conclusion that Mr S followed a reasonably fair procedure is not in our view affected by anything that happened at the appeal meeting. Those flaws were regrettable, but we have concluded they did not have a significant impact on the fairness of the appeal process. We note that even if we had reached a different conclusion on that issue, this would have been unlikely to assisted the claimant, given our conclusions as to the fairness of the procedure leading to the decision to dismiss.

Could the respondent reasonably be expected to wait longer before dismissing the claimant (**Issue 2.3.4**)?

259. This is a key issue in relation to the unfair dismissal claim as this was what the claimant wanted Mr S to do at the final FARM.

260. The claimant's position was that Mr S was premature in moving to dismiss the claimant on 6 February 2023 and should have allowed at least another two to three months before holding another FARM in April to re-assess her medical position. In support of the claimant's position we were referred to a number of factors that, it was submitted, made it right for the respondent to allow the claimant longer to see if either her health improved or a more definite prognosis could be given as to when she might

be fit to return to work, on a phased in basis. The claimant still had about two months left of the GP fit note current at the February FARM. She was in the middle of therapy and there were plans for her to undergo further therapy, and she deserved a chance to see if it led to improvements. The wrong kind of OH Report had been obtained by Mr S. The claimant was about to move to zero pay, so that the cost to the respondent of retaining her in employment was minimal. The respondent employer was a large organisation with significant means, and did not need to dismiss her in order for someone else to carry out her role.

261. The respondent's position was that Mr S was always led by the medical evidence in deciding what to do aft her end of each FARM and that he had been prepared, in response to medical evidence, to allow matters to continue until the February FARM. By that date the claimant had been absent for almost 10 months and there was no prospect, on the evidence available at that FARM, of anything changing for at least 3 to 6 months more. There was nothing in the evidence to suggest that the medical evidence in February 2023 was incomplete or wrong. Keeping the claimant's post open had become unsustainable financially and in staffing terms in Mr S's view. In those circumstances it was reasonable for him to consider dismissal as an option open to him. His decision to dismiss, rather than to allow things to continue for another two months or so, was a reasonable one to make.

262. In the light of the medical evidence it is most unlikely that a different decision would have been made at a further FARM held in April 2023. There is no reason to think that any substantial improvement in the claimant's mental health or prognosis would have taken place by then. Doubtless Mr S would have been aware of that on 6 February. But it is not in our view a complete answer to the claimant's assertion that the decision on 6 February was premature and so unreasonable and unfair, and that she should have been given a further chance for things to improve.

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263. Under the applicable law summarised above it is not for us to decide what we would have done on 6 February in Mr S's place. It was for him to make a decision after the February FARM and that decision can only be impugned by us if it was outside the range of reasonable responses (because no reasonable employer would have made the same decision).

264. We have already described the claimant's medical position at the time of the final FARM and her uncertain prognosis. There was little chance of any significant improvement in less than 3 to 6 months, even after almost 10 months' absence. On any view that was not a positive prognosis in assessing under the absence management policy whether a return to work (in whatever capacity initially) "is likely within a reasonable timescale" and whether "the sickness absence can continue to be supported".

265. We refer to our findings above about the financial constraints those managing the prison were under. As a public sector organisation HMPPS is funded by public money and its budget only allows limited flexibility in managing the workforce at the prison to deal with long-term absences. Mr S was not able to recruit a further prison officer to cover for the claimant's absence (and we rejected the suggestion by the claimant that the prison had over-recruited and could have used one of the "extra" prison officers to cover for the claimant's absence). Our findings bear out Mr S's assertion that he was not able to hold open the claimant's job indefinitely. We consider it was reasonable for him to act in the light of the financial and staffing considerations he described to us

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266. In any event, Mr S's decision was based squarely on the medical evidence, none of which suggested that there was any likelihood of any significant improvement in the claimant's state of health in the next 3 to 6 months. If there had been a reasonable expectation that things might have significantly improved within another couple of months we have no reason to think that that would not have been taken into account in determining whether to allow things to continue. Mr S had allowed the absence to continue at the second and third FARMs because there was some hope of a recovery to allow a return to work within what he regarded was a reasonable period under the absence management policy. But that was not his assessment at the final FARM, based largely on the claimant's own medical evidence from her psychologist.

267. While we acknowledge that Miss C put forward some cogent points on this issue, we have concluded that the respondent could not reasonably be expected to have waited longer before dismissing the claimant. The assessment whether the absence could be supported for longer was a decision for Mr S and the decision he made was in our view within the range of reasonable responses by an employer. We can see why the claimant felt it was unfair for her not to be allowed to continue her treatment to the end, but that was taking time and there was no reason for Mr S to think that it would lead to any speedier recovery than her psychologist suggested in his letter about her medical position. Indeed that letter did not specifically address the question when a return to work might be anticipated.

Was dismissing the claimant within the range of reasonable responses (**Issue 2.3.5**)?

268. In our view dismissal was within the range of reasonable responses in the light of the facts known by Mr S about the claimant at the time the decision to dismiss was made. It was clear under the terms of the respondent's absence management policy that a lengthy absence could only be sustained if there was a prospect of a return to work within a reasonable period of time.

269. Once Mr S concluded at the final FARM on the basis of the medical evidence that was no longer the case and a change to another role was not possible, then dismissal became his only practical option.

270. Even if some reasonable employers (at least in the public sector) might have decided to allow an absence to continue in the claimant's circumstances, our assessment is that other reasonable employers (including in the public sector) would have made the same decision as the respondent. Indeed we consider that some reasonable employers would have made a decision to dismiss sooner. This is why we consider that the decision by Mr S not to wait longer was within the range of reasonable responses.

*Conclusion on **issue 2.3** (Did the Respondent act reasonably in all the circumstances in treating the claimant's incapacity as a sufficient reason to dismiss the Claimant?)*

*Conclusion on **issue 2.4** (Was the decision to dismiss a fair response, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?)*

271. Drawing together everything we have set out above we conclude that the answer to issue 2.3 is that the respondent did act reasonably in treating the claimant's proven incapacity as a sufficient reason to dismiss her. This is a conclusion reached in the light of our conclusions above on each of the specific questions mentioned in Issue 2.3. Mr S decided that the claimant was incapable of work and that there was no prospect of a recovery sufficient to allow a return to work in any capacity within a reasonable time. That was his decision to make and we have not identified any basis

on which we could properly interfere with that decision. That was a sufficient reason to dismiss.

272. We also conclude that the actual decision to dismiss was a fair response to the facts as they appeared on 6 February 2023, being well within the range of reasonable responses open to a reasonable employer. The claimant was a valued member of staff and the wish to allow her time to recover and become able to work was one reason her absence had been allowed to continue for almost 10 months. At the earlier FARMs Mr S had decided there was a prospect of a return to work within a reasonable time (taking account of the needs of the business). But at the final FARM Mr S considered things had changed. He had accurate medical information about the claimant and it was reasonable for him to conclude that the business could no longer sustain the continuation of her absence after a period of nearly 10 months and with no prospect of the claimant becoming fit work (in any capacity) in less than 3-6 months and possibly longer. He applied the criteria set out in the absence management policy which itself aimed to strike a fair balance between the needs of the business (including for employees to provide effective service) and the interests of employees.

273. In our view nothing in the points made by Miss C that we have accepted significantly affects the overall fairness of the dismissal.

274. We have considerable sympathy with the claimant in the predicament she was in through no fault of her own while she was absent. But the evidence is (and was on 6 February 2023) that she was seriously unwell, unable to work in any capacity and that was not going to change for at least another 3 to 6 months or more.

Disability Discrimination: general (Issues 3 to 6)

275. The issue of the claimant's disability (arising from her complex PTSD) is conceded by the respondent. Accordingly, it is possible for the claimant to pursue her claims for direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments, all of which depend on her being disabled.

Direct disability discrimination (Issue 4)

Has the Claimant proved facts from which the Tribunal could conclude that the Claimant was treated less favourably than someone in the same circumstances was or would have been treated?
The Claimant relies on hypothetical comparator. The hypothetical comparator relied on is "a person without the claimant's disabilities, whose relevant circumstances, including the level of absence and uncertain prognosis as to their return to work, are the same or not materially different from the Claimant" (**Issue 4.2**)

276. Section 136 of the Equality Act 2010 applies, in the context of the claimant's direct discrimination claim, to shift the burden of proof to the respondent if we find facts from which we "could conclude" that she was treated less favourably by the respondent than someone without her disability, but otherwise in the same circumstances, was or would have been treated. The treatment in question is the dismissal.

277. The claimant has referred in the past to possible actual comparators, such as a colleague who provided a witness statement. Issue 4.2 makes clear that her case depends on a hypothetical comparator, presumably because the circumstances of the actual comparators were different from hers. So we have to consider the position of a hypothetical comparator: a person without her disability (complex PTSD, leading to symptoms of anxiety and depression) whose relevant circumstances are the same or not materially different from her circumstances, including the same length of absence

and the same uncertain prognosis as to when a return to work can be expected. This is necessarily a hypothetical exercise on our part. We note that any person in those circumstances would, after 10 months absence, also be likely to be regarded as disabled.

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278. As for the test in section 136 of the Equality Act, we have not found any facts from which we could conclude that a relevant hypothetical comparator would have been treated more favourably than the claimant in relation to dismissal. There is no evidence to that effect. On the contrary, everything that happened to the claimant in the months leading up to her dismissal was, in our view, driven by the length of absence and the medical evidence, in the light of the respondent's absence management policy. There is no reason to think a hypothetical comparator would have been treated any better.

279. Mr S made clear to us that the claimant was a valued member of staff who nobody wanted to lose and that that had been part of the reasoning for allowing her absence to last as long as it did before he decided to dismiss her. He acknowledged that she had been extremely unwell and was disabled as a result of her mental health conditions. He took account at the earlier FARMs of the need to allow a period for treatment and recovery in addition to considering, after the first FARM whether her continued absence was sustainable for the employer. He thought there was some prospect of a return to work within a reasonable time and was open to exploring a phased return to work (in terms of hours and duties) to ease her back into her working life once she was medically fit to do that. In our view the test for shifting the burden of proof is simply not met in this case.

*If so, has the Respondent shown that there was no less favourable treatment because of disability. The Respondent contends the Claimant's dismissal was due to her capability (ill health), a conclusion the Respondent reached as a result of the Claimant's level of sickness absence and the uncertain prognosis as to her potential return complex PTSD, leading to anxiety and depression (***Issue 4.3***)*

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280. In view of our conclusion on Issue 4.2, Issue 4.3 does not formally arise for decision. However, if we had to reach a conclusion on the basis of the evidence before us we would have decided that the claimant's dismissal was due to her capability owing to ill-health and that the decision to dismiss was the result of her long absence on sick leave and her very uncertain prognosis as to a potential return to work on any basis, viewed in the light of the respondent's absence management policy. As already stated, there is no reason for us to conclude that a hypothetical comparator in similar circumstances (as described in Issue 4.2) would have been treated any better

281. Miss C referred to the fact that the respondent (acting through Mr S) was not prepared to allow the claimant to "work from home" in her ROTL officer role and to allow her to cease undertaking conventional prison officer duties at the prison, both as part of a phased return and more indefinitely after that. This was because the respondent did not allow prison officers to work from home and did not regard ceasing to carry out those duties as compatible with the role of a prison officer on anything other than a temporary basis as part of a phased return. To us, these submissions related more to the other discrimination claims as were not relevant to the issues in the direct discrimination claim which relate specifically to the decision to dismiss at a time when the claimant was seriously ill, unfit for work and unlikely to become fit for work for another 3 to 6 months at best. There was no reason for Mr S to believe that she would become fit for any work within a shorter timeframe than that. This means that any dispute as to what arrangements the respondent should have made for when she

became fit for some work is irrelevant to the question whether the dismissal was an act of direct disability discrimination. Such a dispute would need to be resolved in the light of specific medical advice in an OH Report once her health had improved.

282. It follows from our conclusions on Issue 4 that the claim for direct disability discrimination fails.

Discrimination arising from disability (Issue 5)

Was the treatment of the Claimant (dismissal by reason of incapacity), a proportionate means of achieving a legitimate aim. The Respondent says that its aims were:

5.2.1 Absence management of its employees, namely, managing sick leave and ensuring adequate resources are available to maintain the services provided at the prison where the claimant worked and to protect the health and safety of employees, the local community and service users.

5.2.2 Running an effective workforce and an efficient service.

5.2.3 Protecting and effectively managing limited public funds/resources.

5.2.4 Applying capability and appeal policies consistently to all staff. **(Issue 5.2**)

283. The parties agree that the claimant's dismissal by reason of incapacity, was unfavourable treatment brought about by the claimant's lengthy sickness absence, which arose from her disability. This would constitute discrimination arising from disability unless Issue 5.2 is determined in favour of the respondent.

284. Mr Yeatman submitted that Issue 5.2 should be determined in the respondent's favour and expanded on the aims he relied on (which he accepted overlap to some extent) and why the dismissal was a proportionate means of achieving them. Miss C submitted that Issue 5 should be determined in favour of the claimant because the aims relied on by the respondent were not legitimate aims and/or because the dismissal was not a proportionate means of achieving them.

285. We have considered both parties' submissions on Issue 5.2 carefully both in making findings of fact and in determining Issue 5.2. We have concluded that Mr Yeatman's submissions were substantially correct and that the actions of the respondent in deciding to dismiss the claimant were a means of achieving legitimate aims in terms of the reasonable business needs at the prison. Our reasons for this conclusion are as follows.

286. We refer to the findings of fact above which in our view bear out Mr Yeatman's assertion that there were good reasons relating to the needs of the business why the decision to dismiss was made on 6 February 2023.

287. One of those good reasons (and perhaps the main reason) is in our view the need to properly staff the prison to deliver necessary services and to protect inmates, staff, visitors and the public. This has to be done on a limited budget, which in practice meant that it was not possible to keep the claimant's job as a prison officer open indefinitely. Her unfitness to work meant that the options of a regrade/downgrade to another role was not an alternative to dismissal.

288. The absence management policy is based on that need, which is why the focus of the policy is in supporting absent staff back into work where possible, and in mandating steps to be taken from time to time to ensure that the case for allowing longer absences to continue (and especially the prospects of a return within a reasonable period) is assessed from time to time. The longer the absence continued

without any prognosis to support a reliable expectation of a return within a reasonable period, the harder it became for Mr S to decide to allow the situation to continue.

289. We accept that absence management is a key aim for those managing a prison as part of the need mentioned above. The absence management policy adopted by HMPPS sets out the approach for managers in a proportionate way, aiming to balance the need to treat staff fairly (not least for retention purposes) against the needs of the business in terms of maintaining sufficient staffing levels at all times. The policy does suggest that at some point where an employee has been absent for a long time the balance will shift against allowing the status quo to continue. It is for managers to assess when that time has come, following policies designed to ensure fairness and effective participation by the employee in the process leading to a final decision.

290. For those reasons we agree that the aim set out in Issue 5.2.1 was a legitimate aim of the respondent. We read "adequate resources" as referring primarily to human resources (in addition to necessary accommodation, equipment and other support). This conclusion is sufficient for us to move on to the question whether dismissal was a proportionate means of achieving it, but for completeness we will address the other pleaded aims. We note that that there is considerable overlap between them, but nothing in this case appears to us to turn on this.

291. In our view running an effective workforce and an efficient service (Issue 5.2.2) was also a legitimate aim of the respondent, for the same reasons we consider the first pleaded aim to have been one. Running a prison necessarily involved various key objectives in terms of ensuring the security and safety of prisoners and others on the site and elsewhere, the protection of the public and ensuring that all the other activities required to be carried out in a prison or by its staff are in fact carried out properly. Maintaining effective staffing levels at all times is clearly a vital part of all that.

292. However, we do not see this second legitimate aim as adding much to the first aim as it appears to us to cover similar ground. That is because the aim can only be achieved if the managers are able to properly staff the prison. A long-term absence by a prison officer clearly impacted on their ability to do that. We note that one effect of the claimant's absence was to increase the workload of other members of the ROTL team (as well as requiring prison managers to find cover for her non-availability for shifts working as a conventional prison officer). This could clearly impact on the effectiveness of that team and of the services provided by them over the long term.

293. We also accept that "protecting and effectively managing limited public funds/resources*"* (Issue 5.2.3) is another legitimate aim in the claimant's case. The prison needed to be run within the inevitable budgetary constraints the system imposes on the governor and senior managers. However, as with the second pleaded aim this aim may not add a great deal to the first beyond drawing out one aspect of it. That is because the difficulty of maintaining adequate resources is largely due to the budgetary restraints which in practice restrain the governor's flexibility around recruitment and expenditure. We have accepted, in making our findings of fact, that Mr S was not able to recruit an extra prison officer to cover for the claimant's absence and that her absence put pressure on his ability to properly staff the prison from day to day.

294. Finally, we also accept that the fourth pleaded aim ("applying capability and appeal policies consistently to all staff" (Issue 5.2.4) was a legitimate aim of the respondent. It follows from the existence of an established absence management

policy that it should be applied consistently, although we consider that it also needs to be applied fairly. We have no reason to doubt that this aim was one of the aims behind the claimant's dismissal, although it appears to us that the first pleaded aim (supplemented by the second and third aims) is the most significant one.

295. The next aspect of issue 5(2) is for us to decide whether the claimant's dismissal for ill-health incapacity was a proportionate means of achieving the legitimate aims we have identified above.

296. It is clear to us that an extended and indefinite period of sick leave for a single member of the prison officer staff at the prison would inevitably have a serious adverse effect on staffing arrangements, by taking up half of the assumed allowance for absentees. That would plainly make the task of maintaining staffing levels more difficult. It is also one of the reasons for having a clear absence management policy focused on supporting sick employees to return to work as soon as practicable and compatible with their state of health (as well as meeting other objectives and requirements such as statutory or contractual obligations owed to employees).

297. Mr Yeatman invited us to conclude that the dismissal of the claimant was proportionate. Miss C submitted that the dismissal was not proportionate. However her main reason was that the prison management had been "over-recruiting" at the prison and sending surplus staff to other prisons and that "the business" could have borne the claimant's continued employment for longer than it did. We understood her to accept that at some point (assuming no significant improvement in the claimant's health and/or prognosis) dismissal would have been a proportionate response, but her position was that when the claimant was dismissed that point had not been reached. We have made findings of fact on the matters raised by Miss C that demonstrate that the overrecruiting she referred to was not in fact of assistance to her position on proportionality. earmarked for transfer to other prisons which had been struggling to fill their vacancies. While we understood why the claimant may have thought there was some surplus capacity among the prison officer staff, her evidence did not directly contradict anything said by Mr S.

298. In our view the dismissal was a proportionate means of achieving the legitimate aims identified above. There was accurate information available to the respondent as to the claimant's medical position. After an absence of nearly 10 months with no prospect of a return in less than 3 to 6 months at best, dismissal was an option reasonably open to the respondent as a means of achieving the first three legitimate aims (taken together). Mr S had waited for about 6 months since the first FARM before moving to a decision to dismiss. Mr S decided in effect that the needs of the organisation were such that it was no longer reasonable to put off a decision to dismiss. In our view that was a proportionate decision in terms of the first three legitimate aims, taken together.

299. Further, the respondent had an established absence management policy which, among other things, made clear that dismissal would at some point become an option for an employee on long term absence and provided for the procedure to be followed before a final decision is made. The relevant parts of that policy were plainly based to a considerable extent on the legitimate aims mentioned in Issues 5.2.1 to 5.2.3. The policy ensured that the needs of the business (running the prison) were balanced against other interests (such as retaining experienced staff and treating absent staff fairly). In our view this supports our conclusion on proportionality in that a decision

properly reached under the policy is very likely to be proportionate to the legitimate aims on which it is based.

300. If and when a final decision to dismiss was adjudged to be the right thing to do in the circumstances of a particular employee (which was Mr S's view in relation to the claimant at the end of the final FARM) it was proportionate with the fourth legitimate aim (consistency of treatment of staff) not to make that decision. The same goes for the decision made at the appeal. However, we do not consider that the fourth pleaded aim is that significant in the claimant's case given that the absence management policy requires each case to be taken on its merits and in the light of the facts at the material time. Consistency here means applying the policy correctly and equally to all employees and treating employees the same way if their circumstances are the same. But the circumstances of different individuals are likely to be different when it comes to applying the policy to them. For example if the claimant's medical position had been slightly different (for example if she had a more definite medical prognosis at the date of the final FARM or when Mr L decided the appeal) we have no reason to doubt that that would have been taken into account and might have led to a different decision. So we prefer to base our conclusion on Issue 5.2 mainly on the first three pleaded legitimate aims, taken together.

Failure to make reasonable adjustments (Issue 6)

Did the Respondent have the provision, criterion or practice (PCPs) alleged by the Claimant:
6.1.1 The requirement for employees to work on the Respondent's premises;
6.1.2 The requirement for employees to be at work. (**Issue 6.1**)

*Are the PCPs alleged by the claimant capable of constituting a PCP under section 20 of the Equality Act 2010? Namely, are the PCPs alleged applied to other employees or capable of being applied to others or are they a one-off decision and/or specific to the Claimant and her situation? Do they have a sufficient level of repetition about them to suggest similar facts would be treated in a similar way if it occurred again? (***Issue 6.2***)*

301. We found it difficult to understand exactly what the PCPs relied on by the claimant, as stated in the agreed issues, mean. So before addressing issues 6.1 and 6.2 we must clarify what we consider them to mean.

PCP 1 (requirement to "work on the respondent's premises")

302. In the light of the discussions at the hearing the first pleaded PCP ("PCP1") appears to us to relate to the respondent having a policy that prison officers are not allowed to "work from home" (even in relation to tasks which could in theory be done at home) and (b) are expected to carry out shifts in their conventional role and to be ready to carry out that role (even if assigned to a non-prisoner facing role, such as the ROTL office role). We heard evidence and submissions about those matters and consider it appropriate to treat PCP 1 as covering them. It was the position after a return to work that appeared to us to be in dispute.

303. We do not consider that the respondent is unfairly prejudiced by our reading it in that way. That is because at the hearing they were aware of the matters concerning the claimant on this aspect of her case and were able to address the question whether working from home was acceptable to them.

304. It was common ground that prior to her sickness absence the claimant was working at the prison as a ROTL officer. She spent a proportion of her time out of the prison, for example when visiting employers. In addition to her ROTL officer work she

was expected to work shifts as a conventional prison officer at the prison and was liable when doing ROTL officer work to be diverted to prisoner-facing duties if for some reason that was necessary at short notice. There was some disagreement between the claimant and other witnesses as to the exact proportion of her time spent out of the prison in her ROTL role, but we do not consider the difference to be material in deciding whether the respondent had a PCP as alleged.

305. We consider that the respondent did have a policy along the lines of PCP 1 as explained in paragraph 302 above. This was supported by the evidence and was not seriously disputed, even though Mr Yeatman did not accept that PCP1 as set out in the agreed list of issues was a proper PCP. It was clear from the correspondence about a phased return that for a limited period the claimant would be excused conventional prison officer duties, but after that she would be expected to be available for them (like any other prison officer). She would also be expected, once back to work, fully to carry out her ROTL officer duties from the prison as her base. Her employer did not allow working from home as a regular or permanent arrangement and she did not have a laptop she could take home to use for work. There was some debate between the witnesses as to whether a laptop was available, but again we do not consider it necessary to resolve that.

306. We consider that PCP1 does fall within the test in section 20 of the Equality Act. It would be applied to other prison officers and ROTL officers and was not specific to the claimant.

PCP 2 (requirement "to be at work")

307. The second pleaded PCP ("PCP 2") is more problematical as on its face it appears to refer to the idea that employees should work, which is a fundamental part of the employment contract rather than "a provision, criterion or practice" within the meaning of the Equality Act. Mr Yeatman invited us to conclude that it is not a proper PCP. As worded in the list of issues PCP 2 would not fall within the definition of a PCP.

308. However, we consider that PCP2 needs to be interpreted in its context, including the claimant's pleaded case and the arguments she presented to Mr S at the final FARM and to Mr L on her appeal about reasonable adjustments. The asserted disadvantage (Issue 6.3) and the asserted reasonable adjustments (Issue 6. 5) in the list of issues are also part of the context we consider it appropriate to draw on. We note that the first of those (being allowed to work from home, rather than at the prison) appears to relate back to PCP1 only. The other two adjustments refer to being allowed paid leave or unpaid leave for treatment. But this did not appear to us to have been addressed in the submissions from Miss C in terms of what would happen when the claimant was back at work, although we consider that might have been one natural reading of the reasonable adjustments about leave for treatment

309. One possibility is that PCP2 refers to being allowed time off for treatment after any return to work. However, we did not understand the claimant's position to be that she was relying on the position that she might have been in had she been able to return to work. In any event, one difficulty with this reading of PCP 2, from the claimant's point of view, is that a phased return over 3 months (following discussions about what her needs were once she was medically fit to do some work) would have allowed her time to attend medical appointments. What the position would be after a successful phased return (if that happened) is speculative. We do not have evidence that the employer would not have allowed the claimant time off (paid or unpaid) for necessary medical appointments. The focus of their absence management policies was to help employees who return for a period of sick leave back to normal full time

working, if their health permits. We have no reason to believe that she would not have been able to take leave for necessary medical treatment; but whether that would have been paid or unpaid would depend on how the employer's absence and sick pay policies impacted on a person who had already been absent for a long period and (if they did) on decisions by managers at the time.

310. So, if the allegation is that the respondent had a PCP that did not allow employees (who were not otherwise absent from work) to take leave needed for medical treatment, this was not really addressed by the parties at the hearing. We are unable to conclude from the evidence that the respondent had such a PCP. As far as we could see the absence management policy did allow for absences for such purposes and whether they were paid or unpaid would depend on the cumulative length of sickness absences a member of staff had at any given time. For this reason the answer to Issue 6.1 in relation to such a PCP is "no".

311. However, we have concluded that what the claimant is actually seeking to rely on here relates to her position, as she sees it, while she was on long-term sick leave due to her poor mental health following an incident at work. On 14 January 2023 she asked for a reasonable adjustment allowing her time to concentrate on treatment and recovery until able to return to work on a phased return, and to be able to do that without pressure or threats of dismissal from her employer. She felt strongly that it was unfair to be dismissed for being off sick for about 10 months and that she should have been allowed longer to recover and receive treatment, preferably on full pay and certainly without being at risk of dismissal. She said that it was not her fault that there was delay in the NHS making whatever treatment(s) she needed available. This view of the position was repeated to us at the hearing.

312. That view of her position appears to be at the heart of the claimant's other claims in these proceedings, and in our view her "reasonable adjustments" claim is part of the same overall case. Instead of what she thinks should have happened, she says that she was dealt with too strictly in accordance with her employer's absence management policy, without any concession being made for her disability and its effects. This policy meant she became at risk of dismissal after about six months' absence, when invited to the second FARM. She says the fact she was disabled did not in itself affect the application of those policies, when it should have done.

313. Accordingly, we interpret PCP2 as referring to a policy that puts an employee on long term sickness absence for mental health conditions (a) on reduced and then nil pay and (b) at risk of dismissal, before the employee has completed treatment and been given time for it to work (assuming no fault on the employee's part in any delay in receiving such treatment). We consider this reading is consistent with the overriding objective, being fair to the claimant (who is not legally represented but has tried to put forward her case) without unfairly prejudicing the respondent.

314. Mr S and Mr L considered that reasonable adjustments have to relate to things that happen when the claimant was at work, but while that is the usual position, we consider that a policy of the kind referred to in paragraph 313 above is, potentially, something that could be a proper PCP.

315. As to the question in Issue 6.1, we conclude that the employer did have a PCP of the kind described in paragraph 313. While on long-term sick leave she was of course able to attend medical appointments without any consequences under her employment contract. But the effect of the absence management and sick-pay policies was that after 5 months she moved to half pay and after 10 months to nil pay, and in

the light of her unencouraging medical prognosis, dismissal became a possibility from around five or six months. That was when Mr S decided that dismissal might be a possible outcome of the second and subsequent FARMs.

316. As for the question in Issue 6.2, a policy as described in paragraph 313 is in our view capable of constituting a PCP under section 20 of the Equality Act. It applies to all staff on sickness leave. It amounts, in our view, to a PCP within the meaning of section 20. That conclusion is not in itself a criticism of the employer's policies, which we understand are similar for all civil servants. We note that those policies are relatively generous in terms of the level of sick pay and the period for which it is payable. They compare favourably with the position of employees who are dependent on statutory sick pay.

If so, did the alleged PCPs put the Claimant at a significant disadvantage compared to someone without the Claimant's disability? The Claimant states the significant disadvantage she faced by the PCPs is that she needed treatment and her absence was to obtain treatment, that her absence exposed her to the risk of dismissal. (**Issue 6.3**)

If yes, did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage described above. (**Issue 6.4**)

PCP 1

317. As for PCP 1, the "significant disadvantage" referred to in issue 6.3 does not appear to relate to it. We understood the claimant's position to be that the effects of her disability meant that she would need to be able to work from home rather than go to the prison for work purposes, potentially indefinitely. This was because she felt it impossible to be on the premises at which she told us the things that led to her collapse in mental health took place. She felt that her mental health would be adversely affected by having to attend at the prison and, perhaps, see or interact with people who had been involved in the events leading to her becoming so unwell. That is presumably why being allowed to work from home is one of the adjustments she says her employer should have made.

318. We accept that the claimant's wish to avoid working at the prison was genuine and that, for example, when she gave evidence she believed that attending work at the prison would be impossible for her. We also accept that that was the position while she was off work owing to her mental health illness. But she was not at that time capable of work on any basis, so to us the question is whether PCP1 had any direct impact on her to put her at a significant disadvantage while she was absent.

319. In our view PCP1 could only have impacted on her if and when she returned to work. We do not consider therefore that it put her at any significant disadvantage while she was absent. Whether it would do so, if and when she was able to return to work, is a matter of speculation. That would depend on her state of mental health when she was, finally, fit for work. She might not still be disabled at that time or, even if she was disabled, she might have been able to attend at the prison (or parts of the prison) if her state of mental health had improved enough to be fit for work. We accept that, if she was still disabled and unable to attend for work at the prison without serious consequences for her mental health, then PCP1 would put her at a significant disadvantage compared with someone without complex PTSD. But it did not do so while she was on long-term sick leave, despite her being disabled. For this reason, we do not consider that PCP1 in fact put the claimant at a significant disadvantage at any material time before she was dismissed. The fact that she might be placed at a

significant disadvantage months later (if and when fit for work to any extent) is not in our view sufficient to count for these purposes.

320. So our answer to the question posed by issue 6.3 is "no". Accordingly issue 6.4 does not arise for decision in relation to PCP1 as it is conditional on the answer to issue 6.3 being "yes.

PCP 2

321. As for PCP 2, we consider that it did not place the claimant at a significant disadvantage compared with someone who did not have the claimant's disability. In our view a person on long term sick-leave who did not have the claimant's disability would have been in exactly the same position after six months absence as the claimant was, under the employer's absence management and sick pay policies. There is an awkwardness embedded in Issue 6.3 in that any employee with a medical condition resulting in a long-term absence is likely (assuming the condition is not likely to resolve itself before 12 months' absence) to be disabled. But this does not mean that the claimant was put at a significant disadvantage compared with other employees.

322. It was not clear to us exactly what the claimant's case is on this point. Issue 6.3 refers to *"the significant disadvantage she faced by the PCPs is that she needed treatment and her absence was to obtain treatment, that her absence exposed her to the risk of dismissal."* As we understood the position, the claimant had not completed much of the second course of therapy that she needed before the decision to dismiss was made. She considered it unfair that she was unable to complete that therapy and given a chance for it to work before she was considered for dismissal. The difficulty with this is that her absence was not "to obtain treatment", in the way that taking time off work to attend for treatment would be absence for that purpose. She was absent due to her being unfit for work owing to her poor state of mental health resulting from Complex PTSD, triggered by events shortly before she began her period of sick leave. It was not clear to us exactly why her therapy/treatment did not begin sooner, but that was not something the respondent could do anything about.

323. In view of our conclusion on "significant disadvantage" (that the answer to Issue 6.3 is "no" in the case of PCP 2), Issue 6.4 does not arise for formal decision in relation to PCP 2.

6.5 Did the Respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The Claimant says that the following adjustments to the PCP would have been reasonable:

6.5.1 Permitting the Claimant to work from home.

6.5.2 Permitting the Claimant paid leave in order to undergo treatment for her condition;

6.5.3 Permitting the Claimant unpaid leave in order to undergo treatment for her condition.

6.6 Did the Respondent implement any of the above adjustments. The Respondent has asserted the Claimant had approximately 10 months of paid sick leave, paid between April 2022 until 11 September 2022 at the Claimant's full pay and from 11 September 2022 to 13 February 2023 at half pay.

6.7 If any of the adjustments above were not implemented and/or not implemented to the extent the Claimant has alleged they should have been, was it reasonable for the Respondent to have made that adjustment/taken those steps.

324. Given our conclusions on Issue 6.3 in the case of both PCP 1 and PCP 2 it is not necessary for us to make decisions on Issues 6.5 to 6.7. However, we will make some comment on those Issues, as they were addressed in the hearing.

PCP 1

325. For PCP 1 the alleged reasonable adjustment is that described in Issue 6.5.2 (working from home). The case put forward by Miss C was that working from home would need to be an indefinite adjustment, presumably until something changed to enable the claimant to attend at the prison without any serious effects on her mental health. The respondent did not implement the alleged reasonable adjustment.

326. But there is a timing difficulty for the claimant with this alleged reasonable adjustment, given that she was an employee on long-term sick leave with no immediate prospects of becoming fit for work. This is an adjustment to be made when the employee is working, but that point was 3 to 6 months off (at best) at the date of the last FARM in February 2022. Miss C suggested that at that FARM it would have been possible to plan for the position on a return to work. However, in our view that is not correct, because any decisions about any short-term adjustments (in the proposed phased return) or longer-term adjustments (if still suffering anxiety and depression as a result of a continuing disability) could only be made in the light of the claimant's medical position when she was, or was about to become, fit to return to work. Whatever discussions might have taken place before then, medical evidence would be needed about her fitness to work (and what work she could do) and the adjustments needed on return. Consideration of current medical evidence would be an essential part of the decision-making process.

327. That means, in our view, that until the claimant's health improved enough for a return to work to be possible or imminent, it would be premature for the employer to be deciding what adjustments to make (if any) on return and subsequently. And implementation of any adjustments would not happen until she was back at work. Accordingly, there could be no failure to comply with any duty to make such adjustments at the last FARM or at the appeal meeting. It was not reasonable to expect the employer to implement, or agreed to implement, any work adjustments at those meetings or at any time before her employment terminated. This is because at no time before the end of her employment was there ever any prospect of a return to fitness to work being possible or imminent.

328. It was clear to us that the respondent was open to a phased return for a period of 12 weeks. The initial proposals put forward to the claimant included a period on greatly reduced hours and light "admin" duties. Doubtless "working from home" was something that the claimant could have suggested, among other things that could have allowed her to build up to full time working. However, the practical scope for her to work from home in her normal ROTL role was very limited. At some point she would have been expected to return to normal working patterns and duties, working from the prison as her base and doing her expected shifts at the prison as a conventional prison officer. In due course she would have had to return to a full-time role as a conventional prison officer.

329. The well-established position of HMPPO is that prison officers should not be working from home (not least because they might be needed to act at short notice in their conventional role for various possible reasons) and that they should be ready, willing and able to carry out their conventional role at their prison.

330. The ROTL role might, in our view, have allowed for some very occasional home working (even though regular working from home was not acceptable to the employer) on a temporary or ad hoc basis, and this is something the respondent might have considered. But this would not have satisfied the claimant. She would still have been expected (after a phased return) to attend at the prison for work, to carry out her shifts as a conventional prison officer and to return, eventually, to conventional prison officer duties full-time. Not attending at the prison (because of home working) would have meant she could not be deployed at short notice to conventional prison officer duties

and would not have performed shits as a conventional prison officer. And in any event the ROTL officer role is not a permanent role but one a prison officer fulfills for a limited period.

331. The respondent's position was clear: the nature of the prison officer role is such that an office-holder must expect, and must be able and willing, to carry out conventional prison officer duties at their prison. This is fundamental to the role for which they are trained and the key difference between prison officers and other HMPPO staff. Their position is that it would not be possible for a person who did not wish to carry out the conventional role to remain a prison officer. A move to some other role in HMPPS would be the only possible alternative to dismissal.

332. We understood that the claimant did not want to move to another prison and that she would prefer to remain as a ROTL officer and thought that, if provided with a laptop, she could perform that role from home. That would not be possible according to the respondent for the reasons summarised above, and as a matter of policy ROTL officers are not allowed to work from home on a regular or permanent basis

333. We do not consider it to be reasonable to expect the employer to dispense, on an indefinite basis, with the fundamental feature of the role and duties of a prison officer, namely performing conventional "prisoner-facing" duties. Those are the things they are trained (and paid) to do. We would have accepted the respondent's reasons for refusing to allow someone who does not wish to carry out such duties to remain a prison officer, whether or not disabled.

334. In addition we would probably have accepted the respondent's reasons for not excusing the claimant from conventional duties while she remained a ROTL officer, for not allowing her to work from home full-time as a ROTL officer and for not allowing her to remain a ROTL officer permanently or indefinitely. However, whether there might have been some temporary or ad hoc adjustments in these areas that might have been reasonable adjustments for the respondent to make is speculative in the absence of clear medical information about the claimant when she became or was about to become fit for work.

335. In other words, we do not consider that the adjustments the claimant appears to have wanted would have been adjustments that it would have been reasonable for the respondent to make. We are not in a position to judge what other adjustments (if any) would have been reasonable adjustments in the event she became fit for work, either as part of a phased return or subsequently.

PCP 2

336. We found it difficult to understand the two suggested adjustments in Issues 6.5.2 and 6.5.3 (which appear to be alternatives). We read them as referring to the idea put forward in the claimant's case that she should not have had the long-term absence procedures applied to her with dismissal as a possible outcome until after her therapy concluded and had had time to work. She also appeared to want to continue to receive sick pay after it ceased in accordance with the respondent's (and the civil service's) sick-pay policies.

337. In our view, if issues 6.5 to 6.7 had required a decision from us in this case, the claimant's case on them in relation to PCP 2 is relatively weak. That is because in relation to absence management the basic legal position is that employees are employed to work and sickness absences (even if justified in themselves) inevitably become a problem once they last for more than a few weeks. This means that employers will have to manage the situation in terms of how long they can sustain an

absence before taking difficult decisions about the employee's job (i.e. dismissal, downgrade or regrade, in the case of a prison officer).

338. Under the absence management policy various steps had to be taken by managers to address the issues relevant to a continued absence. In our view it would not be reasonable to expect the employer to have dispensed with those steps for any employee, even if they are disabled with a mental health condition that means they are placed at a significant disadvantage by PCP 2. Nor do we consider it reasonable to expect the employer to suspend the option of dismissal (or regrade/downgrade) for an indefinite period pending the completion of treatment and a period for recovery. We note that the respondent did in fact do some of what the claimant wanted by (a) allowing the absence to last for around 6 months before the second FARM was held with dismissal as an option (for the first time), and (b) by allowing another 4 months' absence before the decision to dismiss was taken in the light of the facts as they stood on 6 February 2023.

339. Also, the respondent's absence management policy was plainly designed to deal with the position of employees on long term sickness absence, most of whom would, sooner or later, be regarded as disabled once it was apparent the absence for a particular medical condition might last longer than 12 months. It strikes a balance between the needs of the business (including that employees should be able to provide effective service) against other factors (fairness to the employee, retention of staff etc). It creates a framework that allows for all considerations, including matters arising from disability, to be taken into account. This all supports, in our view, the conclusion that it would not be reasonable to expect the employer to make the adjustments mentioned in paragraph 336 above.

340. As for sick pay, the civil service arrangements reflected in the respondent's policy allow for 10 months sick pay (disregarding use of accrued holiday entitlements). That is also plainly designed to offer some security for employees who are on long-term sick leave, while reflecting the fact that the employer is not benefitting from any work by the employee. This is a more generous allowance than many other employers offer. We do not consider it to be reasonable to expect the respondent to adjust the sick pay policy so as to allow the claimant to receive it for longer.

Decision

341. It follows from our conclusions on each of Issues 2, 4, 5 and 6 that our decision is that none of claimant's claims are well-founded and they should all be dismissed.

342. The claimant was a valued and well-liked employee who liked her job and was good at it. We emphasise that it was not in any sense her fault that she became ill and lost her job. It is regrettable that she ended up losing her job, but our decisions confirm that the respondent acted lawfully in dismissing her.

Employment Judge Hogarth
Dated: 9 June 2025

Sent to the parties on

16 June 2025 By Mr J McCormick

For the Tribunal