Reserved judgment

Between

Mr M Campbell

Claimant

and

The Secretary of State for Justice

Respondent

Heard at London South Employment Tribunal on 6 – 8 February & in chambers on 10 April 2017

Before Employment Judge Baron

Lay Members: **Mrs R C Macer & Ms V Stansfield**

Representation:

Claimant: ***Georgina Leadbetter***

Respondent: ***Jane Russell***

ORDER AND JUDGMENT

The Tribunal **orders** that the identity of the Respondent be corrected to the Secretary of State for Justice.

It is the **judgment** of the Tribunal as follows:

1 That the Claimant was unfairly dismissed by the Respondent;
2 That the Respondent discriminated against the Claimant within the meaning of section 15 of the Equality Act 2010 and that such discrimination was unlawful;
3 That the remaining claims made by the Claimant fail.

REASONS

Introduction

1 Apologies are due to the parties for the delay in promulgating this judgment and the reasons. This has been due to the unfortunate indisposition of one of the lay members.

2 The Claimant was a Prison Officer based at HMP Wandsworth from May or June 2005 until his dismissal in January 2016. He presented a claim for to the Tribunal on 6 May 2016. His claims are of unfair dismissal, and

also under the provisions of the Equality Act 2010 based upon the protected characteristic of disability.

3 It was agreed that the correct identity of the Respondent is the 'Secretary of State for Justice' and not 'HMP Wandsworth' as stated in the claim form, and the Tribunal ordered that the title to the proceedings be amended accordingly. No issue arises as a consequence.

4 By agreement between counsel, and at the request of the Claimant, the Respondent's witnesses gave evidence first. We heard from the following witnesses:

Ian Bickers – Governing Governor
Alvin Mendoza – Custodial Manager and the Claimant's line manager
Amy Frost – Deputy Governor
Paul Baker – Deputy Director of Custody
Graham Horlock – Head of Security

The Claimant gave evidence himself and did not call any additional witnesses.

5 We were provided with a bundle of documents of some 600 or so pages. Further documents were added by agreement during the course of the hearing. We have only taken into evidence those documents, or parts of documents to which we were referred.

The issues and relevant statutory provisions and authorities

6 The issues to be decided had helpfully been agreed between the parties as follows:

Unfair Dismissal

1. What was the reason for the dismissal? The Respondent's case is that it was capability.
2. Was the Claimant's dismissal fair within the meaning of s.98(4) Employment Rights Act 1996? The Claimant relies in particular upon:
    a. The Respondent's failure to obtain appropriate medical evidence regarding the nature and prognosis of the Claimant's condition;
    b. The Respondent not waiting to understand the outcome of the Claimant's further occupational health report (scheduled for 26 January 2016, the day after the capability hearing) before making a decision;
    c. The Respondent not waiting to understand the outcome of the Claimant's pain management appointment (scheduled for 3 February 2016) before making a decision; and
    d. The Respondent's failure to take reasonable steps to ascertain whether the Claimant was entitled to ill health retirement, in particular:
        i. Failing to obtain evidence from an Occupational Health practitioner expressly considering whether his was an appropriate case for ill-health retirement;

ii. Failing to make a level 5 referral to the Civil Service Pension Scheme Medical Advisor before dismissing, as required by the Respondent's policy;

iii. Failing to wait a reasonable time for the Claimant's prognosis to become clearer before ruling out referral for ill-health retirement; and

iv. Relying upon an Employee Consent Form as reason not to take further steps in circumstances where this form had been completed by Mr Mendoza of the Respondent without the Claimant's consent (and in any event would not have operated as a permanent bar to the same being considered).

3. If the Claimant was unfairly dismissed, does the Respondent prove that he would he have been dismissed fairly in any event? If so, when would this dismissal have taken place?

Discrimination

4. The Respondent accepts that the Claimant was disabled at the relevant time by reason of chronic pain in his jaw and post-traumatic stress disorder.

Direct Discrimination (s.13 Equality Act 2010)

5. Did the Claimant's dismissal constitute less favourable treatment?

6. Was the Claimant dismissed because of his disability?

Discrimination arising from a Disability (s.15 Equality Act 2010)

7. Did the Claimant's dismissal constitute unfavourable treatment?

8. Was any such unfavourable treatment because of something arising in consequence of the Claimant's disability, namely his absence from work?

9. Does the Respondent show that this treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (s.20-21 Equality Act 2010)

10. Did the Respondent apply the following provision, criterion or practice (**'PCP**'):

    a. Requiring employees to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions;

    b. Dismissing individuals on long term sickness absence where there is little or no prospect of a return to work in the short to medium-term future and/or where the prognosis is unclear; and/or

    c. Permitting only trade union representatives or work colleagues to accompany individuals at capability and grievance meetings.

11. Did these PCPs put a disabled person at a substantial disadvantage in comparison with persons who are not disabled? The substantial disadvantages relied upon are, respectively:

    a. An increased likelihood of dismissal (given that a disabled person is more likely to be on long term sickness absence);

    b. An increased likelihood of dismissal (given that a disabled person is more likely to be on long term sickness absence and to have little or no prospect of a return to work in the short to medium-term future); and

    c. The restriction of full and active participation in capability and grievance meetings (given that a disabled person is more likely to have limitations on his or her ability to concentrate and/or communicate and as such is more likely to require assistance from an individual already familiar with his or her circumstances).[1]

12. Did the Respondent take such steps as it was reasonable to take to avoid the disadvantage? In particular, would it have been reasonable to:

    a. Defer the usual trigger point for a dismissal decision by a reasonable period;

    b. Allow a reasonable period for gathering further medical evidence regarding the Claimant's prognosis before making a dismissal decision; and

    c. Permit the Claimant to be accompanied at capability and grievance meetings by his wife.

7 The provisions of the Employment Rights Act 1996 relating to unfair dismissal are well known and we will not set them all out. The provisions which is particularly in question is section 98(4):

> **Section 98(4) Employment Rights Act 1996**
> Where the employer has fulfilled the requirements of subsection (1), [i.e. shown the reason for the dismissal and that it was a potentially fair reason] 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.

8 The relevant provisions of the Equality Act 2010 are as follows:

> **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.
> (2) . . . .

[1] We have deleted a superfluous duplicated 'familiar' from the document provided to us.

(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.
(4) – (8) . . .

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.

20 Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A'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.
(4) – (13) . . . .

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13, . . . there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability;
(b) . . . .
(3) . . . .

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.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
(6) A reference to the court includes a reference to—
(a) an employment tribunal;
(b) – (f) . . . .

9 We were referred to the following authorities:

East Lindsey District Council v. Daubney [1977] ICR 566 EAT
Igen Ltd v. Wong [2005] ICR 931
First West Yorkshire Ltd v. Haigh [2008] IRLR 182 EAT
Royal Bank of Scotland plc v. McAdie [2008] ICR 1087 CA
Matinpour v. Rotherham Metropolitan Borough Council UKEAT/0537/12
Pnaiser v. NHS England & anor [2016] IRLR 170 EAT

Buchanan v. The Commissioner of Police of the Metropolis UKEAT/0112/16

The facts

10 We find the material facts to be as below. The findings are made in the light of the issues as set out above. It is not appropriate to recite all the evidence we heard, nor to make a finding upon every detail where there may be disagreement.

11 As already mentioned, the Claimant was employed as a Prison Officer at HMP Wandsworth. On 3 November 2014 he was attacked and seriously injured by a prisoner and his jaw was broken. He has subsequently had various operations as a consequence. He now suffers from chronic pain and also Post-Traumatic Stress Disorder. The Claimant has not worked since the incident. The Respondent accepted in an email of 3 October 2016 that the Claimant was at all material times a disabled person for the purposes of the Equality Act 2010.

12 There was a series of forms Med3 in the bundle provided by the Claimant's GP. We are not providing details of each of them, as they were not referred to and do not appear to be particularly important by comparison with the Occupational Health reports to which we refer below.

13 The Respondent has a 'Management of Attendance' policy, also known as PSO 8404. In the Statement of Purpose it is said that the 'PSO contains the mandatory policy for the management of attendance.' It is therefore more than guidance or advisory. The copy in the bundle was issued in November 2008, but certain provisions were amended with effect from 1 March 2014. Those changes relate specifically to ill health retirement below normal retirement age. The Claimant was born in 1971 and was therefore well below retirement age. The material provisions are in paragraphs 2.38, 2.43, 2.58 and 2.59. Before those paragraphs there are steps set out relating to various stages of the procedure are to be undertaken. The document then refers to managing attendance using Occupational Health referrals. The paragraphs in question are as follows:

> **What are the outcomes of the referral?**
>
> 2.38.1 There are five possible outcomes to a referral:
>
> 1 Return to work within a clearly defined timescale:
>
> 2 Return to work on the basis of altered working arrangements. These alterations may be time bound phased return or limited duties, or may be more permanent adjustments under the Equality Act if the Act applies;
>
> 3 Prognosis remains unclear and further reports/examinations will be needed by the Occupational Health Medical Practitioner.
>
> 4 There is no prospect of a return to work within an acceptable timescale and the employee is *likely to be permanently incapacitated for the normal duties of their employment in their substantive role.* In this scenario, the case will be referred to the Scheme Medical Advisor for consideration of ill health retirement (IHR). 'Permanently Incapacitated' means to normal pension age. If ill health retirement is not approved, it may

> now be appropriate to convene a capability hearing. If the Scheme Medical Advisor approves ill health retirements, managers should follow the procedure for that set out in paragraph 2.41.
>
> 5 There is no prospect of a return to work within an acceptable timescale and the employee is unlikely to be permanently incapacitated for the normal duties of their employment in their substantive role, the case will not be referred on to the Scheme Medical Advisor for consideration of ill health retirement (IHR). 'Permanently incapacitated' means to normal pension age. In this scenario, it may now be appropriate to convene a capability hearing.
>
> These outcomes may also apply in circumstances where staff are not absent on long term sick but are failing in providing regular and effective service at work over a prolonged period for medical reasons.
>
> **Medical Inefficiency Termination[2]**
>
> 2.43 If following a referral to a NOMS Occupational Health Physician or the Scheme Medical Advisor (formerly Level 5), there is no prospect of a return to work within an acceptable timescale and medical retirement has been ruled out, dismissal on grounds of capability should be considered. *In doing* so *the. member of staff concerned must first be invited to attend a Capability Hearing heard by the Governor. Where the Governor is absent for* a *prolonged period* of *time this authority may be delegated to the acting Governor. . . . .* The aim of the Hearing is to ensure that the views of the affected member of staff are properly considered before any final decision is made as to whether dismissal Is the appropriate course of action.
>
> **Medical Retirement (also known as ill health retirement)**
>
> 2.58 *Ill-health retirement must be considered when there is* a *possibility that* a *member of staff on long term sickness absence, or with an ongoing serious underlying medical* condition, *may have their employment terminated due to ongoing inability to provide regular and effective service.*
>
> 2.59 Eligibility for medical retirement is determined by the Civil Service Pension Scheme Medical Advisor. Only where a NOMS Occupational Hearth Physician has determined that the employee is likely to be permanent incapacitated for the normal duties of their substantive role will a case be forwarded to the Scheme Medical advisor. 'Permanently incapacitated' means-to normal pension age. If the criteria for Medical retirement are met a Medical Retirement Certificate will be issued, and a formal meeting held. If the criteria have not been met a Refusal Certificate will be issued with a report explaining the reasons for the refusal and setting out the appeals procedure. *The criteria depend on the member of staff's pension scheme. In cases where medical retirement is ruled out and Medical Inefficiency Termination is being considered line management must proceed with* a *Capability Hearing.*

14 It was agreed that logically the outcomes 4 and 5 in paragraph 2.38.1 are in the wrong order and ought to be reversed in that the various outcomes are set out in increasing levels of seriousness.

15 The Claimant was regularly referred to OHAssist (a trading name of Atos IT Services UK Limited) for occupational health advice. Such referrals could be either to an Occupational Health Adviser, or to an Occupational Health Physician. Subject to one exception we were not provided with a copy of the referrals but only the consequent report. All of the referrals

[2] As will be seen below, the phrase 'Medical Inefficiency Termination' has caused difficulties.

were initiated by Mr Mendoza. If the referral is to an Adviser then it can be effected by the manager of the employee in question electronically. If, however, the referral is to be to a Physician then the referral has to be dealt with on paper and go through HR. The Respondent treats any report, certainly from a Physician, normally as being valid for a period of three months.

16 There are three documents which have to be completed for the purposes of referral to a Physician. The individual in question has to complete an Employee Consent Form.[3] As its name suggests, the purpose is to obtain the consent of the employee to the occupational health provider obtaining medical information about him. That is set out in part B of the form. Part C2 refers to employees of the National Offender Management Service, of which the Claimant was one. It is relevant only for 'referrals where ill-health retirement is to be considered.' There are boxes which can be ticked, marked 'Yes' and 'No'. The employee in question is being asked to agree to his medical information being provided in confidence to medical advisers to the Principal Civil Service Pension Scheme for consideration for ill-health retirement. There is a note to the effect that if consent is not given, then the case cannot be considered for ill-health retirement, but a capability hearing may still be held to consider the options for the employee's future employment.

17 There appears to have been a material misunderstanding about this form. The 'Yes' / 'No' boxes are to be ticked not in answer to the question as to whether the employee wants to have ill health retirement, but rather as to whether, if ill health retirement is to be considered, consent is given to the disclosing of medical records.

18 The manager responsible for the referral completes a further form 'OHP2' where various details are set out. There are also specific questions which can be included as appropriate. Those two forms are then submitted to HR, and a further form, 'OHP1', is generated. After setting out the relevant details of the Claimant there is a section headed 'Product Details'. Two 'products' are shown as being available. The first is 'Option1 – Sick absence Management (OHP referral only)'. The second is 'Option 2 – Potential ill health retirement'.

19 If an employee is granted ill health retirement then the employee receives a percentage of his salary to retirement age and also an enhanced pension. Mr Baker explained to us that ill health retirement can be granted retrospectively after the employee has been dismissed, but a special application has to be made to the Cabinet Office for that purpose. Mr Baker did not know of any occasion when such application had succeeded. If an employee is dismissed for medical inefficiency then he receives a lump sum, being just over £23,500 in the case of the Claimant. He does not receive any enhancement to accrued pension rights.

20 There are OH reports dated 26 November, 16 December 2014 and 27 January 2015 prepared by Mrs Geniva Olaniyan, an Occupational Health

[3] Such consent form is not required for a referral to an Adviser.

Adviser. They are all to the same effect. At the relevant time the Claimant was unfit for work, it was reasonable to expect that he would return to work although the time frame could not be certain, and that he was not at the time a disabled person within the 2010 Act.

21 On 10 March 2015 Dr Wright, a Consultant Occupational Physician, advised that a return to work in 2015 remained possible, but that a specialist's report was awaited. Such report was obviously received (although a copy was not provided to us) and on 28 April 2015 Dr Fisher, a Consultant Physician, provided further advice. His advice was that the Claimant was unfit for work at the time, and the longer term prognosis remained uncertain. He specifically said as follows:

> Long-term or permanent incapacity for the usual NOMS role is not expected, from today's perspective.

Although he thought that at the time the Claimant did not fall within the 2010 Act, Dr Fisher said that he was unable to suggest any adjustments that could bring about an early return to work.

22 Mr Horlock and Mr Mendoza visited the Claimant at his home on 19 June 2015. They wished to discuss his health, the medication and therapies being provided, and whether the Claimant felt able to return to work and whether there were any adjustments to his duties and work environment which might assist. There were also discussions concerning his sick pay, the details of which are not relevant save to say that the Claimant remained on full pay until his employment was terminated. The Claimant said that he wished and intended to return to work in his normal role as a prison officer, but he did not know when that would be possible. They discussed an alternative role working on the prison gate and it was agreed that that was not possible or appropriate for the Claimant at the time. Mr Horlock and Mr Mendoza both wanted the Claimant to return to work, and the Claimant also very much wanted the same. There was no mention of ill-health retirement.

23 During that meeting the Claimant presented a written grievance. The only relevance of the grievance in these proceedings is that the Claimant's wife was not allowed to accompany him to the appeal hearing on 20 April 2016, to which we refer further below.

24 Dr Geoghegan provided a further OH report on 1 September 2015. The report records that the referral papers requested advice as to the Claimant's fitness for work and also his capabilities. Dr Geoghegan advised as follows:

> Mr Campbell is currently unfit for work and for his full duties due to his persisting pain and ongoing psychological health problems. Providing such difficulties settle, then he should be able to get back to his usual duties. It remains to be seen the extent of his response to his ongoing therapy in relation to his psychological health concerns and also the outcome of his pain management assessment when this takes place. I cannot give any definite timescales to when Mr Campbell may be able to get back to his full duties but this may be possible later this year depending on his progress.

25 In response to the question as to whether there were any adjustments which could be made to allow the Claimant to return to work, Dr Geoghegan advised as follows:

> At present there are no adjustments that would allow Mr Campbell back to work at present. Later this year, depending on the extent of his further progress both with his psychological health concerns and his persisting pain, then return to work may be possible. Mr Campbell is likely to benefit from phased return to work at that time. Mr Campbell says he would like to get back to work once his health improved sufficiently to allow this.

26 Dr Geoghegan specifically advised that the Claimant was likely to be considered a disabled person.

27 There was an exchange of emails between Mr Horlock and the Claimant on 7 and 15 October 2015. Mr Horlock said he would like to ring the Claimant to discuss his current position and the potential for returning to work on a phased basis away from prisoners. The Claimant replied saying that he wished to take the opportunity to accept the offer working away from prisoners. He then referred to treatment which he had received and further treatment which was proposed for him. It was agreed that the proposed date of return to work was either 22 or 23 November 2015. As it transpired, the Claimant was not able to return to work because of his ongoing medical condition. His GP insisted he should not do so.

28 In his witness statement the Claimant said that during a telephone conversation in mid-October he 'got the strong impression that Mr Horlock intended to bully [him] into coming back to work or dismiss [him].' We do not accept that evidence. It was not supported by his answers during cross-examination. The Claimant was at all times keen to return to work, and made it clear during this hearing that he still wished to do so.

29 The Claimant's wife telephoned Mr Horlock on 11 November 2015. Mr Horlock described the Claimant's wife as being angry, and having said that she perceived that he was putting pressure on the Claimant to return to work. As a result of that conversation he (Mr Horlock) contacted Mr Allinson of HR with a view to having a capability hearing convened. That was set out in an email from on 11 November 2015. There was then an exchange of emails. Mr Allinson replied on 13 November providing an intranet link to an internal document. He said as follows:

> As outlined in the above guidance, Michael will need to be referred for ill-health retirement consideration and pension estimate requests submitted. Once again if you require assistance with this just let me know.

30 We were not provided with a copy of the internal document in question, at least as far as we are aware. Mr Horlock asked Mr Allinson for a copy of the latest occupational health report, and on 17 November Mr Allinson replied, and part of the email is as follows:

> The paperwork sent by [Mr Mendoza] did not include a request for IHR consideration and consequently the OHP report does not make reference to it. Prior to a Capability Hearing being convened then due consideration must be given to IHR. Given that Michael has been signed off until February 2016 and it is 2 and a half months since his last OH report then it would be

worth making a further referral to OHAssist and include a request for consideration for ill-health retirement.

No referral specifically relating to ill health retirement was made in response to that email.

31 On 16 November 2015 Governor Bickers wrote to the Claimant inviting him to attend a Capability Hearing on 30 November. The letter said that the purpose was to discuss the following matters:

- Your current fitness for work in your role as a Prison Officer.
- Whether you will be able to provide regular and effective service going forward.
- Whether there are any adjustments that can be made to enable you to provide regular and effective service now and for the foreseeable future.
- Dismissal on the grounds of Medical Inefficiency.

32 In accordance with the Respondent's usual practice, HR provided Governor Bickers with what is described as a "Case Analysis". It was a brief document recording that the Claimant had been absent from work since 5 November 2014. It summarised Dr Geoghegan's report. It also specifically stated that Dr Geoghegan had not indicated that ill-health retirement should be considered in this case and accordingly no such referral been made. We note that there is no evidence before us that Dr Geoghegan was ever asked to consider the possibility of ill-health retirement being applicable. The Case Analysis mentioned the possibility of transferring the Claimant to an alternative establishment or regrading to a non-prisoner facing role. There was also reference to the possibility of dismissal for medical inefficiency.

33 Governor Bickers held the first Capability Hearing on 30 November 2015. The Claimant was present with his wife, and also accompanied by Mr Mendoza in the capacity of a 'McKenzie friend'. No notes or minutes of the meeting were provided. We have to make findings on the basis of the evidence of those involved.

34 There was a brief discussion concerning the possibility of ill-health retirement, but that was not pursued because the medical advice was that the Claimant was likely to be able to return to work at some stage in the future, and further and importantly the Claimant wished to return to work. The two remaining possibilities were of the Claimant returning to work in some capacity, or termination on medical grounds. In the latter case a discretionary lump sum may be paid to the Claimant as mentioned above. The Claimant was keen to return to work, whereas his wife was principally concerned with the amount of any lump sum which might be paid on the termination of the Claimant's employment. Governor Bickers estimated the amount which might be payable, which Mrs Campbell said was insufficient.

35 There was a discussion concerning the Claimant returning to work on a phased basis and working on the main gate. The Claimant was interested in the possibility but wanted time to consider it. Governor Bickers agreed to adjourn the meeting to allow the Claimant time to consider his position. He was to contact Governor Bickers by 4 December 2015. It was agreed at the hearing that a further OH

assessment would be arranged at as suggested by the Claimant's GP in a form Med3 dated 13 November 2015.

36 We heard a considerable amount of evidence concerning the completion of form OHP2 and an Employee Consent Form by Mr Mendoza. It is now agreed that the Employee Consent Form was completed by Mr Mendoza and he signed it in the Claimant's name. He ticked the initial box indicating that consent was given to medical information being supplied by the Claimant's GP. He also ticked the 'No' box in Part C2 to indicate that it was not agreed that medical information could be supplied to the medical advisers to the pension scheme. As explained above, that section relates only to consent to the provision of medical records, and is not intended to indicate whether or not the employee wishes to have ill health retirement. Paragraph 25 of the witness statement of Mr Mendoza in which he says that the question related to whether the Claimant wanted to be referred for ill health retirement is simply wrong.

37 We consider that the evidence as to who signed the forms became unnecessarily extenuated. We find that this was simply the latest occasion upon which the Claimant had been referred for an occupational health assessment, and the completion of the consent form was simply part of the process. He had completed such forms previously. We find that there was no discussion, or at least no discussion of any substance, between Mr Mendoza and the Claimant concerning the Medical Consent Form. We do not accept that the Claimant specifically authorised Mr Mendoza to sign the form on his behalf. We also find that the issue of ill health retirement was not discussed. Of course Mr Mendoza should not have signed the document in any event.

38 This is the one set of referral forms for referral to an Occupational Health Physician which we do have in the bundle. The referral itself is dated 3 December 2015. The OHP1 was completed by Tamsin Coussell following Mr Mendoza having submitted the OHP2 and the Employee Consent Form. On the referral form she selected Option 1 referring to sick absence management, and not Option 2 relating to ill health retirement. She asked the specific question as to whether the Claimant was fit for any work at that time, and asked for a prognosis.

39 Mr Mendoza also made a referral to an Occupational Health Adviser on 4 December 2015. It was not explained to us why a referral was made to both an Adviser and a Physician at the same time. Following a telephone discussion with the Claimant on 7 January 2016 Mrs Olaniyan, the OH Adviser, advised that the Claimant was unfit for work, that a recovery could be expected, but that it was not possible accurately to advise on a timeframe. She said that the Claimant was eager and willing to return to work, but fearful of doing so at the time. Additional assessment would be required. Mrs Olaniyan said that the Claimant might be able to return to work in some capacity initially on restricted duties. She advised that OH reviews should be arranged 'as required.' Finally she advised that the Claimant was likely to be considered a disabled person.

40 Governor Bickers wrote to the Claimant also on 7 December 2015 summarising the meeting of 30 November 2015, and following a

telephone conversation of 7 December. Governor Bickers recorded that the Claimant did not feel able to return to work, and informed the Claimant that the Capability Hearing would be reconvened following receipt of the further OH advice. The possibility of dismissal on the grounds of medical inefficiency was specifically mentioned.

41 On the following day, 8 January 2016, Governor Bickers wrote to the Claimant inviting him to the reconvened Capability Hearing on 25 January 2016. The hearing was said to be for the same purposes as set out above. There are no notes of that meeting either.

42 As before, a Case Analysis was provided to Governor Bickers which was dated 20 January 2016. The matters under 'Points to Consider' were reasonable adjustments, ill health retirement, and dismissal for medical inefficiency. It made the same points as before, save that reference was made to the advice of Mrs Olaniyan of 7 January 2016. The Case Analysis did not specifically mention that the Claimant had also been referred to an OH Physician by Mr Mendoza, despite the fact that that had been arranged through HR. The Case Analysis stated as follows:

> On the basis of the information available at present the decision to dismiss would be **medium risk**. This is because PSO 8404 provides that you will have up-to-date (i.e. dated within the last three months) advice from an occupational health physician before reaching the decision to dismiss.

43 It will be recalled that Dr Geoghegan's report was dated 1 September 2015, and therefore the original hearing was held on the last day of the three month period, but the resumed hearing on 25 January 2016 was well outside of that period. We did not hear from the author of the Case Analysis and do not know if the reference to the OH advice was to that of Dr Geoghegan or that to be provided following the referral by Mr Mendoza. If the latter, then the resumed hearing was held before the report was available.

44 Governor Bickers did not allow the Claimant's wife to be present at the resumed hearing because of her attitude at the earlier hearing. Governor Bickers considered that she had talked over the Claimant, had not allowed him to speak for himself, and had been rude. We accept his evidence that otherwise he would have allowed Mrs Campbell to be present, although contrary to the Respondent's normal practice. The Claimant was content to continue with the meeting on the basis that there could be a break if desired to enable the Claimant to discuss matters with his wife.

45 We accept the evidence of Governor Bickers that he said to the Claimant that ill health retirement was not available in the circumstances, to which the Claimant agreed.

46 Governor Bickers concluded that the Claimant was to be dismissed. The relevant part of the letter confirming the decision dated 26 January 2017 is as follows:

> At the meeting the following options were considered:
>
> - Whether you will be able to return to work in the near future
> - Your current fitness for work in your role as a prison officer

- Whether you will be able to provide regular and effective service going forward
- Whether there are any adjustments that could be made to enable you to return to work
- Whether there are any adjustments that could be made to enable you to provide regular and effective service now and for the foreseeable future
- Dismissal on the grounds medical inefficiency

> At today's meeting I referred to the Capability Hearing that was held on 30 November 2015. At this meeting we explored the option for you to return to work on a phased return doing non-prisoner facing duties for a short period. We agreed that the meeting would be adjourned to give you the opportunity to consider this option and to enable us to seek further Occupational Health (OH) advice.
>
> A further OH assessment took place on 7 January 2016. OH advised in their report that you remain unfit for work due to your current physical and psychological symptoms.
>
> At today's reconvened hearing you confirmed that you remain unfit for work. You explained that you are due to undergo treatment at a pain management clinic on 3 and 4 February. This will hopefully provide you with a clearer picture on your long term prognosis. You said that you may undergo an operation to help with the pain and that your medication is not helping. You explained that the lack of clarity over your medical treatment and prognosis has been very difficult for you.
>
> I explored whether there were any adjustments that we could put in place at this stage to enable you to return to work. You could not identify any adjustments that might enable you to return to work including a re-grade to a non-Prison Officer grade.
>
> I said that I had some concerns about a return to Prison Officer duties, as you previously stated you did not know how you would respond to any future verbal threat from a prisoner. You agreed that this was still the case.
>
> I have carefully considered all the circumstances of your situation and it is with regret that I inform you of my decision terminate your employment on the grounds of medical inefficiency subject to 11 weeks' notice.

47 Unbeknown to Governor Bickers, the Claimant had an appointment for the Occupational Health assessment by an OH Physician on 26 January 2016. In his report Dr Dar advised that the Claimant remained unfit for work in any capacity. He said that the Claimant had by then been referred for treatment by a pain specialist but he did not know when that would take place. He added that when the Claimant's symptoms had settled 'he should be able to initially resume the role with limited prisoner contact as part of a phased return to work.' Dr Dar also stated that the Claimant's psychological issues would need to improve before he could attempt a return to his substantive role.

48 On 3 February 2016 the Claimant appealed against the decision of Governor Bickers to terminate his employment. The details of the grounds of appeal are important. The Claimant referred to disability legislation. He mentioned the pending criminal prosecution of the assailant causing him stress. He also said that no steps had been taken by the Respondent to prevent the assault. He mentioned the injury suffered and his constant pain. Finally, he said as follows:

> I therefore request my grounds of dismissal be changed from Medical Inefficiency to Medical Retirement on the grounds of disability in accordance with rule PSO 8404.

49 It is apparent to us that the particular objection which the Claimant had was the use of the word 'inefficiency' rather than the dismissal decision itself. He protested before us that he had never been inefficient, and Miss Russell for the Respondent endeavoured to assure him at this hearing that there was never any question of him having been inefficient in the work which he had undertaken.

50 The appeal was heard by Mr Baker on 3 March 2016. The minutes of that appeal are extraordinarily brief, despite a note taker having been present. After 'Introductions' there are only ten paragraphs, of which five record what Mr Baker said and five what the Claimant said. They only cover one side of A4 paper. Mr Baker did not allow Mrs Campbell to attend the hearing. The Claimant was to be allowed breaks to discuss matters with his wife, and he was content with that arrangement.

51 A Case Analysis was also provided for Mr Baker. In addition to the information before Governor Bickers, Mr Baker also had the report of Dr Dar, but it was simply ignored by Mr Baker. The Claimant provided Mr Baker with a letter from his Consultant to the effect that the pain from which he was suffering should diminish. We did not have a copy of that letter. It was put to the Claimant by Miss Russell that therefore the Claimant was not permanently incapacitated, and in reply he again made the point that he did not want 'inefficiency' on his c.v. as it would make it more difficult to get another job. That, he said, was the only reason for making the appeal. The position taken by the Claimant was that he appeared to accept that his employment should have been terminated, but that his objection was to the ground being 'medical inefficiency' rather than 'medical retirement'. It was not an appeal against the dismissal itself. He was only concerned with the terminology relating to the dismissal.

52 In the light of the request by the Claimant for the variation in the reason for the dismissal there was a discussion about the possibility of the Claimant being granted ill health retirement retrospectively. Mr Baker explained the necessity for preliminary approval from the Cabinet Office, and that it was not in the gift of the Respondent.

53 Mr Baker also had before him the consent form of 3 December 2015 which appeared to bear the Claimant's signature. He had no reason to doubt the signature. He noted that the 'No' box had been ticked in relation to the giving of consent relating to records being made available for the consideration of ill health retirement. He said that therefore the Claimant had indicated that he did not wish to be considered for ill health retirement. As noted above, that is not what the consent form says. The Claimant said that he did not recall the document. We add that the Claimant confirmed that he had previously completed and signed the medical consent forms in connection with the references to OH Physicians which we have mentioned above. No copies were provided to us. It was subsequently discovered that the signature was not that of the Claimant but of Mr Mendoza in the name of the Claimant. Mr Baker was not made aware of that fact.

54 Mr Baker left it with the Claimant that he (the Claimant) would write to him (Mr Baker) explaining his position so that Mr Baker could apply to the Cabinet Office. The Claimant decided instead to report the false signature on the consent form to the police, although we do not know on what date that was done. He did not write to Mr Baker, despite a reminder dated 9 March 2016.

55 Mr Baker dismissed the appeal by letter of 21 March 2016. He said that the medical advice received did not indicate that medical retirement should be considered. Further, the Claimant's own Consultant had stated that the Claimant's pain should improve over time. Mr Baker also said that the Claimant had not provided reasons as to why it would be appropriate to seek Cabinet Office approval for an application for medical retirement to be made.

56 There is one further piece of evidence which was provided by Mr Baker. When asked about whether he should have obtained further medical evidence he replied that the issue was for how long the Claimant's absence could be supported by the Respondent, as it placed extra strain on the remaining staff while the Claimant was part of the complement.

57 The final matter with which we deal is the hearing of the Claimant's grievance appeal. The details of the grievance and the appeal are not relevant. The date for the appeal to a panel chaired by Mrs Frost was fixed for 20 April 2016 after having been changed at the Claimant's request. We are not sure that we have all the emails. However, Mrs Campbell sent an email to Mrs Frost on 14 April questioning the constitution of the panel. Mrs Campbell also said that if she was not allowed to be present at the meeting, then there would not be a meeting. Mrs Frost replied on 15 April saying that the relevant policy allows a union representative or a work colleague to accompany an employee, and Mrs Campbell would not be allowed to attend.

58 The Claimant was not present at the time fixed for the appeal hearing. He was contacted by telephone, and he said that he would not be attending. A decision was made in his absence.

Submissions

59 Miss Leadbetter prepared both written opening and closing submissions on behalf of the Claimant, and Miss Russell provided written closing submissions. Both counsel supplemented those submissions by concise oral submissions. Not all of the issues which we have to decide were addressed.

Discussion and conclusion

60 This is what can only be described as a very sad case. The Claimant is obviously a very experienced and dedicated Prison Officer. As was made clear during the process leading up to his dismissal, and during this hearing, the Claimant's overwhelming desire was, and still is, to be back at work, doing the job which he enjoyed. He is unable to do so because of the pain from which he suffers, and his fear of being attacked again. Paragraph 42 of his statement is as follows:

> Since being dismissed I have lost my family and my home. I was previously homeless for 10 days in early October, and I'm currently living in a hostel after being housed under the Mental Health Act but have to wait approximately 6 months to be moved into council housing. I have no confidence that I will ever work again, which I wish I could, I miss my job. I've worked since I was 17 and now have nothing to do. I'm slowly trying to rebuild my life, living day-to-day but feel tired all the time.

61 The assailant is serving a prison sentence of six years for causing grievous bodily harm. We have been informed that there is a civil personal injury claim being pursued by the Claimant against the Respondent in respect of which liability has been admitted. Neither of those matters is material to the decisions which we have to make, but contribute to the overall picture.

62 Each of the claims of unfair dismissal, and those under the Equality Act 2010, are of course separate one from the other, and we will consider them separately, commencing with the claim of unfair dismissal.

63 It was agreed between counsel that there was no dispute as to the law. The first matter to decide is the reason for the dismissal. It was not in dispute that it was because of the effect of the Claimant's injuries that rendered him, at least at the relevant time, unable to fulfil his role as a Prison Officer. That reason relates to the capability of the Claimant, and is a potentially fair reason for the purposes of section 98 of the Employment Rights Act 1996. What we have to decide is whether it was actually fair within the meaning of section 98(4) of the Act. We have reminded ourselves, as ever, that our function is to decide upon the fairness of the decision of this particular employer in the prevailing circumstances, and it is not our role to decide what we would have done if we had been in the place of the employer.

64 Miss Russell referred the Tribunal to the well-known authority of *East Lindsey DC* in which Phillips J (as he then was) said the following:

> Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done.

65 We also bear in mind the comment made by the same judge in the earlier case of *Spencer v. Paragon Wallpapers Ltd* [1977] ICR 301 EAT as follows:

> 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

66 Miss Leadbetter, for the Claimant, referred to the following passage from *Haigh*:

> **40** As a general rule, when an employee is absent through ill health in the long term, an employer will be expected, prior to dismissing the employee, to take reasonable steps to consult him, to ascertain by means of appropriate medical evidence the nature and prognosis for his condition, and to consider alternative employment. An employer who takes such steps will generally meet the standard set out in s.98(4).
>
> **41** Where, however, an employer provides an enhanced pension on retirement through ill health, it seems to us that an employer will also be expected to take reasonable steps to ascertain whether the employee is entitled to the benefit of ill-health retirement.
>
> **42** We reject [the submissions of counsel for the company] that the company was not required to give consideration to the question of ill-health retirement. Our reasons are the following.
>
> **43** Firstly, the company's sickness policy, which we have already quoted, expressly stated that it would consider retirement along with termination on medical grounds. This policy seems to us to be entirely proper and correct. We think that good industrial practice requires nothing less in a case where an employee who is long-term sick may be entitled to an enhanced retirement pension on grounds of ill health.
>
> **44** Secondly, entitlement to an enhanced retirement pension is established, under the company's insurance scheme, by a certificate signed by an occupational health advisor. It must follow that any entitlement to the benefit will generally be referred by the company to its occupational health advisor for a decision. In our experience this is common practice in industry. The company therefore had an essential role in ensuring that retirement is considered before an employee is dismissed.
>
> **45** Thirdly, under s.98(4) whether it is reasonable to dismiss is to be decided in accordance with equity and the substantial merits of the case. If an employer could proceed to dismiss a sick employee who might be entitled to an enhanced retirement pension without considering that question, substantial injustice might occur. An employer who had conferred a valuable benefit on an employee might hinder his ability to claim it carelessly, arbitrarily or even deliberately. It may be that the employee would have a common law claim against the employer; but that is no substitute for proper consideration of the matter by the employer before dismissal.

67 Miss Leadbetter quite properly drew our attention to *Matinpour* which is not a simple case to understand as it was a second appeal following an earlier remission to the same Tribunal. Two extracts are sufficient:

> **[35]** . . . . It is plain that unless the circumstances are such that an employer should think that an employee is or may reasonably be suitable for ill-health retirement, it has no duty to delay dismissal for further consideration of his case in order to consider a matter which, on the information before it, it has no reason to think might arise.
>
> **[37]** . . . Cases in which *First West Yorkshire v Haigh* is pressed into service in the argument will differ widely on their facts. It is an important factual matter whether there is in a particular case any real reason to think that an employee is or might be eligible for ill-health retirement. If there is not, then it is entirely reasonable for an employer not to consider it. It cannot be otherwise. The focus of a tribunal's decision must be upon the employer's actions at the time, in the light of what the employer knew at the time.

68 The first point to be considered arising from the agreed list of issues is the extent of the medical evidence obtained. Miss Leadbetter submitted that the Respondent ruled out ill health retirement relying primarily upon the report of Dr Geoghegan and that 'was not a sound basis upon which to do so.' She further submitted that the Respondent should specifically have considered ill health retirement under PSO 8404, and she referred to Mr Allinson's email of 17 November 2015 in which he said that advice

on the point should be obtained. Miss Russell drew our attention to the conclusions in the nine reports which had been obtained, and also the fact that the Claimant had indicated that he wanted to return to work and did not want ill health retirement.

69 The next aspect relates to ill health retirement and the Respondent's policy PSO 8404 as amended. We make a preliminary initial point. The first is that compliance with a procedure does not by itself make a dismissal fair, just as non-compliance makes it unfair. The procedure is a factor to be taken into account.

70 Paragraph 2.38 refers to the outcome of OH referrals. The result of the various referrals in this case all clearly fall within outcome numbered 5 in paragraph 2.38.1. The final one relied upon by Governor Bickers dated 7 January 2016 was that the Claimant was unfit for work, that a recovery could be expected but that it was not possible to advise on a timescale. Under the procedure, therefore, the Claimant was not to be referred to the pension scheme medical advisor for consideration of ill health retirement.

71 There appears to be a conflict with paragraphs 2.43 and 2.58 and between those paragraphs. Under paragraph 2.43 dismissal on the grounds of capability should be considered where there is no prospect of a return to work within an acceptable timescale and medical retirement has been ruled out. But paragraph 2.58 requires that where there is the possibility of termination due to long term sickness absence then medical retirement must be considered involving a referral to the pension scheme medical adviser. Then outcome 5 in paragraph 2.38.1 provides that such a referral will only be made where the OH advice is that the employee is likely to be permanently incapacitated. We find these various provisions extremely confusing.

72 We have looked at the reality of the position in this case. Throughout all the OH referrals the advice has always been the same. The Claimant was not at that time able to work, but that he was expected to be able to return to his usual duties. Therefore ill health retirement would not have been available. Further, and most importantly, the Claimant was at all times, and during this hearing, stating that he wanted and intended to return to work. He did not want to be retired. In particular we have accepted the evidence of Governor Bickers that at the first hearing on 30 November 2015 the question of ill health retirement had been discussed with the Claimant in accordance with the points to be considered as set out in the Case Analysis and the Claimant had agreed that it was not appropriate. We do not accept that in those circumstances there was any necessity to make a further referral with specific reference to ill health retirement.[4]

73 Although not available to Governor Bickers we have noted that Dr Dar also reported on 26 January 2016 that the Claimant was then unfit for work but, although not asked the specific question, he did not state that

[4] We have not omitted to note the advice of Mr Allinson of 17 November 2015.

the Claimant was likely to be permanently incapacitated from returning to his original role, and made reference to a phased return to work.

74 We have difficulty with the procedure adopted by the Respondent in two linked respects. The first is that on 25 January 2016 the Respondent was awaiting the report of an OH Physician following the referral instigated by Mr Mendoza, although that was not known to Governor Bickers. We have commented above on the ambiguous terminology of the Case Analysis of 20 January 2016. If it were the report of Dr Geoghegan to which reference was made then it was out of date. If it was reference to the forthcoming report of Dr Dar then the Respondent should have waited for the report. Governor Bickers did know that the Claimant had an appointment with a pain management specialist.

75 We entirely fail to understand how it is that Governor Bickers came to dismiss the Claimant at a time when there was these outstanding medical appointments. It must have been thought that it was appropriate for the Respondent to have made the OH referral, and in the view of the Tribunal it was incumbent on the Respondent to wait for the report and then discuss it with the Claimant in accordance with the *East Lindsey DC* principles. That was not done. Further, that default was not cured during the appeal process. Although Mr Baker had a copy of the report it was not discussed with the Claimant. It was also incumbent on the Respondent to await the outcome of the consultation which was booked for the Claimant at the pain relief clinic. In our judgment this was an unreasonable and unfair process for the Respondent to have adopted.

76 It is difficult to know what to make of the 'appeal' as the Claimant was not seeking to overturn the dismissal but only to change the terminology used. Mr Baker treated it as the Claimant seeking to obtain the additional; benefits attributable to ill health retirement. On that basis we find the process to have been unfair also. Mr Baker was relying on a signature on form OHP2 which was not that of the Claimant. Further, he deduced from that that the Claimant had decided that the Claimant had not been interested in ill health retirement. That was not a proper deduction to make because that was not what the tick on the form indicated.

77 What we have to consider is whether in all the circumstances the dismissal was fair or unfair in accordance with section 98(4) of the 1996 Act, and again we have reminded ourselves of the importance of considering reasonableness in respect of all elements of the procedure leading up to dismissal, and the dismissal itself. For the reasons set out above we find that the dismissal was unfair.

78 There is a claim of direct discrimination within section 13 of the 2010 Act and a claim under section 15. For a section 13 claim to succeed the individual must have been treated less favourably because of the disability than another individual falling within section 23. The circumstances of such a comparator must not be materially different, and the employee's abilities are relevant where the protected characteristic is disability. Such a comparator must therefore have had the same absences as the Claimant, and also have had the same prognosis. The

treatment in question was the dismissal of the Claimant. There is no evidence from which we could reasonably conclude that any such person would not have been dismissed.

79 A claim under section 15 is, however, conceptually very different. The unfavourable treatment, being the dismissal, must have been because of something arising from the disability, and not the disability *simpliciter*. It is self-evident that the reason for the dismissal was because of the Claimant's absences combined with the lack of an appropriate prognosis, and also that that was in consequence of the Claimant's disability.

80 The Respondent has a defence to this claim as set out in section 15(1)(b). That requires first of all that there be a legitimate aim. For that reason we have analysed the pleadings, submissions and considered the evidence. The Claimant presented the claim himself, and ticked the box to indicate that he was making a claim of disability discrimination. He did not, however, set out the nature of his allegations by reference to the statutory provisions.[5] In the response the Respondent set out denials of liability in relation to the provisions of the 2010 Act which appeared to be material, and in paragraph 46 asserted that any unfavourable treatment was a proportionate means of achieving a legitimate aim. Nothing further was said on the point.

81 There was a preliminary hearing on 20 July 2016 and in the notes of that hearing EJ Sage made reference to the section 15 claim and the statutory defence but without further details being stated. The Respondent then sought what were described as further particulars by asking the Claimant 87 questions. That document, and the replies, did not take this point further.[6] However an amended response was then filed dated 7 September 2016. Again it was asserted that there was a proportionate means of achieving a legitimate aim without any details having been provided. The issue is of course included as issue 9 in the agreed list of issues. It is therefore undoubtedly before us.

82 The point as to what was any legitimate aim was not addressed by any of the Respondent's witnesses in their witness statements. The nearest to such evidence was what Mr Baker said in cross-examination about the need to fill the Claimant's place in the relevant complement of staff. The point was simply not addressed in the closing submissions of either counsel.

83 We have concluded that the Claimant must succeed under this heading because of the failure of the Respondent to specify and establish what was the legitimate aim in question. It is not up to the Tribunal to make the case for a party, and without the aim in question being clearly articulated the Tribunal cannot decide whether it was legitimate, nor whether the means of achieving that aim were proportionate in the circumstances.

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[5] That is not a criticism of the Claimant who can hardly be expected to be conversant with the details of the 2010 Act in relation to disability.

[6] We were not referred to that document during the hearing.

84 There are also claims under section 20 of the 2010 Act and associated provisions. We have found ourselves in some difficulties on these matters because of a lack of focus on the issues in submissions. It is trite law that when considering a claim under section 20 the Tribunal must consider each of the three elements of section 20(3). Those points were clearly set out in the list of issues but our difficulties arise from a lack of evidence and submissions on the points in issue.

85 We will deal with the first two of the alleged PCPs[7] along with the associated alleged disadvantages and adjustments together.[8] The Respondent had the Management of Attendance policy PSO 8404, and we accept that the PCPs set out in paragraphs 10a and 10b of the list of issues were applied. We are in difficulty in that there was simply no evidence before us as to the second limb of section 20(3), being the substantial disadvantage to disabled persons of the PCP.

86 Despite this lacuna we find using our common sense that the disadvantages referred to do fall within section 20(3) so that the duty to make adjustments arose. However, again we were not addressed about these proposed adjustments nor was there specific evidence about them. We were not referred to the trigger point mentioned in issue 12a and therefore what change ought to have been made to the policy. We were not told what the reasonable period should have been for the purposes of paragraph 12b, nor how allowing such a period would have avoided the disadvantage referred to in paragraph 11b. Again, we state that it is not our function to make the case for a party. We consider that we are entitled to receive evidence and have an analysis from counsel of the points at issue to enable us to come to an informed decision on each of them.

87 We find that we must therefore dismiss those claims under section 20.

88 The third PCP in question relates to being accompanied. We were not referred to any written policy, but Governor Bickers accepted in cross-examination that the process allowed a union representative or work colleague to accompany an individual at capability hearings. We therefore find that there was the PCP which was alleged. Again, there was a dearth of evidence as to the substantial disadvantage caused to the Claimant and other disabled people by the application of that PCP. The claim must therefore fail. However, we find that irrespective of that point, the Respondent did not in fact apply the PCP to the Claimant initially. Governor Bickers allowed the Claimant to be accompanied by his wife at the initial hearing on 30 November 2015. She was not allowed to be present at the resumed hearing on 25 January 2016 because of her conduct on 30 November 2015. Governor Bickers specifically stated that he would have allowed her to be present on the second occasion absent that conduct. As recorded above the Claimant was willing to continue with the hearing on the basis that he could consult with his wife

[7] Provisions, criteria or practices
[8] We are treating the reference to a risk of disciplinary sanctions in paragraph 10a of the list of issues as being a reference to a risk of dismissal.

if required. It cannot in our view be a reasonable adjustment to have to have a person present with an employee when that person is disruptive and rude. This claim would also fail for that reason The same reasoning applies also to the appeal hearing on 3 March 2016 with Mr Baker.

Employment Judge Baron
08 May 2017