EMPLOYMENT TRIBUNALS

Claimant: **Miss B Duggan**

Respondent: **Secretary of State for Justice**

Heard at Leeds by CVP **On: 27, 28 and 29 June 2022**

2 September 2022 (In chambers)

Before: **Employment Judge Brain**
Members: **Mr M Weller, JP**
Mr J Howarth

Representation

Claimant: **In person**
Respondent: **Mr A Webster, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The complaint of unfair dismissal brought under the Employment Rights Act 1996 fails and stands dismissed.
2. The complaint brought under the Equality Act 2010 of unfavourable treatment for something arising in consequence of disability fails and stands dismissed.
3. The complaint brought under the 2010 Act that the respondent was in breach of the duty to make reasonable adjustments was brought outside the limitation period in section 123 of the 2010 Act.
4. It is just and equitable to extend time to vest the Tribunal with jurisdiction to hear the complaint in paragraph 3.
5. The complaint brought under the 2010 Act that the respondent was in breach of the duty to make reasonable adjustments succeeds in part.

REASONS

Introduction and preliminaries

1. The Tribunal heard evidence in this case on 27 and 28 June 2022. The final witness for the respondent was heard upon the morning of 29 June 2022. The Tribunal then received helpful oral submissions from Mr Webster and from the claimant. The Tribunal then reserved judgment. Supplemental submissions were invited on 7 July 2022. We now give reasons for the Judgment that we have reached.

2. The claimant presented her claim form on 14 March 2021. Before doing so, she went through mandatory early conciliation as required by the Employment Tribunals Act 1996. Early conciliation commenced on 25 January 2021. The early conciliation certificate was issued by ACAS on 14 March 2021.

3. The case benefited from a case management preliminary hearing which came before Employment Judge Bright on 26 May 2021. The issues in the case were identified. It was directed that there was to be a public preliminary hearing to decide whether to strike out any of the complaints because they have no reasonable prospect of success and/or whether to order the claimant to pay a deposit as a condition of continuing to advance any complaint or specific allegation or argument in the claim.

4. The public preliminary hearing came before Employment Judge Rogerson on 8 July 2021. In summary, two of the complaints brought by the claimant were dismissed upon withdrawal. One complaint was dismissed by Employment Judge Rogerson upon the basis that it had no reasonable prospect of success. She then ordered the claimant to pay a deposit as a condition of continuing with the remainder of her allegations.

5. The claimant complied with Employment Judge Rogerson's deposit order in part. Those matters in respect of which a deposit was not paid were dismissed by Employment Judge Lancaster in a Judgment dated 31 August 2021.

6. The upshot is that this Tribunal is left to deal with the matters referred to in the list of issues at pages 132 to 136 inclusive of the hearing bundle. In summary these are:

    1. That the claimant was unfairly dismissed. This is a complaint brought pursuant to the Employment Rights Act 1996.

    2. That the claimant was unfavourably treated for something arising in consequence of disability when she was dismissed for misconduct. This is a complaint brought pursuant to sections 15 and 39(2)(c) of the Equality Act 2010.

    3. That the respondent failed to comply with the duty to make reasonable adjustments by failing to provide the claimant with a mentor from 23 September 2019. This is a complaint brought pursuant to sections 20 and 21 and 39(5) of the 2010 Act.

7. We shall consider the list of issues in more detail in due course.

8. For the purposes of the complaints brought under the 2010 Act, the relevant disability is anxiety and depression. In an email dated 20 July 2021, the respondent's solicitors accepted (on behalf of the respondent) that at all material times the claimant was a disabled person by reason of anxiety and depression.

9. The claimant's claim arises out of her employment by the respondent as a prison officer. It is not in dispute that she was employed in that capacity between 13 November 2017 and 3 November 2020. She worked at HMP Wakefield.

10. The Tribunal heard evidence from the claimant. The following witnesses were called on behalf of the respondent:

    (1) David Dyson. He is employed by the respondent as head of Covid recovery at HMP Wakefield. Mr Dyson undertook the investigation into the claimant's conduct (which led to her dismissal) and prepared the investigation report into the matters with which the Tribunal is concerned.

    (2) Thomas Wheatley. He is the governor at HMP Wakefield. He chaired the disciplinary hearing at which the decision was taken to end the claimant's employment.

    (3) Gavin O'Malley. He is employed as the prison group director of the long term and high security estate (north). He heard the claimant's appeal against dismissal.

    (4) Mark Docherty. He is employed at HMP Wakefield as head of residence. He had dealings with the claimant following issues which arose in September 2019 (to which we shall come in due course).

    (5) Kirsty Smith. She is a governor at HMP Wakefield. She provided support and management for the claimant from January 2020.

11. The Tribunal shall firstly make factual findings. We shall then consider the issues in the case and the relevant law. We shall then set out our conclusions by applying the relevant law to the factual findings in order to arrive at our conclusions upon the issues in the case.

Findings of fact

12. The claimant commenced work as a prison officer at HMP Wakefield on 13 November 2017. Her principal terms and conditions are at pages 144 to 149 of the bundle. The job description is at pages 137 to 140. Her responsibilities, activities and duties include locking prisoners securely in their cells at each lock up period and keeping account of the unit roll in order to make sure that prisoners are accounted for.

13. As a newly enrolled prison officer, it was a requirement for the claimant to pass prison officer entry level training (known as *'POELT*') following which the claimant was required to undergo a 12 months' probationary period. The claimant was also required to complete satisfactory the custodial care National Vocational Qualification, level 3. The claimant successfully passed her probationary period and obtained the necessary NVQ qualification. The latter is certified at pages 152 and 153 of the bundle. The modules covered include operating safely and securely in custodial environments.

14. The claimant was assigned a POELT mentor. The mentor contact log is at pages 174 to 177. The POELT mentor is Vicky Kitching. It appears from the log that the first contact between Vicky Kitching and the claimant was on 10 May 2018. There is provision upon the *proforma* (at page 175) for the assignment of a wing mentor. This has been left blank.

15. Evidence was given by Mark Docherty about the different kinds of mentors operating at HMP Wakefield. A POELT mentor is for new recruits going through their probationary period. A wing mentor is an experienced member of staff to whom others may turn who work upon the same wing.

16. There is a third kind of mentor. This was described by Mr Docherty as an individual or specific mentor assigned to an employee. There would be no expectation that such a mentor would necessarily work upon the same shift as the mentee. In evidence given under cross-examination, the claimant accepted that a specific or assigned mentor would not *"physically stand over"* the mentee but is someone to whom the mentee may turn for guidance and "*signposting".*

17. The claimant's line manager at HMP Wakefield was Kevin Bailey. Mr Bailey's absence through ill health prompted Kirsty Smith to offer the claimant support and management from January 2020.

18. On 20 February 2018 a Governor's Order was issued (pages 154 and 155). This concerned roll checks and accounting for prisoners. The roll check procedure was laid out. Of relevance to this case is the direction that when doing the roll check for landings one and two at HMP Wakefield, three staff were to be engaged. One officer was to count an entire side of the landing. A second officer would count the other side. The third officer will then count the whole landing as a double check. It was then directed that a roll check form was to be recorded by the officer checking the landing, signing for the prisoners that he or she has counted. The Order also says that, "*Staff must ensure that prisoners are properly locked in their cells when the roll is checked. They must satisfy themselves that the prisoner is actually there. A verbal response is not sufficient. If it is necessary to wake a prisoner in order to get an accurate roll check then this will be done."*

19. On 27 March 2018 Mr Bailey asked all of those under his line management (including the claimant) to confirm that the Governor's Order had been read and understood. The claimant emailed to acknowledge that she had read and understood it on 4 April 2018 (page 158).

20. On 17 June 2018 the claimant's partner took his own life. Unsurprisingly, this tragic incident had (and continues to have) a profound effect upon the claimant. According to the return to work form at pages 163 to 167, the claimant commenced a period of absence from work on 25 June 2018. She returned to work on 31 July 2018.

21. Arrangements were made for her to return to work upon a phased return basis. The plan was for her to return to full duties after 12 weeks.

22. Mr Bailey also commissioned an occupational health report. Maria Lawless, occupational health advisor prepared a report dated 27 September 2018 at pages 172 to 174.

23. Miss Maria Lawless referred to the claimant's circumstances and noted that she had returned to work *"where she has found some comfort in the support she has received from friends and colleagues. She was particularly complimentary about her line manager support."* As her sleep was disturbed and the inquest was pending, she recommended a four weeks' extension to the phased return to work period. Maria Lawless opined that the claimant was *"fit to be at work with adjustments only. I recommend that for a period of four weeks she does not work more than three days at any one time without having a day off and catch up on her sleep."* She also said that in her view the claimant's condition was likely to be considered a disability under the 2010 Act.

24. On 2 October 2018 Paul Gissing emailed those undergoing POELT training (page 174A). He said that he had taken over from Vicky Kitching as the mentor co-ordinator. He offered a refresher on some basic tasks including locking up pursuant to the Governor's Order at pages 154 and 155. On any view, compliance with that Order was a matter of priority for the respondent.

25. On 11 October 2018 the claimant commenced counselling. This had been arranged through occupational health. On 21 October 2018 the claimant returned to work on full duties. This was in fact prior to the period advised by Maria Lawless.

26. On 17 October 2018, Mr Gissing emailed Mr Bailey (page 181A). Mr Gissing noted that the claimant was *"out of probation on 13 November [2018]."* He asked Mr Bailey whether, *"other than her personal issues which we are aware of, do you envisage any issues with her passing her probation. I'll chase her up on her passport."* Mr Bailey said he had no concerns with the claimant's performance.

27. In paragraph 43 of her witness statement, the claimant says that she was signed out of her probation period in February 2019 "*despite not having had a mentor for 12 months, and without completing the required POELT passport".* The mentor contact log to which we have already referred gives, at page 175, the probation completion date as 13 November 2018. There was no evidence from the respondent upon the issue of when the claimant completed her probation. We infer that it was slightly later than envisaged due to the claimant's difficult personal circumstances. At all events, there is no dispute that she successfully completed her probationary period.

28. On 16 May 2019, the claimant was involved in an incident where the healthcare centre gate was discovered to be unsecured and unsupervised that morning. Custody manager Mike Hulme was commissioned to investigate the matter. The instruction so to do dated 29 May 2019 is at page 188.

29. In paragraph 75 of her witness statement the claimant says that, *"Following the incident [of 16 May 2019] and subsequent investigation as well as re-living many painful and emotional 'key dates' involving [my partner] as the year anniversary of his death approached, my mental health had hit an all-time low."* She then says in paragraph 79 that, "*365 days after I had lost him, I was going to take my own life."* Thankfully, she did not do so. She says in paragraph 83 that, *"I promised myself to fight my feelings and get help. I couldn't let the cycle continue and so I promised myself that I needed to do everything in my power to try and get myself better."* She then gives

an account of contacting a support group run by the Samaritans for bereaved family and friends of those lost to suicide. She also sought the help of her general practitioner.

30. Mr Hulme interviewed the claimant about the healthcare centre gate incident. The interview took place on 16 July 2019 (pages 206 to 208). The claimant was accompanied by Kimberley Oxley, her Prison Officer Association ('POA') representative. The claimant acknowledged her responsibility for the incident.

31. Mr Hulme's report is at pages 196 to 208. He concluded that the establishment procedures regarding the security of gates and locks were not followed. He recommended the matters proceed to a disciplinary hearing.

32. On 6 August 2019 Mr Wheatley wrote to the claimant (pages 233 and 234). The letter set out an allegation that the claimant breached security by leaving the healthcare centre gates unsecured and unsupervised on the morning of 16 May 2019. The claimant was told that if she accepted the allegations to be true then the case may be considered via the *'fast track'* process. However, if the claimant wished to contest the allegations then matters would proceed to a full hearing. The letter then set out the options available to Mr Wheatley. The options range from the taking of no further action to issuing the claimant with a disciplinary warning up to and including a final written warning. The range of options open to him included the removal of eligibility for promotion for a specific period, re-grading, financial restitution, or loss of an increment/pay increase.

33. The claimant wrote on 14 August 2019 to say that she accepted the allegations to be true and wished the matter to be dealt with through the fast track disciplinary process. The claimant's letter to this effect is at page 235.

34. Accordingly, Mr Wheatley wrote to her on 21 August 2019 to convene a disciplinary hearing for 4 September 2019. The letter is at page 223.

35. The transcript of the fast track disciplinary hearing held on 4 September 2019 is at pages 225 to 229. The claimant was again accompanied by a representative of the POA.

36. The claimant accepted the charges. She accepted it was her responsibility to check the gates and in particular that they were locked back by her colleague. Upon the day in question, the claimant and a colleague were transporting a number of prisoners to the health centre. The colleague was in front and unlocked the gate. The claimant's task was to ensure that the gate was locked back. This means that the doors will be left open, but the prisoners can't have access to the locking of the door. The claimant's failure to ensure that the gate was locked back occurred upon two occasions that day.

37. Mr Wheatley asked the claimant whether there was anything that she wished to say in mitigation. The claimant replied, *"just genuinely, I'm so embarrassed to be here. I know that. I just need a minute."* At this juncture the claimant became upset.

38. Mr Wheatley decided to impose a first written warning which was to be upon the claimant's record for a period of six months. He told her that, *"If during*

that six month period we have a similar set of circumstances which I'm confident we won't, but we go to a full disciplinary."

39. On 5 September 2019 Mr Wheatley confirmed his decision in writing (pages 230 and 231). This confirms his decision to give the claimant a six months' written warning. Mr Wheatley acknowledged that, "*Throughout this process you have been completely honest in your contribution to it. I'm aware that this is not your normal method of operating, rather a lapse of concentration and I am more than content with the way that you normally carry out your duties. However, we are a high security prison and security and locking of gates is business as usual for all prison staff in all prison settings, therefore there has to be a consequence. I also have to advise you that should there be any repeats then obviously this penalty would be taken into consideration."*

40. The claimant was afforded a right of appeal. On 10 September 2019, the claimant confirmed that she was not going to exercise that right. She asked Mr Wheatley's personal secretary to "*pass on my sincerest respects to Governor Wheatley for everything regarding the meeting – I'm still so incredibly sorry the incident happened."* Her email to this effect is ta page 236.

41. Unfortunately, at around this time, the claimant was suffering harassment at the hands of prisoners and found herself accused of corruption. The Tribunal needs to say at the outset that it was no part of the respondent's case that the claimant was engaged in any corrupt practice. When he gave evidence, Mr Wheatley acknowledged that the allegations were unsubstantiated (and were not matters that he took into account when deciding to dismiss the claimant). The Tribunal was presented with no evidence of corruption on her part, and nothing recorded in these reasons must be interpreted as any imputation against her character.

42. In paragraph 97 of her witness statement, the claimant says that, "On 14 September 2019 I submitted an intelligence report to the security department regarding a prisoner spreading false rumours that I was openly discussing prisoners' offences." She then goes on to say in paragraph 98 that, "*I had recently been targeted by two prisoners (prisoner [number] 1 and prisoner [number] 2) because I had gathered and submitted intelligence regarding prisoner [number 1] having a mobile phone (he was subsequently searched and this was found) and I had been the sole witness to prisoner [number] 2 assaulting another prisoner and breaking his jaw."*

43. In paragraph 102 she says that, *"On 23 September 2019 I attended work and was told by a colleague, minutes before entering the prison, that allegations had been made against me. I was in complete shock and was instantly devasted."* When she entered the prison, she was told that Governor Mark Mahoney wished to see her. Mr Mahoney is head of corruption, prevention and counterterrorism. The interview took place that day. The claimant was accompanied by two representatives of the POA. In paragraph 112 of her witness statement the claimant says that, "*I made it clear to the corruption prevention unit on 23 September 2019 that I was struggling with my mental health following [my partner's] death and that I believed I was being targeted because I was vulnerable (as is taught in corruption prevention training)".*

44. The claimant says in paragraph 115 of her witness statement that, "*It was clear that [the respondent] believed my mental health issues were not legitimate or being used to cover up corruption (Tribunal bundle pages 237 to 242).*" These pages contain emails from Mr Mahoney to a number of recipients including Mr Bailey, Mr Docherty and Mr Dyson.

45. On page 238 (an email from Mr Mahoney dated 23 September 2019), Mr Mahoney recognises the toxic environment upon the residential unit in which the claimant was working and questioned "*whether this was a suitable atmosphere for her to operate (with particular regard to her [underlying/mental health] issues. She was adamant that she wanted to "front it out". As a compromise, it was agreed that she would go home today (she had become distraught again during our meeting) as she was clearly unfit to go on duty today, potentially having to deal with gossip and direct challenge as to the allegations.*"

46. Mr Mahoney said that she would undertake her shift as normal on 24 September and then go to work in the segregation unit. The segregation unit is on F Wing. This was considered to be a more supportive environment as there is a higher prison officer to prisoner ratio.

47. Mr Mahoney goes on to say that, "*Accepting that such an adjustment was considered as only temporarily necessary until the "dust settles" from the current chatter, we separately discussed a medium term response to address the problems with her "style" recognising that this was at least a contributing factor to her current situation. As such, in the medium term, it has been agreed that it would be beneficial to place her on the same bell scale as an experienced female member of staff. This will foster the development of a more appropriate approach to her engagement with prisoners, ensuring that she avoids the current situation of becoming too involved, trying to do everything on her own. Once again Kev [Bailey] will take this plan forward … in recognition of (and her acceptance of) the belief that her current frantic approach is an attempt to compensate for (and potentially mask) her well-being issues, we reiterated the need to seek support for her bereavement issues and associated psychological well-being. To this end, Kev [Bailey] will speak with her again re her re-engagement with PAM Assist [the respondent's occupational health provider] …"* The 'bell scale' is the respondent's shift pattern.

48. From this, the Tribunal must reject the claimant's contention in paragraph 115 of her witness statement that the respondent was not taking her mental health issues seriously. On the contrary, the evidence is that the respondent was doing so. The claimant was moved to F Wing as a supportive measure for a period of time. The respondent also recognised the need for the claimant to have support from an experienced female member of staff. Although Mr Mahoney does not use the word "*mentor*" in his email of 23 September 2019, this plainly is what he had in mind. This was to assist the claimant and also to provide some reassurance for the respondent given the respondent's concerns about aspects of the claimant's performance which arose from the mental health issues consequent upon the claimant's bereavement. The email was addressed to (amongst others) Mr Bailey, Mr Docherty and Mr Dyson.

49. At page 240 is an email from Mr Mahoney to a number of recipients within the respondent (including Mr Bailey, Mr Docherty and Mr Dyson). It is dated 6 September 2019 and concerns issues arising out of the claimant's performance. Mr Mahoney says that, *"we are satisfied that the concerns that had been raised about her from colleagues, in terms of her engaging in some risky activities eg locking R53s on her own, "waving off" fellow staff to manage recalcitrant prisoners on her own etc are a direct result of her attempts to distract herself from her personal problems. To be fair she has recognised this herself and, to a degree, has taken some steps to try and address it; we additionally talked with her about ways to manage the drain on her as an officer who prisoners know will follow up on issues they raise, making her their first port of call. However, I believe that she will default back to this approach if her head is not in a good place and as such will need to be protected from herself to an extent, but also the prisoners such as [Mr X] who have latched on to her as a crutch."*

50. At page 241 is an email dated 5 September 2019 from Mr Mahoney to recipients including Mr Bailey, Mr Docherty and Mr Dyson concerning a potential security breach. This led to the claimant breaking down and becoming *"absolutely disconsolate and inconsolable".* Mr Mahoney observes that the claimant's *"mental health well-being is at rock bottom and this appears to be ongoing from the suicide of her partner last year."* Mr Mahoney also mentions that the clamant had considered taking her own life in the same way. Mr Mahoney expresses concern that the claimant had *"been using work to fill the void she feels from her bereavement, but this has manifested itself in an approach which causes her peers to question her motivation. Ultimately, she is spreading herself too thin, taking on too much and placing herself in situations which place her at risk. She accepted that trying to manage the woes of a wide range of the more challenging prisoners on her own and their resultant "need" and associated "attention" as a distraction from her own woes; that she has tried to address this and minimise such interactions with limited success."* Mr Mahoney says that the claimant had recognised the need for help and that she should have sought it before.

51. From all of this, we conclude that the claimant was on the respondent's radar because of performance concerns. These arose through no fault of hers, but rather out of mental health issues arising from the tragic event which beset her in June 2018. The respondent recognised the need to support the claimant.

52. In paragraph 145 of her witness statement, the claimant says that, *"On 16 October 2019 I was asked to attend a meeting with CM Paul Cole and CM Katie Blackburn as a prisoner had submitted a complaint that I was complicit in the robbery of another prisoner's property on Charlie [C] Wing."* This appeared to have some connection with the incidents which had manifested themselves in September 2019 around the mobile telephone. On 30 October 2019 the claimant submitted an intelligence report and a corruption prevention intelligence report concerning further allegations of corruption from the two prisoners involved in matters the subject of the September 2019 investigation.

53. The claimant then got involved in an incident on 6 November 2019 on bravo (B) wing. She was still working upon the segregation unit (F wing) at this

time pursuant to the adjustment made in September 2019. However, she had been requested by CM Paul Cole to go on to bravo wing to retrieve a letter. This led to a confrontation with a number of prisoners including one of those involved in the September 2019 incident. The claimant raised her voice. In paragraph 179, she says that she shouted back to the prisoners *"just because you haven't fucking won."* She acknowledges that she was rebuked by Mr Cole for acting in an unprofessional manner.

54. The next day, 7 November 2019, she was contacted by a colleague and told that prisoners on B wing had placed "*hits out"* on her. A *"hit"* arises where a prisoner offers a certain amount of money to another prisoner for a staff member to be attacked.

55. Following an adjudication process, the allegations made against the claimant were found to be unsubstantiated. The prisoner who was at the heart of the September 2019 issue (and who appears to have been the ring-leader of the incident which occurred on 6 November 2019) was informed of such on 4 January 2020 (page 247). The claimant had already been informed by Mark Mahoney that the adjudication had found against the prisoner. The claimant was informed of this on 9 December 2019.

56. On 18 November 2019 the claimant returned to work upon C wing. Mr Docherty gave evidence that the claimant had loved working upon the segregation unit. He says in paragraph 13 of his witness statement that *"Custodial Manager Kate Currie had general well-being conversations with Miss Duggan and reported that Miss Duggan was delighted about working on the unit and had indicated that she didn't need any additional support as all the staff were great with her and supportive of her in her roll."*

57. It was put to Mr Docherty by the claimant during cross-examination that Miss Currie was acting as line manager and not a mentor. Mr Docherty took the view that Miss Currie "*was both, as a female member of staff."*

58. At pages 248 to 253 is a log of professional standards concerns pertaining to the claimant. There was no evidence from the respondent about the provenance of this document. Copied and pasted within it is the email from Mr Mahoney of 5 September 2019 to which we referred above in paragraph 50. At all events, this document is further corroboration that the respondent had concerns about the claimant's performance, the causes of it and the need to provide support for her.

59. On 4 January 2020 the claimant was informed that the same prisoner (at the heart of the September 2019 incident and the ringleader of the 6 November 2019 incident) had taken out a *'hit'* on her. She was informed of this by Mr Mahoney. Unsurprisingly, the claimant was concerned about being repeatedly targeted and that the prisoners at the heart of matters were being allowed to freely associate. In the note of the meeting of 4 January 2020 (at pages 262 and 263 of the bundle) the claimant is recorded as saying that she still had no mentor.

60. Following the meeting of 4 January 2020 Mr Mahoney emailed Mr Docherty and Mr Dyson (pages 256 to 257). He made them aware of the further intelligence suggesting that she may be under threat from prisoners. Mr Mahoney said that, *"in recognition of her belief that she isn't being supported, and noting the absence of her line manager due to long term*

sick, can you please look at addressing this situation as a matter of urgency".

61. He then makes reference to his email of 23 September 2019 to which we referred above in paragraphs 45 to 47. He goes on to say that, *"Primarily, it remains evident that her mental well-being is of considerable concern, with the death of her partner continuing to be the defining factor in this area".* He then makes reference to medical intervention. He then goes on to say that *"there are issues of her professional ability, confidence and approach which we have highlighted are a common factor in all the reporting concerning her. As per my previous email and discussions, I firmly believe that she would greatly benefit from focussed mentorship; I had suggested that once she returned from her period at F Wing, we looked at giving her an experienced female mentor – potentially even adjusting her shift pattern so that they work parallel shifts for a period. From our discussion today, she evidently feels like she is being left to her own devices to try and determine how she needs to change her approach."* He then says that the allegations against her from the prisoners remain unsubstantiated. Mr Mahoney acknowledges that following the incident of 6 November 2019 she had been endeavouring to address the concerns raised. He recommended separating the prisoners at the centre of the campaign against the claimant.

62. Mr Docherty accepted, in evidence given under cross-examination, that Catherine Currie was going to be allocated the claimant as her mentor (as opposed to being a wing mentor). Mr Docherty said that Miss Currie had taken *"responsibility for [the claimant] in the segregation unit and then moved over to the [C] wing"* when the claimant moved back to the residential unit.

63. It has to be said that the evidence from the respondent upon Catherine Currie's movements was less than satisfactory. The claimant made a valid point when she said in submissions that had Catherine Currie moved over with her in November 2019 to act as mentor the issue would not have to be raised by her again with Mr Mahoney on 4 January 2020. It was not clear to the Tribunal when Mrs Currie moved from F to C wing. There was nothing within the bundle as evidence that she was ever formally appointed as a mentor assigned to the claimant.

64. In closing submissions, the claimant said that Catherine Currie had not moved over to C wing until April 2020. We have to treat that remark with some caution as it was made by way of submission rather than in evidence. What can safely be said is that there was no satisfactory evidence that Catherine Currie was assigned to the claimant as a specific mentor for her. Such is against the evidence given the claimant's need to repeat the request on 4 January 2020. The respondent has also not helped themselves by failing to call Mr Mahoney (or for that matter Catherine Currie herself) to give evidence.

65. In January 2020, Kirsty Smith moved from HMYOI Wetherby to HMP Wakefield. She started at HMP Wakefield as custodial manager on C wing. In paragraph 4 of her witness statement she says that, *"I was not Miss Duggan's line manager however in the absence of her line manager custodial manager Kevin Bailey due to sickness I did offer Miss Duggan*

support and manage some sick absence between January 2020 and Miss Duggan's dismissal."

66. Mrs Smith did not know the claimant before her (Mrs Smith's) move to HMP Wakefield).

67. Mrs Smith says that she received *"a brief from my line manager at the time, Governor Docherty around her sensitive personal circumstances, and some previous performance issues."* She says that she was *"tasked to speak to [the claimant] to see if any further support was required beyond that which had been previously offered."*

68. Mrs Smith says that she had several informal catch ups with the claimant and then, at Governor Mahoney's request, spoke to her formally on 18 January 2020. This resulted in Mrs Smith sending to Mr Mahoney the email that we see at page 264. This records that the claimant felt that she *"needs no further support or training with regards to her working with and managing prisoners and feels more confident in this area".* Mrs Smith records that, *"We discussed the possibility of an experienced female mentor which she said she was happy to have, however felt this would have been more useful when she first started, or when she returned after the loss of her partner. She felt that she got what she needed from the staff on F wing with regards to support in this way."* The conversation then turned to support with her mental health. The claimant confirmed that she had been in contact with PAM Assist to arrange counselling which the prison was prepared to fund.

69. Mrs Smith's email of 18 January 2020 was not copied to the claimant. The claimant emailed on 22 January 2020 to express her appreciation for Mrs Smith's support. "*I honestly couldn't thank you more"* is how she put matters. We refer to page 266.

70. In cross-examination, it was put to Mrs Smith by the claimant that there appeared to be a tension between what she said in paragraph 7 of her witness statement on the one hand and the contents of the email at page 264 on the other upon the question of mentoring. In paragraph 7 of her witness statement, Mrs Smith said that the claimant *"did not feel she needed a mentor"* whereas in the third bullet point on page 264, she says (as we have observed) that she was happy to have a mentor but felt that one would have been more useful at an earlier stage.

71. This was a point well made by the claimant. Mrs Smith readily accepted there to be a contradiction. Mrs Smith said before us in evidence that the claimant was *"ambivalent"* upon the issue of mentorship. Mrs Smith took the view that the claimant's position that she would have one if offered but that one was not really needed at that stage.

72. When the claimant was asked about the position and was taken to page 264, she said that she *"was happy to have a mentor, Governor Ripley was sorting out counselling and was arranging it. I'd never had one."* It was put to her by Mr Webster that the claimant was not positively saying that she wanted one but rather was saying that she would take one if offered. The claimant said that she, *"was of the understanding that Governor Ripley was arranging it, I appreciated Kirsty Smith's involvement."*

73. In paragraph 238 of her witness statement, the claimant says that she and Mrs Smith (referred to in the statement by her maiden name of Kemp) "*discussed the prospect of a mentor and I stated I was happy to have one. I'd seen how important this was whilst working in the segregation unit and wished that I would have had that support when I first started."*

74. We do not accept the respondent's case that the claimant eschewed a mentor in January 2020. On the other hand, it is understandable that Mrs Smith formed the impression that the claimant was somewhat ambivalent about matters as even on the claimant's own case she was not positively asserting that she needed a mentor. It seems to us that to some degree the claimant took the view that the ship had sailed and that a mentor was required at an earlier stage. That said, the claimant had told Mr Mahoney on 4 January 2020 that she still had been assigned no mentor. She would not have raised that had she not needed one or, at the very least, felt that one would be beneficial.

75. Mr Mahoney appears to have recognised this as on 17 January 2020 he sent an email to Kirsty Smith (amongst others) saying that, "*it is imperative that in terms of best supporting her progression we make sure we give her all the assistance she needs eg OHA-OHP referral, stress risk assessment, formal mentoring programme etc."* We refer to page 265.

76. On 21 January 2020 a security incident occurred. This ultimately led to the claimant's dismissal. The incident occurred at around the time of the tea-time lock up that day. Concerns were raised that the respondent's procedures for the security of gates and locks as set out in the Governor's Order had not been followed. Further, the claimant had signed the roll in circumstances where she had assumed without checking that a category A prisoner was in his cell. This individual is serving a life term for murder.

77. Mr Dyson was appointed to investigate the incident on 27 January 2020 (page 278). Jennifer Willis, the commissioning manager, instructed Mr Dyson that she was appointing him *"to investigate the circumstances surrounding an allegation that staff failed to secure cell C2-03 before reporting the landing roll correct at approximately 16:35 hours on 21 January 2020."*

78. Mr Dyson's report dated 24 February 2020 is at pages 314 to 424. The claimant was interviewed by him on 6 February 2020 (pages 331 to 335). The claimant had in fact undergone a short period of sickness absence between 28 January and 3 February 2020 prior to the interview.

79. Shortly after her interview with Mr Dyson, the claimant was assessed by Julie Reilly, occupational health advisor. Her report is at pages 312 to 313. The report was commissioned by Kirsty Smith.

80. Julie Riley opined that the claimant was fit for work *"as she is still functioning well on a daily basis."* She recommended the claimant to contact work-based counselling service for further support. She recommended that ongoing management investigations be concluded as soon as possible. As for current outlook, it was reported that the claimant "*has a history of mental vulnerability therefore further occurrences of mental ill health could occur in the future if exposed to known triggers. However, ongoing effective support from her GP, early access to counselling services, healthy self-care*

strategies and good management support are all likely to help reduce the impact of any such occurrences on her overall health and work." She considered that the claimant would be considered a disabled person for the purposes of the 2010 Act.

81. Mr Dyson interviewed all those involved in the matter. The list of interviewees is at page 321.

82. At her interview held on 6 February 2020, the claimant was again accompanied by Kimberley Oxley.

83. The claimant explained that that day she was carrying out her regular duties as a primary care officer. She then returned to the C wing in order to assist with the locking up of prisoners ready for the tea-time roll check.

84. She was instructed by her colleague senior officer ('SO') Brown to assist upon the *"twos".* (This is a reference to the second floor landing). The claimant told Mr Dyson that she was checking one side of the twos landing. She noted that the Category A prisoner was in the servery where he works. He asked her if he could have "*two more minutes"* to finish his tasks to which she replied that he may. The individual in question lives in Cell C2-03. The claimant worked her way down one side of the twos landing. She says*, "I didn't even look at [cell] 3, because I knew that [the prisoner] was in the servery.*"

85. Mr Dyson then asked the claimant where she thought the prisoner was when she signed for the roll to confirm that all of the prisoners were present and correct. She says, "*When I signed for the roll I believed he was in his pad locked behind his door because the servery is supposed to be supervised. The grab bags are given out at that time so I was under the impression when I was beginning the count that the remainder of the staff that should have been supervising that area would have put [the prisoner] behind his door, because I'd seen him, I knew he wasn't an escape risk, it wasn't a question of he being on the landing or not, it was a case of he's finishing his bits in the servery."* Kimberley Oxley then intervened to say that *"[the claimant] signed for the roll she has accounted for [the prisoner] because she's seen him in the servery."*

86. Mr Dyson put it to the claimant that, *"When you sign for a roll check your signing that you know that prisoners are secured in their cells. If you've got a different view of that tell me and then."* He then made reference to the Governor's Order.

87. The claimant then referred to there being a lack of staff on the wing. She said that she and Jane Walker were undertaking a task that needed to be done by three members of staff pursuant to the Governor's Order.

88. Mr Dyson put it to her that she still signed the roll without having checked that all of the prisoners were properly accounted for. The claimant said*, "I admit that, that is where I've gone wrong. I should have double checked that [the prisoner] was behind his door before I signed the numbers, I'm not disputing that but obviously I've signed for them at the time because they wanted the numbers getting in and cos I'd seen him and knew he was accounted for, the wing sterile gates have been locked, I knew that there was nowhere for him to go."*

89. Mr Dyson then raised a concern that the prisoner had not been accounted for and he was a Category A prisoner. The claimant said*, "But I'd seen him with my […]he lives two doors away from servery. I'd seen him with my own eyes and I expected that the people who were supervising that area were to put him behind his door, because otherwise if I'd got to three and waited for it, we'd have been late putting the roll in because we'd been waiting for just [the prisoner] and then you've still got to count the remainder of …"*

90. Jane Walker was interviewed on 16 February 2020. She observed (at pages 360 and 361) that there were no officers on the twos landing at tea-time lock up time*, "which I've never seen before."* Jane Walker has 29 years' experience of working in the prison service. She went to assist with the locking up. The only other person engaged in the task was the claimant. Jane Walker was due to go home and was allowed to do so after she had locked prisoners up on one side of the landing. She described the landing as being *"like a ghost ship".* She observed that three members of staff should have been undertaking the locking up in accordance with the Governor's Order.

91. Within Mr Dyson's report is the roll call log signed by the claimant that day. This is at page 416. We can see that she signed the log for the 16:45 lock up for landing C2 confirming there to be 36 prisoners accounted for.

92. On 20 April 2020, the Governor's Order issued on 20 February 2018 was reiterated (pages 435A and B). This corroborates our earlier finding of the importance to which the respondent attaches compliance with it.

93. Returning to the disciplinary process, on 11 March 2020 the claimant was notified that disciplinary proceedings were to be taken against her arising out of the incident of 21 January 2020. We refer to pages 430 and 431. A more detailed letter was sent to her on 19 March 2020 (pages 433A and 433B).

94. In the letter at pages 433A and B, Mr Wheatley wrote to the claimant to say that she would face disciplinary proceedings upon the following allegations:

    (1) Breach of security: that you failed to secure cell C2-03 before reporting the landing roll correct at approximately 16:35 hours on 21 January 2020.

    (2) Failure to follow order/instructions: that you failed to comply with the process laid down in the LSS instruction L1.2.04 and Governor's Order 001/2018. [We interpose to say that the order in question is that within the bundle at pages 154 and 155].

95. Mr Wheatley went on to say that, *"These charges are being dealt with under gross misconduct due to you already being on a live 6 month written warning at the time of the alleged incident for leaving a gate open in the healthcare centre which expired on 3 March 2020".* Mr Dyson's investigation report was included. The claimant was directed to the conduct and discipline policy. That policy was in the bundle within the policies section in tab C.

96. The incident which occurred in January 2020, Mr Dyson's investigation and Mr Wheatley's decision to move matters on to a disciplinary hearing coincided of course with the onset of the pandemic. On 21 March 2020 the claimant was sent a letter by the NHS identifying her as someone at risk of

severe illness should she catch coronavirus. She was therefore advised to shield for a period of 12 weeks. The relevant letter is at page 434.

97. On 3 April 2020, the claimant wrote to Mr Wheatley to confirm that she accepted the allegations against her as true. She asked that account be taken of *"the attached statement".* Her letter is at page 435. The attached statement setting out her mitigation is at pages 441 to 445. It appears that this was emailed by her to Mr Wheatley's PA on 27 April 2020 (page 441).

98. In the mitigation statement, the claimant accepts the allegations against her to be true. She says that, *"Although I mention other staff, I am in no way shaking off any responsibility or blaming/involving anyone else. I accept that the allegations are my sole fault/responsibility and that I made a huge and avoidable mistake by signing for the landing roll without checking myself. I can't express in enough words how sorry and ashamed I am of the situation. I would just please ask that the following issues to be considered."*

99. She then says in the statement that she saw the prisoner in question in the servery. Directly opposite the servery were around half a dozen members of staff. She expected that they would ensure the prisoner was locked in his cell. She says, "*As the CCTV footage shows, I prove and count cells C2-01, C2-02 and then I don't even look at cell C2-03 as I know that the prisoner in question is in the servery (this location is where the Cat A prisoner lives) and then continue as normal with my account by proving and counting."* She says that she signed for the numbers upon the roll because she *"believed the prisoner to be secured behind his door".* She goes on to say, *"I completely accept and feel embarrassed, ashamed and frustrated at myself that I simply didn't personally go and check the prisoner's door prior to signing, as I then would have been aware that this wouldn't have been carried out."*

100. She raises the issue of being short-handed on the twos landing. This left her "*wondering who was actually allocated to the twos landing in the first place, and why they weren't assisting myself and Officer Jane Walker."*

101. The claimant said in the mitigation statement that she *"felt under pressure in order to get the job done as I was aware that the numbers needed to go in – on interview with Miss Blackburn and Governor Dyson, Miss Blackburn explained that it was fine for the roll to go in a little later if necessary, and in hindsight I explained that I could have waited at the prisoner's door, before completing the remainder of the roll, however skipping the wing workers and coming back to them is something we often do as they are they are the last to lock up."* Echoing Jane Walker's sentiment, the claimant said that the twos *"appeared like a ghost town this particular shift."*

102. The claimant said that she "*will always go out of my way to help my colleagues."* She then airs a suspicion that others may take advantage of this.

103. She says that on the morning of 21 January 2022, while working at primary care, she had encountered the prisoners with whom she had had a long running issue. She found this to be a frustration as was the *"rapid declining teamwork/spirit recently amongst the staff on C Wing."* She commented

that she was frustrated by the fact that other staff members were sitting around while she got on with the job of locking up that day.

104. She concludes that, *"I would like to reiterate that I in no way want to involve/blame/bring other staff into this investigation. The mistake is my own, and was completely avoidable, but I would like please to categorically state that it was an honest mistake of not double checking myself – there was never and would never be any wilful negligence from myself as a member of staff in the security of the establishment …"*

105. Notwithstanding the advice received from the NHS, following receipt of her shielding letter, the claimant continued to work and not shield. She says that she wanted to continue working for the sake of her own mental health, to help the respondent and to prove her commitment to the role. There is no reason to doubt these sentiments to be genuine. Unfortunately, the claimant's resolve to carry on working was short lived because she was sent home from work during a night shift on 9 April 2020 following what is described as a *"breathing incident."* She was required to shield for the remaining weeks. Thankfully she tested negative for coronavirus.

106. This, of course, caused a delay with the progress of the disciplinary procedure. The claimant was scheduled to return to work on 1 September 2020. In anticipation of her return, Mr Wheatley sent her a letter inviting her to attend a disciplinary hearing to take place on 9 September 2020. The letter of invite is dated 13 August 2020 (pages 455 and 456).

107. The transcript of the disciplinary hearing held on 9 September 2020 is at pages 469 to 510. Mr Dyson attended in order to present the respondent's case. The claimant was accompanied again by Kimberley Oxley. Mr Brown and Jane Walker attended as witnesses.

108. Mr Dyson presented his report. The claimant had no questions for him after she was invited by Mr Wheatley to raise questions of Mr Dyson about *"who was interviewed, who wasn't, any issues or concerns about the conduct of [Mr Dyson's] investigation.'*

109. In the course of his cross-examination, it was put to Mr Dyson by the claimant that on the day of the incident in January 2020 she had still not been assigned a mentor, had had to have time off due to personal issues and had been accused of corruption and yet those features did not appear in Mr Dyson's report. There is no dispute that Mr Dyson was aware of the claimant's mental health issues and the corruption allegations against her. Mr Dyson replied that, *"Those factors were not brought into my investigation. I was assessing you on that incident [alone]. It's for a hearing authority to look at other factors."*

110. The claimant confirmed during the disciplinary hearing that she accepted the allegations. Mr Wheatley then took her to the Governor's Order. The claimant was then invited to tell Mr Wheatley what had happened on the day in question.

111. The claimant confirmed that she had returned from her duties in primary care and had walked into the twos landing and there weren't any staff anywhere. She's agreed to help with the twos and started locking the prisoners up. She said (at page 478) that she felt frustrated that she had returned from her role and had offered her assistance which others do not

do. She said that she attended to the locking up process along with Jane Walker. Mr Wheatley observed that Jane Walker too had also been attending to her other duties. She had been allowed to go leaving the claimant on her own.

112. The claimant confirmed (as she had with Mr Dyson) that she did not *"bother to look at C2-03"* having encountered the prisoner in the servery and allowing him two minutes to attend to his tasks. She says that *"my belief when I got to C2-40 and had completed my account and got the person who was supervising him, or should have been supervising him, had taken him behind his door, locked his door, proved his door and he was happy that he was in there. That's why I then signed the book."* Mr Wheatley asked her if she had checked cell C2-03. She confirmed that she had not.

113. She confirmed that she should personally have checked C2-03 before signing the roll. She complained that others were in the vicinity but not assisting with the task. Perhaps unsurprisingly, this caused the claimant some frustration (page 481). The claimant said that she did not feel it her position to address her senior officer, ask for assistance or query what she had been asked to do. She says that she "*just go on with the job to the best of her ability at that time."* That said, she took responsibility for signing the roll. She also felt that she was under some pressure "*to finish everything"* (page 483). Mr Wheatley asked why she had signed the roll when she felt *"frustrated and annoyed that [the claimant] had been left on her own."* She replied that she "*felt under pressure to sign, they wanted the numbers in."*

114. After hearing evidence from Mr Brown and Miss Walker, Mr Wheatley summarised the position (page 501). He said that it had been established that the claimant was aware of the process for doing a roll check and that she had not done it and "*because you were working on that landing alone the only other person who had been visibly working on that landing with you had gone [that being Jane Walker]. You weren't in a position at the point that she left to conclude that process because you couldn't do it in the way it's supposed to be done."*

115. Mr Wheatley said it was reasonable for the senior officer to assume that if signing for the numbers the process had been followed. The claimant argued that she was simply there to assist and that the senior officer would have known that those allocated to the twos were with him and not actually undertaking the task. Mr Wheatley accepted there to be no dispute that only the claimant and Jane Walker were engaged in locking the landing up. The claimant confirmed that she perceived herself to be under pressure to sign the roll. It appears from the transcript that she accepted that no one expressly asked her to sign it and that this was simply a perception upon her part (page 503).

116. Mr Wheatley said that he was concerned that the Governor's Order had not been complied with. He observed that the procedures are there because the respondent "*locks up the most dangerous prisoners in the country."* We refer to page 504.

117. Before arriving at his decision, the claimant was asked if there was anything that she wished to say by way of mitigation. At this point, she referred to the mitigation statement which she had submitted in April 2020. This was

copied and pasted into the minutes of the disciplinary hearing transcript at pages 504 to 507.

118. The claimant said in evidence before us that she was concerned that Mr Wheatley had not read the mitigation statement before the disciplinary hearing and during it he took only around 30 seconds or a minute to do so. Mr Wheatley told us that he had not read it prior to the disciplinary hearing. He said that he may have taken around a minute to read it at the hearing. He said that he looked through it to ascertain whether it contained any issues which had not been raised by her earlier during the course of the hearing.

119. The claimant makes no reference in the mitigation statement to her mental health issues. During the course of Mr Wheatley's evidence, the Employment Judge asked Mr Wheatley whether he was aware of the events from the claimant's past. He said that he knew of the fact of the claimant's partner's death and that she had been moved to F Wing as a supportive measure. He had not read the occupational health reports upon the claimant's file.

120. In paragraph 23 of his witness statement, Mr Wheatley says that, *"at no point, including in the hearing or in her statement, did Miss Duggan say any health concern caused or contributed to the conduct in question."*

121. It is noteworthy that this is not argued as a factor in her mitigation statement. There is no record of her or her POA advisor raising this as an issue during the course of the disciplinary hearing. This is in fact an issue which arose at the hearing before Employment Judge Rogerson on 8 July 2021. In paragraph 11.4 of her reasons, Employment Judge Rogerson notes that the claimant "*was unable to explain why she/her union representative did not take the opportunity before dismissal to inform the employer if her ill health was a mitigating factor or had caused the admitted misconduct or might require further enquires to be made."* Employment Judge Rogerson goes on to say that, *"The claimant appealed against the dismissal decision and did not raise any of those matters in the appeal."* During the hearing, the claimant said that she had been discouraged by the POA from raising the issue. That is of course a matter between the claimant and her trade union.

122. Mr Wheatley then imparted his decision. The record of this is at pages 508 and 509. He referred to the fact that at the material time the claimant was the subject of a written warning following the incident of 16 May 2019. He observed that the cell door incident of 21 January 2020 was of a similar nature, being a breach of security in relation to failing to lock gates and doors. He said that such was an important factor when considering his ability to trust employees to do their job. This is all the more so in the environment in which the respondent operates. The individual in question is *"one of the most risky prisoners in the country and someone who the public have a legitimate expectation … to ensure that escape is made impossible"* and that expectation was not met on that occasion. Mr Wheatley concluded that he could no longer repose trust in the claimant to do her job conscientiously and effectively and therefore decided to dismiss her. She was afforded a right of appeal.

123. After the decision was imparted, the claimant said that she had *"never had any support, I lost my partner, none of the care team spoke to me."*

Mr Wheatley was of course aware of these matters. The claimant was still not seeking to link her performance on 21 January 2020 with her mental health issues. The claimant also alluded to the corruption allegations against her.

124. Mr Wheatley wrote to the claimant to confirm his decision on 14 September 2020 (pages 511 and 512). He said, *"I had to consider my ability to trust you to do your job as a prison officer and whether or not I can trust you not to do it again and, on this occasion you've done it again. In this environment the risks are substantial and on this occasion the person involved was a Category A prisoner who is someone who is a danger to the public, the police and the security of the State, he is one of the most dangerous prisoners in the country. The public have a legitimate expectation that with a professional body of staff effectively resourced to do a job, we will be able to do all the things that are needed to ensure that escape is made impossible and you haven't done that on this occasion. So, you've let the public down in what is our primary duty and you have done that on the back of a previous warning for a similar breach, that leaves me in a position where I cannot trust you to do your job conscientiously and effectively and as a result of the hearing I dismissed you from the prison service."*

125. Although the Tribunal were not expressly referred to the relevant part of the policy, it is not in dispute that continuity of employment was preserved pending the outcome of the claimant's appeal. (Hence, the effective date of termination was agreed as 3 November 2020. That was the date upon which Mr O'Malley dismissed the claimant's appeal).

126. For the purposes of the respondent's disciplinary procedure, gross misconduct encompasses conduct of a nature that makes any further relationship and trust between the parties untenable. We refer to pages 579 and 580. It was upon this basis that Mr Wheatley decided that the claimant should be dismissed for gross misconduct.

127. On 22 September 2020 the claimant appealed against Mr Wheatley's decision. She appealed upon the basis that the penalty was unduly severe and that the original finding was against the weight of evidence. Her letter is at page 516. The claimant was invited to attend an appeal hearing to take place on 28 October 2020. Mr O'Malley's letter to this effect dated 28 September 2020 is at pages 520 and 521.

128. The claimant expanded upon her grounds of appeal on 1 October 2020 (pages 523A and 523B). She says that she was the only member of staff to be interviewed and investigated even though she was the only person who did anything. Presumably she means by this that she was the only person who did anything on the day in question (except for Jane Walker). She also raised a consistency issue contending that two officers have recently been investigated for a failure to follow the Governor's Order following which a prisoner was left unchecked and who received a lesser penalty.

129. The appeal hearing minutes are at pages 528 to 531. The claimant was again represented by Kimberley Oxley of the POA. Mr O'Malley was accompanied by a HR caseworker and Gemma Turner who acted as a note taker.

130. The claimant again said that she had not been detailed to work upon the twos landing and was only there to help out. She had expected that the other staff who were detailed to do the locking up that day would have been interviewed.

131. Mr O'Malley said (at page 529) that he was clear that "*This incident is about whether security was followed and not if people followed their detail."* He said that the claimant *"stood out in this instance as she is the one who signed the roll when she should not have done."* The minutes record the claimant as accepting this *"but explained that she genuinely believed that the servery staff had locked up the prisoner as the server itself was locked and there had only been the one prisoner left for the servery staff to return to his cell."* She said that "*when looking at the door as it had been pushed to it did look locked and [the claimant] was under pressure to sign for the roll."* Kimberley Oxley made it clear that the claimant accepted her responsibility for the matter "*but strongly believes that other staff should have been interviewed."*

132. Mr O'Malley wished to investigate the issue of inconsistency of treatment further. Mr O'Malley adjourned in order to consider the matter further.

133. On 3 November 2020 Gemma Turner emailed Mr O'Malley with her report about the other cases cited by the claimant. She had contacted Mr Wheatley's PA. It transpired that there was indeed a security breach involving two officers who had each received a 12 months' final written warning. After not insubstantial efforts, it was ascertained that neither of them had a live written warning at the time of the incident in which they were involved. At any rate, there was no evidence that such was the case.

134. Mr O'Malley says in paragraph 13 of his witness statement that, "At no point during the appeal process did Miss Duggan say that mental health caused or contributed to her misconduct. She only referenced that she took on too much and was under personal and work related pressures."

135. Mr O'Malley wrote to the claimant on 3 November 2020 (pages 536 and 537). He rejected her appeal.

136. He said that*, "the key reason for your disciplinary sanction is that you were the only officer who reported that all prisoners were locked in their cells by signing the landing roll, which you accepted full responsibility for in your statement which you presented in your disciplinary hearing on 9 September 2020."* He said that he was unable to establish the claimant's claim that either of the two officers in question in relation to the other incident had live warnings on their files.

137. Mr O'Malley acknowledged the claimant's good intentions on 21 January 2020. However, he said that he could not, *"ignore the severity of the offence which breached Governor's Order 001/2018 and may have put your colleagues and other prisoners at risk."* He went on to say that, "*at the time of the incident you already had a live warning for a similar offence on your record. Given the potentially grave implications of failing to manage security risks of this kind within a high security prison such as HMP Wakefield I agree with the Governor that this second security failure on your part renders the breakdown of trust incurred irreparable."* He confirmed her last day of service to be 3 November 2020.

138. The following evidence was given by the claimant during the course of her cross-examination:

(1) The absence of a third member of staff to undertake the locking up of the twos was not causative of the claimant signing the roll.

(2) That her mistake in signing the roll was avoidable. She accepted that she was not saying that she was too ill to follow the procedure or policy. She said that her mental health was not "*a direct reason I couldn't carry it out."* She said that she was struggling at the time due to her mental health. She said that she was *"trying to survive from one day to the next, get it done and go home."*

(3) She accepted that she had done the checks on other occasions and was well enough to have done so. She accepted that she had not said to the respondent that she was not well enough to complete the tasks on 21 January 2020.

(4) She did not think it was necessary to raise her mental health issues in her mitigation statement. She said that she considered her mitigation statement *"alluded"* to them.

(5) The claimant was taken to her grounds of claim. These commence in the bundle at page 17. This refers to the claimant being party to overhearing a telephone discussion about cell door C2-03 being insecure. This telephone conversation occurred on the same day of the incident. The claimant says in her grounds of claim (at page 35) that *"Immediately as I heard this information I was incredibly upset as I knew that I had signed for the landing and so I would be held accountable."* She then says that she became upset, went to the ladies' toilets and was comforted by a female officer. The claimant accepted this to be recognition on her part that she felt responsible. Similarly, on page 42 of the bundle, she says that "*I never expected to receive no punishment at all".* This is a very fair and candid acknowledgement by the claimant of her responsibility. Indeed, in her closing submissions he said that she never claimed that she should receive no punishment. She said, *"I took responsibility – I should have done better."*

(6) The claimant accepted that an assigned personal mentor would not be standing over her checking her every move. Nor would the mentor (or for that matter the claimant) be acting in a supernumerary capacity. While the claimant accepted this, she said that had she had a mentor she may have had the confidence to protest that signing the roll call did not "*feel right".* She said that a mentor may have vested her with more confidence.

(7) The claimant accepted that she had undertaken lock up duties many times and that a mentor would not be able to tell her something about the process with which she was unfamiliar. The claimant acknowledged that having a mentor to *"stand over her"* could not be considered to be a reasonable adjustment.

(8) The claimant accepted that the respondent was judging her by the standards of a prison officer undertaking the roll. The claimant said that she considered that she was being judged by reference to the standards of an experienced prison officer. She said that she could not perform to

the *"respondent's standard"* upon the basis that, *"she did not have support and my anxiety ran wild, it's a stressful environment."* This issue appears to be a reference to Mr Dyson's findings that the claimant was guilty of wilful negligence being a disregard for the process set out in the Governor's Order or a conscious indifference as to whether that had been carried out. Mr Dyson observed in evidence that she felt unsupported "*but did not ask for help which as an experienced officer she would have been expected to do."* Accordingly, there is some merit, in our judgment, to the claimant's complaint that she was being held to the standards of an experienced prison officer.

139. Mr Dyson considered the claimant to be experienced upon the basis of her two years' length of service (by reference to the standards of the respondent at the current time, from which we infer there to be a high attrition rate).

140. In his evidence given under cross-examination, Mr Wheatley said that there were no alternative posts which the claimant may have been assigned. He said that all of the rolls at HMP Wakefield are key holding. He said that there were *"no roles in the prison that wouldn't require [the claimant] to draw keys."* Even those such as teachers or nurses are issued with keys to enable them to move around the prison.

141. Although not an issue raised by the claimant, the issue arose as to an apparent tension between the respondent's decision to end her employment upon the basis of lack of trust on the one hand and permitting the claimant to fulfil her role pending the outcome of the disciplinary hearing on the other. Unsurprisingly, the respondent had not called any evidence upon this issue given that it was only raised by the Tribunal in the course of the hearing. The claimant did continue to work after 21 January 2020 until she was dismissed albeit, that there was a significant period of time when she was absent from work through ill health. Effectively, she was absent from 9 April 2020 until September 2020. Mr O'Malley surmised that the decision not to suspend may have been upon the basis that she may be trusted to maintain a focus while at work in the short term. Indeed, the warning of September 2019 appeared to have had that effect until the lapse of January 2020. He said that suspension arises usually in cases such as those involving corrupt behaviour and sexual deviancy but is less common for a breach of security. He said that this was a judgement call made by the commissioning officer at the time.

142. This concludes our findings of fact.

The issues in the case

143. The relevant issues are set out in the list of issues at pages 132 to 136. These are as follows:

1. The claimant is making the following complaints:

1.1. Unfair dismissal (section 98 Employment Rights Act 1996);

1.2. Discrimination arising from disability (section 15 EQA) about the following:

1.2.1. Dismissed for misconduct which was caused by her anxiety and depression;

1.3. Failure to make reasonable adjustments (sections 20 and 21 EQA) about the following:

1.3.1. The failure to provide a mentor from September 2019.

The issues

2. The issues the Tribunal will decide are set out below:

1. Time limits

1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 26 October 2020 may not have been brought in time.

1.2. Were the discrimination complaints made within the time limit in section 123 EQA? The Tribunal will decide:

1.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the Act to which the complaint relates?

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

1.2.3. If so, was a claim made to the Tribunal within three months (plus early conciliation extension) at the end of that 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:

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

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

2. Unfair dismissal

2.1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.2.1. There were reasonable grounds for that belief;

2.2.2. At the time the belief was formed the respondent had carried out a reasonable investigation;

2.2.3. The respondent otherwise acted in a procedurally fair manner;

2.2.4. Dismissal was within the range of reasonable responses.

3. <u>Remedy for unfair dismissal</u>

3.1. [We shall not set out the remedy issues here. By consent, it was agreed that the Tribunal would only consider those remedy issues arising from the application of the principal in Polkey and any issue arising out of the claimant's conduct at this stage];

4. <u>Disability</u>

4.1. Disability is conceded by the respondent and specifically anxiety and depression.

5. <u>Discrimination arising from disability</u>

5.1. Did the respondent treat the claimant unfavourably by:

5.1.1. Dismissing her (for misconduct);

5.2. Did the following things arise in consequence of the claimant's disability:

5.2.1. Her misconduct arising in consequence of her anxiety and depression?

5.3. Was the unfavourable treatment because of any of those things?

5.4. Was the treatment a proportionate means of achieving a legitimate aim?

5.5. The Tribunal will decide in particular:

5.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2. Could something less discriminatory have been done instead?

5.5.3. How should the needs of the claimant and the respondent be balanced?

5.6. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6. <u>Reasonable adjustments</u>

6.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what day?

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

6.2.1. That the claimant will fulfil her job roll to the standard of an "experienced" prison officer?

6.3. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was not able to perform at that level, could not challenge the behaviour of her colleagues, got into difficulties and was dismissed for misconduct?

6.4. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5. What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1. A mentor.

6.6. Was it reasonable for the respondent to have to take those steps and when?

6.7. Did the respondent fail to take those steps?

7. <u>Remedy for discrimination</u>

[We shall not set these out here as by consent it was agreed that any remedy issues should be dealt with at a subsequent remedy hearing]

The relevant law

144. We shall now turn to a consideration of the relevant law. We shall start with the consideration of the claimant's unfair dismissal complaint.

145. No issue arises that the claimant has a right to complain that she was unfairly dismissed. There is also no issue that the claimant was dismissed. Accordingly, it is for the employer to show the reason for the dismissal and that the reason is permitted by the statute.

146. The permitted reason relied upon in this case relates to the conduct of the claimant.

147. If the employer establishes that the reason for the dismissal is permitted by statute, then the Tribunal will determine whether the dismissal was fair or unfair in all the circumstances. The Tribunal must have regard to the size and administrative resources of the employer's undertaking and have regard to the equity and substantial merits of the case.

148. There is a burden upon the employer to establish the reason for the dismissal. However, the burden in relation to reasonableness and fairness is neutral.

149. The Tribunal will consider whether the employer had reasonable grounds to sustain the belief that the employee had committed the conduct in question. The Tribunal will take into account not only whether the employer had reasonable grounds for dismissing the employee but also whether the employer adopted a fair procedure in dismissing them.

150. The correct approach for the Tribunal is to consider whether the employer's actions, including the decision to dismiss, fell within the band of responses which a reasonable employer could adopt. The Tribunal must not substitute its view for that of the employer and judge whether the

employer has taken the correct approach. Rather, it should recognise that different employers may reasonably react in different ways to a particular situation. A finding of unfair dismissal should only be made where an employer's conduct and decision-making falls outside the range of reasonable managerial responses to the situation in question. The question therefore is whether dismissal fell within the range of reasonable responses taking into account that different employers might reach different decisions.

151. The band of reasonable responses test does not apply only to the decision to dismiss. It also applies to the procedure followed by the employer. This includes in a conduct case the investigation and the employer's findings and conclusions.

152. Not every procedural error will render the decision outside the range of reasonable responses and unfair. The Tribunal must look at the procedure carried out by the employer as a whole. Deficiencies may be corrected through a thorough and effective appeal process.

153. In conduct cases, a starting point will be the formulation adopted in **British Home Stores Ltd v Burchell** [1990] ICR 303 where it was said that, "*What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question (usually though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."*

154. In addition to that test, for the dismissal to be fair it must have been reasonable for the employer to have dismissed the employee for the misconduct in question. In other words, dismissal must be a fair sanction and within the range of reasonable responses. Although employers should consider each disciplinary case on its individual merits, on occasion a dismissal may be held unfair on the ground that the dismissed employee has been treated inconsistently, in that the employer has on other occasions dealt more leniently with similar instances of misconduct. This will only be the case however if the cases in question were truly parallel and sufficiently similar.

155. A fair procedure must of course be followed. The employer should investigate the matter fully and give the employee an opportunity to explain themselves. The reasonableness of the investigation may be assessed by reference to the way in which the employee puts their case during the internal procedure. That said, the question remains whether the investigation was a reasonable one.

156. A decision by an employer not to suspend an employee will not render a subsequent decision to dismiss for misconduct to be unreasonable. As

was said in **East Berkshire Health Authority v Matadeen** [1992] UK EAT/599 otherwise it would follow that employers would be minded to suspend at every juncture even though full investigation had not taken place. Suspension is undoubtedly a stigma. Good industrial practice does not require suspension in every case. It was said by the EAT in that case that, *"it would be extremely unwise, save in obvious cases, to draw any inference or conclusion from the suspension or lack of suspension. It would discourage management from treating employees with a compassion and acting in a way which they thought was reasonable in the circumstances."* Suspension will usually be a matter of discretion for management.

157. Should the Tribunal uphold an employee's complaint of unfair dismissal, then the Tribunal will consider remedy. The primary remedies are re-employment (in the form of reinstatement or reengagement). Failing re-employment, then compensation will be awarded. This will be in the form of a basic award (calculated in much the same way as a redundancy payment) and a compensatory award. The latter shall be in such amount as the Tribunal considers just and equitable having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

158. Where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. The impugned conduct must be causative of the dismissal. The conduct must be culpable or blameworthy and such to render it just and equitable to make a reduction.

159. A basic award may also be reduced on account of conduct. Where the Tribunal considers that any conduct of the complainant before the dismissal is such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal will so reduce the award. Again, the conduct in question must be such as to be culpable or blameworthy. However, it need not be conduct causative of the dismissal (unlike with the compensatory award).

160. Upon a consideration of what it is just and equitable to award an employee, the Tribunal may take into account whether any procedural failures made any difference to the outcome. The Tribunal may also take into account the likely longevity of the employment in any case. This is the principle derived from **Polkey v AE Dayton Services Ltd** [1987] UKHL 8.

161. We now turn to a consideration of the complaints brought under the 2010 Act. We shall start with the consideration of the complaint brought under sections 15 and 39(2) of unfavourable treatment for something arising in consequence of disability.

162. By section 15 of the 2010 Act, a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This provision will not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

163. A claimant needs to establish that they have been unfavourably treated. There is no issue in this case that the claimant was unfavourably treated by being dismissed. No comparator is required.

164. The unfavourable treatment must be because of a relevant *"something"* and that *"something"* must arise in consequence of the disability.

165. In **Pnaisier v NHS England** [2015] UK EAT/137/15 guidance was given upon the correct approach to section 15 cases. The Tribunal must firstly identify whether there was unfavourable treatment and by whom.

166. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of the decision makers. The *"something"* that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than a trivial) influence on the unfavourable treatment, and so amount to an effective reason for it.

167. The Tribunal must then determine whether the reason is something which arises in consequence of the claimant's disability. A loose causal link may be established by the complainant. The second stage of the causation test involves an objective question and does not depend on the thought process of the alleged discriminator. The required state of mind is simply that the unfavourable treatment should be because of the relevant something. There is no requirement that the alleged discriminator should have known that the relevant something arose from disability.

168. An employer will not be liable where the employer did not know and could not reasonably have been expected to know that the employee had a disability. We do not understand that the knowledge defence (as it is sometimes referred to) is being run in this case. That must be right as a number of senior individuals within the respondent's organisation knew of the claimant's mental health issues.

169. Should the claimant establish that she has been unfavourably treated for something arising in consequence of disability, then it is open to the respondent to justify that unfavourable treatment. The burden is upon the respondent, when seeking to run a justification defence, to show that the treatment of the complainant is a proportionate means of achieving a legitimate aim.

170. The aim in question must be legitimate and unrelated to any discrimination based on any prohibited ground. The means or measure adopted to achieve the aim must be capable of so doing and must be proportionate. The objective of the measure must be sufficiently important to justify the limitation of a protected right. This involves a consideration of whether a less intrusive measure could have been used and balancing the severity of the measure's effect upon the complainant against the extent that the measure will contribute to the achievement of the aim from the prospective of the employer.

171. The test to be applied by the Tribunal is objective. The Tribunal has to make its own judgment as to whether the measure applied by the respondent is reasonably necessary as a proportionate means of achieving the aim in question.

172. The respondent pleaded the following as legitimate aims:

    (1) Avoiding the risk of further serious security breaches which create a significant risk and pose a danger to the public, police and to national security.

    (2) To avoid the risk of high risk category prisoners having the opportunity to escape from the prison, risking injury and violence to staff and to the public.

    (3) To ensure that security procedures are followed by all staff so that prisoners cannot escape from the prison unit.

    (4) To ensure that the security procedures are followed by all staff so that risks can be identified and managed appropriately.

    (5) To ensure the proper completion of prison records which is important in maintaining security.

    (6) To ensure the respondent can have trust and confidence in staff to follow security procedures and avoid creating situations of significant risk for staff, the public and national security.

    (7) To ensure that staff members can have confidence in their colleagues to fulfil their duties to the highest standard and not put them in situations which pose significant risks to their health and safety.

173. The claimant did not raise any issue that any of these aims are not legitimate. On any view, they plainly are. The question is whether the dismissal of the claimant was a proportionate means of achieving these aims. The balancing exercise must take account of the fact that the decision to dismiss was career ending for the claimant. That needs to be weighed against the aims being pursued by the respondent.

174. The Tribunal must evaluate the employer's legitimate aim and not some other aim that the Tribunal may consider would have been preferable. Where there is no other way of achieving the identified aim, the means will inevitably be proportionate. The employer must convince the Tribunal that they had the legitimate aim. The employer must also however show that it was appropriate and reasonably necessary to adopt the means in question in order to achieve that aim. It must actually contribute to the pursuit of the aim.

175. It will also be relevant to consider whether or not any lesser form of the measure would serve the employer's legitimate aim. It will normally be for the parties to identify possible alternatives although in **Naeem v Secretary of State for Justice** [2014] IRLR 520, EAT it was suggested that a Tribunal might be expected of its own motion to consider *"manifest"* alternatives.

176. The Equality and Human Rights Commission's *Employment Code* sets out guidance on objective justification. The *Code* says that the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. As to proportionality, the *Code* notes that the measures adopted by the employer do not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

177. In **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160, CA, Elias LJ said: "*An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say, allowing him to work part time – will necessarily have infringed the duty to make reasonable adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified*."

178. There are difficulties with conceiving of a case where it would be open to a Tribunal to find that an employer's unfavourable treatment of the claimant because of something arising in consequence of their disability is justifiable as a proportionate means of achieving a legitimate aim if, at the same time, it is established that the employer could and should have made a reasonable adjustment to deal with the substantial disadvantage caused by the claimant's disability. This view is supported by the EHRC in the *Code* which states (at paragraph 5.21) that, "*If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it would be very difficult for them to show that the treatment was objectively justified."*

179. The key point here is that an employer is likely to find it difficult to show that the unfavourable treatment was objectively justified if the reasonable adjustment that the employer failed to make *"would have presented or minimised the unfavourable treatment".*

180. There can however be cases where a complaint is upheld of a failure to make reasonable adjustments but where a section 15 claim in the same case fails. For example, in **Knightley v Chelsea and Westminster Hospital NHS Foundation Trust** [2022] EAT 63 the EAT held that an Employment Tribunal had not erred in concluding that the complainant's dismissal on the grounds of capability did not constitute an act of discrimination arising from disability. The claim that the employer had failed to make reasonable adjustments by refusing to allow the complainant an extension of time to lodge an appeal succeeded. However, the Tribunal found that the appeal would have failed in any event because of the strength of the case for dismissal. There was no realistic alternative to the dismissal of the complainant given the length of time which she had had off work. The Tribunal was therefore entitled to find that the lack of an appeal did not render the dismissal disproportionate notwithstanding the failure to make reasonable adjustments to allow an extension of time for her to lodge it. Conceptually therefore it is possible for there to be a failure to make reasonable adjustments on the one hand while upholding the proportionality of unfavourable treatment for something arising in consequence of disability on the other.

181. We shall now turn to a consideration of the law as it relates to reasonable adjustments. Employers are required to take reasonable steps to avoid a substantial disadvantage where a provision, criterion or practice applied to a disabled person puts the disabled person at a substantial disadvantage compared to those who are not disabled. The word *"substantial"* in this context means "*more than minor or trivial".*

182. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that the particular provision, criterion or practice disadvantages the disabled person. Accordingly, there is no requirement (as there is in a direct discrimination claim) to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances. A comparison can be made with non-disabled people generally.

183. The phrase *"provision, criterion or practice"* is not defined by the 2010 Act. It broadly encompasses requirements placed upon employees by employers. It can extend to formal or informal policies, rules, practices or arrangements.

184. An employer only has a duty to make adjustments if they know or could reasonably be expected to know both that the affected worker is disabled (which is not in dispute in this case) and that they are placed at a substantial disadvantage by the application to them of the relevant provision, criterion or practice.

185. The duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take in order to make adjustments. There is no onus upon the disabled person to suggest what adjustments should be made. However, by the time that the matter comes before the Employment Tribunal, the disabled person ought to be able to identify the adjustments which they say would be of benefit.

186. There is no requirement for the disabled person to show that on balance the adjustment would ameliorate the disadvantage. There merely has to be a prospect that the adjustment may benefit the disabled person.

187. The following are some of the factors which, according to the ECHR *Code*, might be taken into account when deciding what is a reasonable step for an employer to have to take. These are:

- Whether taking any particular step would be effective in preventing the substantial disadvantage
- The practicality of the step.
- The financial costs of making the adjustments and the extent of any disruption caused.
- The extent of the employer's financial or other resources.
- The availability to the employer of financial or other symptoms to make an adjustment.
- A type and size of the employer.

188. Ultimately, the test of reasonableness is an objective one and will depend upon the circumstances of the case. Adjustments may include transferring the disabled person to fill an existing vacancy, altering the disabled person's working hours or providing them with training or assigning a disabled person to a different place of work or arranging home working.

189. By section 136 of the 2010 Act there is a burden upon the claimant to show a *prima facie* case of discrimination. This applies both to the section 15 claim and the reasonable adjustments claim. Once there are facts from

which the Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent to provide a non-discriminatory explanation.

190. By section 123 of the 2010 Act, proceedings must be brought before the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks to be just and equitable. The period of three months starts with the date of the act to which the complaint relates. Conduct extending over a period is to be treated as done at the end of that period.

191. Where the complaint relates to an omission to do something, then failure to do something is to be treated as occurring when the person in question decides upon it. A person is to be taken to decide upon a failure to do something when they do an act inconsistent with it or (where there is no inconsistent act) upon the expiry of the period in which the decision maker might reasonably have been expected to do it.

192. Where the claim arises out of an act inconsistent with the doing of the omitted act then the matter is fairly straightforward, as when time starts to run is clearly identifiable. A more difficult situation arises where the complainant is seeking to argue that there is no inconsistent act, but the employer may reasonably have been expected to do the act in question. This creates a counter-intuitive situation where, upon a consideration of whether a claim is in time or not, it will be in the interests of the employer to argue that they might reasonably have been expected to deal with the reasonable adjustment earlier and in the interests of the employee to assert that the employer had not been unreasonably slow to act.

193. It is of course possible for there to be separate acts of discrimination about the same matter. Where this situation arises, there may be discreet decisions each of which gives rise to a separate course of action. Where an employer fails to make a reasonable adjustment for a disabled employee and then keeps the refusal under review, there will be a continuing act or omission. In **Rovenska v General Medical Council** [1997] IRLR 367 the Court of Appeal held that the time limit begins to run again on each occasion on which the policy is applied. Thus, where a complainant was refused the same request on a number of occasions each refusal caused the three months' time limit to start afresh.

194. It is open to a Tribunal to extend time should it be just and equitable so to do. Time limits are exercised strictly in employment cases. It is for the complainant to convince the Tribunal that it is just and equitable to extend time. The exercise of the discretion is the exception rather than the rule. In considering whether to exercise discretion under section 123 to extend time, all factors must be considered including in particular the length and the reasons for the delay.

195. The Tribunal's discretion to extend time upon an out of time complaint is a wide one. The factors which are almost always relevant are the length of and the reasons for the delay and whether the respondent suffered prejudice. There need not be a good reason for the delay. It is not the case that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature

of any reason are relevant matters to which the Tribunal ought to have regard. However, there needs to be something to convince the Tribunal that it is just and equitable to extend time. Authority for these propositions may be found in the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2019] EWCA Civ 640.

196. Tribunals are vested with a wide discretion when applying the just and equitable test. There needs to be something to persuade the Tribunal that it is just and equitable to extend time. There is no presumption that time will be extended unless the claimant can justify a failure to present the complaint in time. While the exercise of the discretion is the exception rather than the rule, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

197. The Tribunal may take into account any factor which it considers to be relevant. The strength of the claim may be a relevant factor when deciding whether to extend time. In disability cases, the Tribunal may recognise that disabled claimants may find it difficult to comply with the three months' time limit.

198. It is necessary for the Tribunal to weigh the balance of prejudice between the parties. A refusal to extend time will inevitably prejudice the claimant. However, the claimant needs to show more than that the loss of the claim because of the application of the relevant limitation period will prejudice them. If that were to be sufficient, it would emasculate the limitation period. Plainly, Parliament has legislated for relatively short limitation periods in employment cases. The limited period must be applied unless the claimant can convince the Tribunal that time ought to be extended.

199. The other side of the coin is that some prejudice will of course be caused to the respondent if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that. Otherwise, such would emasculate the discretion invested in tribunals by Parliament to consider just and equitable extension of time. One possible ground for extending time is that the complainant was unaware of their right. Another is that they received incorrect advice from their lawyers or advisors. Another factor which may arise is where the complainant has delayed because they were awaiting the outcome of an internal appeal or grievance procedure. However, first exhausting internal procedures will not always justify a delay.

200. That concludes our consideration of the relevant law.

Discussion and conclusions

201. We now turn to a discussion and our conclusions. We shall start with the unfair dismissal complaint. By application of the **Burchell** test, the respondent has plainly established the fact of their belief in the claimant's conduct. Mr Wheatley and Mr O'Malley had the benefit of Mr Dyson's report. They had the benefit of hearing from the claimant.

202. Furthermore, there were reasonable grounds upon which for the employer to sustain a reasonable belief. Much of the claimant's cross-examination of the respondent's witnesses was to the effect that she acted with the

integrity in that she accepted what she had done and took responsibility for it. It is to her credit that she did not shy away from her conduct and accepted fault. In the circumstances, there is no question that the respondent had reasonable grounds to believe that the claimant had failed to comply with the Governor's Orders on 21 January 2020 by both failing to ensure the prisoner was behind the door of his cell and completing the roll when it was inapt to do so.

203. The next issue is whether the employer had carried out as much investigation into the matter as was reasonable in the circumstances. The claimant raised no criticism of the process followed by the respondent save for Mr Wheatley spending a period of only around a minute or so perusing her mitigation statement.

204. There is some merit in the claimant's criticism of Mr Wheatley upon this issue. The mitigation statement ran to four A4 pages of single-spaced typing. Characteristically for the claimant, it was very well written and well set out. Mr Wheatley himself ventured that he had spent around a minute perusing it. At best therefore he skim read it. He also delivered his decision shortly after reading it. Unlike Mr Malley, therefore, he did not adjourn to consider the mitigation points raised by the claimant.

205. That said, we think there is merit in Mr Webster's point that Mr Wheatley was able to digest the points being made by the claimant even with a skim read. There was no material unfairness to the claimant. We think Mr Wheatley is right when he says that she was not raising anything new within the mitigation document other than what she had been saying both to Mr Wheatley at the disciplinary hearing and to Mr Dyson in the course of the latter's investigation.

206. Not every procedural flaw will take the process outside the band of reasonableness. We do not consider that the skim read of the claimant's mitigation is sufficient to put Mr Wheatley's decision outside the band of reasonable managerial responses.

207. If we are wrong on that, then we are satisfied that Mr O'Malley did read the mitigation statement in more depth than did Mr Wheatley. We accept Mr O'Malley's evidence that he read through the bundle of documents (which included the mitigation statement). He also re-read it following the adjournment. Therefore, any procedural unfairness caused by Mr Wheatley's cursory examination of the mitigation statement was cured on appeal. On looking at the procedure as a whole, therefore, the treatment of the claimant's mitigation statement was not such as to render the process outside the band of reasonable responses given the circumstances.

208. The other issue is one raised of the Tribunal's own volition. This is over the question of suspension. **Matadeen** is authority for the proposition that a failure to suspend cannot render a subsequent decision to dismiss an unreasonable one. Such would fetter managerial discretion and result in defensive suspensions inimical to good industrial relations. We are satisfied therefore that the failure to suspend the claimant does not put the decision subsequently to dismiss her outside the range of reasonable responses.

209. The claimant will appreciate that it is not for the Tribunal to substitute their view of what the respondent ought to have done. The Tribunal can only interfere and declare a dismissal to be unfair if the respondent's decision to dismiss is one that fell outside the range of reasonable responses in the circumstances.

210. In this case, it is impossible not to have sympathy with the claimant's personal circumstances. Further, she was not detailed to undertake the lock up on the twos landing on the day in question and stepped in to lend assistance. That is to her credit.

211. However, in our judgment, it was within the range of reasonable responses for the respondent to focus upon the claimant's acts (notwithstanding that she was only in that position because she had volunteered to assist). The fact of the matter is that the claimant had disregarded or failed to comply with the Governor's Order during the lock up process itself and by signing the roll. This was a second occasion within a period of around five months in which the claimant had found herself involved in a security breach. She had been given a first written warning. Mr Wheatley had told her in no uncertain terms at the first disciplinary that a repetition within the period of the warning may result in further disciplinary action being taken against her. Volunteering for a task does not give licence to perform it below the required standard. The way it was performed seriously damaged the respondent's confidence in the claimant's ability to perform this fundamental task.

212. We accept that some employers may have been inclined to leniency given the claimant's personal circumstances and that she was effectively volunteering to assist others who had been detailed to do the lock up that afternoon. However, that does not put this employer's response outside the range of reasonable managerial responses. In our judgment, it fell squarely within the prerogative of management running such a high security establishment to take the view that enough was enough and that the claimant could no longer be trusted to undertake the most fundamental elements of the role being carried out at HMP Wakefield.

213. The claimant also raised the issue of consistency of treatment. Where cases are truly parallel or sufficiently similar it can of course be against the equity of the case to dismiss one employee but not another. However, the comparator cases do not assist the claimant. There is no evidence that the two officers involved in the other security incidents were on a final warning at the time. Upon that analysis, they in fact received harsher treatment than the claimant who only got a six months' first written warning for a first offence. Further, there was an additional aggravating factor in the case of the claimant as she in fact signed the roll. There was no evidence that the comparators had done so. The cases are not therefore truly parallel or sufficiently similar and may be distinguished.

214. We now turn to our consideration of the section 15 claim. As we have said, there is no dispute that the claimant was unfavourably treated by being dismissed. The operative cause of the unfavourable treatment was her performance on 20 January 2021 coupled with the fact that she was on a first written warning for a similar offence which occurred in May 2019.

215. The relevant *"something"* is the claimant's conduct. That was the fact which operated upon the minds of Mr Wheatley and Mr O'Malley. The claimant was unfavourably treated for "*something"*, the relevant *"something"* being her conduct, in particular on 21 January 2020.

216. The key issue therefore is whether the claimant is able to link that conduct on the one hand with her disability on the other. In other words, can she prove that the relevant *"something"* arose in consequence of her disability? It matters not whether Mr Wheatley and Mr O'Malley knew that the conduct arose from her disability.

217. There is ample material within the bundle from which it is plain that the claimant's mental health was, understandably, affected by the death of her partner. We have little doubt that this affected the claimant's performance. Indeed, the respondent (in particular, Mr Mahoney) was concerned about the claimant's mental health and how it was affecting her performance in her roll.

218. Against that, the occupational health report of 27 September 2018 certified the claimant as fit to work (with adjustments). The report of 12 February 2020 (prepared only around three weeks after the cell door incident) again certified her as fit to work. No reference was made to the incident of 21 January 2020 as attributable to her mental health.

219. At no stage did the claimant attribute the cell door incident of 21 January 2020 to her mental health. She said that she was frustrated by the lack of co-operation from her colleagues. She did not seek to link her mental health with the incident when she gave evidence: see paragraph 138. This corroborates what she said in the mitigation statement, where she disavowed such a link. Locking up was a task that she had performed many times. In our judgment, the claimant has not shown the necessary causal link between the *'something'* which was the cause of the unfavourable treatment on the one hand and her disability on the other.

220. Even if we are wrong upon this, we hold that the respondent's treatment of the claimant may be justified as a proportionate means of achieving a legitimate aim. We do not understand the claimant to be contesting the legitimacy of the aims pursued by the respondent as set out above. On any view, all are legitimate aims.

221. The issue is whether the dismissal of the claimant may be justified by the respondent as reasonably necessary in pursuit of the aim. Removing the claimant from prisoner facing and frontline duties (involving following the Governor's Order and the locking up and roll call procedure) in our judgment pursues the aim in question. Avoiding the claimant being upon the landings avoids the risk of her committing security breaches with the attendant danger that those security breaches present to fellow members of staff, other inmates, the police and members of the public.

222. We accept this to be a hard consequence for the claimant, as dismissal is career ending. However, that impact upon the claimant has to be weighed against the aim being pursued by the respondent. The respondent has the custody of some of the most dangerous individuals in the country. The respondent is charged with a high degree of responsibility. To allow the continued employment of those jeopardising security would be to defeat

the aim being pursued by the respondent. The dismissal of the claimant therefore represents a real need on the part of the respondent and goes towards the achievement of the respondent's aim. There is no other way of achieving the aim than to have competent prison officers on the landings in whom the respondent may repose confidence to discharge their functions.

223. Removing the claimant therefore from front line prisoner facing duties is a proportionate means of achieving the aim. The next question that arises then is to whether a lesser sanction than dismissal may be adopted to achieve the aim. Dismissing the claimant from the service altogether would not be to achieve the aim if she could be removed from her substantive roll but then placed in to one which does not jeopardise security and is a non-prisoner facing frontline roll.

224. The difficulty for the claimant upon this issue is the evidence given by Mr Wheatley that no roles are available within the establishment which do not involve the operation of keys and security systems. That being the case, it must follow that dismissal of her is proportionate given the security risk presented by her.

225. We now turn to the reasonable adjustments claim. The agreed list of issues identifies the relevant PCP as the requirement for the claimant to fulfil her job to the standard of an *"experienced prison officer."* The Tribunal may only consider the claim made to it by the claimant. It is not for the Tribunal to reformulate the claimant's case by reference to a different PCP.

226. There can be little doubt that requiring an employee to fulfil their role to a certain standard is capable of being a PCP. Such clearly is capable of being a policy or requirement.

227. The question is whether as a fact the respondent in this case required the claimant to fulfil her job role to the standard of an experienced prison officer. If the claimant cannot establish the application of such a PCP to her then the claim must fail at this first hurdle.

228. In our judgment, the claimant has established the application of such a PCP to her on the facts of the case. The respondent's evidence was that the claimant was considered to be experienced by virtue of her two years of service at the material time. The claimant was required to fulfil her role in accordance with the several policies and procedures. This of course included the relevant Governor's Order. That is what the respondent required of her. When put in this way, it is clear that the respondent applied to her a requirement that she fulfil her job roll to the standard of an experienced prison officer. By this, the respondent meant no more than an expectation that she would fulfil the role to the standards that may be expected for somebody of her experience and years of service.

229. The next issue therefore is whether the claimant was put at a substantial disadvantage in comparison with non-disabled because of the application of that PCP to her by reason of her disability. As a general proposition, we hold that the claimant was so disadvantaged.

230. The respondent recognised the disadvantage caused to her. Mr Maloney referred in his emails of 23 September 2019 and 4 January 2020 in

particular to the difficulties which the claimant was experiencing in fulfilling her role and that the difficulty was, at least in part, caused by her disability. It is for this reason that the suggestion was made of a number of supportive measures including the provision of a mentor. However, he did not note any issue with her undertaking the locking up procedure.

231. To be a substantial one, the disadvantage must merely be more than minor or trivial. We are satisfied that a non-disabled comparator would not have required the supportive measures suggested by Mr Mahoney. The disadvantage to the claimant by the application to her of the PCP was substantial (in the sense of being more than minor or trivial).

232. A non-disabled comparator with similar service to that of the claimant would in our judgment have been able to undertake the role without adjustments. We take Mr Webster's point that a newly qualified prison officer may also have required a mentor as would the claimant. However, we have to look at how the claimant was coping with work given her level of experience and ask ourselves whether a non-disabled comparator employee would have been able to fulfil the role. That tests the question of whether the disability was the cause of the disadvantage. A like-for-like comparison is not required. The question is whether a non-disabled employee of the respondent would have suffered the same disadvantage as did the claimant.

233. There was no evidence advanced by the respondent that individual mentors were required for newly qualified prison officers or indeed prison officers of two years' experience in general. The tenor of Mr Mahoney's correspondence is to the effect that there was an identified need for a mentor for the claimant because of her mental health issues which (of course, constitutes a disability). In his email of 4 January 2020, Mr Mahoney recognised that the claimant had an issue with confidence and feeling that she was left to her own devices. He recognised those to be features arising from the claimant's mental health issue. A prison officer of over two years of service without a disability in our judgment would not have been beset by such confidence issues. A non-disabled comparator in that position ought to have built up sufficient resilience.

234. In summary, we conclude that the claimant was ill-equipped to carry out the role expected of her in general because of her disability. She lacked the anticipated resilience of a prison officer of two years' experience. This was attributable to her mental health which is accepted to be a disability by the respondent. However, her mental health did not prevent her from carrying out basic tasks such as locking up and compliance with the Governor's Order.

235. The respondent accepts that they had knowledge of the claimant's disability. The respondent (through Mr Mahoney, Mr Dyson and Mr Bailey and others) knew of the disadvantage caused to her by the expectation that she fulfil her role as a prison officer of two years' service. Mr Mahoney was clear that issues around her professional ability to comply with the relevant PCP arose at least in part from her mental health. It follows therefore that the respondent had the requisite knowledge both of the disability and the disadvantage caused to the claimant by reason of it because of the application to her of the relevant PCP.

236. The Tribunal had some difficulty upon the question of substantial disadvantage claimed in this case. It was for this reason that supplemental submissions were invited in the Tribunal's letter dated 7 July 2022.

237. As set out in paragraph 6.3 of the list of issues, the substantial disadvantage claimed is **"***an ability to perform at the level expected of the claimant, that she could not challenge the behaviour of colleagues, that she got into difficulties and was dismissed for misconduct."* We asked the parties whether these disadvantages were to be read disjunctively or conjunctively. We took the view before inviting further submissions that the first two elements of this framing of the disadvantage were on the evidence substantial disadvantages caused by the disability. Those disadvantages seemed to be causative of the latter two elements of the pleaded disadvantages being that her inability to perform at the requisite level (in particular, an inability to challenge the behaviour of colleagues) got her into difficulties as a consequence of which she was dismissed.

238. The respondent's submissions dated 12 July 2022 referred to paragraph 55 of the amended defence and the use there of the coordinating conjunction '*and/or.'* The claimant in her submissions of 4 August 2022 said that her case quite simply was that she was not able to perform at the requisite standard of an experienced prison officer and that her inability to challenge colleagues, getting into difficulty and being dismissed *"show a continuation of being unable to perform at that expected level, and are further example of my disability continuing to affect my job performance throughout my career and its ultimate termination."*

239. The Tribunal takes the view that the disadvantages recorded by Employment Judge Bright in paragraph 6.3 of the list of issues are to be read disjunctively and that for the claimant to succeed she need only establish any of the four elements of the disadvantage as it is framed. The respondent accepts this construction and submitted (before the Tribunal and in their written submissions of 12 July 2022) that the claimant had not demonstrate any of the disadvantages in any case.

240. In the Tribunal's judgment, the claimant has shown that she was at a substantial disadvantage by reason of her disability compared with a non-disabled comparator in complying with the requirement to perform to the level of an experienced prison officer for the reasons given in paragraphs 229 to 234. The substantial disadvantage did not extend to the locking up and roll call procedure.

241. The next question is whether there were steps that the respondent could have taken which had a prospect of alleviating the substantial disadvantage of not being able to perform to the requisite standard. The claimant suggested the provision of a mentor.

242. It must follow from Mr Mahoney's emails (in particular that of 4 January 2020) that the provision of a mentor came with the prospect of alleviating the substantial disadvantage presented to the claimant of being unable to perform at the required level and to challenge the behaviour of colleagues. The whole idea of the mentor was (amongst other things) to increase the claimant's confidence and resilience. Mr Mahoney would hardly have suggested this had there been no or little prospect of the mentorship

alleviating the substantial disadvantage caused to the claimant by reason of her mental health.

243. However, we do not accept that the provision of a mentor came with the prospect of alleviating the difficulties which beset the claimant on 21 January 2020. Firstly, the mentor would not be watching the claimant's every move. This the claimant accepted. Secondly, the locking up task was one of which the claimant had much experience. She knew the process to be followed and simply failed to follow it that day. Likewise, she knew not to sign the roll unless all of the prisoners were present and correct. The provision of a mentor would not have prevented the claimant from so acting upon that day given that these were tasks fundamental to the role which the claimant had been taught upon the NVQ course and of which she had significant experience. The mentor would therefore be highly unlikely to have to tell the claimant how to undertake such fundamental parts of the role and to check that she had done them. She did not attribute (at the time or before us) the inability to challenge colleagues to her mental health. There was no evidence before us that an inability to challenge her colleagues' bad practice that day was because of her disability.

244. Therefore, while we accept that in general terms the provision of a mentor would have alleviated the substantial disadvantage caused to the claimant generally by building up her resilience, we do not accept that the provision of a mentor would have had any prospect of avoiding her getting into the difficulties which beset her on 21 January 2020 ultimately leading to her dismissal. There was simply no reason to sign the roll unless she was satisfied that it was appropriate to do so. There is no evidence that others were putting unnecessary pressure upon her to sign. Such was only the claimant's perception. The task which she took upon herself on 21 January 2020 did not require her to challenge colleagues. It simply required her to check that all of the prisoners were in their cell (in particular in cell C2-03) and only sign the roll when she was so satisfied. She did not seek to excuse her actions by reason of her mental health. Understandably, she was frustrated with her colleagues but that is not the same things as proving she was unable to challenge them because of her disability.

245. We hold that it was reasonable and would have been a reasonable adjustment for the respondent to provide her with a mentor. Indeed, the respondent itself considered that such was a reasonable step. It was mooted as far back as 23 September 2019, yet the respondent had still not furnished her with one by January 2020. The provision of a mentor was a reasonable step for the respondent to have to take to alleviate the disadvantage caused to the claimant by the requirement for her to fulfil her job role to the required standard. However, it would not be reasonable for the respondent to provide a mentor essentially to watch the claimant's every move. The claimant herself fairly recognised that such would be unreasonable. It would not be a good use of public money to engage what would essentially be a supernumerary position to supervise a two years' qualified prison officer. Such would not be a good use of the mentor's time. That was not what the claimant herself had in mind.

246. Accordingly, the reasonable adjustments claim succeeds in part. The respondent failed to make an adjustment by the provision of a mentor which had a prospect of alleviating the substantial disadvantage in performing her role. A mentor would have provided the claimant with a level of support and improve her performance in role, alleviating Mr Mahoney's performance concerns.

247. However, the provision of a mentor to provide very close supervision of basic tasks was not a reasonable one to make. The claimant was able to perform the locking up role and completing the roll call paperwork. Her disability did not prevent her from doing these tasks. She was not disadvantaged in doing them by her disability, so the duty was not engaged upon them as no reasonable adjustments were required to enable her to perform them.

248. The reasonable adjustments claim has been brought outside the relevant time limit provided for by section 123 of the 2010 Act. In our judgment, there was an omission on the part of the respondent to provide a mentor with effect from 23 September 2019. There was no act inconsistent with the provision of a mentor. Therefore, time begins to run against the claimant from when it would be reasonable to expect the respondent to have provided a mentor. When the matter was before Employment Judge Rogerson in July 2021, the claimant is recorded as saying that it would be reasonable to expect the respondent to have taken that step by mid-November 2019. We refer to paragraph 17 of Employment Judge Rogerson's Judgment. This may be a reasonable assessment on the part of the claimant because it was around that time that she returned to C (or Charlie) Wing.

249. The matter was revisited by Mr Mahoney in early January 2020. On the authority of **Rovenska** we hold that what was in effect the second refusal of the respondent to appoint a mentor (it having been agreed by Mr Mahoney but not implemented) starts time running again and therefore for limitation purposes time begins to run within a reasonable period of the respondent's failure to implement the adjustment after 4 January 2020.

250. Mr Webster said that he was not holding the claimant to the timescale advanced before Employment Judge Rogerson. However, by a parity of reasoning, this seems to suggest that upon the claimant's case the mentor should have been appointed within two months or so of 4 January 2020. That being the case, the claimant needed to have commenced proceedings by around June 2020 (making allowance for any periods spent in early conciliation).

251. The claimant did not commence early conciliation until 25 January 2021 and did not present her claim to the Employment Tribunal until 14 March 2021. On any view, the claim has been brought (at best from the claimant's perspective) around nine months out of time.

252. Mr Webster asked the claimant why there was such a delay in pursuing the reasonable adjustments claim. The claimant said that she intended to rely upon the internal process *"to deal with things in a fair and right way."* Mr Webster submitted that this was difficult evidence to understand given that the issue of mentorship (or lack of it) did not feature in the claimant's mitigation. Having said that, she did say towards the end of the disciplinary

hearing (after Mr Wheatley had pronounced his verdict) that she felt unsupported.

253. The claimant did not expressly refer to the lack of a mentor. Further, the point was not followed up by her before Mr O'Malley. Reference to there being a lack of support towards the end of the disciplinary hearing before Mr Wheatley seems to us to be a rather small peg upon which to hang the heavy coat that the lack of reasonable adjustments was being dealt with as part of the internal process. We hold that it was not. The claimant was not therefore awaiting the outcome of an internal procedure relevant to that issue. That therefore is a point against the exercise of discretion in the claimant's favour.

254. The claimant advanced no evidence as to what the POA had said to her (if anything) about the pursuit of a grievance or other internal process upon the mentoring issue. She did however say that the POA had advised against raising her disability as mitigation. We therefore factor this in the balance in the claimant's favour upon the basis that she was in receipt of sub-standard advice upon this issue.

255. A further factor in favour of the claimant is the onset of the pandemic. Effectively, this put matters on hold for a period of around five months between April and September 2020. We take Mr Webster's point that the claimant was not infected with coronavirus. There is no evidence that the mental health prevented her from presenting her complaint. We have seen that notwithstanding her mental health issues she is well capable of presenting very well-reasoned and well written presentations and papers.

256. All of this being said, the claimant plainly had hopes of saving her job. She made it clear in the mitigation document and during the course of the internal process that she wished to save her job and fulfil her career with the prison service. This was to be with the support of a mentor as had been agreed by Mr Mahoney. There had not been time to implement that albeit that the claimant had had some support from Mrs Smith. Arrangements had not been made by the time that the country went into lockdown in March 2020.

257. It would be a bold move for the claimant to have presented a complaint against the respondent arising out of a failure to make reasonable adjustments in such circumstances at that time. While the claimant did not pray in aid of the lack of a mentor as such, she would have had in mind that Mr Mahoney was going to make arrangements for her to have one should her job be saved.

258. On our findings, time would not have begun to run against the claimant until early March 2020 in any case. The country was then beset by the pandemic. That led to an unavoidable delay in the domestic proceedings which was not the fault of the claimant or the respondent. The claimant, as she was entitled to do, pursued the appeal process to its conclusion on 3 November 2020. She commenced early conciliation within three months of that date.

259. No forensic prejudice has been caused to the respondent arising out of the delay in instituting the reasonable adjustments claim. There was no submission (let alone any evidence) led by the respondent that the

cogency of the evidence had been affected by the delay. Matters were documented. The relevant people involved all had good recollections of the case.

260. On balance, therefore, we conclude that there was a lengthy delay in instituting proceedings. However, there were exculpating factors (not least being the impact of the pandemic and the claimant's overriding wish to save her job coupled with Mr Mahoney's agreement on two occasions to provide her with a mentor). The mere fact of the delay must be set against those factors coupled, with the absence of forensic prejudice to the respondent. On balance therefore the Tribunal's judgment is that it is just and equitable to extend time to enable the Tribunal to consider the complaint of a failure to make reasonable adjustments.

261. No limitation issues arise upon the unfair dismissal complaint or the section 15 complaint (arising as it does out of the dismissal).

262. The respondent is able to justify the dismissal of the claimant notwithstanding the failure to make the reasonable adjustment by providing her with a mentor given that the 21 January 2020 incident is unconnected with the failure to provide the mentorship for the reasons which we have given. We mentioned the **Knightley v Chelsea and Westminster Hospital** case in the summary of the relevant law. The application of the principle of that case to this is that while it may generally have been a reasonable adjustment for the respondent to provide the claimant with a mentor, it would not have prevented what happened on 21 January 2020 and therefore dismissal was still a proportionate measure, notwithstanding the failure to make reasonable adjustments.

263. The matter will now be listed for a remedy hearing. Should the parties consider that a case management hearing will be beneficial, then they shall write to the Tribunal to that effect within 21 days of the promulgation date below. The parties shall also, within the same period, furnish dates of availability for a remedy hearing (with a time allocation of one day) over the next four months.

264. We should also mention that on 1 September 2022, the claimant made some further submissions. It concerned a press report of an inquest into the death of a prison officer who took his own life after being accused of corruption by inmates. The claimant submitted that this supported her case of a lack of support for mental health issues across the service. No case was brought by the claimant of institutional neglect of mental health issues within the prison service. The Tribunal can attach no weight to the

circumstances of the individual the subject of the inquest. Each case must be judged upon its own merits. It would be unjust to the respondent to draw an adverse inference arising out of this tragedy without hearing evidence upon it. As the case was not pursued upon this basis, none was called by the respondent.

Employment Judge Brain

Date: 12 September 2022