



EMPLOYMENT TRIBUNALS

Claimant

Ms J Taylor

Respondent

v

The Secretary of State for Justice

Heard at: Cambridge

On: 14 & 15 February 2022
16 February 2022 (in chambers)

Before: Employment Judge S Moore
Mr A Chinn-Shaw
Mr B McSweeney

Appearances

For the Claimant: Mr A Ross, Counsel

For the Respondent: Mr J Chegwiddden, Counsel

This has been a remote hearing to which the parties did not object via CVP. A full face-to-face hearing was not held because it was not practicable, and all matters could be determined in a remote hearing.

JUDGMENT

- (1) The claim for discrimination arising from disability is dismissed.**
- (2) The claim for failure to make reasonable adjustments is dismissed.**

REASONS

Introduction

1. This is a claim for discrimination arising from disability under section 15 of the Equality Act 2010 (EqA), and for failure to make reasonable adjustments under sections 20-21 EqA.

2. In about 2012 the Claimant was diagnosed with mixed cluster B personality disorder and Obsessive Compulsive Disorder. Her claim form describes her conditions as Antisocial Personality Disorder with traits of Histrionic Personality Disorder and Narcissistic Personality Disorder. At the outset of the hearing, Mr Chegwiddden accepted that these conditions constituted a mental impairment for the purposes of the EqA that had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-day activities, and that therefore she satisfied the definition of a disabled person for the purposes of that act.
3. The remaining issues were identified at a Preliminary Hearing on 18 January 2021 and are addressed in the "Conclusions" section of the judgment.
4. We heard evidence from the Claimant and, for the Respondent, from Ms Sonia Walsh (SW) and Mr Gary Monaghan (GM). We were also referred to bundle of documents. On the basis of that evidence we make the following findings of fact:

The Facts

5. In her impact statement the Claimant says she believes she was first formally diagnosed with a mixed cluster B personality disorder and obsessive compulsive disorder in 2012, and that her disorder impacts her emotions, ways of thinking, behaviour, psychology and social relationships. She says her social interactions are poor and she is unable to show empathy towards others, she is stressed and anxious all the time, and finds it difficult to make decisions and concentrate. She also tends to lose her temper a lot and struggles to maintain healthy relationships due to her extreme levels of emotions. She has no regard for how others feel or what other pressures or responsibilities they have as she is solely focussed on herself. Her obsessive compulsive disorder means she worries about germs and cleanliness all the time and sees blood and needles in her surroundings when they are not even present, which leads her to have panic attacks. She further states her conditions cannot be cured and will last forever.
6. The Claimant's employment commenced on 2 April 2018. Prior to joining the Respondent she completed an Occupational Health (OH) Questionnaire in which she answered "no" to the questions, "Do you need any special aids or adaptations to the workplace to assist you?" and "Do you have a medical problem, a disability or recent injury that affects your ability to work?" and "yes" to the questions, "Do you have or have you ever experienced a health problem or disability associated with the following...Anxiety/Stress or Depression...Other Mental Health Problems including any drug or alcohol problem." The Claimant was subsequently contacted by OH and she informed them that she had been diagnosed with a personality disorder. She did not say that she considered herself to be disabled because at that time she did not understand that her personality disorder amounted to a disability.
7. At the outset of her employment the Claimant undertook training at the location of Stirling House, in Suffolk, which, after some difficulties, she

completed successfully on 9 August 2019. On 13 August 2018 she undertook a week of Prison Officer Entry Level Training consolidation training which required her to carry out prison officer duties in a shadowing capacity at HMP Wayland. On 20 August 2018 the Claimant went “live” as a Prison Officer at HMP Wayland.

8. The summary for the current job description of a Prison Officer (which we were told had changed only minimally since 2018) provides:

“The job holder will supervise and support prisoners, ensuring all services are provided to a high standard and that security and control are maintained at all times adhering to local and national policies.

The specific duty of the jobholder is to supervise, manage and control prisoners on the Residential Unit and during daily purposeful activity, decently, lawfully safe and securely whilst carrying out all activities.

This is an operational job with no line management responsibilities.”

9. At some point before the Claimant went “live” on the prison wings, she was taken to the Control & Restraint (C & R) room to learn more about C & R policy and practice at HMP Wayland. The Claimant considered there were differences between the C & R techniques she was being told to deploy at HMP Wayland and those on which she had been trained.

10. On 21 August 2018 the Claimant’s line manager, Elaine Thomas (ET) observed the Claimant and was concerned about the Claimant’s interaction with prisoners and comments the Claimant had made about her appearance. In particular, the Claimant told ET that a prisoner had propositioned her, and when ET asked the Claimant if she had challenged the prisoner or reported the incident, the Claimant said she had not. ET had a meeting with the Claimant on 22 August 2018 at which the Claimant was told a meeting had taken place and it had been agreed she (the Claimant) would be placed onto restricted duties in the admin block. A subsequent letter from ET to the Claimant states:

“There are concerns that you could be perceived as naïve and will be in a vulnerable position on the wing at present if you were to go live next week. There is also a fear that you could be a risk to yourself or others if you are not able to perform duties to the required standard, namely C & R [Control & Restraint].”

11. The letter further stated that the Claimant would be required to attend a full C & R refresher course and would also be required to complete Corruption and Manipulation Training. It also stated that ET had submitted an OH referral for the Claimant regarding concerns the Claimant had raised regarding stress and anxiety.

12. The Claimant was absent from work between 23 August and 16 September 2018. The reason for her absence recorded on her sick record is stress.

13. On 14 September 2018 the Claimant saw Ms Chloe Carter of OH Assist Ltd. The OH report (described as “interim”) states that the Claimant “reported she is signed off sick until 23 September 2018 with stress and anxiety”. The report further noted “I am aware [the Claimant] wants to return to the workplace on or before 23 September 2018 due to financial reasons. I have my concerns and if she does return [advise] that she is placed on restricted duties without any prisoner contact”. Under the heading “Current Outlook”, Ms Carter stated “Short-term [the Claimant] is suffering with anxiety and as such in my opinion is unfit for her job role as a prison officer, she may be able to return around 23 September 2018 if there is a job role she could undertake that does not involve prisoner contact...Medium to long-term is currently an unknown quantity until we have further medical evidence and a further review.” As regards “Disability Advice”, Ms Carter opined that “In my opinion [the Claimant] does come under the Equality Act 2010 for enduring mental health diagnosis, but not for anxiety and depression.”
14. In her statement, SW states that “although ET had proposed a short period of restricted duties in order to allow the Claimant to undertake additional training that she thought would be beneficial, OH had advised that the Claimant should only perform restricted duties with no prisoner contact because of the Claimant’s health. In effect ET and OH had reached the same conclusion by different reasoning”. We consider this to be a fair summary of the situation.
15. Following the advice of OH, when the Claimant returned to work she was placed on restricted duties with no prisoner contact, working in the Business Hub as an Administrator or in the mail room.
16. On 31 October 2018 the Claimant was called to a meeting with ET, primarily to address the Claimant’s sickness absence; the fact that the Claimant had been on sick leave from 23 August 2018 until 17 September 2018 triggered a first stage written warning for attendance under the Respondent’s attendance policy.
17. At the meeting the Claimant was told she could only stay on restricted duties for 13 weeks, namely until the w/c 3 December 2018, and that because of the advice from OH, that the Claimant should be on restricted duties for medical reasons, ET wished to obtain further advice from OH to establish if the Claimant was fit to work as a Prison Officer and/or whether adjustments would be needed to facilitate a return to full duties.
18. At that meeting the Claimant showed ET a copy of letter in which she stated she had been diagnosed as having Anti-Social Personality Disorder with traits of narcissism and Borderline Personality Disorder. The Respondent says that the fact the Claimant had been diagnosed with these personality disorders was unknown until the Claimant raised them at that meeting. The Claimant says she had told OH and ET previously, however the notes of the meeting are consistent with ET only becoming aware of the Claimant’s personality disorders at the meeting on 31 October 2018 and we accept that ET was not aware of the situation until then. Nothing, however, turns on this.

19. The notes of the meeting further record the Claimant stating that she refused to consent to a further referral to OH being made until she had had an appointment on 19 November 2018 with her own mental health team. ET agreed to wait until the appointment had taken place but told the Claimant she was bound by the 12-week limit on restricted duties.
20. The meeting then discussed the Claimant's performance and a proposed action plan to improve it. The action points included the Claimant completing a refresher course in C & R and further Corruption and Manipulation Training. The notes of the meeting record that concerns had also been raised regarding the Claimant being over-familiar with others, including offenders, and also excessive levels of contact with her peers including her line manager ET. Those latter concerns were also discussed at a further meeting with the Claimant on 6 November 2018.
21. On 20 November 2018 Ms Carter saw the Claimant again and produced another (interim) OH report. That report states "I am aware [the Claimant] wants to continue in the workplace due to financial reasons. I have my concerns. I have received [the Claimant's] further medical evidence and explained that I would like [the Claimant] to be reviewed by an Occupational Physician regarding her fitness to work as a Prison Officer...Short-term [the Claimant] is suffering with anxiety and as such in my opinion is unfit for her role as a Prison Officer, she could undertake restricted duties with clear boundaries regarding who to contact and when, together with no prisoner contact."
22. On 23 November 2018 the Claimant saw Consultant Occupational Physician Dr Werner Stipp of OH Assist. His report (also described as "interim") states that OH Assist had received a report from the Claimant's GP confirming the diagnoses of underlying psychological conditions and continues "I understand there are concerns with interactions with inmates and behavioural concerns. Her case history indicates that the psychological conditions affect concentration and ability to interact. I recommend that management assist her by accommodating her in work on restricted duties if operationally possible...I advise that she is referred for a bespoke psychiatric assessment...in order to advise on the optimal treatment and therapy for the psychological conditions. OH assist will arrange a review assessment in 2-3 weeks' time to assess her progress and to give management further advice in relation to addressing areas of concern once she has been accommodated in a supportive work environment."
23. The Claimant attended further meetings with Simon Jones (SJ) and ET on 10 and 12 December 2018 where the Claimant's behaviour while on restricted duties was discussed. The notes suggest that there were behavioural problems involving a number of staff (including the Claimant) working in the mailroom.
24. On 12 December 2018 the Claimant was placed on special leave on full pay (her period on restricted duties having been extended by a week).

25. On 23 January 2019 the Claimant was offered a role doing Band 3 administration duties for a limited period at Stirling House Training and Conference Centre (where the Claimant had undertaken her training). The Claimant refused the offer, stating her solicitor had advised her that she did not believe Stirling House was a reasonable adjustment. In evidence the Claimant said it would have taken her two hours driving each way to work at Stirling House, however the Respondent was not made aware of that reason for declining the role at that time.

26. There was no further review of the Claimant by OH. However, on 11 March 2019, the Claimant was seen by Marilyn A Sher, Consultant Clinical and Forensic Psychologist. The report was produced on 18 March 2019 and sets out information about the Claimant obtained from her medical records and Ms Sher's own interview with the Claimant. The report includes the following passages:

"[The Claimant] reported that she was stable for 8 months prior to this episode and felt that the way she was being treated at work was the current trigger for her deterioration in mental health....She expressed having difficulty focusing on administrative work, and had a preference for working with prisoners as she needs drama and excitement to function. She also described having problems making decisions and can be easily overwhelmed if she does not have people she can discuss things with. She described looking for safety in everything...

[The Claimant] reported that she likes to be special, the favourite, or remembered. When asked why she needs all of this external validation, she replied "to make me feel good". She acknowledged that she is generally not confident, but feels "beauty is power" and enables her to get what she wants. She admitted intimidating people and likes to have people scared of her as this stops her from being seen as vulnerable. She also acknowledged that she sees everything in "black or white" and has extremes of emotions all of the time, as well as tends to be impulsive...

I asked [the Claimant] what would be suitable outcome for her. She expressed that ideally she would like to return to her role as she loves being a prison officer. However she acknowledged that this may be difficult, and stated that she would accept a dismissal package covering her salary for a year. She felt that this would enable her to start afresh with something else once her mental health had stabilised again. She felt she could not take on an alternative administrative role in the prison as she would find it hard to focus and would be prone to being disruptive. She expressed that this all felt very unfair as she feels she has not done anything wrong."

27. Having considered psychometric assessments, a symptom checklist and a Personality Structure Questionnaire, Ms Sher concluded:

"Irrespective of diagnosis, [the Claimant's] current difficulties leave her vulnerable both in terms of working with prisoners as well as with prison

officers. She finds it hard to understand social contexts despite coming across as very socially able and feels unable to change her way of relating without giving up on her values and beliefs. In order to continue working in her role as a prison officer she would require substantial support and supervision. Whether this level of support and supervision can be achieved in her current role will need to be left up to her current employers to decide.

The following recommendations may help in this regard:

- [the Claimant] would need to meet with her manager initially on a daily basis to clearly outline her role for the day, in very specific terms. Once some stability is evidence, then this can shift to once a week.
- [the Claimant] will require very specific, and detailed instructions on what she is to do each day, and verbal information should be supported by having information written down. Again this information needs to be concrete and specific with little opportunity for misinterpretations.
- I would recommend that should the prison decide to allow a return to work, that this is done gradually, with regular monitoring of her mental health.
- [the Claimant] would benefit from being allocated “a buddy” to work alongside who, she has a positive relationship with, and who can monitor interactions as well as give her supportive feedback to aid learning.”

28. The report was provided to the Respondent at some point around the end of March/beginning of April 2019.
29. On 8 May 2019 the Claimant was invited to a meeting to discuss her sickness absence/prognosis for a return to full duties. Although the precise characterisation of that meeting was unclear it is clear from the invitation letter that dismissal was a possibility.
30. The meeting took place on 14 June 2019 and was chaired by SW, who had become Governor of Wayland Prison in January 2019. Notes of the meeting were taken both by a representative from HR and also by the Claimant's Trade Union representative. The meeting commenced at 10.00 and lasted until 15.00 (although there were several breaks). The notes referred to below (except where indicated) are those of the Claimant's TU representative.
31. Towards the outset of the meeting the Claimant was asked about her C & R training and she said that she had passed the training without any issues but when she came back to Wayland and was required to attend a refresher she found it difficult because it was not the way she had been taught in college. She admitted to having developed a phobia about being punched, particularly in the face, and that the training had brought the reality home and made her scared. She was asked if she would be confident enough to do the retraining and said she couldn't say. She also said she couldn't answer as to how she would feel about using C & R on the wing.

32. As regards coming back to work, when the Claimant was asked what it take to get her back into work, the Claimant said that the Prison Officer Entry Level Training Mentors would help, but she had been banned from speaking to them as the contact was deemed excessive. Later in the meeting she stated (twice) she was not fit enough to return to work and was working with mental health in the Community. Towards the end of the meeting SW asked the Claimant if there were any reasonable adjustments that she could make and the Claimant said that she didn't want a re-grade because she found it hard to concentrate in mundane jobs such as admin or OSG, the Claimant then said, "I don't think there is any more you can do."
33. SW was also adamant in her evidence that the Claimant was asked how long it would be before she might be able to be return to work and said about two years. Notably, the Respondent's notes of the meeting record "A decision was made to dismiss, due to JT being unable to return to work for the foreseeable future and JT not in favour of a regrade. Wayland is unable to hold the position for a year to two years while JT receives further treatment." Further in the subsequent letter of 27 June 2019 (see paragraph below), SW refers to the Claimant as having stated in the meeting that "recent experiences had set [her] back and it would take at least 2 years to feel stable again". We found SW to be a credible witness and accept her evidence that the Claimant said in the meeting that she did not expect to return to be well enough to return to work for about two years.
34. A letter was sent to the Claimant on 27 June 2019 setting out what had been discussed and confirming the outcome of the meeting. The letter concludes that SW had taken the "difficult decision to dismiss you" and that the Claimant was entitled to 5 weeks' notice. However the Claimant was not given a termination date, and in the event continued to be paid.
35. The Claimant appealed on eight different grounds. The appeal grounds are dated 11 November 2019.
36. Notably ground 3 was that "When I was first put on special leave I was told that I would be updated regularly on when I would be coming back to work/next stages of her process and this did not happen and led to a deterioration of my mental health culminating in me seeking extra support from the local authorities. I now have a mental health nurse and support worker which I previously didn't need before the stress of being left at home with no updates on my future".
37. Further, ground 8 was that the Prison Service had not implemented the "action plan" in the Psychologist's Report – by which the Claimant meant the four suggested adjustments.
38. The appeal was heard by GM (Prison Group Director) on 27 November 2019.
39. The notes (which are less detailed than those of the meeting on 14 June 2019) record the Claimant as saying that becoming a Prison Officer was the proudest moment of her life and "this had broken her being off for a sustained

period of time..[she] now has a CPN and a support worker. About to go into psychotherapy and a course of medication.”

40. However, notes also record the Claimant as stating that she could return to work immediately and that the only adjustment she would need would be to attend therapy. “The best outcome would be instatement.”

41. As regards the adjustments suggested by Ms Sher, the notes record GM stating that “the adjustments were not reasonable for an establishment to invoke as this is quite onerous and costly process allied to the pressure the prison was under... [and] Recommendations are written by people who don't necessarily work in the Prison Service”.

42. As regards C & R training the notes record the Claimant's union representative stating “the reluctance to training was in line with a clash on the teaching ways deployed by Wayland and this was a struggle for JT. Dr had issued antidepressants and told not to complete this.”

43. In a letter of 5 December 2019, GM rejected the appeal. As regards ground 8 of the appeal (the allegation the Respondent had failed to implement Ms Sher's suggestions), GM stated as follows:

“i. You were placed on restricted duties for a period of 12 weeks. Following this period and with no likely return to full duties, you were placed on special leave for a period where HMPSS looked for alternative roles for you to undertake. One was offered, however you rejected this offer. Following this, you were then placed on special leave up until your dismissal hearing.

ii. The problem around these recommendations is the amount of management time which would be required to ensure that the Establishment was fulfilling their duty of care towards you would have been enormous. Prisons are psychologically testing environments and we require Officers who are able to be robust enough to undertake the rigors of the role which is not what is implied following this assessment of you.

...

44. GM further stated:

“I can totally understand your frustration that you had gone through the pre-medical assessment and being open about your respective health conditions. I really cannot explain how you were able to pass this vetting and I am really sorry that you have had your hopes and dreams of being a Prison Officer taken away from you. However I have a duty of care to you and your colleagues and I do not feel that having you working as a Prison Officer would be a risk which I would be willing to take.

...I would not feel that I would be fulfilling my duty of care to yourself nor your colleagues if I was to allow you back to work as a Prison Officer. You have already been offered a reasonable adjustment which would have allowed you to continue working for HMPPS in a non-prisoner facing role, which you have

rejected. I really cannot see any way now in which I can bring you back into HMPSS.”

45. When it was put to GM in cross-examination that he did not refer to the Claimant’s reluctance to undertake C & R refresher training in his outcome letter, he stated that this consideration did not weigh heavily with him and that that issue could probably have been dealt with separately.

46. The letter concludes:

“Your pay was never stopped on the 27 June 2019 as it should have been. I am now informing you that you are eligible for 5 weeks’ notice following this meeting. There is no requirement for you to work this notice period which means that today the 27 November 2019 is your last day of service. I am also willing to ensure that you receive you 100% compensation which was awarded to you by Governor Walsh.”

47. It follows from paragraphs 34 and 46 above that the Claimant was dismissed with effect from 28 November 2019.

Conclusions

Failure to make Reasonable Adjustments

48. Section 20(3) EqA (read together with Schedule 8) creates a requirement, where a provision, criterion or practice (PCP) of an employer’s puts a disabled employee at a substantial disadvantage in comparison with those not sharing that disability, to take such steps as it is reasonable to have to take to avoid the disadvantage.

49. Pursuant to paragraph 20 of Schedule 8 EqA, the duty to make reasonable adjustments does not apply if A does not know, and could not reasonably be expected to know that B has a disability and is likely to be placed at the relevant disadvantage.

50. While there is no statutory guidance for assessing for the reasonableness of steps that avoid the disadvantage that a PCP causes a disabled person, the EHRC Employment Code lists the following as factors that the Tribunal may take into account at paragraph 6.28:

- a. the extent to which taking the step would prevent the effect in relation to which the duty was imposed (i.e. the effectiveness of the step);
- b. the extent to which it was practicable for the employer to take the step;
- c. the financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities;

- d. the extent of the employer's financial and other resources;
- e. the availability to the employer of financial or other assistance in respect of taking the step; and
- f. the nature of the employer's activities and the size of its undertaking.

51. The first issue is whether the Respondent applied a PCP.

52. The Claimant relies on a requirement that she perform her full job role and duties.

53. The Respondent says that it did not apply that PCP because officers unable to carry out their full job role and duties for a period time are, where possible, offered alternative duties on the same pay, as was Claimant. We do not accept that submission. The evidence is that being put on restricted duties, as the Claimant was, is a strictly temporary measure and that role of a Prison Officer required working with prisoners with the capacity to be deployed in any location. At the meeting on 14 June 2019, SW told the Claimant that "as an officer...it meant [the Claimant] could be working in any wing in the establishment, any department".

54. The second issue is whether the requirement substantially disadvantaged the Claimant, and it is common ground that she was so disadvantaged because she was unable to perform her job role and duties, was placed on special leave and was eventually dismissed.

55. The third issue is whether, during the period of time between June and November 2019, the Respondent knew or ought reasonably to have known, that because of her disability a requirement that the Claimant perform her full job role and duties was likely to put her at a substantial disadvantage in comparison with persons who are not disabled, and the Respondent does not contest that by this point in time it had the requisite knowledge.

56. It follows the Respondent was under a duty to take such steps as was reasonable to take to avoid that substantial disadvantage, and the fourth issue is whether the steps the Claimant asserts the Respondent should have taken were reasonable ones. The steps in question, as identified at the Case Management Hearing, are those that were suggested by Ms Sher in her report and/or allowing a trial period for them.

57. For ease of reference we remind ourselves that the suggested adjustments in question were as follows:

- "[the Claimant] would need to meet with her manager initially on a daily basis to clearly outline her role for the day, in very specific terms. Once some stability is evidence, then this can shift to once a week.
- [the Claimant] will require very specific, and detailed instructions on what she is to do each day, and verbal information should be supported by having information written down. Again this information

needs to be concrete and specific with little opportunity for misinterpretations.

- I would recommend that should the prison decide to allow a return to work, that this is done gradually, with regular monitoring of her mental health.
- [the Claimant] would benefit from being allocated “a buddy” to work alongside who, she has a positive relationship with, and who can monitor interactions as well as give her supportive feedback to aid learning.”

58. The Respondent’s evidence and Mr Chegwidden’s submissions were that these recommendations were too onerous and impractical in the context of a prison, particularly numbers two and four. In this respect it was simply not possible to predict what emergencies might arise on a given day, hour or shift so that providing any prison officer with detailed specific written instructions for every possible eventuality on the prison wing was simply impossible given the inherent working conditions, the unpredictability of prison life and the variety of scenarios to which officer might have to respond. Further, the apparent indefinite appointment of a buddy would require the permanent allocation of two Prison Officers to undertake duties where one was previously required, thus involving a significant resource and cost burden.

59. We agree with these submissions. While such adjustments might be feasible in an office or other working environments, we accept that the working conditions of a prison are inherently unpredictable and challenging, with the real capacity for serious harm to persons and property to occur if things go wrong. We accept that it simply would not have been possible for any manager to provide the Claimant with the level of detailed instruction and supervision necessary to prevent her from placing herself at personal risk, or putting her colleagues or, potentially, prisoners at risk. We also agree that it was not reasonable – either from a cost or resource perspective – to expect the Respondent to appoint a buddy to support the Claimant for an indefinite period of time. The fact the Respondent is a large, publicly funded organisation does not justify the cost of effectively employing two people to conduct one role.

60. We also note that in assessing the reasonableness of proposed adjustments, a relevant factor is the extent to which taking the step would prevent the effect in relation to which the duty was imposed.

61. In this respect we note that Ms Sher’s report expressed considerable doubt about the Claimant’s suitability as a Prison Officer and the suggestions she made were expressed in relatively tentative terms. In this respect Ms Sher stated that “[the Claimant’s] current difficulties leave her vulnerable both in terms of working with prisoners as well as with prison officers. She finds it hard to understand social contexts despite coming across as very socially able and feels unable to change her way of relating without giving up on her values and beliefs. In order to continue working in her role as a prison officer she would require substantial support and supervision. Whether this level of support and supervision can be achieved in her current role will need to be left

up to her current employers to decide.” She then stated that the “following recommendations *may* help in this regard” (our italics).

62. A further hurdle to the Claimant’s return to work as a Prison Officer was the difficulties she had with the C & R techniques deployed at HMP Wayland and the phobia she said in June 2019 she had developed about being punched. While GM stated in cross-examination that the Claimant’s difficulties with C & R did not weigh heavily with his decision to reject her appeal, it is plain from the notes of both the June meeting and the appeal meeting (referred to at paragraphs 31 and 42 above) that they were another factor which stood in the way of the Claimant being able to undertake the role of a Prison Officer, particularly as the evidence was that C & R refresher training has to be undertaken annually.
63. Accordingly, we consider that there is some considerable doubt as to whether the proposed adjustments would in any event have been effective at avoiding the substantial disadvantage to the Claimant caused by her disability and would have been sufficient to enable her to work safely as Prison Officer.
64. For all these reasons we do not consider the Respondent was under a duty to implement the recommendations suggested by Ms Sher, even on a trial basis. The stakes and potential for serious harm were simply too high while the prospect of the recommendations being effective at achieving the aim of allowing the Claimant to work as a Prison Officer were far from guaranteed. It follows from the above that the claim under s. 20 and s.21 EqA is dismissed.

Section 15 Discrimination

65. Section 15 EqA provides that a person (A) discriminates against a disabled person (B) if:
 - a. A treats B unfavourably because of something arising in consequence of B's disability, and
 - b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
66. We have been referred to Pnaiser v NHS England [2016] IRLR 170, EAT, at §31 where Simler J set out the correct analysis for section 15 claims:
 - a. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
 - b. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason

or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

- c. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises...
 - d. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
 - e. For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
 - f. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
67. The first question is whether the Claimant was treated unfavourably because of something arising in consequence of her disability where the unfavourable treatment relied upon is both the taking of the decision to dismiss the Claimant in June 2019 and the dismissal taking effect in November 2019, and the something arising is said to be the Claimant's vulnerability/unsuitability to working with prisoners.

68. The Respondent submits that the Claimant was not dismissed because of her vulnerability/unsuitability to work with prisoners but because she refused to work in a non-prisoner facing (administrative) role and/or a regrade.
69. We reject that submission. The Claimant's job title was Prison Officer and her job description was working with prisoners. The reason why she was dismissed from that role was because of the "something arising" (her vulnerability/unsuitability to work with prisoners) and the fact that she refused an offer to work in a different, administrative role is not relevant at this stage of the analysis.
70. The next question is whether the unfavourable treatment (the dismissal) was a proportionate means of achieving a legitimate aim.
71. In order for an something to be a proportionate means of achieving a legitimate aim, it must correspond to a real need, the means used must be appropriate with a view to achieving the objective and (reasonably) necessary to that end. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group: R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, CA, *per* Mummery LJ at §151. Further, it is for the Tribunal to weigh the real needs of the undertaking against the discriminatory effects of the requirement: Hardy & Hansons plc v Lax [2005] ICR 1565, CA, *per* Pill LJ at §32.
72. The Respondent relies on the legitimate aim as being to ensure the good order and discipline of the prison.
73. Mr Ross submitted that it was not proportionate to dismiss the Claimant without first trialling the adjustments suggested by Ms Sher and/or obtaining updated medical advice about the Claimant's prognosis. In this latter respect he relies on the fact that Ms Sher's advice was dated March 2019 and the Claimant was not dismissed until November 2019.
74. As regards the proposed adjustments, we have dealt with this consideration above.
75. As regards the Respondent's failure to obtain up to date medical advice, we do not consider there was any realistic prospect that the medical advice would have been different in November 2019 than it was in March 2019. The Claimant's disorders are on-going, in her own impact statement, having described the impact of her disability, she states that "her conditions cannot be cured and will last forever". There was no suggestion in the report of Ms Sher that the Claimant's difficulties in a prisoner-facing role were likely to be short-term, at the June meeting the Claimant said herself she was not well enough to return to work because she would be a risk to herself, and in her appeal grounds dated November 2019 she stated that her mental health had deteriorated further since she had been on special leave. While the Claimant did say at the appeal hearing that she wanted to return to work this was at odds with her appeal grounds and what she said about the then current state of her health as recorded in paragraph 39 above. Further, she didn't produce

any evidence to support a contention that the impact of her personality disorders had lessened since Ms Sher's wrote her report and/or that she was well enough to return to work. In these circumstances we do not consider it was incumbent on GM to obtain further medical evidence before deciding the appeal and/or whether to dismiss the Claimant.

76. We also note that the Respondent offered the Claimant the opportunity to regrade (with pay protection for two years) into an administrative role, but she declined that opportunity. In this respect, a formal offer in writing was made in respect of a role in Stirling House in January 2019, and, more pertinently, Ms Walsh made it very clear to the Claimant in the meeting on 14 June 2019 that she would support the Claimant regrading and taking up an administrative role but the Claimant said she had no interest in such a position because she would find it too boring.

77. In the light of the above, we find that the Respondent's decision to dismiss the Claimant was a proportionate one and the claim under s. 15 EqA is dismissed.

Employment Judge S Moore

Date: 22/2/2022

Sent to the parties on: 25/2/2022

N Gotecha

For the Tribunal Office