EMPLOYMENT TRIBUNALS

Claimant: Mr Nicholas Silvester

Respondent: Secretary of State for Justice

Heard at: London South **On:** 20, 21, 22, 23, 24 November 2023

Before: Employment Judge B Smith (sitting with members)
Ms Thompson
Miss Murphy

Representation
Claimant: Mr Lo (Counsel)
Respondent: Mr Ruck-Keene (Counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is dismissed.

2. At the relevant times the claimant was a disabled person as defined by section 6 Equality Act 2010 because of PTSD-type symptoms.

3. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

4. The following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:

   (i) Ensuring the claimant was kept well-informed of the reasons for the delay in his disciplinary proceedings in the period between March 2020 and July-October 2020; and

   (ii) Providing the claimant with sufficient support during the period between March 2020 and July-October 2020, including access to counselling.

5. The remaining complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

A decision on remedy will be made at a future hearing.

REASONS

Introduction

1. The claimant was employed by the respondent, through HM Prisons Service, latterly as a Prison Officer from 18 March 2015 until his dismissal for misconduct. The date of dismissal is in dispute but it was either 24 November 2021 (according to the respondent) or 18 March 2022 (according to the claimant). All relevant events took place at HMP Lewis ('the prison').

2. The claimant's case is about whether his dismissal was unfair, and whether the respondent unlawfully discriminated against the claimant by dismissing him because of something arising from his disability, namely PTSD-type symptoms. The PTSD-type symptoms were felt by the claimant since an incident on 19 July 2017 where he witnessed serious violence in a hostage situation whilst working at the prison. The conduct which led to the claimant's dismissal was allegations of unprofessional conduct, including making threats to kill, and unnecessary and disproportionate use of force by the claimant on prisoner G during an incident on 25 September 2019.

3. The claimant's case was that the dismissal was procedurally and substantively unfair. Also, the claimant says that the way in which the dismissal procedure was handled amounted to a failure to make reasonable adjustments. The claims are resisted by the respondent although some admissions about disability were made.

4. The claimant brings complaints of:
   (i) Unfair dismissal;
   (ii) Discrimination arising from disability, contrary to section 15 of the Equality Act 2010 ('EQA 2010'); and
   (iii) Failure to make reasonable adjustments for disability, contrary to sections 20 and 21 EQA 2010.

5. No issues in relation to time limits were raised in relation to the claims.

6. In respect of case number 2305171/2021, early conciliation started on 4 August and ended on 15 September 2023, and the first claim form was presented on 15 October 2021. In respect of case number 2301122/2022, early conciliation started on 22 February and ended 9 March 2022, and the second claim form was presented on 13 March 2022. The claims were determined together by an order of the EJ Ramsden dated 18 July 2023

Procedure, documents, and evidence heard

7. The claimant was represented by solicitors and counsel and was represented by Mr Lo of counsel at the final hearing. The respondent was represented throughout by the Government Legal Service and by Mr Ruck-Keene of counsel at the final hearing.

8. Reasonable adjustments were made to the claimant in order to ensure that he could effectively participate in the final hearing. These included regular breaks, including at the claimant's request and in order for him to speak to

his counsel. In particular, during the claimant's evidence additional breaks were given and the claimant confirmed during and after the breaks that there had been sufficient breaks and that he was able to continue. Also, although it was necessary to play the CCTV of the incident which led to the claimant's dismissal during the hearing, this was limited to only what was necessary. This was to minimise any triggering effect on the claimant

9. The claimant gave evidence under oath confirming both his witness statement and supplementary statement in respect of disability as his evidence. He was cross-examined. The respondent's witnesses were Stephen Owen, James Cowie, Stephen Murdy, Hannah Lane, and Susan Howard. The witness statement and additional statement of Joanne Krasnuik were adduced as hearsay evidence to the Tribunal. The claimant did not object to the admission of the additional statement of Joanne Krasnuik.

10. The list of issues was agreed between the parties with minor variations from those set by EJ Ramsden by order dated 18 July 2023. The list is replicated at **Annex A**.

11. We considered a final hearing bundle of 797 pages. The witness statement bundle had 78 pages. The parties confirmed that we had the correct documents at the start of the hearing.

12. There was also an agreed chronology and list of key documents. The chronology appears at **Annex B**.

13. In accordance with the usual practice of the Employment Tribunals, we read those documents in the bundle that we were taken to during the hearing including the key documents. The evidence also included body-worn footage ('the BWF') of the incident which led to the claimant's dismissal.

14. After the close of evidence written submissions and oral were made by both parties.

15. No issues relating to the fairness of these proceedings were raised by the parties during or at the end of the hearing.

16. Although it had originally been decided that the issue of disability would be determined at a preliminary hearing, the Tribunal decided at that preliminary hearing that it would be more appropriate for the issue to be determined at the final hearing.

Relevant Law

(i) Unfair dismissal

17. We have applied the relevant sections of the Employment Rights Act 1996 ('ERA 1996') and EQA 2010 and taken into account the statutes and cases referred to in the parties' submissions. In particular, we have applied sections 6, 15, 20, and 21 EQA 2010, and sections 94, 95, 97 and 98 ERA 1996.

18. In the case of unfair dismissal claims, when a summary dismissal is communicated by letter, the '*date on which the termination takes effect*'

for the purposes of 97(1)(b) ERA 1996 means the date on which the employee either receives the letter or had a reasonable opportunity of becoming aware of its contents: *Gisda Cyf v Barratt* 2010 ICR 1475 SC. The Supreme Court's decision in that case included that it was not appropriate to simply apply the normal approach to contractual termination because s.97 ERA 1996 is part of a charter protecting employees' rights and has to be interpreted in its own setting.

19. Section 94 ERA 1996 confers on employees the right not to be unfairly dismissed. The respondent admits that it dismissed the claimant within section 95(1)(a) ERA 1996. Section 98 ERA 1996 deals with the fairness of dismissals. The employer must show that it had a potentially fair reason for the dismissal within section 98(2) ERA 1996. If so, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

20. Misconduct is a potentially fair reason under section 98(2)(b) ERA 1996.

21. Section 98(4) ERA 1996 provides that the determination of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and this shall be determined in accordance with the equity and the substantial merits of the case.

22. Following the guidance in *Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827 the Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on genuine grounds and after carrying out a reasonable investigation. In deciding whether the employer acted reasonably or unreasonably within section 98(4) ERA 1996 the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances in all aspects of the case, including the investigation, grounds for belief, penalty imposed and procedure followed. It is immaterial how the Tribunal would have handled the events or what decision it would have made and the Tribunal must not substitute its view for that of the reasonable employer: *Iceland Frozen Foods Limited v Jones* 1982 IRLR 439.

23. In considering procedural fairness we must take into account all of the circumstances of the case, including the size and administrative resources of the employer and the principles of natural justice, including: whether the employee knows the case against him; whether there has been undue delay at any stage; whether the employee has had a chance to put his case; whether the employee is given a fair hearing and has the opportunity to be accompanied to the hearing; whether, where possible, the disciplinary hearing is held by independent third parties with sufficient seniority; and whether the employee is given a right of appeal.

24. Whether or not a dismissal by reason of conduct is fair depends not on the label attached to or characterisation of the conduct as gross misconduct, but whether in the circumstances the employer acted reasonably or

unreasonably in treating it as a sufficient reason for dismissing the employee: *HOPE v BMA* [2022] IRLR at [25].

25. The range of reasonable responses approach applies equality to investigations as other parts of the disciplinary process: *J Sainsbury PLC v Hitte* [2003] ICT 111 at [34]. This includes investigations into potential mitigation if the investigation is necessary to put the misconduct into its proper context: *Chamberlain Products Ltd v EAT* [1995] ICT 113, 119.

26. Where there is more than one reason for a dismissal, the Tribunals task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all, involves close evaluation of the employer's reasoning. We must deal with the totality of the reason which the employer gives: *Robinson v Combat Stress* [UKEAT/0310/14] at [20, 21]. A failure to establish a particular ground or reason will not be fatal to the fairness of the dismissal in circumstances where the employer is alleging that he dismissed for a number of reasons each of which justified the dismissal independently of the other.

(ii) Disability

27. Section 6 EQA 2010 says, in summary, that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Under section 212 EQA 2010 substantial means more than minor or trivial. Under paragraph 5 of Schedule 1 EQA 2010 an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it, and, but for that, it would be likely to have that effect. Long term is defined in schedule 1 paragraph 2 as lasting for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person affected. The relevant time to be considered is at the time of the discriminatory act.

28. Applying s.6(4)(a) EQA 2010, a reference to a person who has a disability includes a reference to a person who has had the disability. In relation to a claim under ss.20 and 21 EQA 2010, no duty to make reasonable adjustments would arise save to the extent that the claimant was suffering an impairment that put them at a disadvantage : *Alao v Oxleas NHS Foundation Trust* [2022] UKEAT 135 CA at [69].

(iii) Discrimination because of something arising in consequence of disability

29. Section 15 EQA 2010 says, in summary, that a person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of their disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if the employer shows that they did not know, and could not reasonably have been expected to know, that the employee had a disability.

30. There are two causative stages in assessing whether someone is treated unfavourably because of something, and that something arising in consequence of disability: *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 305 EAT at [26]. 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 amount to an effective reason or cause of it: *Pnaiser v NHS England* [2016] IRLR 170 EAT at [31].

(iv) Failure to make reasonable adjustments for disability

31. An employer is under a duty to make reasonable adjustments: s.39(5) EQA 2010. Section 21 EQA 2010 says that a failure to comply with any of the requirements in section 20 is a failure to comply with the duty to make reasonable adjustments. They key questions to be considered are:

    (i) What is the provision, criterion or practice ('PCP') relied upon?

    (ii) How does the PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

    (iii) Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

32. A knowledge defence applies.

33. PCP should be defined broadly. The Code of Practice at [6.10] says that it should be construed widely so as to include, for example, any formal or informal policies, rules, practices arrangements or qualifications including one-off decisions and actions. A genuine one-off decision which was not the application of policy is unlikely to amount to a practice: *Nottingham City Transport Ltd v Harvey* [2013] All ER(D) 267 EAT. PCP carries the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: *Ishola v Transport for London* [2020] ICR 1204 CA. Generally, a one-off incident will not qualify: Pendleton v Derbyshire County Council [2016] IRLR 580. However, a practice does not need to arise often to qualify as a PCP.

34. Substantial disadvantage means more than minor or trivial: s.212 EQA 2010.

Findings of Fact

35. We have only made those findings of fact that are necessary for the fair determination of the claims. In deciding what findings of fact should be made we took into account the express requests of the parties in their submissions, although we are not bound by them. It is not necessary to make findings of fact beyond that required to determine the claims as set out in the agreed list of issues, and we have not done so. We make our findings of fact below because of the written and oral evidence of the witnesses and the relevant documentary evidence in the bundle. In light of some of our conclusions it was not necessary to resolve all factual issues. We agree with the

respondent's submissions that the claimant sought through cross-examination to explore points outside of the list of issues and that we did not need to resolve these in the absence of any request to amend the claim or list of issues by the claimant.

36. Throughout these reasons we refer to PTSD-type symptoms as opposed to PTSD. This is because the claimant does not have a formal diagnosis of PTSD from a psychologist or psychiatrist. However, the absence of a formal diagnosis was not determinative of any parts of the claim and we refer to PTSD-type symptoms only for accuracy. It was not in dispute that at some points in time the claimant had suffered from PTSD-type symptoms. However, exactly what the claimant had in terms of symptoms did vary over time, although the nature of his condition was that it could be triggered in certain situations. Those active symptoms could include a hypervigilant state.

37. We find that the copies of the documents in the bundle were true copies of the relevant documents relied upon by the parties. Where we refer to correspondence, the full content of that correspondence can be found in the evidence bundle and it is unnecessary to repeat it here.

38. We find that the claimant, sometimes, overstated his belief as to the factual position. For example, in oral evidence he stated as a matter of fact that Governor Lane had lied about a particular meeting. Under cross-examination, this transpired to be based on multiple hearsay which in the circumstances could not be a reliable source of evidence for his assertion. Also, he positively asserted that he was forbidden to contact anyone at the prison by the respondent but this is not supported by the written evidence which clearly limited a prohibition on contact to those individuals who were part of the investigation. This can be found in the respondent's letter dated 31 March 2021. As a result we were cautious about relying on the claimant's oral evidence where this was the sole basis for facts asserted by him. This informed some of our findings below.

39. The claimant was employed by the respondent, through HM Prisons Service, latterly as a Prison Officer from 18 March 2015 until his dismissal for misconduct. The date of dismissal was either 24 November 2021 (according to the respondent) or 18 March 2022 (according to the claimant).

40. On 19 July 2017 the claimant was involved in a hostage situation in which one prisoner repeatedly stabbed another. The claimant was signed off work for PTSD-type symptoms between 13 June and 12 July 2018.

41. The first occupational health ('OH') report was dated 28 August 2018. Its content is not in dispute and is contained in the final hearing bundle.

42. On 24 April 2019 the claimant received a refresher training session on control and restraint ('C&R'). It is alleged by the claimant that he did not take part in training scenarios during that session. We consider the evidence as to exactly what the claimant did or did not do during the training inconclusive in the absence of clear and corroborated evidence, although it appeared to be accepted by the respondent that he may have not taken part in every scenario training. We therefore proceeded on that basis.

43. We find that if the claimant had participated in the April 2019 training scenarios this would not have made any difference to the incident on 25 September 2019 with prisoner G. This is because the claimant accepted this in cross-examination.

44. On 22 May 2019 the claimant met with Governors Motter and Lane about a number of concerns around his alleged poor management including the C&R session on 24 April 2019. There was a dispute between the parties about whether the claimant raised any concerns about the adequacy of his control and restraint training with Governor Lane on or before his meeting with her on 22 May 2019 beyond those recorded in the written complaint submitted before the meeting. There are no agreed notes of what was said at that meeting. We are reliant on the claimant's oral evidence that the concerns he raised at the meeting expanded upon his own written notes that he says were read out at the meeting. Governor Lane disagrees that he specifically suggested that his C&R training was inadequate. We do not find that the claimant specifically asserted that his C&R training was inadequate during that meeting with Governor Lane. The claimant's oral evidence on this point is not clearly and expressly supported by the documentary evidence. We also accept Governor Lane's evidence that had such a concern been raised, something would have been done about it, and the fact that the claimant was not retrained is more consistent with him not raising that specific point. It is right to acknowledge that the claimant's notes do include that he was not allowed to take part in certain parts of the training including not taking part in any of the scenario based training, and we do find that those points were raised at the meeting. However, this is not the same as suggesting that the claimant's training by the respondent in the use of force was inadequate.

45. A further OH report was dated 29 May 2019. Its content is not in dispute and is contained in the final hearing bundle. This includes the claimant describing symptoms namely dizziness and spinning feelings which can happen at any time during work. He also described feeling disconnected from reality. It states '*[the claimant] continues to suffer with PTSD symptoms which include flashbacks; obsessional behaviors, sleep problems, anxiety, emotional numbing and hyperarousal'.* It recommends EMDR therapy which is a form of psychotherapy. It concluded that the claimant was not at that time fit for work.

46. Between 29 May and 28 June 2019 the claimant was signed off work for PTSD-type symptoms.

47. On 28 June 2019 the claimant had an interim review meeting and a return to work plan was agreed.

48. On 1 July 2019 there was a further return to work meeting.

49. A further OH report was dated 4 September 2019. Its content is not in dispute and is contained in the final hearing bundle. It included that '*Based on the assessment today, given that he no longer reports any PTSD- like symptoms he is deemed fit for work, however I recommend a gradual return to full capacity….The outlook is good as he has made a significant recovery and should be able to sustain a full operational duties after the rehabilitation plan recommended above.'* It concluded that the psychological

condition/impairment is likely to be considered a disability because it has lasted more than 12 months.

50. A factual dispute was whether the claimant saw and approved this report before it was released to the respondent. We find that he did not. The only evidence that the claimant received the report was based on the assumptions by a respondent witness (Mr. Owen). However, in the absence of documentary evidence showing that it was sent to the claimant, or that the claimant expressly consented to the release of that particular report to the respondent, we cannot safely find that he did receive it. We accept his oral evidence that he did not. There is no substantial and clear oral or documentary evidence to undermine his account on this point. Also, the respondent did not produce an equivalent cover letter as was evidenced for other reports, such as the cover letter dated 10 December 2020. In the absence of a cover letter, it is more likely than not it was not sent.

51. It was also alleged by the claimant that he informed the respondent about alleged inadequacies of this report before 25 September 2019. However, we find that the claimant did not inform the respondent of any alleged inadequacies because for that period because on his own evidence he had not received it.

52. A further dispute between the parties was whether the claimant informed the respondent of his concerns about his mental health and returning to a prison-facing role between 4 September and 25 September 2019. We accept that the claimant may have raised some general, unspecified concerns, informally with his wing supervisor (now deceased). However, informed by our general conclusions about the reliability of his evidence, we do not find that he clearly raised specific concerns about his mental health and returning to a prison facing role during that period. We took into account the fact that, generally speaking, the claimant did not hesitate to clearly raise express concerns with senior management in writing when he felt it was necessary, and he did not do so on this occasion, as clearly evidenced in the document bundle.

53. On 5 September 2019 the claimant started a phased return to work in the prison wings.

54. On 22 September the claimant returned to full duties on the prison wings. There was a dispute between the parties about whether the claimant was pressured by his manager to return to full duty before 25 September 2019. We find that he was not. There is no clear evidence to that effect other than the claimant's perception from his oral evidence. It was not accepted by the respondent's witnesses and we had reason to doubt that. We gave no real weight to the fact that the claimant was visited by Mr Owen whilst off sick because we accept the evidence that this was common practice. This allegation is not supported by clear and substantial evidence.

55. On 25 September 2019 the claimant was involved in an incident with prisoner G in which he used force against him following a confrontation, including something known as the 'Mandibular technique'. Unpleasant language was used by both the claimant and prisoner G. Although in the later disciplinary process there was some dispute as to who said what, it was accepted through the claimant's counsel during this hearing that the words used by the claimant

included threatening to kill the prisoner. A significant part of the incident was captured on BWF. Other officers were also involved in that use of force against prisoner G. The claimant did accept during the disciplinary hearing that there was an exchange of unprofessional language between him and prisoner G, and that abusive threats were made between him and prisoner G.

56. We find that the Mandibular technique is a pain-inducing technique that should only be used if required and necessary, and is a technique of last resort. This is because of the evidence of Joanne Krasnuik and the other witnesses about the use of force, including the relevant prison service policies as evidenced in the bundle. Although Ms Krasnuik was not a live witness, this point was not actively undermined or challenged in the other evidence. This point was also supported by the evidence of Governor Murdy.

57. On 25 September the claimant completed his 'Annex A', a document which contained his account of the events with prisoner G. This included that he had been C&R basic refreshed in the last 12 months, he had completed an initial use of force training course in June 2015 and subsequently 3 refresher courses, the training had raised his awareness of the lawful use of force and the related prison service policies which he had access to via the HMPS Intranet. This document did not suggest that the claimant had overreacted to what had taken place. Other prison officers who took part in the incident also completed Annex A documents.

58. We find that the claimant's impairment on 25 September 2019 was that he had the potential to suffer PTSD-type symptoms, in so far as he had not made a complete recovery, and the potential for circumstances to trigger his symptoms was there. However, there is insufficient evidence to find it is more likely than not he was actively symptomatic, such as being in a hypervigilant state, on 25 September 2019. We readily accept that this could have been the case. However, in the absence of clear evidence of hypervigilance or other PTSD-type symptoms from the claimant, or the other witnesses to his state of mind at the time, we cannot make a positive finding. Although the claimant in various ways at different times may have suggested that he could have been hypervigilant, his evidence consistently throughout the internal proceedings and these proceedings has been that he did not overact in his use of the Mandibular technique on prisoner G. This is informed by his Annex A report, the investigatory interview, the disciplinary hearing, and his written and oral evidence to us.

59. The claimant was 'in date' with his training at the time of the incident with prisoner G because, regardless of what happened during the April 2019 training, he accepted he had received refresher training within 12 months of the incident with prisoner G. This is in accordance with the respondent's training policy and is supported by the documentary evidence about training, including the claimant's own statements about his level of training in his Annex A report. The claimant accepted in his own evidence that he was in date with the respondent's training requirements.

60. On 27 September 2019 the claimant was suspended pending disciplinary allegations. The terms of the suspension are clearly set out in the suspension letter. These did not prohibit the claimant from communicating with everyone

at his place of work but did prohibit communication in effect with those related to the investigation.

61. On 27 October 2019 the respondent wrote to the claimant about the disciplinary actions.

62. On 14 November 2019 the claimant was interviewed by Governor Murdy as part of his investigation. We do not find that the claimant was unfit to attend this meeting. This is because there is not sufficient evidence that the claimant was unfit to attend. He was also able to give a reasonably detailed account as set out in the interview transcript. Also, during the claimant's disciplinary hearing, his union representative agreed that the claimant stood by the evidence he had given during the interview.

63. On 2 December 2019 Governor Murdy produced a disciplinary investigation report. We find that he was appropriately qualified to carry out this work based on his experience. We accept Governor Lane's evidence that there is no mandatory qualification to be an investigator in these circumstances.

64. Stephen Murdy, the investigating officer, was assisted by Adrian Holmes in producing the investigatory report, particularly in relation to the use of force. Both were cross-examined by or on behalf of the claimant during the disciplinary process as shown in the transcript.

65. The allegations that the claimant faced were not to do with whether the Mandibular technique was used correctly, but whether it was appropriate to use it in the circumstances. This is because of the content of the investigatory report and the allegations as discussed throughout the disciplinary proceedings.

66. During the disciplinary process it was suggested by or on behalf of the claimant that Governor Lane should not be the decision maker. This is because it was alleged by the claimant that she was a potential witness to matters relating to mitigation in respect of the training provided to the claimant. There was also a dispute about who the witnesses should be.

67. On 19 December 2019 the claimant submitted a grievance about the 14 November 2019 decision by Governor Murdy to continue with the investigation interview.

68. On 3 March 2020 the claimant was informed there would be a disciplinary hearing.

69. We find that the effect of the Covid-19 pandemic did play a role in the claimant's disciplinary process. This is because we accept the unchallenged evidence of Governor Lane that as a result of Covid the entire prison service was put into command mode in which everything was focussed on the day to day running of prison. There were very high levels of illness which posed real regime and operational challenges, and the service was effectively running as a 'permanent incident'. As a result there was a policy decision between March 2020 and some time between July and October 2020 that disciplinary hearings should not take place save in exceptional circumstances. This is because of the evidence of Governor Lane which also supported by the letter dated 2 July 2020 sent to the claimant. 'Exceptional circumstances' did not

apply to the claimant's case and we were unaware of any application of exceptional circumstances being applied by the respondent.

70. The chronology of the claimant's disciplinary proceedings and appeal proceedings does mean that there was some delay. However, at least some of the delay was at the request of the claimant. He was not, on his own account, fit and able to take part for at least some of the period, as set out in the documentary evidence. There was also some delay to accommodate his union representative's availability.

71. There was a dispute between the parties about whether the claimant's recollection was impaired by the passage of time between the incident and the disciplinary hearing, and what effect this had (if any) on the claimant's ability to represent his position to the respondent or on Governor Lane's ability to reach a fair decision. We do not find that the passage of time between the incident and the disciplinary hearing had any material impact on the claimant's ability to represent his position. This is because he had the benefit of his Annex A account, completed on the day of the day incident, the transcript of his investigation interview on 14 November 2019, the body worn footage, and the extensive union representation support. There was nothing about the delay which rendered the proceedings unfair or which had any material impact on the ability of Governor Lane to make a decision.

72. Prisoner G was not interviewed formally as part of the investigation into the claimant. However, he did provide a brief account to an officer which was in our evidence bundle.

73. On 9 March 2020 a grievance meeting with the claimant and Governor Murdy took place.

74. On 20 October 2020 Governor Lane invited the claimant to disciplinary hearing, including her decision on witnesses and to continue as hearing manager.

75. On 17 November 2020 the disciplinary hearing was adjourned.

76. On 10 December 2020 an OH report included that the claimant had not received any treatment for his PTSD-symptoms since he was suspended. His symptoms at that time included impaired cognitive functioning around memory and concentration which would frequently trigger a range of intense emotional and physical reactions. The report concluded that this amounted to a disability because its duration was longer than 12 months or is likely to last longer than 12 months.

77. On 25 March and 26 April 2021 and 5 May 2021 the disciplinary hearing took place.

78. On 5 May 2021 the claimant was informed that he was dismissed with immediate effect by Governor Lane.

79. There was a dispute between the parties as to whether the claimant raised his mental health issues as potential causes for his conduct during the incident with prisoner G on 25 September 2019 during the disciplinary hearing. We find that it was raised but only to a limited degree as set out in

the transcript of the hearing. For example, the claimant said that '*the incident what occurred obviously was a reactional thing. Obviously as with many incidents it was spontaneous and, at the time I was suffering with PTSD, and as it says in the report obviously there is elements of hyperarousal…Which would probably explain why I don't remember a lot of it'.* We found, also, that the claimant did in fact give a detailed description of a very significant amount of the incident in his various accounts taken as a whole. We recognise that the reactions that *can* happen during PTSD were raised as potentially relevant and the claimant's union representative Mr West suggested that it would have been proper to seek professional medical advice on whether the claimant's reaction *could* have been attributed to his PTSD. Equally, Governor Lane did make reference during the hearing to the OH report suggesting that around that time of the incident the claimant had received treatment, had made a significant recovery, and was fit for operational duties, something the claimant's union representative accepted. It is correct that during the hearing the claimant's union representative suggested that the claimant's disability has played '*a massive part in this, in this event. And it's been very difficult to be able to produce any kind of accurate medical input, in terms of the symptoms of PTSD and how they could affect the presentation of Mr. Silvester during the event – and I refer to, specifically in terms of the language used.'* Mr West also raised the question of threat perception, but equally did not say there was clear supporting evidence of that other than the September 2019 OH report which included '*I'm advising this as the symptoms are reported as severe, and as such they would impair cognitive functioning around memory and concentration, and would frequently trigger a range of intense emotional and physical reactions'.* This report was expressly discussed with Governor Lane during the disciplinary hearing and acknowledged by her. Mr West went on to submit that the incident '*may or may not'* be related the claimant's disability, and in representations stated that PTSD and hyper-vigilance would have been a major contributory factor to the claimant's reaction.

80. The OH report dated 27 January 2021 included that '*A timescale for a return to work is likely to depend on the outcome of the conduct enquiry. I consider that the conduct and mental ill health are directly linked. Given this I would advise that the conduct issue be progressed promptly with support and adjustments…'* However, we gave this evidence little weight. Firstly, it is unclear whether the author is referring to a causal link between the claimant's behaviour on 25 September 2019 and his mental health or a causal link between the claimant's mental health and the conduct enquiry. Secondly, the occupational health adviser did not in this case clearly have sufficient qualifications, expertise, or information to give expert evidence as whether the claimant's disability caused him to behave as he did to prisoner G. Thirdly, there is no clear analysis or detail as to exactly what this statement means.

81. There was a dispute between the parties about whether Governor Lane engaged with and considered the submissions in mitigation put forward by the claimant's union representative Mr West, in particular the impact of mental health on his conduct during the incident. We find that she did consider the submissions in mitigation because they were referred to in her decision letter and she said that she did in her evidence. There is also a discussion of the issue, to a degree, in the transcript.

82. During the disciplinary hearing, at one point Governor Lane had a conversation with Mr West in the claimant's absence. However, we accept her unchallenged evidence that this break was simply her confirming with Mr West that it was OK to carry on the hearing in light of her concerns about the claimant being aggressive.

83. On 7 May 2021 the respondent sent the dismissal letter to the claimant. The claimant was dismissed on the basis of two charges. Firstly, he had accepted the first charge that he had behaved in an unprofessional manner in that offensive language and abusive threats were made. The language used was extremely offensive and abusive and was completely inappropriate, and included a threat to kill. This amounted to gross misconduct in the judgement of Governor Lane. The second charge was that the Mandibular angle technique was used on prisoner G which was not necessary, justified or proportionate. Governor Lane's view was that this was not necessary, justifiable or proportionate because she did not accept the claimant's version of events that prisoner G was actively resisting or aggressively trying to get free. She rejected the claimant's explanation that prisoner G had pulled his arm out of the lock before the technique was applied. She considered that to also be gross misconduct. The letter states that she took into account all of the circumstances and mitigation.

84. On 12 May 2021 the claimant appealed his dismissal.

85. In the claimant's written submissions on appeal it was stated that '*In relation to the unprofessional language there should be evidence from a qualified mental health professional to test the effect that [the claimant's] disability could have had on this matter in relation to hyper arousal [sic] and hyper vigilance….The above report or evidence from [OH] would also have provided useful evidence in relation to the use of force matter'.* The submissions later suggest the unprofessional language must be viewed '*through the prism of [the claimant's] PTSD'.*

86. On 12 July 2021 the appeal hearing was adjourned.

87. On 6 October 2021 the claimant opted to proceed with a written appeal determination.

88. On 17 November 2021 the claimant provided written responses to additional questions. These included that the delay during the disciplinary proceedings had a detrimental effect on his mental health and had increased his anxiety.

89. On 24 November 2021 the claimant's appeal was rejected. The letter from Susan Howard stated that the appeal was dismissed, and '*Governor Hannah Lane will contact you with your last day of service and when your pay will be stopped'*. It also stated that *'I take the view that the penalty was reasonable and proportionate to the misconduct, given the seriousness of the events and the threat that was made to the life of a prisoner.'*

90. At no stage, in terms of the use of force, did the claimant accept that he had done anything wrong. This included during his oral evidence to us. He did not clearly state that he did what he did because of his PTSD-type symptoms during the disciplinary process. He did not clearly say in evidence to us that he would have reacted differently absent any effects of PTSD.

91. On 18 March 2022 the respondent wrote to the claimant about his last date of employment. This was from Hannah Lane and included *'…you were advised that I would get in touch to inform you when your last day of service would be and when pay would be stopped. I have sought HR Case Manager advice, and they have confirmed that in line with HMPPS policy, your last day of service would be the date of your appeal hearing (24th November 2021) and your pay should have been stopped in line with this date'.*

92. On 7 May 2021 the claimant was dismissed for gross misconduct without notice. PSI 10/2016 was impliedly incorporated into the Claimant's contract of employment such that it operated to vary the effective date of termination to the date of the dismissal of any appeal. This is because the contractual position was not disputed by the claimant.

93. The claimant was paid by the respondent until 18 March 2022.

94. In terms of the respondent's decision making, either charge (unprofessional behaviour or unjustified use of force) was sufficient to justify the claimant's dismissal independent of the other. This is because of the clear evidence of Governor Lane and Susan Howard.

95. The claimant's impairment had the following effects on his day-to-day activities. When he was actively symptomatic his symptoms included flashbacks, obsessional behaviors, sleep problems, anxiety, emotional numbing and hyperarousal. These affected his ability to carry out his work. The claimant's condition could also be triggered by experiencing violence, certain emotions, and situations where he had no control. The claimant took medication including Amitriptyline during the relevant period and was prescribed Sertraline shortly after he was suspended in late 2019 to help manage his symptoms. Also, the claimant took various steps to minimise the risk of triggers such as a period of return with restricted duties at the gate. This did not involve prisoner contact. As a result of this measure he was not actively symptomatic. This is because of the claimant's own evidence.

96. At various points as documented in the final hearing bundle the claimant received EMDR therapy, CBT, and medication, all in respect of his PTSD-type symptoms. There is no real dispute as to the medication or therapies received by the claimant, rather the respondent disputed the degree to which the claimant was actively symptomatic at particular times. We have only resolved when the claimant was actively symptomatic as necessary to make our overall conclusions.

97. The claimant had access to a general employee assistance programme. He was aware of this since at least 27 October 2019 when he was informed about the investigation. This is because of the content of correspondence around that date.

98. The claimant was meant to receive regular phone contact from Governor Paul Mason as part of the support given to him whilst he was suspended and during the disciplinary proceedings. We find that the claimant did not receive regular phone contact from Governor Mason. This is because we accept the claimant's evidence of this in the absence of clear contradicting evidence. This finding is also supported by the claimant's letter of complaint to Governor

Lane dated 4 August 2020 referring to a lack of support, contact, and the effect on his mental health. In the same letter, the claimant suggests that he is not in a fit state of mental health, in respect of participation in the disciplinary proceedings.

Conclusions

(i) Unfair dismissal

(1) When was the claimant dismissed?

99. The respondent says that the claimant's employment terminated by the application of PSI 10/2016 which was incorporated into his employment contract. This determines that employment is terminated at the point that an appeal against dismissal is dismissed. This would make the dismissal date 24 November 2021. The claimant did not challenge this being the contractual position. The claimant maintained that the respondent varied the contractual position by the terms of the correspondence from the respondent which he accepted by the fact that he accepted that he was paid by them until 18 March 2022. The respondent says that paying the claimant was an error.

100. We find that the claimant's employment was terminated on 18 March 2022. We agree with the claimant that although the initial contractual position was that his employment was terminated on the date that any appeal was resolved against him, the letter dated 24 November 2021 from Susan Howard had the effect of varying the contract to the extent that his last day of service was not on that date, and would be notified to him at a point unspecified in the future, and that he would be paid up until that date. The claimant accepted the contractual variation by accepting the wages paid to him. The last day of service was not communicated to him until the letter of 18 March 2022 from Hannah Lane. The respondent's submission that his employment terminated without that actually being communicated to him is insufficient, we considered, in the circumstances of this case. This is because if the respondent's case was correct, when calculating the last day of service the claimant had no reason to believe that it had in fact happened. The respondent failed to clearly communicate the last day of service to the claimant until 18 March 2022. We consider that the communication of the last day of service is relevant when interpreting the contractual position applying *Gisda Cyf v Barratt* [2010] ICR 1475, above. We consider the wording of Susan Howard's letter, referring to the future tense, was sufficient in the overall circumstances to amount to a variation of the contract which was duly accepted by the claimant by his conduct.

(2) What was the reason or principal reason for dismissal?

101. We find the reason was conduct. We find that the respondent genuinely believed that the claimant had committed misconduct. This is because is no suggestion otherwise. This is also because of the evidence of Governor Lane supported by the dismissal letter as to the relevant beliefs.

(3) 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?

102. Firstly, we asked was there a reasonable ground for its belief. We find that there was. This is because there was clear evidence of misconduct in the form of excessive or inappropriate use of force and use of unprofessional language in the form of the eye witness evidence (Annex A accounts, internal investigation interviews, body worn footage, and witness evidence in these proceedings).

103. Secondly, we asked whether at the time the belief was formed, the respondent had carried out a reasonable investigation. Also, whether the respondent acted in a procedurally fair manner, and whether dismissal was within the range of reasonable responses.

104. We find that the respondent did, and dismissal was within the range of reasonable, for the following reasons. We were careful not to substitute our own view. Our reasons address the specific allegations in issue. Ultimately, none of the points raised by the claimant were sufficient to render the dismissal unfair.

105. We do not find that Governor Lane should have stepped down from her role as decision maker. Although her explanation given during the proceedings about why she did not need to step down could have been in more detail, we do not find that this rendered the proceedings unfair. This is because we do not find that the claimant expressly said to her in the 22 May 2019 meeting that he felt that his training was inadequate. Also, we find that the issue of training is of tangential relevance because the claimant was in date with training, in accordance with the respondent's policy, the claimant did not clearly state that his training was inadequate at the time, he did not accept even in these proceedings that his training was inadequate, and he also accepted in cross-examination that even if he had participated in the scenario training in April 2019 that would not have made any difference. Also, the misconduct alleged was not about using the technique correctly, but whether it was used in appropriate circumstances. It was not unreasonable in those circumstances for Governor Lane to remain the decision maker. In light of the issue of training being not a relevant factor there was no real conflict of interest. We reject the claimant's submission that because he himself is not a trainer, he was not actually in a position to know whether he was adequately trained. This is because whether or not the technique was in fact used correctly was not the misconduct the disciplinary hearing was about. The hearing was about the circumstances surrounding the use of the technique ie. whether it was necessary and proportionate.

106. We do not find that the delay rendered the proceedings unfair. This is because exact recollections were not central to the decision making, and there was a substantial body of evidence collected as to what happened very close to the time of the incident. This significantly mitigates against any difficulties which might arise from the passage of time.

107. We do not consider that the alleged lack of investigation into why the claimant was signed off as competent in C&R in the April 2019 training rendered the process unfair. This is because the training was not relevant for the reasons already outlined. Also, the issue was investigated to a degree throughout the process. Also, we heard some evidence from Stephen Owen that this could have been simply a matter of local policy, which we accept.

108. We do not consider that any failure to obtain witness evidence rendered the process unfair. The investigation included the Annex A report from Officer Mohidin and we consider this to be sufficient given the other witness and body worn footage evidence available. We did not consider that prisoner G was likely provide material evidence and his account was, to a degree, part of the available evidence. There was no need for Governor Lane to be a witness in light of our conclusions above.

109. We do not consider that the evidence was insufficient for Stephen Murdy to form the view that he did. The use of the technique was not in dispute. There was also ample supporting evidence from witnesses and the body worn footage, Stephen Murdy was assisted by another experienced officer (Adrian Holmes), and both Stephen Murdy and Adrian Holmes were cross-examined by the claimant or his representative in the disciplinary hearing, so there was ample opportunity for their evidence to be tested.

110. We did not consider that the evidence of Adrian Holmes rendered the process unfair. There is nothing to suggest bias or impropriety on his part and this evidence was fully tested in the disciplinary hearings.

111. We do not consider that any unfairness arose from the claimant's representative having a conversation alone with Governor Lane during the disciplinary hearing.

112. We find that the issue of the claimant's symptoms arising from his mental health condition was raised by the claimant and his representative during the disciplinary hearing to the degree set out above. We consider that the respondent failed to fully investigate that issue in respect of mitigation, but only as regards the second charge of unprofessional behaviour. This is because in respect of the use of force, the claimant at no stage accepted that he done anything wrong, even in his oral evidence to us he said that he did not overreact, and his evidence in the disciplinary process was not that he did what did because of his PTSD-type symptoms. However, we feel that it was incumbent on the respondent to investigate to a greater degree any link between the claimant's disability and the unprofessional behaviour charge as a mitigating factor. This is consistent with the points raised by the claimant on appeal, namely that his disability was relevant to the question of mitigation on the second charge of unprofessional behaviour.

113. However, we feel that having regard to the totality of the reason which the respondent gives for dismissal, the dismissal (as sanction) was not, overall, outside of the band of reasonable responses. This is because we accept the evidence of Governor Lane and Susan Howard that either charge was sufficient to justify the claimant's dismissal independent of the other. We have expressly adopted the approach in *Robinson v Combat Stress*. The totality of the reasoning was sufficient to dismiss the claimant and the identified failing by the respondent did not render the dismissal unfair. In support of this, the claimant accepted in cross-examination that Governor Lane's conclusions could be reasonably reached on the evidence, even if he did not agree with them. These conclusions included her interpretation of the BWF about when the Mandibular technique was applied, the position of the claimant's hand, whether prisoner G was showing sufficient compliance, and who spoke any threat to kill.

114. We consider therefore that, taken as a whole and having regard to the totality of the reasoning of the respondent, a reasonable investigation was carried out, the decision to dismiss was reasonable, and the respondent acted in a procedurally fair manner.

115. For the reasons above, the complaint of unfair dismissal is not well-founded and is dismissed.

(ii) Disability

(1) Did the claimant have a physical or mental impairment?

116. We find that the claimant did have an impairment, namely PTSD-type symptoms. This is because of the claimant's own evidence and the supporting occupational health reports.

(2) Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

(3) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

(4) Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

117. We find that the claimant's impairment, variously, did have a substantial adverse effect on his ability to carry out day-to-day activities. This is because of his own evidence as corroborated by his medical records and the OH reports. We accept that the effect on his day-to-day activities varied from time to time. When he was actively symptomatic, such as described in the OH report dated 29 May 2019, his symptoms including flashbacks, obsessional behaviors, sleep problems, anxiety, emotional numbing and hyperarousal. These affected his ability to carry out his work. We also find that the claimant was receiving, at some points, medical treatment including EMDR, CBT, and medication to treat or correct the impairment. We also find that at certain times the effect of the impairment was controlled to a degree by medication and other measures such as removing the claimant from potential triggers through less-than full working duties, or just working on the gate. We were satisfied that the impairment would have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures.

(5) Were the effects of the impairment long-term?

118. We find that the claimant's own evidence and the OH reports clearly demonstrate that the effects lasted more than 12 months and were likely to recur.

119. Also, the claimant was disabled by virtue of s.4(a) EQA 2010, as accepted by the respondent.

120. The respondent also accepted that during the suspension period the claimant's PTSD-type symptoms reemerged such that for the purposes of the s.20 EQA 2010 claim, the claimant was disabled at the material time.

121. For the reasons above, the claimant was a disabled person at the relevant times as defined by section 6 Equality Act 2010 because of PTSD-type symptoms.

122. However, as to whether the claimant was actively symptomatic on 25 September 2019, we repeat our finding above at paragraph [58].

(iii) Unfavourable treatment because of something arising in consequence of disability

(1) Did the respondent treat the claimant unfavourably by suspending him from work for the period 27 September 2019 to 5 May 2021 and dismissing him?

123. We find that the respondent did treat the claimant unfavourably by suspending him from work for the period 27 September 2019 to 5 May 2021 and dismissing him. There was no real dispute that these events happened as a matter of fact and this was inherently unfavourable conduct.

(2) Did the following things arise in consequence of the claimant's disability?

i. The claimant was in a hyper-vigilant state, which caused him to react as he did to the prisoner G Incident?

124. We do not find that there is sufficient evidence to find that the claimant was in a hypervigilant state at the relevant time in accordance with our findings of fact above, or if this is wrong, that any such state caused him to react as he did to prisoner G. It follows, that unfavourable treatment was not because of that. In light of this conclusion it is not necessary for us to make further findings.

125. For the reasons above, the complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

(iv) Failure to make reasonable adjustments for disability

(1) Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

126. We find that the respondent did know that the claimant had a disability for the purposes of the reasonable adjustments claim. This is admitted by the respondent for the purposes of this claim.

(2) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

a. A practice of suspending employees from work when facing disciplinary allegations for lengthy periods of time?

b. A practice of conducting lengthy disciplinary proceedings.

127. We do not find that there is clear and sufficient evidence that the respondent had a practice of suspending employees from work when facing disciplinary actions for lengthy periods of time. This is because only clear evidence available to us was as to what happen to the claimant and there is no evidence that this was part of a wider state of affairs as to the respondent's conduct. The claimant's brief oral assertions, uncorroborated by documentary evidence, about one or two other individuals he named was insufficient evidence in the circumstances of this case to make other findings that the respondent had imposed the PCPs alleged.

128. We find that there was a practice of not holding internal disciplinary proceedings between March 2020 and some point between July and October 2020. This is admitted by the respondent and is supported by the evidence of Governor Lane. We find that this amounts to a practice of lengthy disciplinary proceedings at that time. We do not find that the practice extended beyond that point because there were various reasons for the delays after that point, some of which were attributable to the claimant or his representative, and where they were attributable to the respondent, there was no wider evidence that this was their practice or part of a wider state of affairs. The initial, partly unexplained, delay between the investigatory report being finished on 2 December 2019 and the claimant being informed of his disciplinary hearing on 3 March 2020 did not amount to a practice as there was no wider evidence of this type of conduct by the respondent.

(3) Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that stress and uncertainty and being separated from his network of friends (as per the terms of the suspension) exacerbate the Claimant's depression and anxiety, difficulty sleeping and difficulty with memory and concentration?

129. We find that the PCP did put the claimant at a substantial disadvantage compared to someone without his disability, but only in respect of stress and uncertainty, which exacerbated his depression and anxiety, difficulty sleeping, and difficulty with memory and concentration. We are satisfied that the effect of the 6 month delay at that stage went beyond the effect that anyone would have had in those circumstances because of his disability. The terms of suspension did not as a matter of fact separate the claimant from his network of friends because these only restricted him from communicating with those related to his case. This is clear from his suspension letter.

(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?

130. We find that the respondent knew and could be reasonably expected to know that the claimant was likely to be placed at that disadvantage. There was no occupational health report between 4 September 2019 and a further report on 10 December 2020 to suggest otherwise. The previous OH reports and the application of common sense were sufficient to put the respondent on notice of the likely effects of the practice we have found.

(5) <u>What steps could have been taken to avoid the disadvantage? Did the Respondent fail to take those steps?</u>

131. We find that the steps that could have been taken by the respondent to avoid the disadvantage from the practice we have found happened were to ensure that the claimant was kept well-informed of the reasons for the delay, and it could have provided the claimant with sufficient support during that period, including to access to counselling. We do not find that the reasonable adjustment requested in relation to speeding up the appeal process is arguable because there was no appeal during that time.

132. We find that the respondent did not keep the claimant well-informed of the reasons for the delay because the claimant was only told about the delay and reason for it in July 2020. The claimant was informed that there would be a disciplinary a disciplinary hearing on an unspecified date 2 March 2020 and the next clear correspondence is dated 2 July 2020 explaining that the hearings, generally, were postponed as a result of Covid-19.

133. We do not find that the claimant had access to sufficient levels of support from the respondent during the period of March 2020 to the end point of the practice between July and October 2020. This is because we do not consider that the general access to the employee assistance program, of which the claimant was made aware from at least 27 October 2019 when he was under investigation, was sufficient given the claimant's level of disability. We also accept the claimant's evidence that he did not receive regular phone contact from Governor Paul Mason. These findings are supported by the claimant's letter of complaint to Governor Lane dated 4 August 2020 which refers to a lack of support, contact, and the effect on his mental health. This letter also suggests that the claimant was not in a fit state of mental health as of 4 August 2020.

(6) <u>Was it reasonable for the Respondent to have to take those steps?</u>

134. We find that it was reasonable for the respondent to have to take those steps. This is because there no good explanation as to why they did not and the steps would not have been particularly onerous. The claimant was readily given counselling and other support during other periods, it would have taken very little for someone to have updated him as to the progress of his proceedings and the reasons for any delay. Whilst we accept that the respondent was under a significant degree of pressure as a result of the impact of Covid-19 on its operations, this was not in our judgement sufficient to justify the lack of correspondence during that period. This is in part because correspondence is an administrative task that did not require any significant time on the part of a senior prison officer.

135. To the above extent, and for the reasons above, the following complaints of failure to make reasonable adjustments for disability are well-founded and succeed:

    (i) Ensuring the claimant was kept well-informed of the reasons for the delay in his disciplinary proceedings in the period between March 2020 and July-October 2020; and

    (ii) Providing the claimant with sufficient support during the period between March 2020 and July-October 2020, including access to counselling.

136. The remaining complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

137. Further directions will follow in respect of determination of remedy.

138. This is a unanimous judgment.

_____
Employment Judge B Smith
Date: 22 December 2023

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

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

Annex A – Agreed List of Issues

Unfair Dismissal

1. When was the Claimant dismissed?

   1.1. The Claimant says he was dismissed on 18 March 2022;
   1.2. The Respondent says he was dismissed on 24 November 2021 (and that the Claimant was paid in error until 18 March 2022).

2. What was the reason or principal reason for dismissal?

   2.1. The Respondent says the reason was conduct.
   2.2. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

3. 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?
   3.1. The Tribunal will usually decide, in particular, whether:

      3.1.1. There were reasonable grounds for that belief;
      3.1.2. At the time the belief was formed the Respondent had carried out a reasonable investigation;
      3.1.3. The Respondent otherwise acted in a procedurally fair manner; and dismissal was within the range of reasonable responses.

   3.2. The Claimant alleges that the Respondent's process was flawed in the following respects:

      3.2.1. Governor Lane, the decision-maker in the disciplinary process, should have stepped down from her role as decision-maker, as she could otherwise have provided witness evidence as part of that process pertaining to the Claimant's concerns with the C&R training he had received;
      3.2.2. The lengthy delay between the risoner G Incident and the disciplinary hearing meant that recollections could be impaired by the passage of time;
      3.2.3. The Respondent failed to seek medical advice on the Claimant's condition at the time of the Prisoner G Incident;
      3.2.4. The Respondent failed to consider the impact of the Claimant's disability on his alleged actions at the time of the Prisoner G Incident;
      3.2.5. The Respondent failed to adequately investigate, including into claims that the Claimant was signed off as competent by a C&R instructor who was not present at the training session;
      3.2.6. The Respondent failed to obtain key witness evidence, including from Officer Mohidin (who was present at the Prisoner G Incident), Prisoner G and Governor Lane;
      3.2.7. The investigating officer, Steve Murdy, formed a view on the alleged use of inappropriate force in a C&R manoeuvre, despite admitting that it was not clear from the video footage; and
      3.2.8. The expert evidence on appropriate use of and procedure for C&R relied upon by the investigating officer, Mr Murdy, was provided by

Adrian Holmes, who was also assisting Mr Murdy with the investigation. The investigation undertaken was therefore not impartial, given the Claimant had raised concerns about the quality of that training.

3.3. The Respondent asserts that it was justified in dismissing the Claimant because dismissal is an appropriate sanction for the conduct in question, and that it was pursuing the legitimate aim of upholding high standards of conduct and discipline among its employees, with particular regard to how prison officers treat prisoners. The Respondent is responsible for the health and safety of the prisoners and staff under its care and for maintaining public confidence in the prison system. The Respondent also avers that a reasonable investigation was undertaken and the procedure adopted was fair.

4. Remedy for unfair dismissal

4.1. If there is a compensatory award, how much should it be? The Tribunal will decide:

4.1.1. What financial losses has the dismissal caused the Claimant?
4.1.2. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
4.1.3. If not, for what period of loss should the Claimant be compensated?
4.1.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
4.1.5. If so, should the Claimant's compensation be reduced? By how much?

4.2. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.2.1. Did the Respondent or the Claimant unreasonably fail to comply with it?
4.2.2. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

4.3. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

4.3.1. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

4.4. Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

4.5. What basic award is payable to the Claimant, if any?

4.6. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Disability

5. Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

   5.1. Did he have a physical or mental impairment: PTSD?

   5.2. Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

   5.3. If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

   5.4. Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

   5.5. Were the effects of the impairment long-term? The Tribunal will decide:

      5.5.1. Did they last at least 12 months, or were they likely to last at least 12 months?
      5.5.2. If not, were they likely to recur?

Discrimination arising from disability (Equality Act 2010 section 15

6. Did the Respondent treat the Claimant unfavourably by:

   6.1. Suspending him from work for the period 27 September 2019 to 5 May 2021; and Dismissing him?

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

      6.2.1. The Claimant was in a hyper-vigilant state, which caused him to react as he did to the Prisoner G Incident?
      6.2.2. Was the unfavourable treatment because of that?
      6.2.3. Was the treatment a proportionate means of achieving a legitimate aim?
         6.2.3.1. The Respondent says that its aims were:
            6.2.3.1.1. Ensuring the health and safety of its staff and prisoners;
            6.2.3.1.2. Enforcing its policies on (i) conduct and discipline, and (ii) the lawful use of force against prisoners in its care;
            6.2.3.1.3. Seeking to protect the integrity of the disciplinary investigation;
            6.2.3.1.4. Upholding high standards of conduct and discipline among its employees; and
            6.2.3.1.5. Maintaining public confidence in the prison system.
         6.2.3.2. The Tribunal will decide in particular:
            6.2.3.2.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;
            6.2.3.2.2. Could something less discriminatory have been done instead; and
            6.2.3.2.3. How should the needs of the Claimant and the Respondent be balanced?

7. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

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

   9.1. A practice of suspending employees from work when facing disciplinary allegations for lengthy periods of time?

   9.2. A practice of conducting lengthy disciplinary proceedings.

10. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that stress and uncertainty and being separated from his network of friends (as per the terms of the suspension) exacerbate the Claimant's depression and anxiety, difficulty sleeping and difficulty with memory and concentration?

    10.1. The Claimant says that the substantial disadvantage was caused, in the case of his suspension, by being suspended for 20 months, and in the case of the lengthy disciplinary proceedings, by waiting six months for an appeal outcome.

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

12. What steps could have been taken to avoid the disadvantage?

    12.1. The Claimant suggests:

        12.1.1.1. In relation to the PCP at 9.1, the Respondent could have:
            12.1.1.1.1. Ended the Claimant's suspension prior to the conclusion of its disciplinary investigation;
            12.1.1.1.2. Completed the disciplinary process, or appeal process, sooner;
            12.1.1.1.3. Kept the Claimant well-informed of the reasons for the delay; and/or
            12.1.1.1.4. Provided the Claimant with sufficient support during the prolonged suspension period, including access to counselling.
        12.1.1.2. In relation to the PCP at 9.2, the Respondent could have:
            12.1.1.2.1. Sped up the appeal process;
            12.1.1.2.2. Ensure the Claimant was kept well-informed of the reasons for the delay; and/or
            12.1.1.2.3. Provided the Claimant with sufficient support during the prolonged period, including access to counselling.

13. Was it reasonable for the Respondent to have to take those steps?

14. Did the Respondent fail to take those steps?

Remedy for discrimination

15. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

16. What financial losses has the discrimination caused the Claimant?

17. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

18. If not, for what period of loss should the claimant be compensated?

19. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

20. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

21. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

22. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

    22.1. Did the Respondent or the Claimant unreasonably fail to comply with it?

        22.1.1. If so is it just and equitable to increase or decrease any award payable to the Claimant?

        22.1.2. By what proportion, up to 25%?

    22.2. Should interest be awarded? How much?

Annex B – Agreed chronology

19 July 2017 – Claimant involved in a hostage situation where one prisoner repeatedly stabbed another

13 June to 12 July 2018 - Claimant signed off work for PTSD

28 August 2018 – OH report

01 October 2018 – Claimant involved in stopping prisoner from stabbing staff

09 February 2019 – Claimant attempted to save prisoner after suicide attempt

16 April 2019 – Claimant involved in incident with prisoner

24 April 2019 – Control and Restraint (C&R) refresher session – parties dispute about Claimant's involvement

22 May 2019 – Claimant meeting with Governors Motter and Lane about a number of concerns around his alleged poor management including the C&R session on 24 April 2019

29 May 2019 – OH report

29 May to 28 June 2019 – Claimant signed off work for PTSD

28 June 2019 – interim review meeting and Return to Work plan agreed

1 July 2019 – further Return to Work meeting

4 September 2019 – OH report

5 September 2019 – Claimant phased return to work on Wings

22 September 2019 – Claimant returned to full duties on Wings

25 September 2019 – Claimant involved in index incident with Prisoner G

27 September 2019 – Claimant suspended pending disciplinary investigation

27 October 2019 – Respondent wrote to Claimant about disciplinary allegations

14 November 2019 – Claimant interviewed by Governor Murdy as part of investigation

2 December 2019 – Governor Murdy produces disciplinary investigation report

19 December 2019 – Claimant submitted grievance about 14 November 2019 decision by Gov Murdy to continue with the interview

3 March 2020 – Claimant informed that would be a disciplinary hearing

9 March 2020 – Grievance meeting with Claimant and Governor Murdy

20 October 2020 – Gov Lane invited Claimant to disciplinary hearing, including her decision on witnesses and to continue as hearing manager

17 November 2020 – Disciplinary hearing adjourned

25 March and 26 April 2021 and 5 May 2021 – Disciplinary hearing

7 May 2021 – Respondent sent dismissal letter to Claimant

12 May 2021 – Claimant appealed dismissal

12 July 2021 - Appeal hearing adjourned

6 October 2021 – Claimant opted to proceed with written appeal determination

26 October 2021 – Claimant provided written submissions

17 November 2021 – Claimant provided written responses to additional questions

24 November 2021 – Appeal rejected

18 March 2022 – Respondent wrote to Claimant about his last date of employment. Claimant says that this date was his last day of employment. Respondent disputes this.