



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr N Wooster

AND

Respondent

Secretary of State for Justice

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

22 April 2021

Hybrid Hearing – Partly by Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation:

For the Claimant: In person

For the Respondent: Mr S Tibbitts of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant's claim is dismissed.

REASONS

1. In this case the claimant Mr Nicholas Wooster claims that he has been unfairly dismissed. The respondent contends that the reason for the dismissal was capability, and that the dismissal was fair.
2. This has been a partly remote hearing on the papers which has been consented to by the parties. The claimant was present in person at the hearing, and he was accompanied by his wife. The Employment Judge was also present in person. The respondent's witnesses and counsel for the respondent attended by Cloud Video Platform. A fully face to face hearing was not held because it was not practicable and all issues could be determined in the hybrid hearing as agreed. The documents that I was referred to are in a bundle of 235 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant. For the respondent I have heard from Mr Richard Luscombe and Mrs Jeannine Hendrick.

4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts
6. The claimant Mr Nicholas Wooster joined HM Prison Service in January 2011 and at the times relevant to this claim was based at HM Prison Exeter as a Band 3 Prison Officer. He had been issued with a contract of employment in a job description, and the respondent had a number of policies and procedures in place. The claimant accepts that a fundamental part of his role as a Prison Officer was to meet a required standard of physical fitness such that he could undertake control and restraint of prisoners as and when required.
7. The respondent has an Attendance Management Policy which was available on its intranet and the claimant was aware of its existence. Guidance on the policy was available through a link to website known as My Services, and the policy made it clear that all staff were required to be familiar with all sections of the Attendance Management Policy and the accompanying guidance on My Services.
8. The Attendance Management Policy generally applied to manage sickness absence and as is normal had certain trigger points following which certain action might be taken. In certain circumstances, for instance after 28 consecutive calendar days of sickness, this triggered a Formal Attendance Review Meeting, known as a FARM. The Policy made it clear that downgrading, regrading, and dismissal were all options which might be considered at the FARM. At that meeting the Decision Manager was required to explain why downgrade, regrade or dismissal were being considered, and the employee should be given the opportunity to present any new information which might affect that decision. It was clear that an employee also had to agree to a downgrade or regrade before this could be put in place.
9. Paragraph 2.98 of the Attendance Management Policy provides that: the Decision Manager must dismiss the employee if all of the following apply: the business can no longer support the employee's level of sickness absence; downgrade or regrade is not appropriate without the employee's consent; where appropriate, there are no further reasonable adjustments that can be made; OH advice has been received within the last three months; and an application for ill-health retirement would not be appropriate or has been refused.
10. The Attendance Management Policy also had provisions relating to a Phased Return to Work. Paragraph 2.132 of the Policy suggested that a phased return to work would usually be limited to a maximum of three

months. Further guidance was given in a document referred to as M10 entitled "How to manage a phased return to work". This guidance made it clear that the relevant line manager should seek advice when required; encourage employees to take personal responsibility for their health well-being and recovery; support the employee's return to work; be the first point of contact for employees; discuss the content of medical reports from Occupational Health; and make a decision about what temporary adjustments can be supported.

11. The claimant had a history of knee conditions which had previously required surgery. On 17 August 2019 whilst on duty and intending an incident the claimant suffered a further injury to his knee. Although the incident occurred at work, the respondent does not accept that this was an injury in the course of the claimant's employment for which it was responsible. In any event the claimant remained working in the hope that the swelling and pain in his knee would recede, but after three weeks of difficulty the claimant consulted his GP who immediately signed him off work for 21 days. The claimant's GP said that he was unable to confirm that the claimant could undertake normal duties involving Control and Restraint.
12. The claimant informed his line manager Mr Tim Smith who put in place a referral to Occupational Health (OH). On 1 October 2019 the claimant attended an informal meeting with Mr Smith, and it was agreed that the claimant could return to work on a phased basis once they had more information. On his return to work in October 2019 the claimant was given administration duties for approximately two weeks, and then started working a restricted duties plan in the Gate Lodge, where all persons entering the prison must report for their relevant security checks.
13. There were four referrals to Occupational Health (OH) which are relevant to these proceedings. On the first occasion an OH Adviser Mrs Webster met with the claimant in person and prepared an Interim Report on 11 November 2019. This report confirms that the claimant was in work but on restricted duties, and avoiding control and restraint, because of ongoing left knee issues. He reported a history of operations on both knees and had recently slipped at work resulting in a swollen left knee. He attended his GP after two weeks because his symptoms had remained, and he was then advised by his GP to have a period of time off for symptoms to subside and to return on restricted duties on an ongoing basis. Mrs Webster advised that he returned to his GP for clarification of his diagnosis, prognosis and potential treatment plan. She advised obtaining Further Medical Evidence (referred to as FME) which she estimated would take at least 21 working days. She advised that there should be a further consultation upon receipt of that FME and/or medical report. In the meantime, she advised that the claimant remained on restricted duties and suggested adjustments, namely avoiding control and restraint; flexibility with start and finish times; avoiding longer shifts; and ensuring regular postural changes.

14. There was then a follow-up consultation on 23 December 2019 which took place over the telephone with Dr Charles Miranda, an Occupational Physician. The purpose of this telephone consultation was to assess the claimant's fitness to resume full operational duties. Dr Miranda noted that despite the earlier report from Mrs Webster, no Further Medical Evidence had been received from the claimant's GP and it was noted that the claimant agreed to follow this up. The claimant reported pain, swelling and joint instability in his left knee. Dr Miranda noted that he had been advised at the last OH consultation that he should return to his GP for clarification and possible referral to a specialist, and the claimant was uncertain whether or not that had been done. He reported that the claimant had also been suffering from sciatica. Dr Miranda was of the opinion that the claimant remained fit for work with the existing adjustments. These included a restriction on his having to perform any control and restraint (either planned and spontaneous) and to avoid prolonged fixed postures at work. Dr Miranda advised that the nature of his condition required that he should be clinically examined in person before a suitable opinion could be reached about the likelihood of him returning to full operational duties. Dr Miranda requested an appointment in person for that purpose. In the meantime, if operationally feasible he advised possible referral to physiotherapy via any employee assistance programme.
15. A further appointment was confirmed with Dr Miranda which was due to be a consultation in person on 21 January 2020. For reasons which were not made clear to the claimant, this was changed to a telephone consultation. As a result Dr Miranda prepared his OH report dated 22 January 2020 (which was the Third Report). Dr Miranda reported: "Unfortunately a repeated attempt to obtain written documentation of the rationale for his doctor's assertion that Mr Wooster "will never be fit to carry out Control and Restraint" was unsuccessful. It should be noted that his GP is likely to have access to various information (e.g. radiological scans and opinions from specialists) that occupational health is not party to. An opportunity to perform a clinical examination would have provided me with sufficient information to make a determination on the likelihood of him resuming C&R [control and restraint], but this was changed to a telephone appointment. I have raised these issues with ... Clinical Operations Lead for HMPPS." The claimant reported that the nature and character of his medical condition had remained unchanged since Dr Miranda's previous telephone assessment. This included pain and reduced function of both knees following surgical treatment. The claimant was able to perform the majority of his activities of daily living without restriction. Dr Miranda remained of the opinion that the claimant was fit for work with his existing adjustments and was also of the opinion that the claimant's declared medical conditions were likely to improve over the medium-term. He advised that the claimant's conditions were unlikely to be considered to be a disability under the relevant legislation.

16. Although the report noted that the claimant's GP had advised that he would never be fit to carry out control and restraint, and therefore never fit to fulfil his role as a prison officer, Dr Miranda stated that he was of the opinion that a resumption of C&R [control and restraint] "cannot be excluded". He stated that the claimant's declared conditions are known to resolve with time and treatment, and he considered him temporarily unfit for the full operational role of a prison officer, but that he was fit for work with a temporary restriction on having to perform control and restraint.
17. Following receipt of that report the claimant emailed his line manager Mr Smith on 31 January 2020 and stated: "I am furious at this letter and will speak to Optima [OH] regarding a few things in the report." He complained that no one had contacted his GP surgery for information. Secondly, he complained that a clinical examination in person had been arranged, but it was changed to a telephone appointment. He stated that he agreed with Dr Miranda that a face-to-face examination and assessment was appropriate. He objected to other aspects of the report, including the reference to sciatica. What is important is that the claimant objected to Dr Miranda's statement that his declared conditions are known to resolve with time and treatment. The claimant suggested that his GP did not think that his conditions would ever resolve enough to undertake control and restraint again, and his personal view was that it might be inflammatory arthritis or damage to the ligaments but in any event the claimant did not think that in either event the conditions would resolve fully with time or treatment.
18. The respondent has a recording system known as the Event Log for each employee on which relevant occurrences are recorded. The claimant complains that he was provided with insufficient support during this period. The Event Log records that at least the following events or meetings took place. On 1 October 2019 the claimant met with Mr Smith his line manager for an informal attendance review meeting. The claimant reported that his GP was of the opinion that he would never be able to complete control and restraint duties again, and they discussed options about regrading and retiring. The Event Log reports the restricted duties plan at the Gate Lodge referred to above, which was put in place in October 2019 when the claimant returned to work. On 22 October 2019 the claimant met with Mr Smith and they discussed his restricted duties and the forthcoming OH appointment and they agreed to discuss and progress options once that report was received. On 3 December 2019 Mr Smith and the claimant discussed the OH report now in place at that time, and the claimant reported that he had given his GP authority to provide the Further Medical Evidence. On 30 December 2019 they discussed the fact that the claimant had not yet received a date for a follow-up appointment. On 17 January 2020 the claimant confirmed to Mr Smith that he did now have an appointment date for a follow-up meeting with OH and that they could discuss progress once that report was received. With effect from 1 February 2020 Mr Smith was no longer the claimant's line manager. These line management duties

then passed to Mr Morgan, and Mr Smith reported that he gave a full handover to Mr Morgan, and that he had advised him of possible outcomes when the OH report was received.

19. During this time Mr Richard Luscombe, from whom I have heard, joined HMP Exeter as Governing Governor in November 2019. During the next few months he reviewed the staffing levels at the prison, and there were a high percentage of staff on restricted duties which meant that they could not carry out front-line duties as Prison Officers on the wings. There were then further staffing pressures with effect from March 2020 because of the Covid-19 pandemic.
20. At about this time there was an informal conversation between Governor Luscombe and the claimant at the Gate Lodge about how the position might be resolved. The claimant asserts that Governor Luscombe offered him a permanent downgraded position at the Gate Lodge as a Prison Officer, but the claimant pointed out that this would not be possible without the approval of the POA, and Governor Luscombe then said he would make the necessary arrangements with the POA. Governor Luscombe denies this but accepts there was an informal conversation about possible options and the need for the claimant to seek POA advice
21. In any event by email dated 1 April 2020 Mr Morgan, the claimant's line manager, suggested that the claimant should speak to Governor Luscombe to gain some clarity. Mr Morgan reported that he was unable to support the claimant's continuing employment as a prison officer on restricted duties on a long-term basis, and he informed the claimant that the Governor wished to make decisions regarding his future employment. Mr Morgan suggested: "You have been aware of this for some time, and we have spoken about this several times. I've discussed with you what options are available ... I will refer you to OH again and this will be conducted via telephone due to the current global pandemic ... As always I'm happy to have a chat."
22. The claimant then sought advice from Ms Sinclair of the Prison Officers' Association by email dated 1 April 2020. The claimant was seeking advice and guidance and stated that he felt in the very near future he would be forced to leave the Prison Service because of medical inefficiency. He confirmed that he had been on restricted duties for the last six months, and he explained his understanding of the medical position. He reported that his line manager had approached him saying that the Governor wished to resolve matters and that he would be provided with information as to a potential financial settlement. The claimant made it clear that he had already indicated that he did not want to accept a downgrade to the role of an OSG on protected pay. This meant that the claimant had discussed the possibility of downgrading to an Officer Support Grade, rather than Band 3 Prison Officer, even though he had been offered protected pay for the period of two years. The claimant did not wish to accept such a role and concluded that it

might mean he would be dismissed on the grounds of medical inefficiency.

23. Governor Luscombe then wrote to the claimant on 2 April 2020 to invite him to a formal absence review meeting (FARM) on 16 April 2020. The purpose of the meeting was expressed to be to discuss the claimant's ongoing sickness absence and his ability or otherwise to carry out full duties and whether the current position could be sustained. The claimant was informed of his right to be accompanied by a trade union representative or work colleague and it was made clear to the claimant that dismissal was a possible option open to the Governor. He stated: "I will also explore with you whether you would accept a regrade/downgrade as an alternative to dismissal if this option was offered to you." He also recommended that the claimant read the Attendance Management Policy and gave details of the employee support service which was available.
24. By email dated 6 April 2020 the claimant then complained to his line manager Mr Morgan and asked for clarification as to whether he had pursued the matter of the claimant's complaint in connection with the OH report, and whether the Governor was aware that he had disputed the same. He also asked about any roles or vacancies which might be available and why it had taken two months for a re-referral to OH, and whether there had been an assessment for ill-health retirement. On the same day the claimant also emailed Governor Luscombe to express his concerns about the process. Governor Luscombe responded by email the same day on 6 April 2020, and he responded to each of the claimant's points. He confirmed that the FARM need not be postponed because of Covid-19, that the claimant was not entitled to an area POA trade union representative because he was not a member of the committee, but that he was entitled to be accompanied by a local representative. Governor Luscombe confirmed that the claimant was not eligible for ill-health retirement because he had remained at work but stated that he was happy to discuss this further with his representative. Governor Luscombe noted that the claimant wished to question the earlier OH report, but he confirmed: "As you have stated you have said you can no longer do control and restraint therefore you cannot remain in the officer grade." He confirmed that compensation estimates were not required for the FARM but rather the purpose of the FARM was to establish whether the claimant could carry out the full role of a prison officer, and not to address compensation. However, an estimate could be provided if requested.
25. By email dated 15 April 2020 the claimant then confirmed to his line manager Mr Morgan that he wished the Governor to consider a suggestion, even though he accepted that it might not be operationally acceptable. He asked to remain in the Gate Lodge whilst Covid was still happening and to be retained as a Prison Officer with three-month reviews. He offered to change shifts to accommodate other officers, and

to ask the Prison Service to support any “inter service transfers” which he might find available.

26. Meanwhile the claimant had a further OH consultation, and the Fourth OH report which was dated 8 April 2020 was prepared by an Occupational Physician, namely Dr Greg Palka. This also followed a review over the telephone, without a clinical examination in person. Dr Palka advised that the reported symptoms appeared clinically consistent with damage to the knee cartilage and that this could potentially be managed surgically. However, the final advice on further treatment should be based on an up-to-date MRI scan and a review by a surgeon, and advice on the appropriate treatment. However, Dr Palka was unable to advise on whether surgery should be considered, or within what timescale, bearing in mind the requirements of the job, relevant past medical history, individual susceptibilities, and the claimant’s own views and preference to avoid surgery. Dr Palka was of the opinion that the condition was likely to be manageable but that he required clinical feedback to provide more detailed advice. He reported that they had not received any further medical evidence from the GP and had again requested the GP for potential diagnostic and treatment options. Dr Palka was of the opinion that from a clinical point of view the claimant might be able to return to full duties as a prison officer depending upon suggested treatment but that it would be usual to require at least two to four months of physiotherapy after surgery to return to full manual duties. Given the current situation of the pandemic, surgery was unlikely be available in the near future. Dr Palka was also of the opinion that the claimant was not a disabled person within the relevant legislation.
27. It seems that neither the claimant nor the respondent received this Fourth OH report until 17 April 2020. The FARM meeting took place on 16 April 2020 before either the claimant or the respondent had received it.
28. The claimant attended that FARM meeting on 16 April 2020, and Governor Luscombe was assisted by Ms Chapman from the HR Department. During that meeting the claimant confirmed that he could not return to prison officer duties because he was unable to undertake control and restraint. Governor Luscombe and the claimant discussed his recent appointment with OH and the claimant confirmed that there was no change to his existing medical condition and that there were no proposals which effectively changed the diagnosis or prognosis. The claimant confirmed that he did not wish to be considered for ill-health retirement. Governor Luscombe offered the claimant a re-grade from his current position, with two years pay protection, but the claimant declined this. Governor Luscombe confirmed that there were no reasonable adjustments which could be made in order to maintain the claimant’s role as a Prison Officer. The claimant was offered the opportunity to ask questions of Ms Chapman from HR, but the claimant stated that he felt it was unreasonable that he could not be maintained as a Band 3 Prison Officer until he found another job which he would find attractive in a

different civil service department. Ms Chapman of HR advised the claimant that his period of restricted duties had exceeded six months, rather than the three months allowable under the policy, and that any regrade would come with two years' pay protection. In addition if the claimant became fit again he could reapply to be a Prison Officer. Governor Luscombe offered the possibility of a regrade with two years pay protection at either HMP Exeter Prison or HMP Channings Wood. The claimant declined both offers and did not ask what the jobs were. Governor Luscombe advised the claimant to seek advice from his POA representative and pointed out that the Policy was clear and that he was unable to impose a regrade if the claimant refused, and that the only option which the Governor was left with was dismissal on the grounds of medical inefficiency. Despite the claimant saying that he was reluctant to do so Governor Luscombe insisted that the meeting was adjourned so that he could seek advice from his POA representative.

29. Upon resumption of the FARM meeting the claimant suggested that he would like a role at a different organisation within the wider Civil Service but confirmed that he had not submitted any applications to date and suggested that this was his line manager's responsibility.
30. Governor Luscombe decided to dismiss the claimant for the following reasons. At the date of his dismissal the claimant had not performed his contractual role as a Prison Officer for over six months. His line manager Mr Morgan had already advised the claimant that he could not continue to support his employment on restricted duties long term basis. The policy and guidance relating to a FARM were followed and given that no return to work was likely within a reasonable timescale the respondent could not support any further absence. Governor Luscombe gave due consideration to a medical regrade, but the claimant would not accept the offers which were presented to him. Although the claimant's managers had supported the claimant in an attempt to return to his contractual role, the claimant made it clear that he was unable to do so. The M10 guidance had recommended that it was appropriate to hold a FARM where the employee was unable to return to full duties, and the criteria set out in the Attendance Management Policy for considering whether continuous absence was sustainable were relevant factors. The claimant could not remain on restricted duties at the Gate Lodge because this had a direct impact on the prison and its staff in a number of ways. It affected the ability of other Band 3 Prison Officers to work on the gate who would value time away from the prison wings; it removed the opportunity for other staff to have a return to work in the area; it made the prison less secure in the sense that the gate officer could also form part of the "first on scene" incident response team which might involve control and restraint; and whilst the claimant was in post as a Band 3 Prison Officer, but not undertaking the full duties of that role, the budget would not allow the Governor to recruit another officer to fulfil all of the duties of that role.

31. Governor Luscombe decided that HMP Exeter could no longer support the claimant's employment as a Prison Officer on restricted duties and the claimant was clear that he would never be able to do control and restraint. The claimant had not consented to a regrade, even with two years' pay protection. There were no reasonable adjustments which could be made to maintain his role as a Band 3 Prison Officer because of his inability to undertake control and restraint duties. The OH advice had been received within the last three months as suggested by the policy. Ill-health retirement was not appropriate because the claimant was still at work and fit to do other duties, and in any event the claimant did not wish to be considered for ill-health retirement. Bearing all this in mind, and in accordance with the guidance and the Attendance Management Policy, Governor Luscombe decided to dismiss the claimant.
32. The claimant was offered the right of appeal, which was to Mrs Jeannine Hendrick, the Prison Group Director for Devon and North Dorset Prisons, from whom I have heard. The claimant's letter of appeal was dated 23 April 2020. The grounds of appeal were that a procedural error had occurred, namely that the procedures under the Attendance Management Policy for proceeding to a FARM had not been followed; new information and evidence should be taken into account, namely the OH report (which was about to arrive); and thirdly that no valid OH report had been received within three months of the hearing.
33. In the meantime, between 16 and 20 April 2020 the claimant had exchanged emails with Miss Croome of the respondent's HR Department, during which the Farm process and the potential appeal process were explained in detail to the claimant.
34. The appeal hearing proceeded by telephone conference on 18 May 2020 with the consent of all concerned. Mrs Hendrick was the Appeal Authority. The claimant declined to be represented by a POA representative. The appeal took place as a full rehearing and the claimant was invited to provide any further information. He did so by way of reference to the Fourth OH Report dated 8 April 2020, which had been received on 17 April 2020 after Governor Luscombe's decision to dismiss him had already been taken.
35. Mrs Hendrick explored the background to the matter in detail, and she went through all the points raised by the claimant in his appeal letter, and any further submissions. She also considered the recently received Fourth OH Report. Mrs Hendrick reached the following conclusions. First the latest OH report did not change the pre-existing OH advice and the claimant confirmed that he was still unable to undertake the required full range of duties. Secondly, she enquired why the claimant's GP had not referred the claimant for an MRI scan during his extended period of restricted duties. The claimant's GP had declined to do so because he did not think it was necessary but still signed the claimant off as being unable to carry out control and restraint procedures. This supported her

view that there was no reasonable prospect of the claimant returning to full duties. Thirdly, the claimant confirmed that the OH report dated 22 January 2020 was in date as a relevant report at the time of his FARM with Governor Luscombe, because it had been received within the last three months.

36. Mrs Hendrick noted that Governor Luscombe had offered the claimant a re-grade with pay protection for two years, with the possibility of application for reinstatement if the claimant's knee condition was resolved. The claimant had declined this, and he remained of the fixed view that he should be retained in his Band 3 position until he could find another role which he wanted in the Civil Service. As had already been explained to the claimant at the previous hearing, Governor Luscombe was unable to offer any movement from the Prison Service to the wider Civil Service. In addition, the claimant had not applied for another job at Band 3 in the Civil Service. Also, the claimant had not pursued the matter of the possible MRI scan by way of a second opinion or further request from his GP, even though he knew that it was likely to be career ending if he remained unable to carry out control and restraint duties.
37. Mrs Hendrick was satisfied that there had not been an error in the procedure, and that the correct procedures in the Attendance Management Policy, and the M10 guidance on phased return to work, were correctly followed. The claimant has suggested that there was new evidence which had come to light, namely the Fourth OH Report, but the claimant had confirmed that the report of 22 January 2020 was within three months of the FARM and therefore current, and in any event the claimant had also accepted that the Fourth OH report of 8 April 2020 did not change the prognosis which had been given in the earlier report. Mrs Hendrick was satisfied that there was no likelihood that the claimant would be able to resume his full range of operational duties within a reasonable timeframe. It was also reasonable to conclude that the restricted duties could no longer be supported. Mrs Hendrick concluded that dismissal on the grounds of medical inefficiency in these circumstances was appropriate. The claimant had also raised the criticism that the FARM was a foregone conclusion and that he had not been allowed to finish answers and/or his representative was not allowed to answer questions. Mrs Hendrick considered that the claimant's questions had been answered by the HR case manager, and that adjournments were permitted and even encouraged by Governor Luscombe so that he could seek advice from his POA representative.
38. Bearing in mind all of the above, Mrs Hendrick decided to reject the claimant's appeal. She confirmed her reasons by letter dated 26 May 2020. That concluded the respondent's internal procedures.
39. The claimant then made contact with ACAS under the Early Conciliation procedure on 3 July 2020 (Day A). The Early Conciliation Certificate was issued on 6 July 2020 (Day B). The claimant presented these

proceedings on 18 August 2020, claiming unfair dismissal only. There was no claim for disability discrimination.

40. Having established the above facts, I now apply the law.

41. The Law:

42. The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 (“the Act”).

43. I have considered section 98 (4) of the Act which provides “... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case”.

44. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer’s conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

45. I have been referred to and I have considered the cases of: Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT; GE Daubney v East Lindsey District Council [1977] IRLR 181 EAT; BS v Dundee City Council [2013] IRLR 131 CS; Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Adeshina v St George’s University Hospitals NHS Foundation Trust and Ors EAT [2015] (0293/14); and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.

46. It is clear from BS v Dundee City Council that three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. This is a factor that can operate both for and against dismissal. If the employee states that he is

anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

47. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors.

48. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

49. Decision;

50. In his originating application and during the course of this hearing the claimant has advanced a number of allegations of unfairness. In the first place these include: a lack of duty of care while suffering an injury at work; no HR support available; biased union support as only local representation is available; important emails ignored and unanswered; and failure to manage me appropriately unfairly and failure to provide support and help.

51. It seems clear to me that the respondent had a number of procedures and protections in place, and that the claimant was a member of his recognised trade union the Prison Officers Association (POA). In the first place the injury which claimant suffered at work has not been accepted by the respondent as an injury during the course of employment for which it was responsible, and it is not for this Tribunal to determine that issue. Secondly, there was support available from the HR Department. I accept the claimant's evidence that this would ordinarily require approval of a line manager, but the claimant did email HR during the course of this process, and the respondent also has an employee support programme to which he was referred by the Governor. In addition, the claimant had access to advice and support from the POA throughout. The claimant complains of biased union support and the fact that only local representation was available, but that is a matter between the claimant and his recognised trade union cannot be said to be any cogent procedural failure for which the respondent was responsible. The claimant complains of important emails being ignored and answered, and although the claimant had reason to complain about an OH consultation being changed to a telephone consultation without his consent, generally speaking any emails which you raised were

addressed in reply. In particular Governor Luscombe responded in detail to the claimant's concerns and legally before the FARM meeting. Finally there is an allegation of failure to manage the claimant and failure to provide support and help. However, it is clear that the claimant was afforded a phased return to work and restricted duties for over six months when the respondent's guidance suggests it should be limited to three months. It is also clear from the Event Log that there were a number of informal discussions between the claimant and his line managers Mr Smith and then Mr Morgan. I accept the claimant's evidence that they may have been in passing, but they did take place.

52. It is simply not the case that the claimant suffered an accident at work for which the respondent was responsible, nor that he was then left in isolation with no support or no information pending an abrupt dismissal process. The relationship between employer and employee is not a one-sided relationship, and an employee cannot simply sit back and expect the employer to solve all problems. In this case the events leading to the claimant's dismissal unfolded over a period in excess of six months, during which time the claimant had access to his own GP; to the respondent's OH Department; to the respondent's policies and procedures; to the respondent's HR department; to two successive line managers; and also the Governing Governor.
53. In my judgment these criticisms could not be said, either singly or collectively, to give rise to any persuasive argument that the respondent's actions (including its decision to dismiss the claimant) were sufficiently unreasonable to render the dismissal process and/or decision unfair in the sense that it was not within the band of reasonable responses open to the respondent.
54. The claimant also makes a further allegation that Policy and Procedures were ignored. I do not accept that there has been any breach of the respondent's policies or procedures. It is true that the Attendance Management Policy is primarily designed to address the management of absences, and a FARM meeting would ordinarily be triggered by certain periods of sickness absence. That was not the case with the claimant, who had returned to work on restricted duties. Nonetheless the decision to hold a FARM meeting was still within policy, and the M10 guidance on phased return to work had also been followed. The respondent had of course been more generous than the guidance suggests, in the sense that alternative restricted duties would ordinarily be allowed for a maximum of 12 weeks before being addressed. In the case of the claimant this period was extended to six months or so. The OH report relied upon had been obtained within the previous three months, as recommended by the policy. When the claimant was summoned to the FARM meeting he was aware of the issues which he had to address and was aware that dismissal was a potential outcome. He had access to advice and support from his POA trade union representative, and to a lesser extent to the respondent's HR department. He was afforded the right of appeal against Governor

Luscombe's decision to Mrs Hendrick, a senior director who was independent and more senior to the original decision-maker, and who held a full rehearing of the matter on appeal.

55. In my judgment there has been no procedural breach on the part of the respondent such as to render the investigation or decision-making process unfair in the sense that the investigation and procedure adopted were not within the band of reasonable approaches which a reasonable employer might have adopted when faced with these facts.
56. There are two remaining allegations of unfairness raised by the claimant which in my judgment require more careful scrutiny. These are: incorrect medical reports used for decision; and relevant information ignored.
57. It seems clear to me that the claimant's medical position must be seen against the following background. The claimant accepts that the ability to carry out Control and Restraint is an essential part of his role as a Band 3 Prison Officer, and that being unable to undertake these aspects of his duties was always potentially career ending. The view of the claimant's GP was consistently to the effect that he was unlikely to be able to resume his full duties. It seems that a possible alternative was referral to a specialist; an MRI scan; consultation with a surgeon; possible surgery; and then rehabilitation with physiotherapy. This course of action was very likely to take a substantial period of time, and there was no guarantee that the claimant's control and restraint duties might ultimately and safely be resumed. This was not something which the claimant pursued with his GP during the six months in question which led to the claimant's dismissal. The claimant may well have been reluctant to undergo further surgery, and I make no criticism in that respect, but equally it cannot be said to be the respondent's responsibility to seek to address the physical or medical barriers which prevented the claimant from undertaking his full duties when the claimant and his GP were themselves reluctant or unable to do so.
58. The claimant has two criticisms of the respondent's OH process which at first glance are potentially compelling. The first is that he complained about a process whereby a consultation by telephone was not as satisfactory as a personal examination, and Dr Miranda's view was the same. For some reason (presumably related to the Covid-19 pandemic) the preferred personal consultation was again undertaken by telephone. Secondly, by the time the OH consultation had been rearranged, the claimant was due to face his FARM meeting which then led to his dismissal. The Fourth OH report was not before Governor Luscombe at the time he took his decision to dismiss. At first glance it seems extraordinary that the respondent did not postpone the FARM meeting for a short period to await the imminent arrival of that OH report, in order to be informed of the contents before making such an important decision concerning the claimant's future employment.

59. However, the difficulty which the claimant faces is that there has never been any dispute, and he has agreed, that he was physically unable to carry out the full duties required by his Band 3 Prison Officer role. The view of the OH reports in short was that this was potentially remedial, in the sense that there could have been further investigation; an MRI scan; a referral for potential surgery; the surgery itself; and rehabilitation and physiotherapy. However, there was no active support from the claimant or from his GP for this course of action. Indeed, the claimant and his GP appeared to have disagreed with that conclusion. In any event this suggested alternative course of treatment was bound to have taken many months, and there is no guarantee that it would have been successful.
60. In other words, the fact that the claimant did not have a personal consultation and examination as earlier envisaged, and the fact that the Fourth OH report was not before Governor Luscombe, did not change the medical position with which the claimant agreed. The claimant accepted in his evidence that there was no relevant medical information which was not already before the respondent. In particular, Governor Luscombe asked the claimant to explain the position following his meeting with OH which was leading to the imminent Fourth OH report, so that he was aware of the claimant's view of the consultation and the likely conclusions. In addition, and in any event, there was a full rehearing on appeal, and at the appeal stage Mrs Hendrick was aware of the content of the Fourth OH report and discussed this with the claimant.
61. By the claimant's own admission at the time the decisions were taken to dismiss him and to reject his appeal there was no relevant medical evidence which was not before the respondent. This includes the evidence relating to both his diagnosis and prognosis which was available at that time. For these reasons I do not accept the claimant's assertion that incorrect medical reports were used for decisions, or that the relevant information was ignored. It cannot be said that the respondent's investigation into the current position at the time of dismissal and appeal was inadequate or unreasonable or, to apply the appropriate legal test, cannot be said to have been outside the band of reasonable investigations which a reasonable employer would have adopted.
62. It is also clear from Governor Luscombe's evidence that there were staff difficulties at HMP Exeter, which were being made worse by the Covid-19 pandemic. The respondent had accommodated the claimant with restricted duties for over six months when its internal guidance suggested that 12 weeks would be the normal maximum period. The respondent did not wish to continue to employ the claimant on restricted duties because of the knock-on effect which this had on other members of staff and the security of the prison.

63. The position in short was therefore this: the claimant was physically unable to carry out his normal duties, and the respondent could no longer accommodate continued employment on restricted duties, so what alternatives were available? The claimant had made it clear that he did not wish to pursue an application for ill-health retirement.
64. The only remaining option is that of suitable alternative employment. The respondent offered the claimant a downgrade and/or regrade both at HMP Exeter and nearby HMP Channings Wood, with pay protection for a period of two years. This also presented the possibility of the claimant reapplying for an active Prison Officer role if he became fit enough again to undertake that role. The claimant declined this offer. Similarly, despite the fact that he knew that his injury was potentially career ending, and that he had access to advice from the POA and, through his line managers, to HR, the claimant did not investigate or apply for alternative positions within the Prison Service. The respondent Prison Service was unable to transfer its employees to other Civil Service positions, but in any event the claimant did not appear to make enquiries nor to apply for the same.
65. At the end of his statement of evidence for this Tribunal the claimant has summarised his position as follows: "I feel that my role on restricted duties in the Gate Lodge could have been supported longer whilst correct procedures were followed, and correct information was obtained. If this had happened there is a likelihood of me having an operation and after recovery returning to work as a Band 3 Prison Officer." The difficulty with this argument is that the evidence shows: (i) the claimant could not be supported on restricted duties and definitely because of the impact this was having on other members of staff and security at the prison; (ii) the respondent had to hand all relevant medical evidence available when it made its decision; (iii) the possibility of investigation and potential surgery to address the claimant's knee condition was not actively pursued by the claimant nor supported by his GP, and at best is likely to take many months; and (iv) the offer of a regrade with protected pay for two years, and the opportunity to reapply for normal prison officer duties if subsequently well enough, was made by the respondent, but rejected by the claimant.
66. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
67. In my judgment therefore the respondent had before it all of the relevant information concerning both the claimant's diagnosis and prognosis when it made its decision to dismiss the claimant and subsequently to

reject his appeal. It had followed its internal procedures, and indeed it extended the normal period allowed for restricted duties. The claimant could not be supported on restricted duties indefinitely because of the knock-on effect at the prison. The respondent considered alternatives to dismissal which were declined by the claimant. For these reasons I find that the respondent's investigation and procedural processes were fair and reasonable, and the decision to dismiss the claimant, taken in the round, was within the band of reasonable responses which were open to the respondent at that time.

68. In conclusion therefore, even bearing in mind the size and administrative resources of this respondent, I find that the claimant's dismissal was fair and reasonable in all the circumstances of the case, and his unfair dismissal claim is hereby dismissed.
69. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 39; a concise identification of the relevant law is at paragraphs 42 to 48; and how that law has been applied to those findings in order to decide the issues is at paragraphs 50 to 68.

Employment Judge N J Roper
Date: 23 April 2021

Reserved Judgment & Reasons sent to the Parties: 04 May 2021

FOR THE TRIBUNAL OFFICE