EMPLOYMENT TRIBUNALS

Claimant: **Mr C Snowden**

Respondent: **The Secretary of State for Justice**

Heard at: **Leeds** **On:** **15 February 2017**

Before: **Employment Judge Davies**

Representation

Claimant: Mr S Brittenden, counsel

Respondent: Mr R Stubbs, counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal is well-founded and succeeds.
2. The Claimant did not cause or contribute to his dismissal by culpable conduct.
3. There is a 20% chance that the Claimant would have been fairly dismissed in any event.

REASONS

1. This was the hearing to decide the claim of unfair dismissal brought by the Claimant, Mr Christopher Snowden, against his former employer, the Secretary of State for Justice. The Claimant was represented by Mr Brittenden of counsel and the Respondent by Mr Stubbs of counsel. For the Respondent I heard evidence from Mr P Harrington, Mr S Robson and Mr Paul Foweather. I heard evidence from the Claimant himself and from Mr J Gaines on his behalf. I was provided with an agreed file of documents and I considered those to which the parties drew my attention. I admitted a further document by agreement during the course of the hearing.

The issues

2. The issues were straightforward and agreed at the outset of the hearing namely:
    1. What was the reason for the Claimant's dismissal? The Respondent says it was capability.
    2. If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, having regard in particular to whether it carried out a fair procedure and dismissal was within the range of reasonable responses?

3. If the Claimant was unfairly dismissed what is the chance, if any, that he would have been fairly dismissed in any event?

4. Did the Claimant cause or contribute to his dismissal by culpable and blameworthy conduct?

Facts

3. The Claimant became a prison officer in 1991. At the time of the events with which I was concerned, he was working at HMP Leeds, an establishment with around 400 staff and around 1200 prisoners. From August 2015 the governing governor at Leeds was Mr Robson. From June 2015 the Band 5 custodial manager, who was the Claimant's line manager, was Mr Harrington. The Claimant had 25 years' service as a prison officer during which no disciplinary action had ever been taken against him. Indeed, he had a medal recognising 25 years' exemplary service. In the period from December 2014 to September 2015 he had done nearly 900 hours of overtime to help out the establishment with staff shortages. No action had ever been taken against him under the Respondent's unsatisfactory attendance policy. He was four years from retiring and was 56 years old.

4. Mr Harrington gave evidence that part of the Claimant's role involved carrying out Police National Computer ("PNC") checks. There was no evidence that that played any part in the decisions subsequently taken by Mr Robson and Mr Foweather and I do not deal with it further.

5. The Claimant raised an issue about whether Mr Harrington had lied in an unrelated disciplinary matter. All of the evidence before me indicated that that allegation had been investigated by a governor from a different establishment and had not been upheld and in those circumstances I place no weight on it.

6. Management of attendance is governed by a Prison Service Order 8404. There are two parts of the policy that deal with attendance management. First, there is an unsatisfactory attendance section, which provides for the familiar process of staged warnings being given to staff who are felt not to be attending appropriately. Secondly, there is a separate process for managing attendance using occupational health referrals. I do not set out the terms of the policy in full, but I have had careful regard to it, in particular to paragraphs 2.27, 2.28, 2.29, 2.31. 2.32, 2.36 and 2.38 through to 2.50.

7. The policy provides for what is referred to as a Level 5 occupational health referral. That is also sometimes referred as an OHP referral. That is the highest level of referral and is the level used when termination of employment may be considered. The policy makes clear that an occupational health referral (of any level) can be made at any time that the line manager thinks it is reasonable. A number of examples of when that might happen are set out. The policy says that where there is a serious concern that a member of staff will be unable to return to work and carry out their full range of duties or offer regular and effective service in the future a Level 5 referral must be considered. This will normally be considered between three and six months' continuous absence but can be triggered earlier where appropriate. Six possible outcomes to an occupational health referral are identified. The first three involve a return to work or referral for further reports and examinations.

8. On 29 September 2015 the Claimant was injured at work in an incident involving a prisoner. The prisoner was being searched and attacked the Claimant. In the course of that incident the Claimant sustained a back injury.

He was absent from work from 26 September until 13 October 2015, a period of approximately 13 working days.

9. The Claimant had a return to work interview with Mr Harrington and he came back on full duties with no restrictions. He thinks that at that time he asked whether a return to light duties would be possible and that Mr Harrington told him that the deputy governor Mr Walters was refusing to allow to return to work on light duties at that time. Mr Gaines's evidence was that he recalled that Mr Walters was indeed operating a policy that if someone had a fit note indicating a return to work on adjusted duties they either returned to their full duties or not at all. The Claimant said that at this time Mr Harrington told him that Governor Robson was referring a number of staff for occupational health Level 5 referrals.

10. On 16 October 2015 Mr Harrington made a Level 5 referral in the Claimant's case. He completed a formed called OHP1 and he chose option 2, which essentially amounted to a request for dealing with potential ill health retirement rather than dealing with sick absence management. In the background information Mr Harrington referred to the fact that the ability to carry out control and restraint was an essential requirement of the Claimant's role and that occupational health recommendations must reflect that requirement. He asked whether, if the Claimant could not perform his contractual role, there was a role he would be able to perform, for example Operational Support Grade ("OSG") or administrative. He also asked whether the Claimant was able to carry out his normal duties on return, was there a risk of further absences if he was involved with control and restraint, and was he able to provide regular and effective service?

11. Mr Harrington was asked about why he was making a Level 5 referral and asking for potential ill health retirement to be dealt with. In his witness statement he said that the referral was made on the basis that the Claimant was not at work. That was plainly incorrect. The Claimant had returned to work on full duties. In cross-examination Mr Harrington was unable to identify any reason for making a Level 5 referral where the Claimant had been off work for less than two weeks and was back on full duties by the time of the referral. It is possible that an occupational health referral might have been appropriate to ask for assistance or guidance in circumstances where the Claimant had sustained a back injury and would continue to have to be involved in prisoner control and restraint. But this was not an ordinary occupational health referral. This was one where ill health retirement was being considered.

12. The Claimant was duly invited to an occupational health appointment and he attended on 5 November 2015. The occupational health advisor wrote a report that day recording that the Claimant had residual discomfort in his lower back and was continuing to see a physiotherapist but that there was no effect on his ability at that time. There were no other medical concerns and the Claimant had a full and active lifestyle including skiing, hill walking, mountain biking and sailing. Her opinion was that he was fit to maintain his substantive role at the time. He was reporting no issues in his ability to maintain his role.

13. On 12 November 2015 further forms were completed. The Claimant gave his consent for an occupational health ill health retirement referral and Mr Harrington completed an OHP2 form which was a form for referral to an occupational health physician. He gave as the reason for referral long-term

absence of over 20 days and said that the referral was being made because it was required by the governor for efficient and effective service. He reported that the Claimant had returned to work after 14 days sick leave. The questions asked included whether the Claimant was able to carry out his normal duties on return, whether there was a risk of his going sick every time he was involved in and control and restraint incidents and whether he was providing efficient and effective service with an average 13 days' sickness per year for 24 years.

14. On 24 November 2015 the Claimant completed form IHR1. That gave his consent to go ahead with an ill health retirement process. The form included the question "please describe why you believe you are not able to work in your usual job" and the Claimant wrote, "I am able to carry out normal duties and do not wish to leave my employment as no adjustments are required." He made clear in the form that he could do all the duties of a prison officer and that he was currently back at work. His evidence was that Mr Harrington had told him to fill in the form in case the Respondent got rid of him so he did. Mr Harrington said that did not ask the Claimant to fill the form in, he presented it to him. Mr Harrington pointed out that the Claimant had ticked the box to say that he wanted to proceed with this process. It is plain from what the Claimant wrote on the form that that was not the position and I accept his evidence that he was effectively told by Mr Harrington to fill in the form and did so.

15. On 26 November 2015 the Claimant sustained another injury at work. On this occasion he was assaulted by a prisoner who was apparently under the influence of drugs. He went off work with a back injury again. He went to see his doctor on 30 November 2015 and the doctor advised him to rest and to continue with the exercises he had been given by the physiotherapist in September when he had previously been injured. Mr Harrington phoned him on 1 December 2015. There is no dispute that on that occasion the Claimant requested lighter duties when he was fit to return to work to do them. Mr Harrington said that he would forward that request to the deputy governor and wait for an answer.

16. Ms Williams in HR was assigned to assist Mr Harrington and on 3 December 2015 she completed the second part of the IHR1 form requesting consideration of ill health retirement (i.e. the process that had been started before the second period of absence).

17. I was shown a series of keeping in touch notes made by Mr Harrington purporting to record conversations he had had with the Claimant during the Claimant's absence. The Claimant disputed the accuracy of those notes. He said that some of the conversations had not taken place at all and that for some of the others although the conversation had taken place it was not accurately recorded by Mr Harrington. Mr Harrington's evidence was that all the reports were made about five or ten minutes after the relevant contact with the Claimant and were accurate. For reasons explored in more detail below, for a number of particular records I have found that Mr Harrington's account is inaccurate. Bearing that in mind, where there is a dispute between the two accounts in other respects, I prefer the Claimant's version of events about what was said. I found the Claimant to be an entirely straightforward and credible witness.

18. The contact record refers to a conversation on 9 December 2015. It was not disputed that Mr Harrington told the Claimant that he had made a Level 5

referral. Mr Harrington recorded in the notes that the Claimant had said to him that he could not return to full duties as yet as he was still in pain and that the Claimant had “told me not to bother with the lighter duty jobs as his back still hurts”. The Claimant was also recording as saying that he did not want to take physiotherapy from the Respondent because he had something sorted already. The Claimant disagrees with that note. He says that he did not tell Mr Harrington not to bother with light duties. On the contrary he asked him to arrange light duties. He also said that there was no discussion of physiotherapy during that conversation. I note that when the Claimant spoke to his doctor five days later on 14 December 2015 the doctor recorded that he was trying to go back to work on light duties but work had not got back to him. That was consistent with what he said he had told Mr Harrington. Taking into account that, and my concerns about the accuracy of some of the later notes, I accept what the Claimant says about that conversation.

19. The notes then record a conversation on 20 December 2015. The Claimant accepted that a conversation had taken place on that date. Mr Harrington recorded that the Claimant had rejected a home visit. The Claimant’s evidence was that he would be surprised if he had done so. Mr Harrington recorded the Claimant saying that he was not fit to return to work at that stage as his back was still painful and that he had a date for seeing the occupational health physician on 6 January 2016. That was not controversial.

20. The Claimant went to see his own GP on 21 December 2015. He was having difficulty sleeping and some continuing pain. He was carrying on with exercises from the physiotherapist. He told the GP that he was not ready to return to work. The GP prescribed him some stronger painkillers that he said he would use if he was no better.

21. On 6 January 2016 the Claimant saw Dr McCarthy the occupational health physician. Dr McCarthy produced a report the same day. He recorded that the Claimant’s symptoms were persisting, he was avoiding lifting and prolonged sitting was uncomfortable. There had been no referral for investigation or to a specialist or for a specific treatment. Dr McCarthy said that because of his persisting symptoms the Claimant would be unfit for control and restraint activity and was therefore unfit for his normal prison officer duties. He would be unfit for lifting, carrying, manual handling, pushing and pulling. He would be fit for light work where he could alter posture at will between standing and sitting. If that were available Dr McCarthy would suggest a return on a phased basis. As far as the outlook was concerned, Dr McCarthy said that the indications were that his condition was mechanical in nature and therefore it should improve with active rehabilitation. Physiotherapy was likely to be helpful. Failing that he might require further assessment. However, in the first instance he had advised him to see his GP to discuss a referral for physiotherapy. In the absence of a trend as yet towards improvement Dr McCarthy said that it was not possible to predict a definite timescale for his eventual recovery. In answer to the specific questions asked, he said that the Claimant would be fit for restricted light duties in line with the above advice, he would not be fit for aspects of the OSG role that would require pushing and pulling gates, repetitive bending or lifting etc. If in an administrative role it would need to be of a type that would not require prolonged sitting and would allow him to change posture readily at will. He was not able to carry out his normal duties. He had demonstrated vulnerability to back pain and therefore there was an increased risk of recurrence in the future. Whether he would be able to provide regular and

effective service in his normal job depended on the outcome following further treatment, in the first instance with physiotherapy. Dr McCarthy advised that the Claimant was unlikely to be permanently incapacitated for the normal duties of his employment.

22. Emails indicated that the report was forwarded to Ms Williams on 8 January 2016 and that she sent it to Mr Harrington and a prison governor on 13 January 2016. In fact she had forwarded it to the previous governing governor and Mr Harrington forwarded it to Mr Robson.

23. Against that background I returned to Mr Harrington's contact notes. He made an entry suggesting that he had spoken to the Claimant on 11 January 2016. That read, "I called Chris on the 11th to discuss the report from OHP. He mentioned that he has a slipped disc and that he feels that it will always be a weakness and may not be able to do the prisoner job. I have let him know that a date for the Capita meeting is imminent and he had received paperwork to say the same. All paperwork has been completed and received and a caseworker set. Chris is still unavailable to attend work and has a fit note until 14 January and then will be after another as he still has problems with his back."

24. The Claimant's evidence was that to the best of his recollection he had not spoken at all to Mr Harrington that day. He pointed out that no medical practitioner had mentioned the possibility of a slipped disc at that stage. It was not mentioned until 29 January 2016 and he said that he certainly had not spoken about it to Mr Harrington on 11 January 2016. The Claimant's GP records were consistent with that. The Claimant also said in his evidence that he had not received the occupational health report by 11 January 2016. Mr Harrington's evidence was that despite the email sending the report to him on 13 January 2016 he had in fact received it at a much earlier stage, within 48 hours of it being provided by Dr McCarthy. He said he had received it by email but no such email had been disclosed in these proceedings. Mr Harrington was adamant that the Claimant had told him on that date that he had a slipped disc.

25. He was asked if he had spoken to the Claimant about the content of the report, which he said he had by then received. He was asked in particular whether he had asked the Claimant if he had started physiotherapy. He could not remember. He was asked repeatedly whether he had spoken to the Claimant at any time between the occupational health assessment on 6 January 2016 and 13 January 2016 about whether the Claimant had started physiotherapy. Eventually he answered, "I can't relate to that in my notes. On 9 December he told me he had something sorted." It was clear in the light of his evidence that even if there had been a conversation with the Claimant on 11 January 2016 there was no discussion about the content of the occupational health report and in particular whether the Claimant had followed up on the recommendation to seek physiotherapy.

26. I have referred above to an email on 13 January 2016 in which Mr Harrington replied to Ms Williams and forwarded the OH report to Mr Robson. Mr Harrington concluded that email, "Do we have a date set for the capability meeting as yet? I'm sure we have everything else in place." Ms Williams replied on 19 January 2016 asking if the governor's intention was to move to a capability hearing. Mr Harrington was asked in cross-examination why he was pressing for a capability hearing at that stage, in the light of an

occupational report that was recommending physiotherapy. He said that in his opinion the Claimant did not want to come to work.

27. Pausing there, a Level 5 occupational health referral had been made when the Claimant was back at work on full duties and in circumstances where Mr Harrington could not explain the basis for it. There was now, it seemed to me, an instinctive move towards a capability hearing, without any real consideration of why that was necessary, what the occupational health report said and what was appropriate in the circumstances of an employee who had been absent for around seven weeks with a work related injury. There plainly had been no consultation with the Claimant about the content of the report.

28. The Claimant went to this GP again on 14 January 2016. The GP recorded him saying that occupational health had said that he could do light duties but none were available and work would not let him back.

29. Mr Harrington recorded a conversation he said had taken place on 20 January 2016. His note said, "I've spoken to Chris and asked if he would like a home visit as he now has a date set for a capability meeting on 12 February. He has stated that he has notification about this and will be attending with a view that he will finish his employment with the service as the back injury will stop him doing the job correctly and he has to think long term about his health. No intention of returning to work as a prison officer."

30. The Claimant was not certain whether there had been any conversation at all on 20 January 2016, but he was quite clear that he had not told Mr Harrington that he would be attending a capability hearing with a view to finishing his employment or that he had no intention of returning to work as a prison officer. His evidence was that no capability hearing had been arranged by that stage and he had not received the paperwork.

31. Mr Harrington was asked about this in cross-examination. His attention was drawn to an email sent to him by Ms Shah who had taken over from Ms Williams as the relevant HR caseworker. She emailed on 25 January 2016 asking whether the case was to progress to a capability hearing. Mr Harrington replied on 27 January 2016 saying that it was to go to a hearing and "we are really just waiting for a date." Ms Shah replied the same day. She said that she was liaising with Nicola with a date and would update Mr Harrington once arranged. It was suggested to Mr Harrington that he could not have been speaking to the Claimant on 20 January 2016 about a capability meeting on 12 February 2016 when that meeting had not yet been arranged. At that stage he said that they were waiting for confirmation for a fixed date but that 12 February 2016 had already been pencilled in. He could not explain why that was not what his email to Ms Shah said. He then went on to say that on 20 January 2016 he had made contact with the Claimant to check that he was available on 12 February 2016 and that he then reported back that the Claimant was available and the date was then confirmed. Again, he was not able to explain why that was not what the contemporaneous email said or indeed what the note of 20 January 2016 said. I did not find Mr Harrington's evidence credible or plausible. I accept the Claimant's account. By 20 January 2016 he had not been informed of a hearing date and he certainly did not tell Mr Harrington that he would be attending a capability hearing with a view to finishing his employment and that he had no intention of returning to work as a prison officer.

32. The Claimant went to see his GP again on 25 January 2016. It was clear that he had suffered a deterioration in his condition at around that time. The GP recorded that the Claimant was concerned that work would get rid of him as he could not do his job working in a prison. He was asking for pain relief. The GP recorded that they had tried to get physiotherapy but that the referral had closed by the time they called. It was agreed to refer the Claimant again. In fact, the Claimant discovered that he would have to wait a long time for physiotherapy so he telephoned around and arranged private physiotherapy. The first session took place on 29 January 2016. It was at that stage that the physiotherapist mentioned for the first time that the Claimant might have a slipped disc. He recommended that he see his doctor and ask for an MRI scan. The Claimant did so and was referred for an MRI scan.

33. Notification of a capability hearing to take place on 12 February 2016 was sent to the Claimant on 28 January 2016. The notification said that Governor Robson wanted to discuss with the Claimant his current fitness for work as a prison officer, whether he would be able to provide regular and effective service going forward, whether there were adjustments that would enable him to work now or in the foreseeable future and dismissal on the grounds of medical inefficiency. Mr Robson did not give evidence to me about why it was that he decided that a capability hearing was necessary.

34. There was a telephone conversation between the Claimant and Mr Harrington on 9 February 2016. That conversation had been recorded in the contact log by Mr Harrington as taking place on 10 February 2016. He accepted that that was incorrect and that the conversation had been on 9 February 2016. It seemed to me that that was a mistake that was more likely to have been made if the notes had not, as Mr Harrington suggested, been made within five minutes of each conversation. Mr Harrington recorded that the Claimant said that he had prepared himself to be leaving the service and had to think about his health. The Claimant's evidence was that he might have said that he thought they were going to sack him but he did not say that he was preparing to leave the service for the good of his health. I prefer the Claimant's version of events. Not only did I find his evidence about these contacts more plausible than Mr Harrington's but it was again consistent with what he had said to his GP.

35. Mr Harrington sent an email to Ms Shah on 9 February 2016. He said that he had spoken to the Claimant and "he is prepared to go." Mr Harrington wrote that the Claimant had a slipped disc, which the GP said would go again at any time, and that he was not up to the job. The language used by Mr Harrington, in particular that the Claimant was "prepared to go" seemed to me consistent with the overall picture that Mr Harrington perceived this a process designed to remove the Claimant not as a process designed to consult and engage with him about his ill health and how he might be supported to return to work.

36. The position in advance of the capability hearing was therefore this. I find that the Claimant had not said to Mr Harrington or anybody else that he was not fit enough to return to work ever or that he was not intending ever to return to work. There had been a discussion of light duties at an early stage, when the message had come back that Mr Walters was not allowing a return to work on light duties. At no stage had the Claimant been given an opportunity to return to work on light duties. Still less had he refused that opportunity.

37. An occupational health case assessment report was written to the governor on 11 February 2016. I do not go through it in detail, but I note that it included

a number of inaccuracies, for example it reported that there was no current treatment planned.

38. That brings me to the capability hearing which took place on 12 February 2016. The Claimant attended with Mr Gaines his POA representative. The hearing was conducted by Mr Robson. There was someone present to take brief notes and Mr Harrington was evidently also present. There were fundamentally two versions of the general tone of the meeting. The Respondent's version was that the Claimant was effectively seeking dismissal with compensation. He was indicating that he had no wish to return to work and that that was not the outcome he was seeking. The Claimant's version is that he was making clear that he wanted to return to work as soon as possible but that he was not currently fit to return in any role and could not say at that stage when he would be. No proper minutes were taken. Mr Gaines made some summary bullet points and the note taker made some summary notes.

39. I have to decide which version of events is accurate. The context is important. There had been no prior discussion with the Claimant about the occupational health report. Had there been, in circumstances where he had been absent for seven weeks, no doubt the discussion would have involved consideration of whether physiotherapy had started, how long any physiotherapy was likely to last and whether it was effective. No doubt the fact that the Claimant had been referred for an MRI scan would have been discussed. There might have been consideration of the fact that the Claimant was feeling down and in pain and about the fact that since the occupational health assessment there had been a worsening in his condition so that he was not currently fit to do any duties. That stage had been missed out, so that everybody found themselves at a hearing where the Claimant's possible dismissal was under consideration.

40. A number of times Mr Robson's answers in cross-examination indicated that the tone of his questioning at the capability hearing was to the effect "what can we do to get you back to work now" and it seemed to me that the emphasis was on getting the Claimant back to work *now*. The Claimant's position was that he was not *currently* fit.

41. I find in general terms that the Claimant's position at the capability hearing was not that he was ready to have his employment terminated with compensation and that he did not want to return to work. Rather, it was that he was not currently fit for any duties but that he did want to return to work as a prison officer as soon as he was able. In making that finding I have given very careful consideration to the Claimant's position that was subsequently set out in documentation prepared for his appeal to the CSAB and the hearing at the CSAB (see below). But it seems to me that the context of that documentation was that the Claimant was by then appealing a decision that he should be awarded 70% rather than 100% compensation. In an appeal of that nature, it was plainly in the Claimant's interest to present a picture of his health that was not as positive as he says in fact his health was. Plainly, that gives rise to some tension because it raises questions about the Claimant's credibility. However, it seemed to me understandable that in an appeal of that nature the Claimant might downplay an improvement in his health. Fundamentally, I found the evidence he gave to me straightforward and credible and it seemed to me that what he said to me about the capability hearing was an accurate account. What he said or what was said on his behalf in the subsequent documentation was to some extent inconsistent with

that, but that was understandable in the context and I do not find that it undermined his credibility or led me to reject the evidence that he gave to me. By contrast I found Mr Harrington's evidence wholly implausible. Further, Mr Robson's answers in cross-examination were very often vague or avoided answering the question. Indeed, on a number of points he embellished or added new aspects to his evidence.

42. Having made those general remarks, I deal with some of the particular matters that were dealt with at the capability hearing. For the first time in cross-examination Mr Robson said that he and Mr Gaines had had a conversation before the capability hearing, in which Mr Gaines had told him that the Claimant wanted to leave with compensation. Mr Gaines said that there had been no such conversation. Mr Robson had not referred to any such conversation in his witness statement or in any previous documentation. I do not accept that there was such a conversation. It may be that Mr Robson was confusing this capability hearing with that for another employee.

43. It was not disputed that Mr Robson went through the Claimant's entire sick absence record at the capability hearing. It was not clear to me what the relevance of that was to this occupational health referral process. Mr Robson accepted in cross-examination that Mr Gaines might have said at the capability hearing that the Claimant wanted to return to work as soon as possible and that he had obtained private physiotherapy. The occupational health report was read out. As far as physiotherapy was concerned the Claimant accepts that he said that he was not finding it beneficial at present. He explained that he was feeling down at that stage. I note that this hearing took place on 12 February 2016 and that the first appointment for physiotherapy had been only about two weeks earlier. For the first time in cross-examination Mr Robson said that the Claimant said at the capability hearing that he had stopped going to physiotherapy. That was not in any contemporaneous document and was not in Mr Robson's witness statement. He was not able to explain its absence from those documents and again I find it was not said.

44. By the time of the capability hearing the Claimant had obtained an interim report from his physiotherapist, which he said he had with him and showed to Mr Robson. He said that Mr Robson was not interested and did not look at the report. Mr Gaines agreed that that had had happened and I accept their account. The report was somewhat more positive about the effect of the physiotherapy and the view expressed by the Claimant, but I do not find that the Claimant deliberately withheld the report for that reason. Rather ,I find that the Respondent did not ask to look at it when it was referred to. In reaching that view I have taken into account that on a number of matters it seems to me Mr Robson had embellished his account of what happened at this meeting. I find that there was no meaningful discussion about the physiotherapy that the Claimant was undertaking. He was not asked how many sessions he had been to, how long it was likely to last or what the physiotherapist said. All that was recorded was his view that it was not particularly beneficial.

45. The Claimant had by this point spoken to his GP about an MRI scan and knew that he was to be referred for such a scan. His evidence was that he made reference to that at the capability hearing. Mr Gaines agreed and he had noted it in his summary notes of the meeting. Those notes in general follow the structure and content of the Respondent's notes (which do not refer

to an MRI scan). I find that the Claimant did refer to the fact that he had been referred for an MRI scan. That was either not heard or was ignored by Mr Robson. Mr Robson's evidence in cross-examination was that if he had known the Claimant was being referred for an MRI scan he would have awaited the outcome of it and then re-referred the Claimant to occupational health.

46. There was some discussion of light duties. The Claimant made clear that he had suggested a return on light duties but that that had been refused by the deputy governor. He said that Mr Harrington confirmed that and I find that that was said at the capability hearing. In his witness statement Mr Robson went in to some detail about Mr Harrington's note of 9 December 2015. I have already explained my reasons for not accepting Mr Harrington's notes, but what was striking was that in his witness statement Mr Robson did not refer to any other conversations about light duties or occasions on which the Claimant was said to have refused to undertake light duties. Rather he sought to portray what the Claimant was said to have said on 9 December 2015 about not bothering with light duties as being a "withdrawal of his offer" to undertake light duties. Even if the Claimant had said what was recorded by Mr Harrington, I cannot see how that could possibly be construed as a once and for all refusal by him to carry out light duties.

47. Mr Robson adjourned, and then announced his decision, namely that the Claimant should be dismissed but that his compensation should be reduced to 70% because he had refused light duties and refused a re-grade to OSG. The Claimant said that the only discussion of a refusal to undertake light duties took place after the adjournment when Mr Robson gave his decision. Mr Gaines agreed. I accept their evidence. There was no discussion about the Claimant "refusing to carry out light duties" before Mr Robson reached his decision to dismiss the Claimant. It seemed to me that if there had been such a discussion the Claimant would remember it, because, as I have found, he had *not* refused to undertake light duties. There was a discussion of whether the Claimant could return to an OSG role. I have referred to the content of the occupational health report which made clear that currently he was fit to carry out some but not all of the duties of that role. The Claimant said that he told Mr Robson that he was not fit to carry out that role. There was evidently no discussion of an amended OSG role.

48. When the discussion of whether the Claimant had refused light duties took place, after Mr Robson had given his decision, Mr Harrington referred to his contact log. However, the Claimant was not given a copy of it and did not have a chance to challenge its content. I noted that on 15 February 2016 Mr Harrington emailed Ms Shah. By that time he had heard that the Claimant was going to appeal the 70% award. He wrote, "He seems to be under the impression that he was offered to come back to work on light duties but declined this. It was the reason for the 70% not 100%. In fact he was never offered a lighter duties job and he stated to me that he did not want me to bother with asking again if there was any lighter duties available to him. All in all this offer of doing light duties lasted a very short time after first asking for it. He is bitter that he did not get the 100% award". Mr Harrington said in evidence that he wrote the email because he had never been in the situation of having an appeal before and he wanted to know if there was anything he needed to do. He could not explain why the email did not say that. It seemed to me that it was written because Mr Harrington had come to understand that weight was going to be or had been placed on the suggestion that the

Claimant had refused to carry out a lighter duties job. Mr Harrington was making clear that the Claimant had not been offered a lighter duties job.

49. The Claimant's dismissal was confirmed in a letter dated 12 February 2016. That letter made reference to the Claimant's absence history. Mr Robson recorded that the Claimant had offered to return to work on light duties on 1 December 2015 but that on 9 December 2015 he would no longer consider them because his back still hurt. Mr Robson wrote, "In line with the OHP report in January 2016 you were offered the option of returning to work on light duties which you refused. You stated at the time you were suffering back pain and sought treatment from a physiotherapist. In terms of further medical treatment you advised that you had undergone physiotherapy sessions. However by your own admission you did not deem this likely to be beneficial." Mr Robson added, "In line with the advice of the OHP report I discussed with you the option of a re-grade to an OSG but you stated that your current position is painful and even if you became an OSG it wouldn't reduce the movement which was causing your pain." Mr Robson confirmed that after a short break he concluded that the Claimant was unlikely to be able to provide full and effective service in the future. He set out his reasons for reducing the Claimant's compensation.

50. The reference to the Claimant having refused light duties in January 2016 was inconsistent with my findings of fact and with what Mr Harrington wrote in his email on 15 February 2016.

51. The Claimant appealed against his dismissal and the appeal hearing took place on 5 April 2016. It was conducted by Mr Foweather. The Claimant confirmed at the outset that he was appealing against the level of compensation only, not against the fact of this dismissal. However, Mr Foweather gave evidence that he considered it was his role to determine whether the Claimant's dismissal had been fair and reasonable in any event and that he did so. No notes were kept of the appeal hearing. Mr Foweather did not uphold the appeal. In the outcome letter, he recorded some of the discussion that took place at the appeal. He wrote, "We discussed how Governor Robson was unable to offer you a role undertaking light duties on a permanent basis due to the unforeseeable timescale in returning to full duties as a prison officer. In addition the role of an OSG was offered to you but you did not feel that you could undertake that role at the time of dismissal due to your condition with your back. Indeed you confirmed to me neither would you accept an administration role which would better meet reasonable adjustments … It also became clear in the appeal hearing that your diagnosis of a slipped disc is unconfirmed albeit suspected by the physiotherapist but not through your consultant. Therefore I am upholding the decision to award the level of compensation decided upon by Governor Robson".

52. Perhaps unsurprisingly given the nature of the case advanced by the Claimant, Mr Foweather did not set out in clear terms why it was that he concluded that the decision to dismiss the Claimant was fair and reasonable. He was asked about that in his evidence. He said that he had asked himself whether there was a reasonable alternative available to Mr Robson, for example another occupational health referral. He referred to the fact that he considered the Claimant had a long protracted history of poor attendance and that the prognosis from occupational health was not particularly good. He said that he asked himself whether the Claimant could offer a reasonable prospect of giving effective service working with the Respondent and carrying

out light duties. He said that he was not fully satisfied that all of this had been explored with the Claimant by Mr Robson, because the only job he believed he had been offered was an OSG. He said that he offered the Claimant an administrative role “starting on Monday.” It did not seem to me that Mr Foweather grappled in detail with the question he himself articulated, namely whether there was a reasonable alternative available to Mr Robson. It was not clear to me from his evidence on what basis he had concluded that the Claimant’s dismissal was fair and reasonable. He appears to have accepted that the Claimant was not offered a role carrying out light duties, and to have placed weight on the Claimant’s unwillingness to return to an OSG role “on Monday”, rather than considering medical evidence about whether and when the Claimant would be fit to perform such a role.

53. As indicated above, the Claimant made an appeal to the Civil Service Appeal Board again against the level of compensation only. The written documentation prepared on his behalf for that purpose said in May that he was still unfit and that continued to be his position at the CSAB hearing in September. That was in contrast to the Claimant’s witness statement in these proceedings, in which he said that he was better by the end of May. When he was asked about that in cross-examination he said that when he wrote his witness statement he was “foggy” about the dates. I have already dealt with the tension arising from the nature of the appeal to the CSAB and explained why, despite that, I find the Claimant to be credible. I accept his explanation that when he came to write his witness statement and deal with the question of *when* he was fully fit he was somewhat foggy. As indicated, in part it also seems to me that he is likely to have downplayed his recovery in the CSAB documentation.

54. It was only at the CSAB stage that the Claimant saw the contact record purportedly maintained by Mr Harrington. The CSAB upheld the 70% compensation finding. There was no detailed discussion in their outcome letter of the basis for that and certainly not of the basis for the Claimant’s dismissal.

55. The Claimant had the outcome from his MRI scan during June 2016. That found that he had not in fact slipped a disc but rather had some swelling. I also note that by July of 2016 the Claimant was applying for work including work as a postman or a driver.

Legal Principles

56. There was no dispute about the relevant principles to be applied. The parties referred me to a number of authorities including *Spencer v Paragon Wallpapers Ltd* [1977] ICR 301; *East Lindsay District Council v Daubney* [1977] ICR 566 and *BS v Dundee City Council* [2014] IRLR 131. In outline, each case turns on its own circumstances. The fundamental question that has to be asked is whether the employer can be expected to wait any longer for a return to work and, if so, how long. The Tribunal must weigh up the employer’s need to have the work done and the employee’s need for time to recover his or her health. The Respondent must undertake sufficient medical investigation in the circumstances and must consult with the employee. In the *Dundee* case, emphasis was placed on the relevance of what the employee said about whether they were in a position to return to work.

57. It is not for the Tribunal to substitute its own view. The Tribunal must consider whether what the Respondent did was within the range of reasonable responses.

Application of Legal Principles

58. Against the detailed findings of fact set out above, I turn to apply those principles in this case.

59. I deal with the issues in turn, starting with the reason for dismissal. It was not disputed that the reason for the Claimant's dismissal was the potentially fair reason of capability and I so find. I accept that Mr Robson (and Mr Foweather) genuinely believed that the Claimant was not capable of giving regular and effective service in the future.

60. That brings me to the question of whether the Respondent acted reasonably in treating that as a sufficient reason to dismiss the Claimant. I have no hesitation in finding that dismissal was not within the range of reasonable responses. The question of procedural fairness and the range of reasonable responses are interlinked and I deal with them together. Fundamentally, I find that the Respondent had not reached a point where it could not reasonably be expected to wait longer for the employee's return to work. Indeed, on the contrary the action taken in this case from start to finish was entirely precipitate.

61. In coming to that view, I have taken into account in particular the following matters:

    1. Mr Harrington was unable to explain why a Level 5 referral was even being contemplated at the time it was made. The Claimant had had a brief absence and was back at work on full duties. The reference to Mr Harrington telling the Claimant that Mr Robson, the new governor, was referring a number of people for Level 5 referrals is perhaps telling.

    2. When the occupational health report was provided in January there was simply no discussion of it or consultation with the Claimant about its content. Mr Harrington simply leapt straight on to organising a capability hearing on the receipt of the occupational health report.

    3. I was not given any explanation from Mr Harrington or Mr Robson about why it was thought appropriate to go to a capability hearing and consider the Claimant's dismissal in circumstances where he had been absent from work for a matter of weeks only and the occupational health physician had suggested that there was likely to be an improvement and had recommended physiotherapy in the first instance.

    4. At the capability hearing the Claimant was not saying that he wanted dismissal with compensation. He was not saying that he would not ever return to work as a prison officer or in any capacity. He was saying that he was not fit *now*. In that context, there was no proper consideration with the Claimant of where he was with his physiotherapy, how long he had been attending, how many sessions he had had and how many more were planned. It does not seem to me that it was enough to rely on the Claimant indicating that he was not finding it beneficial at that stage. He was not the medical expert and he was not in a position to know how or when it might be likely to have a beneficial effect. It was clearly very early days. He had a

report with him from the physiotherapist but the Respondent did not look at it or take it into account.

5. The Respondent did not hear or take into account the Claimant's indication that he had been referred for an MRI scan. Mr Robson did not ask him anything about that. His evidence was that if he had understood that the Claimant had been referred for an MRI scan he would have awaited its outcome and re-referred the Claimant to occupational health. That was clearly an option at that stage.
6. At the capability hearing the focus of the Respondent was on getting the Claimant to return to work *there and then*. It seemed to me that Mr Robson's approach was that if the Claimant was not willing to agree a return to work in some capacity *at that stage*, he would be dismissed. The Claimant had been off work seven weeks at that stage.
7. The only offer of alternative work that was made to the Claimant at the capability hearing was as an OSG but there was no acknowledgement that the occupational health report said that the Claimant was not fit for all the duties of that post (still less any recognition of the fact that there had been a deterioration in his condition after the occupational health report was written, so that he was not currently fit to do any of the duties of the role). Further, this was an offer of a re-grade, it was not an offer of a phased return as an OSG until fit to perform the duties of a prison officer.
8. Plainly weight was placed on an incorrect belief that the Claimant had refused to carry out light duties previously. He had not.
9. Reliance appears to have been placed on the Claimant's past absence record although this was not an unsatisfactory attendance case.
10. There was no indication that any consideration was given to the fact that this was an employee who at the time of dismissal had been absent from work around seven weeks but who had 25 years' exemplary service.
11. The policy indicates that it would be usual to refer to occupational health for a consideration of dismissal after about three to six months absence. Of course it could be done at any stage, but I was not given any explanation of why it was thought reasonable to make a referral at the time it was made, let alone the fact that the capability hearing was only seven weeks into the absence.
12. In all of those circumstances I find that the Respondent plainly could be expected reasonably to wait longer before dismissing the Claimant. No reasonable employer could have dismissed the Claimant on capability grounds in those circumstances.

62. None of those shortcomings was cured on the appeal. At the time of the appeal the Claimant still did not have the result of his MRI scan. No updated occupational health report had been obtained and Mr Foweather was not in a position to inform himself about the current medical position. It did not seem to me that he answered his own question about whether a reasonable alternative was available to Mr Robson. He told me that he was not satisfied that light duties had been offered to the Claimant, but he did not explain what consideration he gave to that in reaching the view that Mr Robson's decision had been fair and reasonable, particularly where Mr Robson had referred to

the fact that the Claimant had refused to undertake light duties. I did not consider that the shortcomings were cured by Mr Foweather offering the Claimant to return as administrative worker on Monday. That again was putting him on the spot and demanding his immediate return to work. It was not exploring with him what his level of fitness was, when he might be in a position to return and on what basis. The evidence before Mr Foweather certainly was not to the effect that, whatever might have been the position in February, it was now clear that the Respondent could not reasonably be expected to wait any longer.

63. For all those reasons, I find that the Respondent did not act reasonably in dismissing the Claimant on capability grounds, and that dismissal was outside the range of what was reasonable.

64. The next issue is whether there is a chance that the Claimant would have been fairly dismissed in any event. I do not find that this is a cut-off case where it can be said that if a fair procedure had been followed the Claimant would inevitably have been dismissed at the end of it. There are too many uncertainties. What the Claimant said at the appeal hearing and the CSAB hearing are not necessarily what he would have said and done if he had not been dismissed. Particularly important is Mr Robson's evidence that if he had known the Claimant was being referred for a scan he would have awaited the outcome and then re-referred. The outcome of that scan was not known until the end of June 2016. I have referred to the fact that the Claimant was applying for work as a postman in July 2016.

65. On the other hand, bearing in mind what he said in May 2016 and in September 2016 to the CSAB about still not being fit, it seems to me possible that if the Respondent had followed a fair process and awaited the outcome of the MRI scan then re-referred the Claimant to occupational health, he might still not have been fit to return to duties that were available for him. If so, that might have led to a fair dismissal. That it seems to me is a relatively small chance in view of the work he was applying for by July 2016. I consider it much more likely that he would, by the end of a fair process, have been well-enough to return to work. Doing the best I can, I assess the chance that the Claimant would not have recovered sufficiently to return to work and would have been fairly dismissed as 20%.

66. Turning to the question of contributory fault, I find that it was not culpable to refuse a re-grade to OSG in February 2016 when the Claimant was not fit to do that work. I have found as a matter of fact that he did not refuse to carry out light duties. I also find that it was not culpable for him to refuse the offer of an administrative support worker role "starting on Monday" at the appeal hearing when he was still unfit and awaiting the result of his MRI scan.

Employment Judge Davies

Date 3 March 2017

Sent on 3 March 2017