THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms BC Leverton**
Ms V Stansfield

BETWEEN:

MR HC CAMPBELL

Claimant

-and-

SECRETARY OF STATE FOR JUSTICE
(SUED AS NATIONAL OFFENDERS MANAGEMENT SERVICE)

Respondent

ON: **24 – 27 April 2018**

Appearances:

For the Claimant: In Person
For the Respondent: Ms Jane Russell, Counsel

RESERVED JUDGMENT

1. The unfair dismissal claim fails
2. The disability discrimination claim fails.
3. The Claimant is owed £559.11, notice pay shortfall and £2,795.55 in respect of 25 days holiday pay. The Claimant is to give credit for an overpayment of wages of £155.
4. The Respondent is ordered to pay the Claimant £3199.66

REASONS

1. By a claim form presented on 11 March 2015, the claimant complains of unfair dismissal, disability discrimination, wrongful dismissal and unlawful deduction of wages (Holiday pay). The Respondent denies unfair dismissal and disability discrimination but concedes that the Claimant was owed 25 days holiday pay on termination, amounting to £2795.55 and also, that his pay in lieu of notice was short by 1 week, amounting to £559.11.

2. We heard evidence from the Claimant. The Respondent gave evidence through Edmund Tullett, retired Prison Governor, Brixton; Nicholas Pascoe, Director, Surrey & Sussex Group and; Phillip Chadder, Chaplain Training and Development Officer.

3. The parties presented a joint bundle comprising 3 lever arch files running to 1500 pages. References in square brackets are to pages from the bundle.

Issues

4. The issues in this case are set out in the case management order of Regional Employment Judge Hildebrand of 3 August 2016 and will be referred to more specifically in our conclusions. [178-180]

The Law

5. Section 20 Equality Act 2010 (EqA) provides that where a person (A) applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled it is the duty of (A) to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21 EqA provides that a failure to comply with a section 20 duty constitutes discrimination against a disabled person.

6. Section 15 EqA provides that a person (A) discriminates against a disabled person (B) if –
   a) A treats B unfavourably because of something arising in consequence of B's disability, and
   b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

7. Under the Code of Practice on Employment, the definition of something arising in consequence of employment includes anything which is the result, effect or outcome of a disabled person's disability.

Findings of Fact

8. The Claimant was employed by the Respondent as a Roman Catholic prison chaplain based at HMP Brixton. There was a dispute about the commencement date of employment but we are satisfied from the contractual documentation that it was 17 July 2006.

9. The Claimant suffers from chronic Uvetitis in his right eye and type 2 diabetes. He relies on these conditions as his qualifying disabilities and the Respondent concedes that they both meet the definition of a disability for the purposes of section 6 EqA.

10. On 4 February 2014, following a disciplinary process, the Claimant was issued with a final written warning in relation to a number of incidents of lateness in July and August 2013. The warning was to remain live for 12 months. [906-908]. The Claimant unsuccessfully appealed the warning.

11. On 25 March 2014, the Claimant received a first written warning relating to poor performance following a performance review meeting held in his absence. [1060-1063]

12. Also on 25 March 2014, the Respondent commissioned an investigation into an allegation by the Claimant that Wendy Lloyd, Secretary to the prison Governor, had assaulted him. [1030-1032] In his written account of the assault, he claims that Ms Lloyd had approached him and tried to force him to take a package she said was from the Governor and when he refused to do so (supposedly because he did not know who she was) she forced the package into one of the bags he was holding and their hands, apparently brushed. [1033-1034]. The matter was investigated by Brian West, who found that the Claimant had acted unreasonably in refusing to accept the package from Ms Lloyd (which contained an invitation to a disciplinary hearing) He rejected the allegation of assault and recommended that no further action be taken. The report was dated 10 December 2014 and stated that it was received by the Commissioning Manager on 12 December 2014 (which was after the Claimant's dismissal). [1035-1038] It is common ground that the Claimant was first notified of the outcome by letter from the Respondent dated 3 February 2015. [1309]

13. On 31 March 2014, the Claimant was signed of sick for 2 weeks with work related stress. He remained off until his eventual dismissal. All of the doctor certificates up to dismissal gave the reason as stress/anxiety state until the last 2, which also referred to the Claimant's eye condition. [1379-1383]

14. On 17 April 2014, Occupational Health (OH) reported that the Claimant was suffering from a recurrence of his eye condition and work related stress which the Claimant told him was caused by confrontations at work which had caused him to feel targeted and scared. OH hoped that the work related stress would improve in the next 3 months if the work related issues were addressed and resolved. [1120-1122].

15. However, 3 months later, on 22 July 2014, OH provided a further report stating that the Claimant was still unfit for work and that they were unable to give a timescale for his return [1231-1232]

16. On 1 August 2014, the Claimant was invited to attend a capability hearing on 15 August (re-scheduled from the 11 August due to the Claimant's unavailability) to discuss his absence and whether any adjustments could be made to enable his return to work. The letter warned that one of the topics for discussion was dismissal on grounds of medical inefficiency. [1246-1247]. The hearing was again re-scheduled, for 3 September 2014. [1254-1255]

17. The capability hearing duly took place on 3 September and was conducted by Edmund Tullett, then Governor of HMP Brixton. The Claimant attended with a work colleague. The outcome of the hearing was the Claimant's dismissal on grounds of medical

inefficiency. The rationale for the decision is set out in the dismissal letter dated 4 September 2014. [1275-1278]

18. The Claimant received a compensation payment on termination of £28,659.02 pursuant to the Civil Service Management Code.

19. On 21 September 2014, the Claimant appealed against his dismissal on grounds that the decision was, at best, premature and, at worst, malicious. [1285-1288]

20. The appeal hearing was postponed until after the Claimant's planned eye surgery in October 2014 and eventually took place on 8 January 2015. The appeal was heard by Nicholas Pascoe, then Deputy Director, Custody, Greater London. The Claimant was accompanied by a colleague. There are no minutes of the hearing but we were told by Mr Pascoe that the Claimant said that he was fit to return to work but was still signed off sick until mid January 2015. He asked the Claimant whether, if he were fit, he would return to HMP Brixton and he replied: yes, provided his issues were addressed. The Claimant was told that a decision on the appeal would be deferred for 5 days to allow him to provide medical evidence of his fitness. In the event, the Claimant did not produce a certificate until 20 January 2015. That certificate, rather than declare him fit for work, signed him off until 28 February 2015. The reason for absence was again Anxiety state - related to work issues. [1386]

21. On 2 February 2015, the Respondent wrote to the Claimant with the appeal outcome, which was to uphold the decision to dismiss. [1305, 1306-1308]

Submissions

22. The Respondent provided written submissions which were spoken to. The Claimant made oral submissions. They are summarised briefly below:

Respondent's submissions

23. It was submitted by the Respondent that the Claimant was dismissed on grounds of capability and that it followed a fair process in line with its Attendance Management Policy. At the time of dismissal the Claimant remained unfit for work and there was no prospect of an imminent return. Waiting for the resolution of the workplace issues would not have made any difference as it would not have had a positive effect on the Claimant's ability to return, given the outcome. Turning to the section 15 EqA complaint, it was submitted that the absence did not arise in consequence of the Claimant's disability as the primary condition causing it was stress, which is not a disability. The diabetes was not an issue in the absence and the eye condition was part of the context but not causative. In the alternative, it was argued that his Respondent had a legitimate aim in managing long term absence and that it was proportionate to dismiss the Claimant when it did because there was no end to the absence in sight. In relation to the section 20 claim, it was submitted that the duty to make adjustment had not arisen as the adjustments could only be considered once the Claimant returned to work, which he never did. We were provided with 2 authorities: Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/JOJ and Basildon and Thurrock NHS Foundation Trust UKEAT/397/14

Claimant's submissions

24. The Claimant submitted that he was dismissed unfairly without due regard to his disability or due process. The Respondent did not establish the true medical position. It was his first period of long term illness and the decision to dismiss was premature as it was not established that his attendance was irregular. The Respondent had the option of deferring a decision for 3 months but chose not to. The Attendance Management Policy provides that his absence should have been excluded from any inefficiency calculation because it was related to his disability. At the appeal hearing, he had demonstrated that he was fit and that the only issue preventing him from returning was the outstanding Wendy Lloyd matter. It was unreasonable for the appeal manager to demand a fit note within 5 days and then to uphold the dismissal before the Wendy Lloyd matter had been resolved. Had he been advised of the investigation outcome earlier, he could have requested a transfer to another prison. He had requested adjustments to the workplace, in particular, the position of the computer terminal, but these were not addressed.

CONCLUSIONS

25. Having considered our findings, the parties' submissions and the relevant law, we have reached the following conclusions on the issues:

Section 20 claim – reasonable adjustments

26. Although not expressed, it would appear that the PCP was the application of the Respondent's Absence Management policy. The adjustments sought, which are set out at paragraph A2.14 of Regional Employment Judge Hildebrand's order, are all prospective as they could only be done once the Claimant had returned to work. The Respondent was never furnished with a possible return date by either OH or the Claimant's GP, neither were the proposed adjustments recommended by them. In those circumstances, it would not have been reasonable for the Respondent to make the said adjustments. This complaint therefore fails.

Section 15 claim – discrimination arising in consequence of disability

27. The unfavourable treatment relied upon is the dismissal. In relation to the "*something arising*" we disagree with the Respondent's submission that the absence was not caused by the disability. We have considered the 2 authorities referred to but consider that they are distinguishable from the case before us. Whilst the Claimant was off sick initially for a non disability related reason – stress, from June 2014, the doctor's certificates referred to the Claimant's eye condition as one of the reasons for absence. It was also the Claimant's case that the stress condition was exacerbated by the recurrence of the eye problem so there was an element of overlap. It is clear from the dismissal letter that one of the factors taken into account was the uncertainty around the prognosis following the Claimant's eye operation. We are therefore satisfied that the eye condition, whilst not the only cause, was an effective cause of dismissal. The first 2 limbs of section 15 are satisfied.

28. We accept that managing absence is a legitimate aim for an employer and it was for the Respondent. We have therefore gone on to consider whether dismissing the Claimant was reasonably necessary to achieve that aim. Put another way, could the aims

reasonably have been achieved by a less discriminatory route and do they outweigh the discriminatory impact of the treatment.

29. The Respondent has an established procedure for the management of attendance within the prison service, which it applied in dealing with the Claimant's absence. That provides that dismissal should be considered if following a level 5 OH referral there is no prospect of return to work within an acceptable timescale and medical retirement has been ruled out. [1398] That was the situation the Respondent was faced with. After 6 months of absence, the Respondent was no closer to knowing when the Claimant would be fit to return to work as neither OH or the Claimant's GP were able to give a timescale. When the Claimant gave the Claimant an opportunity at the appeal stage to adduce further evidence to demonstrate his fitness to return, the evidence he presented did the opposite in that it was a further sick note signing him off for a further period. [1386]

30. As to the Claimant's contention that the Respondent had prevented his return by not providing him with the outcome of the investigation into his complaint against Ms Lloyd in good time, we are far from convinced that this would have made a difference. The Claimant submission that he would have accepted the outcome and sought a transfer to another prison was far from convincing. The outcome of the complaint was not in the Claimant's favour and it is unlikely that he would have accepted it. That would have been out of character, given that he had challenged every other adverse decision against him up to that point. Had the matter been capable of resolution by way of a transfer, that is an option the Claimant could have taken at any point. The "unresolved work issues" said by his doctor to be the reason for his inability to return to work, were not limited to the Ms Lloyd issue. During the capability meeting, the Claimant had referred to bullying at work by others and said that he felt that people in the chaplaincy were plotting against him, though he was not specific. The Claimant had raised these matters before and despite being invited to lodge a formal grievance, he did not do so. In our view, the Claimant's work related issues would have remained unresolved and his absence would have continued.

31. In the absence of a time estimate for return to work, 10 months after the initial absence (by February 2017) we are satisfied that the Respondent's need for a catholic Chaplain providing effective service in the role, outweighed the Claimant's need for continued employment. We find that the decision to dismiss was proportionate and justified in all the circumstances.

Unfair Dismissal

32. We are satisfied that the reason for dismissal was capability. In cases of long term sickness absence, the matters relevant to the question of reasonableness are, firstly, whether there has been sufficient medical enquiry, secondly, whether there has been adequate consultation with the Claimant on his position and thirdly, whether the Respondent has reached to point where it can wait no longer for the Claimant to get better. We are satisfied that there was sufficient medical enquiry. There were regular updates by way of doctor's fit notes and 2 referrals to OH. The Claimant was not at any point declared fit for work neither was a timescale given by any of the medics for a return in the foreseeable future.

33. Several attempts were made to schedule a meeting with the Claimant to discuss his situation. The topics for discussion were set out in the various invitation letters and the Claimant had an opportunity to put his view across at the capability meeting that

eventually took place on 3 September 2017. He had a further opportunity to state his case at the appeal and on that occasion was given an opportunity to adduce additional evidence afterwards, which was considered. We are therefore satisfied that the Respondent adequately consulted on the dismissal.

34. Turning to the timing of dismissal. In the absence of any evidence of a return to work in the foreseeable future, the Respondent could not be expected to wait indefinitely for the Claimant to resume his duties. He had been off for 6 months by the time of his dismissal and 10 months by the time of the appeal, at which point the Respondent was no closer to knowing when he would be fit to return. We are satisfied that the Respondent was entitled to say," enough is enough" and to dismiss when it did. We find that the dismissal was fair.

Notice Pay and Holiday Pay

35. As indicated in our reason, the Respondent has conceded that the Claimant is owed sums in respect of holiday pay and notice pay. The Claimant accepts the Respondent's calculation of notice pay due. In respect of holiday, the Respondent's calculation has not effectively been challenged by the Claimant. We therefore accept the Respondent's evidence that 25 days holiday was outstanding on termination.

36. The Respondent contends that it overpaid the Claimant £155 on termination and that was not disputed. The Respondent is entitled to off-set this sum against the sums due to him.

Judgment

37. The notice and holiday pay claims succeed. All other claims are dismissed.

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Employment Judge Balogun
Date: 3 July 2018