

IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

BEFORE THE BERMUDA HUMAN RIGHTS TRIBUNAL (CASE NO. 2021/00175)

BETWEEN:

MR VALACHI PEARMAN

Complainant

-v-

DEPARTMENT OF CORRECTIONS, GOVERNMENT OF BERMUDA

Respondent

JUDGMENT

Mr Arion Mapp, Human Rights Commission, for the Complainant

Mr Brian Myrle, Attorney General Chambers, for the Respondent

Factual Background

1. The Complainant is a former applicant for the post of Corrections Officer with the Respondent. He has type 2 Diabetes. This is classed as a "disability" for the purposes of the Human Rights Act 1981 (Act) and means that he is a "disabled person".
2. The Complainant applied for post of Corrections Officer with the Respondent on 30 March 2019. Following the completion of the various pre-employment assessments, the Respondent informed the Complainant that he was unsuccessful in his application by email dated 1 November 2019 (Rejection). The Rejection did not specify the reason for the Respondent's decision.
3. The Respondent's recruitment process compromised of the following pre-employment assessments:
 - a. a written skills assessment test;
 - b. a panel interview (In the Complainant's case before a selection panel comprising of Mr Shannon Hollis (Mr Hollis) (Chief Officer of Training); Ms Janeek Providence (Ms

Providence) (Human Resource Manager); and Mr. Dorian Tucker (Mr Tucker) (Principal Officer));

- c. a Corrections Officer Physical Abilities Test (COPAT);
- d. a Law Enforcement Selection Inventory (LESI) exam;
- e. an online pre-employment psychological assessment;
- f. an interview with a Psychologist (In the Complainant's case with Dr. Mira Ingeman of Moksa Therapeutics); and
- g. a medical assessment (involving blood tests; an eye exam and a dental exam) undertaken by Dr Prabhakar Reddy Kayam (Dr Kayam).

The Complaint

4. The Complainant's complaint against the Respondent is set out in the Particulars of Complaint dated 15 January 2020 (as amended by the Complainant's application for leave to amend dated 10 August 2023) (Complaint), and in summary, the allegations are that:
 - a. The Respondent's decision to refuse to employ the Complainant was a breach of section 6(1)(b) of the Act as read with section 2(2)(a)(iiiA) (Direct Disability Discrimination); and/or
 - b. The Respondent's decision to refuse to employ the Complainant was a breach of section 6(1)(b) of Act as read with section 2(2)(b)(iiiA) (Indirect Disability Discrimination).
5. The Complainant asserted that the condition which the Respondent applied to him that he could not fulfil because of his disability was the *"exclusionary/disqualifying sections of the process utilised for screening and/or assessing applicants. Specifically, the condition complained of is within the Department of Health – Policy and Procedure, which includes Guidelines on Medical Standards for Recruitment/Health and Physical Fitness Standards, which were utilised by the Medical Officer when disqualifying the Complainant based on his disability"*.
6. The Complainant's position can be summarised as follows:

- a. The Respondent's decision to not employ the Complainant was either Direct or Indirect Disability Discrimination because:
- i. The Respondent determined not to employ him by reason of his disability;
 - ii. His disability was a factor in that decision not to employ him; and/or
 - iii. The Respondent failed in its duty to accommodate a disabled person up to the point of unreasonable hardship.
- b. The duty to accommodate a disabled person includes:
- i. Ensuring that disabled persons who are able to work can do so free from discrimination; and
 - ii. Ensuring that disabled persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without causing unreasonable hardship.
- c. If the Respondent considered that the Complainant was unable to perform the essential functions of the role of "Corrections Officer" then it should have given due consideration to whether it could, without causing unreasonable hardship, have made adjustments to its workplace or his duties to enable him to perform the role. The Complainant asserts that the Respondent did not consider any such adjustments.
- d. The Complainant asserts that the duty to make adjustments comprises of a procedural and substantive component¹. The procedural component refers to the process such as the considerations, assessments and steps taken in response to the need to make an accommodation. The substantive component refers to the accommodation provided as to whether it is appropriate or reasonable as well as the reasons for not providing an accommodation, including the proof of unreasonable hardship. The Complainant asserts

¹ ADGA Group Consultants Inc v. Lane [2008], 39605 (ON SCDC), paras 104-118.

that the Respondent failed in its duty to accommodate with respect to both the procedural and substantive elements.

- e. The Complainant asserts that a prima facie case of discrimination is established and the Respondent bears the burden of showing that the discriminatory condition or requirement is a bona fide occupational one and, if so, the burden of showing that it was not possible to modify the employment without unreasonable hardship.

The Defence

7. In response to the Complaint the Respondent submitted a defence dated 20 July 2023 (the "Defence"), the Respondent's position can be summarised as follows:

- a. The Complainant has no right to be employed;
- b. The Complainant was not subjected to Direct or Indirect Discrimination;
- c. If there was any discrimination (which is denied) it was Indirect Discrimination and allowable as a matter of law;
- d. All potential employees were required to go through the same assessment process and therefore there is no less favourable treatment of one class of persons (as compared) to another class of persons;
- e. Following completion of the assessments undertaken by all prospective employees, and other factors, the Respondent decided that the Complainant was not a qualified candidate because he was unable to perform essential functions of the Job, with or without reasonable adjustments;
- f. There were other factors in the decision whether or not to employ the Complainant and not just considerations related to the Complainant having "unmanaged" diabetes; and
- g. The Complainant's allegations are without merit because all persons applying to be employed, are subject to the same selection process as the Complainant.

8. The Respondent further submitted at the full merits hearing that the condition applied to the Complainant (and to others) was a requirement for all [prospective] employees to undertake and pass a medical assessment in line with the Department of Health's Policy and Procedure policy

document dated March 2009 (the "Policy") which had the legitimate aim of ensuring that candidates for uniformed services did not have any disqualifying medical conditions and had the physical attributes required to perform the essential functions of their role (the "Aim"). Further that the Policy was a proportionate means of achieving that Aim.

9. The Respondent also asserted that there were other factors which were taken into account when denying the Complainant, the position of Corrections Officer, including that Mr Hollis and Ms Providence found that he did not demonstrate he had retained any relevant knowledge and/or lessons learned from his previous employment as a Corrections Officer and did not provide detailed responses to their questions during the interview panel element of the recruitment process.
10. With regards to the duty to consider reasonable adjustments, the Respondent submitted that it would amount to an unreasonable hardship for it to have made any modification because it would have been costly, disruptive and extensive and have had an operational impact on the public service provided by the Respondent. The Respondent stated that it would involve changes to an aspect of the employment because additional apparatus or facilities would be required to enable the Complainant as a disabled person to carry out his role on an effective and consistent basis.
11. The Respondent further submitted that the Complainant was unable to perform the role because, in addition to his type 2 diabetes (which was alleged to be unmanaged or uncontrolled), he had other health conditions (including high cholesterol, liver damage and an enlarged heart), which it is alleged he did not disclose as required during the recruitment process.
12. The Respondent submitted that the Complainant's unmanaged diabetes would affect the qualitative standard and performance of his duties as a Corrections Officer and put others at risk. Specifically, the Respondent asserted that as a public service provider it was not able to secure alternative funding and that there would be unreasonable cost implications from the Complainant's unmanaged diabetes due to the high risk of medical complications, including:
 - a. Blood pressure and cholesterol, stroke, heart disease, the propensity to have a diabetic coma during work if his diabetes is unmanaged or gets too high, chronic kidney disease,

nerve damage, compromised immune system leading to more serious complications from common infections and other problems with his feet, oral health, vision, hearing and mental health;

- b. Additional medicines required to be on site available for the Complainant;
- c. Diabetes is a manageable illness but the Respondent has no means to force the Complainant to effectively manage his diabetes;
- d. The Complainant would have taken sick days which affects other members of staff covering his absence;
- e. Any unreasonable absence of the Complainant will have an effect on staff morale and the quantitative impact on the number of staff as the Respondent's staff strength is currently experiencing a below 90% operational efficiency; and
- f. The safety of fellow officers is an issue because if the Complainant gets sick or feels unwell due to lack of managing his diabetes, this causes health complications because the Complainant may be required, sometimes at short notice, to attend any correctional facility or to provide assistance related to inmate transfer, which could include transfers to and from Court or to effect transfers abroad. The Complainant must be willing and fit enough to be able to work without additional management which would involve more time and resource from the Respondent because the Complainant's diabetes is considered to give rise to a high risk of medical complications if he were to be working for the Respondent.

13. The Respondent also asserted that it was operating at under 90% operational efficiency and therefore it could rely upon the existence of an allowance pursuant to section 4 of Schedule 1 of the Act and was not required to make any adjustments to its operations to accommodate the Complainant.

Preliminary Matter

14. The Respondent asserted in the Defence that whilst it had received notice from the Human Rights Commission (HRC) dated 23 January 2020 confirming the submission of the Complaint it was alleged that the HRC had failed to perform its duties pursuant to section 15 of the Act, specifically it was alleged:

- a. the notice did not state whether the Executive Officer of the HRC intended to investigate the Complaint;
- b. the notice did not contain any grounds for where the Respondent was alleged to have breached the Act; and
- c. neither the Respondent nor, in its belief, the Human Rights Tribunal (Tribunal) were in receipt of any terms of reference.

15. These matters were investigated by the Tribunal prior to the full merits hearing and additional correspondence was obtained from the HRC, including, a letter dated 9 April 2020 headed "RE: *Human Rights Complaint – Notice of Intention to Investigate – CF 19-123*" in which the HRC set out its terms of reference and invited the Respondent to provide any further information relevant to the investigation within 21 days of the date of that letter. The Tribunal was also informed by the HRC that no response was received from the Respondent and that, subsequently, a further letter dated 16 April 2020 was sent by the HRC to the Respondent prior to the matter being referred to the Tribunal in May 2020. The Tribunal empanelled to consider the Complaint wrote to the Respondent's Counsel, Mr Myrie, by letter dated 20 September 2023 confirming its findings that the Respondent's allegations against the HRC appeared unfounded and enclosed copies of the relevant correspondence between the Respondent and HRC. The Respondent did not raise any further concerns in relation to this preliminary matter, either subsequent to the Tribunal's letter dated 20 September 2023 or at the full merits hearing, and the Tribunal considers this issue to have been conclusively resolved.

The Law

16. Section 2 of the Act defines discrimination as follows:

"(2) For the purposes of this Act a person shall be deemed to discriminate against another person-

(a) If he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because –

(iiiA) of his disability;"

(b) If he applies to that other person a condition which he applies or would apply equally to other persons generally but –

(i) which is such that the proportion of persons of the same...disability...as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the...disability...of the person to whom it is applied; and

(iii) which operates to the detriment of that other person because he cannot comply with it.

17. Paragraph 2(2)(a) of the Act is concerned with direct discrimination and paragraph 2(2)(b) of the Act with indirect discrimination.

18. For these purposes "disability" is defined in section 2(1) of the Act as meaning "*the condition of being a disabled person*", and a "*disabled person*" is- "*a person who has any degree of physical disability [or] infirmity ... including diabetes*". The Complainant adduced evidence from Dr Fiona Ross (Dr Ross) of Life Care Family Practice who confirmed that he had suffered from diabetes since 2012. The Complainant's condition was not disputed by the Respondent at the full merits hearing. As such, we find that the Complainant is a "*disabled person*" for the purposes of the Act.

19. Having defined "disability", the Act makes it unlawful for employers to discriminate in the circumstances set out in section 6 of the Act. The Complainant has asserted that he has been discriminated against in reliance on paragraph 6(1) (b).

20. Section 6 of the Act provides as follows:

"Employers not to discriminate

6 (1) *Subject to sub-section (6), no person shall discriminate against any person in any of the ways set out in section 2(2) by...*

(b) dismissing or refusing to employ or continue to employ any person."

21. For the present purposes, the following exceptions and qualifications to subsections to section 6 of the Act are material:

"(9A) For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to employment.

9(B) For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to be given, or to be retained in, any employment for which he is not qualified or which he is not able to perform or of which he is unable to fulfil a bona fide occupational requirement, or any right to be trained, promoted, considered or otherwise howsoever treated in relation to employment if his qualifications or abilities do not warrant such training, promotion, consideration or treatment.

9(C) Notwithstanding subsections (9A) and (9B), a disabled person shall not be considered disqualified for an employment by reason of his disability if it is possible for the employer, or prospective employer, to modify the circumstances of the employment so as to eliminate the effects of the disabled person's disability in relation to the employment, without causing unreasonable hardship to the employer, or prospective employer.

9(D) For the purpose of subsection 9(C), "unreasonable hardship" shall be construed in accordance with Schedule 1.

9 (E) The Minister may give general directions of a policy nature to the Human Rights Commission, relating to the application and interpretation of Schedule 1, and the Human Rights Commission shall give effect to any such directions"

22. Furthermore, in the present case, the provisions of Schedule 1 of the Act and specifically, Section 4 of Schedule 1 Determining the existence of unreasonable hardship- allowances need to be considered which reads as follows:

"4 (1) An employer does not, however, have to eliminate or relocate an essential function (such as a fundamental duty of the employee's job). This allowance is granted because an employee with a disability, who is unable to perform essential functions of a job (with or without reasonable adjustments), is not a qualified employee. Further, an employer is not required to lower production standards, whether qualitative or quantitative, that are applied uniformly to employees with or without disabilities. An employer may, however, have to provide reasonable adjustments to enable an employee with a disability to meet the production standards.

(2) For the avoidance of doubt it shall be unreasonable for the providers of public services that affect public safety, to make an adjustment to the provision of public services when –

- (a) to do so would cause their operational staffing levels to fall below 90% operational efficiency; or*
- (b) the provider of public services is experiencing an existing staffing shortage below 90% operational efficiency.*

(3) For the purpose of subparagraph (2), the "providers of public services that affect public safety" means the –

- (a) Bermuda Fire and Rescue Service;*
- (b) Bermuda Police Service; and*
- (c) Department of Corrections.*

23. There does not appear to be any guidance under Bermuda case law from the Supreme Court relating to direct or indirect disability discrimination save for the case of *Roberts & Hayward v Minister of Home Affairs & Public Safety et al.*, which the Complainant's Counsel relied upon and which we consider to be binding upon us and instructive in this matter.

24. Taking each head of claim in turn:

- a. With respect to a claim for Direct Discrimination, the Complainant must demonstrate that he was treated less favourably than "other persons generally". The case of *Roberts & Hayward* confirmed that a comparator exercise can be applicable in Direct Discrimination claims². In this matter, no specific submissions were made by either Counsel by way of the pleadings or written or oral submissions at the full merits hearing with respect to the appropriate comparator group. As such the Tribunal is at liberty to determine the appropriate hypothetical comparator group for the purposes of considering whether the Complainant's treatment was less favourable. The Tribunal finds that the appropriate hypothetical comparator group in the present case were "other persons" who applied for the post of Corrections Officer, undertook the same pre-employment assessments as the Complainant and did not pass the medical assessment element but who did not share the Complainant's protected characteristic (i.e. non-disabled persons).
- b. With respect to a claim for Indirect Discrimination, the Complainant must identify a condition that applies equally to all persons (regardless of the protected characteristic (i.e. his disability)) but which places individuals sharing the Complainant's protected characteristic at a proportionate disadvantage as compared to others who do not possess that characteristic; that is not "justifiable" irrespective of the protected characteristic; and which operates to the detriment of the person with the protected characteristic such that he or she cannot comply with it.

² *Roberts & Hayward v Minister of Home Affairs & Public Safety et al* [2008] Bda L.R. 47, para 16.

25. The case of *Hayward & Roberts* also considered the interplay between the requirement for "justification" (under Section 2(2)(b)(ii) of the Act) (which the Court held in that case needed to be proved on the balance of probabilities) and provisions of Section 6(9B) of the Act (i.e. the concept of a bona fide occupational requirement). In that case, the Court determined that "justification" was "*essentially the same thing as demonstrating that it is a bona fide occupational requirement*"³. The Tribunal considers this guidance is instructive and has adopted a similar approach to these concepts in this case.

26. The burden of proof in discrimination claims, as confirmed in *Roberts & Hayward*⁴, is that the Complainant must first establish a prima facie case of discrimination. If so established, the burden of showing that there was another non-discriminatory explanation for the less favourable treatment or that any condition or requirement was a bona fide occupational one and, if it was, the burden of showing that it is not possible to modify the employment without unreasonable hardship rests with the employer.

27. With regards to determining whether or not an employer has (on the balance of probabilities) established that a prima facie discriminatory standard is also a bona fide occupational requirement (for the purposes of section 6 (9B)) we find the three step test set out in *B.C. (P.S. EMPL. REL. COMM.) V BCGSEU [1999] 3 S.C.R* instructive. In summary, the employer must establish on the balance of probabilities that:

- a. *The employer adopted the standard for a purpose rationally connected with the performance of the job;*
- b. *The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose; and*

³ *Roberts & Hayward v Minister of Home Affairs & Public Safety et al* [2008] Bda L.R. 47, para 16.

⁴ *Roberts & Hayward v Minister of Home Affairs & Public Safety et al* [2008] Bda L.R. 47, para 12.

c. *The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. This requires the employer to show that it is impossible to accommodate individuals employees sharing the characteristics of the claimant without imposing undue hardship upon the employer*⁵.

28. With regards to the meaning of "unreasonable hardship" for the purposes of the Act it is noted that the Minister has not produced any guidance on this and therefore the words should be given their natural and ordinary meaning⁶. Counsel for the Complainant referred the Tribunal to a number of Canadian cases which addressed the concept of "undue hardship"⁷ and also the case of *Roberts & Hayward*, which addressed a number of the same Canadian cases and held that the Canadian jurisprudence on the expression of "undue hardship" when used in a similar context is relevant and helpful in interpreting and applying the Bermuda law provisions.

29. Counsel for Complainant also referred the Tribunal to the case of *Central Alberta Dairy Pool v Alberta (Human Rights Comm.) (1990) 12 CHRR D/417 (SCC)* with regards to the factors⁸ which should be considered when determining the question of whether "hardship" is "undue" which, whilst are not intended to be exhaustive, include financial cost, relative interchangeability of the workforce and facilities, and interference with the rights of other employees.

30. Counsel for the Respondent relied upon the case of *Owen v Amec Foster Wheeler Energy Ltd. [2019] EWCA Civ 822* in support of its assertion that a requirement to undertake and pass a medical examination was capable of being a proportionate means of achieving a legitimate aim and therefore not unlawful discrimination. The Respondent asserts that the *Owen* case is almost identical on its facts to the present claim. The Claimant in *Owen*, like the Complainant in this case, was disabled, had two type diabetes, was required to undertake a medical assessment which he

⁵ B.C.(P.S. EMPL. REL. COMM.) V BCGSEU [1999] 3 S.C.R, para 54.

⁶ *Roberts & Hayward v Minister of Home Affairs & Public Safety et al* [2008] Bda L.R. 47, para 9.

⁷ *Hydro-Quebec v SFP-FTQ* [2008] 2 S.C.R, para 13-19.

⁸ *Central Alberta Dairy Pool v Alberta (Human Rights Comm.) (1990) 12 CHRR D/417 (SCC) pages 520-521*

failed and was denied the opportunity of an overseas assignment and subsequently claimed the decision was discriminatory. However, the Tribunal considers there are some significant differences. The distinguishing facts are that Mr Owen, as well as suffering from diabetes, was also a double amputee and the specific medical assessment was undertaken in relation to an overseas posting to a remote location rather than as part of a general recruitment exercise. This meant there was a heightened risk of medical complications from deployment in a remote location. In our view the circumstances and facts in the *Owen* case are not comparable to the present case. In addition, the applicable law in *Owen* was the UK Equality Act 2010 which is worded differently to the Act.

31. Counsel for the Respondent also referred us to the case of *Dytkowski v Brand FB Ltd 2402856/2019*. This was a case before the UK Employment Tribunal which involved an employee being dismissed for alleged gross misconduct arising from an altercation with a colleague. Mr Dytkowski alleged that the dismissal was in fact discriminatory on the basis that it amounted to unfavourable treatment arising from disability and argued that his conduct was a result of his diabetes. Specifically, Mr Dytkowski reacted in the manner he did because of his low blood sugar which was something arising from his disability and the employer had treated him unfavourably by dismissing him. However, the Tribunal does not find that this case is instructive in relation to the present claim. Firstly, the applicable law in *Dytkowski* is different from the Act (there is no concept of discrimination arising from disability under Bermuda law). Secondly, Mr Dytkowski was suffering from type 1 diabetes (insulin dependent) unlike the Complainant (who has type 2 diabetes). Thirdly, the material facts are significantly different to the present case.

The Issues

32. Having considered the background to this matter and the applicable legislative framework, the issues in this case are as follows:

Direct Disability Discrimination

- a. Was the Complainant treated less favourably by the Respondent than the Respondent would treat other persons generally (i.e. than an actual or hypothetical comparator group) because of his disability or did the Respondent deliberately treat the Complainant differently because of his disability?
- b. If the Complainant was discriminated against by the Respondent because of his disability, was he unable to fulfil a bona fide occupational requirement of the role within the meaning of section 6(9B) of the Act?
- c. If the Complainant was unable to fulfil a bona fide occupational requirement of the role, has the Respondent shown that it was not possible without unreasonable hardship to modify the circumstances of the Complainant's employment so as "*to eliminate the effects of [his] disability in relation to the employment.*"?

Indirect Disability Discrimination

- a. Did the Respondent apply to the Complainant a condition which it applies equally to others generally but which:
 - a. Puts persons of the same disability as the Complainant (i.e. a person with diabetes) at a disproportionate disadvantage as compared to others (i.e. persons without diabetes) who can comply with such a condition;
 - b. Cannot be justified (i.e. a proportionate means of achieving a legitimate aim) irrespective of the Complainant's disability; and
 - c. Places the Complainant at a detriment because he cannot comply with it.
- b. If the Complainant was discriminated against by the Respondent because of a condition applied by it which had a disproportionate effect on him (as a person with diabetes) as compared to others (i.e. persons without diabetes) and the condition was not justifiable and did place him at detriment, was he unable to fulfil a bona fide occupational requirement of the role, within the meaning of section 6(9B) of the Act?

- c. If there was a bona fide occupational requirement, has the Respondent shown that it was not possible without unreasonable hardship to modify the circumstances of the Complainant's employment so as *"to eliminate the effects of [his] disability in relation to the employment"*?

The Evidence

33. It is noted that, prior to the full merits hearing, by way of a Directions Order dated 23 June 2023 the parties were required to provide a list of their witnesses no later than 17 August 2023 (seven days after receipt of the Complainant's Schedule of Loss) and, subsequently, to exchange signed witness statements on or before 17 October 2023. However, at the Respondent's request, due to witness availability the matter was relisted and the Directions Order varied such that the parties were required to exchange witness statements by no later than 2 January 2024. The parties were also required to provide each other with copies of all the documents that they intended to rely upon by no later than 19 December 2023. Regrettably, the Respondent did not comply with the Tribunal's Directions Order to provide a list of witnesses or exchange witness statements simultaneously with the Complainant and, ultimately, did not provide copies of its witness statements to Tribunal or Complainant until Wednesday 10 January 2024, less than a week before the hearing was due to commence.

34. In addition, the Respondent provided additional documentation together with its witness statements on 13 January 2024, including an adult medical record form dated 13 August 2019 completed by the Complainant (Medical Record) as part of the Respondent's recruitment process and extracts from the Complainant's medical records. This was despite the parties exchanging agreed bundles of documents on 19 December 2023. Whilst the Tribunal allowed the Respondent to ask the Complainant and its own witnesses questions in relation to these documents, we have placed limited weight on the additional documents given the fact they were adduced shortly before the full merits hearing in breach of the Directions Order, appeared incomplete and the Complainant did not have opportunity to address them in his witness evidence.

35. The evidence in this case was taken over the course of one day on Tuesday 16 January 2024. Each witness was required to read in their own witness statement under oath (or by way of affirmation at their choice) and this stood as their examination-in-chief.
36. We do not seek to summarise all of the evidence in this judgment. The Complainant relied upon his own testimony alone. He was cross examined by Mr. Myrie.
37. The Respondent called three witnesses, namely: Dr Kayam, (Medical Officer for the Department of Corrections) who undertook the Complainant's Medical Assessment as part of the Respondent's recruitment process; Ms Providence (Human Resources Representative for Respondent) who sat on the Complainant's interview panel; and Mr Hollis (Assistant Commissioner Administration (at the time, Chief Officer for Training) for Respondent) who also sat on the Complainant's interview panel. Each of the Respondent's witnesses was cross examined by Mr Mapp.
38. The Respondent chose not to adduce a witness statement from the Commissioner of Corrections, Ms Keeva Joell-Benjamin, who it appears from the documentary evidence may have ultimately made the decision that the Complainant was not "suitable" for the role of Corrections Officer.

Evidence of Mr Valachi Pearman

39. We find that the evidence of the Complainant was generally clear and credible.
40. The Complainant was asked about his type 2 diabetes and how this was being treated. He explained that following his initial diagnosis by Dr Fiona Ross in 2012 he had returned to her again in 2016 as his blood sugar levels had increased. He told us that Dr Ross gave him a management plan for his diabetes which involved exercise and managing his diet. The Complainant felt that this helped him to manage his blood sugar level and cholesterol between 2016 and 2019. The Complainant explained that at the time of his application for the post of Corrections Officer he had been prescribed Metformin for his diabetes.
41. He explained that he understood the Respondent's recruitment process from his previous employment in the role of Corrections Officer. Specifically, if he had failed any one of the pre-employment assessments he believed that the Respondent would not have continued with the

recruitment process. He assumed that as he had been allowed to progress to the medical assessment stage he had passed all the other assessments. This assumption was consistent with the documentary evidence.

42. The Complainant said that he undertook his medical assessment on 10 September 2019 and subsequently spoke to Dr Kayam who told him that he had failed the medical assessment because he had diabetes. He explained that Dr Kayam also told him his cholesterol and blood sugar levels were high. It was put to the Complainant that his diabetes was unmanaged or uncontrolled as at the date of his assessment. The Complainant stated that his blood sugar levels were high because he had not been able to take his diabetes medicine due to an allergic reaction to penicillin that he had suffered around the time of the assessment, and which had led to his hospitalisation. The Complainant was not able to specify precisely when he had been hospitalised for this reaction but indicated that it would have been a few months before he undertook the medical assessment in September 2019. He was also asked to comment on the Medical Record which did not indicate that that he had been hospitalised previously. He explained that he did not intentionally fill out the form incorrectly and noted that in his view the Respondent would have had access to all his medical records. He was further asked about the additional hospitalisation records which appeared to show that he was not hospitalised for an allergic reaction in 2019, as he had suggested, but in 2018. He was not able to explain this apparent discrepancy and repeated that in his recollection he had suffered the allergic reaction in the months prior to his medical assessment in September 2019 and this was why he felt his blood sugar levels were high as he was unable to take his diabetes medicine.
43. The Complainant was asked about his other medical conditions and, specifically, why he had not declared on the Medical Record that he had liver disease. He confirmed that he did not have liver disease and there was no requirement to disclose liver damage.
44. The Complainant explained that he understood that Dr Kayam would provide a report to the Respondent and that this was just a recommendation and he did not make the final decision.

Nonetheless the Complainant stated that he was very surprised to receive the Rejection given his previous experience and view that he had successfully passed all the other assessments.

45. The Complainant explained that he met with Dr Kayam again on 12 November 2019 after learning that he was not successful with his application. He stated that Dr Kayam confirmed that the reason he was deemed "unfit" for the role was because he had diabetes and a high Body Mass Index. He said that Dr Kayam shared with him the Department of Health guidance for determining whether or not someone is medically fit for a job at the Department of Corrections. The Complainant gave further evidence that Dr Kayam had told him that the guidelines for medical testing needed to be changed in the same way the previous general physical fitness test had been changed into the COPAT to better match the requirements of the role of Corrections Officer.
46. The Complainant explained that he had subsequently spoken to Mr Hollis and told him about his conversation with Dr Kayam. The Complainant said that Mr Hollis commented that he could understand why the Department of Corrections would not want to take on someone with diabetes given the adverse cost implications. He also gave evidence that he told Mr Hollis that he considered his treatment due to his disability was a breach of the Act and Mr Hollis responded by saying that he didn't think the Act would apply.
47. The Complainant gave evidence that he had informed the interview panel and Dr Kayam of his diabetes by virtue of the medical assessment and by voluntarily disclosing his condition during the recruitment process. He said at no point did anyone enquire if there were any potential accommodations or adjustments that could be made to role of Corrections Officer to enable him to perform the essential functions of the role. Further the Complainant's view was that he understood the requirements of the role and how to manage his diabetes and therefore did not consider any adjustments or accommodations were necessary for him to perform the essential functions. He noted that he had passed the COPAT first time without any need for modifications or adjustment.

48. The Complainant gave evidence based on a recent advertisement from the Respondent for role of Corrections Officer, which he contends was similar to that which he applied for in 2019, that the essential functions, duties and responsibilities are similar and include the following:

- a. Maintaining a consistent level of professionalism in a stressful environment;
- b. Operating with integrity and maintaining a high level of confidentiality;
- c. Maintaining a security vigil at all times to prevent infringements such as escapes, smuggling, altercations etc;
- d. Monitoring the whereabouts and movements of inmates in the units;
- e. Exercising the effective supervision and control of inmates and assisting other officers as needed;
- f. Inspecting locks, grills, and windows for evidence of tampering and needed repair;
- g. Searching inmates and cells for contraband;
- h. Protecting inmates from violent behaviour;
- i. Escorting inmates to and from cells, from one facility to another, for court appearances or outside medical treatment, as required;
- j. Recording and documenting appropriate reports related to security functions;
- k. Making appropriate verbal and written reports on inmates as required;
- l. Recording and relaying all inmate applications appropriately to the Divisional Officer; and
- m. Documenting appropriate reports related to maintenance functions.

49. The Complainant stated that his disability (diabetes) resulted in him falling within the "reject" column of the Policy and that this was the document which Dr Kayam relied upon when making his assessment of his medical suitability for the role of Corrections Officer.

50. The Complainant gave evidence that the Respondent applied broad and speculative perceptions about him and other disabled persons and failed to recognise that disabilities affect individuals in different ways. He contended that the Respondent failed to consider if any modifications or adjustments could be applied to enable him to perform the essential functions of the role.

51. The Complainant further asserted that when seeking to justify their decision to not employ him the Respondent applied the following speculative beliefs (which he said were never raised with him prior to the decision to not employ him):

- a. That he would experience various medical complications;
- b. That the Respondent would require additional medicines on site to accommodate him;
- c. That the Respondent would have no means of forcing him to manage his diabetes;
- d. That he would have sick days which would affect other members of staff;
- e. That unreasonable absences because of his diabetes would have an impact on staff morale; and
- f. That the safety of fellow officers would be an issue because of his diabetes.

52. The Complainant acknowledged that the Respondent had asserted that there were other factors which contributed to the decision not to employ him but he maintained that his disability (diabetes) was a factor, that he could perform the essential functions of the role and the Respondent had failed to consider their duty to accommodate him.

Evidence of Dr Prabhakar Kayam

53. We find that Dr Kayam's evidence was a little unclear and imprecise at times. We also note that Dr Kayam provided limited information with respect to how he considered the Complainant's disability (diabetes) would impact his ability to undertake the essential functions of the role of Corrections Officer.

54. Dr Kayam explained that he was the medical officer for Department of Corrections (as well as for the Bermuda Police and Fire service) and had been in the role for many years. He explained that his role in the recruitment process was to screen potential recruits for any disqualifying medical conditions. He was not responsible for the Department of Corrections staff and had limited involvement with the Respondent other than during the recruitment process. His role was to make a recommendation to the Commissioner of Corrections based on the applicable Department of Health guidance and once provided he had no further involvement in the recruitment process. He

confirmed he had no knowledge of whether or not there were any other factors in the decision not to recruit the Complainant. He explained that he was not involved in the final decision of whether or not to recruit a prospective applicant and did not provide any guidance on possible adjustments to an applicant's role or duties.

55. Dr Kayam confirmed that he did recall speaking to the Complainant and confirmed that he had failed the medical assessment because he had diabetes, high blood sugar and a body mass index (BMI) over 30. Dr Kayam explained that when making his medical assessment he relied on the applicable Department of Health Policy and Procedure.

56. The Tribunal was provided with three different Department of Health Policy and Procedure (Recruit Medical Evaluation) documents. Dr Kayam explained that in 2019 at the time of the Complainant's medical assessment the Department of Health Policy and Procedure (Recruit Medical Evaluation) guidance relating to recruitment was in the process of being updated. The version of the Department of Health Policy and Procedure (Recruit Medical Evaluation) which Dr Kayam said was relevant at the time was dated March 2009 and contained an Appendix B (Guidelines on medical standards for recruitment) which identified specific systems (i.e. Eyes, Ears, Cardio/Vascular, Neuro/Logical, Metabolic, Gastro-Intestinal, Respiratory, and Musculo) and contained two additional columns headed "Reject" and "Carefully Consider" under which were identified specific medical conditions. The reference to "Diabetes Mellitus" fell in the "Reject" Column. Dr Kayam was asked about this reference and explained that this was the general medical term for diabetes which did not distinguish between the two forms of diabetes. Dr Kayam explained that type 1 was where a person's blood sugar level is too high and the body cannot make insulin (so requires daily injections) and type 2, like the Complainant, was where a person may not be able to make enough insulin or cannot process it correctly. Dr Kayam explained that with Type 1 this was a lifelong condition and required daily injections of insulin whereas Type 2 was treatable with medicine and could be managed through exercise and diet control although in his opinion once a person started to take medicine it was very unlikely that they would be able to manage the

condition without continual medicinal assistance. Dr Kayam confirmed that type 2 diabetes can affect individuals differently.

57. The version which Dr Kayam identified as being applicable to the Complainant's medical assessment also contained some manuscript amendments by a Dr [Hein] relating the specific systems and the "reject" and "careful consideration" columns. Dr Kayam confirmed that this version, including [Dr Hein's] manuscript amendments, reflected the applicable guidance at the relevant time.
58. The Policy defined its purpose as "*to ensure that recruits for the uniformed services have no disqualifying medical conditions and have the physical attributes required to fully perform the essential functions of their jobs*". It applied to all recruits of the Fire Service, the Police Service and the Corrections Service. There was also reference that "*There may be some variation in standards between the uniformed services relating to job-task analysis for each discipline*". Dr Kayam was asked whether he had varied the standards with respect to the Complainant's medical assessment or indeed with respect to any other applicants. Dr Kayam confirmed that no adjustments were made in respect of the Complainant's medical assessment. Dr Kayam did not indicate that he had ever considered making adjustments to the medical assessment to take into account different roles or positions within the police, fire or correction services.
59. Dr Kayam was asked whether he was aware of any disabled persons being employed by the Respondent and confirmed that he did not know and that he did not have any day to day contact with the Respondent. His role was limited to undertaking the medical assessment and providing a report to the Commissioner of Corrections and he did not make any decisions in relation to recruitment.
60. Dr Kayam was asked to review the medical report dated 11 October 2019 and confirm whether he wrote the words "*Not suitable*" on the report. He said he did not. Dr Kayam confirmed that he considered the Complainant's condition was a Category B condition as indicated in the medical report. This was a condition that in the opinion of the medical officer was sufficiently serious to

prevent the applicant from performing essential functions or would present a significant risk to the safety and health of that individual or others.

61. Dr Kayam was asked what the specific medical concerns he had in recommending someone who suffered type 2 diabetes for employment. Dr Kayam asserted that the Complainant's mobility could be an issue, that he could become sleepy due to high blood sugar levels and that his condition could raise health and safety concerns for his colleagues.
62. Dr Kayam explained that the Complainant was not only a diabetes sufferer but that he also had other medical conditions such as a liver damage, back problems, enlarged heart, high blood sugar and high cholesterol. He explained that these other conditions also contributed to his decision to fail the Complainant's medical assessment. Dr Kayam suggested that for other potential recruitments whose blood sugar levels were high that he might retest them again in a few weeks' time. It was noted that this was not something that he had offered to the Complainant. Dr Kayam also raised concerns that the Complainant had not completed the Medical Form correctly. Specifically, that, whilst the Complainant had ticked the box for diabetes, he had not ticked the box to say he had been hospitalised. Dr Kayam's concerns were confirmed in an email to the Respondent's Counsel, Mr Myrle, and the Commissioner of Corrections, Ms Keeva Joell-Benjamin, dated 6 July 2023 in which he made reference to the Complainant's BMI 38 and Type 2 DM stating it was uncontrolled and also referred to his high cholesterol and slightly enlarged heart which attributes to his obesity or unmanaged/partially uncontrolled diabetes mellitus and hospitalisations for high bilirubin. This email also stated that only the diabetes was disclosed during his medical examination.
63. Dr Kayam explained that the Policy was subsequently replaced by the Health and Physical Fitness Standards document in 2020. This document had some significant differences from the Policy and was made up of five columns: implications for job functions; medical examination; standard; conditions split into potentially disqualifying and absolute disqualifying. This document was not the subject of much scrutiny as it did not apply at the material times.

Evidence of Mr Shannon Hollis

64. We find that whilst Mr Hollis offered his explanations freely he also provided contradictory evidence and as such we did not consider his evidence to be reliable.
65. Mr Hollis confirmed that he had been with the Department of Corrections for over thirty years and held a wide variety of roles. At the time of the Complainant's application he thought he was probably Chief Officer of Training but could not be entirely certain.
66. Mr Hollis confirmed that he had been part of the interview panel and was asked about his recollection of the interview process with the Complainant. He was taken through his responses and the scores that he had awarded the Complainant on the interview assessment sheet. It became apparent that Mr Hollis had mistakenly recorded that the Complainant had scored 56 out of [92] when he had in fact scored him 66 out of [92]. Mr Hollis acknowledged his error. This meant that he had actually scored the Complainant the highest of all the interview panel members. Mr Hollis was then taken to the part of the interview assessment sheet where the interview panel member is required to tick a box to say yes or no if they would recommend the applicant for employment. Mr Hollis had ticked the box to say yes. However, in his signed witness statement dated 9 January 2024 he had stated that he did not recommend the Complainant for employment following interview because he was not satisfied with his answers at interview. Mr Hollis tried to explain this discrepancy and stated that just because he had ticked the box recommending the Complainant for employment it did not mean that he felt he would be right for the position. The Tribunal found Mr Hollis' explanation unconvincing and noted that the documentary evidence directly contradicted his witness statement.
67. Mr Hollis was also asked about the other assessments that a prospective employee would have to undertake as part of the recruitment process. In particular, he was asked about the COPAT and confirmed that this test was designed to mirror the specific physical activities required for the role of Corrections Officer. He confirmed that he understood that the Complainant had passed the COPAT first time. He was asked what would happen if a potential new recruit failed the COPAT

and whether that would mean that their application was bound to fail. Mr Hollis explained that this was not necessarily the case and that he had allowed other new recruits a further attempt(s) to pass the COPAT during their probationary period.

68. Mr Hollis was asked if he would be happy employing someone who had a disability. He explained that he would not if he felt that the person could be a risk to his health and safety or a colleague's health and safety. He gave an example of a disabled person lacking mobility and struggling to cover an incident at the other end of the ward. Mr Hollis was asked whether he knew of any Correction Officers who had a disability. He said he did not. He was then asked if he knew Mr Randolph Wilkinson who was a Corrections Officer. He confirmed that he did. He was told that Mr Wilkinson suffered from diabetes and subsequently acknowledged that he did actually know this. He was asked how long Mr Wilkinson had been with the Department of Corrections. Mr Hollis did not know exactly how long but thought it was a long time. He was asked whether any modifications were made to assist Mr Wilkinson with performing his role as a Corrections Officer. Mr Hollis confirmed that he was not aware of any modifications being made to accommodate Mr Wilkinson.

69. Mr Hollis was asked if he had spoken with the Complainant after he learned that he was not going to be employed. Mr Hollis confirmed that he had probably spoken to the Complainant following his rejection and may have said something like he didn't think the Act applied given the circumstances. Mr Hollis confirmed that he did not know the reason for the Complainant's rejection as it was ultimately not his decision whether or not to confirm recruitment of a prospective applicant.

Evidence of Ms J Providence

70. Ms Providence's evidence was found to be clear and credible.

71. Ms Providence confirmed that she had been part of the Interview panel that assessed the Complainant. She explained that she had not been impressed with Complainant's responses to the panel's questions and had expected much more from a former Corrections Officer. This was

why she had not recommended him for employment and scored him lowly (41 out of 96) on the interview assessment sheet.

72. Ms Providence confirmed that she had no further involvement in the Complainant's recruitment process. She was asked what she knew about the other assessments that new potential recruits undertake. Specifically, she was asked about COPAT. She gave an explanation about the various elements it involved and explained that it had replaced the previous physical assessment. She felt the CCPAT was much better because it was specifically tailored to the role of Corrections Officer. She explained that it closely mirrored the types of physical activity that an individual would need to perform in that role. She was asked if she knew that the Complainant had passed the COPAT first time. She acknowledged this.

73. Ms Providence was asked what potential risks Correction's Officers might face during the performance of their normal functions. She explained that the hours were long, there was risk of attack from inmates and there would be long periods away from their families.

74. Ms Providence confirmed that she did not recall the Complainant informing the panel that he suffered from diabetes. She stated that she did not know how the Complainant had fared in the other assessments or ultimately why his application was rejected. She had no knowledge of his medical history and her decision to mark him lowly (41 out of 96) was purely due to how he came across in the interview.

Legal analysis

(1) DIRECT DISABILITY DISCRIMINATION

(A) Was the Complainant treated less favourably by the Respondent than the Respondent would treat other persons generally (i.e. than an actual or hypothetical comparator group) because of his disability or did the Respondent deliberately treat the Complainant differently because of his disability?

75. The Complainant must first show that he was treated less favourably by the Respondent than other persons generally. In this regard, the Tribunal is entitled in the absence of an actual comparator

group to determine a hypothetical comparator group to assess whether or not the Complainant suffered less favourable treatment because of his disability.

76. The Tribunal finds that the appropriate hypothetical comparator group in the present case were *"other persons who applied for the post of Corrections Officer who undertook the same pre-employment assessments as the Complainant and did not pass the medical assessment but who did not share the Complainant's protected characteristic (i.e. a non-disabled person)"*.

77. The Tribunal finds that the Respondent requires all prospective employees for the role of Corrections Officer to undertake the same set of pre-employment assessments as the Complainant, including the requirement to not have a disqualifying medical condition as set out in the Policy. The evidence we have heard from the Respondent's witnesses supports this finding of fact.

78. The Tribunal further finds that the evidence before us indicates that the Respondent would have treated any employee, regardless of whether or not he or she was suffering from a disability (as defined by the Act), the same in the event that they failed the medical assessment. Whilst we accept Dr Kayam's evidence that he does not make the decision on whether or not to hire a prospective applicant and only provides a recommendation to the Commissioner of Corrections, we find no evidence to suggest that the Respondent would ever hire an applicant who was evaluated by the medical officer as having a disqualifying medical condition pursuant to the Policy and thus deemed "unfit for recruitment", whether being classed as having a category A or B medical condition and whether or not that individual was suffering from a disability (as defined by the Act).

79. The Tribunal finds that the Complainant's claim for Direct Disability Discrimination is not upheld because he has not been able to demonstrate that he suffered less favourable treatment because of his disability as compared to others generally and, as such, we do not need to consider the other issues listed above with respect to the claim for Direct Disability Discrimination.

(2) INDIRECT DISABILITY DISCRIMINATION

(A) Did the Respondent apply to the Complainant a condition which it applies equally to others generally but which:

- g. Puts persons of the same disability as the Complainant (i.e. a person with diabetes) at disproportionate disadvantage as compared to others (i.e. persons without diabetes) who can comply with such a condition;*
- h. Cannot be justified (i.e. a proportionate means of achieving a legitimate aim) irrespective of the Complainant's disability; and*
- i. Places the Complainant at a detriment because he cannot comply with it?*

80. The Tribunal finds that the Respondent applied a condition to the Complainant which it applied equally to others generally, specifically, the requirement that applicants do not have medical conditions which fall within the "reject" column of the guidelines on disqualifying medical conditions set out in Policy. The evidence from Dr Kayam confirms that the Policy was applied to the Complainant when assessing his suitability for the role of Corrections Officer and was applied consistently to all other applicants for roles within the Department of Corrections as part of the medical assessment element of the Respondent's recruitment process.

81. It follows that the Complainant as someone suffering from Diabetes mellitus (In his case Type 2 – although this was not a material distinction for the purposes of the Policy), a medical condition which was listed within the "reject" column of Appendix B of the Policy was placed at a disproportionate disadvantage as compared to others (who did not have a diabetes) because he was unable to comply with the terms of the Policy.

82. With regards to justification, we consider that this element can be dealt with at the same time as we address whether or not there is a bona fide occupational requirement which the Complainant is unable to fulfil. If there is a bona fide occupational requirement then this would support the argument that ensuring that the Respondent's employees do not have any disqualifying medical conditions which prevent them from performing the essential functions of their role or which present a significant risk to their safety and health or of others, is a legitimate aim and the Policy is the most proportionate means of achieving that legitimate aim.

83. The Complainant by virtue of not being employed by the Respondent has suffered a detriment as a consequence of the Policy imposed by the Respondent.

(B) If the Complainant was discriminated against by the Respondent because of a condition applied by it which had a disproportionate effect on him (as a person with diabetes) as compared to others (i.e. persons without diabetes) and the condition was not justifiable and did place him at detriment, was he unable to fulfil a bona fide occupational requirement of the role, within the meaning of section 6(9B) of the Act?

84. The Tribunal finds that the Respondent on the evidence before us did not manage to establish on the balance of probabilities that there was a specific bona fide occupational requirement that the Complainant was unable to fulfil by virtue of his disability (Type 2 diabetes).

85. The Tribunal finds that the evidence provided by the Respondent, in its Defence, and, specifically, from Dr Kayam with respect to the impact of the Complainant's medical condition (Type 2 diabetes) on his ability to perform the essential functions of the role of Corrections Officer unsatisfactory and insufficient to demonstrate that the Complainant would not be able to fulfil a bona fide occupational requirement of the role. The Tribunal was not provided with any specific evidence or examples of any bona fide occupational requirement relied upon by the Respondent or indeed any specific tasks or essential functions of the role which the Respondent considered would be affected by the Complainant's disability (i.e. his type 2 diabetes). The Respondent instead provided us with a list of speculative beliefs about how the Complainant's diabetes would "affect the qualitative standard and performance of his duties as a Corrections Officer and put others at risk".

86. The Tribunal further notes that the evidence from the Respondent's witnesses was consistent that the COPAT was designed to closely mimic the physical requirements of the role and that the Complainant passed this test first time and without any apparent difficulties. Mr Hollis also gave evidence to confirm that the COPAT was not a pass or fail test and that he had on occasion allowed other applicants to retake the COPAT during their probationary period once they had been offered the role.

87. Mr Hollis also confirmed during his evidence that the Respondent currently employs Mr Randolph Wilkinson, who also suffers from diabetes (the specific type was not identified but it is not material to our findings), in the role of Corrections Officer and had done so for many years. Mr Hollis also confirmed that he was not aware of any modifications or adjustments being made to the role to accommodate Mr Wilkinson. The Tribunal finds this evidence compelling that, notwithstanding diabetes being listed in the "reject" column of the Appendix B of Policy, a person suffering from diabetes can undertake the essential functions of the role of Corrections Officer.

88. The Tribunal therefore finds for the above reasons that the Respondent indirectly discriminated against the Complainant and that the Policy applied to him was not justifiable (i.e. not a proportionate means of achieving a legitimate aim) and that there was no specific bona fide occupational requirement for the role of Corrections Officer that the Complainant could not fulfil by virtue of his disability (type 2 diabetes).

(C) If the condition was a bona fide occupational requirement, has the Respondent shown that it was not possible without unreasonable hardship to modify the circumstances of the Complainant's employment so as "to eliminate the effects of [his] disability in relation to the employment"?

89. Whilst the Tribunal finds that the Policy was not a bona fide occupational requirement and therefore does not need to make any findings as to whether or not it was possible for the Respondent, without unreasonable hardship, to modify the circumstances of the Complainant's employment to ameliorate the effects of his disability, we consider it instructive to do so.

90. The Tribunal accepts the Complainant's evidence that at no point did the Respondent ever turn its mind to consider whether or not any modifications or adjustments could have been made to the role of Corrections Officer to accommodate him and eliminate the effects of his disability. The evidence from the Complainant is that in his view no accommodations or modifications were necessary as he had passed the COPAT first time and was familiar with the role having been previously employed by the Respondent in the same role. The Tribunal further accepts the Complainant's evidence that this is why he did not propose any accommodations or modifications during his recruitment process.

91. In this regard, the Respondent's witnesses are also consistent and support our finding that no accommodations or modifications were considered with respect to the Complainant's employment. We note that none of the Respondent's witnesses was ultimately involved in the decision to not hire the Complainant.
92. In its Defence, and submissions to the Tribunal, the Respondent asserted there would have been unreasonable cost implications if it had employed the Complainant due to the increased risk of medical complications as a consequence of his diabetes and the work required from him. The Tribunal finds that no evidence adduced that the Respondent had applied its mind to what, if any, accommodations or modifications could have been made to the Complainant's role and therefore the assertions around possible additional costs of any accommodations or modifications are entirely speculative. We note, for example, that the Respondent asserted that additional medicines would be required on site for the Complainant and that the Complainant would have had additional sick days. There is no evidence that the Respondent's concerns about the Complainant's potential additional medical requirements or anticipated additional sick days were ever discussed with him. The Tribunal finds that no evidence was adduced with respect to the likely costs arising from accommodating the Complainant in those circumstances.
93. Notwithstanding our finding that the Complainant was able to perform the essential functions of the role of Corrections Officer (without the need for any adjustments, reasonable or otherwise), we further find that the Respondent did not provide any relevant evidence to support its assertion that it was not under any duty to consider reasonable adjustments because it could avail itself of an unreasonable hardship allowance under section 4 of Schedule 1 of the Act.
94. In this regard, we have considered the email from Mr Hollis to Mr Myrie dated 20 July 2023 re "Human Rights Act 1981" which formed part of the Defence and which contained some information regarding the staff strength of the Department Corrections confirming that it was "*currently experiencing below 90% operational efficiency*". Whilst this email was not referred to in Mr Hollis' witness statement and neither Counsel asked him any questions about it at the full merits hearing, we find that email is not relevant because it only suggests that the Respondent

was operating below 90% operational efficiency as at July 2023. The relevant period for the purpose of assessing operational efficiency in the context of the Complainant's Complaint and section 4 of Schedule 1 of the Act would have been at the time the decision was made not to employ him (i.e. November 2019). The Respondent adduced no evidence with regards to its operational efficiency at the material time or why any proposed modification or accommodation would result in an adjustment to the "provision of public services". As a consequence, we find that the Respondent failed to establish that the unreasonable hardship allowance applied in the circumstances and it would have been unreasonable to have made any adjustments to the Complainant's employment because it was operating at less than 90% operational efficiency and/or that any proposed adjustment would have been to the provision of public services.

Remedies

95. In light of the Tribunal's findings of fact and our analysis of the law, we conclude that the Respondent has unlawfully indirectly discriminated against the Complainant on the grounds of disability and is liable to him for compensation.
96. With respect to the Complainant's claim for loss of wages, we note that the salary for the role of Corrections Officer at the time of the Complainant's application was \$68,000 per annum (before deductions). The Complainant has provided a Schedule of Loss dated 10 August 2023 (together with a signed statement of truth from the Complainant). The Respondent has not made any representations with regards to the Schedule of Loss.
97. The Complainant has asserted that he made efforts to secure alternative employment between the date of the Rejection (1 November 2019) and him obtaining a full-time role with effect from 1 December 2020. We have not been provided with any documentary evidence of his efforts to mitigate his loss during this period but note that Complainant asserts that he earned approximately \$3,600 from working as a security guard between 1 November 2019 and 1 December 2020. The Complainant is seeking nine months loss of earnings which he calculates at \$47,400 (\$51,000 less \$3,600 in other earnings). Taking into account the Complainant's assertions regards to mitigation of loss, his stated loss of earnings and the absence of any submissions from

the Respondent in respect to his Schedule of Loss, we award damages in the sum of \$47,400 equivalent to nine months' loss of wages.

98. With respect to the Complainant's claim for injury to feelings pursuant to section 20A of the Act, the general principles in relation to assessing compensation for injury to feelings are set out in the decision of *Vento v Chief Constable of West Yorkshire Police*⁹ and is as follows:

- a. Awards to injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the employer's conduct should be not allowed to inflate the award;
- b. Awards should not be too low, as would diminish respect for anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to "untaxed riches".
- c. Awards should bear some similarity to the range of awards in personal injury cases;
- d. In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings;
- e. Tribunals should bear in mind the need for public respect for the level of awards made;
- f. The level of compensation should relate to the degree of detriment suffered by the complainant.

99. The UK Court of Appeal in *Vento* identified three broad bands of compensation for injury to feeling, which were updated by *Da'Bell v National Society for the Prevention of Cruelty to Children [2010]* and more recently the UK Employment Tribunal Joint Presidential Guidance Issued on 24 March 2023:

⁹ *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR102*. This authority was relied upon in the Board of Inquiry Decision of *Sticca v Stonington Beach Hotel Ltd. and Robinson* dated 15 December 2006

- a. The top band is normally between £33,700 and £56,200. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of harassment. Only in the most exceptional cases should an award exceed £56,200.
- b. The middle band is between £11,200 and £33,700. This should be used for serious cases that do not merit an award in the highest band.
- c. The lower band is between £1,100 and £11,200. This is for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £1,100 (\$1,389) are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

100. The Tribunal has determined that the Complainant should receive an award for injury to feelings in the amount of \$7,164.73¹⁰. This falls within the middle of the lower band. The following factors were taken into account:

- a. The Respondent's discriminatory act was one-off with regards to the Complainant, albeit, it arose from a policy that applies to all prospective applicants to the uniformed services;
- b. The discrimination was indirect and there was no evidence of any malice towards the Complainant or any other aggravating factors; and
- c. The discriminatory act resulted in the Complainant not being offered employment by the Respondent which had a material impact on the Complainant's ability to earn a living and caused him financial hardship.

Power of Tribunals

101. Section 20(1) of the Human Rights Act 1981 sets out the following powers of the Tribunal:

"20(1) A tribunal after hearing a complaint shall decide whether or not any party has contravened this Act, and may do any one or more of the following:

¹⁰ Based on USD to £Sterling rate at XE Currency www.xe.com at 13 March 2024

(a) Order any party who has contravened the Act to do any act or thing that, in the opinion of the tribunal constitutes a full compliance with such provision and to rectify any injury caused to the complainant by the contravention and to make financial restitution therefor:

Provided that financial restitution shall not be ordered for any loss which might have been avoided if the Complainant had taken reasonable steps to avoid it; or

(b) If it is satisfied that an offence has been committed and that any order that it may make under paragraph (a) will be complied with, refer the complaint to the Director of Public Prosecutions with a view to prosecution; and additionally of alternatively;

(c) Order any party to the dispute to pay any other party or the Commission costs of the proceedings before the tribunal, not exceeding in aggregate \$1,000.

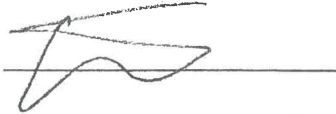
Order

102. For the reasons outlined above, we order as follows:

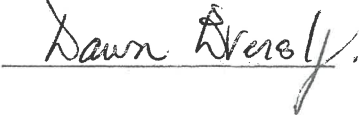
(a) The Respondent shall pay the Complainant the sum of \$47,400.00 for loss of wages; and

(b) The Respondent shall pay the Complainant the sum of \$7,164.73 for injury to feelings.

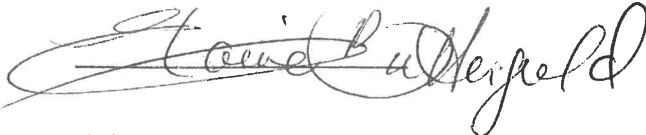
Dated this 12 day of March 2024



JAMES (JAY) WEBSTER, CHAIR



DAWN EVERSLEY, PANEL MEMBER



ELAINE BUTTERFIELD, PANEL MEMBER

Human Rights Tribunal

SUPREME COURT BERNUDA
2024 OCT 10 PM 12: 22