Case Number: 2501300/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr D Dawson	**AND**	**Secretary of State for Justice/ HM Prison & Probation Service**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 26, 27 & 28 February 2018**

Before: **Employment Judge Hargrove**

Appearances

For the Claimant: **Mr M Laing, Employment Consultant**
For the Respondent: **Mr S Goldberg of Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal is not well-founded.

REASONS

1 At this hearing the claimant was represented by Mr Laing, an Employment Consultant with a law degree; and the respondent by experienced counsel, to both of whom I am grateful for their competence and assistance in the presentation of their cases.

2 By a claim submitted on **4 October 2017** the claimant brought a claim of unfair dismissal from his engagement as a prison officer at Durham Prison with effect from **23 June 2017**, he having been employed in that capacity for 29 years since **November 1987**. The respondent asserted that the claimant had been fairly dismissed for gross misconduct. The witnesses called by the respondent, who began, were:-

2.1 Eleanor Griffin, a Band 7 operational manager who was at the time Head of Reducing Re-offending at HMP Kirklevington Grange, and who conducted the investigation into the alleged misconduct. She will be referred to throughout this judgment as EG.

2.2 Paul Foweather, at the time Deputy Director of Yorkshire and North East Prisons, who had dealings with a grievance which the claimant raised concerning his suspension in **April 2016**, and who shared the claimant's appeal against the sanction in the first disciplinary process. He will be referred to as PF.

2.3 Julia Spence, Governor of HMP Hatfield, who conducted the rehearing in the second disciplinary process. She will be referred to as JS.

2.4 Teresa Clarke, Director of Midlands Prison, who conducted the appeal against the dismissal by JS during the second disciplinary process.

The claimant gave evidence and called no further witnesses. All witnesses referred to witness statements and there was a bundle of documents containing over 800 as to which the Tribunal considered only those pages to which it was referred by the representatives or witnesses.

3 The relevant background facts may be summarised as follows. In setting out the chronology I will identify the essential factual issues which arose:-

3.1 On **20 March 2016** the claimant allegedly used abusive language towards and assaulted a member of the public who with two others was visiting a prisoner at Durham Prison. The visitor will be referred to as V1.

3.2 On the same day the claimant submitted a form in Annex A – Use of Force describing the incident. See pages 61-62 of the bundle. So also did Band 4 dog handler who was present during at least part of the incident, Jason Armin, see page 60, used by somebody who was a participant in an incident involving the use of force, restraints of locks. The form indicates:-

> "The use of force must only be used when it is –
>
> (i) reasonable in the circumstance;
>
> (ii) an absolute necessity;
>
> (iii) no more force than necessary;
>
> (iv) proportionate to the seriousness of the situation."

The claimant in his original Annex A stated that he had employed personal protection techniques and taken hold of the front of V1's shirt with his right hand.

On **24 March** the claimant submitted a second Annex A (see pages 63-64).

3.3 On **24 March** the claimant was suspended by Governor Husband (see form at page 65-66). The reason for suspension was identified as:-

> "Subject to formal investigation to look into allegation that Officer Dawson used inappropriate force on a member of the public at HMP Durham."

It was suspension with pay.

3.4 On **30 March 2016** Governor Husband commissioned EG to investigate the allegations. On **12 April 2016** the claimant raised a first grievance alleging unfair bias, failure to make reasonable efforts to establish the full facts of the incident before implementing suspension and lack of duty of care. The subject of the grievance were Governor Petit whom he asserted had a history of excessive and disproportionate behaviour towards the claimant and he heard that she would have influence over the investigation officer EG; Governor Husband and Governor Petit in respect of the decision to suspend and Governor Husband in respect of the alleged lack of duty of care (see pages 70-71). On **14 April** Governor Husband responded stating that he was not accepting the grievance as to do so would impinge on the investigation process. The claimant referred it up to PF on **20 April** (see pages 92B-C). PF responded via Oliver Tomes on 3 May citing PSO 8550 which states that:-

> "Issues associated with the way in which a conduct and discipline issue was handled are not covered by this policy and should be addressed under PSI 06/2010 – Conduct and Discipline."

In addition, the letter notified that PF had "considered the appeal submitted by you against your suspension from duty". It continued:-

> "He had considered:-
>
> - The nature of the allegations that have led to your suspension.
> - Your length of service.
> - Whether alternative duties other than suspension would have been appropriate.
>
> To do this I have reviewed the draft investigation report from the investigating officer into the incident, the rationale for suspending you from duty and the serious _____ against you. Having done so I believe that suspension from duty is currently appropriate due to the seriousness of the allegations made against you."

In his evidence to the Tribunal PF denied that he had in fact at that stage reviewed any draft investigation report from the IO and asserted that the statement in the letter from Mr Tomes was an error on Mr Tomes' part. The claimant does not accept that explanation. He took the grievance to a second stage to Governor Coppell.

3.5 EG interviewed a number of witnesses and the claimant was interviewed on **5 May 2016**. She also considered some CCTV footage and the relevant documentation. Having been granted an extension of time for her report, she issued it on **31 May 2016** (see pages 183-195). She identified two allegations, summarised evidence before and against them. Allegation number 1 was that of alleged misconduct – assault on the public/visitor. Her recommendation stated:-

> "The information gathered through the investigation provides sufficient evidence to indicate that a breach of the code of practice may have occurred and therefore it is recommended that this is tested further at a disciplinary."

Allegation 2 was of abusive language/behaviour towards public/visitor as to which she said:-

> "Evidence in relation to this allegation during the incident is light in context with only dog handler Armin stating he was aware that this occurred. Officer Dawson denies this therefore the recommendation is for this to be further tested at a disciplinary hearing."

3.6 On **3 June 2015** Governor Allen put to the claimant inviting him to a disciplinary hearing on **17 June** (see pages 200-201). The letter enclosed the investigation report, a reference to the code of conduct and discipline and it listed people to attend the hearing. It listed a range of possible action from no further action up to and including ending employment. In fact the disciplinary hearing extended to three days on **3, 17 and 31 August 2016**. By letter dated **7 September 2016** Governor Allen notified the outcome. The charge of abusive language was found unproven but that of assault proven. The outcome letter is at page 285-287. It is clear that he concluded that the allegation of assault was an act of gross misconduct and he gave a final written warning for a period of two years. The reasons set out in some detail indicated that there were what he considered mitigating circumstances. A salient passage from the letter reads as follows:-

> "I heard mitigation and considered the incident in its entirety. It was my view that you were performing your duties by ejecting the visitors with the exception of the use of force. I do note that you were under pressure and I believe that you have made an error and that there was no premeditated action, as such I still have confidence that you can be trusted as an officer. As a result I awarded a final written warning for a period of two years."

3.7 On **13 or 14 September 2016** the claimant appealed the final written warning and identified in a detailed letter (pages 304 onwards) the following:-

(i) the disciplinary proceedings were unfair and breached the rules of natural justice;

(ii) the original findings against the weight of the evidence;

(iii) unduly severe penalty;

(iv) new evidence.

PF wrote to the claimant on **16 September 2016** indicating that he would chair the appeal on **29 September**. In fact the appeal hearing did not take place until **20 October**. Relevantly to the outcome of the appeal PF received a letter from the HR case manager Jessica Morrison on **20 September 2016** in which she set out a number of points to consider. The letter identified three possible outcomes including the upholding of the original decision, upholding the appeal if the appeal's officer considered the penalty was unduly severe, including the overturning of the final written warning or the reduction of the length of the penalty period from two years to 12 or 18 months; or, a rehearing as to which she stated:-

> "Should the appeal hearing authority consider that any procedural issues have resulted in a material difference or negatively impacted on the outcome, the allegations can be reheard. I see no reason for a rehearing of the case as process has been adhered to."

The claimant objected to PF considering the appeal on the grounds of potential bias because of his previous involvement in the claimant's grievance. The appeal hearing went ahead on **20 October**. The claimant was represented by Mr Farrell from Community the Union. Unfortunately there are no notes of the hearing although Jessica Morrison, the HR manager, did attend the hearing and did take notes. Initially, the respondent's case was that the notes had been subsequently destroyed. At the insistence of the Tribunal during the hearing, a further search was instituted and the respondent produced a typed document which was apparently on the respondent's management system and was inserted into the bundle at page 297A. It claims to have been created by Jessica Morrison on **21 October** initially at 15:20 hours and modified by her at 15:22 hours. Two letters were sent out by PF to the claimant, the first dated **21 October** at page 298 and the second on **24 October 2016**. The letters are to some extent contradictory and their contents required careful examination by the Tribunal. In summary however PF reached no decision on the appeal save to direct that there should be a rehearing. This is indicated in the final letter of **9 November** at page 302. Jessica Morrison has not been called by the respondent to give evidence as to precisely in what circumstances the rehearing occurred or what was notified at the disciplinary hearing. On the other hand, the claimant has not called his former trade union representative having apparently fallen out with the trade union, and in response to a direction that the union should be contacted to ascertain whether the notes taken by Mr Farrell at the hearing were available, the Tribunal was told that no notes existed. In the view of the Tribunal, expressed to the parties, the outcome of the disputes between the claimant and FO as to the circumstances in which the rehearing came about is important not least because the outcome of the rehearing was that the claimant's appeal against the final written warning was replaced by a summary dismissal confirmed on appeal. As to that process, on **14 February 2017** the claimant was invited to a disciplinary hearing to be chaired by JS then Governor of HMP Hatfield, which took place on **27 February and 3 and 4 April 2017**. On enquiry from JS, he was notified by PF that the rehearing was to be a rehearing of both the charges, including the charge of abusive behaviour of which the claimant had been acquitted at the first disciplinary process. See exchange of e-mails at page 367. The appeal hearing notes are extensive, see pages 374-617. I have been referred to various passages but as I notified the parties I did not read all of the transcript. The claimant asked for additional witnesses to be called. JS acceded to that request in respect of three witnesses but denied it in respect of a further three on the basis that she considered that the further three could not add anything relevant to the issue as to what had occurred in the confrontation on **20 March 2016**. JS notified the claimant of the outcome at the end of the hearing and confirmed it in detail in writing on **11 April 2017**, see pages 618-624. She reviewed the evidence that she had heard from the

witnesses, she summarised the claimant's case presented at the appeal and identified the mitigation put forward on his behalf particularly at page 621. The claimant had provided three occupational health reports written between **October 2014** and **February 2016**. These are contained in pages 53-59 of the bundle. The latter report of **February 2016** (a month before the incident in question) indicated that he had, "reactive stress that was likely to stabilise in the long term .. remains at high risk of deteriorating without further dialogue with management to discuss the way forward." However it was indicated that it was not likely to be a disability because of the absence of the necessary long term effects. The Tribunal cites specifically from the findings section (page 623):-

> "I found that the allegation of
>
> that you assaulted a visitor member of the public to HMP Durham on 20 March 16 by using unnecessary force is proven.
>
> I have reviewed all the evidence presented and I have also reviewed your previous disciplinary record. This is not the first time you have been reprimanded for an assault upon a prisoner visitor and consequently I believe this to demonstrate states a pattern of behaviour."

The reasoning continues:-

> "This leads me to the conclusion that on balance of probability this allegation of assaulting a visitor or a member of the public to HMP Durham on 20/3/16 by using unnecessary force is proven. Your actions constitute gross misconduct and the appropriate penalty is dismissal without notice."

3.8 The claimant submitted a letter of appeal on **11 or 12 April 2017** and the appeal was heard by the Director of Midland Prisons TC on **12 June 2017**. This was essentially a review of the earlier decision of JS and not a rehearing. TC rejected the appeal by letter of **23 June 2017**. The claimant had again been represented by Mr Farrell at the appeal hearing. The appeal letter is at pages 639-643. The claimant's last day of employment was **23 June 2017**. It is to be noted that the claimant had in fact returned to work for two weeks prior to the hearing of the appeal in the first disciplinary process before PF and was then re-suspended by PF. He was not accordingly at work on date that his employment terminated.

4 The relevant statutory provisions are contained in the Employment Rights Act. Section 98(1) provides:-

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show – the reason or if more than one the principal reason for the dismissal, and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Amongst the reasons for dismissal falling within subsection (2) is a reason relating to the conduct of the employee.

Section 98(4) provides that:-

> "(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

If the dismissal is found to be unfair there are statutory provisions which deal with the calculation of the basic and compensatory award to which the claimant would be entitled. Section 119 provides that the claimant would be entitled to a basic award calculated in accordance with that section. However section 122(2) provides that:-

> "(2) Where the tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent the tribunal shall reduce or further reduce that amount accordingly."

The compensatory award is found in section 123. Subsection (1) provides:-

> "(1) The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."

Subsection (6) provides that:-

> "(6) Where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

5 **The issues**

5.1 The respondent has the burden of proving that the reason or principal reason for the dismissal was related to conduct or more properly a belief in misconduct. In **Abernethy v Mott, Hay and Anderson** the Court of Appeal held that the reason for dismissal is the conduct or may be the belief in the conduct which led to the respondent dismissing the employee. Conduct or belief in misconduct must be held by the dismisser and at any stage of the appeal process. In the present case no other specific reason for dismissal has been identified by the claimant, although he has contended that a number of named Governors or above exhibited bias against him; and/or that there was a culture of managers supporting each other in circumstances where disciplinary proceedings were brought against more junior members of staff. I will deal with this issue in considering the fairness issues which then arise and are listed below.

5.2 In relation to a conduct dismissal the requirement of fairness under section 98(4) requires the Tribunal to apply a three stage test namely that originally set out in **Burchell v British Home Stores** as later explained in a series of Court of Appeal authorities including **Sainsbury Supermarkets Limited v Hitt**. Those tests give rise to the following questions for the consideration of the Employment Tribunal:-

(i) was there an investigation of the alleged misconduct which was reasonable in all the circumstances?

(ii) did the dismisser both at the initial stage and at any appeal entertain a reasonable belief in the misconduct alleged based on that investigation?

(iii) if so was the penalty of dismissal a reasonable sanction in the circumstances?

There are three matters to be noted in the Tribunal's application of these tests. First there is no legal burden on either party to prove that the tests are established in the case of the employer, or that they are not established in the case of the employee or, to put it another way, to establish fairness or unfairness. There will however usually be an evidential burden on the respondent to call evidence in relation to the investigation the beliefs of the dismisser and the decision to dismiss.

Secondly, reasonableness is to be tested by applying a band of reasonable responses test to each of the three elements. The Tribunal has to ask itself whether the actions and decisions of the employer were ones that a reasonable employer could have reached in the circumstances of the case, sometimes called the test of the hypothetical reasonable employer. For example, one employer might, applying that test, fairly decide that dismissal was an appropriate sanction even if another employer might reach a different decision, for example that a final written warning was adequate.

Thirdly the Tribunal must caution itself not to substitute for the hypothetically reasonable employer its own view of what would be reasonable. See for example **London Ambulance Trust v Small Court of Appeal**.

5.3 In the present case there are three particular and important issues relating to the fairness of the decision making process:-

The first relates to the circumstances in which PF, at the first appeal on **20 October 2016**, disposed of the claimant's appeal against the final written warning by not making a decision on it but in effect deferring it and directing a rehearing _____. Allied to that point is the allegation of bias against PF in relation in particular to his earlier handling of the claimant's grievance in what he considered to be the appeal against the suspension. The outcome of the rehearing direction was that Governor Spence decided that the claimant should be dismissed (upheld on the claimant's subsequent appeal to Area Director Clarke, which had the effect that the claimant's appeal against a final written warning resulted in a dismissal. It is common ground that the respondent's disciplinary policies and procedures did not permit the imposition of an increased penalty on

appeal. Mr Laing referred me to the relevant case of **Airedale** (and invited me to conclude that in the particular circumstances of this case the process was to be treated as more akin to an appeal than a rehearing; and that dismissal was not an admissible or fair sanction. Furthermore, the claimant asserts that PF engineered a rehearing because he took the view that Governor Allen's sanction of a final written warning was too lenient and in order to secure that the claimant was dismissed. In this connection there are some important factual issues to be decided by the Tribunal concerning the outcome of the hearing on **20 October 2016**. Secondly, the claimant asserts that PF was responsible for restoring for the rehearing the allegation of abusive behaviour of which the claimant had already been acquitted such that the claimant was submitted to double jeopardy. Thirdly there are issues as to whether Governor Spence and Director Clarke took into account the fact that in 2012 the claimant had been the subject of a final written warning for assaulting a prisoner, which had expired in 2014 and was thus spent in 2017 when they made their decisions. Again there are factual issues which arise including whether, if they did take this into account whether they did so in relation to the issue of whether the claimant was guilty of gross misconduct only or also in relation to sanction. Furthermore there is a legal issue as to fairness which arises as to which I referred the parties to **Airbus UK Limited v Webb [2008] ICR page 541**. This relates to the issue whether an employer in deciding to dismiss is entitled to take into account earlier warnings which are spent.

5.4 Were I to decide that the dismissal was unfair, there are remedies issues which I have to decide applying section 123(1) and sections 122 and 123(6) of the Employment Rights Act:-

(i) what are the chances that, had a fair procedure been followed, this employer would have decided to dismiss fairly in any event, and if so when? (The test in **Polkey v A E Dayton & Son Limited**).

(ii) whether the claimant was in fact guilty of any blameworthy conduct contributing to his dismissal and/or whereby it would be just and equitable to reduce the basic and/or compensatory awards or not to make any award of compensation.

The application of these tests does require the Tribunal to descend into the fact finding arena as opposed to applying the band of reasonable responses test.

6 Conclusions

6.1 The reason(s) for dismissal

I am satisfied from the evidence given by Governor Spence and Director Clarke that the decision to dismiss and to reject the appeal were in each case based on a genuine belief in the misconduct. No other competing reason for dismissal was put to them in cross-examination; and the CCTV evidence and that of Mr Armin were sufficient to form an evidential basis for that belief. Whether that belief was reasonable is a matter for further consideration below.

6.2 The quality of the investigation

EG is one of the participants who is accused of bias. However this relates only to her alleged relationship with Governor Petit against whom undetailed allegations were made by the claimant in the first grievance. The details of the investigation which she carried out are set out in her report. I will deal with them shortly. First, she gathered evidence from three CCTV cameras of the confrontation between V1 in the space between doors 5 and 11 (an area called the Lock or Pedestrian Exit), and thereafter in the corridor and around the door (immediately next to door 11) which led to the exit and search area from the prison. The claimant criticises this part of the investigation because it did not include CCTV of what had occurred at the outset in the visits room where the claimant had notified three visitors and the prisoner that the visit was being prematurely terminated because of a suspicion of a drop or attempted drop of drugs. That CCTV footage was never collected, despite the claimant's request and apparently could not be found. The claimant's case is that it would have shown the extent of the aggression of V1, and of the prisoner. I am satisfied however that the investigator accepted the claimant's description of what occurred in the visits room; and there was other evidence thereof collected in the form of interview notes with prison officers in the visits room at the time. These included the fact that the prisoner became aggressive and was kicking walls and doors. The confrontation between the claimant and V1 however took place at a later stage and in a different area albeit shortly thereafter. Secondly, I accept that the investigator did consider the Appendix A forms filled in by the claimant and dog handler Armin, and took detailed statements which were recorded in writing from all of the relevant witnesses. Further, he referred the CCTV footage to a trainer in restraint techniques, Mr Collins, who prepared a report which formed part of her investigation and was considered during the disciplinary process. I was satisfied that the investigation was reasonably thorough and properly considered the evidence both against and in favour of the claimant's version of events leaving the conclusion to be reached by the disciplinary process. The claimant complains that the investigation did not include an investigation into the circumstances of the institution of the investigation and suspension, and in that connection did not include any interview of PF, or of Mr Tomes who had written the letter on behalf of PF rejecting the claimant's first grievance and appeal against the suspension. I did not consider those to be irrelevant to the issues which any decision maker would have had to have made, but, in relation to PF I will consider this matter further in connection with the issue of the alleged procedural and fairness in respect of the appeal process.

6.3 **The belief of the dismissers**

The claimant relies upon the fact that the first dismisser, Governor Allen, did not impose the penalty of dismissal which was imposed at the rehearing and on appeal therefrom. However, it is noteworthy that even Governor Allen considered that the claimant's conduct did amount to gross misconduct. It was against that finding that the claimant was appealing in addition to the finding that even a final written warning was too severe. The test which the decision makers had to apply was the four stage test identified in the preliminary part of Annex A which the claimant

and Mr Armin had filled in. I am satisfied that the conclusions of all three decision makers that the claimant had breached that test was one which fell within, indeed well within, the band of reasonable responses test. There was ample evidence in the form of the available CCTV footage and in particular from the supporting evidence of the dog handler Armin who was present amply justified that conclusion. Disregarding the band of reasonable responses test I would have reached the same conclusion myself although that is only relevant to any remedies issue which may arise.

6.4 There is then to consider the sanction of dismissal. Where there is more to consider:- the fact that Governor Allen had ascribed a lesser penalty; the allegation that the dismissers had failed to consider the circumstances of the claimant's occupational health record of stress; and the other mitigating circumstances which the claimant put forward. In addition at this stage the Tribunal will start by setting out its conclusions on the four particular issues of fairness set out at paragraph 4.3 above.

First I considered the issue of the claimant's suspension, which the claimant included in his first grievance. The person responsible for making the original decision to suspend on 24 March 2016 was I find Governor Husband (see pages 65-66). It was not PF. The power to suspend is contained in paragraphs 6.3, 6.4, 6.8 and 6.9 of the NOMS conduct and disciplinary policy at page 669 of the bundle:-

> "Suspicion must only be used in exceptional circumstances where there is a particular business risk or risk to an individual that cannot be mitigated through alternative duty or detached duty arrangements. Where a manager decides to suspend a member of staff they must be able to demonstrate why alternative or detached duties were not appropriate in the circumstances and must keep a record locally of their decision. …
>
> Conditions of suspension
>
> 6.8 Suspension must only be used in exceptional circumstances and must be kept under review throughout the disciplinary process. It is not always necessary for a suspension to last for the entirety of an investigation or disciplinary process.
>
> 6.9 Suspension is not a punitive measure and is normally on full basic pay …".

This policy is to be considered alongside provisions in the ACAS Code of Practice and guidance disciplinary and grievance. In paragraph 8 of the Code of Practice it states:-

> "In cases where a period of suspension with pay is considered necessary this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered as disciplinary action".

Under the ACAS Guide the following appears:-

> "There may be instances where suspension with pay is necessary while investigations are carried out. For example where

> relationships have broken down, in gross misconduct cases or where there are risks to an employee's or the company's property or responsibilities to other parties. Exceptionally you may wish to consider suspension with pay where you have reasonable grounds for concern that evidence has been tampered with, destroyed or witnesses pressurised before the meeting. Suspension with pay should only be imposed after careful consideration and should be reviewed to ensure it is not unnecessarily protracted …".

I am satisfied that the original suspension was justified on two grounds:-

First to enable an investigation to take place and also because of the seriousness of the allegation of assault on a visitor to the prison; and as to the potential damage to the prison service's reputation if the claimant remained at work while the disciplinary process continued. The latter also justified PF's continuation of the suspension, or more properly the re-imposition of the suspension because the claimant had in fact been back at work for two weeks after Governor Allen's original decision. This issue is however only a peripheral matter in deciding in the appropriateness or otherwise of the sanction of dismissal. The claimant clearly took the view that PF was out to ensure that the claimant was dismissed during the course of the disciplinary process following Governor Allen's original decision; and relies upon his actions in refusing to deal with his grievance or remove the suspension and in particular the supposed lie by PF and Mr Tomes when it was later alleged, contrary to what was stated in Mr Tomes' original letter that PF had not seen a draft of the investigation report before suspending. He raised this issue during the course of the second disciplinary process and requested that PF and Mr Tomes be made available at Governor Spence's disciplinary hearing. I conclude that Governor Spence was perfectly justified in taking the view that their evidence was irrelevant to what she had to consider and that she acted totally independently of PF when she was making her decision.

Next there is the more substantial issue as to whether or not the decision by PF to order a rehearing on the claimant's appeal from Governor Allen's decision, heard on 20 October 2016 and the propriety of that decision. I set out first the relevant parts of the disciplinary process. This is contained in paragraph 9 which begins at page 676:-

> "9.1 There is a right of appeal against all formal disciplinary decisions made at disciplinary hearings and fast track hearings.
>
> 9.2 When an appeal is made one or more of the following grounds must be specified
>
> - Unduly severe penalty;
> - Evidence not previously taken into account which could affect the original decision;
> - That the original disciplinary proceedings were unfair and breached the rules of natural justice;
> - The original finding was against the weight of the evidence".

9.3 contains the right of staff to be accompanied by a trade union representative or work colleague.

> "9.9 Appeals must not be conducted by a senior manager who has been involved in
>
> - The decision to charge;
> - The decision to find the allegation proven;
> - The decision on the level of penalty".

I accept that at no stage during the claimant's disciplinary process was there a breach of that provision.

More cogently, paragraph 9.10 provides:-

> "An appeal authority cannot increase the level of penalty at the appeal stage. An appeal authority may
>
> - Approve the penalty;
> - Reduce it;
> - Find that the allegation of misconduct was not satisfactorily substantiated;
> - Order a rehearing of the case by an alternative".

On the claimant's behalf Mr Laing submitted that PF had acted improperly at the appeal stage by unilaterally ordering a rehearing; in stating that there was to be a new investigation by a new investigating officer; and in then cancelling it; and that the actions of PF demonstrated that he was determined by whatever means to engineer the claimant's dismissal, recognising that he could not himself do it if the appeal continued to a conclusion because of the prohibition of any increase in penalty. His alternative submission was that his actions in ordering a rehearing were unlawful and/or the subsequent dismissal was unfair on the basis of two Court of Appeal decisions:-

Christou & Ward v The London Borough of Harringey (the Baby P case) [2012] IRLR page 622

McMillen v Airedale NHS Foundation Trust [2014] IRLR page 803.

In **Christou** the claimant's social workers had been the subject of initial disciplinary proceedings under the simplified procedure and had been given written warnings. There followed a public criminal trial in the Baby P case which received great publicity, and a report commissioned by the Secretary of State for Education which found that the original disciplinary proceedings had been inadequate. The respondent then instituted fresh internal disciplinary proceedings which resulted in summary dismissal of both claimants for gross misconduct which was affirmed on an internal appeal. The claimants' subsequent claims of unfair dismissal to the Employment Tribunal were rejected with the dismissals found to be fair. two issues were raised by the time the case got to the Court of Appeal:-

(1) Res judicata;

(2) Abuse of process.

As to the first issue it was held that the principle of res judicata did not apply to internal disciplinary proceedings (see paragraph 48). It was also held that abuse of process did not apply to Tribunal proceedings but that the Employment Tribunal did have power to decide whether it was unfair to institute the second proceedings and to dismiss. In that case the Court of Appeal upheld the Employment Tribunal's decision (by a majority) that it was fair in the circumstances (applying section 98(4) and the band of reasonable responses test) to dismiss at the second set of proceedings (see paragraph 63).

The facts in the **Airedale** case were different. Disciplinary proceedings were taken against a consultant obstetrician employed by the Trust, which resulted at the first stage in the claimant being given a final written warning. The claimant appealed to a panel who upheld the complaint and proposed to reconvene to consider the appropriate sanction indicating that the full range of options were available to the appeal panel including dismissal. The claimant sought and obtained an injunction against the respondent's panel proceeding with the appeal. In that case the Trust's disciplinary policy did not contain any provision either allowing or prohibiting the imposition of a greater sanction on appeal. That is fundamentally different from the prison service's policy in this case which clearly does prohibit any increased penalty on an appeal. The Court of Appeal found that in the absence of any provision allowing an increase in penalty, by reference to the ACAS Code at paragraphs 25-28 that there was an obligation on the part of the employer to allow an employee to appeal which was intended to benefit the employee and not to allow the employer to usurp the employee's right by increasing the penalty as to do so would be to discourage appeals. See also the ACAS Guide cited with approval in the Court of Appeal judgment:-

> "The opportunity to appeal against a disciplinary decision is essential to natural justice, and appeals may be raised by employees on any number of grounds, for example new evidence, undue severity or inconsistency of the penalty. The appeal may either be a review of the disciplinary sanction or a rehearing depending on the grounds of the appeal. An appeal must never be used as an opportunity to punish the employee for appealing the decision and it should not result in any increase in penalty as this may deter individuals from appealing".

In my view neither of these authorities assist Mr Laing's argument. The same principal should be applied to a complete rehearing of a disciplinary process _____. Clearly a complete rehearing did take place in **Christou** and the subsequent decision to dismiss was upheld by the Employment Tribunal, and later by the Court of Appeal. A complete rehearing is not to be equated with an appeal and it is to be noted that the complete rehearing process did incorporate an appeal process. A complete rehearing is to be contrasted with an appeal where absent a specific provision in the employer's disciplinary procedure, no increased penalty can be awarded. One of the options open to the appeal authority under

paragraph 9.10 of the prison service's policy is to order a rehearing of the case by an alternative hearing authority. The clear implication from that is that the alternative hearing authority begins at the beginning and has a full range of options available to it in respect of which there is a right of appeal on the part of the employee.

7 I now set out my findings of fact concerning the circumstances in which the rehearing decision was conveyed to the claimant. I do not accept all of the evidence given in that connection by PF, but I reject the claimant's argument that PF was simply motivated by the desire to ensure that the claimant was dismissed. If I had accepted that argument and found this decision was in fact a sham not made in good faith I may well have found that the subsequent dismissal was unfair but there is no evidence that PF attempted to influence Governor Spence's decision although he did indicate in response to a query that the rehearing was also to consider the charge of which he had been acquitted by Governor Allen. I find the following facts in relation to the appeal hearing:-

7.1 PF did say that there would be a reconsideration by a new investigating officer as was indicated in the first letter that was sent out after the appeal hearing, but then changed his mind and subsequently notified the claimant on 9 November that there would be no new investigation.

7.2 PF re-suspended the claimant. I have already dealt with that issue.

7.3 During the appeal hearing the claimant was made aware of the likelihood or possibility of a rehearing and possible dismissal and did not at that stage object. It transpired for the first time when the HR officer's typed note was produced to the Tribunal that the claimant walked out of the appeal hearing with Mr Farrell who was representing him but that Mr Farrell returned. There is no evidence that Mr Farrell ever raised any objection to the proposed rehearing.

7.4 No reinvestigation in fact did take place before Governor Spence's first instance rehearing, although Governor Spence succeeded to the claimant's application to call three additional witnesses but refused to call PF, Governor Husband or Mr Tomes again for reasons which I have accepted and explained.

7.5 The hearing in front of Governor Spence was in fact a complete rehearing and the claimant had every opportunity via his representative to question the witnesses including the three additional witnesses.

In short I am satisfied that the process carried out by Governor Spence, and the subsequent appeal by Director Clarke was fair and that each entertained a reasonable belief the claimant was guilty of misconduct. I am further satisfied applying the **Burchell** test that the decision to dismiss did fall within the band of reasonable responses and I am also satisfied that the dismissers did properly take into account the mitigating factors relied upon by the claimant during the process, including the occupational health reports referring to the claimant's stress. There remains however the issues whether both Governor Spence and Director Clarke took into account the claimant's previous final written warning for assaulting a prisoner which dated from 2012 for a period of two years and was accordingly spent at the time of the disciplinary process in these proceedings. Mr Goldberg argues that Governor Spence was aware of the previous warning but

did not take it into account or if she did, only at the liability stage and not when she was considering the appropriate sanction. The notes of the hearing before Governor Spence include a passage from which I draw the conclusion that she did take it into account including as part of the consideration of the appropriate remedy and as part of her conclusion that there was a loss of trust and confidence in the claimant. The issue remains whether in those circumstances Governor Spence acted improperly and whether there should in that respect be a finding that the dismissal was unfair. In that connection I refer to the case of **Davis v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135**. This is authority for the proposition that an employer is entitled to take into account in deciding the appropriate sanction any previous warning which the employee may have had and the Tribunal is not required to satisfy itself that the previous warning was properly and fairly imposed unless it was manifestly inappropriate to issue the warning or it had been issued for/or improper motive. That decision does not however deal with the situation where the previous warning had expired prior to the misconduct in question. As to this the Tribunal drew the parties' attention to another Court of Appeal decision in **Airbus UK Limited v Webb [2008] ICR page 561**. In that case, the Court of Appeal, not following a Court of Session authority in **Diosynth Limited v Thompson [2006] IRLR page 284** stated that whilst it remained the case that once a warning had ceased to have effect as a penalty it could not be relied on as the reason for dismissal this did not mean that the misconduct in respect of which the penalty was imposed could not be relevant to the consideration of the reasonableness of the employer's later action in dismissing the employee for similar misconduct as was stated by Lord Justice Mummery:-

> "The language of section 98(4) is wide enough to cover the employee's earlier misconduct as a relevant circumstances of the employer's later decision to dismiss the employee, whose later misconduct is shown by the employer to the employment tribunal to be the reason or principal reason for the dismissal".

I am in any event satisfied with the evidence given by Governor Spence to the Employment Tribunal that she would have decided to dismiss the claimant even if there had not been any prior warning or misconduct. The later misconduct of itself was not the only factor which caused her to dismiss. It was also the fact that the claimant did not admit that he had done anything wrong and continued to argue even up to and including the Tribunal hearing that his use of force was reasonable in the circumstances; that he used no more force than was necessary and such force was proportionate to the seriousness of the situation. It was well within the band of reasonable responses for Governor Spence to reject that claim and for her to take it into account as part of her decision that she had lost trust and confidence. Indeed paragraph 9.11 of the disciplinary policy, at page 677, which sets out a series of bullet points factors which the appeal authority must consider in making their decision, including the penultimate bullet point which the member of staff's disciplinary record, general record, position and length of service. It would have been a relevant factor that the claimant had 29 years unblemished service. That was not however the case because he had a record of a previous assault constituting gross misconduct for which he had received a final written warning. In all of these circumstances I find that the claimant was fairly dismissed.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
13 March 2018