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EMPLOYMENT TRIBUNALS

Claimant: **Mr L Harris**

Respondent: **Secretary of State for Justice**

Heard at: **East London Hearing Centre**

On: **26 January 2017**

Before: **Employment Judge Brown**

Representation

Claimant: In person

Respondent: Ms E Gordon-Walker (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **CONSENT JUDGMENT: The Respondent made deductions from the Claimant's wages and shall pay to the Claimant £68, gross, on account of unpaid overtime and £20 on account of expenses.**

2. **The Respondent did not unfairly dismiss the Claimant.**

REASONS

Preliminary

1 The Claimant was employed as a Prison Officer by the Respondent from 8 February 2008 until 12 February 2016. On 7 April 2016 he presented complaints to the Employment Tribunal of unfair dismissal and unlawful deductions from wages against the Respondent.

2 At the start of today's hearing the Respondent agreed that it had not paid the Claimant for 4 hours of overtime and for some expenses. The parties agreed that the

Respondent should pay the Claimant £68 gross for unpaid overtime and £20 in expenses.

3 The parties agreed the following issues for determination in the unfair dismissal claim:

(1) Has the Respondent shown the reason for dismissal and that it was a potentially fair one? The Respondent contended that the reason for Claimant's dismissal was misconduct, in that he failed to obey lawful/reasonable/written instructions and discredited the Prison Service by removing the closeting chain from a prisoner, without authority, on 6 February 2015 and by allowing the prisoner to be present in a wet room with his girlfriend, while he was naked.

(2) If the Respondent has shown the reason for dismissal and that it was potentially fair one, did the Respondent act fairly in dismissing the Claimant for that reason under *s98(4) Employment Rights Act 1996*?

(3) Did the Respondent have an honest belief in the misconduct?

(4) Did it have reasonable evidence for that belief?

(5) Did the Respondent conduct a reasonable investigation?

(6) Was dismissal a fair sanction? The Claimant contended that his dismissal was inconsistent with the treatment of other officers who were involved in the same matters.

(7) If the Claimant was dismissed unfairly, what was the likelihood that the Respondent would have dismissed him fairly, following a fair procedure?

(8) Did the Claimant cause or contribute to his dismissal to any extent and, if he did, by what percentage should compensation be reduced?

4 The Claimant had not exchanged witness statements with the Respondent before the start of today's hearing. He had sent a brief email on 16 January 2017 to the Respondent. At today's hearing, he brought a handwritten statement and an email setting out points he wished to make regarding the fairness of his dismissal. With his consent, I copied the handwritten statement and the email and provided them to the Respondent, before the Claimant gave his evidence. This was done to put the parties on an equal footing. The Claimant agreed that he wished the matters in his ET1 Claim Form, the matters in his handwritten statement and the matters contained in the email photocopied at the Tribunal to stand as his evidence-in-chief. The Respondent agreed to proceed on that basis.

5 There was a bundle of documents. Both parties were given the opportunity to make submissions. The parties agreed that this hearing would consider liability, only, and that a separate hearing should be listed to determine remedy if the Claimant succeeded in his unfair dismissal claim.

6 I reserved my decision. The hearing had originally been listed for two days. Only one was available and there was not sufficient time for me to make and deliver my decision in that one day.

Findings of Fact

7 The Claimant was employed by the Respondent as a Prison Officer from 8 February 2008. At all relevant times, the Claimant worked at HMP Chelmsford. On 8 February 2015 he, along with another Officer, Officer K, was conducing a bed watch of a prisoner, "LB," at Broomfield Hospital. The prisoner was being treated as an inpatient there and the Claimant and Officer K were supervising him. This supervision is known as a "bed watch".

8 HMP Chelmsford had local instructions, or rules, regarding special escorts and the removal of restraints on prisoners; Local Instruction 2.26, page 362. It also had rules regarding bed watch duties for Prison Officers who were escorting prisoners at hospital; Local Instruction 2.03, page 363 to 366. It was not in dispute that the Claimant was aware of these local instructions at the relevant times.

9 Local Instruction 2.26 provided that a prisoner's restraints should be removed if a health care professional sought their removal, but that escorting staff must notify the prison Duty Governor as soon as possible, in case additional security arrangements needed to be made. All removals of restraints were required to be recorded in an occurrence log for bed watches.

10 Local Instruction 2.03 contained rules for escorts and bed watching duties. In it, the "Visiting and Telephone Arrangements" section required that visitors be instructed to empty their pockets and have their possessions thoroughly searched. Where the member of prison staff was the same gender as the visitor, visitors were also required to be subject to a hand held wand search and level B rub down search. The rules required that a visitor's accompanying property must be thoroughly searched and that visitors were not allowed to give, or leave with, the prisoner any items whatsoever, including mobile phones. The rules required that such items be handed to staff for the duration of the visit and returned afterwards.

11 The rules required:

> "Visits should be conducted in sight and hearing unless instructed otherwise by prison management."

12 They also required, "The prisoner must be in sight of at least one officer at all times …" and "Bed watch staff must exercise close control and observation of all social visits to prisoners."

13 The rules provided that "Bed watch staff must maintain an occurrence log (Bed watch Occurrence Log) to report important events. These will include … removal/reapplication of the restraints including the time, the reason given by a healthcare professional and the name/position of the health care professional involved."

14 On 29 August 2015 the Sun newspaper printed a front page article alleging that, during the bed watch on prisoner LB between 1 – 12 February 2015, LB had been permitted by prison staff to have sex with his girlfriend "AS" in a hospital shower whilst LB was uncuffed. The Sun newspaper sent the Respondent the photographs it had obtained of LB naked in the shower, which had been taken on 8 February 2015, page 96A and 98A.

15 On 1 September 2015 Brian Pollett, a Band 9 member of the International Team within the Respondent's National Offender Management Service, was commissioned by Adrian Smith, Deputy Director Custody for the East of England, to investigate allegations in the Sun newspaper about the way in which prisoner LB had been supervised during his admission to hospital from 1 – 12 February 2015. Roy Stephenson, Senior Manager D, Deputy Governor of HMP Littlehay, was appointed to assist Mr Pollett.

16 Mr Pollett had no knowledge of the Claimant before being appointed as Investigating Officer. Mr Pollett interviewed the Claimant on 4 September 2015. The Claimant was accompanied by his Trade Union representative. Mr Pollett interviewed 12 Prison Officers who had conducted bed watches on prisoner LB on the occasions when he had received visitors at Broomfield hospital.

17 During his interview with Mr Pollett, the Claimant admitted that he was the Officer in charge of the bed watch on 8 February 2015, page 49. He said that he was experienced in conducting bed watches and was aware of the rules which applied to them, page 54. During his investigatory interview he also agreed that his conduct of the bed watch was poor and that he had been completely in the wrong. The Claimant said that he had failed to follow correct procedures. He said that he had removed LB's closeting chain without authority, page 61 and 63, and said that this was a mistake and contrary to procedure. The Claimant also said that, at around 13.15 on 8 February 2015, he had allowed LB's girlfriend AS to be present in the shower with him, while LB was naked, page 56 and 60 – 61. The Claimant agreed that it was possible that AS had taken photographs.

18 After he had interviewed the Claimant, Mr Pollett telephoned the Deputy Governor of HMP Chelmsford and informed him that the Claimant admitted that he had allowed LB's closeting chain to be removed. The Deputy Governor decided to suspend the Claimant.

19 Mr Pollett made recommendations that a number of the Prison Officers, including the Claimant, who had supervised prisoner LB while he was in hospital, be subject to disciplinary proceedings, pages 87 – 88.

20 Mr Pollett reviewed the Local Instructions. He considered that there were aspects of those instructions which needed to be made more clear. He suggested that prison officers supervising a bed watch needed to make clear to persons visiting a prisoner in hospital that the use of mobile telephones in the vicinity of a prisoner was not permitted. He also considered that clearer guidance was needed about when physical restraints could be removed and the nature of the permission which should be sought in such circumstances, page 87 – 88.

21 Mr Pollett concluded that the Claimant had not obtained permission from managers at HMP Chelmsford, or from NHS hospital staff, to remove the prisoner's closeting chain on 8 February 2015, or to allow the prisoner's girlfriend to enter the wet room whilst the prisoner was naked. He concluded that the Claimant also failed to record

those events in the bed watch Log. Mr Pollett's view was that these actions brought the Prison Service into disrepute and constituted serious unprofessional conduct. He recommended that the Claimant should face a formal disciplinary hearing for serious unprofessional conduct in relation to those matters.

22 Adrian Smith, Deputy Director of Custody, asked Helen Carter, Governing Governor HMP Chelmsford, to act as a decision maker in a disciplinary hearing against the Claimant and other officers who were being disciplined for their involvement in the supervision of prisoner LB at Broomfield hospital.

23 Ms Carter wrote to the Claimant on 18 November 2015, inviting him to a disciplinary hearing. She told the Claimant that he had been charged with "Failure to obey lawful/reasonable orders/written instructions" and "Bringing discredit on the prison service ... In that you removed the closeting chain from LB without authority at 13.15 hours on 8 February 2015 and allowed AS to be present in a wet room at Broomfield hospital with LB whilst LB was naked." Ms Carter told the Claimant that he had the right to be accompanied at the hearing by a Trade Union representative or work colleague. She enclosed a copy of Mr Pollett's investigation report and the Respondent's Code of Conduct and Discipline. Ms Carter said that the allegation, if proven, would constitute gross misconduct and that a possible outcome of the disciplinary hearing was dismissal.

24 The Claimant attended a disciplinary hearing over three days on 7th, 9th and 10th December 2016. The Claimant was represented by Mr Cook, a Prison Officers' Association Trade Union representative, page 195 – 297. Mr Pollett attended the hearing and answered questions on his report.

25 The Claimant's representative made a number of procedural points at the start of the disciplinary hearing. He asked why the Claimant had not been provided with a copy of the Sun newspaper article which had triggered the disciplinary investigation. Mr Pollett said that the Claimant was aware of the allegations against him and did not need a copy of the article. The photographs used in the article had been made available. The Claimant's representative queried whether the photographs were genuine and suggested that it might have been possible that the dates and times of the photographs could have been altered. Mr Pollett said that there was no evidence that the photographs had been tampered with and that the date and times of the photographs fitted with the occasions when the prisoner had received visits from his girlfriend. Mr Cook, the Claimant's representative, contended that the charge of "bringing the prison service into disrepute" was described as "misconduct" and not "gross misconduct" in the Respondent's Conduct and Discipline Policy, page 393 of the bundle. The Human Resources representative attending the hearing advised Ms Carter that the Conduct and Discipline Policy stated that serious cases of general misconduct could be treated as gross misconduct if they caused irreparable damage to the relationship of trust and confidence between the National Offender Management Service and an employee, page 395.

26 The Claimant's representative said that Mr Pollett had failed to interview the prisoner's former girlfriend. Mr Pollett explained that he had interviewed all the staff who had been present when the prisoner had been visited by any visitor. The Claimant's representative queried the differences in the charges that had been brought against other Prison Officers who had been involved in supervising LB whilst he was in hospital. He asked why Mr Pollett had not visited the hospital and satisfied himself about the size of the

shower room where LB had been permitted to take the shower with the girlfriend in attendance. Mr Pollett said that he had received detailed descriptions from the Officers during his investigation and was satisfied that he had an accurate description of the shower room.

27 During the disciplinary hearing the Claimant agreed, once more, that he had removed LB's closeting chain without recording this in the Occurrence Log, even though he understood why it was important to do this, page 246 and 256. He agreed that, whilst LB and the girlfriend were in the shower, the Claimant had a restricted view of LB, page 247, 248 and 279. He agreed that he had no view at all of AS, the girlfriend, page 240, 247, 248, 252, 279. The Claimant agreed that he did not have complete control of what was going on, page 280 and that he was unable to supervise the girlfriend, page 248 and 280. He agreed that the girlfriend thereby posed a risk, page 252 and he could not hear clearly what was going on, page 280.

28 On 14 December 2015 Ms Carter wrote to the Claimant, telling him that she had decided to dismiss him for gross misconduct, page 308 – 312. She said that she was satisfied that both the charges of failure to obey/lawful/reasonable orders/written instructions and bringing discredit to the Prison Service were proven. Ms Carter said that she had decided that the Claimant had removed the escorting chain without permission, in order to facilitate a shower for the prisoner. Ms Carter said that there were other options available to the Claimant, such as requesting an additional chain, or seeking permission for the removal of the chain; but that the Claimant had failed to do either of those things, compromising security. Ms Carter noted that the Claimant had recorded that the prisoner had used the toilet, but not that he had used the shower. She noted that the Claimant had admitted at the disciplinary hearing that he had taken the decision to remove cuffs without authority and had also allowed the prisoner's girlfriend into the wet room while the prisoner was naked. Ms Carter said that the Claimant was an experienced member of staff, who had previously undertaken a number of bed watches, and therefore knew what the expectations were of an Officer undertaking bed watch. Ms Carter said that allowing the girlfriend into the wet room whilst the prisoner was naked was a serious error of judgment. She said that the Claimant had admitted, in the disciplinary hearing, that he did not have clear sight of the girlfriend throughout the time that she was in the wet room and that his view of the prisoner LB was restricted. Ms Carter noted that the Claimant did not have full sound of what was taking place and, as such, he was not able properly to supervise and did not have control of the situation. Ms Carter said, in her opinion, it was that set of circumstances which allowed the photographs to be taken, one of which was published in the newspaper article and had brought discredit on the Prison Service.

29 Ms Carter said that each of the individual Prison Officer's case was to be judged on its own merits and that she was satisfied that the charges against the Claimant were of such a serious nature that defining those as gross misconduct was not unreasonable. She said that she was satisfied as to the validity of the photographs. Ms Carter said that the Claimant's decisions were a serious error of judgment, which posed not only a security risk, but failed to meet the standards expected of the Claimant. She said that the Claimant's actions, including allowing the girlfriend into the wet room effectively unsupervised while the prisoner was naked, would fail an acceptability test, damaging the reputation of the prison locally and the service nationally. Ms Carter recorded the fact that the Claimant had an exemplary record of seven and a half year service and a good attendance history. She recorded the fact that the Claimant regularly volunteered for bed

watches, overtime and detached duty and had never been subject to complaints or problems. She said, however, that she believed that the Claimant's actions on 8 February 2015 were of such a serious nature that they made any further relationship trust between National Offenders Management Service and the Claimant impossible. Ms Carter said that she had decided to dismiss the Claimant with immediate effect.

30 Ms Carter told the Tribunal that she was the deciding officer in relation to other Prison Officers who were subject to disciplinary proceedings as a result of their conduct whilst they were on bed watch duty for the same prisoner. She produced copies of her decision letters for each of those officers, page 313 – 333. Ms Carter told the Tribunal that she had considered each case on its individual merits, after hearing all the relevant evidence.

31 The other Prison Officers involved were subject to disciplinary sanctions, but were not dismissed. Ms Carter made the following findings in relation to those other officers:

31.1 Officer P's outcome letter was at pages 316 – 318 of the bundle. This Officer had been the Officer in charge of a bed watch along with Officer B. Officer P admitted it was her decision to remove a closeting chain from a prisoner and to allow his girlfriend to enter a hospital bathroom when the prisoner was wearing boxer shorts, in order to help wash his feet. Officer P could hear and see both the prisoner and the girlfriend throughout the time that they were in the bathroom. Ms Carter was satisfied that Officer P had control and supervision of the area. She found Officer P guilty of failing to obey a lawful or reasonable instruction and gave Officer P a written warning for 24 months.

31.2 Officer B's disciplinary outcome letter was at pages 319 to 322 of the bundle. He was on duty with Officer P, but only had seven months service at the time of the incident. Officer B was found guilty of failing to obey a reasonable instruction. He was given a written warning of 12 months, because he was a junior employee.

31.3 Officer MI's disciplinary outcome letter was at pages 330 – 332 of the bundle. Officer MI was found to have failed to follow a reasonable instruction when she admitted removing the closeting chain without permission, so that LB could take a shower. Ms Carter gave Officer MI an oral warning for six months, because Officer MI had made an entry in the bed watch log, recording the removal and reapplication of the chain and, further, because the room where LB had showered could be secured from the outside.

31.4 Officer BR's disciplinary outcome letter was at pages 323 – 325 of the bundle. Officer BR was on duty with Officer MI. Officer BR was found to have failed to follow reasonable instruction. Ms Carter gave the Officer "Advice and Guidance" to be placed on their personnel file. She did this because it was Officer BR's only second bed watch and Officer BR had started only two months previously in the role of Prison Officer.

31.5 Officer K was on duty with the Claimant on 8 February 2015. Ms Carter decided that he had failed to report misconduct by others, but that there was insufficient evidence that he had brought the service into disrepute. Officer K, on Ms Carter's findings, had undertaken only 6 weeks of live service as a Prison Officer before 8 February 2015 and had not been present when the Claimant had permitted LB and AS to be alone in the bathroom together. Ms Carter gave Officer K a written warning for 24 months.

32 The Claimant appealed against Ms Carter's decision to dismiss him, by letter of 17 December 2015, page 336. He said that the penalty was unduly severe and that new evidence had come to light which could affect the original decision. He said that the disciplinary proceedings were unfair and breached the rules of natural justice. The Claimant also submitted a detailed appeal, page 348. He said that the charges against him had been overstated compared to the charges against other Officers. He also said that the photographs had not been proven as valid and that Mr Pollett, the investigator, had not visited Broomfield Hospital. The Claimant said that all the information and evidence produced during the investigation and interviews had not been produced and that he had an exemplary record of seven and a half years service. The Claimant said that he had been open and honest when stating he had not sought permission to remove the escort chain. He said, however, that on at least three other occasions, other staff had done the same thing. He said that was not clear what policy gave the right for staff to remove items from members of the public visiting on a bed watch. He also said the evidence from the relevant prisoner had not been taken into account.

33 Michelle Jarman-Howe, Deputy Director of Custody for the East of England and Line Manager of all the East of England Prison Governors, was appointed to hear the Claimant's appeal. On 14 January 2016 she wrote to the Claimant, inviting him to a meeting on 5 February 2016. The Claimant attended that appeal hearing, accompanied by his Trade Union representatives, Mr Smoker and Mr Cook. Ms Jarman-Howe wrote to the Claimant, dismissing his appeal on 12 February 2016, page 357 – 361. Ms Jarman-Howe addressed the Claimant's grounds of appeal.

34 With regard to the Claimant's contention that the penalty of dismissal had been unduly severe, Ms Jarman-Howe said that each case was dealt with on its own merits. She said the Claimant had failed to satisfy Governor Carter that he was in full control of the bed watch; by the Claimant's own admission he did not have sight or sound of the prisoner, or his girlfriend, while they were in the shower. Ms Jarman-Howe said that the Claimant's decision making leading up to this event was questionable. She said that she had reviewed the most recent conduct and discipline database and was satisfied that dismissal was amongst the range of penalties which was available. She said that she was satisfied that Governor Carter had taken into account the Claimant's individual circumstances.

35 Ms Jarman-Howe said that she had reviewed a letter provided by Prisoner LB, page 189. She said that it did not materially affect outcome from the disciplinary hearing, other than confirming that photographs had been taken and that the prisoner's girlfriend had sent them to the Press.

36 With regard to the Claimant's contention that the disciplinary proceedings were

unfair and breach the rules of natural justice, Ms Jarman-Howe said that the Claimant had been accompanied by a Union representative, had been allowed to question witnesses and had been given the opportunity to state his case. She said that a copy of the investigation report, witness statements and charges were provided to the Claimant before the disciplinary hearing. She said that those matters suggested that the rules of natural justice were not breached. Ms Jarman-Howe said that, having looked at the hearing transcripts and other evidence provided, it was clear that Governor Carter had been satisfied on the balance of probabilities of two key points. First, that the Claimant had committed a serious error of judgment, leading to a lack of control, when the prisoner and his girlfriend were in the wet room; the result of which caused reputational damage to HMP Chelmsford and the National Offender Management Service. Second, Governor Carter had been satisfied that the Claimant had failed to follow reasonable orders and written instructions. Ms Jarman-Howe said that part of her role was to decide whether the decision made by Governor Carter was correct based on the evidence available. She said that, by the Claimant's own admission, it was evident that the Claimant had removed the restraining chains without permission, despite there being a number of options available to him. She said that, taking into account all circumstances of the case, she had concluded that it was reasonable for Governor Carter to have found the allegations proven. She therefore upheld the decision to dismiss the Claimant.

37 At the Employment Tribunal hearing, the Claimant contended that Simon Burns, the local MP, had stated publicly that someone should be held accountable for the incident. He said that the Prison Service was told that at least one person would have to lose their job. Each of the Respondent's witnesses denied that they had been put under any pressure by anyone, whether the local MP, or by anyone in the Prison Service, to come to any particular conclusion. They each told the Tribunal that they had made decisions on the facts as they had found them.

Relevant Law

38 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

39 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Conduct is a potentially fair reason for dismissal.

40 If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

41 In considering whether a conduct dismissal is fair, the Employment Tribunal is guided by the principles set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379, affirmed by the Court of Appeal in *Post Office v Foley* [2000] ICR 1283.

42 Under *Burchell* the Employment Tribunal must consider whether or not the employer had an honest belief in the guilt of the employee of misconduct at the time of dismissal. Second, the Employment Tribunal considers whether the employer, had in its mind, reasonable grounds upon which to sustain that belief. Third, the Employment

Tribunal considers whether the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

43 The Employment Tribunal also considers whether the employer's decision to dismiss was within a range of reasonable responses to the misconduct.

44 In applying each of these tests the Employment Tribunal allows a broad band of reasonable responses to the employer, *Iceland Frozen Foods v Jones* [1982] IRLR 439.

45 The band of reasonable responses test applies as much to the Respondent's investigation as it does to the decision to dismiss: *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23, LJ Mummery, giving the judgment of the Court, para 30.

46 It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably, *Morgan v Electrolux Ltd* [1991] IRLR 89, CA. This last point was emphasised in *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

47 At decision to dismiss an employee may be unfair if it is inconsistent with the practice or policy of the employer with regard to other employees, but only in limited circumstances. In *Hadjioannou –v- Coral Casinos Limited [1981] IRLR 382,* at paragraph 25, the Employment Appeal Tribunal stated that Tribunals should scrutinize arguments based upon disparity with particular care. It is only in the following limited circumstances that the argument is likely to be relevant:

47.1 that an employee has been led by the employer to believe that such conduct will either be overlooked or at least not dealt with by the sanction of dismissal;

47.2 the evidence supports an inference that the purported reason is not the real or genuine reason for the dismissal or;

47.3 evidence as to the decision made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to dismiss the employee for that misconduct.

48 The EAT commented there will not be many cases in which the evidence shows that there were other disciplinary cases at the same employer which were truly similar or sufficiently similar to allow an employee to argue unfair inconsistency in dismissal decisions.

Discussion and Decision

49 I considered, first, whether the Respondent has shown the reason for dismissal and that it was a potentially fair one. I concluded that the Respondent had proved that the reason for Claimant's dismissal was misconduct, in that he failed to obey lawful/reasonable/written instructions and discredited the prison service by removing the

closeting chain from a prisoner, without authority, on 6 February 2015 and by allowing the prisoner to be present in a wet room with his girlfriend while he was naked.

50 Those were the matters which were investigated by Mr Pollett; they were the allegations set out in the letter inviting the Claimant to a disciplinary hearing (page 184); they were discussed in the disciplinary hearing and addressed in detail in the letter of dismissal (page 308).

51 I accepted Ms Carter's evidence that those were the things which were in her mind when she decided to dismiss the Claimant.

52 I then considered whether the Respondent had reasonable evidence of the Claimant's misconduct when it made the decision to dismiss. I considered that it did. The Claimant admitted that he was in charge of the bed watch (page 49 & 249) and that he had removed the closeting chain without authority (pages 61 & 63) and contrary to procedure (page 246). He admitted that he had allowed AS to be present in the shower with LB, while LB was naked (pages 56, 60-61). He also admitted that while LB and AS were in the shower, the Claimant had a restricted view of LB, no view of AS, that it was possible that AS has taken photographs, he could not hear what was going on and did not have control of the situation (pages 61, 247, 248, and 280).

53 By the Claimant's own admissions, he had done the acts of misconduct and, in doing so, had acted in breach of the relevant local rules. There was no dispute that the incident had been reported in the Sun newspaper.

54 I decided that the following matters did not undermine the fact that the Respondent had reasonable evidence of the misconduct:

54.1 The photographs sent by the Sun newspaper were not independently verified: I considered that the Claimant admitted that he had removed the closeting chain and allowed AS and LB to be in the shower together without sight and sound. The photographs corroborated this and there was no real doubt that they had been taken on the relevant day.

54.2 AS and hospital staff were not interviewed: I considered that the Respondent had reasonable evidence of the misconduct from the Claimant's own admissions. The Respondent did not reasonably need to obtain other evidence from these potential witnesses. There was no reasonable doubt about the relevant facts which needed to be resolved by seeking further evidence.

54.3 Mr Pollett did not visit the hospital: Mr Pollett had a clear understanding of the relevant area from the descriptions given to him by the witnesses he did interview.

55 I also decided that the Respondent had conducted a reasonable investigation. Mr Pollett interviewed the Claimant and all the Officers who had conducted bed watches when LB's visitors had attended the hospital. He compiled an investigation report, which was provided to the Claimant, along with disciplinary charges before the disciplinary

hearing. The Claimant was told that dismissal was a possible outcome. He was accompanied by Trade Union representatives at both the disciplinary and appeal hearings. The Claimant and his representatives were able to raise all the matters they wished to raise in answer to the allegations. The Claimant's contentions were considered and addressed in the dismissal letter. The Claimant was given an appeal and, again, he was accompanied and was able to raise all matters he considered relevant to the appeal. He was given a reasoned written outcome to his appeal.

56 I accepted Ms Carter and Ms Jarman-Howe's evidence that they made their decisions on the basis of the evidence in front of them and were not improperly influenced by any person, inside or outside the Prison Service.

57 I further concluded that dismissal was a reasonable sanction. Ms Carter explained the material differences between the Claimant's case and the cases of all the other Officers. I accepted her evidence about her findings of fact in relation to those Officer's cases, as set out in paragraph 31 above. In particular, I considered that Officer K's misconduct was less serious than the Claimant's, in that Ms Carter found that Officer K had not been present when the Claimant had permitted LB and AS to be alone in the bathroom together. Furthermore, Officer K, on Ms Carter's findings, had undertaken only 6 weeks of live service as a Prison Officer before 8 February 2015. Officer K had significant mitigation, therefore. The Claimant, by contrast, was an experienced Officer and was in charge of the relevant bed watch.

58 I concluded that the Respondent had been reasonable to dismiss the Claimant, despite his long and previously good service. I considered that it was within the range of reasonable responses to dismiss where the Claimant's misconduct was so serious. The Claimant breached rules for supervising prisoners in a number of respects, and in circumstances where he did not have sight and sound - and therefore control - of the situation. It was the Claimant's actions which led to the relevant photographs being taken and published in a national newspaper, which brought the Service into disrepute.

59 The Respondent did not dismiss the Claimant unfairly.

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Employment Judge Brown

20 February 2017