



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Dundee

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

**Heard at:** Reading **On: 12, 13 June and (in chambers) 17 August 2017**

**Before:** Employment Judge Gumbiti-Zimuto

**Representation:**

Claimant: Miss N Joffe (Counsel)

Respondent: Miss L Price (Counsel)

## RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and wrongful dismissal are not well founded and are dismissed.

## REASONS

1. In a claim form presented on the 18 October 2016 the claimant made a complaint of wrongful dismissal and unfair dismissal. The respondent defends the claim.
2. The claimant gave evidence in support of his own case. The respondent relied on the evidence of Michael Bailey, Paul Crossey, Glenn Knight and Catherine Robinson. The witnesses all produced witness statements which were taken as their evidence in chief. There was also a Trial Bundle containing 573 pages of documents. From these various sources, I made the following findings of fact which I considered necessary to determine the issues arising in this case.
3. At around 11am on 5 January 2016 Michael Bailey, a Senior Prison Officer temporarily promoted to Custodial Manager, observed a prisoner under restraint being moved. A decision was taken to move the prisoner to

the IBIS unit. At the relevant time the staff undertaking the restraint included the claimant and other officers. The prisoner was being uncooperative and making comments to staff, he was not struggling.

4. As the restraint moved from the unit into the secure link Michael Bailey heard the prisoner complaining about pain in his wrists. Michael Bailey saw what he believed was the claimant putting excessive force on the prisoner's right wrist and say, "that's pain now fucking shut up". Michael Bailey saw the prisoner react by his body going up. The prisoner became angry and aggressive.
5. Michael Bailey did not challenge the claimant's actions at the time, his judgment being that raising it with him then in front of the prisoner and other staff members could have made the situation worse. Very soon after the incident Michael Bailey raised concerns with CM Cook and Governor Donaghue who advised that he submit a protected intelligence report.
6. On 7 January 2016 Michael Bailey met with CM Dean Barden and told him what he witnessed. The claimant was suspended on full pay pending an investigation in to an allegation of excessive forces on 5 January 2016.
7. On 13 January 2016 Paul Crossey, Head of Corporate Services at HMPYOI Feltham, was commissioned to carry out an investigation into the circumstances surrounding the allegation that the claimant used excessive force and said, "that's pain now fucking shut up" during the restraint on 5 January 2016.
8. On the 22 January 2016 Michael Bailey was interviewed by Paul Crossey (the investigating officer). The investigating officer subsequently interviewed the claimant and other officers involved in the restraint. The investigation report should have been completed by 22 February 2016 however, the investigating officer sought an extension to 22 April 2016 because of the availability of the witnesses.
9. On 31 March 2016, the investigation report was completed and submitted to Deputy Governor Brooks for her consideration. In his report, the investigating officer concluded that there was sufficient evidence to support the allegations and recommended that the evidence be tested at a disciplinary hearing. Deputy Governor Brooks accepted the recommendation and referred the matter to Governor Knight to arrange for the evidence to be tested at a disciplinary hearing.
10. The claimant was advised of the charges against him and that disciplinary hearing would be arranged. The claimant was also advised of the

- potential outcomes, including dismissal if the charges were found proven, and that he could be accompanied to the hearing.
11. The disciplinary hearing took place on the 26-27 April 2016.
  12. During the disciplinary hearing, the CCTV footage was viewed. The investigating officer presented his report and explained that there “were two versions of the evidence”: that the claimant reacted to a complaint from the prisoner about his right hand in verbal manner before appearing to apply additional force to his right hand, and alternatively, that the prisoner had started to struggle more intensely against restraint which resulted in the need to apply handcuffs.
  13. The prisoner gave evidence and was shown the CCTV footage. The prisoner described undue pressure being applied to his right hand during the restraint.
  14. Michael Bailey gave evidence describing what he had observed. Michael Bailey denied that he had any reason to fabricate allegations against the claimant.
  15. Officer Moralee gave evidence, she could not remember the claimant saying, “that’s pain now fucking shut up”. Officer Page gave evidence that she heard the claimant say something like “that’s pain” but did not recall the claimant swearing. Officer Soudan gave evidence that he did not hear the alleged comment and did not see the claimant use excessive force. He said that from the position he was at he would have expected to have seen it. Officer Copeland gave evidence that she heard the prisoner complain of his hand or wrist hurting but she did not hear the claimant make the alleged comment to the prisoner. Officer Rob Aris gave evidence that he did not hear the prisoner complain about his wrist or hear the alleged comment by the claimant.
  16. Officer Collier, National Instructions Manager at the National Tactical Response Group, gave expert evidence. He had considered the CCTV footage and the use of force paperwork. He said that because of the contradictions in the evidence it was not possible to conclude whether the matters alleged against the claimant took place.
  17. SO Mark Aris gave evidence that he could not recall the prisoner complaining about his wrist and did not hear the claimant making the alleged comment.
  18. The claimant gave evidence. The claimant described having a light lock on the prisoner’s arm because the prisoner had indicated that his hand was

- hurting. He described the prisoner constantly moving and resisting the restraint. The claimant speculated that Michael Bailey had a reason to make up the allegations against him because of an incident that had occurred two years previously.
19. After hearing final submissions from the claimant's trade union representative and taking time to consider his decision Governor Knight gave his decision to the claimant. Governor Knight concluded that the claimant deliberately provoked the prisoner, used offensive/aggressive language, and assaulted/used unnecessary force on the prisoner.
  20. Governor Knight explained that when deciding if unnecessary force had been used he considered if the force was lawful, i.e. if it was reasonable in the circumstances, no more force than necessary, and proportionate to the seriousness of the circumstances. Was it the most justifiable course of action considering the risk identified and was the force proportionate so only the minimum amount of force was used to safely bring the situation under control. What efforts were made to de-escalate the level of violence, threat or non-compliance through alternatives to the use of force.
  21. Governor Knight explained that when determining if the force used by the Claimant was justified he considered whether the perceived threat justified the force deployed. The prisoner was in an agitated state but Governor Knight did not believe the evidence suggested that he was being threatening or physically non-compliant. Governor Knight considered that he was raising his concerns about the level of force on his right hand and the pain he was in. Governor Knight stated that in the CCTV footage the officers involved appeared to be calm and relaxed; no personal protection was deployed; the staff involved indicated that the prisoner was loud but they did not state that he was making any physical threats of harm to them or that he was being violent. The prisoner repeatedly voiced concerns about his right wrist and the level of pain being inflicted but did not make similar complaints about his left wrist.
  22. Governor Knight found that the Claimant used unnecessary force. He concluded that there were inconsistencies in the evidence and that whilst it was agreed by all the witnesses that the decision was taken to relocate the prisoner to the Ibis Unit there were conflicting accounts of what happened. Governor Knight considered that the accounts given by Michael Bailey, the prisoner and Officer Page more credible. They were all clear on what they saw and heard, albeit that their accounts were not exact word for word. Governor Knight accepted that there were differences in accounts and the prisoner could not remember the exact words. However, Officer Page and Michael Bailey's accounts were very similar.

23. Having explained his reasoning to the Claimant Governor Knight adjourned the hearing to consider the penalty and to allow the claimant to consider if he wished to raise any points in mitigation.
24. Governor Knight then heard the claimant's representations before adjourning once more to consider the appropriate sanction.
25. Governor Knight dismissed the claimant with immediate effect. He explained his decision to dismiss in the following way:

“Prison Service staff are expected to meet high standards of professional and personal conduct and must conduct themselves in accordance with the Civil Service Code and the Professional Standards of Conduct set out in PSI 06/2010. When dealing with prisoners, staff must be professional and take particular care to ensure their dealings with them are not open to abuse. This is particularly so with young offenders many of whom are vulnerable. In this instance the allegations were so serious that I concluded that the relationship of trust and confidence between the Claimant and the Service had irretrievably broken down and this made any further relationship impossible. I was extremely concerned about the Claimant's actions and the potential for further poor judgement which could compromise the safety of prisoners that I therefore concluded his future employment with the Service was untenable. I considered the Claimant's actions to be deliberate and wilful and this was also an aggravating factor as far as I was concerned. For this reason, I had no choice but to dismiss the Claimant. I considered alternative sanctions but felt given the seriousness of the charges no other sanction was appropriate. I also took into account the Claimant's previous good conduct and length of service but this did not detract from the seriousness of the matter and the fact that I could no longer trust the Claimant.”

26. The claimant appealed the decision to dismiss him. The claimant's appeal was heard by Catherine Robinson, Deputy Director of Custody for the Young Persons Estate. The claimant stated in his letter of appeal that his grounds were that the decision to dismiss was unduly severe, new evidence, unfair proceedings and that the original findings were against the weight of the evidence.
27. The claimant's appeal hearing took place on 14 June 2016. At the hearing the claimant viewed the CCTV footage again; the claimant referred to an incident with Governor Vanderluys; the claimant referred to an incident with Michael Bailey; there was a suggestion that the CCTV footage could have been tampered with. The claimant stated that there had been

confusions with the charges and that there had been a delay in the investigation and he had not been given the correct reason for this.

28. Catherine Robinson did not uphold the appeal. She concluded that the claimant did not provide any further or new evidence in relation to the incident on 5 January 2016 and that the incident with Governor Vanderluys was separate and unrelated. Catherine Robinson concluded that the claimant's arguments that the decision to dismiss was based on evidence presented from two members of staff who had reasons to make false statements against him was not credible. Catherine Robinson considered that the investigation officer had interviewed all relevant witnesses and evidence had been carefully tested at the hearing: it was reasonable for Governor Knight to find the charges proven on the balance of probabilities and to consider the dismissal an appropriate sanction. Catherine Robinson stated that the charges can differ in the terms of reference and the charge report depending on the outcome of the investigation. Catherine Robinson considered that it was reasonable to conclude that the claimant had failed to act within the professional standards of conduct for a prison officer and that dismissal was an appropriate sanction.

The parties' submissions and the law

29. The parties have provided written submissions the content of which I have considered in coming to my conclusions set out below.
30. Section 98 of the Employment Rights Act 1996 ("ERA") provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.
31. Where an employer has shown a potentially fair reason the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.
32. The Respondent must show that it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; at the stage which it formed that belief on those grounds, it had carried out

as much investigation into the matter as was reasonable in the circumstances of the case.

33. It is not necessary that the Tribunal itself would have shared the same view of those circumstances.<sup>1</sup>
34. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting our own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"<sup>2</sup>. The burden is neutral at this stage: The Tribunal must make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.

Conclusions:

35. I am satisfied that the respondent has shown that the claimant was dismissed on the grounds of his conduct.
36. I am satisfied that Governor Knight had a genuine belief in the claimant's misconduct. I am also satisfied that this was based on reasonable grounds, following a reasonable investigation, during which the claimant was given the opportunity to make representations which were considered by the respondent before a decision was made to dismiss the claimant.
37. The claimant contends that there were significant errors in the investigation: there was a failure to appreciate a significant difference between Michael Bailey and Officer Page as to where they heard the alleged provocative words; the investigation officer's approach to obtaining evidence may have fatally tainted it; had more care been taken the investigation officer may have concluded that there was no case to answer.
38. The respondent contends that "the investigation was plainly thorough" and included considering the use of force form; interviewing 11 witnesses; looking at the CCTV and commissioning an expert on the use of control and restraint.

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<sup>1</sup> British Home Stores Limited v Burchell [1978] IRLR 379

<sup>2</sup> Iceland Frozen Foods v Jones [1982] IRLR 439

39. I am satisfied from the evidence presented that the respondent carried out a thorough investigation. It was a reasonable investigation. It teased out information that could have been in the claimant's favour and that which went the other way. The conclusions that there was a case to answer was a permissible one bearing in mind that the evidence obtained in the investigation was to be tested at the disciplinary hearing. The investigation was fair and reasonable.
40. It is submitted on behalf of the claimant that Governor Knight did not conduct a reasonable investigation at the disciplinary hearing in relation to his approach to the witnesses; did not seek exculpatory evidence as well as evidence of guilt; did not have reasonable grounds for a belief in the claimant's guilt bearing in mind the extent and quality of the exculpatory evidence and the extent and quality of the evidence of guilt.
41. The claimant criticises Governor Knight's conclusions which preferred the account given by Michael Bailey, Officer Page and the prisoner over other evidence given. The reasons given by Governor Knight for this preference are clearly expressed: the accounts of Michael Bailey, Officer Page and the prisoner were that the claimant had used unnecessary force and they were clear on what they saw and heard. In respect of Officer Page, Governor Knight found that she "became upset during the hearing and it was clearly not easy for her [to] give her evidence in the presence of the claimant and knowing that it could result in his dismissal." Governor Knight considered her evidence crucial and he could see no reason why she would have an ulterior motive.
42. In contrast, the accounts of the other witnesses "were not conclusive and during the hearing they were quite vague in their evidence as they either did not hear anything or could not really remember or they simply read from their use of force statements." Governor Knight stated that "some of the staff present did not witness the comment/use of excessive force and they were in close proximity to the claimant" and considered if further management action was required. He had "concerns about some of the recollections".
43. In answer to questions from the claimant Governor Knight stated: "*Most credible witness – Mr Bailey and Miss Page adamant what they heard. None of them categorical that it did not occur, therefore that is key element of this*". In answer to a question from the Tribunal Governor Knight stated: "*Some of the evidence was vague. What they did not say was that it did not happen. They said 'I'm not sure' – 'I don't remember'.*" Governor Knight preferred the evidence of Michael Bailey and Officer Page because they were clear that the things occurred. In contrast the other staff were not "categorical that it did not occur" or were "not sure". These conclusions



in my view he was entitled to make having heard the evidence of the various witnesses.

44. The claimant contends that the conclusions of Governor Knight in respect of the level of resistance by the prisoner was perverse. If the prisoner had already broken his hand in a fight, having previously broken the same hand, it is likely that he may experience pain even when there was no inappropriate force used. The claimant argues that there was evidence that the prisoner was resisting the restraint. The claimant contends that Governor Knight's conclusion that that the prisoner was not physically non-compliant is manifestly unreasonable and reflects on his overall approach to the evidence and the case against the claimant which was not even handed because of his wilful disregard of exculpatory evidence.
45. Governor Knight pointed out in his evidence that the prisoner was in an agitated state but he did not consider that the evidence suggested that he was threatening or physically non-compliant. Governor Knight concludes that the prisoner was raising concerns about the level of force used. There were other factors that Governor Knight considered in arriving at his conclusions about the events: no personal protection was used, most of the officers appeared calm and relaxed, the failure of the claimant to complete relevant information on the Annex A form; the CCTV footage. Governor Knight did consider the accounts given by the other witnesses but did not consider that it was conclusive. It is the case also that he considered their evidence vague. Governor Knight had "concerns about some of the recollections".
46. Governor Knight was required to form a view as to what the level of resistance of the prisoner was. He did so. In doing so he appears to have weighed up the varying accounts and arrived at conclusions about which he preferred and explains why. On the evidence before him it was a conclusion he was entitled to reach.
47. The claimant states that no reasonable employer could have concluded that the claimant had said the words alleged by Michael Bailey. The claimant relies on the failure of several officers to hear the alleged words used when they were in proximity to do so. The claimant further contends that the evidence to support Michael Bailey is inconsistent.
48. The conclusion that Governor Knight reached in respect of the words alleged to be used by the claimant relies on him accepting the evidence of Michael Bailey and being able to gain some support from the evidence of Officer Page. I am satisfied that there is sufficient similarity in the words recalled by Officer Page and the account alleged by Michael Bailey to justify a conclusion that the words alleged were uttered. This conclusion

- is justified in circumstances where the evidence of those who do not hear the words is not accepted as conclusive of the fact of the words not being uttered. There was an evidential basis justifying the conclusion that the words were uttered if the evidence was accepted by Governor Knight. He accepted the evidence.
49. The claimant contends that no reasonable employer could have concluded that there was an application of excessive force. The claimant states that Michael Bailey never saw the claimant apply force to the prisoner; what Michael Bailey saw was the body language of the prisoner suggesting force had been applied. No other witness saw the claimant apply force to the prisoner. The prisoner was suffering from pain in his hand and so the application of appropriate restraint may cause the claimant to complain of pain. The CCTV did not show application of excessive force. The claimant denied applying excessive force and Michael Bailey did not intervene to remove the claimant from the restraint.
50. The respondent argues that the claimant's use of force form was inconsistent with his later account of events and that the respondent was entitled to take this into account in concluding that the misconduct occurred. The claimant's complaint that the pain was in his right hand and no complaint about the left hand was also relied upon by the respondent.
51. Governor Knight found that the claimant had used unnecessary force relying on what the prisoner said that his right wrist hurt and "mad things" were being done to it, together with the account of Michael Bailey. Governor Knight also took into account the way that the claimant completed his use of force paperwork which omitted to mention that he used any pain techniques. In answer to questions from the claimant Catherine Robinson stated that: *"sometimes only know excessive force by reaction of the prisoner."* Governor Knight concluded that there had been the use of unnecessary force. There is evidence which would justify, if accepted, the conclusion that the claimant had used excessive force. The evidence of the other officers who do not support the use of excessive force was not considered by Governor Knight to be conclusive and but was considered vague. There is a basis for the conclusion that the claimant used excessive force.
52. The criticism is made that Governor Knight's approach was to characterise the exculpatory evidence as vague or inconsistent and to lead witnesses to give evidence which supported the charges but vigorously cross-examine the witnesses who gave exculpatory evidence. This is not a conclusion I feel able to endorse from the evidence presented.

53. The scenario under investigation was one where there was some clear evidence of alleged misconduct on the part of the claimant. Set against this was an absence of support for the acts alleged from people who could have been reasonably expected to have observed the incidents complained of. Governor Knight was unable to rely on the failure to support the alleged incidents as evidence of the allegations not taking place. Governor Knight expressed a clear concern about “some of the recollections”. Governor Knight on the other hand was impressed by the evidence of Officer Page and the prisoner. He attached weight to the evidence of Officer Page who in his view went some way to substantiate the evidence of Michael Bailey. The fact that Governor Knight formed a clear conclusion on the basis of the evidential available in my view does not show that he applied any unfair approach to the evidence. Governor Bailey explained his conclusions and why he arrived at them from the evidence available. Whilst it may well have been the case that another Governor could have concluded that there was not sufficient evidence to justify a conclusion against the claimant (as Mr Collier the expert did). There was evidence from which he could conclude that the claimant was guilty while at the same time being even-handed.
54. I am called upon by the claimant to stand back and look at the approach of Governor Knight in the round which showed “over-all unreasonable approach” to the evidence and a determination to reach conclusions against the claimant’s interests. There is said to have been a failure to probe Michael Bailey and test his evidence.
55. Michael Bailey was cross examined he was clear about what he saw. He denied that he had any grudge against the claimant which was played out in the making a false allegation. On being challenged and tested in the Tribunal proceedings Michael Bailey was able to give a clear account of what he saw and what he did. I am unable to conclude that more robust questioning would have resulted in Michael Bailey giving evidence that might have led to a different conclusion.
56. In the way that Governor Knight conducted the disciplinary hearing I am satisfied that he acted reasonably and tested the evidence presented to him. I am not persuaded that there were defects in the disciplinary investigation or disciplinary hearing so as to render the dismissal unfair.
57. Nothing emerges from the appeal to Catherine Robinson that renders the dismissal unfair. The appeal was a review of the disciplinary proceedings and it upheld the decision to dismiss.
58. The claimant contends that dismissal was not reasonable in the circumstances: the conduct alleged was not at the extreme end of the

spectrum for the offence; the claimant had a long period of service and clean disciplinary record; he had been commended for his work with young people; there was nothing to suggest the conduct would be repeated.

59. The reasons for dismissing were clearly set out by Governor Knight: Prison Service staff are expected to meet high standards of professional and personal conduct and must conduct themselves in accordance with the Civil Service Code and the Professional Standards of Conduct set out in PSI 06/2010. When dealing with prisoners, staff must be professional and take care to ensure their dealings with them are not open to abuse. This is particularly so with young offenders many of whom are vulnerable. In this instance, the allegations were so serious that Governor Knight concluded that the relationship of trust and confidence between the Claimant and the Service had irretrievably broken down and this made any further relationship impossible. Governor Knight was concerned about the Claimant's actions and the potential for further poor judgement which could compromise the safety of prisoners and concluded future employment with the Service was untenable. Governor Knight considered the Claimant's actions to be deliberate and wilful.

60. On the findings made by Governor Knight the dismissal of the claimant was reasonable. The claimant had deliberately and unlawfully inflicted pain on a young prisoner in his care. There were no mitigating circumstances for the conduct found. Dismissal in the circumstances was within the range of response of a reasonable employer.

61. The claimant's complaint of unfair dismissal is not well founded and is dismissed.

#### Wrongful dismissal

62. The evidence given by Michael Bailey if accepted in my view justifies a conclusion that the claimant applied unnecessary force to the prisoner, and that he did so deliberately in circumstances which amount to an abuse of power. The conduct if established in my view is a repudiatory breach of contract by the claimant.

63. Michael Bailey's evidence was refuted by the claimant.

64. I found the evidence of Michael Bailey clear and compelling. I accept the evidence that he gave that he heard the claimant say: "that's pain now fucking shut up". I also accept the evidence he gave that it was accompanied by a reaction from the prisoner suggesting that the claimant had applied force on to the prisoner. I am satisfied that the claimant

applied unnecessary force to the prisoner, and that he did so deliberately in circumstances which amount to an abuse of power.

65. The claimant's complaint of wrongful dismissal is not well founded and is also dismissed.

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Employment Judge Gumbiti-Zimuto  
18 September 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS