Appeal No. UKEATS/0060/12/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 14 May 2013

Before

THE HONOURABLE LADY STACEY

MR P HUNTER

MR M SIBBALD

SCOTTISH PRISON SERVICE — APPELLANT

MR STEPHEN LAING — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS M SANGSTER (Solicitor) Dundas & Wilson CS LLP Solicitors Saltire Court 20 Castle Terrace Edinburgh EH1 2EN
For the Respondent	MR A HARDMAN (Advocate) Instructed by: R S Vaughan & Co. 114 Union Street Glasgow G1 3QQ

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Tribunal found that the Scottish Prison Service had unfairly dismissed Mr Laing and that he had contributed to his dismissal to such an extent that 65% should be deducted from any award. They found that there was insufficient information for them to decide on pension loss and continued the matter for a further hearing or written submissions.

The Scottish Prison Service appealed against the finding of unfair dismissal and further argued that if the dismissal was unfair the contribution by Mr Laing had been 100%. Mr Laing cross-appealed on the question of contribution, his first position being that the ET's determination should not be changed and his second position being that if it were to be changed, then it should be a finding of no contribution at all. The decision of the EAT is that the dismissal was not unfair and the Employment Tribunal's decision is overturned. The EAT has decided that if they were required to consider the question of contribution, then Mr Laing contributed 100% to his dismissal. The Respondent took issue with the ET continuing the case for further information about pensions. The EAT decided that that was a matter entirely within the discretion of the ET and they were entitled to make the order made by them.

THE HONOURABLE LADY STACEY

Background

1. This is an appeal by the Scottish Prison service against a finding that the dismissal by them of Mr Laing was unfair. We shall refer to the parties as Claimant and Respondent.

2. The background to this case was helpfully set out by the solicitor for Scottish Prison Service in her skeleton argument. A prisoner, a 19 year old young offender, was assaulted by a prison officer. Three other prison officers were present and while they took no part in the assault, they did witness it. The Claimant accepted that he did see the prisoner being assaulted and that he should have intervened and he should have reported the incident, but that he failed to do so. There were two layers of disciplinary proceedings within the Scottish Prison Service. The Respondents operate a procedure whereby a prisoner who complains about treatment can make a confidential approach to the governor of the prison. The prisoner in this case did so and, while he did not mention names of any members of staff, this led to the Respondents viewing CCTV coverage from which they formed the view that there had been behaviour that might indicate an assault on the prisoner by one prisoner officer and that, at the time, there were other prison officers on duty within the area, being three in number including the Claimant.

3. This led to the Claimant being suspended from his duties and advised of an investigation into an allegation of gross misconduct. The allegation was as follows:

> **"It is alleged that on 7 June 2010 at/or around 14:20 hours within Munro Hall at level 1 you were negligent in your duty in failing to take appropriate action when an incident occurred."**

A report was made following investigation by a Mr Barry Fowler. In the course of that investigation the Claimant was shown the CCTV footage and he was interviewed. The prisoner, the other prison officers, and nursing officers who were in the hall at the time were

interviewed and telephone statements were taken from the doctor and other nurses. Mr Fowler reached the conclusion that there was a case to answer in respect of alleged gross misconduct by the Claimant.

4. Criminal proceedings were taken by the procurator fiscal in which the Claimant was charged with assault, along with one other officer. There was a request on behalf of the Claimant to delay disciplinary procedure until the criminal proceedings were completed. That request was not granted and nothing now turns on it. The Claimant was acquitted in the criminal case.

5. The first disciplinary hearing took place before the governor, Mr Inglis. The outcome of that hearing was that the Claimant was dismissed by reason of a finding of gross misconduct. Mr Inglis gave his reasons in a letter to the Claimant together with a note in which he essentially said that he thought that the Claimant could and should have intervened immediately he was aware of an assault happening. There is within the Respondent's disciplinary procedures provision for an appeal to an Internal Dismissal Appeal Board (IDAB). The appeal was refused in a letter stating that the Claimant had "observed the inappropriate and unprofessional conduct of a fellow officer, but failed to intervene during the incident and failed to report the matter."

6. All four officers were initially dismissed. One of them, not he who carried out the assault but another officer who was present, appealed to IDAB and his appeal was allowed. The point taken before the Employment Tribunal was that dismissal was unfair because the Claimant had been dismissed whereas the other person had his appeal upheld and was issued with a final warning.

7. In his ET1 the Claimant asserted that he had been unfairly dismissed. He asserted that the investigation which formed the basis of the subsequent disciplinary action was flawed. The Claimant sought to argue that the governor should not have accepted the evidence before him from the prisoner and others which the Claimant described as incredible and unreliable. He stated that his own version of events should have been believed, namely that he did not witness an assault on the prisoner, but rather an incident within a room where the prison officer shouted at the prisoner and restrained him. He also sought to argue that he did intervene. He stated that he stood at the door to the room watching what was happening and took a decision to intervene by opening the door and entering the room and insisting that both prisoner officer and prisoner get up from the floor where he found them. He also said that he reported the incident to his union representative. He complained that he had not been believed at the IDAB hearing either. He did, however, also state in his ET1 that there had been no consistent justice when one other prisoner officer was allowed to retain his job and he was not.

8. In the ET3 lodged by the Respondent, they stated that the Claimant was dismissed for gross misconduct. They claimed that they undertook a reasonable investigation, invited the Claimant to a disciplinary interview and gave him a right of appeal. They asserted that the decision to dismiss fell within the band of reasonable responses available to the Respondent and that his dismissal was fair in terms of section 98(4) of **ERA**. They stated that the decision to dismiss the Claimant was not inconsistent with the decision not to dismiss the other man. They stated that the facts and circumstances of the cases were different, resulting in different outcomes.

9. At the ET evidence was led from the governor and from a member of IDAB. The governor explained that if a prison officer witnessed an assault on a prisoner then he should intervene to deal with the incident and also report the matter to his line manager. Evidence was

led about the layout of Munro Hall including the production of a plan showing the hall and the places where the prison officers were standing at the time of the incident. The Tribunal watched the CCTV footage and Mr Inglis commented on why he thought particular issues were significant in deciding the outcome of a disciplinary process. The ET made various findings in fact about what could be seen by them on the CCTV footage. Mr Inglis' evidence was to the effect that the Claimant said at his disciplinary interview that he was told by the prisoner officer who carried out the assault that he was going to "have a word" with the prisoner because the prisoner had called him "an arsehole". Mr Inglis explained that the prisoner had been taken to an interview room and left there to wait. The Claimant had asked one of the nursing staff about the prisoner's hernia operation which had been done shortly before the date in question. The Claimant explained that he had done that because he was wary of the prison officer who carried out the assault and had been concerned about this behaviour. He had never seen that prison officer assault anyone but he had noted him being verbally aggressive with prisoners on occasions and was concerned at his attitude. The Claimant said that he asked the nurse about the prisoner's condition so that the officer who carried out the assault was aware of this condition, in the event that he was "going to do something stupid". The ET found at paragraph 48 that the CCTV footage shows the prison officer who carried out the assault moving at a fast pace through the door of the interview room towards the prisoner. The other three prisoner officers are in the hall area. The Claimant was then seen to move quickly to the door of the interview room which he half opened, then went halfway into the interview room and then retreated to stand outside. Mr Inglis explained that having looked at the CCTV he was of the view that the prison officer went into the interview room and took the prisoner to the floor. He thought that the Claimant responded because he heard a noise and went to the door. The CCTV footage then showed the Claimant half entering the room, then coming back out and in again twice. Mr Inglis gave evidence to the effect that at the disciplinary interview the Claimant said that he saw the prison officer lying on top of the prisoner or side by side with him. He was

asked by Mr Inglis, at the disciplinary hearing, if his concern when going to the door was for the prisoner or the prison officer and he replied that it was for the prisoner. He said that when he got to the door he did not raise his voice but he asked the prison officer what was going on. He could see the prison officer shouting in the prisoner's ears. He could see that he was across the top of the prisoner. He asked the prison officer perhaps three times; "What is going on, do you want me to press my alarm bell." He said that the prisoner was not being violent towards the prison officer. Mr Inglis said that at the disciplinary hearing the Claimant said that he did intervene, by kicking the prison officer and telling him to stop. Mr Inglis decided that by the time that happened the incident was effectively over as the prison officer was hauling the prisoner to his feet. The CCTV footage concludes by the Claimant taking the prisoner out of the room and back to his cell and the prison officer who carried out the assault apparently rearranging furniture within the room.

10. Mr Inglis explained his view to the ET that there was an assault on the prisoner at the relevant time and that he was concerned about the lack of intervention and inaction by the Claimant. He thought that a medical report was consistent with grazing caused by a fall to the floor. At the hearing Mr Inglis asked the Claimant directly if he thought, on that night, that the prisoner was being assaulted and the response was "Yes". It was agreed that the incident had taken about 90 seconds.

11. The appeal was taken on various grounds as follows:

1. That the hearing had taken place before the criminal trial and that the hearing of the disciplinary procedure for all four men was taken by the same person. IDAB did not allow the appeal on that basis.
2. The conclusion that there had been an assault on the prisoner was unjustified. IDAB considered that there were various sources of evidence to which Mr Inglis

had had regard and they were satisfied that there was evidence entitling him to find that the prisoner had been assaulted.

3. Reference was made to another incident in another prison in which it was suggested that there had been an assault, but no one reported it to the authority. IDAB found that to be irrelevant.

4. There had been an inadequate enquiry regarding the removal of the prisoner to another unit. IDAB did not regard that as significant.

5. It was maintained that the Claimant had in fact intervened by taking appropriate steps once he understood what was happening. IDAB considered that Mr Inglis had had before him material entitling him to accept that the Claimant had heard shouting and swearing and gone to the interview room to investigate. He then saw a situation that made him very uncomfortable and while he did not take full control of a situation he did appeal to this prison officer to desist. IDAB found that the delay in personally intervening or calling for more assistance (by pressing his personal alarm) or taking more forceful control of the situation was not adequately explained by his assertion before them of his being confused or fearful of the potential consequences. IDAB also found that the Claimant may have been fearful of the other prison officer's potential physical reaction to him and may have had concern about how colleagues might treat him if he reported the matter. They found that that was part of the job and that he paused for too long before taking effective action.

6. It was asserted that Mr Inglis did not explain why he did not believe all of the Claimant's evidence. IDAB found that Mr Inglis broadly accepted the version of events given by the Claimant but that the fundamental issue was whether or not the Claimant's response to the events was appropriate and acceptable and that Mr Inglis had correctly considered that issue.

7. It was argued that the prison officer who carried out the assault was well known to be volatile and that the Respondents had failed in their duty of care to the Claimant and other staff. While IDAB accepted there was some evidence that that prison officer behaved inappropriately, they noted that it was for that reason that it was important that all staff report significant incidences of inappropriate or unacceptable behaviour.

8. It was argued that the decision was perverse. IDAB disagreed on the basis that there was evidence to support the complaint, and that the level of intervention by the Claimant was inadequate.

9. It was argued that it was unreasonable to recommend dismissal in view of the Claimant's length of service, that he was not the instigator, that no one came to his assistance and that he had a good work record. IDAB considered these matters and found that "there are few more serious types of misconduct than allowing colleagues to act so inappropriately and unacceptably without taking strong and determined action and ensuring the matter is fully reported to senior management."

12. The real crux of the issue in this case was the treatment of one of the other prison officers. He was dismissed at first instance, but his appeal succeeded. The same person chaired both appeal panels, but not all of the people on the panel were the same. The chair was not available to give evidence and evidence was led from Ms Brooks, who had been on one of the appeal panels. She referred to a document drawn up by the chair which explained that in relation to the other prison officer he was not dismissed because he was new in the area, because he saw much less than did the Claimant, that he did not normally work in the area and that he did not know the others well. He did not report the incident to management but he was the first member to seek advice from the trade union. These were seen as distinguishing

factors. The ET found at paragraph 89 that the witness was uncomfortable in giving this evidence. Correspondence from the chair of the IDAB board hearing was led in evidence and from it the key points on which IDAB focussed in reconsidering Mr Inglis decision to dismiss were given as follows:

1. The prison officer had been allocated to work in a location he rarely worked in and staff he had never worked with, working with prisoners he had never worked with and he knew nothing of the working regime. Whilst this will never militate against not taking appropriate action, the IDAB had some sympathy with the fact that he had no handover and no orientation and no idea of the style of prison management adopted by the other three officers who regularly worked together.
2. The IDAB noted when the incident began to develop when the prisoner was put in the interview room that the prison officer was not on the flat and could conceivably not know who if anyone was in the interview room.
3. The IDAB considered that he should have sought further information when he was told there was a security issue and is due criticism and must take responsibility for that failing.
4. The IDAB accepted the possibility that the prison officer could have been unaware of anything untoward going on until he saw the prison officer who carried out the assault enter the interview room and heard him shouting and swearing. The IDAB thought long and hard about this aspect and the extent to which the prison officer who carried out the assault's behaviour would trigger a more appropriate response than the other prison officer chose to take.
5. Even though the IDAB accepted the possibility that the prison officer could conceivably have not seen the assault he still failed in his duty. The IDAB however saw his failure as being of a lesser magnitude than if he had seen the

assault. The prison officer still fairly failed in his duty and this in and of itself is very serious however the IDAB felt that dismissal because of the mitigations was just too harsh an outcome.

6. The IDAB also looked at the CCTV footage and thought it was possible given the site lines that the prison officer could only see part of the interview room and of that part could from his viewpoint conceivably only see the upper part of the room.

7. Whilst the prison officer admitted to hearing shouting and swearing the IDAB felt there was not conclusive evidence he saw the prisoner being assaulted. For the IDAB the balance of probability in favour of suggesting the prison officer was aware of the assault was not sufficiently well enough evidence to justify the decision.

The IDAB went onto consider consistency and severity and proportionality and stated:

> **"Consistency: the SPS regard the safety and protection of prisoners as a serious issue. Staff who are deemed to have failed or been negligent in their duty of care particularly in relation to assault can normally expect the most severe sanction of dismissal. In this case the mitigations were such that by a very small margin the [prison officer's] appeal was upheld.**
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> **Severity and proportionality: [the prison officer] was negligent in his duties. He should have and could have done more. His only saving grace is the fact of his relative ignorance of the process, procedures and people in the area he was in and ignorance of what was normal this was allied with some doubt about what he could actually see from his viewpoint."**

It was submitted before the ET that the reasons for dismissal of the Claimant was his gross misconduct and that the decision to dismiss the Claimant was not inconsistent with the decision not to dismiss the other officer. It was argued that each decision was within the band of reasonable decisions open to the Respondent. There was a clear and rational basis for distinguishing the cases and in terms of the case of **Securicor v JP Smith** [1989] IRLR356 the test was whether the appeal panel's decision was so irrational that no employer could have reasonably accepted it.

13. For the Claimant it was argued that it had been unreasonable to reach the view that the Claimant was aware at the time of the incident that he should have intervened more directly than he did. It was argued that the reasonable employer would have concluded that the Claimant saw no assault on the prisoner. It had been unreasonable to deal with discipline before the criminal case. At the criminal case the sheriff found the prisoner to be incredible. It was submitted that the decision of IDAB to dismiss the Claimant but not the other prison officer was perverse and irrational. It was asserted that the prisoner officer who carried out the assault had carried out a crime of commission. The other prison officers had if anything carried out crimes of omission. The Claimant had, unlike the other two, taken some steps to intervene. None of the three officers reported the matter. On the question of inconsistency it was maintained that any reasonable employer would have concluded that the officer who was not dismissed must have seen the initial part of the incident and that he was therefore at greater fault than the Claimant. The Claimant had admitted that he reacted inadequately with the benefit of hindsight but the point that was sought to be made was that the other person, who did not lose his job, had acted as badly if not worse. It was argued that in those circumstances it was perverse to commute the other man's dismissal to a final written warning while not doing the same for the Claimant.

14. The ET reminded themselves that the employer required to have a genuine belief in the employee's misconduct, rather than conclusive proof of it, under reference to the case of **London Ambulance Service NHS Trust v Small** [2009] IRLR 536. They noted that the section 98(4) (b) of ERA requires tribunals to determine the reasonableness of a dismissal "in accordance with equity and the substantial merits of the case." They found that equity may give rise to a finding of unfair dismissal where there is inconsistency of punishment for misconduct. They referred to the case of **Hadjioannou v Coral Casinos Limited** [1981] IRLR

352 which emphasised the need for flexibility on the part of employers but which noted that if decisions made by an employer in truly parallel circumstances are inconsistent then that may not be fair. The ET noted that that approach was subsequently endorsed in the case of case of **Paul v East Surrey District Authority** [1995] IRLR305 where the Court of Appeal held the where two employees were dismissed for the same incident and one was successful on appeal but the other was not, the question to be asked was whether the appeal panel's decision was so irrational that no employer could reasonably have accepted it.

15. The ET came to the view there had been an incident which had been properly investigated by the Respondent. It then required to consider whether the dismissal was a reasonable response to the act of misconduct and in so doing the ET reminded itself that they must not substitute their own view but consider whether dismissal was the response of a reasonable employer. They found at paragraph 155 that the Respondents had met the tests laid out in the case of **Burchell**.

16. The ET then went on to consider consistency. They noted that in so doing they required to consider consistency of treatment and decide if the circumstances of the cases to be compared were "truly parallel". They found that there was an inconsistency of treatment in that the Respondents did not dismiss the other prison officer for the same offence arising out of "truly parallel circumstances"; and that the drawing of a distinction between the two prison officers was irrational so that no reasonable employer could accept it. At paragraph 158 of the judgment the ET explained that there were "truly parallel circumstances" in that:

1. Both prison officers were experienced, the Claimant having 17 years and the other 20 years.
2. Both were charged with failing to deal appropriately with the same incident and failing to report the same incident. Both these allegations were found to be

proved against both of them.

3. Both were subject to the same standards of behaviour and codes of conduct.

4. The other prison officer had a view of the prisoner officer who carried out the assault going through the interview room door; he heard the noise of upset furniture and he heard bawling and shouting. He did nothing to intervene and then walked away. The Claimant did not see the prison officer going through the interview room door but was alerted to the situation by the noise of upset furniture and bawling and shouting. He went to the interview room door to see what was happening and failed to intervene. But it was not rational to consider that the distinction meant that they were not truly parallel circumstances and that one should be dismissed and the other not.

5. Neither the Claimant nor the other was considered to have colluded or be complicit in the incident. Both were therefore unprepared for the assault.

17. The ET found that there was no acceptable evidence led before them of the reason for the difference in outcome. They noted that the IDAB wrote in the following terms:

> **"The key points the IDAB focussed on in terms of why [the other prison officer] should not be dismissed was very much on the basis of mitigation and reconsideration of the balance of probability assessment made by Mr Inglis. The IDAB recognised the other prison officer had been allocated to work in a location he rarely worked and staff he had never worked with, working with prisoners he had never worked with and knew nothing of the working regime. Whilst this will never mitigate against not taking appropriate action the IDAB had some sympathy with the fact that he had no handover and no orientation and no idea of the style of prison management adopted by the other three officers who regularly worked together."**

The ET found that any distinction was irrational in that IDAB themselves found that the reasons given will "never mitigate against not taking appropriate action" and in an incident where it is apparent that an assault is taking place no "style of prison management" could excuse that behaviour or be taken as a reason for the incident. The ET found that it would be irrational to consider that the lack of handover was a reason for non-intervention or non-

reporting of the incident. The ET noted that the IDAB noticed that when the incident began to develop the other prison officer was not on the flat and could conceivably not know who if anyone was in the interview room. They took the view that that was irrational because it did not matter, as no prisoner should be assaulted. The ET went on to consider that the IDAB said the following:

> **"The IDAB accepted the possibility that the other prison officer could have been unaware of anything untoward going on until he saw the prison officer who carried out the assault enter the interview room and heard him shouting and swearing. The IDAB thought long and hard about this aspect and the extent to which Mr Doherty's behaviour would trigger a more appropriate response than the other prison officer chose to take.**
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> **Even though the IDAB accepted the possibility [the other prison officer] could conceivably have not seen the assault he still failed in his duty. The IDAB however saw his failure as being of lesser magnitude than if he had seen the assault. Mr Findlay still clearly failed in his duty and this in and of itself is very serious; however, the IDAB felt that dismissal because of the mitigations was just too harsh an outcome."**

The ET took the view that in this passage it was irrational to distinguish between the other prison officer and the Claimant if the distinction was that the other was "unaware of anything untoward going on until he saw Mr Doherty enter the interview room and heard him shouting and swearing." The ET asserted that the Claimant knew nothing untoward was going to happen either. They go on to state that it was irrational to consider that the other prison officer did not see the assault. The ET took the view that this was irrational as it was patently obvious what had happened. At paragraph 168 the ET held that it was irrational to consider that there was some excuse by the other prison officer in not knowing the normal processes procedure and people. They point out that the incident was by no means normal and neither could it be excused as being normal. They also said that the IDAB only required to look at the CCTV footage to see the position of the other prison officer to realise his view of the entry into the interview room was clear.

18. The ET sum up in paragraph 169 by stating that while they appreciate that finding a dismissal unfair on the basis of inconsistent treatment is rare, they make such a finding in this

case. They disavow the idea of substituting their own view and state that they are conscious that the exercise to be conducted in this aspect of consistency is essentially to see if the distinction sought to be drawn between people makes sense. They go on to say that they think it irrational to dismiss one officer who went to see what was happening but did nothing but not dismiss another officer who saw more than the Claimant of the entry by the prison officer who carried out the assault into the interview room then heard the same disturbance and walked away.

Submissions for the Respondent

19. Ms Sangster submitted that the ET had substituted their own views, despite stating that they did not do so. They watched the video evidence and decided what they could see on it. At paragraph 164 they set out their own view of what the CCTV showed and what must have been witnessed by the officers involved. This led to the ET finding that there was no consistency in the Respondent's position with the two officers. It was however built on the ET substituting its own view of the facts for that of the Respondents. Under reference to the cases of **London Ambulance Services NHS Trust v Small**, **Paul v East Surrey District Health Authority** and **Hadjioannou v Coral Casinos Ltd** Ms Sangster submitted that the ET had substituted its own view in deciding the facts and in considering whether there was a disparity with other cases, and whether the Respondents had failed to act consistently.

20. The test which Ms Sangster submitted had to be met was that of irrationality. The ET could regard the Respondents decision to dismiss as one with which they could interfere if and only if it was so irrational that no employer could accept it. She submitted that the decision was not irrational. She referred to the case of **Securicor v Smith** [1089] IRLR 356. She illustrated the point by reference to the case of **SPS Technologies Ltd v Chugtai** UKEAT/0204/12/SM.

21. In relation to contributory conduct, Ms Sangster submitted that the relevant legislation is s.123(6) of ERA which refers to a finding that 'dismissal was to any extent caused or contributed to by any action of the complainant' and requires the ET to reduce an award by such proportion as it finds just and equitable having regard to any such finding. Thus she argued that in accordance with cases of **Parker Foundry Ltd v Slack** [1992] IRLR 11, and **Allders International Limited v Parkins** [1981] IRLR 68, it is only the conduct of the Claimant which is to be examined. She argued that when properly understood, the conduct of the Claimant was the sole cause of his dismissal and so if contrary to her submission the dismissal was unfair, the contribution should be 100%.

22. The ET found itself in difficulty in calculating pension loss. It had before it evidence from Messrs Pollock & Galbraith, consulting actuaries. They found it to be insufficient. At paragraph 183 the ET stated that the calculation provided made no allowance for likelihood of the Claimant leaving the employment of the Respondent before the age of 60, nor for any value of pension benefits he might be able to accrue in future with alternative employers. The ET went on to set out its general approach to the issue of remedy but found itself unable to quantify compensation satisfactorily without further information. The ET ordered that a further remedy hearing be held, or if parties preferred, that the matter be dealt with by written submissions.

23. Ms Sangster criticised that approach as 'allowing the claimant a second bite of the cherry.' She referred to the case of **Adda International Ltd v Curico** [1976] IRLR 425. She submitted that the Claimant, having failed to produce adequate vouching, should get nothing in respect of pension loss.

Submissions for the Claimant

24. In response to the argument that the ET had substituted its own view for that of the Respondent, counsel referred to the cases of **Graham v Secretary of State for Work and Pensions** [2012] IRLR 759 and **Tayeh v Barchester Health Care** [2013] IRLR 387, which he submitted were recent re-statements of the correct approach. He argued that the ET had explained in the judgment why they found that there were 'truly parallel circumstances' in the two cases. This was essentially a finding in fact which the ET was entitled to make. Thus they had not substituted their own view, and had not made any decision properly categorised as irrational or perverse. Counsel reminded us that the facts are for the ET, and that an appeal tribunal should not substitute its own view.

25. In relation to contribution, counsel submitted that the percentage chosen by the ET should not be disturbed unless it was plainly wrong. He referred to the case of **Warrilow v Robert Walker Ltd** [1984] IRLR304. Thus he submitted that the contribution of 65% should not be increased. Counsel did also submit in his cross appeal that the conduct of the other prison officer and the outcome of his disciplinary case were relevant. He argued that the determination of the ET was illogical. They had found that the Respondent dismissed the Claimant because they made an irrational distinction between his behaviour and that of the other prison officer who was not dismissed. Thus, he argued, the ET had not found his conduct blameworthy, and so should have made no reduction.

26. He argued that the ET was entitled to hold over pension loss pending further information. They had identified a possibility not made clear in evidence before them and were entitled to seek information about that.

Discussion and Decision

27. We take the view that the question before the ET was whether or not the IDAB decision was irrational. In light of the findings in fact by IDAB and the evidence from Ms Brooks that the other prison officer could not see as much as the Claimant we take the view that the high test of irrationality has not been met. We are very mindful that IDAB is an organisation within the prison service which is familiar with the working environment of the prison. It is aware of the code of conduct and of the necessity for prison officers to uphold that code. It is aware that any assault on a prisoner requires to be stopped and thereafter reported. It may be thought hardly surprising that the question of dismissal was very much in the mind of IDAB when considering both cases. They came to view, after discussion and thought, that the circumstances of the other officer were such that the sanction of dismissal was too harsh. The question before the ET was whether or not they were entitled to come to such a view, not whether the ET itself would come to such a view. We are of the opinion that the view to which IDAB came was a view to which they were entitled. They gave reasons for their decision. The ET was shown the video which the IDAB had watched and the ET decided from what they could see that IDAB's view was incorrect. In our opinion such incorrectness would require to be blatant before the ET would be entitled to intervene. We have decided that while the ET rehearsed the cases on the necessity not to substitute their own view, in the end they did just that. We were left with the impression that the ET considered what they would have done rather than asking themselves if the actions taken by the Respondents were within the range of reasonable responses from an employer. We are of the view that there are sufficient findings in this case to enable us to take the decision that the dismissal was fair.

Contributory Conduct

28. The ET quoted section 123(6) of ERA to the effect that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall

reduce the compensatory award by such proportion as is considers just and equitable having regard to that finding. They noted that an equivalent provision for reduction of the basic award exists also in section 122(2) of ERA. It took the view that it required to consider the blameworthy conduct of the employee rather than the blameworthy or other conduct of anyone else when considering whether compensation should be reduced. It referred to **Parker Foundry Limited v Slack** [1992] ICR302 in which a claimant's dismissal for fighting at work was held to be unfair on procedural grounds but compensation was then reduced by 50% for contributory fault. The argument before that tribunal was that it should have been taken into account that the other employee involved in the fight had merely been suspended. That argument was rejected on the basis that although consistency of treatment was relevant to the fairness of the dismissal it was not a matter for the tribunal to consider when assessing contributory fault. The ET found at paragraph 174 that the reasons for unfairness in this dismissal was because there had been no dismissal of the other prison officer. Thus, for this employer the conduct of the Claimant was not something for which dismissal of the other prisoner was warranted because they had not applied that sanction to the other prisoner officer. The Tribunal then asserts that in those circumstances it could not be correct to say that the Claimant was 100% to blame for his dismissal. They find however in paragraph 175 that the Claimant was negligent in this duties and in paragraph 176 they decide that it would be just and equitable to assess the contribution at 65%.

29. We take the view that it is necessary to consider the conduct of the Claimant and to decide whether or not the dismissal was to any extent caused or contributed to by any action of the Claimant. In our view the dismissal was completely caused by the action of the Claimant in failing to take any action to stop the assault and in failing to report it thereafter. We are therefore of the view that, had we required to decide this, the appropriate deduction would have been 100%.

30. The Tribunal in paragraphs 181 – 185 note the position concerning pension loss. They find that they do not have enough information to make the decision they need to make about the likelihood of pension loss in future. They therefore put the case out for a further hearing or written submissions. Ms Sangster argued that that was unfair as it meant that her clients, the Respondents, would require to come back to the Tribunal. She argued that the onus lay on the Claimant to produce evidence and if he failed to do so then he should get nothing under this head. Counsel for the Claimant argued that that was not so and that he had provided material to show there was a pension loss and therefore it was up to the Tribunal to decide if they accepted that, and if so to reach a figure. The ET was entitled to leave that over for another hearing.

31. We took the view that the Tribunal were quite entitled in the course of their case management to say that they needed further information and in order to make well informed decisions and that there is nothing wrong with their decision to put this part of the decision out for a hearing at a later date. In light of our own decision this becomes academic.