EMPLOYMENT TRIBUNALS

Claimant: Mr. A. Olalekan

Respondent: Serco HMP Thameside

Heard at: London South, Croydon
On: 18-20 July 2017 and the 30 August and the 3 October 2017 in chambers

Before: Employment Judge Sage
Members Ms. J. King
Dr. R. P. Fernando
Representativeresentation

Claimant: Ms. E. Godwins Legal Consultant

Respondent: Ms. L. Chudleigh of Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well founded and is dismissed
2. The Claimant's claim for direct race discrimination is not well founded and is dismissed.

REASONS

1. By a claim form presented on the 27 January 2017 the Claimant claimed unfair dismissal. The Claimant also claimed that his dismissal was an act of race discrimination. The Claimant had been employed by the Respondent from the 2 April 2012 until the 26 September 2016 as a prison officer. He was dismissed on the grounds of gross misconduct for an unnecessary and excessive use of force on the 16 July 2016. The Claimant states that the dismissal was unfair and an act of direct discrimination; he relied on five actual comparators in his ET1 and claimed that had he been white, he would not have been dismissed.

2. The Respondent defended the claims stating that the dismissal was fair and on the grounds of conduct and denied that he was treated less favourably because of race.

The issues

3. The Claimant claims race discrimination and the issues are:
   a. The Claimant describes himself as Black African and he compares himself with White Custody Officers at his place of work
   b. Did the Respondent treat the Claimant less favourably by dismissing him and was this on the grounds of race?
4. The Claimant claims unfair dismissal and the issues are:
   a. What is the reason for dismissal – the Respondent contends that the Claimant was dismissed for the potentially fair reason of conduct.
   b. Was the dismissal of the Claimant fair within the meaning of Section 98(4) of the Employment Rights Act?
5. It was agreed at the start of the hearing that we would deal with the issue of liability only.

Witnesses

The Witnesses before the Tribunal were as follows:
Mr Chambers the Dismissal Manager and the Assistant Director Head of Security
Mr Thomson the Appeals Manager and Prison Governor
The Claimant and
Mr. K. Adetokunbo Trade Union Representative

Findings of Fact

The findings of fact which are agreed or on the balance of probabilities we find to be as follows:

6. The Respondent is prison operated by Serco. The Claimant was employed as a Prison Custody Officer. He was appointed on the 2 April 2012 and his contract was seen at pages 71-78 of the bundle.

7. The Respondent had a number of standard operating procedures "SOP's" and we were taken to the SOP dealing specifically with the Use of Force and the rules that applied at page 45b of the bundle. It was noted that the use of force was only to be used when "**absolutely necessary and when Control and Restraint "C & R" is used, only authorised C & R will be used**". The SOP stated at paragraph 3.2.2 that where spontaneous use of force is used the Duty Custodial Operations Manager "COM" must be informed as soon as the prisoner is relocated. At 3.2.3 it stated "**use of force must be regarded as a last resort and may only be used when persuasion or other means, which do not entail the use of force, have been explored or are unlikely to succeed**". At 3.2.4 it stated "**Staff must not employ C & R techniques when it is unnecessary to do so in a manner which entails the use of more force than is necessary**". The SOP confirmed that when force is used the employee is expected to complete a "Use of Force" form which was seen at page 45j of the bundle.

8. Mr Chambers told the Tribunal (paragraph 13-14 of his statement) that the Claimant was trained in C & R on recruitment and was updated annually, which was agreed. It was also his evidence that "**under no circumstances must a PCO assault a prisoner who is prone on the floor, safely under C & R by a team of PCO**s", he stated that the only circumstances when it is appropriate to strike a prisoner when it is for "**personal protection**" (when a PCO is faced with or in fear of a physical assault by a prisoner in a one to one situation), in that situation force will be used "**spontaneously as a reaction to violence towards staff, other prisoners or to prevent self harm**" (paragraphs 15-16 of Mr Chamber's statement).

9. The Tribunal saw the disciplinary procedure at pages 48-53 of the bundle. It stated at paragraph 4.1.1 that the investigation should be carried out "**promptly and thoroughly to establish the facts relating to the case. The employee will be informed in writing of the investigation, the reason for the investigation and the name of the Investigation Manager**". The appeal process was seen at page 53 of the bundle.

10. It was not disputed that the Claimant suffered an injury at work on the 19 July 2015 and was absent until the 19 October 2015 (see pages 87-8). The Claimant returned to work on amended duties and on a phased return to work.

11. The incident that led to dismissal occurred on the 15 July 2016, the Claimant's report of the incident was on page 91 of the bundle and it stated that after an earlier altercation the prisoner became aggressive and threatened to assault him, the Violence Reduction "V & R" prisoner spoke to him and told him that the Claimant was only doing his job and he should calm down. The Claimant stated that the prisoner ignored this and went on with his threats. The report then stated that the prisoner refused to go back to his cell when asked to do so and then "**C & R was initiated, first response came to the scene, prisoner was located to CSU**".

12. The Claimant also filled out a 'Use of Force' form which was seen at page 92-3 of the bundle where the Claimant replicated his explanation of the events that led up to the use of force and then stated that "**At this point C & R was initiated, I took control of the head, while other officers took control of the right and left arm. He was non-compliant throughout….he dropped is (sic) body weight and was controlled to the floor. During this process he attempted to bite my finger couple of times..**". The Claimant accepted in his statement at paragraph 25 that he did not state that he pressed down on the prisoner's face because he stated that it was a "reflex action" and he did not remember it. The Claimant accepted in cross examination that he did not say on this form what he was doing with his right hand but said that the omission was not deliberate. Use of force documents were completed by Mr Rutherford (page 94) and Mr Shanu-Taylor (95-6) who were also involved in the incident.

13. The prisoner was seen by a medical officer shortly after the incident and he complained that he was "**hit on the mouth**" but no injuries were observed (page 100). The prisoner then attended adjudication (for breaching prison rules) with Mr Chambers on the 18 July 2016; Mr

Chambers told the Tribunal (paragraph 21 of his statement) that the prisoner complained that he had been punched in the face three times when he was prone on the floor and being restrained by three officers. Mr Chambers stated that on hearing this, he stopped the adjudication to watch the CCTV and on doing so, he observed what he concluded was the Claimant "**displaying downward motion towards [the prisoner's face]"** whilst he was in a prone position and being restrained. Mr Chambers confirmed in cross examination that he took this as a complaint against the Claimant and there was no need for the complaint to be in writing. He therefore decided to ask his colleague Mr White to investigate (the partner of Mr Chamber's daughter). The Tribunal saw the instruction at page 103 of the bundle which was also copied to Ms. Chambers (who the Tribunal later learned was his wife), which was headed "alleged assault". The Claimant accepted in cross examination that the Respondent was right to conduct an investigation into this matter.

14. Mr White wrote to the Claimant, Mr Rutherford and to Mr Shanu-Taylor on the 26 July 2016 (pages 104-9) informing them that a complaint of alleged assault had been made by the prisoner and he wished to interview all staff involved. All witnesses were informed of the right to be accompanied by a colleague. The handwritten notes of the interview which took place on the 1 August 2016 were at pages 110-114 and these were signed by the Claimant, the typed version of the notes was at pages 115-123, these were not signed. The Claimant was accompanied by his union representative Mr Adetokunbo. Although the Claimant stated that the notes were incorrect, there was no evidence that he raised any concern about the accuracy of the notes at the time or during the hearing or the appeal.

15. During the interview the CCTV evidence was viewed. The Tribunal were also shown the relevant CCTV footage and we saw the Claimant with his back to the camera with his arm moving up and down three times in rapid succession; his hand appeared to be in the vicinity of the prisoner's head. This movement is said to be the "three separate motions".

16. The interview notes reflected at page 117 that the Claimant stated, "**when I had the head he was trying to bite me, my right hand, I was using my hand to press down on his head**". He was asked what the three separate motions were and he replied, "**pulling my hand off, trying to stop him biting me**". He was then asked why he had placed his hand there (on the face) and he replied, "**there was a struggle, he was trying to bite me, and my hands were slipping**". The Claimant was then asked to comment on the reaction of the prisoner who was a witness to the incident and he asked the Claimant what the prisoner was shouting and he replied, "**I wasn't aware of anyone shouting, maybe because I was pressing on his head**". The Claimant accepted when asked that the prisoner was not kicking and his upper body was not moving.

17. At page 118 of the bundle, the notes of the investigation reflected that the Claimant was again asked what the three motions were as he had confirmed that the legs and upper body were not moving and he replied "**my hand was by the mouth, don't know, was emotional**". The Claimant accepted that he did not complete a "near miss" form. Mr White

again asked the Claimant what the three downward motions were and the minutes reflected the following response "**at the point there is a fear of anger, he kept threatening me, I lost it, I hit him with an open palm**"; he then stated that he was sorry and again said that he "lost it". He was then asked if he had anything to add and he stated that "**important that I tried to avoid it, I then lost it, hit him 3 times with an open palm. I'm sorry, previously been assaulted and flashbacks".** The Claimant told the Tribunal in answers to cross examination that he did not say that he 'hit' the prisoner, he stated that he 'pushed' the prisoner with an open palm in defence. He also added that when he said that he 'lost it' he was not asked what this meant, he stated that a lot had been going on around Ramadam. He denied that he used the word hit he stated that he used the word pushed.

18. The Tribunal saw Mr Shanu-Taylor's interview notes at pages 120-123 (which were signed by him), he did not see the three downward motions and did not hear anything. He confirmed however that after the incident he recalled the Claimant saying that he "**was being bitten**" (page 122). Mr Rutherford's interview notes were on pages 124-127, again they were signed by him. He had no recollection of the Claimant saying he had been bitten and he felt that they had the situation 'under control'. He also did not see the three downward motions.

19. Mr White also took a statement from the prisoner who observed the incident (the V & R prisoner see page 128) who confirmed he saw the Claimant "**punch him three times**"; he stated that he shouted at the Claimant "What are you doing?" and the Claimant replied that the "**prisoner was trying to bite him**".

20. The investigation report was at pages 129-140 and although on the front page it carried the date of 28 July 2016 the written statements were not completed until the 1 August 2016 (page 134). The completed report was sent to the Claimant under cover of a letter of the 13 September 2016 (page 143a of the bundle). The Claimant was not suspended during this time.

21. The investigation report at page 132 gave an outline of what was seen on the CCTV (which was shown to the Tribunal and is referred to above at paragraph 15). It was concluded that the prisoner was in a prone position and the Claimant "**appeared to be struggling with head rest position and at one point put his knee on top of [the prisoner's head]"** (paragraph 1.9). It then recorded at paragraph 1.10 that the Claimant looked around and then (at paragraph 1.11) "**performed three quick, dynamic motions with his right arm towards [the prisoner's] head and neck area**". He concluded from the CCTV and from the Claimant's admission that there was sufficient evidence "**based on the probability that [the Claimant] did assault [the prisoner] three times whilst in the prone position as number one**" (page 132). Mr White also concluded that the Claimant had admitted to "**striking the prisoner"** (page 135 at paragraph 3.8). He also concluded that this was "**not necessary for self-defence, defending a third party, preventing a criminal act and/or upholding the regime of the establishment**".

22. The Tribunal noted that the investigation report failed to address some of the objectives outlined in the memorandum instructing Mr White on the objectives of the investigation. The report did not deal with the circumstances surrounding the incident, who was responsible, its causes, the manner in which the incident was managed and how a similar occurrence could be avoided in future (see page 103 of the bundle). The Claimant's criticism of the report was there had been no written complaint submitted by the prisoner (paragraph 30 of his statement) and felt that Mr White had not considered the fact that the prisoner had "**tried to bite me**". The Tribunal noted that the only recommendation made was for the Claimant to attend a disciplinary hearing.

23. The disciplinary hearing was convened on the 26 September 2016 before Mr Chambers. The Respondent could not explain to the Tribunal why it took 3 months to convene a disciplinary hearing. During this time, the Claimant continued to work. The letter calling the Claimant to the hearing warned him that the charge of Use of Force was an offence of gross misconduct and if proven, could lead to dismissal. The Claimant was advised of the right to be accompanied and of the right to submit a written statement to the hearing two days in advance.

24. The disciplinary and the notes were at pages 145-150. The Claimant was attended by his union representative. At the start of the meeting the Claimant confirmed that he had had sufficient time to prepare and he had seen all the documentation regarding the investigation. The minutes reflected (page 146) that the Claimant was recorded to have said that he had taken the prisoner's head and "**upon doing this the prisoner tried to bite him"** and the prisoner remained aggressive during C & R so the Claimant **"pushed him with an open palm three times**". The minutes then showed that Mr Chambers asked the Claimant why he would "hit" the prisoner three times and he replied "**the prisoner had tried to bite him, and he had become emotional, however, he did not know why he had hit him three times, and things sometimes happen during C & R**" (page 147). The Claimant in his statement told the Tribunal that the minutes were not agreed and he denied saying that he "hit" the prisoner.

25. The CCTV was viewed during the hearing. Whilst watching the CCTV Mr Chambers put to the Claimant that "**the prisoner was on the ground, seemingly complying with staff, with [the Claimant] holding his head in place and then [the Claimant] striking him three times, which [the prisoner] had detailed in his adjudication. PC asked if he acknowledged this. [The Claimant] confirmed he acknowledged the footage and the incident**" (page 148). The Claimant clarified, when asked, that the prisoner did not try to bite him whilst on the floor but prior to this when he first initiated C & R. The Claimant also appeared to agree that he had "**striked (sic) the prisoner when he had full control**…".

26. After watching the CCTV Mr Chambers asked the Claimant if he had any further thoughts and the Claimant replied that he had "**become emotional and should have distanced himself from the situation, however he thought that C & R was necessary due to the prisoner being aggressive and he had prepared for the worst**". His union representative stated that **"Unfortunately, sometimes things happen during C & R and it is not until you look at the CCTV footage after the**

event that you realise you have dealt with it incorrectly". Mr Chambers took this to be an admission by the representative that the Claimant had acted incorrectly (paragraph 58 of Mr Chamber's statement). The representative also referred to the fact that the Claimant had been suffering flashbacks from his previous assault and had been dealing with family issues.

27. The Tribunal noted that the Claimant's recollection of the events of the incident appeared to be inconsistent within his witness statement; at paragraph 25 he stated that the prisoner attempted to 'bite' his finger. At paragraph 30 he stated that while he was pressing down on the prisoner's face "he was biting my hand". When this inconsistency was put to him in cross examination he replied that "he was attempting all the time to bite my hand". This answer and the manner in which the Claimant presented his evidence to the Respondent during the disciplinary process (see above at paragraph 16-7 and 24) reflected the vague and inconsistent manner in which his case was advanced; it is for this reason we conclude that his evidence lacked credibility and the Respondent was entitled to view the representations made in the disciplinary hearing as an admission of wrongdoing made by the union representative on his behalf.

28. The meeting was then adjourned and Mr Chambers returned thirty minutes later and informed the Claimant that the conduct was gross misconduct and warranted summary dismissal. This is dealt with at paragraphs 64-70 of his witness statement. He concluded that the prisoner had been restrained and the staff had been in full control and he was compliant but whilst vulnerable the Claimant used force which was "**excessive and unnecessary**". He concluded that the Claimant had used force by "**three blows with palm of your hand and with intent**". The Tribunal conclude that this was supported by evidence before the Respondent in the CCTV footage and on the Claimant's and the prisoners evidence. He also concluded that the Claimant had put his colleagues at risk by restraining a prisoner unnecessarily in view of an unlocked wing of prisoners. Mr Chambers also stated in his conclusions that "**it appeared that [the Claimant] looked up, looking to ensure that there were no witnesses"**, however the evidence before Mr Chambers in the disciplinary hearing was that the Claimant informed him that he looked up to see who was around him and at the time of the incident there were a number of custody officers attending the incident (page 148).

29. Mr Chambers confirmed in answers given in cross examination that he made the decision after considering all the facts, looking at the CCTV evidence and after hearing the Claimant's evidence. Mr Chambers conceded in answers to questions from the Tribunal that he could possibly have taken a statement from the prisoner. He stated however that the offence was serious and could not have been dealt with by a lesser sanction. The Tribunal find as a fact and on the balance of probabilities that there was sufficient evidence before Mr Chambers for him to conclude that the Claimant had struck the prisoner and this conduct amounted to a breach of the SOP (see above at paragraph 7 of our findings) and in the circumstances under which it arose amounted to an assault on a complaint and restrained prisoner. Under these circumstances he was entitled to conclude that this amounted to gross misconduct.

30. Mr Chambers denied that he treated the Claimant less favourably because of race and he would have dismissed a white officer who had committed the same offence. The Tribunal were taken to his statement at paragraphs 167-169 where he stated that he had dismissed three officers two had been White, one of the White prison officers had been dismissed for racially abusing a Black Prisoner Officer. The Claimant had been the only Black prison officer dismissed by him during his time as Assistant Director.

31. The Claimant and the union representative made submissions after the decision to dismiss was read out, including the Claimant saying that he should have been given the opportunity to resign. Although not reflected in the minutes the Claimant and his representative maintained in their statements that Mr Chambers told them that he had made the decision to dismiss on the previous Saturday, this was denied by Mr Chambers.

32. The Claimant stated that Mr Chambers appeared to be determined to dismiss him and stated that he had been treated less favourably than comparable white officers, who would not have been dismissed for the same offence (see paragraph 37 of his statement). There was no accusation of race discrimination made at the disciplinary hearing. A copy of the notes of the hearing were sent to the Claimant under cover of a letter dated the 27 September 2016 (see page 151 of the bundle). It was noted that the dismissal letter only confirmed that the Claimant was summarily dismissed.

33. The Claimant appealed by an email dated the 28 October 2016 (see page 152 of the bundle). He appealed on three grounds, that the award of dismissal was too severe; the award was perverse in that Mr Chambers had made the decision prior to the disciplinary hearing and that the award was racially discriminatory as white officers are treated more favourably. The Claimant did not submit any written submission before the hearing. The Claimant was represented by a different trade union representative at the appeal (Mr. Van Zandt). The minutes were at pages 160-163 of the bundle and the appeal was conducted by Mr Thomson who is the Director of HMP Thameside Prison with 32 years' experience. It was confirmed that the appeal was a review of the decision to dismiss, not a rehearing.

34. The minutes reflected that the Claimant opened the hearing by providing details of his psychological problems that had begun after an assault at work and provided a copy of a medical report produced by Occupational Health dated the 10 September 2015, which was over 10 months before the incident (page 167 of the bundle). Mr Thompson told the Tribunal that the Claimant had not informed management that he was unwell at this time. Although the Claimant attempted to go over the facts of the incident that led to dismissal he was advised by Mr Thomson not to drift from the grounds of his appeal; the Tribunal noted that Mr Thomson stated that the Claimant had "admitted the incident" and advised him not to embellish or to "drift from the facts". It was noted that the union representative agreed with Mr Thomson.

35. The Claimant handed Mr Thompson a handwritten note of comparator prison officers who had not faced disciplinary action or who were not

dismissed after using excessive force (see pages 165-6 of the bundle); the Claimant stated that they were all White whereas three Black officers had been dismissed for similar offences. He also alleged that the decision to dismiss amounted to race discrimination. It was confirmed that the Claimant was suggesting that there was a disparity between the severity of sanction between White and Black officers.

36. Mr Thomson agreed with the union representative that he would investigate the names on the Claimant's list and he confirmed to the Tribunal that he gave this task to Ms. Chambers (the dismissal manager's wife). Although Mr Thomson was aware that Ms. Chambers was married to the dismissal manager, he did not feel that this was inappropriate as he felt that she was a competent manager. He confirmed that this investigation would be limited to the time when he was in Office. He confirmed in cross examination that Ms. Chambers only provided him with verbal feedback after carrying out her investigations. He confirmed that he did not consider the decision making of previous Directors assuming that, as they had been adjudged to be 'fit and proper persons' they would have come to an appropriate decision.

37. The Claimant explained that he viewed the decision to be perverse because Mr Chambers had told them that he had made the decision before the hearing. He also asked why he had not been allowed to resign. The Claimant was recorded to have said at the end of the hearing that he felt he had been treated fairly and had been given an opportunity to present his case.

38. Mr Thomson was asked in cross examination whether he asked Mr Chambers if the decision to dismiss was tainted by discrimination and he replied that there was no reason to ask him about this as the Claimant did not complain that the decision to dismiss was tainted by discrimination and he did not claim that Mr Chambers was a racist.

39. Mr Thomson asked Mr Chambers about the alleged comment about making the decision before the hearing and the Tribunal were taken to page 171 dated the 17 November 2016 where Mr Chambers confirmed that he told the hearing that he had <u>not</u> made up his mind before the hearing. He accepted that his question to Mr Chambers was not recorded. The Tribunal find as a fact on the balance of probabilities that the explanation given by Mr Chambers was credible that he had not made his mind up before the hearing, we preferred the consistent evidence of Mr Chambers as compared to the inconsistent evidence of the union representative on this issue.

40. It was put to Mr Thomson in cross examination that the comparator case of Mr Valaitis a White prison officer who assaulted a prisoner and was only given a final warning was evidence of less favourable treatment because of race. Mr Thomson said that he did not adjudicate on this matter but the evidence of Mr Chambers was that this matter was not 'on all fours' with the Claimant's case (see paragraph 140 of his statement). He explained that because the prisoner who was already being restrained the contact made by the Claimant was viewed to be gratuitous. Mr Thomson told the Tribunal in answer to its questions that he felt dismissal was the only option because "**the Claimant had an opportunity to walk**

away, if it is a red mist or flash backs. He puts his hands on the prisoner's head when someone is immobilized, he strikes him three times on the ground, it is unreasonable and unjust and verges on criminal assault". The incident involving Mr Valaitis involved what was described as minimal contact at a time when he felt threatened by the prisoner. The Tribunal find as a fact that the two scenarios were materially different due to the surrounding circumstances and the perceived level of threat and therefore cannot amount to an appropriate comparator. There was therefore no evidence that the Claimant was treated less favourably because of race.

41. The appeal was unsuccessful and the dismissal was upheld. The appeal letter was dated the 23 November 2016 at pages 172-5. The appeal letter dealt with all the Claimant's points of appeal.

Closing submissions of the Claimant were as follows:

42. The Claimant complains of unfair dismissal and race discrimination. The written submissions cited the cases of **BHS v Burchell [1978] IRLR 379 and Iceland Frozen Food v Jones [1983] ICR 17 and Post Office v Foley [2000] ICR 1283, Clark v CAA [1991] IRLR 412 and First Hampshire & Dorset Ltd v Parhar [2012] UKEAT 0643 and Igen v Wong [2005] ICR 931.**The Tribunal must consider all of the process including the appeal. Counsel took the Tribunal to the case of **Bowater v Northwest London Hospitals NHS Trust [2011] EWCA Civ 63 where** it was stated that the employer cannot be the final arbiter of its own conduct it is for the Tribunal to make it's judgment bearing in mind that the test is whether dismissal is within the band of reasonable responses open to a reasonable employer. Counsel also referred to the case of **Strouthos v London Underground Ltd [2004] IRLR 636**

43. In relation to the investigation, it is a test of reasonableness, the Claimant complained that there was no interview with the prisoner and no account was taken from the prisoner or an investigation about him trying to bite the Claimant's hand. The Claimant recorded this on the 15 July. A fair employer would have asked the question, we do have cases where prisoners were interviewed. The Claimant was not provided with an adjudication sheet but it was not produced for this hearing. The CCTV does not show what was happening at the face area.

44. The Respondent took issue that the Claimant did not fill out a near miss form but they provided no documentary evidence of what the prisoner said. Where the prisoner complains, there is an interview. If the prisoner makes a complaint (verbal) there is a Comp1, that did not happen.

45. The investigation interview, the Claimant was not given an opportunity to sign and agree, this was at the disciplinary meeting but he was not given an opportunity to send back the signed version. The witnesses were given an opportunity to do so but the Claimant was not. The Claimant also gave evidence because he did not agree, that is why he did not send them back.

46. At the disciplinary hearing, as to the accuracy of the disciplinary hearing notes, page 145 at the commencement says if necessary we will give you an opportunity to comment on a draft transcript, these documents were relied on. He was not given an opportunity to comment on a draft transcript. The only opportunity was at the appeal and the Claimant said the notes were inaccurate.

47. As to the investigation at the appeal stage, the Claimant's case is that he raised with Mr Thomson the disciplinary hearing notes and tried to explain but he was not given an opportunity to do so. If Thomson had been acting fairly he would have given him an opportunity.

48. The issue about Chambers saying he had said he made a decision on Saturday, he didn't interview, he didn't ask the note taker or ask for the handwritten notes of the hearing. It may be that they are consistent with what the Claimant said.

49. At the appeal stage, it was put to Mr Thomson that the decision to dismiss was race discrimination as there is a discrepancy with White Officers and Black Officers. Mr Thomson never asked Mr Chambers about this, that was unreasonable.

50. He did not consider contacting the Equalities and Diversity Officer. For the first time in his statement he started that Ms Chambers looked into it but this was not mentioned in the outcome letter. The Claimant did not know that Ms Chambers had been asked to investigate. It was not pleaded because the Claimant did not know. There is relevance because Sarah Chambers is Mr Chamber's wife.

51. The investigation into the comparators what we say is that Mr Thomson chose not to look at all the decisions the Claimant brought to his attention and the reason he gave was Directors that went before him had been appointed by the Government and they were just and it was not for them to look at what the Governors did under another watch. That was unreasonable and unfair. There was a duty to look at that and he chose not to.

52. Valiates was the incident that happened under his watch (page 165). Maybe the Respondent may say that Petrov name is incorrect however the Claimant provided details of the date of the incident and the name of the prisoner, there was enough information for Ms Chambers to look at the case.

53. They were able from the date of the Tyler incident to find the details. Mr Thompson was able to come back on that; he did not do a fair investigation on the comparators.

54. At the disciplinary hearing and the decision at page 149, the Claimant's case regarding misconduct is that he accepts he said he pushed the prisoner and he also told Mr White and Mr Chambers that he pushed down on the prisoner's face when he attempted to bite him. His evidence did not change. It is only in the disciplinary notes did it say he attempted to bite him. The Tribunal should find that the Claimant's evidence was consistent. The Claimant tried to explain in the appeal before Mr Thomson

but he refused to listen. The Claimant said he pushed the prisoner's face when he attempted to bite him.

55. If the Respondent said push to the face was an assault, the Claimant's case is that looking at the circumstances, what he said, his past conduct, it would be unreasonable for Mr Chambers not to take what the Claimant said into account.

56. The decision at page 149 said there were three blows and we say this decision was not supported by the evidence given by the Claimant in the meeting and not supported by Mr Taylor and Rutherford.

57. Mr Rutherford does say that when the prisoner was lying down in the prone position but from the CCTV the prisoner had his face facing Rutherford's back therefore he couldn't see the prisoner's face. Officers could not see what was happening.

58. The decision on the use of force was not supported by the evidence, not moving compliantly, not supported by the CCTV. The prisoner was put under C & R.

59. The third bullet point at page 149 was not supported by any evidence by the VR Prisoner. They didn't take issue with it. It didn't lead to anything and C & R was often spontaneous. Mr Perry acknowledged that he had flash backs it would not be logical or reasonable to do this in front of all the officers. The decision making was poor; the Claimant does not accept that leaving would de-escalate matters but he does accept that he should remove himself.

60. In relation to mitigation it was put to the Claimant about Pete Debbit outside Thameside, the details of the fight he provided to Mr Chambers, his account was that he was having problems with alcohol and that was accepted and used to mitigate the conduct. In relation to his previous conduct, they did not consider his past and his good conduct. We consider the dismissal to be unfair. Mr Thomson had an opportunity to look at the Claimant's complaints it was not for him to review what Mr Chambers has done but in some way he has visited in the decision letter at page 173; he said he went back and looked at the CCTV but did not give the Claimant a chance to comment, it is unreasonable and unfair.

61. He did not conduct a fair appeal; his conversation was more with the union representative. You heard for the first time yesterday they had a close relationship. Mr Thomson had already made up his mind that is why he did not carry out a fair appeal.

62. The comparator document forms part of the submissions it has relevance in terms of race. The Claimant accepts that his case is different to the white officers. At page 16, the Claimant's ET1 at paragraph 21, the reason he draws similarity to the black officers Mr Olafioye was an unprovoked assault, one to one with white officers Bailey, Valaitis and Shukri were also one to one assaults. The documents are in the bundle, I invite the Tribunal to look at the documents. Olafioye admitted he caused the action and that is why he apologized. He also referred to family issues that was not used as mitigation. The Claimant's case is that it is race

discrimination but acknowledges that his case is not exactly the same but when you look at the white officers we say that their explanations would have been accepted as to mitigation and what was on the CCTV. Even if the Tribunal does not find race, it is unfair.

The Respondent's submissions are as follows:

63. The Respondent referred the Tribunal to their written submission on race at paragraphs 3-17. In addition, it was stated that it was common ground that there must be no material difference and the burden of proof is on the Claimant to show facts, if he does then the burden of proof will shift. The Claimant stated at page 156 that it was almost impossible to compare two situations within the prison system and the Claimant's union representative stated that he "cannot say that Perry Chambers' decision to dismiss the Claimant was race discrimination" (paragraph 27). I remind you that it is Mr Chamber's mental process that is in question. In race, Mr. Chamber's decision to dismiss was on compelling evidence which was that he struck the prisoner three times on the 15 July and the evidence was seen on CCTV, there was also the evidence from the prisoner. They also had the Claimant's admission that he had struck the prisoner when he had full control of him (see closing submissions at paragraph 21). The conduct was the reason that he was dismissed.

64. It is now accepted in the Claimant's submissions that none of the comparators are relevant under Section 23 of the Equality Act. Now I think it is put that it is a hypothetical comparator regarding the treatment of black employees. Mr Chamber's evidence was put to the Claimant that he had been even handed and he had dismissed two white and one black employee, this background evidence does not assist you in constructing a hypothetical comparator.

65. Black employees' situation is entirely different, Mr Olafioye was found to have kicked a prisoner and put a prisoner at risk. The Claimant clearly has not discharged the burden of proof on him, to find facts which you could conclude. I ask you to accept Mr Chamber's evidence if you accept the shifting burden of proof.

66. Your view has been confirmed in relation to the response to the written questions. Although we had a number of questions we have no inference to draw on the questions at paragraph 17 of the written submission, no questions have been asked. This is a case about the excessive use of force, in the disciplinary hearing he said the bite was before the C & R. When he got the notes, he did not raise a complaint at the appeal stage. Each hearing proceeded on the basis that the Claimant admitted the conduct.

67. Although in his statement he says the notes are wrong, the main point in the case is that the confession is inaccurate. He says nothing about this in his statement and his union representative says nothing. They have shamelessly tried to mislead the Tribunal.

68. In response to the question of whether there was a reasonable investigation we say and it was within the range of reasonable responses. In the ET1 no complaint was made about the investigation (although he

said he was not given the prisoner's statement). He also does not complain about not correcting the notes. The decision was taken as it was a case of admission therefore it was entirely within the band of reasonable responses. The Claimant had agreed it was an attempt to bite at an earlier stage. The notes ought to be given to the Claimant to sign and agree, he signed the manuscript that had the typed notes, yes, he wasn't sent a letter to say sign and return but he had them in good time.

69. Then he was not given the chance to comment on the disciplinary notes, the same point, he had them on the 27 September and he put in an appeal on the 28 October he then had until the 16 November to prepare his case, ample opportunity. He was represented and could have written to Mr Thomson or Mr. Chambers if he disagreed with the notes. It was within the range of reasonable responses, he had them two months before the hearing.

70. It is next said that the Claimant complained about the Saturday comment, it is again the band of reasonable responses, he checked and knowing the Claimant's representative as he did, he knew he would have spoken up at the time. I also ask you to accept the evidence of Mr Chambers that he approached the job to conclude whether the Claimant was guilty as charged in a fair and balanced way and did not make up his mind before the hearing.

71. It is then said that it is unreasonable not to ask Mr Chambers if he made a racist decision, evidence of discrimination is hard to come by and it is not helpful to ask that question. What was done was within the range of reasonable responses. The Claimant's representative said it is unfair only to look at a selection of cases but this approach was agreed with the representative. It must also be reasonable for an employer to draw the line somewhere and to restrict the investigation. Now we have agreement in closing that none of the white employees are similar to his case.

72. We say dismissal is on reasonable grounds after a reasonable investigation. It therefore passes the Burchell test. Counsel then referred to their submissions at paragraph 24 onwards dealing with the range of reasonable responses test. With regard to the decision not to suspend, there is nothing to say that an employer cannot dismiss for conduct even if they have not suspended. Summary dismissal involves a fundamental breach, the employer is entitled to accept the breach by dismissing. If there is to be a decision, the failure to suspend may not be admissible in law to say that a resulting dismissal is unfair. The case of **Paul v East Surrey District Health Authority [1995] IRLR 305.**

73. Two final points, the Chambers family, it is said that it would be better for the Equality and Diversity representative to look into it but this officer does not have an employee remit, HR matters are handled by an external department. The Equality and Diversity representative deals with prisoner issues. After the appeal hearing Ms. Chambers was asked to look into comparators, she looked for documents. No issue was made about good faith. There was no evidence that Ms. Chambers had any decision-making function.

74. The Claimant's representative replied as follows;

75. The Chambers issue – the Claimant became aware of this in the proceedings that Ms. Chambers was involved in evidence gathering and did not cover all the officers. Valaitis was an officer under Mr Thomson.

76. I am not saying that the facts of the cases are similar but they were gross misconduct but the punishment was not gross misconduct.

The Law

98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

> (b) relates to the conduct of the employee,

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

Section 9 Equality Act 2010

(1) Race includes--

> (a) colour;
> (b) nationality;
> (c) ethnic or national origins.

Section 13 Equality Act 2010

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Decision

The unanimous decision of the Tribunal is as follows;

77. We will first deal with the issue of whether the Claimant was treated less favourably because of race. In the agreed issues above at paragraph 3(a) and (b) the Claimant alleges that his dismissal was less favourable treatment because of race. The Tribunal have noted in the closing submissions of the Claimant that it is now accepted that the comparators referred to in his evidence are not the same and are materially different. It was also noted that the Claimant's case now alleges that it is not the

dismissal that is discriminatory (as stated in his ET1), it is now that 'white officers explanations would have been accepted as to mitigation and what was on the CCTV', this was not the Claimant's pleaded case. There was no evidence before the Tribunal to suggest that the Claimant was treated less favourably when the Respondent considered his evidence as to mitigation.

78. There was also no evidence that the Claimant had been treated less favourably than comparable white officers who had used excessive and unnecessary force against a prisoner who had been restrained; we conclude from the consistent evidence from the Respondent that any prison officer who had committed a similar offence would have been dismissed. We refer to our findings of fact above where Mr Chambers was clear that he would have dismissed a white officer for the same offence (see above at paragraph 29). Having considered all the evidence the Tribunal conclude that there is no evidence from which we can conclude that the Claimant has been treated less favourably because of race. There was no evidence to suggest that mitigation offered by White Officers "would have been accepted" whereas mitigation offered by Black Officers would not. We conclude that the reason for dismissal was conduct and a comparable White Officer who had committed the same offence would also have been summarily dismissed.

79. Turning to the claim for unfair dismissal, the Respondent has shown a potentially fair reason to dismiss which was misconduct. There was consistent evidence that the Respondent called the Claimant to a disciplinary hearing on the ground that he had used force outside of that set down in the SOPs and that the force used amounted to an act of gross misconduct. The Respondent concluded on the evidence before them in the form of CCTV evidence, and the testimony of two prisoners that the Claimant had used force when the prisoner was in a prone position under restraint. The Respondent had a reasonable belief on reasonable grounds that the Claimant's conduct gave them serious cause for concern and that the Respondent formed a belief that this was conduct which should be dealt with under the disciplinary process.

80. The Tribunal has found as a fact that Mr White the investigations manager, was the partner of Mr Chamber's daughter (see above at paragraph 13), although this was not ideal, the Claimant, who was aware of the connection, made no complaint at the time and neither did his union representative. Despite the familial connection, there was no evidence to suggest that this adversely impacted on the thoroughness of the investigation. The Claimant highlights a number of issues about the disciplinary investigation, firstly, that there was no statement taken from the prisoner under restraint and secondly, that the notes taken during the investigation were inaccurate. The Respondent's response to these allegations are that the prisoner escalated his complaint orally during the adjudication process, the Respondent's evidence was that when this complaint was made, the hearing was stopped and it was at that stage that Mr Chambers watched the CCTV and what he saw appeared to corroborate the prisoner's complaint. The Tribunal concludes that a statement from the prisoner would have added little to the CCTV evidence and of the prison officers who were involved in the restraint.

81. On the issue of the accuracy of the minutes, the Tribunal noted that the Claimant had an opportunity to present any complaints about the accuracy of the investigatory minutes at the start of the disciplinary hearing. However in the disciplinary hearing the Claimant confirmed that he had received all the documents and made no complaint about the accuracy of the minutes. The Tribunal note that the Claimant had the assistance of a trade union representative at the hearing and could have raised concern about the accuracy of the minutes but did not do so. The Tribunal therefore conclude that the investigation conducted by the Respondent was within the band of reasonable responses and was fair.

82. The Claimant challenges the disciplinary hearing on a number of grounds, firstly, he alleged that the dismissal manager had predetermined the matter as it was alleged that Mr Chambers had said that he had made the decision the previous Saturday, this was denied by him. Mr Chamber's evidence was that he took the decision after considering all the evidence and although he candidly accepted he could have taken a statement from the prisoner, the Tribunal conclude that this would have made no difference to the outcome in the light of the Claimant's confession to the investigatory manager corroborated by the CCTV evidence, that he had struck the prisoner three times while being restrained.

83. Mr Chambers was entitled to conclude that the Claimant had used force which was not authorised by the SOP and was an offence of gross misconduct. The Respondent was entitled to conclude that the Claimant's evidence was not entirely consistent and what was viewed on the CCTV was so serious that dismissal was the only option open to them. The Tribunal therefore conclude that the decision to dismiss was fair and within the band of reasonable responses.

84. The appeal was handled by Mr Thompson and he approached the appeal from the basis that the Claimant had admitted the offence. Although the Claimant provided evidence of his previous assault and the psychological problems that he faced following that incident, this submission was rejected by the appeals manager because he felt this was not a ground of appeal and the Claimant had told no one of his ill-health at the time. The Tribunal found as a fact that medical report produced was 10 months before the incident in question and there was no consistent evidence before the Respondent that he was suffering from mental impairment or that his health impacted upon his judgment at the time of the incident.

85. The Tribunal also took into account that the employer had medical staff on site and the Claimant had not raised his health as an issue prior to the incident that led to his dismissal. The Respondent was entitled to conclude that any alleged ill-health issues did not absolve or explain the incident that led to dismissal. The Respondent was entitled to conclude that as the Claimant was fit to attend work and had been signed fit after the previous assault that he was capable of carrying out his duties. It was also noted that there was no current medical evidence produced at the appeal to substantiate the Claimant's claim that he was suffering from flashbacks at the time of the incident.

86. Although the Claimant raised an issue about the accuracy of the minutes of disciplinary hearing, the Claimant failed to highlight any problems or obvious inconsistencies at the appeal.

87. The Tribunal noted that Mr Thompson conducted an investigation into the points that the Claimant raised in his appeal, he carried out some investigation into the comparators that the Claimant maintained had been treated more favourably in respect of the sanction awarded and concluded that the cases he raised were not similar to the incident before him. The Tribunal noted that Mr Thomson instructed Ms Chambers to carry out this investigation, although the closing submissions made on behalf of the Claimant refers to this, there has been no suggestion that her involvement was detrimental to the Claimant's case. Mr Thomson concluded that all appeals are dealt with on their own merits and did not find any evidence to suggest that others had received a lesser sanction, this ground of appeal was rejected. He also asked Mr Chambers whether he had told the Claimant that he had made his mind up before and is written response was that he had clearly said he had not made up his mind, this matter was therefore investigated and the answer he received was accepted.

88. The decision letter covered all the points that Claimant raised in his appeal but it was concluded on the evidence that the Claimant had used excessive force by striking the prisoner three times and the only option open to them was dismissal. Therefore, the decision was upheld. The Tribunal conclude therefore that the appeal was thorough and dealt with all points but concluded on all the evidence that the decision to dismiss was reasonable. The Tribunal conclude therefore that the disciplinary process in its entirety was fair. The Claimant's claim for unfair dismissal is therefore dismissed.

Employment Judge **Sage**

Date 3 October 2017