EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105245/16

Held in Glasgow on 11, 12 & 13 September 2017

Employment Judge: Frances Eccles

Ms Marion King	**Claimant** **Represented by:** **Mr D Macphee - Solicitor**
GEO Group UK Ltd	**Respondents** **Represented by:** **Ms H Kemmett - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed by the respondents.

REASONS

BACKGROUND

1. The claim was presented on 26 October 2016. The claimant complained of unfair dismissal. The claim was resisted. In their response dated 28 November 2016 the respondents gave misconduct as the reason for the claimant`s dismissal. The respondents denied any unfairness.

2. At the Hearing, the claimant was represented by Mr D MacPhee, Solicitor. The respondents were represented by Ms H Kemmett, Solicitor. The parties provided the Tribunal with a Joint Bundle of Productions. The Tribunal heard evidence from the respondents' Dismissing Officer, Andy Grieve, Corporate

QHSE Manager and their Appeal Officer, Parmeet Jagdev, Financial Controller. The claimant gave evidence. She called Sarah Lynch, Centre Manager, Yvonne Burley, Registered Mental Health Nurse, John McClure, former Centre Manager and Heather Bryson, former Security Manager to give evidence on her behalf.

FINDINGS IN FACT

3. The Tribunal found the following material facts to be admitted or proved; the claimant had been continuously employed from 12 January 2004 when she was dismissed by the respondents on 20 July 2016, the claimant`s contract of employment (P11/46 - 51) having transferred to the respondents from another service provider. At the time of her dismissal the claimant was employed as a Residential Manager based at Dungavel House Detention Centre in Strathaven where the respondents provide security services to the Home Office. The respondents employ between 85 and 100 people at Dungavel House. The claimant's income was £526 gross per week with an average take home pay of £416.70 per week. At the date of her dismissal the claimant was aged 58. The respondents contributed to a pension scheme on behalf of the claimant.

4. Dungavel House is a detention centre for the purposes of the Detention Centre Rules 2001 ("the Rules"). The respondents' contractual obligations with the Home Office require them to comply with the Rules. In terms of Rule 3, the purpose of detention centres is to "*provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time whilst, respecting in particular their dignity and the right to individual expression*".

5. The claimant was employed as an officer at Dungavel House for the purposes of the Detention Centre Rules 2001 (P15/65-84). Rule 51 provides:-

"*No officer shall, without the authority of the Secretary of State, communicate with any person whom he knows to be a former detained person or a relative or friend of a detained person or former detained person in such a way as could compromise that officer in the execution of his duty or the safety, security of control of the centre*."

6. Officer were provided with Guidance (P16/85-121) on the Detention Centre Rules 2001 which contained the following information on Rule 51:-

"***Rule 51: Contact with former detained persons***

108. This Rule is concerned with ensuring that officers do not allow themselves to become involved with detainees or the relatives of detainees in a way that might hinder them in the exercise of their functions. Officers must not enter into any communication with someone they know to be a former detainee or relative or friend of a current or former detainee if in doing so this could compromise that officer in the exercise of his duties or for the safety, security or control of the centre. The Rule refers to communication taking place with the authority of the Secretary of State and what is in mind here are legitimate communications. For example, where a former detainee or relative or friend of a detainee might have reason to make contact to discover the whereabouts of property that might have been mislaid and, in the case of a relative or friend of the detainee to locate his whereabouts following removal from the UK or to another removal centre."

7. The claimant was aware of and understood the Rules (P15/65-84) and Guidance (P16/85-121). She was aware that one of the purposes of Rule 51 is to prevent the possibility of an officer's safety being compromised. The claimant understood the importance of Rule 51 to the safe operation of

Dungavel House. She was aware of and understood the restrictions placed on officers by Rule 51. The respondents' Disciplinary Procedure (P12) includes the following as examples of gross misconduct which can result in summary dismissal;

- *Acting in any way that, in the Company`s reasonable opinion is likely to bring the Company into disrepute or bring serious discredit to the Company or damage the efficiency of its operations (whether or not the act was committed at work)*

- *Serious or repeated breach of expected professional standards.*

- *Serious breach of any Company policy, code or procedures, including any rules to which the Company is required to adhere in order to comply with contract requirements."*

8. On or about 15 May 2016, during a routine inspection of a detained person`s room, the claimant`s personal email address was noticed amongst paperwork belonging to a detained person. A search was conducted of the room which uncovered a diary and paperwork belonging to a detained person. The diary contained the claimant's private e mail address. The paperwork contained the claimant's work e mail address. The detained person's diary (P20/32) and paperwork (P20/133) were passed to Will Cairns, Senior Manager.

9. On 25 May 2016 Will Cairns telephoned the claimant at home to confirm that she had been suspended from work. Will Cairns referred to the reason for suspension as *"inappropriate behaviour*". The claimant became agitated and upset. Will Cairns informed the claimant that her email addresses had been found in the possession of a detained person.

10. Gillian Duffy of the respondents' HR wrote to the claimant on 25 May 2016 confirming her suspension from work. In her letter to the claimant (P19/124-125) Gillian Duffy informed the claimant that she was suspended from work

on full pay with immediate effect and that an investigation would be immediately undertaken into the allegation of:-

> "*A detainee being in the possession of staff information which may be a breach of expected professional standards*."

The claimant was informed that the alleged conduct was contrary to the rules and regulations under which she was employed and might constitute misconduct under the respondents' Disciplinary Policy (P12/52 to 57) which could lead to her dismissal from employment.

11. The claimant was also informed by Gillian Duffy that suspension was the opportunity for the respondents to investigate the matter thoroughly and to establish the facts; it was not a disciplinary sanction and in no way implied guilt. Gillian Duffy described the claimant's suspension as action "*taken to ensure the safety of those involved*". The claimant was notified of arrangements made for an investigation interview scheduled to take place on 6 June 2016. The claimant was informed of her right to be accompanied at the investigation meeting by a work colleague or trade union representative. The claimant was requested to keep the matter confidential and that in no circumstances should she attend for duty or visit the respondents' premises unless instructed to do so. The claimant was informed that she must not contact any of the respondents' employees except her trade union representative for the purposes of obtaining advice. The claimant was informed that, in terms of their obligation to notify the Home Office of an employee`s suspension, her details and the allegation under investigation had been passed to the Home Office. In terms of Home Office procedure the claimant's authority to enter Dungavel House was suspended pending the outcome of the respondents' investigation.

12. Will Cairns was appointed Investigating Officer and instructed "*to collate relevant information and conduct interviews where appropriate in order to make a recommendation as to whether the matter should be pursued under*

the formal disciplinary policy" (P20/126). The matter to be investigated was identified as;

"*the circumstances around how (the detained person) came to be in the possession of personal and work email addresses of a staff member*".

Will Cairns left the respondents' employment before completing his investigation. Sarah Lynch, Centre Manager was appointed in his place. As part of her investigation, Sarah Lynch instructed Heather Bryson, Security Manager to interview the detained person found to be in possession of the claimant`s work and private email addresses. The interview took place on 2 June 2016. The detained person informed Heather Bryson that somebody had given him the claimant`s work and private email addresses. He could not remember who. The detained person informed Heather Bryson that another detained person gave him the email addresses for John McClure, the claimant and Jo Henney as contacts should he require emotional support. The detained person confirmed that he had never used the email addresses to contact the claimant. He confirmed that he had been in possession of the email addresses for approximately 6 months. Heather Bryson produced a written record of her interview with the detained person (P20/129) which she passed to Sarah Lynch.

13. As part of her investigation Sarah Lynch interviewed the claimant on or about 7 and 8 June 2016. When they first met the claimant was too upset to proceed and the interview was re-arranged for the following day. When questioned by Sarah Lynch on or about 8 June 2016 about how the detained person came into possession of her email addresses, the claimant stated that at first she had been confused but having given the matter some thought believed that they were obtained through the detained person`s son. The claimant explained that she had been working on a project to develop a support scheme for detainees to be known as "Talk Mates". Detainees were involved in the project, one of whom was the detained person. The detainees had assisted in designing a leaflet to support the scheme. The detained person

had asked his son to assist. His son sent the leaflet to her email address. The claimant could not recall which email address was used as she may have given him two addresses. The claimant referred to there being a "*bit of back and forwards*" which the respondents could check on their email account.

14. The claimant confirmed that the detained person had been at Dungavel House for some time and that she had assisted in his care and welfare. The claimant denied that she would ever breach professional standards. She accepted that on this occasion she had been foolish in giving out her email addresses. She acknowledged that she should have reported this at the time. She stated that at no point was this done in any way to compromise the respondents. She stated that she was sorry for being foolish and asked Sarah Lynch to recognise that at no point would she have acted in an unprofessional manner. She accepted full responsibility for the situation and described herself as guilty of supporting the detained person on an almost daily basis. She emphasised the importance she attached to ensuring that the respondents maintain the care and welfare of detainees. The claimant referred to Talk Mates as a project intended to support detainees. She referred to the project being delivered to John McClure and not proceeding on the advice of Health Care professionals based at Dungavel House.

15. The claimant denied that she had been in regular e mail contact with the detained person outside work. She denied having a relationship with the detained person other than in a professional capacity. The claimant emphasised how much she cared about her job and her commitment to Dungavel House and the respondents. The claimant was questioned about purchasing a birthday cake for the detained person. The claimant explained the circumstances of purchasing the birthday cake. Sarah Lynch produced a written record of her interview with the claimant (P20/130-131). The claimant was provided with a copy which she declined to sign.

16. Sarah Lynch produced an investigation report dated 7 June 2016 (P20/126-137). She detailed the terms of her interview with the claimant. She referred

to making enquiries about the purchase of a birthday cake for the detained person. As background information, Sarah Lynch attached to her report (P20) a Staff Handbook, Disciplinary Policy (P12), copy interview notes with the detained person (P20/129), copy interview notes with the claimant (P20/130-131), copy extracts from the detained person's address book (P20/132) and paperwork (P20/133), copy of the Talk Mates booklet (P20/134-135) and copy cash disbursement form (P20/136-137).

17. In her investigation report (P20), Sarah Lynch made the following recommendation:-

"***Recommendation***

Based on information obtained the addresses had been supplied to (the detained person), although it would appear no malice or unprofessional relationship can be established. Marion is extremely remorseful for this action. I would therefore recommend the following:-

- *Residential Manager Marion King. Should be invited to attend a disciplinary hearing in line with staff handbook. Misconduct (Minor or serious) – Breach of expected professional standards relevant to the job role.*

- *(The detained person's) address book and info sheet is sanitized and returned to his person.*

- *(The detained person) should be reminded that he should not be contacting or obtaining staff information via email*."

18. Sarah Lynch`s investigation report (P20) was referred to Andy Grieve, Corporate QHSE Manager. Andy Grieve, in consultation with the respondents' HR, agreed with Sarah Lynch's recommendation that the claimant should be invited to a Disciplinary Hearing. He wrote to the claimant

on 9 June 2016 requesting that she attend a Disciplinary Hearing. In his letter to the claimant (P21/138 to 139) Andy Grieve informed the claimant that the purpose of the meeting was to consider that;

- *you allowed your personal and work email addresses to fall into the hands of a detainee without authorisation.*

- *you had contact with a relative of a detainee in contravention of DC Rule 51….*

Andy Grieve referred the claimant to examples of gross misconduct in the respondents' Disciplinary Policy (P12).

19. Andy Grieve informed the claimant that she should be aware that if the allegations against her were substantiated they might constitute gross misconduct under the respondents' Disciplinary Policy (P12) and that one possible outcome could be her dismissal. The claimant was provided with a copy of the respondents' Disciplinary Policy (P12) and Sarah Lynch`s investigation report (P20) and attachments. The claimant was informed of her right to state her case and ask questions about the allegations made against her at the Disciplinary Hearing. She was also informed of her entitlement to be accompanied by a work colleague or trade union representative.

20. The claimant attended a Disciplinary Hearing on 16 June 2016. She was accompanied by Alan Ramsay, her trade union representative. Andy Grieve was accompanied by Gillian Duffy who acted as notetaker. When asked by Andy Grieve to explain how the detained person had obtained her personal and work email addresses, the claimant replied, "*I honestly don`t know*" and that the only thing that she "*could come up with*" was the Talk Mates project. The claimant explained that she sent a leaflet for Talk Mates to the detained person`s son. She stated that John McClure, Centre Manager had approved this after she had explained the problems they were having with completing

the leaflet. The claimant stated that John McClure had said "*that`s not a problem*" after which she sent the leaflet to the detained person's son. The claimant recalled being concerned about where to send the leaflet from and that she did not remember from where she ended up sending it. She recalled the detained person giving her his son`s email address and that she sent the leaflet to him. She recalled giving documents to Sarah Lynch. She recalled the project not going ahead as Health Care did not agree with it.

21. The claimant recalled contacting the respondents' Learning Centre about completing the brochure but they were unable to assist due to pressure of work. The claimant referred to having a conversation with John McClure about sending the leaflet out and that he did not have a problem with it. The claimant explained that she did not want to use the respondents' email address as she thought *"they could get in somehow*". The claimant stated that she really did not know how the detained person obtained her work email address. Given her worries about sending the brochure from the respondents` account, she was sure that she sent it from her own email address. The claimant confirmed that she did not have contact with the detained person`s son and only sent the leaflet to him. She recalled him sending it back to the detained person, and not to her. She reiterated that she got approval from John McClure before sending it. She recalled John McClure stating "*it`s fine, we want it up and running*." She recalled obtaining John McClure's approval and not wanting to send it from the respondents' email address so "*they couldn't hack the company*". There was the possibility that she sent the leaflet to the son`s work. She recalled telling Sarah Lynch at the time that she had spoken to John McClure. She referred to it as "*a big thing at the time*".

22. Andy Grieve pointed out that during her investigation interview the claimant had stated that she should have reported disclosure of her emails and that now she was claiming to have obtained authority to "*go ahead*" and disclose them. He questioned the claimant as to why she would worry about reporting the disclosure of her emails if she had already informed John McClure. The

claimant replied that when interviewed by Sarah Lynch she did not have any idea about what was going on and her explanation was "*just a possibility of how (the detained person) got this information*". The claimant confirmed that she did have a conversation with Sarah Lynch about obtaining approval from John McClure and that Sarah Lynch had said "*but he's not here now*". The claimant expressed concerns about what was happening and described the process as being like "*a witch hunt*". Andy Grieve sought to reassure the claimant and to explain that all allegations would be fully investigated. The claimant was questioned about the birthday cake. The claimant denied that she would ever be conditioned by a detained person. The respondents produced a record of the Disciplinary Hearing (P22/140-144). The claimant was provided with a copy which she declined to sign.

23. On 22 June 2016 Andy Grieve wrote to the claimant to confirm that he was waiting for information linked to points raised during the Disciplinary Hearing. In his letter (P23), Andy Grieve requested that the claimant confirm if there was any other information that she wished him to consider before making a decision. The claimant replied to Andy Grieve in writing (P24/146) questioning the trustworthiness of John McClure given that he had left the respondents' employment, questioning whether the evidence against her was sufficient to establish guilt and expressing the view that the procedure had turned into "*a personal witch hunt".* The claimant questioned why a copy of the incident report that led to a search of the detained person's room had not been provided to her in advance of the Disciplinary Hearing. The claimant highlighted her past performance and commitment to the welfare of detainees. She expressed shock and distress about the apparent lack of confidentiality on the part of the respondents given that her colleagues were aware of the reason for her suspension. She stated that she was totally innocent of the allegations made against her.

24. Andy Grieve wanted to question John McClure given the claimant's evidence that she had obtained his authority to contact the detained person' son to assist with the Talk Mates project. John McClure was reluctant to discuss

matters. He informed Andy Grieve that he did not wish to be involved in internal matters concerning the respondents given that he was no longer in their employment. Andy Grieve was anxious to discuss matters with John McClure before reaching a decision in relation to the allegations against the claimant. Sarah Lynch contacted John McClure after which he agreed to have an informal conversation with Andy Grieve. John McClure telephoned Andy Grieve on 19 July 2016. He denied having authorised the claimant to contact the detained person's relative to assist with the Talk Mates project. He confirmed that he was aware that the claimant was working on a project to assist detainees and had asked her to submit a proposal regarding how the process and group would work. John McClure stated that he had instructed the clamant to seek assistance from the respondents' Learning Centre in relation to the leaflet. He recalled the claimant requesting that they use an outside graphic designer who would do the work for free and that he had agreed to this. He denied being made aware of the identity of the person involved or that he would have agreed to their involvement had he known it was the detained person's son. John McClure stated that he had expressly forbidden the detained person being involved in the project due to his personal history and the possibility of the project involving peer support. Andy Grieve produced a written record of his conversation with John McClure (P25). Andy Grieve also contacted Alison Twilley at the respondents' Learning Centre. She could not recall being contacted by the claimant for assistance with graphics for the Talk Mates leaflet.

25. Andy Grieve believed John McClure. He preferred his version of events to that of the claimant. He did not believe that John McClure had authorised the claimant to contact the detained person's son. Having considered all of the evidence before him including the notes of interviews with the claimant and the detained person; the claimant's evidence at the Disciplinary Hearing and his discussion with John McClure he was satisfied that the claimant had allowed her personal and work email addresses to come into the possession of a detained person, having disclosed them to the detained person's son without authority. He concluded that the claimant`s contact with the detained

person's son could have compromised her safety and was a serious breach of Rule 51 of the Detention Centre Rules 2001. He was satisfied that the claimant`s conduct was sufficiently serious to amount to gross misconduct in terms of the respondents' Disciplinary Procedure (P12). He considered mitigating circumstances including the claimant's length of service and disciplinary record. He was not persuaded that they justified a sanction less than dismissal. Andy Grieve concluded that the claimant should be dismissed without notice.

26. Andy Grieve wrote to the claimant by letter dated 20 July 2016 (P26) confirming his decision and giving his reasons as follows:-

> "*The purpose of the Hearing was to give you an opportunity to provide a satisfactory explanation for the following areas of misconduct which the Company considers to be of a most serious nature:-*
>
> - *Allegations that you allowed your personal and work email addresses to fall into the hands of a detainee without authorisation.*
>
> - *Allegations that you had contact with a relative of a detainee in contravention of DC Rule 51 as laid out below:*
>
> ***Contact with former detained persons***
>
> *51. No officer shall, without the authority of the Secretary of State, communicate with any person whom he knows to be a former detained person or a relative or friend of a detained person or former detained person in such a way as could compromise that officer in the execution of his duty or the safety, security of control of the centre*.
>
> *These allegations also fall under the Company disciplinary policy for: gross misconduct:-*

- *Acting in any way that, in the Company`s reasonable opinion is likely to bring the Company into disrepute or bring serous discredit to the Company or damage the efficiency of its operation (whether or not the act was committed at work)*

- *Serious or repeated breach of expected professional standards.*

- *Serious breach of any Company policy, code or procedures, including any rules to which the Company is required to adhere in order to comply with contract requirements.*

During the Hearing, you brought issues to my attention that I stated I would enquire about further. I can now confirm the following findings.

1. *You stated that you believed you asked for assistance from ILC Manager Alison Twilley with the project – I spoke with Alison and she was unable to recall the events.*

2. *Whilst not mentioned during the investigation you stated that you had received permission from John McClure (Centre Manager when the alleged incident took place). As you are aware, there was a delay in me being able to speak to John McClure because of his period of annual leave. I have now spoken to John and he recalls the discussion but expressly denies that he authorised you making contact with the detainee`s relative.*

   John also noted that he discussed that you should use a member of staff at Dungavel (Rodina Young) that was very proficient in IT to assist you but that you stated that you had a graphic designer who would do it. John made it very clear that he was, never made aware that you intended to use a relative

of a detainee and also that he expressly forbid you using the (detained person) to assist with the project.

As a result of this further evidence, I do not believe your explanation that you had been given authority by the centre manager.

After careful consideration of the circumstances, I find there is sufficient evidence to substantiate the allegations listed above. I have taken into account your long service at Dungavel IRC whilst making this decision but cannot accept that there are any reasonable mitigating circumstances that would excuse your actions. You have confirmed you were aware it is a breach of DC Rule 51 to share personal details, in this case your work and personal email addresses with a detainee or his relative. Whilst you say you provided them to a detainee`s relative they did become known to the (detained person); neither of which is acceptable. One of the reasons DC Rules are in place is to avoid compromising the safety of staff. Although you apologised for your actions, you directly compromised yourself by sharing your details in this way.

I have therefore regretfully concluded that you will be summarily dismissed without notice or pay in lieu of notice and your last day of service will be 19th July 2016. Your dismissal is on the grounds of conduct amounting to gross misconduct that was sufficiently serious to entitle us to dismiss you without notice or pay in lieu of notice."

27. The claimant was informed of her right to appeal the decision made by Andy Grieve. She was provided with a copy of Andy Grieve's telephone conversation with John McClure (P25). The claimant appealed against the decision in writing dated 26 July 2016 (P27). The claimant`s grounds of appeal were as follows: -

"(i) Severity of Award; (the award was both punitive, accumulative and perverse in relation to the full facts of this case).

(ii) Procedural; It is my opinion that there has been several breaches of internal procedures and ACAS guidelines that I will allude to in full detail at my appeal hearing.

(iii) Other Substantial Reason to that of the specific reason afforded to me for the reason for my dismissal."

28. Parmeet Jagdev, Financial Controller was appointed to hear the claimant`s Appeal. She wrote to the claimant on 1 August 2016 (P28) confirming that the Appeal would be heard on 18 August 2016 and that she had the right to be accompanied to the Hearing by a fellow worker or trade union representative. In advance of the Appeal Hearing the claimant's partner, who was also an employee of the respondents, reported contact between the claimant and the detained person's daughter. The claimant`s partner reported to the respondents that while on holiday in London, he and the claimant had been to a show in which the detained person's daughter was performing. The claimant`s partner felt it prudent in the circumstances to report the matter to the respondents. The claimant was informed by letter of 4 August 2016 (P29) that information had been received regarding a trip to the theatre in London earlier in the year. The claimant was informed that details surrounding the matter would be discussed at the Appeal Hearing.

29. At the Appeal Hearing the claimant was represented by Stephen Farrell, a trade union representative. Parmeet Jagdev was accompanied by Joanna Evans from HR who acted as notetaker. Parmeet Jagdev confirmed that the purpose of the meeting was to review the disciplinary decision as opposed to a rehearing of the evidence. Steven Farrell confirmed that the severity of the sanction was the over-riding ground of appeal. He stated that insufficient weight had been attached to the claimant's exemplary record; it was her first alleged misdemeanor and had resulted in dismissal. Steven Farrell submitted

that a learning outcome would have been more reasonable. The claimant described being hysterical when asked about how the detained person obtained her email addresses. The first thing she had thought about was the Talk Mates leaflet. She stated that since then she had realised there were several ways in which the detained person could have obtained her email addresses. She gave as an example deliveries of items she had ordered for Dungavel House and which contained her personal details including name and e mail addresses. She provided Parmeet Jagdev with an invoice for such a delivery.

30. The claimant remained adamant that John McClure knew she was in contact with the detained person`s son by email. She referred to the leaflet being discussed at several morning meetings attended by John McClure, Sarah Lynch and other Managers. Stephen Farrell questioned John McClure's credibility given his involvement and the evidence from other members of staff. Stephen Farrell emphasised that in her report, Sarah Lynch had highlighted there would appear to be no malice or evidence of an unprofessional relationship and that the claimant was extremely remorseful. He referred to evidence of the detained person being in possession of the e mail addresses of other Managers including John McClure.

31. Steven Farrell questioned whether Andy Grieve could prove that the claimant had shared information with the detained person. He described the detained person as a highly intelligent, manipulative individual who has been involved in major crime. He observed that detainees have several means of gaining information about staff. The claimant referred to the detained person having the email addresses of other staff members. She suggested that another one means by which he could have obtained her e mail address was by paying for it. She referred to Andy Grieve choosing to believe John McClure. She claimed that John McClure had lied about not allowing the detained person to be involved in the project. She claimed that Yvonne Burley from Healthcare had been told by Helen Adams, also from Healthcare, not to give a statement

in her defence as it could have serious implications for her job. Steven Farrell requested that Parmeet Jagdev interview Yvonne Burley.

32. When asked by Parmeet Jagdev why she told Andy Grieves that she was sure that she had sent the leaflet from her own e mail, the claimant recalled speaking to Yvonne Burley and telling her that the detainees had "*hit a snag*" because they were unable to access the necessary tools on the respondents' computers or attach documents to emails. She could not recall which e mail address had been used but recalled being concerned about using the respondents' e mail address.

33. In response to further questions from Parmeet Jagdev about whether she had breached Rule 51, the claimant stated that there was a regular requirement to contact detainees' families. The claimant described it as part of her daily duties to speak to detainees' families if requested to do so by a detained person. The claimant was unable to provide a specific example of such contact. The claimant provided Parmeet Jagdev with written statements in her support of her position about contact by officers with detainees' relatives (P32/162-164). Stephen Farrell described John McClure as being vicariously liable for any breach of Rule 51 having given the claimant authority to provide the detainee's son with her e mail address. He questioned the fairness of the investigation. He stated that an investigation into gross misconduct should be more than 3 pages long. He questioned whether it was appropriate for the Investigating Officer to be the claimant`s line manager and a key witness.

34. The claimant questioned why her authorisation had been suspended by the Home Office before she was interviewed. Joanna Evans explained that the respondents were obliged to inform the Home Office of an employee`s suspension at the time and to provide brief details about the reason for suspension. Steven Farrell questioned whether the investigation was sufficiently thorough. He stated that if conducted properly the investigation would have established that John McClure gave the claimant his permission to pass on her e mail address. Steven Farrell explained that the alleged

breach of the ACAS Guidelines related to the inadequacy of the respondents' investigation. He also explained that reference to "*other substantial reason*" in the grounds of Appeal related to John McClure's lack of honesty. The claimant described him as a liar. Steven Farrell stated that the claimant was prepared to take a lie detector test.

35. The claimant was questioned by Parmeet Jagdev about her trip to London. The claimant explained that it was coincidental that the detained person's daughter had performed in a show for which she had been purchased tickets by a family member (P32/168). The claimant provided Parmeet Jagdev with documentary evidence relating to the purchase of theatre tickets (P32/165-169).

36. Steven Farrell asked Parmeet Jagdev to review the evidence discussed at the Appeal Hearing and to reinstate the claimant. Parveet Jagdev confirmed that she would speak to Sarah Lynch and Yvonne Burley. The claimant raised concerns about the respondents having failed to contact her while suspended to enquire about her welfare. Joanna Evans confirmed that her concerns were noted. The claimant raised concerns about lack of confidentiality on the part of the respondents. She described being approached by another employee while out walking who knew all about her suspension. Parmeet Jagdev apologised on behalf of the respondents and agreed that the incident was unacceptable.

37. Parmeet Jagdev wrote to the claimant on 26 August 2017 (P33) to confirm that she was looking into the points raised at the Appeal Hearing and would complete the outcome letter as soon as possible. She enclosed a written record of the Appeal Hearing (P31/157-161). By letter dated 30 August 2016 (P36/174) the claimant sought amendments to the record of the Appeal Hearing (P31/157-161). The claimant's amendments were accepted by the respondents and the requested changes made (P37/180). The amended notes (P36/174-179) were copied to the claimant. The claimant declined to sign the amended notes.

38. Parmeet Jagdev spoke to Sarah Lynch who was unable to confirm that she was aware of the claimant obtaining permission to disclose he e mail addresses to the detained person's son. She also contacted Yvonne Burley by letter dated 26 August 2016 (P34) and requested that she attend an investigatory interview at which she would put a variety of questions to her to establish the facts regarding the incident involving the claimant. Yvonne Burley had been advised by her Line Manager not to provide a statement in support of the claimant. Yvonne Burley and her Line Manager were both employed by Health Care providers for Dungavel House. They were not employed by the respondents. Yvonne Burley agreed to respond to questions from Parmeet Jagdev in writing. Parmeet Jagdev contacted Yvonne Burley by email on 26 August 2016 (P35/172-173). Her email (P35/172-173) contained the following questions:-

"*(1) Do you recall Marion (Marni) discussing the issues she had in regards to the leaflet she was working on? If you do, can you state what you recall?*

(2) You may have answered this above but, are you aware that she found it difficult to find someone internally to add a picture on to the leaflet?

(3) If you were aware of this do you know how she resolved the issue?

(4) Do you know whether she sought permission from the then Centre Manager John McClure in order to address the issue?

(5) If you are aware that she sought permission from the then Centre Manager can you state how you are aware of this?"

39. Yvonne Burley responded to Parmeet Jagdev by email dated 30 August 2016 (P35) as follows:-

"*In response to your email, I have answered your questions to best of my ability and provided information from what I can clearly recall from the past events which you refer to.*

I was aware of the `Talk Mates` project that Miss King was proposing and had many discussions with her in relation to this. I had given her some evidence based literature on the benefits of peer led support systems, which I had previously researched and along with a colleague had worked on a similar type project. I recall Miss King being enthusiastic about this project and informing me about the positive feedback from her discussions with detainees, some of whom were keen to help with the implementation of the project. I had several discussions with Miss King in relation to the project and she seemed dedicated in implementing the project as to have a positive impact upon the detainees. Sometime later I recall Marni giving me the paperwork back, which I had given her relevant to her project.

I am unable to recall any discussion with Marni in relation to difficulties about adding a picture onto the leaflet specifically, although I do have some recollection from discussions with Marni whereby she had mentioned to me how she had spoken to a detainee about the leaflets, and from this informed me how the detainee`s son had expertise relevant to the design/creation of leaflets and I recall Marni perceiving this be of some value. I recall her informing me about email communication in order to use the expertise she had spoke about, and that she would have to obtain permission from the centre manager and referred to `up the stairs` and `John`. I am unable to recall whether she had exactly sought permission, although I do remember some discussion whereby she spoke of obtaining permission in relation to this.

I was aware she had saught (sic) permission initially in relation to the actual implementing of the project from the centre manager. I do recall Marni telling me previously that she had informed the centre manager about her proposals to take forward the `Talk Mates` project and I recall that she had perceived her proposal to have been given the `go ahead`. I hope this information is helpful with regards to your investigation. Please don`t hesitate to contact me if I can be of any further assistance."

40. Parmeet Jagdev was not persuaded from the evidence of the claimant, the submissions from her trade union representative and the additional information obtained from Yvonne Burley that the claimant had obtained authority from John McClure to contact the detained person`s son. She contacted John McClure by email of 8 September 2016 (P38). She referred to having had sight of a statement he had provided to Andy Grieve. Her email (P38) contained the following questions:-

"*1. Did you give permission for Marion to seek external assistance for the leaflet she was producing for the Centre? If so who did you think she was contacting?*

2. Can you confirm that you did not give permission for Marion King to email the detainee`s son for assistance with the leaflet?

3. In your conversation with Andy you stated you forbade Marion involving (the detained person) on the project. Can you explain why you felt forbidding this was necessary? Why did you think she would involve him?"

41. John McClure responded to Parmeet Jagdev by email on 8 September 2016 (P38). He stated that he had agreed to speak to Andy Grieve "*off the record*" as a personal favour to Sarah Lynch. He stated that he had made it clear to

Andy Grieve that he did not think it was appropriate for him to get involved in another company`s internal disciplinary process and was surprised that Parmeet Jagdev had referred to a statement as he had not provided one. He referred to having a chat on the telephone with Andy Grieve at Sarah Lynch`s request which he had understood was background information and not a statement to be used in an internal disciplinary process. John McClure did not respond further or answer Parmeet Jagdev`s questions.

42. Parmeet Jagdev was not persuaded that management would agree to an officer providing a detainee's relative with their e mail address. She was not persuaded that the detained person could have obtained the claimant's e mail addresses from parcels delivered to Dungavel House or that he would have paid for them. She was not persuaded that the investigation was flawed or the disciplinary procedure followed by the respondents had been in breach of the ACAS Code of Practice.

43. From her own investigations and the information before her including the claimant's evidence, submissions made on behalf of the claimant and the information provided by Yvonne Burley and Sarah Lynch, Parmeet Jagdev was not persuaded that she should overturn the decision to dismiss the claimant. She considered the claimant's length of service and disciplinary record. She had regard to the respondents' Disciplinary Procedure (P12) and the Detention Centre Rules 2001. She was satisfied that Andy Grieve was entitled to conclude from the evidence before him that the claimant had contacted the detainee`s son without obtaining authority from her Centre Manager and had provided the detainee`s son with her work and personal email addresses. She was satisfied that Andy Grieve was entitled to conclude that the claimant's contact with the detainee's son could have compromised her safety and was a serious breach of Rule 51 of the Detention Centre Rules 2001. She was satisfied that Andy Grieve was entitled to conclude that the claimant`s conduct was sufficiently serious to amount to gross misconduct in terms of the respondents' Disciplinary Procedure (P12). Parmeet Jagdev decided to uphold the original decision. She wrote to the claimant by letter

dated 15 September 2017 (P39/181 - 187) to confirm the outcome of the Appeal Hearing. She gave her reasons for refusing the claimant`s Appeal as follows:-

"***Length of Service and Previously Unblemished Record***

During the appeal you claimed that the severity of the original sanction was your overriding ground of appeal. You stated that this was your first misdemeanor and that your good record should be considered. You suggested that someone with a poorer record could have been dismissed for this misconduct.

I accept your point about your long service and having inspected your personnel file, I can confirm that prior to this disciplinary process, you have received no previous sanctions as a result of misconduct. I have given careful consideration to this point of appeal and whilst I am mindful of your long service and previous record, GEO has a very clear disciplinary policy in place. In order to ascertain whether or not this point of appeal was upheld, I examined the specific wording of the policy, which states that `Cases of gross misconduct will normally, irrespective of any previous warnings, result in summary dismissal (i.e dismissal without notice or pay in lieu of notice).'"

Furthermore, as you are aware, the Company is required to comply with the Detention Centre Regulations 2001 which are a statutory instrument and are laid down by Parliament.

The Regulations state that:

`45(1) It shall be the duty of every officer to conform to these Rules and the rules and regulations of the detention centre, to assist and support the manager

in their maintenance and to obey his lawful instructions.

(2) An officer shall inform the manager and the Secretary of State promptly of any abuse or impropriety which comes to his knowledge.`

In particular, Detention Centre Rule 51 states:

`No officer shall, without the authority of the Secretary of State, communicate with any person whom he knows to be a former detained person or a relative or a friend of a detained person of former detained person in such a way as could compromise that officer in the execution of his duty or the safety, security or control of the centre.`

The Company in weighing up the correct sanction had to place a greater onus on the strict adherence to this rule. Given the sensitive working environment, where Employees deal with potentially high risk and highly vulnerable individuals, there can be no deviation from the clear guidance in this rule. The knock on ramifications of not doing so are so potentially serious, to the reputation of the Company and to our relationship with the client, the Home Office, that we cannot allow for a one off deviation from the rules.

Detention Centre Rules is a topic on the Initial Training Course which you completed when you joined. A full copy of the rules are available in several locations on the K Drive for staff to access, they are referenced, some rules specifically, in the Local Security Strategy (LSS) also available on the K drive with additional references to the gov.uk website where the rules can be found. Managers and staff are regularly reminded of the importance of adhering to the LSS via emails from Senior Managers, Daily Briefing Sheets and Weekly Bulletins.

Having considered your comments, I would expect that someone with your length of service would have the requisite experience and awareness to know that any contact with a detainee`s family member is a serious breach of DC Rule 51 as well as the importance of adhering to DC Rule 51 in itself.

During the appeal you presented evidence (statements from Bryan Hoffin and a detainee family friendly contact). I have considered this evidence and feel that in Bryan`s examples either: the detainee passed the phone to the Employee and the Employee called the detainee`s family, or the Employee spoke to the visitor whilst they were in the Centre. Only one example demonstrated the staff member making direct contact with a relative which was a specific instance of a detainee being on an ACDT as you mentioned during the appeal hearing. In none of Bryan`s examples does he indicate members of staff provide contact details to a detainee or their relatives.

Therefore I do not uphold this point of appeal.

Permission Granted by Senior Manager

The next point of your appeal which I wish to deal with is that you claimed the ex-Centre Manager, John McClure had given you permission to contact the detainee`s son. You stated that John was aware that you had been emailing the detainee`s son. You also claimed that your line manager Sarah Lynch was aware of this. Having investigated your claims, I can find no reference of you alleging Sarah was aware of your contact with the detainee in any of the previous investigation minutes or disciplinary Hearing minutes. I do not believe that you have provided evidence to prove that Sarah was aware. You also did not provide any further clarification during the Hearing to support this statement.

In relation to John McClure expressly authorising your contact with the detainee`s son, you stated that the leaflet you were tasked with completing had been mentioned in morning meetings where management and other members of staff were present.

Following the Hearing, I contacted Yvonne Burley, RMN from Healthcare, who you suggested would corroborate your claim that you had sought and received permission from management to contact the detainee`s son. Yvonne provided me with a statement in which she stated that she had discussion with you and that you had mentioned the detainee`s son had particular technical expertise that you felt would be valuable in helping you create the leaflets. She also stated that you discussed using e-mail communication to use the expertise and would need to obtain permission from the centre manager. Yvonne clearly stated however that she was `unable to recall whether she exactly had sought permission`, in reference to you. As such, I do not believe that the additional evidence you provided conflicts with the evidence that the decision to dismiss you was based upon

John McClure provided a statement in which he was vehement in his denial that he had authorised you to contact the detainee`s son. He categorically states that he was never aware of whom you had asked to work on the graphics and indeed goes onto say that he had suggested a third party, however, you told him that you had someone who could provide their services for free. He also states that had he known you were using the detainee`s son for this work, he would never have allowed it.

There is no other evidence to suggest that John authorised any other Employee to contact relatives of detainees in this manner, I have spoken with several Employees who have not raised this issue when I asked them.

Having considered all of the above information, I do not feel that there is sufficient evidence to uphold this point of appeal. Based on the evidence at hand, I believe that Andy Grieve had a genuine belief that you had contacted the detainee`s son without obtaining permission from John or anyone else in management and that as such, given the Company`s adherence to the Detention Centre Rules, your summary dismissal was proportionate.

Alternative Means of a Detainee Gaining Your Personal Information

You also suggested during the Appeal Hearing that the detainee may have obtained your contact details in another way.

You provided a narrative suggestion that your email addresses could have been copied from delivery notes or packages that your brought into work. You explained that sometimes detainees helped with deliveries. You also told me that items sometimes came wrapped up inside their exterior packaging and that the delivery details were often in this interior wrapping. It was therefore your assertion that the detainee could have obtained both of your e-mail addresses in this manner.

You supplied me with an invoice from Achica in support of this theory which contained your name, your home address and your mobile phone number. I note that this did not contain your e-mail address, either the private or work ones which were found in the detainee`s possession.

I find it unlikely that a detainee would have access to both of your e-mail addresses, even if they had taken possession of a delivery note which did have your e-mail address on it. For the detainee to have both of your e-mail addresses, they would have needed to do this at

least twice, whilst you would have had to use alternating e-mail addresses. I also note that the detainee did not have your phone number or your home address, even though these are normally on the label of any package as well as contained on a delivery note, such as the one you provided from Achica.

You also stated that a detainee could have paid for this information. You were unable to substantiate this assertion with any evidence. I do not find it plausible that a detainee would pay for information about your, only to obtain your e-mail address. I would expect that any persons obtaining details in this manner would seek to have much more comprehensive notes and details, as alluded to above, your name, telephone number and home address for example.

The Investigation

You also wished to question the nature of the investigation. In summary, you felt that Sarah Lynch ought not to have been the investigating manager as she was your line manager and a key witness. Having read through the investigation minutes, I note that you did not suggest at any point to Sarah that she was aware of your seeking permission to contact the detainee`s son. I find this unusual as it could have been reasonably expected that a person in your situation alerted the investigating officer to the fact that they were aware of any prior authorisation, thus taking the opportunity to rectify the situation and exonerate themselves at the earliest opportunity.

You also stated that your direct line manager should not have been the investigating officer. There is no section in the ACAS Code on Disciplinary and Grievance Procedures which state this. The Code states that consideration is given to the size of the Employer and the resources available to it. Will Cairns, Senior Manager – Security and Operations, was initially tasked with conducting your investigation

however he left the Company prior to its commencement. With small ST team Sarah was then deemed the most appropriate manager, as the Code also states that wherever possible in misconduct cases, separate people should act as the investigating officer, the disciplining manager and the appeal hearer,

Therefore, I can find no breach of the ACAS Code in relation to the investigation.

You also stated that the investigation report ought to have been more than 3 pages long. The report included copies of the detainee`s note book which contained both of your e-mail addresses, a statement from the detainee, your statement, a copy of the `Talk Mates` leaflet, details of a cake purchase as well as an overview and summary, including recommendations by the investigating officer which ran to 12 pages in total. You did not provide the names of any witnesses or suggest anyone else be interviewed at this stage. I believe that the investigation was, therefore, comprehensive.

I note that during your Appeal Hearing you also pointed to the fact that the investigating officer commented that `it would appear no malice or unprofessional relationship can be established` However, in the recommendations, the first recommendation is that formal disciplinary proceedings be instigated. I also refer you to the specific wording of DC Rule 51 which clearly states that there ought to be no communication with a detainee`s relatives which would compromise an officer`s duties. Whether an unprofessional relationship currently exists or if there is any malice is not the crucial issue."

44. Parmeet Jagdev confirmed to the claimant that she was satisfied that she had not attended the theatre in London because the detainee`s daughter was involved in the production.

45. The claimant was a popular employee and colleague. She was committed to the welfare of detainees and enjoyed her work. She was distressed at being dismissed and was too unwell to look for work immediately following her dismissal. She was in receipt of Universal Credit. She has obtained alternative employment as a retail Customer Associate from which she is in receipt of an income of around £150 per week.

SUBMISSIONS

RESPONDENTS' SUBMISSIONS

46. Ms Kemmett on behalf of the respondents submitted that the Tribunal should find that the claimant was fairly dismissed for conduct in breach of the respondents` Code of Conduct and Rule 51 of the Detention Rules 2001. Specifically, the claimant was guilty of allowing personal information to become known to a detained person through unauthorised contact with his son. The Tribunal should accept the respondents` position that the unauthorised conduct placed the claimant in danger of manipulation by a detained person with a criminal and violent past.

47. Ms Kemmett asked the Tribunal to prefer the evidence of the respondents' witnesses, John McClure and Sarah Lynch to that of the claimant. She questioned the relevancy of the evidence of Yvonne Burley and Heather Bryson to the issues before the Tribunal.

48. Referring to the authority of **Burchell v British Home Stores Ltd 1980 ICR 303**, Ms Kemmett submitted that both Andy Grieve and Parmeet Jagdev had a genuine belief in the claimant`s guilt. Their belief was based on the claimant`s own evidence that she sent an email, which was likely to have been her personal email, and that this was the most reasonable explanation. In these circumstances submitted Ms Kemmett the respondents had

reasonable grounds to conclude that the claimant was guilty of the misconduct in question. Ms Kemmett referred to the risks of conditioning in circumstances where personal information was passed to detainees.

49. Ms Kemmett identified the issues that had to be determined by the respondents as follows:-

(1) Did the disclosure happen?

(2) Was it authorised? &

(3) Did it have the potential to compromise the claimant?

50. For the reasons referred to above, submitted Ms Kemmett, the respondents have established from the claimant`s evidence that she disclosed her e mail address and that it was most likely from contact with the detainee`s son. As regards authorisation, there was conflicting evidence from the claimant and John McClure. The claimant stated at the Disciplinary Hearing that she had authority. John McClure was unequivocal that he did not give her authority. He also denied any knowledge of the claimant having contacted the detainee`s son and it was his evidence that he would not have expected her to do so. The respondents had to decide which version of events to believe. Ms Kemmett submitted they had no reason to doubt John McClure. He described normal practice. The respondents were also entitled to take into account that the claimant only provided mitigation at the Disciplinary Hearing. She had ample opportunity before then, submitted Ms Kemmett, particularly during the investigation to explain that she had obtained John McClure`s authority. She did not report that there had been contact between them. It was therefore reasonable for the respondents to conclude, submitted Ms Kemmett, that John McClure as opposed to the claimant had given the correct version of events. Nothing further was produced at the Appeal Hearing to suggest that the evidence upon which Andy Grieve made his decision could be successfully challenged.

51. As regards whether disclosure of her email had the potential to compromise the claimant, Ms Kemmett submitted that the claimant did not have to be compromised for there to be a breach of Rule 51. There had to be the potential. Ms Kemmett referred to the unique environment in which the claimant was employed to work. It is a custodial environment. Ms Kemmett referred to the evidence from John McClure and the claimant of the fundamental rule that officers do not share personal details with detainees. Ms Kemmett referred to evidence from other witnesses regarding security risks. Those risks are the reason why Rule 51 is so important, submitted Ms Kemmett. Ms Kemmett referred to the detained person in question being highly manipulative and having a serious criminal background. Ms Kemmett referred to the claimant`s evidence about other detainees having tried to break IT security. Ms Kemmett submitted that the respondents were entitled to conclude that there was the possibility of the claimant being compromised and that the risk was very real.

52. Ms Kemmett described the investigation undertaken by the respondents as being thorough and sufficient. She submitted that there was "*no stone left unturned*" by the respondents in their attempt to explain the claimant`s actions.

53. Referring to the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17**, Ms Kemmett reminded the Tribunal that it was irrelevant what it would have done in the same situation. The decision to dismiss fell within the band of reasonable responses. Ms Kemmett also reminded the Tribunal, under reference to the case of **Chubb Fire Security Ltd v Harper 1983 IRLR 311**, that it must not have regard to the consequences on the claimant of the dismissal when deciding upon its fairness or otherwise. Ms Kemmett referred to the case of **London Ambulance Service NHS Trust v Simon Small 2009 EWCA Civ 220** in relation to the issue of substitution. The Tribunal should disregard evidence which the claimant sought to rely on to clear her name and which was not available to the respondents at the time of deciding

whether or not she should be dismissed. It was necessary, submitted Ms Kemmett, to have regard to the particular and unique environment in which the claimant was working when considering whether the decision to dismiss for the misconduct in question was within the band of reasonable responses.

54. In response to any complaint of procedural unfairness, Ms Kemmett submitted that the respondents followed a fair procedure which exceeded that required by the ACAS Code. Ms Kemmett submitted that there was no identifiable unfairness in the change of investigating Officer and that from her evidence the claimant appeared to have no real concerns about Sarah Lynch taking over responsibility when Will Cairns left the respondents' employment. Ms Kemmett rejected any suggestion that suspension of the claimant's Home Office authorisation was evidence of predetermined guilt. It was a requirement on the part of the respondents to inform the Home Office of the claimant's suspension and the Home Office`s decision to suspend her authorisation.

55. Ms Kemmett referred to the two meetings held during the investigation and the notes of both meetings. She drew to the Tribunal's attention that there was no record of the claimant challenging her use of the words "*foolish*" or "*remorseful*" during the meetings. It is noteworthy submitted Ms Kemmett that the claimant subsequently relied on her remorse to argue at the Appeal Hearing that the sanction of dismissal was too harsh. Ms Kemmett submitted that the claimant not receiving reports of the initial inspection and search of the detained person's room (P122) before the Disciplinary Hearing did not amount to procedural unfairness**.** The claimant was provided with adequate information about the allegations made against her in advance of the Disciplinary Hearing, submitted Ms Kemmett. Whether or not the Tribunal found that the discussion between John McClure and Andy Grieve was "*off the record*" was irrelevant to the fairness or otherwise of the procedure followed by the respondents. There was no requirement in the ACAS Code that an investigation must follow a particular format, submitted Ms Kemmett. John McClure had confirmed that the note of their discussion was accurate.

The respondents could not ignore this information. It carried evidential weight regardless of how reluctant John McClure had been to provide it. It was noteworthy, submitted Ms Kemmett, that when information was provided to the claimant about John McClure that she proceeded to question his credibility. The evidence before the Tribunal of Yvonne Burley being prevented from providing a statement by her line manager was only disclosed at the Appeal Hearing, submitted Ms Kemmett. It was not known to Andy Grieve. In any event, it was irrelevant to whether the claimant should be dismissed. Yvonne Burley was not an employee of the respondents. Her evidence would have made no difference to the outcome of the Disciplinary Hearing. The respondents took into account alleged inaccuracies identified by the claimant in the record of meetings. It was not credible that the claimant had previously requested changes to be made. In all the circumstances submitted Ms Kemmett the claimant`s dismissal was fair and her claim should be dismissed.

56. As regards remedy, in response to the request for reinstatement, Ms Kemmett submitted that given the passage of time and the nature of the dispute between the parties this would not be reasonably practicable. The respondents only operate at Dungavel House and it was unclear, submitted Ms Kemmett, how the claimant could be reintegrated into the workplace. The respondents are unable to employ officers without authority from the Home Office and there was no guarantee that in the circumstances this would be provided. In the event of a finding of unfair dismissal, Ms Kemmett submitted that both the basic and compensatory awards should be reduced by 90% to reflect contribution. If the procedure followed by the respondents is found to be unfair, submitted Ms Kemmett, applying the principles in the case of **Polkey v A E Dayton Services Ltd 1987 IRLR 503** the Tribunal should find that the procedural errors made no difference, the claimant would have been dismissed in any event and compensation should be reduced by 100%. Ms Kemmett questioned the extent to which the claimant had sought to mitigate her loss. She disputed that there had been any breach of the ACAS Code of

Practice and submitted that any uplift to compensation sought by the claimant should be refused.

CLAIMANT'S SUBMISSIONS

57. Mr McPhee on behalf of the claimant submitted that there was a lack of proper investigation by the respondents before deciding to dismiss her. At her first interview, the claimant had been distraught. At the next meeting, there was a discussion about what Mr MacPhee referred to as "*the leaflet problem*". It was not in dispute that this had happened months previously, around October 2015. Despite this, there was lack of effort by the respondents to check the position, submitted Mr MacPhee. The respondents are not a small organisation and have internal facilities which would have allowed them to check what might have happened. They chose not to check any email traffic, submitted Mr MacPhee. In any event the leaflet was only raised by the claimant as a possible way in which the detained person obtained her email address. There was no contact by the respondents with John McClure at that stage. Contact only took place after the Disciplinary Hearing.

58. Mr MacPhee challenged the fairness of the investigation. In particular, the claimant received no documentation. Mr MacPhee accepted that there was no obligation on the part of the respondents to provide documentation at this stage and that Sarah Lynch had also not received an incident report. He questioned how on this basis the investigation could be as thorough as was reasonable in all the circumstances. It was the claimant, submitted Mr MacPhee, who had mentioned "*the leaflet problem*" and of sending the leaflet to the detainee's son. While the claimant had not raised any concerns herself about Sarah Lynch conducting the investigation it could be argued, submitted Mr MacPhee, that Sarah Lynch was too close to her. It should also be taken into account, submitted Mr MacPhee, that the claimant had an unblemished record and it would appear surprising therefore that Sarah Lynch would recommend disciplinary action especially without having fully investigated the matter.

59. Turning to the Disciplinary Hearing, Mr MacPhee submitted that the Tribunal should have regard to Andy Grieve`s conduct and his lack of credibility. Mr MacPhee referred to Andy Grieve's answers to the line of questioning about Will Cairns which he described as evasive and his reluctance to accept any involvement. Mr MacPhee also drew to the Tribunal's attention Andy Grieve's evidence when pressed about a previous interview meeting with the detained person and his eventual concession that it may have happened. Mr MacPhee submitted that Heather Bryson`s evidence was relevant. It was not challenged in cross-examination. He referred to her evidence about a previous interview with Will Cairns which again, submitted Mr MacPhee, undermines the credibility and reliability of Andy Grieve's evidence. Andy Grieve, submitted Mr MacPhee, should not have been involved in interviewing the detained person and the Disciplinary Hearing. This was a basic principle of fairness.

60. Mr MacPhee referred the Tribunal to the particulars of claim. He submitted that Andy Grieve appeared to be of the belief that the officers were forbidden from having contact with detainees. This was clearly not the case. It was an important role for the staff. Mr MacPhee submitted that the respondents understanding of Rule 51 was critical to the case. They believed, submitted Mr MacPhee, that there was a prohibition on contact between staff and detainees, or detainee`s relatives. He gave the example of text messaging as an example of contact which would be of legitimate concern to the Home Office and covered by Rule 51. In this case, the contact amounted to an attachment to an email. The claimant had inadvertently disclosed her personal email address. On one level it was contact submitted Mr MacPhee but there is a qualification in Rule 51 in particular whether it would compromise the officer. In this case he submitted that was not the case.

61. Mr MacPhee submitted that the Detention Centre Rules date from 2001 when there would have been limited email correspondence. He submitted that arguably email correspondence was safer than other methods of

communication given that there is a trace. There is no requirement to respond. Mr MacPhee submitted that there was no evidence that the claimant`s actions were compromising. Parmeet Jagdev, submitted Mr MacPhee could only give the example of bribery. This would be just as possible submitted Mr MacPhee by the other means of communication.

62. Mr MacPhee submitted that Parmeet Jagdev had limited experience of Appeal Hearings. This was her first. She was still carrying out the investigation during the Appeal process. This was the first occasion on which Yvonne Burley was permitted to give evidence. Mr MacPhee disputed that her evidence was irrelevant. It supported the claimant's explanation of "*the leaflet problem*". It was only at the eleventh hour that contact was made with her by the respondents.

63. Mr MacPhee referred to the contact with John McClure as being an "*off the record*" discussion. He referred to Andy Grieve's evidence of forming the impression that John McClure had indicated to the claimant that he had given permission to the claimant to obtain outside help and that she should "*just get it done*". This was consistent with the claimant`s position, submitted Mr MacPhee. Even if John McClure did not give permission, submitted Mr MacPhee, he knew that emails were being sent. The Tribunal should also take into account, submitted Mr MacPhee, that the claimant sent the emails as part of a job. She did not disclose any further information. She was not putting herself at risk. The detainee`s son sent the information to someone else.

64. Mr MacPhee referred the Tribunal to the case of **Ladbroke Racing Ltd v Arnott 1983 IRLR 154** in which Lord Dunpark in the Inner House stated that an employer may not have acted reasonably if they summarily dismiss an employee for breach of a company rule for which the stated penalty is instant dismissal. It will depend on all the circumstances of the case including equity and the substantial merits of the case. In this case, submitted Mr MacPhee, there was no reference in the claimant`s terms and conditions of employment

that sending an email to a detainee`s relative would result in dismissal. It was necessary to look at all of the circumstances and in particular that the email was sent in the course of the claimant's employment. The claimant`s conduct at best for the respondents was misconduct, submitted Mr MacPhee. It was not gross misconduct.

65. In relation to the allegation concerning the theatre visit, Mr MacPhee submitted that again it was not fully investigated by the respondents. It was left to the claimant to prove that it was no more than a coincidence and that there had been no inappropriate contact. Mr MacPhee submitted that it was evidence of the respondents "*looking for some other reason*" and demonstrated a predisposition to dismiss the claimant. The same could be said of the allegations against the claimant in relation to the birthday cake.

66. Mr MacPhee challenged the respondents position that in their investigation "*no stone was left unturned*". He submitted that the investigation could have been much more thorough in particular in relation to how the claimant`s personal email came into the possession of the detained person. There was no evidence of conditioning submitted Mr MacPhee. The claimant is well aware of the risks of working with detainees. The claimant volunteered the information. As described by the claimant, the respondents then "*ran with it*". The fact that the detained person had her email address did not create a line of communication between him and the claimant. There was no suggestion from the respondents of an improper or unprofessional relationship between the claimant and the detained person.

67. Rule 51, submitted Mr MacPhee, is a qualified prohibition. The Tribunal must ask itself how the claimant could have been compromised. There was no evidence of any improper relationship. The claimant was dismissed submitted Mr MacPhee because of her level of commitment to the job. She was anxious to get the leaflet out. She was doing what John McClure wanted her to do. Although there has been a breach of procedures, Mr MacPhee submitted, it did not amount to gross misconduct.

68. Mr Macphee disputed that there had been any contributory fault on the part of the claimant. In relation to the application for a 25% uplift for breach of the ACAS Code, Mr MacPhee referred to the failure on the part of the respondents to produce an incident or target search report and the production by the respondents of statements (P17 & P18) too late in the process. In conclusion, Mr MacPhee submitted that the claimant was doing her job. She was not guilty of misconduct. Her dismissal was unfair.

ISSUES

69. The issues to be determined by the Tribunal were as follows;

(i) What was the reason for the claimant's dismissal?

(ii) If the claimant was dismissed for gross misconduct, did the respondents believe that the claimant was guilty of that misconduct and did they have reasonable grounds for their belief having carried out as much investigation into the matter as was reasonable?

(iii) If the claimant was not dismissed for gross misconduct was the reason some other potentially fair reason which the respondents were entitled to treat as a sufficient reason for dismissing her?

(iv) If the claimant was dismissed for gross misconduct or some other potentially fair reason, did the respondents follow a fair procedure including compliance with the relevant ACAS Code of Practice when disciplining and dismissing the claimant?

(v) If the claimant was dismissed for gross misconduct or some other potentially fair reason did the respondents, having regard to equity and the substantial merits of the case, act reasonably in treating the claimant's misconduct as a sufficient reason to dismiss her?

(vi) If the claimant was unfairly dismissed what if any compensation should be awarded to her having regard to the issues including contribution and procedural unfairness in terms of **Polkey**?

DISCUSSION & DELIBERATIONS

70. In terms of Section 94 of the Employment Rights Act 1996 (ERA 1996) the claimant had the right not to be unfairly dismissed. Section 98 ERA 1996 provides that it is for the respondents to show the reason (or, if more than one, the principal reason) for the claimant`s dismissal. The Tribunal was satisfied that the claimant was dismissed for allowing her personal and work email addresses to come into the possession of a detained person, having disclosed them to the detained person's son without authority. This is a conduct related reason. The respondents concluded that by disclosing her email addresses, the claimant had communicated with a detainee's relative in such a way that could have compromised her safety and was a serious breach of Rule 51 of the Detention Centre Rules 2001. While the claimant disputed that the respondents had reasonable grounds for concluding that she was guilty of the alleged misconduct, she did not advance an alternative reason for her dismissal. In all the circumstances, the Tribunal was satisfied that the reason for dismissal related to the claimant`s conduct. This is a potentially fair reason in terms of Section 98(2)(b) of ERA 1996.

71. When determining whether the claimant`s dismissal was fair or unfair for a reason relating to her conduct, the Tribunal had regard to Section 98(4) of ERA 1996 and whether in the circumstances (including the size and administrative resources of a respondents' undertaking) the respondents acted reasonably or unreasonably in treating the claimant`s conduct as a

sufficient reason for dismissing her. This must be determined in accordance with equity and the substantial merits of the case.

72. The reason for dismissal being conduct related, the Tribunal had regard to the threefold test set out in the case of ***Burchell –v- British Home Stores Ltd [1980] ICR 303*** in terms of which the respondents must show that it believed the employee was guilty of misconduct; it had in mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

73. The Tribunal was satisfied that Andy Grieve as the dismissing officer genuinely believed that the claimant was guilty of providing a detainee's son with her work and personal email address and that she had done so without authority in breach of Rule 51 of the Detention Centre Rules 2001. The Tribunal found his evidence to be credible and reliable. While he was hesitant when answering some of the questions put to him in cross-examination, primarily in relation to exchanges with Will Cairns, the Tribunal was not persuaded that this undermined his evidence that he believed the claimant to be guilty of a serious breach of professional conduct that could have compromised her safety. The Tribunal was also satisfied that Andy Grieve had reasonable grounds upon which to sustain his belief based upon the information before him at the time of reaching his decision which included Sarah Lynch's investigation, the evidence of the claimant at the Disciplinary Hearing and the information provided to him by John McClure.

74. The claimant challenged the fairness of the respondents' investigation. She questioned the procedural fairness of the respondents being unable to provide her with the fabric and incident reports which led to the discovery of her email addresses amongst the detained person's paperwork. The Tribunal was not persuaded that in the circumstances of this case, any failure on the part of the respondents to produce the above reports amounted to an irregularity sufficient to make the investigation unfair. It was unclear how the

situation would have differed had the claimant been provided with the fabric and incident reports detailing the discovery of the email addresses. The claimant did not dispute that her e mail addresses where discovered amongst the detained person's paperwork. There was no suggestion that they had been placed in the detained person's room by a third party. The detained person, when interviewed as part of the investigation, did not deny being in possession of the claimant's email addresses. It was necessary in these circumstances for the respondents to investigate how they came to be in his possession.

75. The Tribunal was also not persuaded that the respondents' investigation was not sufficiently thorough. While it was not in dispute that the claimant was extremely upset and agitated at various stages during the procedure, the Tribunal was satisfied that she understood the matter under investigation. It was the claimant who advanced the explanation for the detained person being in possession of her email addresses. It was the claimant who informed the respondents about contacting the claimant's son and providing him with her email addresses. In these circumstances, the Tribunal was not persuaded that the respondents failed to fully investigate how the detained person obtained the claimant`s email addresses.

76. The respondents had reasonable grounds to conclude, on the evidence before them, that the detained person was in possession of the claimant's email addresses. They had reasonable grounds to conclude, based on the claimant`s own evidence, that the detained person was in possession of the email addresses because she had provided them to his son. The Tribunal was not persuaded that in these circumstances the respondents were required to undertake any further investigation into the matter including checking any email traffic with the detained person`s son, the detained person or any other officer based at Dungavel House.

77. The Tribunal was not persuaded that Sarah Lynch's professional relationship with the claimant should have precluded her from undertaking the

investigation. The Tribunal was satisfied that she had undertaken a fair and balanced investigation. In her report (P20) she highlighted the fact that "*no malice or unprofessional relationship*" could be established. She advanced mitigating circumstances in support of the claimant, in particular the claimant's contrition. The Tribunal did not agree with the claimant's submission that had Sarah Lynch attached sufficient weight to her unblemished disciplinary record that she would not have recommended that the matter under investigation proceed to a disciplinary hearing.

78. As regards the Disciplinary Hearing, the Tribunal was satisfied that Andy Grieve followed a fair and thorough procedure. The Tribunal was not persuaded that he had formally interviewed the detained person or otherwise participated in the investigation. The claimant was allowed the opportunity to answer the allegations made against her. She was accompanied by a trade union official who was allowed to make representations on her behalf. It was at the Disciplinary Hearing that the claimant mentioned that she had obtained authority from John McClure to contact the detained person`s son. The claimant did not dispute that she had provided the detained person's son with at least her personal e mail address. It was her position at the Disciplinary Hearing that she had authority not only to contact the detained person's son but also to provide him with her e mail addresses. It was not unreasonable in these circumstances for Andy Grieve to make contact with John McClure. There was no reason advanced as to why John McClure would not support the claimant's position. The claimant was critical of the respondents for not having contacted him before. The basis for her criticism was unclear given that she first mentioned obtaining his permission during the Disciplinary Hearing.

79. While the Tribunal recognised that John McClure was a reluctant witness who did not wish to become involved in the respondents' internal proceedings, it was not in dispute that he provided the respondents with evidence that he did not authorise the claimant to contact the detained person`s son or for that matter to provide him with her work and email addresses. The claimant was

unable to provide a convincing explanation as to why she had provided the detained person`s son with her private email address. It was her position that it was not an unusual occurrence for detainees to have officers' work email addresses. There was however insufficient evidence before the Tribunal to establish whether this was the case and if so, whether the officers concerned had obtained authority to disclose their work email address to detainees.

80. The Tribunal was satisfied that Andy Grieve was entitled to prefer the evidence of John McClure to that of the claimant. There was no reason advanced as to why John McClure would give evidence to prejudice the claimant. He could recall the claimant working on the Talk Mates project and that the claimant had raised the issue of graphics for the leaflet with him. His evidence was consistent throughout that he did not give the claimant authority to contact the detained person`s son and provide him with her email addresses.

81. The Tribunal was satisfied that the respondents were entitled to conclude that the claimant`s conduct of disclosing her e mail addresses to the detained person's son was a serious breach of Rule 51 of the Detention Rules 2001. The Tribunal did not accept the claimant`s submission that the respondents applied Rule 51 as a prohibition on any contact with detainees' relatives. The claimant was aware of the importance attached by the respondents to employees avoiding the possibility of being compromised personally or of compromising safety in Dungavel House generally. Based on her own evidence about concerns over "*hacking*" by detainees of the respondents' system, the claimant recognised that there is the potential for misuse of emails to compromise security. The claimant had sought to explain her conduct by claiming to have obtained authority, an explanation which Andy Grieve had reasonable grounds to reject. He was entitled to conclude that it had not been an accident. In all the circumstances, the Tribunal was satisfied that based on the evidence before him, Andy Grieve had reasonable grounds upon which to sustain his belief in the claimant`s guilt, the respondents having carried out a reasonable investigation. The Tribunal was satisfied that Andy

Grieve exercised his discretion when deciding whether to dismiss the claimant and did not proceed on the basis that there were no circumstances in which she could avoid dismissal.

82. At the Appeal Hearing the claimant provided Parmeet Jagdev with additional information including statements in support of her position that contact was permitted between officers and detainees' families (P162/163) and that Yvonne Burley had been prevented from providing a statement in her defence. The Tribunal was satisfied that Parmeet Jagdev considered the additional information provided by the claimant when reaching her decision to refuse the claimant's Appeal. She did as requested by the claimant and contacted Yvonne Burley and Sarah Lynch. Yvonne Burley, while able to remember some discussion about obtaining permission for email communication with a detained person's son, was unable to recall whether permission was sought or for that matter granted. Her recollection of whether the claimant obtained permission from John McClure to disclose her email addresses was vague and lacked clarity. The Tribunal was satisfied that Parmeet Jagdev was entitled to conclude that Yvonne Burley`s evidence did not support the claimant`s position that she had obtained authority from John McClure to contact the detainee`s son by e mail. The fact that Yvonne Burley had been at least discouraged if not prevented from giving a statement in support of the claimant did not persuade the Tribunal that the respondents had acted unreasonably. This was not a matter within their control. Sarah Lynch had no recollection of the claimant requesting or obtaining permission to disclose her email addresses to the detained person's son.

83. On the basis that the claimant remained adamant that she had obtained permission from John McClure, Parmeet Jagdev sought to contact him to question him herself about whether the claimant had authority to contact the detained person's son. The Tribunal was satisfied that Parmeet Jagdev was entitled to proceed on the basis that she could rely upon the evidence provided to Andy Grieve in circumstances where he refused to be of further assistance with the respondents' internal proceedings and referred to their

discussion as "*off the record*". The Tribunal did not find that the evidence of Sarah Lynch, Yvonne Burley or Andy Grieve to be of assistance to the claimant in establishing that the respondents acted unreasonably in concluding that she had provided the detained person's son with her email addresses without authority. At the Appeal Hearing, the claimant's representative relied upon statements made by the claimant at the Disciplinary Hearing of her regret in relation to the incident. Parmeet Jagdev was entitled in all the circumstances to conclude that the claimant was guilty of the alleged misconduct and that Andy Grieve had acted reasonably when deciding that dismissal was the appropriate sanction.

84. The Tribunal did not accept the claimant's submission that the respondents were "*looking for some other reason*" to dismiss her. This position was not supported by the evidence before the Tribunal. The respondents did not make a finding of wrongdoing in relation to the allegation concerning the claimant's purchase of a birthday cake for the detained person. It was the claimant's partner who had reported contact with the detained person's daughter through her appearance in a theatre production. While it was raised as an issue during the Appeal Hearing, it was not something in relation to which the respondents made any finding against the claimant of wrongdoing. The Tribunal did not agree with the claimant's submission that Parmeet Jagdev displayed her lack of experience in the conduct of the Appeal Hearing. She gave the claimant the opportunity to present her Appeal, undertook a thorough investigation of the issues raised by the claimant and provided detailed reasons for her decision.

85. In terms of procedure generally, the Tribunal was satisfied the respondents had complied with the ACAS Code of Practice (Disciplinary & Grievance Procedures). They carried out an investigation of the potential disciplinary matters without unreasonable delay to establish the facts of the case. This included holding an investigatory meeting with the claimant before proceeding to any disciplinary hearing. The claimant understood the purpose of the investigation and Disciplinary Hearing. Different people carried out the

investigation and Disciplinary Hearing. The ACAS Code of Practice refers to the period of suspension with pay being as brief as possible. The Tribunal did not consider in all the circumstances that in this case the time in which the claimant was suspended from work was unreasonable.

86. The claimant was notified of the disciplinary case to answer in writing (P21). The Tribunal was satisfied the notification contained sufficient information about the alleged misconduct to enable the claimant to prepare to answer the case at a disciplinary meeting. The Tribunal was not persuaded that the respondents acted unreasonably by not providing the claimant with an incident and search report. The claimant was given details of the time and venue of the disciplinary meeting and was advised of her right to be accompanied at the meeting.

87. At the Disciplinary Hearing, the respondents explained the complaint against the claimant and went through the evidence that had been gathered. The claimant was allowed the opportunity to set out her case and to answer any allegations that had been made against her. She was represented by a trade union. The claimant was given a reasonable opportunity to ask questions and present evidence.

88. After the Disciplinary Hearing, the claimant was informed of her dismissal in writing (P26) as soon as possible, when her contract would end and of her right of appeal. The claimant was given the right to appeal against the decision. The Appeal was dealt with impartially and by a member of management who was not previously involved in the case who considered each of the claimant's grounds of Appeal. The claimant was represented by her trade union at the Appeal Hearing. The claimant was informed in writing of the result of the Appeal Hearing as soon as possible.

89. The respondents having reasonably concluded the claimant was guilty of misconduct, the Tribunal went on to consider the sanction of dismissal. In the case of **Iceland Frozen Foods Ltd v Jones 1980 ICR 17**, Lord Justice Brown-Wilkinson stated that it was the function of the Tribunal to determine

whether an employer`s decision to dismiss an employee falls within the band of reasonable responses.

90. In this case, the Tribunal was persuaded that the decision to dismiss the claimant did fall within the band of reasonable responses. The Tribunal was persuaded that the respondents did take into account the claimant`s length of service, unblemished disciplinary record and that she gave the detained person`s son her email address for work related reasons. There was no suggestion of an improper relationship between the claimant and the detained person. The claimant was a popular employee and colleague. It was not in dispute that she was committed to the welfare of detainees and enjoyed her work. The respondents however were entitled to have very serious concerns about the conduct of the claimant and the potential risk to her safety of disclosing her email addresses to a detained person`s son. While there was no evidence of the claimant's safety having been compromised, the respondents were entitled to conclude that the claimant's contact with the detained person's son could have compromised her safety. They were entitled to have serious concerns about the claimant's conduct in the context of her working with detainees in a secure environment. They were entitled to conclude that her conduct was a serious breach of the Detention Centre Rules 2001 under which she was required to operate and the importance and purpose of which she understood. The respondents were entitled to find the explanation provided by the claimant that she obtained authority lacked credibility and in all the circumstances, dismissal for gross misconduct was within the band of reasonable responses.

CONCLUSION

91. The Tribunal concluded that the respondents acted reasonably in treating the claimant`s conduct as a sufficient reason for dismissing her and that in accordance with equity and the substantial merits of the case that the claimant was not unfairly dismissed.

Employment Judge: Frances Eccles
Date of Judgment: 23 November 2017
Entered in register: 27 November 2017
and copied to parties