EMPLOYMENT TRIBUNALS

Claimant: **Mr AR Neill**

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

Heard at: **Hull** **On:** **5 & 6 March 2019**

Before: **Employment Judge Maidment (sitting alone)**

Representation
Claimant: **Mr C Adjei, Counsel**
Respondent: **Mr A Serr, Counsel**

JUDGMENT

1. The Claimant was unfairly dismissed but in circumstances where his basic and compensatory award fall to be reduced by a factor of 75% to reflect his conduct before dismissal.

2. The Claimant was dismissed in breach of contract and is entitled to damages referable to his period of notice.

ORDERS

1. This matter shall be listed for a Remedy Hearing with a time estimate of 1 day. The parties shall inform the Tribunal within 14 days of the date this Judgment and Reasons is sent to the parties of any inconvenient dates from 1 August to 30 November 2019.

2. Within 4 weeks of the date this Judgment and Reasons is sent to the parties the Claimant shall serve on the Respondent (copied to the Tribunal) his Schedule of Loss. The Respondent shall then within 4 weeks thereafter serve on the Claimant (copied to the Tribunal) its Counter Schedule of Loss.

3. The parties shall agree the contents of a Bundle of Documents to be placed before the Tribunal not later than 14 days before the date of the Remedy Hearing.

REASONS

The Issues

1. The Claimant, it is accepted by him, was dismissed arising out of an allegation that he had used excessive force and/or assaulted a prisoner during an incident where the prisoner refused to cooperate when being escorted back to his cell. The Claimant, however, maintains that such dismissal was unfair in terms of their having been an unreasonable investigation, no reasonable grounds for the conclusions the Respondent reached, procedural defects and that the sanction of dismissal was too harsh.

2. The Claimant also complains that he was dismissed without notice in circumstances where the Respondent was not entitled to summarily dismiss him.

Evidence

3. Having discussed the issues with the parties, the Tribunal took some time to privately read into relevant documentation and the witness statements exchanged between the parties. This meant that when each witness came to give his/her evidence he/she could do so by simply confirming the contents of his/her statement and then, subject to brief supplementary questions, be open to be cross-examined.

4. The Tribunal heard firstly on behalf of the Respondent from Jennifer Willis, Governor at HMP full Sutton at the time of the Claimant's dismissal and then from Mr Edward Cornmell, Deputy Director of the Long Term and High Security Estate. He had previously served as a Governor at HMP full Sutton. Finally, the Claimant gave evidence on his own behalf.

5. The Tribunal had the opportunity of viewing CCTV footage of the incident arising out of which the Claimant was dismissed, shown from two alternative camera angles. This was viewed agsin in open Tribunal.

6. Having considered all the relevant evidence, the Tribunal makes the findings of fact as follows.

Facts

7. The Claimant had served as a prison officer from 6 May 2009, firstly at HMP Wandsworth before transferring to HMP Full Sutton, which is a maximum security prison housing over 500 Category A and B male prisoners. As was described by the Respondent, the prison's primary function is to hold some of the most difficult and dangerous criminals in the country in conditions of high security. The Claimant was regarded as being a good prison officer.

8. On 14 April 2017 an incident occurred involving prisoner X. That prisoner was housed in the Respondent's segregation unit for his own and others' safety. There had been instances where he had lost control resulting in acts of violence and destruction. He would often destroy the fabric of his cell and had a history of manufacturing home-made weapons. He had also assaulted members of staff on a number of occasions. The Claimant was well aware of his history and pattern of behaviour. Whilst the Claimant had been moving him into a different cell on one occasion, prisoner X had punched another prison officer and a number of sharp metal and plastic objects had been seen to fall from his waistline to the floor. He had been subject to a significant number of adjudications where he had been found to be in serious breach of prison rules.

9. Recently, prisoner X had smashed the observation panel of his cell causing broken glass to scatter, some of which had not been able to be retrieved. The Claimant suspected that he might seek to use any glass fragment he might have found as a weapon. Prisoner X had been placed on what is known as '*Back Wall Unlock Protocol'*. This meant that when being removed from his cell, he was instructed to back out of it onto a shield for the protection of prison officer staff. He was then required to step away from the door to allow the prison officers to conduct a basic rubdown search before being instructed to walk with his hands gripped onto his trouser legs.

10. On 14 April 2017 at around 4:30pm, prisoner X was taken from his cell in the segregation unit in that manner to walk to the medication hatch. When being escorted he had five prison officers surrounding him. On the way back, prisoner X suddenly sat down on the floor and refused to move. Prison Officer Jamieson, who was acting as the supervising officer in this task, asked him to return to his cell but prisoner X refused. Two prison officers sought to get prisoner X to stand by lifting him from under his arms, but at that point he became, what Miss Willis described as, '*refractory*'.

11. Very quickly he was lying in a prone position facedown with his arms tucked under his body gripping onto his clothing. The Claimant took control of his head and kept instructing him to release his arms to allow staff to take full control of his arms. Prisoner X refused to comply. Whilst doing so he continually abused the prison officers and threatened that he was going to stab or kill them.

12. The Claimant maintained that he had attempted to apply pain compliance techniques to try to force prisoner X to release his arms, but without effect. He then said that he decided that one concentrated knee strike to prisoner X's upper arm might be of more effect. He then delivered a single knee strike following which prisoner X released his arms and he was shortly thereafter escorted back to his cell under restraint.

13. The Respondent operates a policy on which prison officers are trained relating to the use of force. Annual refresher training is a mandatory requirement. This makes it clear that the use of force by one person on another without consent is unlawful unless justified. Justification depends upon a consideration of force being reasonable in the circumstances, it being necessary, no more than necessary force being used and it being proportionate to the seriousness of the circumstances. The policy goes on to state that the interpretation of reasonableness is a key feature concerning a use of force and a matter of fact to be decided in each individual case. Each set of circumstances, it is recognised, are unique and to be judged on their own merits. A distinction is drawn between force used in self-defence and force used because someone has refused to obey a lawful order. It is then important to take into account the type of harm that the prison officer is trying to prevent, ranging from risk of life, risk to limb, risk to property and risk to the good order of the establishment. Whenever the use of force is necessary, only approved control and restraint techniques should be employed unless this is impractical, an example being given of whenever there are less than three officers present. It is then stated: *"The nature of incidents are so diverse that it is not realistic to cover every possible scenario. For this reason, there will always be occasions when individual officers resort to techniques that are not taught in a training session on the use of force. In such circumstances, the actions of the officer will not necessarily be wrong or unlawful, provided that they have acted reasonably and within the law. In all circumstances where force has been employed the individual concerned must be able to account for their own decisions and actions."* A report justifying the use of any type of force must be completed in all cases.

14. The policy encourages conflict resolution and attempting to defuse the situation to seek to avoid its escalation. It is then recognised how controlling a conflict that has escalated beyond verbal reasoning may entail using force and that all staff must make their own decision about how to act in particular situations. When force becomes necessary, control and restraint techniques are always the preferred option.

15. Prison officers, including the Claimant, were taught and refreshed on such control and restraint techniques which to an extent involve methods of inflicting degrees of pain on a prisoner to subdue and restrain him with the ability to escalate the level of pain employed where necessary. Where such techniques are not practicable, the policy recognises that staff must resort to other means of protection and separate 'personal safety' techniques. They might include, for example, the use of batons. Again, an example is given that where fewer than three officers are present, personal safety techniques may be necessary to be employed.

16. The code of conduct for prison officers forbids the provocation or use of unnecessary or unlawful force or assault of a prisoner. The disciplinary policy provides under examples of 'misconduct': *"use of unnecessary force*

on a prisoner". Under the heading of 'gross misconduct' is included "*assault*". The policy goes on to state that serious cases of general misconduct may also amount to gross misconduct if they are of a nature that makes any future relationship and trust untenable.

17. The disciplinary procedures allow for the consideration of any live disciplinary penalty. In terms of penalty, as well as disciplinary warnings, loss of benefits or pay increments are provided as a possibilities, as well as the re-grading of an employee. It is stated that the sanction of dismissal should only be awarded in cases where there is a continued pattern of misconduct or an individual act has meant dismissal is the only option.

18. Immediately after the aforementioned incident with prisoner X, a nurse visited him and observed him through his cell door. She recorded that he was raising no issues or complaint and that he had sustained no injuries during the incident. The Tribunal is unaware of the level of the nurse's inspection of prisoner X. The nurse was not interviewed during the investigatory process, but did appear as a witness at the disciplinary hearing. She was not asked for clarification on this point. Nevertheless, Miss Willis proceeded at the disciplinary hearing on the basis that prisoner X had been uninjured.

19. Immediately after the incident, there was no recognition that anything had occurred which required any form of escalation as a disciplinary matter.

20. The Claimant, along with his colleagues, individually submitted '*Use of Force'* forms. As supervisor, Mr Jamieson reported the use of control and restraint but not of any personal safety techniques. The Claimant's report recognised that he was stationed at the prisoner's head. He described the incident and that he had taken control of the prisoner's head. He described applying pain compliance techniques to assist a colleague gain full control of prisoner X's arm. He went on that after some more pain compliance, the prisoner then gave up his arm. Contrary to the requirements for the completion of this form, no details were given by the Claimant as to the exact techniques used. The Claimant, it is noted, did not refer to any personal safety techniques and certainly not to any knee strike. It is noted that the Claimant's colleagues in completing their own forms also described their actions in general terms.

21. Prisoner X, however, then submitted a substantial number of written complaints, alleging amongst other things that he had been assaulted on 14 April including by being kneed in the face, having his head stamped on and having his throat grabbed. The Claimant was specifically named in the complaints. Miss Willis replied to a number of them saying that she had commissioned an internal investigation. She told the Tribunal that this was by way of an initial fact find by Custodial Manager, Dave Wood.

22. In the meantime, prisoner X was referred to an adjudication hearing before a Judge. This was an option when it was considered that matters were sufficiently serious as to be elevated to a Judge led adjudication, where a range of more severe sanctions were available to impose upon a prisoner in breach of prison discipline. District Judge Fanning conducted this adjudication on 3 May 2016 and found that prisoner X was guilty of a breach of prison rules and of failing to comply with lawful instructions on 14 April. An extra 10 days were added onto his sentence. District Judge Fanning was not charged with determining whether or not an appropriate level of force had been used by prison officers and indeed the conduct of prison officers was a matter of internal discipline.

23. Miss Willis recognised that on her initial viewing of the CCTV footage of the incident, there was no evidence of wrongdoing by any prison officer. However, Mr Wood analysed the footage in greater detail slowing certain sections down before reaching a conclusion that there was a concern regarding the Claimant's role in the restraint of prisoner X. Miss Willis determined that the matter ought to be referred to the police and the Claimant be suspended.

24. On 12 June Miss Willis wrote to the Claimant informing him of his suspension on full pay following an allegation that he had inappropriately used force/assaulted prisoner X. She determined that the seriousness of the offence required suspension rather than placing him on alternative duties. The suspension was to be kept under review and the Claimant was to report by telephone on a weekly basis, which he did until it was made clear that the Claimant could simply provide an email update in terms of his continued availability. The Claimant was made aware that he could submit any representations against his suspension to Mr Cornmell, Deputy Director of the Long Term and High Security Estate. The Claimant made no such representations at any stage.

25. The Claimant's suspension was periodically reviewed by Mr Tempest, Acting Deputy Governor, who wrote to the Claimant on a number of occasions confirming its continuance albeit, contrary to what was required in the Respondent's policies, he did not tell the Claimant the reason for the need to continue to extend the period of suspension.

26. On 15 June Miss Willis appointed Mr Tempest as Commissioning Manager for what would now be a formal investigation. He in turn appointed Mr Neil Cowans, Head of Residential and Safety as the Investigating Officer. It was considered that any investigation ought then to be put on hold until the police had determined what action, if any, they were taking. Mr Cowans was advised by the police on 20 August that, from their point of view, the matter was closed. The detective constable responsible stated: *"In my view the CCTV shows that officers were required to restrain prisoner X and that in order to effectively do this he is taken to the floor. The complaint that is directed at PO Neill is one that he knees prisoner X in the head whilst he is*

on the floor. I do not feel that the CCTV adequately supports his complaint and any movements that I could see on the footage could as easily be the officer adjusting his position."

27. As Mr Cowans was shortly to retire, Mr Tempest appointed Mr Bottomley as a new Investigating Officer. He interviewed the Claimant on 27 September. The Claimant accepted that he had been trained in control and restraint and had attended the annual refresher course. The Claimant expressed his understanding that force was to be used only when necessary and no more force than was necessary. The Claimant did not think that anything had occurred on 14 April which fell outside that requirement. The Claimant was then asked to explain the incident. Whilst explaining this, he said that they believed that prisoner X still had glass secreted on him. The Claimant accepted that he had used pain compliance techniques and when asked how he did that he referred to already having given prisoner X numerous instructions to release his arms and that he was refusing to do so. He went on: *"So I gave him a knee strike to his upper left arm I believe, one knee strike to his arm which helped, he then released his arm after that and Mr Williams could take control."* He was then asked if he had ever been advised that he could use a knee strike in normal control and restraint techniques. The Claimant said that in this case the prisoner was not under full control such that control and restraint hadn't applied at that time. He reiterated that he delivered one knee strike to the upper arm fearing for staff safety due to the prisoner possibly being in the possession of glass. It was put to the Claimant that only approved control and restraint techniques should be used when there was a three-person team present. The Claimant repeated that there was a belief that the prisoner had glass on his person stating: *"He'd become very non-compliant, very aggressive towards staff, making threats towards staff that he was going to hurt staff, stab staff etcetera and I believed, it was my honest belief at the time that we had to gain control of both his arms as quickly as possible so I gave one knee strike to the top of his arms for him to release his arms which he did do."*

28. The Claimant said that he definitely did not bang the prisoner's head on the floor. When asked if he had used other pain compliance techniques he said that he was not one hundred percent sure but may have used a mandibular angle behind his ear prior to the knee strike but that didn't work which is when he decided that, if he hit the direct area of the prisoner's arm with his knee, that might be a better way of getting his arm out from under his body. Mr Bottomley and the Claimant viewed the CCTV footage. The Claimant was asked if he thought the knee strike was lawful and the Claimant responded that it was his honest belief at that time due to the belief that the prisoner potentially had a weapon on him.

29. Mr Bottomley subsequently interviewed prisoner X. Interviews were also conducted with other prison officers. None of them reported witnessing the knee strike. This included Mr Jamieson. He referred to the Claimant being

at the prisoner's head and possibly seeing the other prison officer struggling to get the prisoner's arms from underneath his body, continuing: *"I don't know what Mr Neill said but if he has delivered a knee strike in that situation I think he could justify it as you can see we had not got the prisoner under control…"* It is noted that Mr Jamieson was a local instructor in control and restraint techniques. He was asked about the use of personal safety techniques taught during training. He said that some specific techniques were taught during training but staff were not restricted to using these in self-defence albeit the use of force had to be necessary and the minimum necessary be used. It is noted that, when interviewed, some prison officers expressed a difficulty in recollecting events on 14 April.

30. Mr Bottomley completed his investigation report on 30 December. He explained the nature of the incident and how the investigation had proceeded before providing a summary of the interviews conducted. His comments included reference to Mr Jamieson stating that personal safety techniques such as a knee strike could be used in self-defence, one on one or two on one. He said that a knee strike was not an approved technique when part of a three-person team. There was no record of a knee strike in the Claimant's '*Use of Force'* paperwork and such an action was not a pain compliance technique. In summary, he considered that with the prisoner's arms on his chest, there could not have been any imminent threat. He referred to his concern that the staff as a whole had not taken time to de-escalate the incident before employing control and restraint techniques. The Claimant's knee strike could not, he said, be justified as a personal protection measure. He was concerned that Mr Jamieson's evidence was inconsistent and unclear as to what was legal in the circumstances, particularly given he was a qualified control and restraint trainer. Ultimately, he recommended a formal charge of gross misconduct should be brought against the Claimant. A 'Recommendation Summary' was then completed and approved by Mr Tempest in terms of the formal charge of gross misconduct.

31. The Claimant was subsequently invited to attend a disciplinary hearing by letter of 10 January 2018 on the charge that he used inappropriate force/assault on 14 April 2017. He was provided with the investigation report and appendices and asked if he would wish any particular witnesses to be called. He was given the right to be accompanied at that hearing.

32. Prior to that disciplinary hearing another issue of discipline concerning the Claimant had arisen. On 29 May 2017, the Claimant had reported to Miss Willis that he had been found to be driving over the legal alcohol limit the previous day. Given the Claimant's admission of the offence and that the likely outcome was not dismissal, following the Claimant's conviction for drink driving on 21 June 2017, the Claimant was invited to a fast-track hearing which took place on 24 November 2017 . The Claimant was given a 12 month written warning in the light of the personal conduct expectations of him as a prison officer. Miss Willis acknowledged and appreciated his

honesty throughout the process and in reporting the incident quickly to her. She recorded that he had assured her that this was an isolated incident and would not happen again which she accepted. She stated, however, that should there be a repeat of the same or similar action in the future, that would result in a further disciplinary investigation where dismissal might be considered. This was confirmed to the Claimant by letter of 29 November 2017.

33. The disciplinary hearing relating to prisoner X was convened on 22 February and was reconvened for a further full day on 2 March 2018. Both hearings were recorded and transcribed. Day one of the hearing started with a presentation by Mr Bottomley of his investigation during which he was questioned by the Claimant's representative and Miss Willis. The evidence of Mr Jamieson was then heard. On the second day, evidence was heard from the nurse who had examined prisoner X, John Collier, who headed up national training regarding the use of force and Paul Williams and Paul Fallon, other Prison Officers who had been involved in the incident on 14 April 2017. Mr Collier was effectively agreed by both parties as an appropriate expert witness to explain methods in decision-making regarding the use of force. The Claimant and his union representative were then given an opportunity to make final representations.

34. The Claimant himself was also questioned by Miss Willis on the first day of the hearing. He explained that he had tried the mandibular angle pain management technique twice, which he said didn't work. Other members of staff had tried thumb locks unsuccessfully and that he had then resorted to a personal safety technique, thinking that if he delivered one knee strike to the arm, the prisoner might suffer some bruising but only minimal skeletal damage and it could allow the other officers to get at his arms in circumstances where he might have a weapon. He said that he thought a personal safety technique was appropriate in circumstances where there was need to protect oneself and others and he believed he had exhausted all options. The prisoner wasn't under control, he explained, and had a history of violence. He agreed that he had not been taught that the use of a knee strike was a pain compliance technique.

35. Mr Jamieson's evidence regarding the appropriateness of a knee strike was consistent with what he had told Mr Bottomley. Miss Willis understood that he was defending the Claimant's use of a knee strike.

36. Mr Collier was questioned firstly before he had viewed the CCTV footage of the incident. He agreed that the description of the incident was that the prisoner was under an element of, but not full, control. He agreed that the prisoner might bring his arms out. He explained that the Claimant had the option of pinning the arms - as the officer at the prisoner's head he could actually use the knee to go into the bicep trunk arms. There were a range of options that could be considered. Mr Collier explained that there was no definitive answer for the situation, saying that that is the case in any situation

and that they looked to people to make judgement calls. At one stage he referred to: *"the adrenaline, all the other emotional factors that are affecting those involved in the physical restraint."* When put to him by the Claimant that a prisoner, aggressively resistant to staff who honestly believed him to be in possession of a weapon and issuing extreme threats, could be deemed as someone offering violence, Mr Collier agreed. Mr Collier later expanded that any strike on a prisoner was an extreme circumstance, normally linked to personal safety situations where you were protecting yourself or maybe a third party. It would never be taught to be used in a situation where there were three or more prison officers present. He stated: *"We understand in the extreme circumstances that the level of force can be used, will be dependent on the individual perception at the time, however, it is not something that I would say would be taught at that stage."* Defensive strikes were for exceptional circumstances where there was a risk of harm to someone. He agreed that a knee strike could be classed as a defensive strike if it was in circumstances where the perpetrator was at risk of harm.

37. After the CCTV had been viewed, the Claimant asked Mr Collier to comment on why the Claimant had used a knee strike. He said that he wasn't in a position to comment on the Claimant's thought process. It was not his decision to say whether that was right or wrong. The Claimant reiterated his perception and reasons for delivering the knee strike. Mr Collier repeated that he couldn't talk about the Claimant's individual perception. He said that personal protection measures were available in *"immense*" circumstances, but staff were trained to deal with people with weapons and a prison officer would not ordinarily use any kind of strikes at that stage but would look to restrain the prisoner by controlling, isolating and fixing the arms. The Claimant queried what could be done if that wasn't possible and the prisoner had a weapon asking if Mr Collier could understand. He responded: *"I think, I think in some respect"* before Miss Willis intervened to say that Mr Collier was unable to answer that question. On further questions from Miss Willis, Mr Collier confirmed that a knee strike was not taught and, if it was used, this should have been recorded in the '*Use of Force'* form. She asked whether he could say that a strike was a reasonable thing to do in the circumstances. He said that, having now seen the footage and the number of staff involved, there was limited control but enough control should any adverse reaction from the prisoner have taken place. Miss Willis mentioned Mr Jamieson's stance as a local control and restraint instructor that he could defend the delivery of a knee strike. Mr Collier responded that he would be concerned if someone felt that giving a knee strike to a prisoner being controlled by three staff was appropriate. Control and restraint ought to be applied before considering any further steps.

38. Mr Collier then accepted that the same methods of control and restraint could be used when the prisoner was in a prone position. Mr Collier also accepted there was *"an obvious risk"* to safety from this particular prisoner in all the circumstances. He went on *"… the decision making a judgement I will imagine will be a lot higher than people working in other environments, not only at Full Sutton but in other prisons."*

39. Mr Rawling, the Claimant's union representative, summed up saying that the charge ought not to have been one of gross misconduct and there had been no intention to carry out an assault. The use of a knee strike was made, rightly or wrongly, to achieve the objective of getting the prisoner to release his arm. The Claimant only used minimal force to achieve his aim. The violent behaviour of prisoner X was also highlighted. The Claimant then made a final statement himself. He said that he had an honest belief that the prisoner posed an imminent risk to himself and others. He felt failures to de-escalate the situation and to free the prisoner's arms through other techniques resulted in him concluding that the simplest and quickest of movements could have led to a prison officer being injured and that the knee strike was used to gain control of the prisoner not out of malice or as an attempt to hurt or injure. He believed the decision was better than possibly allowing someone to be cut or killed by the prisoner.

40. Miss Willis then adjourned to consider whether the charges were proven. On reconvening, she said that it couldn't be proved that the Claimant had used or treated the prisoner's head inappropriately. However, on the question of the knee strike she had sufficient evidence. Having discussed some of the opposing arguments, she then asked if there was anything the Claimant wished to say in mitigation before she decided on the outcome.

41. The Claimant reiterated that he had acted out of a need to gain control as quickly as possible and was trying to defend himself and others. He had delivered purposefully one knee strike not multiple strikes and without any attempt to injure the prisoner but rather just to achieve the objective of freeing his arms. He referred to Mr Collier being obviously very good in giving his expert views and that personally, if he was in the same situation again, he probably wouldn't deliver any strike because Mr Collier had made him aware of certain other things which could have been done. He said that he loved his job and just wanted to get back to work. If it was not considered appropriate to return him to the segregation unit, then he would happily agree to that. Miss Willis was then left to consider the outcome.

42. On then reconvening the hearing, she referred to it being a very difficult decision. She referred to the standard of proof being on the balance of probabilities and it was more probable than not that misconduct or gross misconduct had taken place. She went on: *"So in terms of considering the penalty I have had to consider your intent. You intended to issue a knee strike to the prisoner and you believed that a knee strike was in your options of things to use. That was an unreasonable belief and it shouldn't have happened. He denied these charges throughout and ignorance is not a defence. Your statement has changed in relation to the mandibular angle which does give some question for cause of some concern. On the concerns you had pure clarity about your actions but the actions were wrong and for me throughout this hearing you have established that those actions were wrong and I still don't think you understand that and I still don't think that*

you then said do you know what I did was wrong and I apologise and shouldn't have done it. You have not apologised or taken responsibility. Your mitigation is fine with hindsight and I don't know why that wasn't documented and at the point that you know it was wrong you didn't own up and have continued to contest. In terms of threat to life and what is reasonable I cannot believe you can justify these actions with that many staff present.… Trust element is therefore affected and I must consider that you are already on written warning which is live for drink-driving. I have looked through my penalties and I cannot re-grade you as I'm not allowed to do this for a prison officer.… As it was inappropriate and therefore unlawful it is therefore assault too and I cannot take the risk of a repeat." Miss Willis went on to say that she had no choice but to go to dismissal referring to this being with a *"very heavy heart"*.

43. It is noted at this stage that the Respondent's procedures do allow for consideration of re-grading as an alternative sometimes to dismissal. Miss Willis was of the view that the Claimant was on the lowest grading level for a prison officer. There was no lower grade of prison officer he could be re-graded to. Any more junior positions were entirely different positions to that of a prison officer.

44. This was confirmed in her decision to terminate the Claimant's employment by letter of 5 March in which she repeated the Claimant's right to appeal. The allegation proven was stated as "*unnecessary use of force/assault*". In the decision letter she stated: *"I considered the intent in this case and it was clear that you intended to issue a knee strike to the prisoner and you believed that a knee strike was within your options of things to use. That was an unreasonable belief and it should not have happened. You denied the charges throughout the investigation and disciplinary process and I advised you that ignorance was not a defence. Your statement had changed in relation to the mandibular angle which did give me cause for concern. There were concerns that you had pure clarity for your actions but that the actions were wrong. Throughout the hearing you established that your actions were wrong, but I still did not think that you understood nor did you apologise or take responsibility. Your mitigation is fine with hindsight and I do not know why that your actions were not documented at the point that you knew it was wrong. You did not own up and you continued to contest throughout. In terms of threat to life and what is reasonable, I did not believe you could justify these actions with that many staff present. Even if you couldn't see all of them, you knew that there were at least five staff present during the incident and therefore your actions were not proportionate or justified. The witness called from the National Tactical Response Group, John Collier stated 'we should use the least force necessary and a defensive strike should only be used in absolutely exceptional circumstances'".* She went on to refer to the live warning for drink-driving.

45. Before the Tribunal, Miss Willis said that she found that the Claimant genuinely believed he was able to give a knee strike but said that this was an unreasonable belief. She would have accepted an immediate admission

that it was wrong and shouldn't have happened although when asked if the Claimant knew he had done any wrong before hearing Mr Collier's evidence at the disciplinary hearing, she said she didn't know. On the other hand, she felt that it shouldn't have required an investigation to establish that a knee strike was wrong. She agreed that the Claimant had made a misjudgement. She said she had noted that he had volunteered the fact that he had delivered a knee strike and said that she gave that due weight in her decision making.

46. When asked in cross examination why she had come to a decision to dismiss she said that it was no longer appropriate for the Claimant to serve as a prison officer. He had used inappropriate force, with the intent to do so, where lots of staff were present and where the use of force was not reasonable. The Claimant was on a disciplinary warning, had not apologised and had not accepted that what he had done was not right. He had said he wouldn't do it in the future but it shouldn't have been done in the first place.

47. By letter of 13 March 2018, the Claimant wrote to Miss Willis appealing the dismissal decision. This was sent after the seven-day deadline given for an appeal, but no issue was taken in this regard by the Respondent.

48. On 5 April the Claimant was sent transcripts from both days of the disciplinary hearing. It was also confirmed that his letter had been forwarded to Mr Cornmell for his use in the appeal.

49. On 4 May 2018 Miss Willis received a letter from the Claimant which apologised for what had happened and set out more of the mitigating factors he pleaded in his aid in respect of the incident. Miss Willis responded on 11 May thanking him for the letter but saying that the decision had already been made and the appeal process was now in progress. The letter was also passed to Mr Cornmell.

50. Before commencing the appeal, Mr Cornmell reviewed all the relevant documentation produced at the disciplinary stage including the notes of the disciplinary hearing and the CCTV evidence. The hearing took place on 21 May, the Claimant again represented by his union representative, Mr Rawlings. His main ground of appeal was that the penalty was unduly severe and that the Claimant had been unfairly considered as untrustworthy. Mr Cornmell noted that the Claimant and his representative appeared to be suggesting that in hindsight they should have put their case across in a different way to Miss Willis and were concerned that she had not appreciated the extent to which the Claimant was remorseful and that he appreciated both the severity of the matter and accepted that he was incorrect to use a knee strike. The hearing was then adjourned for Mr Cornmell to investigate further.

51. Mr Cornmell telephoned Miss Willis at some point between 22 -30 May to discuss her decision making. Miss Willis was clear to him that she did not believe that it was clear that the Claimant accepted that he had acted wrongfully.

52. The Claimant also wrote to Mr Cornmell on 30 May 2018 about another case of a prison officer, employed at a prison elsewhere, who had faced disciplinary charges under purportedly similar circumstances, but had not been dismissed. Mr Cornmell considered this but thought that each case had to be judged on its own merits. On the face of the information the Claimant had provided about this other case, it did appear to Mr Cornmell that too lenient a sanction had been applied in that case – it appeared to involve a more serious assault by a prison officer. However, he did know the circumstances of that case and did not think that he ought to be bound by another case. It did not materially change his assessment of the Claimant's own case and his view as to the level of the Claimant's misconduct.

53. Mr Cornmell wrote to the Claimant on 4 June dismissing his appeal. He believed that the Claimant had provided much more clarity regarding his acceptance of wrongdoing only once the decision to dismiss him had been made. He considered the charge against the Claimant and, in particular, Mr Collier's statement that there are only very exceptional circumstances during which a knee strike could be justified. He did not believe that a knee strike could have been justified in prisoner X's circumstances and agreed that this amounted to an assault on a prisoner through using unnecessary or excessive force. It was an act of gross misconduct. As regards penalty, he noted that in the light of the lack of an immediate and convincing acceptance from the Claimant that his use of force was not appropriate and that he was currently subject to a live disciplinary warning, he agreed that the issue of trust would be further brought into question if his employment was allowed to continue. He therefore concluded that Miss Willis' decision to dismiss the Claimant was fair and reasonable.

Applicable law

54. If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the Employment Rights Act 1996 ("the ERA"), which provides:-

> *" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably*

in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

55. Classically in cases of misconduct a Tribunal will determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard.

56. The Tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

57. A dismissal may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

58. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employer would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

59. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to his dismissal – ERA Section 123(6). The EAT in **Hollier v Plysu Ltd 1983 IRLR 260** has suggested that contribution ought to be assessed broadly considering whether an employee was wholly, largely, equally (with the employer) or only slightly to blame.

60. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal.

61. The Claimant is also claiming damages for breach of contract and that his dismissal was without the notice which would have been required to have been given to him to lawfully determine his contract of employment. In such

complaint the Tribunal has to determine whether or not the Claimant's conduct amounted to conduct which could be classified as gross misconduct and a fundamental breach of his contract of employment so as to entitle his employer to terminate summarily.

62. Applying the legal principles to the facts found by the Tribunal, the Tribunal reaches the conclusions set out below.

Conclusions

63. It is accepted that the reason for the Claimant's dismissal was one related to conduct, which is a potentially fair reason.

64. It is then for the Tribunal to consider whether the Respondent reached its conclusion on reasonable grounds and after reasonable investigation. The Claimant also maintains that there were breaches of a procedural nature which render dismissal unfair.

65. The Tribunal deals with issues relating to the investigation and matters of procedure first.

66. Criticism is made of the Respondent for failing to seek further information regarding the basis for the decision of District Judge Fanning to increase the prisoner's sentence as a sanction for his failure to comply with a lawful instruction. Miss Willis did not consider the Judge's considerations to be material to the Respondent's but this was in circumstances where the Judge was looking at whether the prisoner had broken the rules rather than at the Claimant's or any other prison officer's use of force. He might have come to a view on the CCTV footage he had seen, but it was considered reasonably that the Respondent had to come to its own view regarding prison officer behaviour. The Judge had not heard any evidence from the Claimant.

67. The Respondent was entitled to proceed uninfluenced by the decision of Humberside police not to charge the Claimant with assault. This was again in circumstances where, whilst CCTV footage had been viewed, there was no admission from the Claimant before the police as to any knee strike he had directed at and which had impacted the prisoner.

68. The time it took for the Claimant's disciplinary process to be completed was lengthy. He was however suspended at an appropriate point in time when an initial fact find had been made which called into question his actions. The Claimant was regularly updated regarding the continuance of his suspension and whilst the reason was not explained to him, he did not raise any concern directly or through his union representative. Nor can he point now to any prejudice to him in the Respondent's decision-making relating to this lack of information. The Respondent was reasonable in not seeking to progress matters until the police had determined whether they wished to take the matter forward as a criminal prosecution. There was not thereafter, the Tribunal finds, any unreasonable delay in progressing with the

investigation which led to a very lengthy and detailed disciplinary hearing. There is always in cases of delay a risk that memories might fade, but ultimately the Claimant was not disadvantaged by the passage of time given the existence of the CCTV footage and a significant narrowing of a potential area of dispute given his own admission that he had delivered a knee strike. The Claimant was not, therefore, disadvantaged by any lack of memory of his fellow officers who had witnessed the event albeit not the knee strike to which the Claimant himself admitted.

69. Mr Bottomley did not initially interview all potential relevant witnesses but was directed then to do so and all relevant witness evidence was before the disciplinary hearing. It is noted that the nurse who had examined the prisoner was not interviewed by Mr Bottomley and that the questioning of her at the disciplinary hearing was limited. However, Miss Willis proceeded on the basis that she accepted that the Claimant's actions had not caused any injury to the prisoner.

70. The Tribunal notes criticism made of Mr Bottomley asking what were said to be leading questions of the witnesses, but considers that such criticism applies too high a standard in this case on an investigating officer. There is no evidence that any witnesses spoken to had their evidence ignored or that they were pressurised or encouraged into giving a particular account.

71. Mr Bottomley is criticised for making a recommendation that the matter be dealt with at gross misconduct level and, whilst he went beyond what he was required to do under the Respondent's policy, this has not, the Tribunal finds, tainted the decision-making of Miss Willis who approached the matter afresh without any straightforward or blind acceptance of any conclusion Mr Bottomley may have come to.

72. Mr Cornmell, at the appeal stage, considered the Claimant's representation regarding a prison officer elsewhere being dealt with more leniently for an ostensibly more serious offence. The Tribunal has no evidence as to the exact circumstances of this other prison officer. However, it does not consider Mr Cornmell's lack of further investigation at the appeal stage to be sufficient to render dismissal unfair in this case. Mr Cornmell's view was that the sanction as described by the Claimant in the other case appeared to be lenient and questionable, but he was entitled reasonably to concentrate on the case before him and ensure that the Claimant's conduct was viewed on its own particular facts.

73. This dismissal is not rendered unfair due to any failing in the investigation of the allegations against the Claimant or in the disciplinary process adopted which was full and allowed the Claimant and his representative the opportunity to contribute.

74. Nor can Miss Willis be said to have come to a conclusion in the Claimant's guilt of misconduct on anything other than reasonable grounds. The Claimant admitted to making a knee strike on the prisoner. She reasonably concluded, with reference to the Respondent's policies regarding the use of force and having considered Mr Collier's evidence regarding the inappropriateness of a knee strike in the circumstances pertaining, which he himself had viewed through the CCTV footage at the disciplinary hearing, that a knee strike ought not to have been administered in circumstances where alternatives were available and given the number of prison officers in attendance.

75. Miss Willis did not engage in any attempt to disentangle the concept of excessive use of force from that of an assault. That was not an unreasonable approach. She concentrated on what the Claimant had actually done, whether that amounted to misconduct and then at what level that misconduct ought to be classified, particularly in terms of the appropriate sanction. The Tribunal agrees that an excessive use of force will inevitably amount to a form of assault. If the force is necessary, reasonable and proportionate it will not. Whilst the Claimant might have been guilty of an error of judgement that error, it was reasonably concluded, led him to an act of misconduct.

76. In weighing up whether an act of misconduct had been committed, Miss Willis did consider the overall context, including Mr Jamieson's evidence that a knee strike might be an appropriate action, Mr Collier's expert evidence regarding the differentiation between control and restraint techniques and protective measures, the history of violence of the prisoner and the risk he posed to others. She came to a conclusion of misconduct mindful of and accepting that the Claimant had delivered the knee strike with the intention of allowing the prisoner to be brought under for control. It is less clear how much weight she gave to such factors however when it came to her conclusion as to sanction.

77. The Tribunal is acutely mindful of the constraints in its decision-making and that it is not judging for itself the sanction it would have imposed or considered to have been reasonable, but rather evaluating whether any employer in these circumstances acting reasonably could have dismissed the Claimant.

78. Mr Serr is correct to point to the particular nature of the Respondent's activities in terms of it being a top security facility with significant duties of care and obligations to prisoners and society more widely. The context of the Claimant's employment was one of him being a member of a disciplined service. On the other hand, the context is also of the Claimant, as a prison officer, having to work in an extremely challenging environment securing prisoners but also ensuring the security of other prisoners, himself and his colleagues. This is not an educational environment where ordinarily any form of inappropriate physical contact is likely to be rightly considered to be

beyond the pale. It is an environment where there is an inevitability of occasional unpredictable violent behaviour and where it is accepted that to prevent and subdue such behaviour prison officers can and are directed to administer pain to the prisoners, no more than is reasonably necessary, but in circumstances where a prison officer might have to ratchet up the degree of pain applied to achieve his legitimate aims. A prison officer has to make quick and decisive judgements and no one, including Miss Willis, would seek to argue that this is always easy it practice.

79. It was considered that the Claimant's use of force was excessive in the context of five prison officers being present and involved directly in the control of the prisoner. Miss Willis considered that the period of around 50 seconds from the prisoner commencing his version of a peaceful protest until the Claimant's knee strike was a relatively short one where there was still scope for conventional control and restraint techniques to have been used. She considered the prisoner in the interim to have been under an element of control. Therefore, the Claimant's knee strike, an act to be reserved for exceptional circumstances, was excessive and inappropriate.

80. However, she had heard from Mr Collier the difficult considerations which might be in play. His evidence before her was that the prisoner should be got to stand up at the earliest opportunity given the increased risk of injury to him lying in a prone position. He agreed that there had been an element of control before the knee strike, but not full control of the prisoner. Whilst it is accepted this was before he had seen the CCTV footage, Mr Collier also said that there was no definitive answer for all situations and that people had to make judgement calls. He accepted that a prisoner aggressively resistant to staff whom staff honestly believed to possibly be in possession of a weapon and issuing extreme threats to staff could be deemed as offering violence. He accepted that he could understand why the Claimant believed the use of a single knee strike could be justified, the Claimant referring to his view of the exhaustion of pain inducing compliance techniques. He agreed that there were grey areas regarding the use of force. He recognised that risk, adrenaline and emotional factors affected those involved in a physical restraint.

81. Ultimately, Mr Collier was of the view that the use of a knee strike would never have been taught as an appropriate course of action to take at the stage the Claimant and his colleagues had reached with the prisoner. In particular, he considered there were enough staff to control the prisoner and other restraint options available which rendered the knee strike unnecessary and excessive. Ordinarily such an action would be justified only if the Claimant was more individually under threat without the assistance available of other prison officers.

82. However, that was against the aforementioned general considerations regarding methods of restraint being matters of judgement. Mr Jamieson who trained locally on control and restraint techniques did not think the knee

strike to be inappropriate in the circumstances. Miss Willis said that she could have accepted that the Claimant's actions amounted to an error of judgement regarding what force was reasonable proper and necessary but said to the Tribunal that he did not say that at the disciplinary hearing. The Tribunal cannot agree. His position at the disciplinary hearing was that he felt at the time that he was doing what was appropriate in circumstances where he was dealing with a dangerous prisoner who was a known risk, where the prisoner was in a prone position, where the prisoner's arms were not fully secured by the prison officers and where pain management techniques had not achieved a resolution. In that context Miss Willis knew that the Claimant's case was that he had judged/decided that a single knee strike to the upper arm would result in the release of the prisoner gripping his own clothing and allow for the situation be brought under control.

83. She accepted that the Claimant did not act out of anger or frustration. She accepted that he had made a single knee strike for the purpose of allowing the prisoner to be brought under control. She accepted that the prisoner suffered no injury.

84. Miss Willis considered the Claimant to have shown a lack of insight and acceptance of wrongdoing in him seeking to defend his actions. However, the Claimant ought not reasonably to have been penalised for seeking to maintain a position that his actions ought to have been considered with regard to the situation which pertained at the time rather than with the benefit of hindsight. His genuine belief at the time was that, in all the circumstances, a knee strike was acceptable to bring the situation under control and to remove a risk of injury to others and that indeed was why he had acted as he had.

85. She did not then appreciate, as she reasonably ought to have from the Claimant's closing statements, that he was recognising having heard Mr Collier's expert evidence that he ought not to have delivered the knee strike in circumstances where the other prison officers were present and where other techniques could and should have been applied. The Claimant said that in similar circumstances he would not act in the same way again. He was seeking to give Miss Willis an assurance regarding his insight and future conduct.

86. Miss Willis' decision to dismiss was in part based upon a lack of apology and lack of acceptance by the Claimant that he had acted wrongly. Whilst she recognised he had said he wouldn't act in this way in the future he had not explicitly said that he shouldn't have done so in the first place. He had used inappropriate force. He had intended to do that. This was in a situation where the use of force was not reasonable.

87. The Tribunal does not doubt that Miss Willis came to a genuine and careful conclusion and that this indeed often makes it difficult to say that a

conclusion has been reached which falls outside a band of reasonable responses. Miss Willis herself recognised that this was a difficult decision and the Tribunal can relate to that. However, considering all the circumstances, the Tribunal considers that the sanction of dismissal in this case for the misconduct arising out of the knee strike was outside the band of reasonable responses.

88. Consideration that the Claimant was subject to an existing live warning for drink-driving does not alter that conclusion. Miss Willis was entitled to have regard to the warning when she stood back to view the Claimant's misconduct and the appropriate sanction but the nature of the Claimant's misconduct in drink-driving certainly when considered alongside his quick admission of that act does not affect the reasonableness of her decision to dismiss for the knee strike.

89. The Claimant therefore was unfairly dismissed.

90. The Tribunal, however, has to consider the issue of the Claimant's conduct, whether it contributed to his dismissal and the extent to which it would be just and equitable to reduce any award of compensation. The Tribunal has concluded that the Claimant acted outside the Respondent's policies (upon which he had been trained) regarding the use of force and that he did apply an excessive and unreasonable level of force in the circumstances. The Claimant himself agrees with that conclusion on the basis of Mr Collier's explanation at the disciplinary hearing upon which the Tribunal also relies. That leads to a conclusion that the Claimant was guilty of an assault on a prisoner, an obviously potentially serious offence. He had also failed to report his actions to the Respondent as he ought to have done immediately on the *'Use of Force'* form. His account thereafter was not entirely consistent as Miss Willis recognised. The Claimant himself obviously felt that he had not been clear enough at the disciplinary stage as to his level of remorse. Whilst it is concluded that the sanction of dismissal for his offence fell outside the band of reasonable responses there was still a significant misjudgement on the Claimant's part and the level of contribution must be high. It should be assessed on the basis that the Claimant was largely rather than simply partly to blame for his dismissal and a reduction therefore to his basic and compensatory award of 75% is appropriate in all the circumstances.

91. Whilst the Claimant was guilty of misconduct, indeed sufficient to justify a significant reduction in his compensation for unfair dismissal, the Tribunal on its findings does not conclude that he committed a repudiatory breach of contract such as to allow the Respondent to terminate employment without notice. Assaulting a prisoner more often than not would, but there has to be an appreciation of the nature of the assault, the circumstances the Claimant found himself in, his need to exercise quick judgement in a pressure situation and his safety based intention in delivering what was a short sharp single targeted knee strike. Objectively this was not a

relationship where the Claimant's actions must have destroyed the mutual obligation of trust and confidence. The Claimant's complaint seeking damages for breach of contract must therefore also succeed.

Employment Judge Maidment

Date: 8 April 2019