EMPLOYMENT TRIBUNALS

Claimant: Mr K Hutchinson

Respondent: Secretary of State for Justice

Heard at: Nottingham

On: 8, 10 and 11 April 2019

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Mr R Cifonelli of Counsel
Respondent: Mr P Smith of Counsel

JUDGMENT

1. This claim of unfair dismissal is dismissed.

2. The other claim for unpaid outstanding holiday pay is dismissed upon withdrawal.

REASONS

Introduction

1. The Claim (ET1) was presented to the tribunal on 1 June 2018. It had been prepared for the Claimant by his solicitors. It is a claim of unfair dismissal; the Claimant having been employed by the Respondent as a Prison Officer (otherwise known as a detainee custodial officer)[1] between 1 September 2002 and the confirmation of his summary dismissal post the hearing of his appeal on 27 February 2018. The Claim is ACAS early conciliation compliant and in

[1] Hereinafter where applicable I refer to him as a PO.

time. There appeared to be before me a second claim relating to the non-payment of holiday pay. I work on the premise that it has been withdrawn.

2. In due course a Response (ET3) was filed on behalf of the Respondent which is equally fully pleaded. Finally, a colleague (Employment Judge Dyal) heard a case management discussion on 16 October 2018 which was essentially confined to the issue of documentation and the extending of the time for the hearing. As to the hearing before me, it occupied 3 days, namely Monday 8, Wednesday 10 and Thursday 11 April 2019.

3. At the heart of the case is whether the Claimant was grossly negligent such as to warrant summary dismissal in failing to observe an inmate at risk of suicide in the course of his duties as a prison officer at IRC Morton Hall . Not in dispute is that the inmate who I shall refer to as Mr M was found hanging from the shower in the observation suite otherwise known as the constant observation room on the 16 August 2017 at approximately 16:59 hours and had to be cut down. This was during a period when the Claimant was tasked with close observation of him

4. For the purposes of reaching my decision, I have heard sworn evidence in the following sequence, in each case evidence-in-chief by way of a written witness statement. Thus, for the Respondent: -

   4.1 Carla Wiley who at the time was Head of Safer Detention at IRC Morton Hall where the events took place. She was appointed as the investigating officer in relation to this matter. Circa 19 August 2017, she undertook what I am satisfied was a full investigation. On 16 October she published her report with all the appendices and which was before me. More important, the Claimant received the same on 16 October 2017. She has got long service with the Respondent

   4.2 Phillip Wragge. He was taken out of turn as he no longer works for the Respondent but is now employed as Centre Director at Gatwick Immigration Removal Centre for G4S. At the time of the material events, he was a Prison Group Director within the Respondent with some 31years of service. He heard the appeal that the Claimant raised against his dismissal. That appeal took place on 23 January 2018 followed up on 23 February; thence he gave his decision dismissing the appeal.

   4.3 Karen Head. She is the Governor (although she is called a Centre Manager) of the Morton Hall establishment. She has been some 30 years employed by the Prison Service. She presided at the disciplinary hearing on 30 November and 1 December 2017. Her decision was to dismiss the Claimant without notice for gross misconduct. She confirmed her decision in her letter to the Claimant dated 8 December 2017 (Bp295-7).

   4.4 Finally I have had before me an agreed substantial bundle of documents germane to the case.

5. The obvious final point to make is that the Claimant has long service of some 15 years in prison establishments and is fully trained, in particular on matters to do with safety prevention and the watching and surveillance of prisoners or residents, all of which I shall come to. He had had a last refresher course so to speak of this type of training around about 15 months before material events.

Introduction as to the factual background and first observations

6. Morton Hall is an immigration removal centre. It is an all male establishment in terms of the inmates (who are actually called residents) who have been refused bail and are waiting to know their fate in terms of them being illegal immigrants and whether therefore they may well be deported. For obvious reasons, that means there is a considerable degree of tension about the establishment and a fundamental role of the prison officers (which is what I shall call them) is to try and keep things as peaceful and harmonious as possible.

7. This therefore cross-references to inter alia the Decency Statement Policy at Bp 329 or such as the Safety Detention Policy at Bp 501.[2]

8. Important is keeping the residents at ease, who (as Ms Head said) often do not know their fate from one day to the other. This means dialogue with them and being sensitive to potential troubles and inter alia also suicide risks. I am well aware of the fact that the prison establishment has over the last few years at least been under close scrutiny as to the safeguarding of those under its watch. It s self-evidently follows that the prevention of suicide is a fundamental role of the prison officers and those who manage them. It could not be clearer in the Safer Detention Policy.

9. An important part of the regime is the dignity of the individual and utmost regard to his human rights. It is outweighed however where necessary, ie identified suicide risk, by the fundamental need for the preservation of life. See Bp 505. It is therefore implicit in that policy that there should, if necessary, be constant and close supervision. This is cross-referenced to the policy in relation to supervision, to which I shall now turn.

10. Where a resident is seen to be at risk of suicide or other serious self harm, then that resident can be made the subject of what is known as 'constant observations'. If that is introduced, and which requires the approval of a senior manager, then it engages constant and close, including otherwise intrusive, supervision. Furthermore, such an individual is isolated from the rest of the community to some extent in terms of for instance sleeping or using the shower and matters of that nature. He is confined to what is known as an observation suite other that when enjoying association with other inmates such as in the exercise area. The observation suite is a secure unit; that is to say securer than the overall prison establishment. Before me, I had photographs of the relevant room. Suffice it to say that it is situate leading off the corridor opposite the staff room in the relevant part of what is known as the Windsor Unit. Outermost is a blue door. It can be locked. Opening the same and inside it just

[2] BP = bundle page in the bundle of plus 600 documents that was before me.

to its left is a barred prison door which is covered with see-through Perspex. It too is lockable. Looking into the room on the left is a bed and just visible is a table and a low wall behind which is a toilet. Obscured from view as it is round to the right is a shower.

11. I have no doubt, having looked at the photographs and heard the evidence and even on the Claimant's best evidence viz the visibility of the shower, that absent entering the inner room area, it is somewhat limited. The only ability at the time from outside the barred door to view someone in the shower being via what looks to be a metal convex mirror fixed in the ceiling. Even the Claimant accepts that this would not afford clear vision of the upper part of the body of someone showering including the neck and head.

12. In any event, going back to the policies, the outer door would only be locked when somebody is not inside the observation suite – see Bp 327. Furthermore, if they are in the room, unless there is a lockdown situation (and I trust the parties know in common parlance what that means) then the inner door must also be unlocked. As to which see Bp 526.

13. The other part of the regime is that there is a requirement (as to which see Bp327) for constant observation of such people at risk for a minimum of 15 minutes per recorded observation and more if appropriate. That observations take place is self-evidence from the observation logs which are before me in relation to the potential suicidal person at risk, in this case namely Mr M. There is a running log of these observations and it is kept in a booklet which is known as ACDT. It is before me, in particular at circa, for the purposes of the crucial entry, Bp 94A.

14. That explains the regime. Not in dispute is that the Claimant was well aware of the safeguarding regime and his responsibilities and obligations in relation to it.

15. That brings me to material events and to making findings of fact. Before I do I make the following further observations.

Observations

16. All of the witnesses who gave evidence before me clearly did their best. I found the three witnesses for the Respondent consistent. There was one issue, and which goes to the statement of Ms Head. I agree with learned Counsel for the Claimant that it could be read that she was suggesting that the outer of the two doors to which I have referred was closed. But as it is and by cross-referencing to the contemporaneous documentation in this case and in that sense connecting through with the disciplinary hearing (to which I will refer), I am absolutely clear that the statement is an inadvertent muddling of the scenario and that the reality was that nobody ever was in doubt that the outer door was open; the fundamental is whether the inner barred door was or was not locked at the material time.

17. I do not criticise the Claimant for somewhat misleading paragraphs at various passages of his witness statement. I am quite clear from what he has told me

that he may not have paid that much attention to what had been written on his behalf in that respect. I will say no more than that there are passages, in terms of quotations in the witness statement (and for instance referring to the policy documents to which I have referred) where I agree entirely with learned Counsel for the Respondent that there has been a somewhat economy with the actuality in terms of the citation of passages; and material elements have been missed from the actual policy document so as to slant it as if there was not the degree of obligation upon the Claimant that is in fact in play in this case. It is unfortunate that this happened but I do not actually in that sense impugn the Claimant but be that as it may.

18. However, another example that does concern me as it goes to a fundamental , is the assertion at inter alia paragraph 32:

"… *The CCTV clearly proves that much of what the witnesses have said about where I was standing … was very wrong …*"

Then finally down to paragraph 39:

"*Fourthly, the witness evidence was shown by the CCTV to be very unreliable. …*"

19. I will deal with the CCTV evidence simply thus. When she undertook her disciplinary investigation, Ms Wiley looked at the CCTV footage; she refers to it in her disciplinary investigation report. She concluded that it did not assist because the angle of the camera therefore meant it could not see through a brick wall or around the corner in terms of where the custody suite was, whether it be the external or internal door. She made this plain at the disciplinary hearing. The Claimant was asked, having been told that (and he had with him his POA representative Richard Smith) as to whether or not he wished to challenge her view and whether or not in that respect the CCTV needed to be seen. Mr Smith who was acting on his behalf took the view that they did not.

20. By the time it came to the appeal hearing, the issue resurrected itself. It was now again submitted that the CCTV might be of relevance and thus could be new material. This was when Mr Wragg was hearing the appeal on 23 January 2018. It goes to the integrity of Mr Wragg and totally demolishes the idea that he might (which is an inference to possibly be drawn from the Claimant's case) be somehow in league to get the Claimant out and thus biased, that he immediately flagged up his concern that there might be a shortcoming in the process. So, what did he do? He adjourned out the appeal hearing to get himself a copy of the CCTV and make sure the Claimant had a copy and they would then resume having seen the same. They did on 23 February. Suffice it to say that the Claimant conceded that the CCTV footage added nothing.

21. Nevertheless, I was asked if I would view the same at the commencement of this proceeding and I did several times. Suffice it to say that it indeed adds nothing. The description of what could not be seen as given by Ms Wiley is 100% accurate. The Claimant thought that the footage might somehow show what was going on in the shower room by way of a reflection in the window of

the staff room. Suffice it to say that the footage shows nothing at all of any significance.

22. What does that mean? It means that the assertions in the witness statement that there was a material procedural unfairness in terms of the CCTV which undermines the Respondent's witnesses and particularly those at first-hand, has no substance to it at all. In that respect, and no more than that, it does impact upon the credibility of the Claimant.

Findings of fact

23. By 16 August 2017, Mr M had made at least three suicide attempts; this included attempting to hang himself on at least one occasion; also being found to have razor blades; furthermore assertions that he would kill himself come what may[3].

24. In her role as the senior custody/safety manager of the establishment (that is to say Head of Safer Detention), Ms Wiley (CW) had via Security Custodial manager officer (Kirstie Fear) on 15 August therefore ordered that he be placed upon constant observation. I have already explained what that means. Thereafter he was.

25. CW was not on duty on the 16th. In the early hours of the morning on that day, Mr M made a second hanging attempt; this time in the shower in the observations suite. The notes in the observation record speak for themselves. As the Claimant himself said, he was not a sentenced prisoner; he could not be punished. Therefore, the most they could do was to make sure that they did their fundamental utmost to preserve his life. That is where preservation of life outweighs the dignity of the individual. This I have already mentioned in the policy documents to which I have referred and in particular Bp 505 and 510.

26. Of course the necessary intrusive observation that is to say present within the observation suite so as to observe Mr M showering rather that standing outside it and looking in , would impact upon the dignity of Mr M because it seems he was very keen upon taking showers. But of course as per policy that was outweighed by the duty to try and ensure the preservation of his life. The Claimant knew this as is obvious from his experience and training: indeed he had undertaken the assessment as part of training of other POs.

27. However, what I do factor in is as follows and it goes to the evidence of Kirstie Fear as per her initial interview on 31 August 2017(Bp 126) as part of the investigation into what had a happened undertaken by CW and thus the giving of evidence by her (Bp 222) at the disciplinary hearing heard by Karen Head and which commenced on 30 November 2017[4]. She was quite clear that about three months before material events, she had had what I might describe as a philosophical discussion with the Claimant which interacted upon policy. The Claimant was reluctant in the sense of when dealing with residents under

[3] See the full observation noes between Bp82 and 99.

[4] The hearing was tape recorded: transcript is at Bp 195-294.

constant supervision as to whether one should advance, so to speak, in terms of close proximity in the shower area so as to view the individual bathing because of the impact in that respect upon their dignity. Ms Fear made absolutely clear to the Claimant that dignity was outweighed by preservation of life. In other words, if he had to get in close proximity to the resident at risk to ensure they did not self harm (ie hang themselves or slash their wrists) then he should do so.

28. When the Claimant was interviewed about this[5] by CW and then when questioned about it at the disciplinary hearing, he could not remember. He never denied said conversation. It therefore follows that there is no evidence to contradict Ms Fear and there is no evidence that she was motivated by such as ill will to the Claimant. Thus the dismissing officer, Karen Head, was entitled to believe what she had to say. This in turn impacts upon the Claimant's failures when we come to 16 August.

29. In any event as at 16 August at the time of material events, there is no doubt whatsoever that she as part of her decision could reasonably conclude that Mr M was a serious suicidal risk: Albeit he was an arrogant; unpleasant; rude; and with a reputation for drug dealing and therefore the prison officers would have had a very difficult task in looking after him. But of course it goes with the job; it does not undermine responsibility. No matter how they might personally feel about him, the preservation of his life is paramount.

30. So, what happened on 16 August against the background of the earlier incidents? This brings in PO's Ring and McNulty and inter alia Westerman[6] and the Claimant. At about 4:15 pm Mr M had been let out of the constant observation room, for what was not the first occasion, to associate with other residents; and therefore he was in the exercise area near what I gather is some gym equipment. He was seen to have tied a ligature to the apparatus as per a noose and appeared to be moving to insert his head. Obviously at that, the POs in close proximity (including the Claimant) rushed to stop him. PO Ring inter alia told Mr M that he could not be allowed to kill himself. I have no doubt it was stressful but of course that is what these POs are trained to deal with.

31. He was calmed down and the decision was taken to escort him back to the constant observation room from which he had been brought, namely on Windsor Unit and to which I have referred. The Claimant was one of those who took him there.

32. So should the Claimant have realised he was a suicide risk? Was this a scenario in the words of PO Westerman (as to which see Bp 142 and thence what he had to say at the disciplinary hearing) that could be treated with a bit of a pinch of salt because it did not really look like a serious attempt and this man was inter alia an attention seeker? But of course, it was more serious than that because he had made real attempts to kill himself in the last 26 hours

[5] Commencing Bp149. His evidence at the disciplinary hearing commences at Bp239.

[6] All were interviewed by CW and thence gave evidence at the disciplinary hearing as to which again see the bundle.

or so. The Claimant may not have known that at that stage for reasons I shall come to. What the Claimant did know is what he had seen that afternoon.

33. What is the most contemporaneous evidence that would have assisted the Karen Head in her decision and assists me as to the state of the Claimant's knowledge at the material time? It brings me back to the ACDT running observation logs, to which I have now referred. I bring into the equation that as with for instance nurses, and this is in some ways like a mental health unit in terms of the residents at risk, that there is a running log (analogous to a nursing note) which is the ACDT and that every time there is a handover there is required to be a signature by the officer being handed over to, to confirm they have received handover. Why does it matter? Because the Claimant says he did not get any handover and links that into having only a limited knowledge of the risk that Mr M posed. I cross-reference, as Karen Head did, to Bp 94A. This shows, because it is the Claimant's signature and handwriting, that at 16:30 he signed to receive handover, which would have been from PO Sharon McNulty. He has written: "h*andover tried to hang*". Therefore, Karen Head would be entitled on the balance of probabilities test (as to which see the disciplinary policy at Bp 357), to conclude that this cannot but show knowledge. When interviewed CW Wiley and thence questioned at the disciplinary hearing, at which he had a full opportunity to explain himself and indeed at the appeal hearing, he never denied he had that knowledge.

34. To turn it around another way, he has never tried to argue apropos Westerman's observation, ie seeking to reduce the significance of what happened on the basis that Mr M was an attention seeker.

35. I then come to the notes that made in the observation log once he had taken charge of Mr M. Before I do I will factor in whether he received a handover from PO McNulty who had been on observations with Mr M prior to the Claimant taking over at 16:30 hours as to which see Bp94A. After the exercise yard incident, there is no doubt that PO McNulty went elsewhere in the establishment. Did she have a handover in the full extent of that word with the Claimant and if so where. The evidence as I see it is that the Claimant had noticed Ms McNulty because he had been elsewhere, I think in the visitors' reception, and had waved his acknowledgment. They may have exchanged a few words but then the 'kerfuffle' started over Mr M's suicide attempt (if that is the right word) by the exercise apparatus and they both went to assist other officers.

36. Her recollection is that she would have given handover, ie explained events up to the Claimant coming on duty. Incidentally, I note that she had not been on duty earlier on that day when Mr M had attempted suicide in the shower. But the Claimant would of course been able to pick up what had been happening, viz before Ms McNulty assumed her duties, by simply reading the ACDT observation record. For instance, it can be seen from those notes that PO McNulty (because these officers spend limited time undertaking observations because of the intensity of the observations required) had only taken over observing Mr M at about 15:05, and she ceased to be responsible for him once the Claimant assumed that responsibility circa 16:30. Up to the exercise yard

incident nothing of note happened on her watch. He was talking to friends who were visiting him, chatty and cheerful. l So, a detailed handover from her would have been of little or no significance to the Claimant. He of course observed happened in the exercise yard and of course he could form his own judgement, which he clearly did because of the entry he made.

37. So, it is a bit of a red herring although it has been a valiant argument put on his behalf by Mr Cifonelli.

38. To turn it around another way, the Claimant knew Mr M was on constant obs. He had seen for himself what he had attempted to do. He had recorded himself "tried to hang". He had in the observation record the clear entries for all of that day and those preceding showing the various suicide attempts and threats to kill himself made by Mr M. It follows that Karen Head and thence Philip Wragg were acting reasonably in concluding that he had the necessary knowledge to appreciate the heightened safeguarding responsibilities he was tasked with viz Mr M.

39. So, what then happened? At about 16:56 Mr M had decided he wanted his shower. It could have been slightly earlier than that for reasons I shall come to. The Claimant had recorded at 16:45 viz Mr M "*Sat on his bed a little teary and upset*". The Claimant says he was hampered because after the incident in the exercise yard, Mick Westerman (who is a more senior officer and was then I think acting up as the Custody Manager on this particular unit) had needed to make an entry, presumably about what had occurred and thus had taken away the observation log. But there is no such entry by Mr Westerman. When interviewed about this, Mr Westerman (and nobody pushed him and the Claimant and his trade union rep at the disciplinary hearing never in fact quizzed him on the topic) said he did not actually have the observation log at that time. His evidence was that he needed to have it after in fact the suicide attempt that had occurred on the Claimant's watch and to which I have going to refer.

40. So, had the Claimant got the observation log? According to PO McNulty, her recollection in her evidence was that she would have given it to him. I have this recording of handover at 16:30 in Bp94A and I have the Claimant making an entry at 16:45 in the observation log at Bp95. The Claimant says he had only just got the log when he made that entry because Mr Westerman had only just brought it back. However, I do note that the Claimant made the record to which I have referred, ie "a little teary and upset". Why would the Claimant be doing that? Because he knows he has to got to keep an observation log because Mr M is a suicide risk. So again this issue about the observation log is a red herring.

41. What then happened? From the observation notes Mr M decided, it seems on the spur, that he wanted a shower and started undressing on the bed; the Claimant let him. I can understand that entirely, it would keep the situation defused. Mr M then stood up and, in what has been described to me as a pair of small boxer shorts, took himself into the shower cubicle. The Claimant followed and noted that Mr M was wiping down the cubicle with a blue cloth and then left him to it. To turn it around another way, he did not stand over him in

the shower, ie follow Kirstie Fear's strongly worded advice of some 3 months previously.

42. As to What then happened brings in the evidence in the contemporaneous records. According to PO Val Frank (first record Bp 75) and PO Sally Ring (see interview Bp 142) it happened thus. Piecing it together with looking at the CCTV footage (as of course I have), doing my best (and it does not matter other than in terms of the core material events as found by Karen Head and upheld by Philip Wragg), SR observed the Claimant outside the inner door to the constant observation room and enquired as to whether Mr M was in the room and on being told that he was Mr M noticed that the inner door was locked. She told the Claimant he should unlock it. She then can be seen going off into the staff room. Within a matter of seconds can then be seen advancing towards constant observation room PO Frank.

43. What happened? That brings in the contemporaneous record as I have said already of POs Ring and Frank. It also cross-references to the Claimant's first report of what happened which is to be found at Bp 74.

44. PO Frank is clear that when she arrived, the Claimant was standing by the outer door frame. This in the photographs before me is the door frame surrounded by black painted metal. He was looking in; half in half out; looking back or forth towards the barred gate door. Cross-reference that to the photographs before me and that can be clearly seen as possible. She was concerned and asked him whether he had got Mr M under observation and he said that yes he had by looking at the mirror, to which I have referred. PO Frank observed that she did not think he could have a clear enough view of him and he had better get inside quick.

45. As she is doing that, Ms Ring arrived, this means PO Ring returned, and she is consistent in the sense of she also says the door was locked and both of them therefore, either collectively or individually, made plain to him that he should not have the door locked and that he had best get it open immediately.

46. Was the door open or was it shut? The Claimant's evidence at the interview with CW and as per his evidence before Karen Head , was always clear that the door was open. He never therefore had to use his keys to open it as the other two alleged.

47. In any event on agreed facts, the Claimant (having now got of course present PO Frank, possibly PO Ring), whether or not said door was locked or unlocked, advanced into the room, went around to the shower cubicle and found Mr M hanging with his feet off the ground. Why do I say that? It is because he had to get out his fishing knife (that is the Claimant) of which he is provided for the very sad purpose of having to deal with these things, and he cut the ligature. He had difficulty getting Mr M down to the ground and that task was taken over by in particular PO Ring. Then to the rescue came in Mr Westerman who assisted. This therefore could not but have been a serious attempt at suicide.

48. So, in that context an entry was made in the observation log by in particular the Claimant. He went off duty shortly thereafter. the 16th. Mr Westerman had wanted him to stay and debrief him but he did not. Be that as it may, Mr Westerman saw him the following day. The Claimant completed a report in his own hand. It is at Bp74. Crucially is says this:

"*… proceeded to take a shower and was a few minutes, it seemed a little long …*"

49. When interviewed by Mr Westerman (MW) about matters (as to which see Bp 101), thence cross-referenced to the latter's evidence to CW at Bp 143 and thence his evidence at the disciplinary hearing at Bp 229, Mr Westerman was always 100% consistent. He asked the Claimant why the door was locked and the Claimant explained as he understood that there were in a patrol state. Mr Westerman explained to the Caimant on that they had not been in a patrol state and that he should therefore have had the door open and that led to yet another discussion on the issue of privacy outweighs preservation.

50. Was Mr Westerman ever challenged by the Claimant or his key POA rep at the disciplinary hearing that Mr Westerman was not telling the truth or was mistaken? The answer is no. So, Karen Head had evidence from MW of the first account by the Claimant because of course in the written report the Claimant had not said whether the door was open or not. So, she had a weight of evidence justifying her reasonably concluding that the Claimant had wrongfully got the door shut because of course it flies in the face of the procedures to which I have referred and, second, had allowed Mr M to remain in that shower unobserved for a few minutes rather than seconds.

51. As to it being not seconds but a few minutes, would fit with the observation record which is in the Claimant's handwriting at Bp 95. He has made an entry at 16:56 "*Having a shower*" and then next at 16:59: "*Tried to hang …*". Thus Mr M cannot but have been in the shower for at least 3 minutes. However, when the Claimant was interviewed by CW and in the presence of his trade union official, it had now become "*He wasn't in there that long, 30 seconds if that*" – Bp 153.

52. At the disciplinary hearing before Ms Head, he said the same (Bp 244). By the time it came to the appeal, it had become "*20 seconds, 10 – 20 seconds*" (Bp 313).

53. It thus can be seen, and this was a point made by Mr Smith in cross-examination, that the Claimant has narrowed the time because of course the smaller the time, the less the responsibility, possibly, in that respect.

54. But throughout, inter alia Karen Head was sceptical. How could Mr M have had the opportunity to successfully complete tying a noose around his neck, suspend it from something that will sufficiently weight bear and thence be able to sufficiently hang himself so as to be need be cut down in the space of a matter of seconds? Is it not that it would take longer than that, ie minutes, which would fit with the very first recording of times in this case by the Claimant?

It wold obviously fit with the observations of PO's Ring and Frank as to the Claimant being outside the inner door,Mr M not being in view but the Claimant confirming he was in the room. Thus on the weight of the evidence Karen Head could reasonably conclude that the Claimant had wrongfully failed to observe Mr M.

55. Moving on, it of course follows that this incident could not but have been more serious. Mr M clearly nearly died. He had to be cut down.

56. It follows that the employer was not acting unreasonably in deciding that an investigation needed to be held and in the circumstances, because of the seriousness of the issue, that the Claimant should be suspended on full pay pending the investigation being completed and then a decision made on how to take it forward. In this case, it was decided to proceed with disciplinary charges, the Claimant's suspension was therefore extended. Given the weight of the evidence this was obviously not unfair.

57. As to matters procedurally, it is suggested that CW was biased. This brings me back to the witness statement of the Claimant and in particular paragraph 26:-

"*… I feel the report was biased against me …*"

58. To feel is one thing, it is an emotional reaction. It is an altogether different thing to provide substance to support the feeling. What is the substance? It is argued that Ms Wiley (CW) should never have undertaken this investigation because she is conflicted. This was not raised at the internal proceedings. Where is the conflict? It is confined to that because she had authorised constant ops on the 15th, that she should not have been involved because it may be that she would therefore (and I elaborate upon the interference) try and cut down lines of other enquiries so as to deflect any blame from what had happened away from herself. That fits in effect with paragraph 46 of the Claimant's witness statement.

"*… I have been made a scapegoat for the employer's failings …*"

59. Where is the evidence? First, CW was the appropriate person to be appointed to undertake this investigation. I am persuaded by Karen Head to that effect and it is because it falls within her remit as the Senior Safeguarding Officer at the establishment. Therefore, there would only be a need outsource the investigation to another prison establishment if she was somehow or another herself involved in a way that might bring upon her some sort of blame. But she was not there on 16 August; she was on a rest day. It follows this is a non-starter of an argument. It follows thus that there is nothing untoward about Ms Wiley undertaking this investigation. It does not constitute a procedural unfairness.

60. There is then the suggestion that somehow or another, Karen Head was conflicted but as to why or otherwise that she might have been biased has never really been put to her and indeed where is the evidence? She was dealing with matters on the basis of a thorough investigation report from which it is self-

evident from what I have already now found that there was a clear cut case to answer. Furthermore her conclusion of gross dereliction of duty is of course consistent with the weight of the evidence.

Procedural unfairness

61. In the ET1, it is pleaded that this was a breach of the ACAS Code of Practice. That is a reference to the ACAS Disciplinary and Grievance Code of Practice latest edition 2015. How? cross-referencing in that respect to the Respondent's own disciplinary procedure to which I have already referred.

62. **Fundamentals**

62.1 Full investigation. All material leads for the purposes of investigation were followed up including CW and her deputy Vicky Mital, placing one of themselves in the shower cubicle and the other outside in line of the mirror to see if the Claimant was correct in saying he could see something of Mr M and then swapping over to double check. Neither could see the other in the shower. This evidence (see CW statement para 37) was not challenged.

62.2 Did the Claimant get a fair interview? Yes: he was invited to an interview, he knew why and he had the right to be accompanied by a trade union representative and he was in the form of Mr Smith.

62.3 Was he provided with details of the case that he had to meet in the form of what I would describe as a step 1 ACAS compliant letter? Yes: on 1 November 2017. He was supplied with the full investigatory pack, including the witness appendixes.

63.4 As to the dismissal hearing, did he have the right to be accompanied? Yes, and he was by Mr Smith.

63.5 Did he have a fair hearing at which he could challenge the evidence? Yes, all the material witnesses were called to give evidence, ie Frank, Ring, Westerman, Fear and McNulty. There is a suggestion made that three witnesses ought to have been called and as they were not this undermined tthe fairness of the proceedings. One of these is Mr Ferguson another is Mr White. But the trade union representative, having had their statements, agreed that they were not material to the fairness of the enquiry because they had nothing to add because they were not present at the material time. So that takes us nowhere.

63.6 The CCTV point – I have dealt with.

63.7 Did the Claimant get a fair say; was he shut out from being able to explain his position at the disciplinary hearing? No, it was a lengthy hearing; it was tape-recorded. I have read the transcript from cover to cover. The hearing was a model of fairness. He was not shut out at all from making his defence.

63.8 Where there any additional lines of enquiry that were required to be pursued by Karen |Head? The answer to that is no because the CCTV issue at that stage had been cut off for the reasons I have gone to.

63.9 Therefore, we come to the appeal. It was by way of a review hearing not a rehearing. That was as per the Respondent's policy. The POA knew that. The Claimant had put his grounds of appeal in, really as it turned out focused more than anything on that this was a mistake by him and offering mitigation in particular his length of service and unblemished record of service.

63.10 Did the Claimant get a fair hearing at the appeal? He had a full opportunity to make his case and there is no evidence Mr Wragg was in the least bit biased. He was a very senior Prison Officer from another establishment. Did Mr Smith get an opportunity to make all the points he wanted to for the Claimant? Yes, he focussed on mitigation.

64. So to argue that this was a breach of the ACAS Code of Practice, is , put simply, misconceived.

65. Thus it follows that this was a procedurally fair dismissal.

Conclusions

66. The Claimant clearly made a serious error. Even on his own evidence, and assuming therefore that the inner door might have been ajar, he accepted that he could not from his vantage point see enough of Mr M through the mirror, in other words to safely make out what he was doing with his top half. That must follow because as was repeatedly put to him at the investigation and thence the disciplinary hearing if he had had a clear line of sight then how could he have missed Mr M trying to hang himself?

67. So, why did the employer decide to dismiss this Claimant given this was a mistake? After all, this is a man of 15 years' impeccable service. This occupied my mind most. What was the reasoning of first Karen Head and then Philip Wragg?

68. Essentially, it is that the Claimant and of course is hoisted on the evidential petard, maintaining that the door was not locked. Obviously, he would have to say that because it would be a breach of the procedure if it was locked. Maybe the Claimant is correct, it is not really for me. The question is the weight of the evidence. Could the employer reasonably conclude within a range of reasonable responses, and indeed on its own test of balance or probabilities, that it was more probable than not that the Claimant had got that door locked. It is the weight of the evidence, so the answer becomes yes.

69. Could the employer conclude on the weight of the evidence that he left Mr M behind a locked gated door, that is the inner one, unable to clearly see him for minutes as opposed to seconds. The answer to that question is again as to the

weight of the evidence. This Claimant contradicted himself. His first record was that it was a few minutes. Only subsequently did he change. Once the employer has made the finding in terms of credibility that it believes the weight of the evidence on the door issue, it logically follows that it is reasonably entitled to reach a similar conclusion on the issue of minutes as opposed to seconds.

70. What it means therefore is that Ms Head and Mr Wragg would not have found reassurance in the defence of the Claimant given those contradictions. It is that reason why they both concluded that trust and confidence was so fatally undermined that it outweighed the impeccable good character prior thereto of the Claimant.

71. It is not for me to substitute my own view. The test is has the employer acted fairly within the range of responses having regard to the findings that it was reasonably entitled to make given the nature of the undertaking and of course the crucial safeguarding responsibilities of such as the Claimant. I am not dealing with a breach of contract claim which of course could have been brought for notice pay as this was a summary dismissal. In that respect the test is an objective one rather than based upon the range of reasonable responses.

Deploying Av B; also the disparity point and the Claimant's submission

72. I am well aware of the jurisprudence as per A v B (2002) IRLR 245 EAT followed by ***Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA***. Obviously the Claimant's ability to work in his chosen career was clearly likely to be finished once he was found to have committed an act of gross misconduct by way of gross negligence. as happened in this case. But that is a factor to be engaged in assessing the penalty Av B is more concerned with that the disciplinary enquiry should ensure that evidence that might assist the Claimant, if it exists should be fully considered.

73. Was there some other evidence that came to light that assisted the Claimant? That was explored, it came to naught and it is the CCTV evidence. So what is the weight to be put on the scales of justice apropos AvB? It is the Claimant's previous record. He admitted in the disciplinary process that with hindsight he had got things wrong. Before me he focussed on that "I take responsibility". But he never really accepted that he had been negligent. His defence always essentially was a) his limited ability to view the observation log, b) that he had the door ajar and c) that as far as he understood it to use the mirror was sufficient; and which it is not when looking at the policies because they require this standing right up close even if it impacts upon the individual's dignity if he is at suicide risk and which engages a judgement call. Therefore the more experienced the officer thus the more the employer could reasonably be entitled to rely upon him to not neglect a fundamental duty and which he clearly did.

Mr T

74. Not deployed during the internal proceedings but perhaps understandably now, because I gather he only found out afterwards, is that the Claimant raises that

another employee who similarly erred, a Mr Thacker, unlike him was not dismissed. I heard evidence on this issue from Karen Head. There is a distinction and there no evidence to contradict her. Mr Thacker was an officer of very recent experience, I gather some 15 months. Because of pressures on the Prison Service at the time, he had received very limited training before being deployed to. He had then been deployed from the training establishment as I gather to Morton Hall where he was pushed in at the deep end so to speak with very little training on dealing with safeguarding.

75. As soon as he realised he had a problem with a resident, it seems attempting to hang himself in the shower of the relevant observation suite, he himself had pushed open the door and rushed in on his own. To turn it around another way, he was not standing outside the door and needing to be prompted by other officers.

76. Accordingly given these factors the incident didn't warrant dismissal. Ms Head contrasts the experience of the Claimant and her findings. I stress they were not incidents that occurred contemporaneously.

77. It follows that given the difference in the circumstances, the disparity of treatment/ unfairness argument fails.

Finally

78. For all the above reasons the claim is dismissed.

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Employment Judge Britton

Date: 22 May 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE