EMPLOYMENT TRIBUNALS

claimant: Mr C O'Reilly

respondent: The Secretary of State for Justice

FINAL HEARING

Heard at: Leicester **On:** 13 to 16 May 2019

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: Miss M Stanley, counsel
For the respondent: Mr A Lyons, counsel

REASONS

1. This is the written version of the reasons given orally on the day for the Judgment of 16 May 2019, written reasons having been requested by the respondent. That Judgment was to the effect that the claimant was wrongfully, but not unfairly, dismissed.

2. The claimant was employed by the respondent as a Prison Officer from 1999, latterly at HMP Glen Parva (the "Prison"), which is a Young Offenders Institution. He was summarily dismissed for gross misconduct on 13 June 2017. Having gone through ACAS early conciliation from 12 September 2017 to 26 October 2017, he presented an ET1 claim form to the tribunal on 25 November 2017.

3. The respondent initially took a time limits point connected with early conciliation, but that was abandoned part-way through this final hearing.

4. The claimant presents two complaints: unfair dismissal and wrongful dismissal. The unfair dismissal complaint is a so-called 'ordinary' unfair dismissal claim under section 98 of the Employment Rights Act 1996. There have been hints and suggestions during the proceedings that there could be other claims, but those claims have not materialised. No application to amend has been made at any stage.

5. In terms of the law and issues, a document containing a draft list of issues and a summary of the law was prepared by me and presented to the parties overnight between days 2 and 3 of this hearing. During submissions, both parties' counsel

accepted that document as accurate and complete. It should be deemed to be incorporated into these Reasons and I refer to it.

6. The alleged gross misconduct for which the claimant was dismissed related to an incident in the Prison on 10 May 2016 during which the claimant used force on a prisoner, who has been referred to throughout this hearing as "Prisoner A".

7. The respondent's essential case was and is that the claimant used force when he should not have done so, and that in doing so he put himself and others in danger.

8. I shall now set out what evidence there was before me.

9. First, I had witness statements and oral evidence from the claimant and from the respondent's investigator, Mrs J Packwood (formerly Coe), the dismissing officer, Mr P Novis, and the appeals officer, Mr P Foweather OBE. The respondent's witnesses were all senior and experienced members of staff, with Mr Novis being a Prison Governing Governor and Mr Foweather being Director of the Yorkshire Prisons Group. None of them knew the claimant before their involvement in this case.

10. Secondly, I had two bundles of documents, running to 695 pages in total. As one would expect, what happened is extensively documented. Relevant meetings and hearings were recorded and transcribed and the most extensive documents in the bundles are the transcriptions. I do not, though, have a transcription or notes of a part of the disciplinary hearing and of an unofficial follow-on from the appeal hearing. I shall return to this later in the decision.

11. Also within the bundles are various policies, including, in particular, the Use of Force policy applicable at the relevant time. Amongst other things, the policy states that the use of force is only lawful if its use is reasonable, proportionate and necessary.

12. Within the policy there are different types of use of force. These include personal safety techniques and control and restraint. The use of force involved in the present case was the former: personal safety techniques. These are techniques used when necessary to prevent harm to a prison officer or a third party. They are used for unplanned incidents. In the policy, it is stated that unplanned incidents occur where there is an immediate threat to someone's life or limb, or to the security of an establishment, and staff need to intervene straight away.

13. Control and restraint (C&R) has been discussed during this hearing, but is not what this case is concerned with. C&R are techniques used by a team of three or more officers in a planned way, to manage a violent or what is described as a "*refractory*" prisoner.

14. The third part of the evidence – the most important part of it, in my view – is CCTV of and around the incident itself. I have been provided with 5 minutes' worth of footage from each of two CCTV cameras. Extensive use of that footage was made during the respondent's disciplinary process and during this hearing, particularly during the cross-examination of the claimant and of Mr Novis. The footage was provided to the tribunal before the first day of the hearing and I was asked to and did watch it during the first

half day of the hearing, which was a reading morning. The claimant and the respondent's witnesses must have watched it dozens of times; I certainly have.

15. The incident took place in a corridor between a hallway where there were lavatories and a classroom / education room. The claimant and a colleague, a Mr Yeung, had been supervising a toilet break of a group of prisoners including Prisoner A. The incident occurred whilst the claimant and Mr Yeung were escorting seven prisoners back to the classroom.

16. The prisoners were dawdling. The claimant had ushered them through the doors connecting the hallway with the corridor and when doing so had moved some of them along by putting his hand on their backs. As they entered the corridor, Prisoner A was arguing with the claimant, accusing him of having touched his backside. Prisoner A used homophobic insults. Part of the way down the corridor, the claimant and Prisoner A stood facing each other. The argument continued. After some minor physical contact between the two of them, which has variously been suggested to be the claimant pushing Prisoner A and/or Prisoner A batting away the claimant's hands held out in front of the claimant, the claimant made a grab for Prisoner A's neck and head. Prisoner A ducked under the claimant's grab and the claimant, possibly still in physical contact Prisoner A, but in any event close to him, followed Prisoner A down the corridor in the direction of the classroom. The two of them wrestled, with Mr Yeung quickly coming to the claimant's assistance. Ultimately, with Mr Yeung's and, later, other officers' assistance, Prisoner A was restrained and then taken away.

17. During the course of what I would describe as the wrestling, the claimant can be seen doing something that, putting it neutrally, could conceivably be him punching Prisoner A.

18. The entire incident was caught on CCTV. The first lot of CCTV footage I have is of the hallway. That footage does not capture the incident at all, but establishes (and the respondent at the time accepted it established) that the claimant did not touch Prisoner A's backside.

19. The second lot of CCTV, the footage that is important in relation to these proceedings, is of the corridor. The camera is pointing down the corridor towards the classroom and appears to be positioned above the door connecting the corridor and the hallway. There is no sound. There is only a single camera and camera angle, and the camera is positioned above and behind the claimant, who was facing Prisoner A during the most relevant parts of the footage, so there is a foreshortening effect, and one's view of much Prisoner A is blocked by the claimant, and one can only see the back of the claimant. But with those reservations, the CCTV is of good quality.

20. Of course the CCTV is not perfect, and of course one could be misled by film just as one could be misled by other types of evidence. However, I think it is by far the best evidence available to me, as well as being the best evidence that was available to the respondent, to determine what occurred, much better than the witness evidence, even the contemporaneous witness evidence.

21. There are several reasons why I say this about the witness evidence, but they boil down to the fallibility of human perception and memory. The brain does not work like a recording device. People misperceive and misremember. In particular, in relation to the claimant himself, human beings have a natural tendency to self-justification, which operates at a subconscious level. This natural tendency can cause people to convince themselves that they did not do things that they did do but which they ought not to have done, and that they did things which they didn't do but which they ought to have done. People really persuade themselves that black is white and vice versa.

22. Further, in relation to the claimant and to all the other witnesses too, people's memories have inevitably been warped by the fact that there has been a disciplinary process ending in a dismissal and then a tribunal process, during the course of which all of them will have thought about and discussed their evidence with numerous people, numerous times. Everyone involved will have constructed a narrative in their own heads about what happened. Human psychology being what it is, it is likely to be a narrative that is favourable to their own interests, whether that accords with reality or not.

23. In conclusion on this point, although I accept that everyone who gave evidence, not least the claimant, was doing their best to tell me the truth as they genuinely believe it to be, this does not mean that I accept the accuracy of their evidence; and although the CCTV evidence has its weaknesses, they are insignificant in comparison to those of the witness evidence.

24. Bearing in mind the existence of the CCTV evidence, there is, in my view, an artificiality or air of unreality about the claimant's case. Mr Novis, the dismissing officer, was assessing whether the claimant had acted appropriately or inappropriately during the course of an incident, the relevant part of which lasted less than a minute and which he could see in its entirety on CCTV footage. Whatever the claimant or anyone else said and whatever other evidence there was, Mr Novis was entitled to and did form his own view about events that were unfolding before his eyes on the CCTV and as to the appropriateness of the claimant's actions which he could see on the CCTV. Naturally, different people viewing the CCTV will form a different view as to what it shows and will reach different conclusions as to whether the claimant behaved appropriately and/or as to the seriousness of any inappropriate behaviour by the claimant. But, whatever else, Mr Novis's key conclusion that the claimant should not have used force and that in doing so he put himself and others at risk was one that was plainly open to him on the basis of the CCTV evidence alone.

25. In the circumstances, the claimant's attack on the respondent's decision that the two charges of misconduct were made out is misguided. I don't in the slightest criticise the claimant or his legal team for this, but it seems to me that that attack would only succeed if I were improperly to subject the respondent's decision-making to the kind of intense, detailed forensic scrutiny that is, perhaps, suitable in relation to a judicial decision being appealed, but is wholly unsuitable when what I am considering is an employer's decision pursuant to section 98(4) of the Employment Rights Act 1996. It is wholly unsuitable even where the employer is of the size and has the administrative resources of this respondent.

26. I turn to the facts.

27. I refer to the respondent's key chronology and key cast list documents. Apart from what happened during the incident (in relation to which, as above, I can to a considerable extent form my own view from watching the CCTV, just as Mr Novis and Mr Foweather did), very little about the facts is in dispute.

28. I shall set out my findings about what happened in the incident itself later.

29. On the day of the incident, the claimant completed an internal document about his use of force, referred to as "Annex A". Amongst other things, he stated: "*I started to walk towards him* [that is, towards Prisoner A] *with my hands held out at chest height informing him that he needed to go back. He continued to be abusive in a very confrontational manner. As I got towards him I applied pressure to his chest to move him. He resisted this and therefore I initiated C&R by taking control of his head.*"

30. The claimant did not in that document suggest he had initiated the use of force because he had been assaulted and/or because he feared he was about to be assaulted.

31. Prisoner A complained to the Prison's Governor, Governor Clarke. Concerns were also raised by one of the members of education staff who had witnessed the build-up to and aftermath of the incident and/or who had overheard some of the conversation between the claimant and Prisoner A.

32. The only eye witnesses to the critical parts of the incident itself were the claimant, some prisoners and, to an extent, Officer Yeung. I say "*to an extent*" in connection with Officer Yeung because the evidence he gave to the investigation was not particularly helpful. He didn't see and/or hear and/or could not remember things, and in the CCTV he is looking away from the claimant's and Prisoner's A's interaction at crucial points.

33. Governor Clarke launched a formal investigation, as it seems to me she was bound to do. There is no discernible valid basis for any criticism of her in relation to this, certainly not for the allegation which the claimant and his Prisoner Officers Association ("POA") representative, Mr Drabble, made. That was an allegation to the effect that the investigation had only been commissioned because Governor Clarke 'had it in' for the claimant.

34. The claimant had, as I understand it, been an active member of the POA and for a period had been a POA Chairman. He had a fair amount of experience of investigations and disciplinaries from his work for the POA. Whether it was connected with this or was for other reasons, the claimant and his representatives (he was represented by the POA throughout), took, as far as I can see, every conceivable point of objection during the course of the investigation and disciplinary process. They sought to erect obstacles in its path and to attack those involved in it. I don't blame the claimant for this. No doubt he believed that it was tactically what he should do to protect his position. However, I don't think he was always, necessarily, in hindsight, acting in his own best interests in this respect.

35. Mrs Packwood was appointed the investigating officer. This was on or around 15 May 2016. Terms of reference were given to her in which it was stated that the allegations she was investigating were that the claimant has, "*provoked* [Prisoner A] *by pushing him in the chest resulting in* [Prisoner A] *being restrained*". Allegation 2 was that, "*Officer O'Reilly failed to attempt de-escalation and was aggressive in both his manner and inflection*". Allegation 3 was that during the incident, the claimant, "*put himself, colleagues and prisoners at risk by his actions*".

36. On 24 May 2016, Mrs Packwood wrote to the claimant and to individuals identified as witnesses seeking to arrange interviews with them. Interviews took place between 1 and 10 June 2016. The interviews were transcribed and I refer to the transcripts.

37. An initial interview took place with the claimant on 24 June 2016, which was the date convenient for the claimant and for Mr Drabble. The only thing of substance that occurred in that interview is that the claimant made a complaint against Governor Clarke, demanding that the investigation be suspended, which it was.

38. One of the things relied on by the claimant is allegedly making dismissal unfair is delay. I am told the respondent's guidance relating to investigations has 28 days as an initial target for the period of time for competing investigations, although this is subject, always, when necessary, to a power to extend time. For an investigation of this kind, 28 days was never going to be remotely realistic.

39. Up to 24 June 2016, I am satisfied that the respondent and Mrs Packwood acted with reasonable speed.

40. I shall deal with the claimant's delay point in a little more detail later, but I would like to highlight a couple of things at this stage. First, most of the delay, at least that prior to dismissal, was wholly or partly caused by the claimant's tactical manoeuvrings and/or were not mainly the respondent's fault. Secondly, if the claimant genuinely thought, and I doubt he did, that those tactical manoeuvres would result in the investigatory and disciplinary process being stopped altogether, this was unrealistic. He knew, or at least ought to have known, the best he could reasonably hope for was that the process would be delayed. I am quite sure that if he could not succeed in completely derailing the process, he wanted it to be delayed for as long as possible. He is therefore not in a good position to complain about delay, delay that he wanted and that he largely brought about himself.

41. One of the claimant's points that he used to attack the investigation was a complaint that although Mrs Packwood did formally seek and was granted extensions of time, she did not formally notify the claimant of this. This is one of a number of points that has not really been pursued on the claimant's behalf during this hearing – realistically, I should say. Insofar as the claimant has not abandoned that point, I reject it. The claimant must, himself and/or through his POA representative, have known that extensions of time were being granted. This and other failures to comply with the letter of the respondent's policies and procedures relating to the administration of the investigation and the disciplinary process have no impact at all on the fairness of his eventual dismissal, in my view.

42. The investigation resumed in September 2016. Mrs Packwood interviewed a further witness on 20 September. The following day, she received from Mr Drabble the claimant's written answers to written questions that, I think, were first posed by Mrs Packwood in June 2016.

43. The written answers included this: "*As I walked towards him* [Prisoner A]*, with my hands held at chest height as a protective barrier, my hands touched his chest as he was now being very confrontational and abusive, refusing to return to his classroom. He swiped my arms away rather than me pushing him and therefore, fearing for my safety, I initiated C&R as he had assaulted me and he was in a heightened state of aggression*".

44. An interview with the claimant had been proposed for 20 September 2016, but it was rearranged at the claimant's request and for his convenience and it eventually took place on 10 October 2016.

45. During the interview on 10 October 2016, the claimant said he did not think his arms touched the prisoner at all and that if he did, "*it was not a push, it was a lightest of pushes and I walked towards him with my hands out with a defensive manner to try and encourage him to go back and he has hit my hands away*".

46. That is a quotation from what appears in the transcript. Of course the transcript may have one or two words wrong, but I accept it is substantially accurate.

47. When asked twice why he did not take a step back, the claimant did not really answer the question and referred to it being inappropriate to judge his actions with the benefit of hindsight; and to the fact that he was charged with challenging prisoners' poor behaviours; and that Prisoner A had had plenty of opportunity to go back to his classroom and do as instructed and that Prisoner A had chosen not to do so.

48. On my reading of the interview, the claimant does not explain why he initiated the use of force except to suggest he was fearful for his safety.

49. On or around 26 October 2016, seemingly in light of the claimant's complaints against Governor Clarke, Mr Novis was appointed commissioning manager of the investigation in her place. His appointment was confirmed to the claimant on 2 November 2016. Nothing changed in relation to the investigation and disciplinary process with his appointment. In particular, the charges against the claimant remained the same.

50. Mrs Packwood completed her report on 20 November 2016. I refer to it. It is clear and reasonable in terms of how it summarises the allegations and the evidence. Reading it, the claimant could have been in no doubt as to what he was being accused of and why he was being accused of it.

51. The report contains the following: "*During interview Officer O'Reilly has stated that he didn't touch the prisoner before restraining him or that if he did it was the lightest of touches. Officer O'Reilly's use of force* [Annex A] *confirmed that Officer O'Reilly applied pressure on Prisoner A's chest to move him. CCTV footage shows him push Prisoner A with one hand, move forward 3 small steps and then push him once more with both*

hands before restraining him. Instead of withdrawing from confrontation and calling for assistance to deal with Prisoner A and the group of prisoners, Officer O'Reilly chose to restrain the prisoner, giving Officer Yeung no choice but to assist him."

52. The report also included this: "*In disciplinary cases, the standard of proof required is the balance of probability, i.e. it is more probable than not that misconduct or gross misconduct took place. … It is recommended that there is sufficient evidence for a disciplinary hearing to be held regarding all 3 allegations made against Officer O'Reilly*."

53. Mr Novis wrote on 14 December 2016 to the claimant enclosing the report and inviting him to a disciplinary hearing. The letter stated:

> *It is alleged that you have behaved in a manner which is in breach of the standards set out in the NOMS code of conduct in discipline and you are therefore required to attend a disciplinary hearing. The following claims have been made against you and have been investigated in accordance with NOMS' policy. If proven these allegations would constitute gross misconduct:-*
>
> 1. *You provoked* [Prisoner A] *by pushing him in the chest resulting in him being restrained.*
>
> 2. *You failed to attempt de-escalation and were aggressive in both manner and inflection.*
>
> 3. *You put yourself, colleagues and prisoners at risk by your actions during the incident.*

54. These are substantially the same charges as had been contained within the initial terms of reference and which had been put to the claimant when he was first invited to interview in May 2016.

55. The claimant was also told what people were being called as witnesses and was invited to suggest other witnesses who might support him.

56. The claimant alleged he did not receive that letter of 14 December 2016, nor a second similar letter that was sent on 6 January 2017. He only responded to the third similar letter, which proposed a disciplinary hearing in February 2017. His response was to raise a grievance against Mr Novis, alleging that the disciplinary process should be discontinued due to alleged failures to comply with the letter of internal procedures.

57. The disciplinary process had to be suspended during the grievance process.

58. I do not think it is necessary for me to address the claimant's grievance at any length, given that it has barely been mentioned, except as a source of delay, during this final hearing. Suffice it to say that I agree with the respondent's conclusions about it, the gist of which are: that there were some technical breaches of procedure; that none of those breaches adversely affected the fairness of the process to any significant extent; that there were no reasonable grounds for discontinuing the disciplinary process.

59. The grievance process concluded with an appeal decision letter of 8 May 2017. The disciplinary process then resumed.

60. The disciplinary hearing began on 6 June 2017 and concluded on 13 June 2017, with Mr Novis giving an oral decision dismissing allegation 1 – the allegation about pushing Prisoner A in the chest – and rejecting a subsidiary allegation that the claimant had inappropriately thrown a punch, on the basis that the evidence in relation to both these things was inconclusive, but upholding allegations 2 and 3 and dismissing the claimant for gross misconduct.

61. Generally, it seems to me that the disciplinary hearing itself could hardly have been more fair and thorough. The relevant available witnesses were called, including whoever the claimant wanted called. The claimant and his representative were allowed to cross-examine, seemingly without restriction. The hearing lasted many hours. This is reflected in the length of the transcript, which is not complete but nevertheless runs to over 150 pages. I refer to that transcript.

62. What is missing from the transcript is the evidence that was given on the afternoon of 6 June 2017. There is nothing sinister about it being missing. Respondent's counsel is instructed – and I have no reason to disbelieve this – that what happened was that, for unknown reasons, the tape or disc containing the recordings from that afternoon was not typed up along with all the other recordings, and that by the time anyone realised the transcript was missing, the tape or disc had been recorded over.

63. Apart from in one respect, nothing of any great importance seems to have happened on the afternoon of 6 June 2017. That is evident not least from the fact that, seemingly, no one, the claimant included (and he was provided with the transcripts at the end of July 2017), noticed the transcript from that afternoon was missing until sometime in 2018. The one potentially important thing that occurred on the afternoon of 6 June 2017 and which we are missing the transcript of is the evidence given by a Mr Thornhill. Mr Thornhill is the one person Mrs Packwood did not interview who the claimant suggests he wanted her to.

64. Mr Thornhill was not a witness to the incident. What he was, was a local use of force expert. On the afternoon of 6 June 2017, he was shown and was asked about the CCTV footage, including questions around whether what the claimant could be seen doing in that footage was, in Mr Thornhill's expert opinion, lawful and appropriate. The claimant's case is that Mr Thornhill expressed the view that everything the claimant did in terms of use of force was lawful and appropriate.

65. It is convenient to deal with that issue now. I don't think the claimant's recollection of what Mr Thornhill said on 6 June 2017 is accurate. The best evidence I think I have as to what Mr Thornhill said is what the claimant and his POA representative said about Mr Thornhill's evidence nearer the time. On 13 June 2017, Mr Drabble, who was his POA representative at the disciplinary hearing, did a detailed summing up on the claimant's behalf. If Mr Thornhill had expressed the view that all of the claimant's actions were lawful and appropriate, Mr Drabble would have put this front and centre in his submissions and Mr Drabble did not. He did not, however, forget about Mr Thornhill

completely. He twice referred to evidence Mr Thornhill had apparently given specifically in connection with the alleged punch that: he saw nothing unlawful; and that the CCTV was inconclusive in terms of whether it actually was a punch or some other 'technique'. I think it is likely that what the claimant now remembers as Mr Thornhill saying the claimant's actions were all lawful was what Mr Thornhill said purely about the alleged punch.

66. Similarly, if Mr Thornhill had given such potentially important evidence as the claimant remembers him giving, I would have expected the claimant to have noticed that the transcript was missing before his appeal and to have referred to that evidence during his appeal; and, again, he did not do so.

67. In addition, even if Mr Thornhill had expressed a general view as to the lawfulness of the claimant's actions, that would not make this dismissal unfair.

67.1 First, although Mr Thornhill is an expert, this was not a situation where the decision-makers were entirely reliant on expert evidence and were bound uncritically to accept that evidence. Mr Novis and Mr Foweather were, as I have already mentioned, highly experienced senior personnel very familiar with the use of force within prisons and reasonably entitled to form their own views, potentially assisted by, but not bound by, the views of use of force experts. Even if, like me, they lacked that experience and familiarity, they would have been entitled to watch the CCTV and form their own views as to whether the claimant had acted reasonably and out of necessity.

67.2 Secondly Mr Novis, reasonably and without objection from the claimant, called as an expert witness a Mr Hunt, who was a national use of force expert more qualified than Mr Thornhill to give an opinion on what the claimant did. In relation to the alleged punch, Mr Hunt's views were similar to Mr Thornhill's, but in relation to the critical period leading up to the claimant's first use of force, he was very critical of the claimant. He said things to the effect that: he would not have initiated force when the claimant did; that other options were available and therefore that force was not being used, as it should have been, as a last resort; that there was no threat; and that force wasn't reasonable or necessary or appropriate.

68. Returning to a narrative of events, Mr Novis sent the claimant a letter recording his decision on 25 July 2017. The claimant sent a letter expressing an intention to appeal on 31 July 2017. Grounds of appeal, of a very limited kind, were set out in an email of 21 August 2017. The grounds were: unduly severe penalty; new evidence has come to light which could affect the original decision; the disciplinary proceedings were unfair and breached the rules of natural justice; the original findings were against the weight of the evidence. In relation to the second of these, no new evidence had, in fact, come to light and the claimant accepted as much when he was being cross-examined at this hearing.

69. By a letter, also of 21 August 2017, the claimant's POA representative wrote to the respondent asking for the appeal to be heard by a different person from the person who would normally have dealt with it – Director Teresa Clark – because she had dealt with

the claimant's grievance appeal. (It was being suggested that the grievance appeal overlapped with the disciplinary appeal). This, understandably, led to further delay. Although the extent of that further delay has not been explained to me, I expect it was partly to do with the prospect of tribunal proceedings, early conciliation, and then the instigation of tribunal proceedings.

70. Mr Foweather was appointed and he conducted an appeal hearing on 15 December 2017. Again, the hearing was recorded and there is a transcript of that recording to which I refer.

71. At the end of the transcript of the appeal hearing there is a discussion about whether or not the CCTV showed the claimant pushing Prisoner A. Mr Foweather said this: "*If you want to give me a separate written submission on frame by frame, giving times, I am quite happy to accept that as well if that helps you. If you want to give me any more submissions around the CCTV I am quite happy to defer my decision until, say, early next week, but it has to be fairly timely. If that helps you, I will revisit the CCTV. I haven't got the facility to be zooming in and I have gone frame by frame. I can get an IT person to do that on my big screen.*"

72. It is common ground that they all then did go with Mr Foweather and watch the CCTV on a big screen. There was a disagreement between the parties as to whether they went through it frame by frame and as to the extent to which, when going through the CCTV, Mr Foweather put to the claimant particular allegations about what Mr Foweather felt the claimant had done wrong. I haven't reached a conclusion on that disagreement because I don't think it matters to the fairness of dismissal. Indeed, I don't think it is really relevant to my decision. I shall explain this below.

73. Mr Foweather gave his decision rejecting the appeal by a letter of 18 December 2017. It is common ground that, in accordance with the respondent's procedures, Mr Foweather's role was not to rehear but was instead, as stated in the appeal outcome letter, to consider whether the decision to dismiss was fair and reasonable or whether the appeal should be upheld.

74. Although Mr Foweather limited himself to his designated role in the outcome letter itself, in his witness evidence in the tribunal, and to an extent during the appeal hearing, he expressed the view that he disagreed with Mr Novis's conclusion about the alleged push or pushes and about the alleged punch.

75. I now turn explicitly to my decision on the unfair dismissal issues.

76. I note that I do not think it is necessary or desirable for me to completely to separate in this decision my findings of fact and my conclusions on the issues. I have already set out some of my conclusions and I shall be making further findings in this part of my decision. Similarly, I do not intend rigidly to go through the British Home Stores v Burchell test and to address separately every part of that test.

77. I start with sections 98(1) and (2) of the Employment Rights Act 1996: what was the reason for dismissal and was it one relating to the claimant's conduct?

78. Plainly, the reasons in Mr Novis's and Mr Foweather's minds were reasons relating to the claimant's conduct: a genuine belief that the claimant was guilty of gross misconduct. The contrary was not put to them in cross-examination and there is no reason in the evidence to doubt that that was indeed the reason. The dismissal was therefore for a potentially fair reason.

79. In relation to section 98(4) of the Employment Rights Act 1996, I am going to focus on the particular reasons put forward by claimant's counsel in submissions for why the dismissal was allegedly unfair. It should be noted that I have taken into account everything else that has, directly and indirectly, been put forward by the claimant during the course of these proceedings in relation to the fairness of dismissal. If I felt that claimant's counsel had overlooked good points in the claimant's favour in her submissions, I would be addressing them now, but I don't think she has. I think she has advanced every point in support of the claimant's case that the claimant could reasonably hope to win on, and has done so forcefully and at least as well as the claimant could reasonably have expected her to.

80. I start with the argument that the delays in the investigation and disciplinary process, including in relation to the appeal, made the dismissal unfair.

81. It is undoubtedly the case that there were unexplained, and therefore unreasonable, delays. For example, although the claimant's complaints about Governor Alison Clarke in June 2016 and about Director Teresa Clark in August 2017 would inevitably have led to some delay, respectively to the investigation and to the appeal, the months of delay that in both cases ensued is not explained. However, my task is to ask myself whether the dismissal was made unfair by unreasonable delays by the respondent, not merely to ask whether there were delays that were outside the band of reasonable responses. My short answer is it was not; the unreasonable delays did not make the dismissal unfair.

82. I reject counsel's submission that delay in and of itself results in unfairness. Delay will often lead to unfairness, but that is something different. For example, the unfairness that arises out of delay may come from the claimant being suspended and the claimant was not suspended in this case; or from evidence being lost; or from the claimant being given a legitimate expectation that no disciplinary charges are going to be brought.

83. Even if I am wrong about this, I cannot identify anything about the delay in the present case, particularly but not limited to the delay relating to the appeal, that adversely affected the claimant in connection with the dismissal and/or that might otherwise make the dismissal unfair. Counsel suggested that the prejudice caused by the delay came from the fact that memories fade, meaning the evidence was degraded. In another case that might be a real source of prejudice, but it is not here. The claimant gave an account of events on the day. Others gave their accounts fairly shortly afterwards. The claimant had an opportunity to give a further account at the same time as other witnesses and chose not to do so. There was CCTV of the whole incident that was preserved.

84. Had the disciplinary hearing taken place at the time it would have done had the claimant not complained about Governor Clarke – probably in late summer 2016 – I do not think the evidence in his favour would have been any better or stronger than it was in June 2017. If anything, the claimant was assisted by the delay in two respects. First, it appears that a witness who gave evidence to Ms Packwood against the claimant, a Ms Wright, had left the prison by June 2017 and so did not give evidence in June 2017 as she would have done in February 2017 (or, at least, as it was suggested she was going to in the invitation to the disciplinary hearing of January 2017). Secondly, I think that all that would have happened if there had been less delay is that the claimant would have been dismissed sooner than he was.

85. Another reason put forward on the claimant's behalf in submissions for why the dismissal was unfair relates to the claimant allegedly having post-traumatic stress disorder ("PTSD").

86. In the 11 months prior to the disciplinary hearing, the claimant never once put forward the fact that he had allegedly been diagnosed with PTSD as a relevant factor. He put forward no evidence in relation to PTSD to the respondent, nor to me. At the disciplinary hearing, he did not even, I think, himself say to Mr Novis anything like, "I was suffering from PTSD and that explains why I acted as I did". Instead, he chose to use his alleged diagnosis of PTSD as ammunition to attack the investigation. He was explicit about this in his evidence. He told me that he was using Mrs Packwood's failure to uncover that diagnosis, which he said would appear from his occupational health or personnel records, "*to highlight that she had not completed a thorough investigation*" (that is, as best as I can produce, an exact quotation from part of his oral evidence).

87. The proposition that the claimant suffered from PTSD and that, if he did so, this might have affected his actions, was also put to Mr Hunt. I think the only other reference to PTSD during the disciplinary hearing was in Mr Drabble's summing up.

88. This is the main thing I was referring to earlier when I talked about the claimant not necessarily acting in his own best interests. If he genuinely believed, as he now appears genuinely to believe, that he initiated the use of force in part because of a heightened perception of risk caused by PTSD, to choose to sit on that for the best part of a year and not get any evidence to support it, in an attempt to embarrass the investigator and make a point about the investigation, is a rather strange way to behave. To then seek to rely on it in tribunal proceedings but still not to get any evidence to support it is, if anything, even more odd.

89. The suggestion that seems to be being made is that as soon as the claimant mentioned PTSD during the disciplinary hearing, or as soon as somebody mentioned PTSD on his behalf, the respondent should have stopped the disciplinary and sought medical evidence on the claimant's condition. In my view, it was well within the band of reasonable responses for the respondent not to do this. I could almost say it would have been outside the band of reasonable responses for the respondent to have done this. The claimant cannot reasonably expect the respondent, or this tribunal, to give significant weight to a bare assertion, unsupported by any evidence other than the claimant's own say-so, that he had a relevant diagnosis of a serious psychiatric

condition which ought to have been taken into account, particularly not when it was used largely for point-scoring during the disciplinary hearing.

90. Another factor said to make this dismissal unfair is the fact that Mr Foweather allegedly went beyond his proper role during the appeal and made his own findings about what happened based purely on the CCTV and without a proper rehearing.

91. I do not accept the submission that anything Mr Foweather did made the dismissal unfair. First, if I look at his actual decision – that is, his decision letter – it is, I think, confined within the proper parameters. Secondly, it was entirely appropriate for Mr Foweather to watch the CCTV to satisfy himself that there were reasonable grounds for Mr Novis's decision. Thirdly, Mr Foweather would not be human if he had not formed his own views as to what the CCTV showed. To expect him not to do so would be to expect the impossible. So what this challenge to fairness seems to boil down to is a submission that Mr Foweather ought not to have expressed the views he would inevitably have formed about what the CCTV showed – that he should just have kept those views in his head.

92. It seems to me that by telling the claimant what at least some of his views were, Mr Foweather was making the process more, not less, fair. He was giving the claimant an opportunity to challenge those views and potentially change Mr Foweather's mind. There is nothing wrong with a decision maker in Mr Foweather's position saying in relation to an appeal – and this is the substance of his evidence and of his decision: I am satisfied that Mr Novis's decision was one that it was open to him to make; but had it been me, I would have been even harder on the claimant.

93. I take the claimant's other points together.

94. The starting point of this part of the claimant's submissions is that, near the start of the disciplinary hearing, Mr Novis said something to the effect that the standard of proof he was applying was much higher than just 51 percent. I think that this is something of a red herring. A standard that is "*much higher than just 51 percent*" is vague. Although he was asked about this during the present hearing and said that he meant "*something like 80 percent*", what I am looking at is fairness at the time. What the claimant's argument seems to be around this is a 'legitimate expectations' argument: that because the claimant had been told that the standard of proof was much higher than just 51 percent, that was the standard that should have been applied. If Mr Novis had agreed with an assertion Mr Drabble made that he [Mr Novis] had to be satisfied beyond reasonable doubt, that would be one thing. Beyond reasonable doubt is a standard of proof that could meaningfully be tested. The band of reasonable responses is wide enough to mean the claimant cannot persuade me, where Mr Novis was satisfied that the respondent's charges were made out, and where it would have been reasonable for him to decide that they were made out on the balance of probabilities, that it was outside the band of reasonable responses for him to think, as he did, that they were made out to the "*much higher than just 51 percent*" standard.

95. In addition, this was a loose comment. It was made in circumstances where Mr Novis had been misled by an erroneous submission made by Mr Drabble about what is stated

in Halsbury's Laws, and where the requisite standard in these circumstances is the balance of probabilities, as stated in the investigation report. I do not think it gave rise to any kind of legitimate expectation that Mr Novis would in practice work to a materially different standard of proof from the balance of probabilities, still less one that materially affected the fairness of dismissal.

96. The next set of points made on the claimant's behalf surround what specific factual findings were or were not made by Mr Novis. I disagree with the starting premise of those submissions, which is that it was incumbent on Mr Novis to make explicit factual findings about particular things, for example, whether there was contact between the prisoner and the claimant prior to the instigation of force, and whether the prisoner batted the claimant's hands away. I don't think it was. What Mr Novis had to do, and what he did do, was to decide whether the charges were or were not made out. Within the charges, it was only the first charge that included an explicit factual allegation – that the claimant had pushed the prisoner away – and that factual allegation was dealt with, with the decision being that the charge was unproven.

97. The other charges, as everyone knew and understood, were all about whether it was reasonable and necessary for the claimant to instigate the use of force. Again as everyone knew and understood, that was not being judged simply by reference to the moment the claimant instigated force, but also to the build-up to that moment as well. That was crystal clear from, amongst other things, the questions asked of Mr Hunt during the disciplinary hearing and the contents of the investigation report. There was, as I have already said, ample evidence to support Mr Novis's findings that force ought not to have been used. The CCTV alone entitled him to make them.

98. A further point made against Mr Novis is that, supposedly, he decided that Prisoner A did not knock the claimant's hand and then hands away, as the prisoner can plainly been seen doing in the CCTV. I simply disagree. Mr Novis made no such decision.

99. This leads into the last relevant criticism of Mr Novis, which is that finding the claimant had changed his evidence, as Mr Novis did, was perverse. It is clear to me that Mr Novis got a little bit confused about what the claimant had said on different occasions and did not fully take into account what the claimant had put in his written answers to the questions. (This second point is, perhaps, unsurprising since the written answers to the questions were not, I think, mentioned at all during the disciplinary hearing). However, whilst I do not myself go completely along with it, Mr Novis's point to the effect that there was a change of emphasis on the claimant's part was one that was reasonably open to him on the evidence.

100. In my view, the alleged change of emphasis was not – as has been suggested by claimant's counsel – about what had happened and about whether or not there had been a technical assault on the claimant. Instead, it was about the reasons being put forward for the claimant instigating the use of force. The failure to mention an assault in Annex A was striking, if, as the claimant maintained, it was important in explaining the use of force. The claimant's explanations for why he instigated force were confusing and there <u>was</u> a change of emphasis, at least to some extent: at the start of the

disciplinary, the claimant did not seem to be suggesting that the assault was particularly important; then it became very important; then its importance seemed to recede.

101. The bottom line, as I suggested at the start of this decision, is that an experienced Governor had CCTV which, to put it at its lowest, left open to question why the claimant had felt the need to instigate force and why he had advanced towards the prisoner in the seconds before instigating force when there was no obvious need to do so. Mr Novis also had expert use of force evidence to the effect that the claimant had acted wrongly. The claimant and others may legitimately disagree with Mr Novis's conclusions, but it was well within the band of reasonable responses for him to reach them.

102. A final point in relation to liability for unfair dismissal is whether dismissal was within the band of reasonable responses. In a moment, I will explain my decision on wrongful dismissal, which is to the effect that I am not satisfied that this was gross misconduct because I am not satisfied that it crossed over the line from being an unfortunate lapse of judgment to something more serious – from misconduct to gross misconduct, in other words. However, Mr Novis was perfectly entitled to decide that it did cross over that line, bearing in mind, in particular: what he reasonably perceived as the changes in the claimant's evidence; the claimant's reluctance to accept that he had done anything wrong; the fact that this was an unnecessary use of force which left the claimant and his colleague wrestling with a prisoner by themselves in a corridor with 6 other prisoners present, creating a very significant risk to their health and safety. Accordingly, this was not an unfair dismissal.

103. I turn, briefly, to wrongful dismissal. I have to form my own view from the CCTV. I do think that the claimant blundered. He did not need to, and should not have, put his hand on Prisoner A's chest, as I find he did. He was not at that point just continuing to usher prisoners along the corridor. Looking at his body language and at his positioning, I do not accept that that is what he was doing. I am not satisfied that at any point he actually pushed Prisoner A with any force, but I think he did exert pressure.

104. After Prisoner A retreated, the claimant should definitely not have advanced towards him. Again he was plainly not just ushering the prisoner along. His arms are in front of him, not to the sides. Other prisoners are behind and to the side of him. He is advancing into Prisoner A's personal space with his arms in front of him; in fact, largely doing what he said he was doing in Annex A.

105. At the point at which the claimant instigated the use of force, I am prepared to give him the benefit of the doubt and to accept that he genuinely thought he was going to be attacked. Had that belief been reasonable it would have been reasonable for him to instigate the use of force, albeit he should not have been in that position in the first place. I do not, however, accept that it was a reasonable belief, and he undoubtedly did put himself and Officer Yeung in danger, in circumstances where it was not necessary for him to do so.

106. I, like Mr Novis, also give the claimant the benefit of the doubt in relation to the alleged punch.

107. Putting all of that together, this comes very close to crossing the threshold between misconduct and gross misconduct. But the burden is on the respondent, and it has failed – by, I should say, the narrowest of margins – to discharge that burden. The claimant therefore was wrongfully dismissed.

108. Had I found that the claimant was unfairly dismissed, I have no doubt at all that had the alleged sources of unfairness not been present, this would not have made any difference. This is, then, one of those rare cases where a 100 percent reduction pursuant to the so-called 'Polkey principle' is appropriate. I say that because Mr Novis and Mr Foweather took from the CCTV what they took from it, namely that the claimant had acted unreasonably and without it being necessary for him to use force; and I do not think, whatever else had been different, they would have taken anything different from the CCTV. Being satisfied of that and being satisfied that the claimant's actions had put himself and another prison officer in danger, I do not think there is any significant chance that they would have decided to do anything different from dismissing him, particularly given that the claimant was not really contrite and did not really accept that he had done anything wrong.

109. In terms of contribution and fault pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996, if I had decided that the claimant was unfairly dismissed, I would have reduced the basic award and any compensatory award by 70 percent. That is based on my findings in relation to wrongful dismissal about the claimant being guilty of misconduct that came very close to being gross misconduct.

110. So, for those reasons, the unfair dismissal claim fails and the wrongful dismissal claim succeeds.

EMPLOYMENT JUDGE CAMP

14 June 2019

SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE