



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122788/2018

Held in Glasgow on 18, 19 and 20 March 2018

Employment Judge: Claire McManus

5 **Mr James H Cunningham**

Claimant
Represented by:-
Mr Paul Deans
(Solicitor)

10 **The Scottish Ministers**

Respondent
Represented by:-
Ms Ilaria Moretti
(Solicitor)

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Tribunal is that:-

- The claimant's dismissal by the respondent was a fair dismissal and his claim under section 98 of the Employment Rights Act 1996 is dismissed.

REASONS

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Background

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1. The ET1 claim form was submitted on behalf of the claimant against the respondent on 14 November 2018. The claim was for unfair dismissal. No preliminary issues arose. The ET3 response was submitted on behalf of the respondent on 18 December 2018. There were no Preliminary Hearings in this case prior to this Final Hearing, which was scheduled to take place on 18, 19, 20 and 21 March 2019, but was concluded on 20 March, other than

the issue of Judgment. There were no amendments to the parties' stated positions in the ET1 and ET3.

Proceedings

2. Both parties were professionally and ably represented at the Hearing. Parties
5 relied on documents contained in a Joint Bundle, with items 1 to 50 numbered consecutively with pages (1) to (419). The numbers in brackets in this Judgment refer to document page numbers in this Joint Bundle.
3. Prior to evidence being commenced, it was confirmed by the respondent's
10 representative that the dismissal was admitted, and the respondent's position was that the dismissal was a fair dismissal on the grounds of the claimant's conduct and in terms of the Employment Rights Act 1996 ('the ERA') section 98(4). It was confirmed by the claimant's representative that it was the claimant's position that the dismissal was an unfair dismissal because the
15 decision to dismiss was out with the range of reasonable responses. It was confirmed that the issue for determination by the Tribunal in respect of the fairness of the dismissal was consideration of whether the decision to dismiss was within the band of reasonable responses only. The claimant's representative confirmed that there was no issue taken with the extent of investigation or the procedure prior to dismissal. It was accepted by the
20 claimant's representative that all three strands of the test set out in BHS -v- Burchell are met. Reliance was placed by the claimant on alleged inconsistency of treatment by the respondent between him and another manager (the Control Manager).
4. Evidence was heard on oath or affirmation from all witnesses. For the
25 respondent, evidence was heard from Mr Allister Purdie (Governor of HMP & YOI Grampian, who took the decision to dismiss) and from Ms Elizabeth Fraser (Chair of the appeal panel). For the claimant's case, evidence was heard from the claimant himself.
5. The reason for the claimant's dismissal involved his duties at a particular time
30 in respect of a particular prisoner. It was agreed that that prisoner would be referred to only as 'Prisoner X', who would remain unidentified before the

Tribunal. Parties representatives were asked if there was any issue with the sensitivity of any content of evidence before the Tribunal. Parties' position was that there was not. It was agreed that individuals other than the claimant who were involved with that particular prisoner at the material time would be referred to, if necessary, by their own initials only.

Issues

6. The Tribunal required to determine whether the claimant's dismissal was a fair dismissal in terms of the Employment Rights Act 1998 ('ERA') section 98, in consideration of the respondent's reliance on the reason for dismissal being the claimant's conduct, which is a potentially fair reason for dismissal under section 98(2)(b). It was agreed by parties' representatives that the question for consideration in terms of s98 ERA was whether the decision to dismiss was within the band of reasonable responses for the respondent to take, particularly with regard to the respondent's treatment of the Control Manager.

7. If the dismissal was found to be an unfair dismissal, the Tribunal would require to determine what award should be made, including basic award and any compensatory award. Consideration would require to be given to what was just and equitable to award the claimant, taking into account the provisions of section 122 and section 123 ERA, and in particular whether there should be any reduction in any award to reflect an element of contribution by the claimant to his dismissal, and if so to what extent.

Findings in Fact

8. The following material facts were admitted or found by the Tribunal to be proven:

(a) The respondent is a public service organisation with key responsibilities to keep people in secure custody; care for their health and well-being; identify the needs and risks of those individuals; address those risks and prepare for their transfer back to the community. The respondent's core objective is to maintain prisoners in secure custody. HMP Grampian is a community facing prison with

all classifications for adult men and woman and Young Offenders, accommodating up to 474 prisoners. The prison population is complex, ranging from individuals in police custody to those serving long term sentences. There are approximately 300 employees at HMP Grampian (full and part-time), with 240 of those being operational uniform staff.

(b) The claimant was employed by the respondent from 1 July 1985 until 24 July 2018 when he was dismissed on grounds of gross misconduct. Other than the circumstances leading to his dismissal, the claimant had never been subject to any disciplinary proceedings in his 33 years of service with the respondent. At the time of the conduct which was the reason for the claimant's dismissal (3 April 2017), the claimant was employed by the respondent as Nightshift Manager. The claimant had previously been employed as a Control Manager. Both the Nightshift Manager post and the Control Manager post are First Line Manager positions within the respondent's organisation, reporting to the Operations Unit Manager (aka the Duty Manager). The claimant was a very experienced Prison Officer. Prior to transfer to HMP & YOI Grampian, he had previously been employed as Prison Officer in HMP Edinburgh and HMP Peterhead. Having taken a promotion exam, the claimant was appointed as a Senior Officer in 1991 and had the rank of First Line Manager from 1995 until his dismissal. The claimant had exercised a partial retirement option which allowed him to continue his employment with the respondent, at reduced hours, and also receive pension payments. At the time of the termination of the claimant's employment with the respondent the claimant worked 18.5 hours a week.

(c) The Scottish Prison Service Employee Code of Conduct (280 – 319) ('the Code') sets out the procedure to be followed when a potential disciplinary issue arises. Disciplinary proceedings against the claimant were dealt with in accordance with the Code. Section 1 (at 284) sets out the scope of the Code. This includes, at 1.5:-

5 *'As an integral part of the criminal justice system, the Scottish Prison Service set certain standards of conduct for its employees, which in some instances are significantly higher than those expected in other employment relationships. The standards that SPS employees are required to meet are detailed in the SPS Standards documents relating to Conduct and Behaviour and the Strategy to deal with discrimination, victimisation, harassment and all forms of unacceptable behaviours.'*

10 (d) An exemplary standard is expected from the respondent's employees because of the nature of the respondent's role in ensuring a custodial environment, where security is absolutely paramount. The code sets out that *'all staff are advised to familiarise themselves with these standards and apply them as required'* and that *'..failure to do so may result in action up to and including dismissal'*.

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(e) The principles of this Code are set out at section 2. This includes:-

'2.2 the Code will be applied fairly and consistently to all employees of the Scottish prison service, all employees will be treated in accordance with current HR policies and collective agreements.'

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And

*2.4 the Code should be used as a positive means of ensuring the maintenance of consistent standards of conduct - **not** necessarily as a means of punishment.'*

25 gross misconduct is dealt with at section 6 of the code

(f) The Code provides at section 4.5, that a broad general investigation may be conducted in some circumstances. Section 6 of the Code covers gross misconduct. This includes:-

'6.1 Gross misconduct is regarded by the SPS as any conduct, unacceptable behaviour, breach of the rules or

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fundamental breach of contract which, if substantiated, is so serious it would be likely to result in summary dismissal. Summary dismissal means dismissal without paid notice or pay in lieu of notice .

5 *And*

6.2 In general, acts which constitute gross misconduct are for the Scottish Prison service to decide. However, they might include the following:

- *theft, fraud and deliberate falsification of records*
- 10 • *physical violence*
- *deliberate damage to property*
- *fraudulent misuse of SPS property or name*
- *serious incapability brought on by alcohol or substance abuse*
- *serious negligence which causes unacceptable loss, damage*
- 15 • *or injury*
- *serious act of insubordination*
- *serious infringement of health and safety rules and regulations*
- *serious breach of confidence*
- *alleged criminal offence or conviction*

20 (g) Section 6.10 and 6.11 of the Code set out provisions in respect of suspension of an employee whilst an investigation is carried out. Section 6.10 states:-

25 *'Suspension will be used only in exceptional circumstances, e.g. where the alleged offence, if proven, may result in dismissal and / or where the interests of the employee or of the organisation would be best served by such suspension.'*

(h) Appendix X of the Code is the SPS Standards of Professional Conduct. This includes, at 3,:-

30 *'Follow the rules and procedures which govern our roles within the Scottish Prison Service.'*

(i) There are circumstances where a prisoner requires to be removed from the confines of a prison establishment under an 'emergency escort'. An emergency escort is a form of external escort i.e. external to the confines of the prison establishment. Such circumstances include when a prisoner requires to attend for medical treatment outside the prison establishment. Such circumstances present a threat to security of the prisoner because of the lack of physical aids to their security such as walls, fences, bars, cameras, etc. The respondent has a number of policies and procedures, including Standard Operating Procedures ('SOPs') in place to seek to address the risks which such emergency escort situations present. The claimant had training on and was aware of the requirements of these policies and procedures. He was trained in escort procedures and the application of handcuffs, to the standard of SVQ in Escorting. The claimant had carried out duties in respect of Emergency Escorts in his capacity as Nightshift Manager, and previously as Control Manager. When the claimant had carried out duties in respect of emergency escorts in his previous capacity as Control Manager, when necessary, he had remained on duty and fulfilled all the requirements of the Line Manager discharging the Emergency Escort even where that required him to work beyond his normal finishing time. That was not relied upon in the respondent's internal procedures in respect of the dismissal of the claimant.

(j) The respondent has in place a 'Guidance Document' entitled 'Use of Handcuffs: External Escorts' (at 324 – 328). This has a heading 'Risk Assessment', including (with the noted typeface emphasis):-

*'The requirement for the use of handcuffs during escort has to be **assessed on an individual basis** with factors such as health, age, gender, physical disabilities and the psychological condition of the prisoner taken into consideration - **as well as** their current supervision level, risk markers and relevant intelligence. The risk assessment needs to also consider what*

risk the prisoner may be subject to by taking them into a public arena.'

- (k) This Guidance document was circulated with Notice from the respondent's Director of Operations in April 2014 (at 329 – 330). That note sets out in its introduction:-

'The Scottish Prison Service (SPS) recognises that the requirement to maintain the secure custody of prisoners is a core element of our operating task. This is most at risk when the prisoner is out-with the confines of an establishment. The use of handcuffs where such use is properly justified can reduce this risk. In delivering its mission, the SPS is committed to treating all prisoners with respect and humanity at all times and recognises the importance of maintaining the individual's dignity whilst balancing that concern with the need for secure custody.'

There is a heading in this note of 'Policy Statement', including:-

'SPS policy is that - when conducting any form of external escort – the requirement for the use of handcuffs will be established through risk assessment on a case-by-case basis. This risk assessment should balance the assessed need to use handcuffs from a security perspective, against the impact of such a decision on the prisoner's dignity.'

- (l) A further note was issued by the respondent's Director of Operations in January 2015 (at 331 – 332). The subject of that note is 'Double Cuffing' i.e. the practice of applying one set of handcuffs with a cuff around each of the prisoner's wrists, and then a further set of handcuffs connecting the prisoner to a Prison Officer. That note includes, under the heading 'Background':-

'After a number of recent operational incidents, all Heads of Operations should ensure managers utilise all available resources and processes to ensure that when prisoners are out

with the confines of the prison under escort of Prison Officers that we minimise the risk of escape and harm to the public.

5 *To minimise risk we need to ensure staff are properly trained and competent in the application of handcuffs. Nevertheless, the SPS is committed to treating all prisoners with respect and humanity at all times and recognises the importance of maintaining the individual's dignity whilst balancing that concern with the need for secure custody.*

10 *There is a presumption against handcuffs being applied, unless an assessment concludes that there is a need for the use of handcuffs. The responsible managers must ensure that the relevant level of security is applied and that the proper application of handcuffs and level of staffing is appropriate to the assessed risk.'*

15 Under the heading 'Operational Update', the note includes:-

20 *'Double cuffing should only be considered if there is a risk of escape and or where there is intelligence to suggest that there is an increased risk from the individual when outwith the confines of the prison. Those on Escape Precautions or Extreme Risk Precautions should routinely be considered for the application Double Cuffing. Similarly, where there is intelligence or historical information about an individual's ability to 'Slip Cuffs' then double cuffing should be considered to prevent any escape and resulting public harm. As per GMA*
25 *27A/14, historic information needs to be objectively considered as part of the assessment process and not an automatic deciding factor.'*

30 (m) The respondent's SOP in HMP and YOI Grampian in respect of Emergency Escorts is at 333 – 338 (with a review date stated at 333 as 29/10/16). The version of the respondent's SOP in HMP and YOI

Grampian in respect of Emergency Escorts at 353 – 359 (with a review date stated at 353 as 05/08/18) contains an additional paragraph.

(n) The SOPs provide that the most frequently used escort locations, such as particular hospitals, are security risk assessed prior to any particular emergency escort requirement. This is a 'planned location risk assessment' A 'closet chain' is a longer set of handcuffs, used e.g. to enable a prisoner to remain handcuffed during a medical examination. The SOP at 354 – 355 sets out the Control Manager responsibilities at Section A as follows:-

- 10 • *'When informed that a prisoner is required to be escorted out with the establishment at short notice the Control Manager will organise staffing for the escort, taking into account the guidance contained within Special Security Brief 4 regarding escort strength and make up.*
- 15 • *The Control Manager will inform the Duty Manager of the planned absence, prior to departure; this includes any escort out of hours.*
- 20 • *The Control Manager will complete the Prisoner Escort Record (PER) referring to PR2 for the relevant details and collate the other paperwork required to facilitate an emergency escort;*
 - *Escort Approval Certificate / Risk Assessment*
 - 25 • *PR2 report (E41)*
 - *Planned Location Risk Assessment (if available)*
 - *Medical Letter (if required)*

- 5 • *Prior to departure the Control Manager will identify the Officer in Charge of the escort and brief all staff on the escort plan, providing details on the final location and the prisoner's current behaviour, relevant intelligence and any specific risk or conditions. The Control Manager will satisfy themselves that all staff on the escort are familiar with the contents of Special Security Briefing 4.*
- 10 • *The Control Manager will inform the Officer in Charge of the escort that **under no circumstances should handcuffs be removed** without the approval of the Duty Manager after a risk assessment has been carried out. This decision should be recorded on the Escort Approval Certificate and the PER. If the*
15 *circumstances for the handcuffs being removed changes, or if there is no further medical reason for the handcuffs to be removed the handcuffs will*
20 *be reapplied as soon as possible and recorded on the Escort Approval form and the PER*
- 25 • *the Control Manager will inform Police Scotland. 'Force Control' via the non-emergency number (101) of the escort details and requesting the Police Scotland 'incident number', this should be recorded in the Control Manager's Diary/ Log*
- 30 • *If the prisoner is being admitted to hospital the Control Manager will send a request to the Service Provider with the details of the hospital confinement and request they take over the escort.'*

(o) That SOP sets out 'Reception Pre-Departure Checks' at Section C, which includes the following:-

- *'the Control Manager will check that the Officer in Charge of the escort has all the required documentation:*

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- *Prisoner Escort Record*
- *Escort Approval Certificate / Risk Assessment*

-PR2 report (E41)

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- Special Security Measures (if applicable)

- ACT documents – (if applicable)

- *Planned Location Risk Assessment (if available)*

- Medical Letter (if required)

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- *The Control Manager will check that the Officer in Charge of the escort has all the necessary equipment, at a minimum this will consist of:*

- *handcuffs*

- *closet chain*

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-mobile phone'

And

- *'Only once the Control Manager is satisfied will the Officer in Charge of the escort be approved to leave the establishment.'*

- (p) The version of the respondent's SOP in HMP and YOI Grampian in respect of Emergency Escorts at 353 – 359, contains an additional paragraph at that Section C, being:-

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'In the event of an emergency escort being required during the nightshift, the Nightshift Manager will undertake the responsibility of the Control Manager as detailed above.'

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That additional paragraph was inserted by the Duty Manager following the incident when Prisoner X escaped on 4 August 2017. The timing of that addition to that SOP was not raised as an issue during the internal procedure which led to the dismissal of the claimant, including the claimant's disciplinary hearing or appeal.

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- (q) A notice was issued by the respondent's Director of Operational Support Services in December 2016, with the subject 'Security Brief - External Escorts Conducted by SPS Staff. This states under the heading 'Operational Update' the following:-

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'While there is a Service Provider contracted to carry out prisoner escorts, there is still at times a requirement for SPS staff to conduct escorts. In such cases, the Scottish Prison Service (SPS) recognises that maintaining the secure custody of prisoners is a core element of our operating task. This risk is increased when a prisoner is escorted out with the confines of an Establishment and all necessary precautions must be taken to prevent a breach of security and ensure public protection. The guidance incorporates a risk assessment document that must be completed prior to an escort taking place.'

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The Guidance Document is available on the Prison's Resource Library (PRL). The guidance set out in the Escort Security Brief must be followed whenever a prisoner is required to be escorted to destinations out with the confines of an Establishment.'

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- (r) The respondent's 'Escort Security Brief - External Escorts' Guidance Document dated December 2016 is at 340 – 352. Appendix A to that

Guidance is the template 'Escort Approval Certificate / Risk Assessment'. The purpose of that 'Escort Certificate' is set out (at 342), as follows:-

5 "1.2 *The Escort Certificate (Appendix A) provides instructions to staff on the conduct of an escort outside the establishment. It supplies the basic information that escorting officers need prior to, during and on completion of the escort. The Escort Certificate also provides an audit of accountability in relation to those involved at each stage of the escort process: preparation*
10 *of the security briefing, briefing of the escort, conduct of the escort and completion of the escort. The briefing should be made generally available as advice on best practice to all staff who conduct escorts.*

15 1.3 *Secure custody of prisoners is at its most vulnerable when prisoners are out with the confines of the establishment and every effort should be made to minimise risk.*

20 1.4 *It is recognised that escorts carried out by Scottish Prison Service (SPS) will normally be in emergency situations, however, a risk assessment must be completed prior to the escort.*

 1.5 *This briefing confirms that it is the responsibility of the Governor -in -Charge to ensure that arrangements for effective security are in place and that escorting staff understand their responsibilities, and are fully capable of discharging them.'*

25 (s) Under the section 'General instructions on escorts' is included:-

 "2.2 *The identities of the line manager carrying out the briefing and of those staff being briefed e.g. officers / drivers, must be recorded, together with a note of instructions and any issues identified on the Escort Certificate..."*

30 And

“2.3 The briefing must include the following:

- *Communications during escort (paragraph 6 below refers)*
- *strength of escort*
- 5 • *mix of male / female officers i.e. male prisoner(s) must not have an all-female escort – female prisoners must not have an all - male escort*
- *escort staff will be provided with all relevant information concerning the prisoners in their charge, e.g. character, current behaviour, relevant intelligence, et cetera.’*

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And

“2.4 When conducting any form of external escort the requirement for the use of handcuffs will be established through risk assessment - refer to GMA 27A-14 and associated guidance for further information. The option of double handcuffing prisoners should be employed where there is any doubt about the security of the person refer to GMA 2A- 15.

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- (t) Under the section ‘Treatment of certain classes of prisoners’ is included:-

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“4.1 Before an escort involving any prisoner takes place, an individual risk assessment must be carried out by the Line Manager discharging the escort. The assessments will take into account:-

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- *past history of prisoner*
- *apparent stability in prison*
- *notoriety*
- *any current or domestic or family problems*

- *any reasonable occurrences e.g. positive drug tests, assaults or misconduct reports*
- *number of prisoners on escort*
- *prisoners supervision level*
- 5 • *location and layout of escort destination*
- *estimated duration of escort*
- *assessment of likelihood that prisoner(s) will attempt to escape*
- *assessment of potential external threat*
- 10 • *assessment of reaction to external events (notified life-threatening illness, visit to terminally ill relative. Longer sentence than expected)*
- *assess potential of prisoner escape*
- *managing individuals displaying Excited Delirium Syndrome- 48A – 16'*
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(u) The Escort Certificate (349) is intended to capture details of the prisoner being escorted, together with information on their historical risk and current risk. The staff carrying out the escort should be briefed on the contents of this Escort Certificate by the Line Manager carrying out the risk assessment. The reference to 'PR2' is to information on the Electronic Prisoner Record System. The respondent's staff have access to the SOPs in hardcopy in the training areas and digitally on the respondent's Intranet SharePoint site.

(v) Escape of a prisoner from secure custody is one of the most serious incidents in a prison. In the early hours of 4 August 2017, Prisoner X escaped from secure custody during transfer to an external hospital for medical attention. That escape was brought to the attention of the Governor of HMP & YOI Grampian, Allister Purdie. Mr Purdie directed

that a broad general investigation should be conducted in terms of section 4.5 of the Code of Conduct (at 289). Mr Purdie instructed George Peden, Head of Offender Outcomes, to carry out this broad general investigation. Mr Peden was considered to be suitable because he was independent from operational security, had no management responsibility or oversight for anyone involved and it was considered he could give an independent overview.

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- (w) The claimant was not suspended in the period until his dismissal. The Employee Code of Conduct sets out in respect of suspension, at paragraph 6.10 (at 297):-
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“The Governor in Charge, Head of Branch or Directorate will consider whether it is appropriate to suspend the employee whilst an investigation is carried out. Suspension will be used only in exceptional circumstances, e.g. where the alleged offence, if proven, may result in dismissal and / or where the interests of the employee or of the organisation would be best served by such suspension....”

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- (x) Mr Purdie considered that it was not appropriate to suspend the claimant while investigations were carried out. Mr Purdie consulted the respondent’s central HR department in respect of his decision not to suspend the claimant. Mr Purdie took that decision on the basis that it was not prejudicial to any eventual decision that he might make on conclusion of the disciplinary proceedings. Mr Purdie considered that the reasonable action to be taken in the circumstances was that the claimant be redeployed from his role as Night Shift Manager while the investigations took place. The claimant was redeployed into a day shift First Line Manager role, and then to an Access and Egress First Line Manager role. He did not have any restriction on his duties within those roles. Mr Purdie did not believe that in the redeployed roles a risk presented to the claimant, to prisoners or to the respondent’s organisation, given the measures which were put in place after 4 August 2017 to limit the chances of re-occurrence.
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- 5 (y) George Peden carried out the broad general investigation and prepared a report on that broad general investigation (78 – 86). That broad general investigation included an investigation on the events leading to Prisoner X absconding and the involvement of a number of the respondent's employees, including the involvement of two First Line Managers (being the claimant and the individual who was Control Manager in the shift immediately preceding the claimant's Nightshift Manager shift on 3 August 2017) and three Prison Officers, including the designated Officer in Charge of the emergency escort. All of the involved individual employees were interviewed as part of this broad general investigation. Mr Peden's Conclusions (at 83 – 84) set out what he concluded to be the primary contributing factors to the abscondment / escape. In a section headed 'Recommendation' (84 – 86), George Peden set out his conclusions in respect of the responsibilities of each of the involved employees. His conclusion in respect of the Control Manager involved was that he *"...does not have a case to answer but requires substantial training and development to ensure he is fully aware of the accountability and professionalism expected of an FLM."* His conclusion was that the claimant *'...does have a case to answer.'*, for the reasons set out in his report at 85. He also concluded that the individual who was designated Officer in Charge of that emergency escort *'...does have a case to answer.'*
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- 25 (z) Mr Purdie considered Mr Peden's report. Mr Purdie considered that report to be a fair assessment which covered all the areas of the broad general investigation. He considered that Mr Peden had presented the facts and stated an accurate overview of the circumstances leading to the escort and that he had made reasonable conclusions on the findings and reasonable recommendations. Mr Purdie understood that it was his decision as Governor whether to accept some, all or none of the recommendations set out in the broad general investigation report. Mr Purdie decided to accept all of Mr Peden's recommendations in this report.
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- 5 (aa) On the basis of the broad investigation report, Mr Purdie decided, in line with Mr Peden's conclusions, that no disciplinary proceedings should be initiated against the Control Manager involved. Mr Purdie decided that that Control Manager should undertake training on performance issues. The Operations Manager was tasked with ensuring that that training was carried out. Mr Purdie decided that disciplinary proceedings should not be initiated against that Control Manager because he was not ultimately responsible for the full preparation, checking, briefing and dispatch of the escort staff. Mr Purdie concluded that communication about the escort between the Control Manager and the claimant was poor. Mr Purdie considered it to be very significant that the Control Manager was not the person in charge of the prison at the time of the dispatch of the emergency escort. In deciding that no disciplinary investigation should be initiated in respect of the Control Manager, Mr Purdie considered it to be very significant that the Control Manager did not have responsibility as the manager at the time the escort was approved for dispatch.
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- 20 (bb) Mr Purdie decided that an investigation into allegation of gross misconduct should be initiated against the claimant because the claimant had responsibility on the night of 3 until 4 August 2017 for the secure departure of that emergency escort, and because the claimant had chosen not to follow SPS standards and protocols. Mr Purdie considered it to be significant that at the time of the dispatch of the emergency escort the claimant did not satisfy himself that any paperwork had been properly prepared, that an accurate assessment had been made, or if staff had been fully briefed on the escort. Mr Purdie decided on the basis of Mr Peden's report that the claimant and one other individual (who was the Officer in Charge of the escort) had failed to follow SPS standards and protocols and should face gross misconduct disciplinary proceedings.
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- (cc) Mr Purdie instructed Darren Moss as Investigating Manager to carry out the claimant's gross misconduct allegation investigation. Darren Moss was appointed because he worked in the respondent's Conduct

Investigation Unit, based at their Headquarters in Edinburgh. The Conduct Investigation Unit carries out all gross misconduct investigations for the respondent in Scotland. Individuals working there are impartial from the prison establishments, have knowledge and expertise in carrying out further investigations and are considered able to approach investigations in a sensitive and supportive manner. The Conduct Investigation Unit can recommend that an individual has no case to answer, or that they should proceed to a gross misconduct disciplinary interview. Mr Purdie commissioned Darren Moss to carry out the investigation and then took no further part in respect of that investigation.

- (dd) The claimant was notified of this gross misconduct investigation by notification dated 13 September 2017 (at 87). This details the allegation of gross misconduct against him as follows:-

“ It is alleged that whilst carrying out your role as the First Line Manager responsible for the preparation, checking and departure of the escort of [Prisoner X] on the 3rd August 2017, you failed in your duties and responsibilities by failing to carry out the recognised SPS standards and procedures relating to the preparation, checking and departure of that escort.

If proven, these allegations could constitute a breach of the SPS Code of Conduct and Standards of Professional Conduct.”

- (ee) The claimant was represented throughout the respondent’s internal disciplinary process by his POAS Representative, Tony Quinn. The Conduct Investigation Unit report into the allegation of the claimant’s gross misconduct is dated 23 February 2018 (120 – 174). There are appendices to this report. Appendix C includes the Escort Approval Certificate / Risk Assessment in respect of the emergency escort of Prisoner X on 3 August 2017 (at 178 – 183). Some information which was included in this Certificate by the Control Manager was not correct. This Escort Approval Certificate / Risk Assessment shows incomplete information. The Escort Approval Certificate / Risk

Assessment provides (at 181) for signature by the First Line Manager who has had responsibility for briefing and checking the escort, and the acknowledgement of that by the Officer in Charge of the escort. The document at 181 shows that to be unsigned.

- 5 (ff) The Conduct Investigation Unit report was presented to Mr Purdie on completion. Mr Purdie took time to go over the report, including the transcripts of meetings contained in it, before taking any decision to take the case forward. Mr Purdie considered that at the time of departure of the emergency escort the claimant had responsibility for
- 10 checking the relevant paperwork for that escort. Darren Moss's conclusion was that the ultimate responsibility for preparation, checking and departing of the escort lay with the claimant as the manager on duty at the time of the escort (as set out at 173). His conclusion was that the claimant had a case to answer in respect of
- 15 the allegations of gross misconduct. Mr Purdie considered that Darren Moss's report as set out at 170 – 174 captured the full facts and information from all the parties, and that his conclusion was fair and reasonable. On that basis, Mr Purdie decided that the claimant should be invited to a disciplinary interview.
- 20 (gg) The claimant was notified of his disciplinary interview by letters dated 13 March 2018 (at 215) and 14 March 2018 (216 – 217). Included with the letter of 14 March were: details of the allegations to be considered at the disciplinary hearing; details of the particular sections of the Code considered to be relevant; links to the relevant sections of the
- 25 Employee Code of Conduct; information in respect of presentation of any new evidence or information which the claimant wished to be considered at the disciplinary interview; information in respect of access to any relevant CCTV footage and information in respect of trade union representation. The claimant was notified of his
- 30 opportunity to call witnesses to the disciplinary interview. The claimant was advised that Mr Purdie's options in deciding whether he feels gross misconduct has occurred were to: decide no penalty is appropriate; or issue an appropriate level of warning; or decide that

dismissal is appropriate. Prior to the disciplinary hearing the claimant was sent the complete Conduct Investigation report.

- (hh) The claimant's disciplinary hearing took place on 5 June 2018, before Mr Purdie. The accurate transcript of this hearing is at 220 - 231. The claimant decided not to call any witnesses at this hearing. At the disciplinary hearing the claimant admitted that he had responsibility for the departure of the escort and that it was 'his fault' (particularly as recorded at 229). At the conclusion of the disciplinary interview Mr Purdie asked the claimant and his representative if they had any further information they wished to provide before he made his decision. No further information was provided. Following the disciplinary interview on 5 June 2018 and prior to making his decision to dismiss, Mr Purdie reviewed the transcript of the disciplinary interview and the full content of the Conduct Investigation Unit Report. Mr Purdie checked the claimant's background in respect of training and conduct in his years of service with the respondent. Prior to reaching his conclusion, Mr Purdie considered and took into account that prior to August 2017 the claimant had had 32 years of unblemished conduct with the respondent, within which no concerns had been raised, and there had been no other significant incidents. Mr Purdie attached significant weight, on balance, to that lengthy, unblemished service. Mr Purdie also attached weight to the claimant's admission that, with hindsight, he was responsible and was at fault (as set out in the accurate transcript of what the claimant said, as noted at 229). Mr Purdie believed that the claimant was genuine in that statement. Mr Purdie balanced that statement with the significance of the events which had happened, which Mr Purdie considered to be because of the claimant's decision making, assumptions and lack of action. Mr Purdie took into account the steps which had been taken by the Control Manager who had been on shift immediately preceding the claimant's nightshift on 3 August and who had taken some steps in respect of the preparation of the emergency escort. Prior to making his decision, Mr Purdie contacted the respondent's central HR

Department. He discussed his rationale with the allocated HR Business Partner. He asked if there were any precedents of decisions in similar circumstances within the respondent's wider organisation. He looked at all the reports and investigations which had been carried out in relation to the incident from 4 August 2017. Prior to making the decision, Mr Purdie considered all of the options which were open to him. Mr Purdie considered that the claimant did have a case to answer in respect of the gross misconduct allegation. Mr Purdie considered that it was not suitable to issue the claimant with any written warning because of the significance of this case; the risk which Prisoner X posed to the public; the claimant's failure to follow SPS standards and SOPs, which, he concluded, would have ensured that Prisoner X's risks were fully established, shared and implemented via staff action. Mr Purdie concluded that if the claimant had followed the relevant SPOs, staff would have been briefed on the need to double-cuff Prisoner X, which would have reduced any likelihood of escape. Mr Purdie considered it to be significant that the claimant was in charge of the prison at the time of departure of the emergency escort and therefore had full responsibility for checking preparation and departure of the emergency escort. Mr Purdie considered it to be significant that the claimant did not accept that there was a requirement on him to check the paperwork, even in circumstances where the claimant had understood that another manager had completed the necessary paperwork and briefed the escort staff. Mr Purdie considered it to be significant that the claimant did not think it appropriate for him to check another manager's work. Mr Purdie took into account that the Escort Approval Certificate / Risk Assessment form and Form E41 should be checked and signed to confirm that a risk assessment has been made and the escort has been briefed and checked. Mr Purdie took into consideration that after escort staff are briefed, there is a requirement for a form to be signed to confirm that the staff are aware of the risks. Mr Purdie took into account that the claimant's position was that he had understood that the emergency escort had been arranged by the Control Manager and the timing of the dispatch (departure) of the

escort happened to fall on his shift because of the timing when the doctor was available to see the prisoner. Mr Purdie's view was that at the time of dispatch of the emergency escort, the claimant had full responsibility for the security of the escort, including briefing of staff and advising staff to stick to SPS standard procedures. Mr Purdie's view was that following the departure of the Duty Manager, full responsibility fell to the claimant, as Nightshift Manager, who had full responsibility for the prison at the time of dispatch of the emergency escort. Mr Purdie considered it to be significant that in those circumstances at no point had the claimant checked the paperwork which had been passed to him by the Control Manager, and so he did not know if this was complete or incomplete. Mr Purdie considered it to be very significant that at the time of departure of the escort the claimant was the First Line Manager who had responsibility for the escort and the claimant had chosen not to follow relevant SOPs. Mr Purdie considered it to be very significant that the claimant had not ensured that the escort paperwork was complete, had not ensured that staff were briefed on the escort plan, providing details on behaviour and risks presented by the prisoner and had not given consideration to 'double-cuffing'. Mr Purdie considered that the claimant had failed in his duties and responsibilities by failing to carry out recognised SPS standards and procedures relating to the preparation, checking and departure of that escort. Mr Purdie considered that the actions which were taken by the claimant in respect of his discussions with the escort staff and checks of the handcuffs which were on Prisoner X were not sufficient in line with the risks of the prisoner and the relevant SOPs. On balance, and taking into account all these considerations, Mr Purdie took the decision to dismiss the claimant. Demotion was not an option open for consideration under the SPS Code of Conduct. The claimant was notified of this outcome by letter dated 6 June 2018 (232 – 233), with extended reasons set out separately (at 234 – 235). Those documents accurately reflect the reasons why Mr Purdie concluded that the claimant should be dismissed. Mr Purdie was aware that the escape of Prisoner X had had local press and some

national press coverage. That was not significant in his decision to dismiss the claimant.

5 (ii) The claimant appealed Mr Purdie's decision. Mr Purdie took no part in the appeal process. Elizabeth Fraser is employed by the respondent as HR Business Partner for HMP Edinburgh. Elizabeth Fraser was appointed Chair of the Internal Dismissal Appeal Board ('IDAB') panel which heard the claimant's appeal. The other members of that panel were senior operational managers, being Governor-in-Charge Brenda Stewart and Deputy Governor Morag Stirling. The purpose of the IDAB panel is to review the reasonableness of the decision taken at the disciplinary hearing stage, and to specifically focus on the points of appeal made. The options open to the IDAB are, to confirm the dismissal (i.e. uphold the decision to dismiss), to overturn the dismissal, or to substitute a lesser penalty which is consistent with the Code of Conduct and the levels of warning set out therein. Demotion is not an option for their consideration within the terms of the Code of Conduct.

10 (jj) The email from Tony Quinn of 9 July 2018 (at 242) sets out the basis of the claimant's appeal as follows:-

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- The unfair approach in only finding a case to answer in relation to the management of this incident against the claimant
 - the severity of the award recommended by the Governor
 - that the decision-making governor having overall responsibility for all aspects of the establishment may have a perceived bias that could have affected his decision making.
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30 (kk) Prior to the claimant's appeal hearing, the members of the appeal panel received and considered all of the papers relevant to the claimant's disciplinary process, including the broad general investigation report (with copy statements); the report of the Conduct Investigation Unit (with transcripts of interviews and copies of

statements taken); Mr Purdie's decision letters; the claimant's confirmation of his intention to appeal and, separately, the claimant's points of appeal. The claimant's appeal hearing took place on 12 July 2018. The transcript at 243 – 269 is an accurate record of that appeal hearing. The claimant was represented at that appeal hearing by Tony Quinn. The claimant elected not to call any witness, although he had previously indicated that he would do so. An adjournment was allowed to enable the claimant and his representative to discuss whether they wish a longer adjournment to enable a witness to be called by them. Following that adjournment, the appeal panel was informed that the claimant did not wish to suspend the process and was happy to proceed without a witness. No new evidence was presented at the appeal.

(II) Ms Fraser understood it to have been a fundamental point of the claimant's appeal that the claimant should not have had to check the work of other managers, it being his position that his mistake was in assuming that the Control Manager had completed the relevant documentation and that the escort staff had been properly briefed by him. The claimant's position was that he felt he had been let down by his colleague who was the Control Manager in the shift immediately preceding his night shift.

(mm) The appeal panel considered their remit was to consider the reasonableness of the decision to dismiss, taking into account all of the evidence before the IDAB. In making their decision to uphold the decision to dismiss, the appeal panel considered it to be very significant that the claimant was the manager in charge at the point of the escort being dispatched. The appeal panel had discussions following the appeal hearing and prior to making their decision. The senior operational managers on the appeal panel were clear that the actions of Mr Purdie were consistent with the approach across the SPS estate and were appropriate. The decision of all of the members of the appeal panel was that Mr Purdie's response was appropriate and proportionate. The appeal panel discussed that the decision to

dismiss was consistent with how the operational managers on the appeal panel would have dealt with the situation in another establishment and was in line with SPS policy and procedures. It was the conclusion of the appeal panel that no new information was presented at the appeal undermined the decision to dismiss. It was the conclusion of all the members of the appeal panel that the decision to dismiss the claimant was appropriate and proportionate. It was the view of all of the members of the appeal panel that dismissal was appropriate because of the seriousness of the claimant's breach of the respondent's procedures. It was the view of all of the members of the appeal panel that the decision to dismiss the claimant was consistent with how that the situation would be managed in another of the respondent's establishments (although there was no direct comparator to these circumstances).

(nn) The claimant was informed of the IDAB outcome by letter dated 24 July 2018 (270 – 271). The IDAB panel rejected the claimant's appeal and upheld Mr Purdie's decision to dismiss the claimant. The claimant was dismissed with effect from 24 July 2018. The document at 272 – 279 was prepared by Ms Fraser and sent to the claimant with the intention of capturing the appeal panel's reasons for their decision to uphold Mr Purdie's decision to dismiss the claimant. The appeal panel upheld the decision to dismiss because they considered that the claimant's conduct was a significant breach of the respondent's standards of conduct. The appeal panel was satisfied that the transcript of the disciplinary interview clearly showed that Mr Purdie had taken into account the roles played by others in the circumstances which led to Prisoner X absconding. The decision of the members of the appeal panel was that the decision to dismiss was proportionate, taking into account all the information, including the claimant's experience; his confirmation that he had taken on responsibility for the escort; his experience in dealing with the respondent's policies and processes and his failure to take responsibility for checking that the relevant stages had been completed. The appeal panel considered it

to be very significant that the claimant 'had not taken a full risk assessment approach' and that he was the manager in charge at the time of dispatch of the escort. The appeal panel considered it to be significant that the claimant had made assumptions that the paperwork was complete and that the briefing had been properly done, without satisfying himself that these had been done to the required standard. The appeal panel considered it to be significant that at the time the claimant was aware that the third member of the escort had not been briefed. The appeal panel took into account that the claimant had asked the two other members of the escort staff if they were 'happy' and had not asked them if they had been briefed. The appeal panel considered it to be significant that the claimant had not checked the relevant emergency escort paperwork, despite him confirming that he was fully conversant with the relevant procedures. The appeal panel considered it to be significant that the claimant clearly had responsibility for preparing the prisoner to leave because he had checked his cuffs, but that he did not apply a risk assessment approach. The appeal panel took into account all the information before them and the circumstances.

(oo) The appeal panel had sympathy with the situation with the claimant found himself in i.e. coming on shift at 20:45 and being told that an emergency escort was being prepared and was likely to go out. The appeal panel formed the view that the claimant was clearly busy from 20:45 until when the emergency escort was dispatched (and afterwards). The appeal panel considered that a number of assumptions had been made by the claimant based on his contact with the Control Manager who was going off shift. Although the appeal panel had some sympathies with the claimant in those circumstances, the appeal panel members were absolutely clear that the responsibility sat with the claimant to satisfy himself that the necessary checks had been done, and that, had the claimant applied a risk assessment approach, that may have changed the events leading to the prisoner absconding. The members of the appeal panel considered it to have

5 been foolhardy of the claimant to accept that the paperwork was complete when he took on responsibility for the emergency escort and was accountable for checking on departure. The members of the appeal panel accepted that both the claimant and the Control Manager had not followed what should have been done when they were the manager in charge of securing the departure of a dangerous individual into the community. It was the view of the appeal panel that the Control Manager had responsibilities which had been investigated in the broad general investigation, and conclusions had been reached in that broad general investigation in respect of the Control Manager having not completed the paperwork to the appropriate standard while he was on duty. The appeal panel took into account that the Control Manager was subject to significant training and development requirements and that no disciplinary action was taken in respect of the Control Manager.

10 The appeal panel took into account the Escort Approval Certificate at 178, as completed by the Control Manager. The appeal panel considered it to be significant that the claimant was responsible for the decision on 'cuffing' the prisoner and that had the claimant checked the information on the prisoner then it would have been apparent to him that the paperwork was not complete and the information was not in place. The appeal panel considered it to be very important that the claimant was responsible for ensuring that the respondent's policies and standards were adhered to. The appeal panel considered it to be incumbent on the claimant to ensure that the escort paperwork was completed to the required standard. The appeal panel considered it to be significant that the claimant was fully aware that no decision had been taken in respect of the appropriate 'cuffing' for the prisoner and that the claimant fully understood that that was his role. The appeal panel had concerns about the quality and content of the paperwork completed by the Control Manager (at 179). The appeal panel fully recognised that the relevant escort paperwork had only been partially completed. A risk assessment approach was considered by the appeal panel to be paramount to how the respondent operates and to not have been applied by the claimant. The appeal panel considered

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it to be significant that the claimant did not ensure that policies were adhered to, and did not do a risk assessment. In reaching their conclusions, the absconding of the prisoner was considered by the appeal panel to be not so much relevant as the potential for serious incident on '*on the back of failure to adhere to procedure*'.

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(pp) The appeal panel was satisfied that the information presented for and on behalf of the claimant at the disciplinary hearing in respect of alleged inconsistency of treatment between him and the Control Manager had been fully considered and explored at the disciplinary hearing stage and that Mr Purdie's response to the points raised at the disciplinary stage was appropriate.

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(qq) The appeal panel considered that Mr Purdie had acted appropriately by commissioning a disciplinary investigation. The appeal panel considered it to be significant that the claimant could have raised objection previously to Mr Purdie hearing the disciplinary stage, but did not do so. The appeal panel concluded that there was no reason why Mr Purdie was not a fit and appropriate person to manage the disciplinary process in respect of the claimant. The view of all of the members of the appeal panel was that the approach taken by Mr Purdie was consistent with how the matter would be managed in other establishments and was reasonable and proportionate in all the circumstances.

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(rr) The timescale between the incident and the claimant's dismissal was lengthy, in part because the claimant had a significant absence due to incapacity.

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(ss) Disciplinary investigations in respect of the conduct of the other individual who was identified at the stage of the broad general investigation to have a case to answer stalled because of the incapacity of that individual. That incapacity led to the termination of that individual's employment with the respondent. The fact that those disciplinary investigations did not proceed in respect of that individual

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had no impact on the on the decision to dismiss the claimant or the decision of the appeal panel to uphold that decision.

(tt) At the time of his dismissal, the claimant's weekly pay with the respondent was £376.32 gross, net £296.43. At the time of the effective date of termination of employment (24 July 2018) the claimant had 33 years' service with the respondent and was aged 59. The claimant continues to receive some pension payments in respect of his service with the respondent. On 21 September the claimant began alternative employment. The claimant's earnings from that employment are more than his earnings were with the respondent as at the time of his dismissal, but the claimant works significantly more hours than he did for the respondent at the time of his dismissal. The claimant has suffered pension loss as a result of his dismissal because he continued to accrue pensionable service after he took partial retirement.

Relevant Law

9. The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 – 122 with regard to compensation.

Section 98(1) states:-

'In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) *the reason (or if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

Section 98(2) sets out that a reason falls within this subsection if it –

(a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) *relates to the conduct of the employee, [(ba) is retirement of the employee]*

5 (c) *is that the employee was redundant, or*

(d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

Section 98(4) states:-

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

15 (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and,*

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

20 This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

10. Where the dismissal is by reason of the employee's conduct, consideration requires to be made of the three stage test set out in *British Home Stores -v- Burchell 1980 ICR 303*, i.e. that in order for an employer to rely on misconduct as the reason for the dismissal there are three questions which the Tribunal must answer in the affirmative, namely, as at the time of the dismissal:-

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i. Did the respondent believe that the claimant was guilty of the misconduct alleged?

- ii. If so, were there reasonable grounds for that belief?
- iii. At the time it formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

- 5 11. What has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal. Tribunals must not substitute their own view for the view of the employer (Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23 and London Ambulance Service NHS Trust -v- Small [2009] IRLR 563) and must not
- 10 consider an employer to have acted unreasonably merely because the Tribunal would not have acted in the same way. Following Iceland Frozen Foods Ltd –v- Jones 1983 ICR 17 the Tribunal should consider the 'band of reasonable responses' to a situation and consider whether the respondent's decision to dismiss, including any procedure prior to the dismissal, falls within
- 15 the band of reasonable responses for an employer to make. The importance of the band of reasonable responses was emphasised in Post Office -v- Foley [2000] IRLR 827.
12. Where the Tribunal makes a finding of unfair dismissal it can order reinstatement or in the alternative award compensation. In this case the
- 20 claimant seeks compensation. This is made up of a basic award and a compensatory award.
13. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference
- 25 to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation.
14. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)).
- 30 15. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having

regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. In terms of Section 123(6) where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall
5 reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Submissions

16. Both parties' representatives spoke to their own substantive written submissions. Both parties made submission on the material facts and their
10 interpretation of these. There was substantial agreement on the substantive law. Where either party's submissions were not accepted, this is addressed in the Decision section below.

17. In addition to the authorities set out in the 'Relevant Law' section above, the respondent's representative relied upon:-

15 *Hamilton -v- Argyll and Clyde Health Board [1993] IRLR 99*
Hadjiioannou -v- Coral Casinos Ltd [1981] IRLR 352
Paul -v- East Surrey District Health Authority [1995] IRLR 309
Proctor -v- British Gypsum Ltd [1992] IRLR 10
Securicor Ltd -v- Smith [1989] IRLR 356
20 *Epstein -v- Royal Borough of Windsor and Maidenhead (UKEAT/*
0250/07)

18. The respondent's representative submitted that the respondent has satisfied the requirements of section 98 ERA and invited the Tribunal to find that the respondent's dismissal of the claimant was fair in terms of section 98 and that
25 the claimant's claim should be dismissed. In the event of a finding of unfair dismissal, the Tribunal was asked to consider section 123(6) ERA. The respondent representative invited the Tribunal to decide that the employee's conduct was entirely to blame for his dismissal and to make a reduction for contributory fault of 100%, or at least a substantial reduction to the
30 compensatory award of 75% or more. The respondent's representative also asked the Tribunal to reduce any basic award in terms of section 122(2) ERA.

The respondent's representative invited the Tribunal to conclude that it would be just and equitable to reduce any basic award to nil, or by a significant percentage such as 80%.

19. In addition to the authorities set out in the 'Relevant Law' section above, the claimant's representative relied upon:-

Post Office -v- Fennell [1981] IRLR 221

20. A schedule of Loss was provided by the claimant's representative, including pension loss (362 – 364). It was agreed that the claimant was in receipt of his pension but that employer and employee contribution continued to accrue on his pension with the respondent. The basis of the calculations in this schedule of loss were not contested.

Comments on evidence

21. Evidence was heard on oath or affirmation from all witnesses. All witnesses were straightforward, credible and consistent in their evidence. There was no real dispute on the material facts.

22. It was noted that the individual against whom comparison was sought to be made with the claimant in terms of inconsistency of treatment was the other First Line Manager involved in the material events, being the Control Manager was on duty in the shift immediately preceding the claimant's shift as Nightshift Manager on 3 August 2017. It was the claimant's position that no disciplinary proceedings were taken with regard to any other of the named individuals in the broad general investigation report. The respondent relied on the reason for disciplinary proceedings not taking place in respect of the other individual involved who was considered to have a case to answer being due to the incapacity of that individual, and their later termination of employment on the grounds of incapacity. It was recognised by the claimant that that individual was not a Line Manager. The Tribunal could not reach a conclusion on what the outcome of the disciplinary proceedings in respect of that other individual would have been, had they proceeded, but it was relevant that the claimant was not the only individual named in the broad general investigation who was considered to have a case to answer. For these

reasons, findings in fact have been made in respect of the respondent's reasons for dismissing the claimant and reasons for considering that the Control Manager did not have a case to answer. Findings in fact have also been made in respect of the conclusion that one other individual did have a case to answer, and the reason why no disciplinary proceedings took place in respect of that individual (which was not contested). The reasons why no disciplinary proceedings were taken in respect of any of the other individuals named on the broad general investigation report, as set out in the conclusions of that report, were not contested and were not material to the claimant's argument of inconsistency, it being accepted by him that those individuals' involvements and responsibilities were different to his own.

23. There was considerable reliance by the respondent on the timing of dispatch of the escort being after the claimant's night shift manager shift had begun. The respondent relied on the claimant being the first line manager in charge of the establishment at the time of the dispatch of the emergency escort, and therefore full responsibility lying with him. The claimant candidly admitted that he had been at fault, particularly in relation to failure to check the documentation relating to the emergency escort, but his position was that the Control Manager had also failed in his responsibilities, and that it was unfair that responsibility should be considered to fall solely to the claimant.

24. It was not necessary for findings in fact to be made in respect of the detail of what had occurred on 3 to 4 August 2017 because that detail was not materially contested or materially relevant to the issue for determination by the Tribunal, given the narrowness of the point taken in respect of the dismissal being an unfair dismissal (i.e. that the decision to dismiss was out with the band of reasonable responses). Findings in fact were made on the reasons for the decision to dismiss the claimant and the reasons why no disciplinary proceedings were initiated against the individual who the claimant considered he had been treated inconsistently with (i.e., the Control Manager).

25. There were some matters raised before the Tribunal which were not put for consideration during the respondent's internal proceedings and therefore

were not material to the reasonableness of the decision to dismiss. I made it clear to all parties during the proceedings that it was not for the Tribunal to substitute their own view for the decision of the employer, and that if matters were not raised at the time, or on appeal and where no issue was being taken with the extent of the investigation, then there was a difficulty in matters which had not been raised during the internal proceedings, being raised at the stage of these Tribunal proceedings. That position was accepted by both representatives.

Discussion and decision

10 26. It was not contested that the reason for dismissal was the claimant's conduct, a potentially fair reason for dismissal in terms of section 98(2)(b) ERA. I determined the fairness of that decision, with regard to the provisions of s98(4).

15 27. Mr Purdie gave clear evidence on the reasons why he made the decision to dismiss the claimant. These were as set out in the findings in fact, and in essence were because at the time of departure of the escort the claimant was the First Line Manager who had responsibility for the escort and the claimant had chosen not to follow relevant SOPs. The respondent concluded that the claimant had not ensured that the escort paperwork was complete, had not
20 ensured that staff were briefed on the escort plan, providing details on behaviour and risks presented by the prisoner, nor did he give consideration to 'double-cuffing'.

25 28. Mr Purdie's reasons for why he agreed with the decision that here was 'no case to answer' in respect of the Control Manager and that he should receive training, but no disciplinary procedures should be initiated against him were clear and are set out in the findings in fact. In essence, the respondent's rationale for the difference in treatment of the claimant and the Control Manager was because the Control Manager did not have responsibility as the First Line Manager at the time the escort was approved for dispatch.

30 29. I accept the respondent's representative's reliance on *Hamilton V Argyll and Clyde Health Board [1993] IRLR 99* and that_what constitutes gross

misconduct must be considered in relation to the particular employment and employee. On that basis, given the nature of the respondent's organisation and the importance of the maintenance of security, and in consideration of the view of the appeal panel, I could not find that the decision to dismiss the claimant in all these circumstances was outwith the band of reasonable responses.

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30. With regard to the claimant's argument that the decision to dismiss him was inconsistent with the decision that the Control Manager had no case to answer, I accepted the respondent's representative's reliance on the three limited circumstances in which a disparity argument may be available being identified in Hadjiannou -v- Coral Casinos Ltd [1981] IRLR 352. These circumstances were there identified as:

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(a) where there is evidence that the employee has been led by an employer to believe that certain categories of conduct will either be overlooked or at least will not be dealt with by the sanction of dismissal

(b) where there is evidence that the purported reason stated by the employer is not the real or genuine reason for the dismissal, and

(c) where there is evidence of 'truly parallel circumstances'.

20 I noted that that case was decided without reference to Post Office -v- Fennell. Given that the EAT's decision in Hadjiannou was latterly accepted by the Court of Appeal in Paul -v- East Surrey District Health Authority, I accepted the respondent's representative's reliance on Paul -v- East Surrey District Health Authority [1995] IRLR 309, on Proctor -v- British Gypsum Ltd [1992] IRLR 10, on Securicor Ltd -v- Smith [1989] IRLR 356 and on Epstein -v- Royal Borough of Windsor and Maidenhead (UKEAT/ 0250/07). I noted and considered it to be relevant that in Securicor Ltd -v- Smith, the Court of Appeal held S's dismissal to be fair on the ground that there was a clear and rational basis for distinguishing between the cases of C & S; namely, that S was more to blame for the incident than C. The circumstances of this case were that the broad general investigation had set out findings and rational

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conclusions in respect of the different treatment of the various individuals involved in the emergency escort on 3 / 4 August 2017, and those findings and conclusions had been accepted by Mr Purdie.

- 5 31. The claimant's argument of inconsistency treatment was in respect of the respondent's treatment of the Control Manager who had been on shift immediately before the claimant's nightshift started on 3 August, and who had taken some steps in preparing the emergency escort. With regard to the circumstances identified at (a) to (c) in Hadjioannou, there was no argument that there was evidence that the employee has been led by an employer to believe that certain categories of conduct would either be overlooked or would not be dealt with by the sanction of dismissal. It was not argued that the reason stated by the employer was not the real or genuine reason for the dismissal. I considered whether there was evidence of the claimant and the Conduct Manager being in 'truly parallel circumstances.
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- 15 32. The claimant and the Control Manager were not in 'truly parallel circumstances. It was clear from the evidence of Mr Purdie that their circumstances were distinct because the claimant had responsibility as the First Line Manager at the time the escort was approved (and dispatched). The claimant was not dismissed because Prisoner X escaped, but for his failures as set out above.
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33. With regard to the comments of Waterhouse J in Paul -v- East Surrey District Health Authority [1995] IRLR 309, on approving Hadjioannou, the cases of the claimant and the Control Manager are '.....sufficiently similar to afford an adequate basis for the argument...'but, following Proctor -v- British Gypsum Ltd '....the overriding principles must be that each case must be considered
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34. I noted that the specific terms of the 'Escort Security Brief - External Escorts' Guidance Document dated December 2016 is at 340 – 352, dated December 2016 were not referred to by either representative before me, although were referred to in general terms and were clearly before the decision makers at each stage of the relevant internal procedures. I understood the claimant's representative's reliance on the handover period causing a 'blurring of
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responsibilities. I considered it to be very significant that Mr Purdie had considered it to be significant that the claimant had not checked the emergency escort papers at all. That that had been admitted by the claimant and was considered to have been significant at the time of the decision to dismiss and at the appeal. These papers provide for signature by the Line Manager who has taken responsibility for arranging the escort. Had the claimant checked that paperwork, he would have recognised that it was incomplete. I accepted the opinion of the appeal panel that it was very significant that the claimant had not adopted a risk assessment approach to the departure of the emergency escort. I accepted that if the claimant had followed the relevant SOPs and adopted a risk assessment approach to the departure of the emergency escort then he would have seen that the paperwork passed to him by the Control Manager who had been on shift immediately preceding his nightshift had not been completed and had not been signed. I understood the reasons for the appeal panel's sympathy for the claimant in respect of what he had understood to have been carried out by the Control Manager. I understood why the claimant would consider that he had been treated unfairly in circumstances where he had understood that the emergency escort had been arranged by the Control Manager and the timing of the departure of the escort happened to fall on his shift because of the timing when the doctor was available to see the prisoner. I understood that the claimant's actions were in part because he understood there to be an urgency to the situation because of the prisoner being suspected to have appendicitis and because in his own experience of being a Control Manager he had always completed the necessary paperwork in respect of emergency escorts before leaving, even if that meant staying on after his official shift finishing time. It was agreed by the representatives that those points were not made during the internal proceedings. Those points were not before the decision makers when making their decisions, therefore I could not take them into account in my consideration of the reasonableness of the respondent's decision to dismiss. I could not substitute my own view for the decision of the respondent. I appreciated why the claimant's perception was that he was unfairly treated and as a 'scapegoat' to blame for the escape of prisoner. I appreciated the respondent's position that responsibility for the departure of

the escort ultimately lay with the claimant, as the First Line manager on duty at the time of the departure of the escort and that the claimant had not checked the escort paperwork and have not followed relevant SOPS in respect of the departure of the escort.

5 35. It was significant that at the disciplinary hearing the claimant admitted that he had responsibility for the departure of the escort. I had to consider the fairness of the decision to dismiss in terms of the applicable law. The respondent's core objective is to maintain prisoners in secure custody. The respondent has a number of policies and procedures in place to reduce risks
10 in particular circumstances where there is an increased risk to the maintenance of the secure custody of prisoners. The claimant was aware of this and was aware of the SOPs which required to be followed in the arrangement of emergency escorts. The claimant did not follow these SOPs. In all the circumstances, my conclusion is that the decision to dismiss was
15 fair in terms of s98(4), being a decision, which was within the band of reasonable responses for the respondent to take, for admitted conduct which was considered by the respondent to be sufficiently serious to lead to dismissal, given the nature of the respondent's organisation. I take that decision with regard to the equity and substantial merits of the case. I
20 accepted the claimant's representative submission that no special rules apply to the Prison Service, and that what I required to determine was whether in the circumstances, the respondent acted reasonably or unreasonably in treating the reason for dismissal as sufficient for dismissing the claimant.

25 36. I did not accept the claimant's representative submission that the decision to dismiss falls out with the band of reasonable responses open to the respondent because (as submitted by the claimant's representative "...*The prisoner escaping was down to a combination of all of these trained and experienced individuals failing to do what was expected of them and was not simply the actions of the claimant.*") The claimant was dismissed because of
30 his failure to follow relevant SOPs. On the basis of the evidence before me, I did not accept the claimant's representative's position that the claimant's misconduct was '*..to rely on the word of another manager that all paperwork was complete and to assume that his request that staff members were briefed*

had been carried out. That position does not recognise the claimant's responsibilities on dispatch of the escort.

37. I did not accept the claimant's representative submission that the appeal panel '*..entirely failed to consider the claimant's position of inconsistent treatment*'. I noted the terms of the document at 246, as relied on by the claimant's representative, but also took into account Ms Fraser's evidence, which was entirely credible and reliable. Ms Fraser's clear and consistent evidence before the Tribunal was that the appeal panel had considered whether Mr Purdie had taken into account both the claimant's and the Control Manager's involvement in the preparation for the departure of the emergency escort. I accepted that the information provided to the claimant (at 246) could have been clearer with regard to that, and the reasons why then it was not for the IDAB to consider the appropriateness of management action or otherwise against other members of staff (their position being that that had been considered at the disciplinary level). That position was reasonable given that no new evidence or witnesses were presented at the appeal hearing stage.

38. I accepted the claimant's representative's submissions that the claimant's lengthy unblemished service was a material consideration. Mr Purdie was also entirely credible and reliable and I accepted his uncontested evidence that he had taken into account the claimant's lengthy unblemished service as a material consideration and significant factor before coming to his decision to dismiss.

39. Having found Mr Purdie to be an entirely credible and reliable witness, I accepted his evidence that the press coverage in relation to the escape of prisoner X was not a factor in his decision to dismiss the claimant and that the claimant was not considered to be an '*easy target*' because of his partial retirement status.

40. In my consideration of the claimant's representative's reliance on *Post Office -v- Fennell [1981] IRLR 221*, I took into account and considered to be significant the evidence that the view of all of the members of the appeal panel was that the approach taken by Mr Purdie, and Mr Purdie's decision to

dismiss, were consistent with how the matter would be managed in other establishments and were reasonable and proportionate in all the circumstances.

5 41. Taking into account all of the evidence relied upon before me and the evidence of the claimant, who was also found to be entirely credible and reliable, I did not accept the claimant's representative submission that the amendment to the SOP by the Duty Manager shortly after 3 August 2017 (at 356) was significant in respect of the reasonableness of the decision to dismiss. It was the claimant's clear understanding and admission during the
10 internal procedures that he had responsibility for the departure of the escort.

42. For all these reasons, the claimant's claim of unfair dismissal is unsuccessful and is dismissed.

15 43. I note that considerable time at the Tribunal Hearing was spent seeking to establish which Manager (either the claimant or the Control Manager who had been on shift immediately preceding his shift on 3 August 2017) had responsibility for each step of the SOP at 354 – 355. I suggest that the respondent review its policies and procedures to ensure that there are clearer lines of responsibility for each step in that SOP prior to departure of an emergency escort, so as to ensure clarity on where responsibility for each
20 step lies, and enable responsibility for each step to be taken by the relevant Line Manager, even in situations where there is an element of urgency in arranging the emergency escort and where the circumstances are such that these steps would require to be taken over a shift hand-over period.

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Employment Judge

C MacManus

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Date of Judgment

05 April 2019

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**Entered in Register
and copied to parties**

09 April 2019