



EMPLOYMENT TRIBUNALS

Claimant: Mr G Rose

Respondent: Ministry of Justice

Heard at: Hull **On:** 12-14 March and 14-16 August 2019

Before: Employment Judge Maidment

Representation

Claimant: Mr B Huckstepp, lay representative

Respondent: Miss H Trotter, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal fails and is dismissed.
2. The Claimant's dismissal was not in breach of his contract of employment and his claim for damages fails and is dismissed.

REASONS

Issues

1. The Claimant complains of unfair dismissal. This is in circumstances where the Respondent puts forward conduct as the reason for dismissal and, in particular, its consideration that the Claimant had failed in his responsibilities for the care of a prisoner categorised as vulnerable and who ultimately took his own life.
2. The Claimant separately seeks damages for breach of contract where he maintains that his dismissal without notice was in breach of contract.

Evidence

3. The Tribunal heard evidence on behalf of the Respondent from Mr Philip Render on the operation of the Respondent's CCTV systems followed by Mr Gary Sword, Head of Reducing Reoffending at HMP Hull, Mr Andrew Hall, Custodial Manager and Ms Marcella Gallagher, Governor

of HMP Humber. Proceedings then went part heard and, on the resumption of the hearing, evidence on behalf the Respondent was completed by the Tribunal hearing from Mr Paul Fowweather, Director of Yorkshire Prisons Group. The Claimant then gave evidence on his own behalf.

4. The Tribunal had before it an agreed bundle of documents in two volumes and stretching to in the region of 850 pages. The Tribunal had placed before it by agreement between the parties further additional documentation including statements given as part of a police investigation and papers relating to a coroner's inquest.
5. Having considered all of the evidence the Tribunal makes the findings of fact as follows.

Facts

6. The Claimant was employed as a prison Officer at HMP Humber. He worked in a dual role as supervising Officer/offender supervisor.
7. On 14 June 2016, Prisoner A was found to have committed suicide by hanging in his cell on D Wing. Prisoner A had a significant history of mental health problems and at the time of his death was subject to an Assessment, Care in Custody and Teamwork ("ACCT") plan in accordance with prison service instructions regarding the management of prisoners at risk of self-harm, known as 'Safer Custody'. The aims of Safer Custody include *"to manage and support prisoners and detainees who are at risk of harm to self, others and from others"* and to *"reduce incidents of self-harm and deaths in custody"*. Certain mandatory actions are provided for including, within an ACCT plan, to ensure that any prisoner identified as at risk of suicide or self-harm is managed using ACCT procedures. These include a requirement that a first case review must be held within 24 hours of the ACCT plan being opened and ideally immediately after the initial assessment interview. Subsequent case reviews are to be *"multidisciplinary where possible. The ACCT process will operate more effectively if there is continuity in the attendance of staff from relevant departments/services"*. The prisoner's progress should also be monitored and recorded against an initial Caremap (which is intended to identify any issues or triggers where the prisoner might need support) with consideration given to whether the prisoner exhibits any additional needs which might require the Caremap to be updated. The frequency of case reviews should be determined, the timing of the next case review recorded and who should be invited to it. A detailed and accurate record is to be kept on a Record of Case Review Form.
8. On 15 June 2016 the then prison governor, Mr Ian Telfer, appointed Mr Gary Sword to act as investigation Officer to formally, but in broad terms, investigate the circumstances of Prisoner A's death. He was told to

consider the period from 7 June when the ACCT for Prisoner A was reopened by Officer G until 14 June 2016. An earlier ACCT had been opened on 27 May and closed on 3 June. Mr Sword explained that after its closure the ACCT document is still active although there are no ongoing observations. Any subsequent concerns can lead to it being reopened. Mr Sword told the Tribunal that nothing he found caused him to consider widening the period of his enquiry.

9. Mr Sword had no line management responsibility for the Claimant, although he had managed him previously. At this first stage prison Officer Jenkinson acted as Mr Sword's assistant, although he did not sit in on all the interviews and was appointed for his own professional development rather than as an active participant. It is noted that Mr Jenkinson conducted the first ACCT review with Prisoner A on 27 May – Prisoner A had been moved to a safer cell after trying to set fire to his cell and to choke himself. He had also been in operational charge of the prison during the day of 13 June.
10. The police had become involved on 14 June immediately on the discovery of Prisoner A's death. They had secured various relevant documents and a section of CCTV footage recording the last pictures taken of Prisoner A on the early evening of 13 June before his 6pm lock up. Other documents were held at the prison and Mr Jenkinson became the point of contact with the Prisons Ombudsman providing it with any evidence requested.
11. Mr Sword quickly identified a number of potential witnesses including the Claimant and Officers C, D, E, F and H. The first interview with the Claimant took place on 6 July which was recorded and a transcript subsequently produced. The Claimant chose not to be accompanied. He confirmed that he had received ACCT training and refreshers, care manager training and had chaired case reviews. He also confirmed that he understood case reviews were expected to be multi-disciplinary which might include healthcare professionals, mental health professionals and/or members of the prison chaplaincy.
12. The Claimant's position before the Tribunal was that shortly after the ACCT had been reopened he was asked by a supervising Officer, Officer K, to conduct an ACCT review of Prisoner A. However, when he got to Prisoner A's cell he was very threatening and had a weapon. He said that, as a result, Officer K told him not to do a multi-disciplinary review (as she did not feel it safe for a third party to be sat at a table with prisoner A), to just write up what had happened and note that Prisoner A was to be reviewed the next day. This is not something that the Claimant raised with Mr Sword or indeed before his internal appeal against dismissal.

13. The ACCT form completed by the Claimant referred to a “*verbal contribution*” from Officer K but without giving any detail. Despite being questioned on this incident by Mr Sword, the Claimant did not provide such information to him – when asked if there was a reason why other agencies, such as mental health, had not been involved in the review, the Claimant said: “*none whatsoever.*” He referred to no instruction from Officer K. The Claimant then said in evidence to the Tribunal that, rather than telling him at this meeting, he might have told Mr Sword in a couple of off the record conversations they had had before that 6 July 2016 interview. No such conversations had been put to Mr Sword when he had given his evidence. Nor were they referred to in the Claimant’s witness statement. On the balance of this evidence, the Tribunal finds that they did not occur.

14. Mr Sword produced a first investigation report dated 13 July which focused on the ACCT documentation and management of the ACCT process having spoken to all of the prison Officers who had been involved up to 14 June 2016. Mr Sword’s conclusions in respect of the Claimant were critical of his actions in a number of respects. He found that there had been no multidisciplinary review of Prisoner A on 7 June, but instead the review had been carried out by the Claimant alone. No separate assessment (due on the opening of an ACCT) had been carried out on 8 June when, he thought, there should have been and the Claimant was the person responsible for arranging this. No case review had been carried out on that day. He recommended that the Claimant to be subject to disciplinary proceedings in respect of potential gross misconduct. Similar recommendations made in respect of other Officers, ranging from a need for refresher training to charges of gross misconduct. The Claimant had not been suspended and remained at work after that recommendation up to his disciplinary hearing.

15. Mr Sword noted that the Claimant, following what was his final review of Prisoner A on 13 June, said that he had recommended that the prisoner be placed in a safer cell with anti-ligature clothing and had spoken to Officer D, the relevant duty manager, in that regard. However, when interviewed, Officer D had denied being informed of any case review or such recommendations by the Claimant. He accepted that the Claimant had expressed concerns about Prisoner A, but not that he had mentioned those specific recommendations.

16. Mr Sword produced an interim report on 18 August in which he set out certain factual findings he had made up to that point. This focused on the reviews of Prisoner A’s ACCT between 7 – 13 June 2016. Within this he noted that prisoner A’s ACCT plan had been reopened by the Claimant on 7 June (the Claimant had thought that to be the case when in fact it had already been reopened before his involvement). There was to be an ACCT case review on 8 June which did not take place. On 9 June, the case review was carried out by Officer C on her own. There

also appeared to be some confusion as to the date specified for the next case review since the date of 13 June specified on the front page appeared to have been overwritten to read 14 June. On 13 June a case review was recorded as having been conducted by the Claimant following which the Claimant had said that he had spoken to Officer D with the aforementioned recommendations. There was no record of any decision or follow-up actions related to the concerns which the Claimant said he had raised.

17. Following Mr Sword's initial report, Mr Telfer commissioned a further five separate investigations into individual named officers, including the Claimant. The Claimant was interviewed again on 13 September 2016. The other officers were also re-interviewed and Officers I and G were interviewed for the first time.
18. The Claimant's interview was again recorded and a transcript produced. A supervising Officer, Mr Richard Graham, attended as the Claimant's chosen companion. Again, the Claimant did not refer to any direction from Officer K about the 7 June ACCT. He said that it was his own judgement not to involve anyone else in such a volatile environment saying that he had made "*that call*." The Tribunal does not accept that the Claimant's reference to a verbal contribution by Officer K was sufficient to put Mr Sword on notice that he ought to ask the Claimant to elaborate or speak to Officer K herself. If the Claimant had believed he was acting under Officer K's direction he would have expressly said so.
19. Mr Sword viewed the CCTV footage of D wing for around the hour before Prisoner A was locked up for the night. He viewed this in the security office – it was the same footage the police had retrieved and other footage covering a wider timeframe had been routinely wiped by this stage and was not retrievable. As will be explained, the footage was shown to the Claimant at the subsequent disciplinary hearing.
20. Mr Sword produced a final investigation report dated 9 June 2017. He concluded that there had been no multi-disciplinary review on 7 June 2016 - the review had been carried out by the Claimant alone. No assessment had been carried out on 8 June when he thought there should have been. The Claimant was responsible for arranging this. No case review had been carried out on 8 June which was again the Claimant's responsibility. The Claimant did not attend the case review carried out on 9 June, as was his responsibility. Finally, the Claimant, he felt, had not sufficiently satisfied himself that actions were taken on 13 June to safeguard Prisoner A. Mr Sword recommended again that the matter proceed to disciplinary action for potential gross misconduct.
21. Mr Sword believed that the management processes designed to support prisoners at risk of suicide were not followed, with the death of Prisoner

A the most serious possible consequence of such professional failings. Whilst Prisoner A had been under the care of the mental health team, the case reviews, if and when they were carried out, had not been multidisciplinary in circumstances where additional expertise and information available might have provided the prisoner with the necessary Caremap support. Whilst the Claimant said that he had raised his concerns on 13 June, it was Mr Sword's conclusion that he had walked away without ensuring those concerns were properly addressed within the procedures designed specifically for that purpose. He felt that the death of Prisoner A could be traced directly from those failings and indeed all five individual officers investigated were referred for disciplinary action.

22. It is noted at this stage that Officer C was ultimately recommended for refresher training having failed to carry out a multidisciplinary review on 9 June, Officer E was dismissed for failing to conduct a case review on 14 June, Officer F was given a written warning for failing to carry out management checks and no disciplinary sanction was imposed on Officer D, who had been subject to a charge relating to Prisoner A not being placed in a safer cell with anti-ligature clothing on 13 June.

23. Before reaching his own conclusions, Mr Sword considered the conflict of evidence between the Claimant and Officer D who he had interviewed on 30 June and again on 12 September 2016. The Claimant maintained that following his case review with Prisoner A at 17:45 on 13 June, he spoke to Officer D by telephone to express his concerns that Prisoner A be moved to a safer cell with anti-ligature clothing. When interviewed on 30 June, Officer D accepted that the Claimant had said over the phone to him that he had met with the prison chaplain who informed him of Prisoner A having had some sort of vision about being dead or dying. He was clear however that at no point did the Claimant tell him anything about a safer cell or anti-ligature clothing. Mr Sword noted that there was a doubt as to the time of the call, but concluded that the content in any event had not been as the Claimant described. When interviewed on 12 September he noted that Officer D had produced a note to assist with the interview and that he had now put a lot of thought into what had occurred. He maintained that his earlier evidence was accurate, but that there had been two phone calls from the Claimant, firstly to refer to the chaplain's concerns and the second call around half an hour later telling Officer D not to forget to see Prisoner A.

24. Mr Sword also interviewed prison Officer H about the telephone call made by the Claimant to Officer D. In his final report, Mr Sword said that Officer H confirmed the Claimant's version of events. He preferred the Claimant's and Officer H's accounts to that of Officer D. However, before the Tribunal, Mr Sword stated that his position is now that this did not fully and accurately relay the uncertainty with which Officer H had spoken about what he had heard, uncertainty he felt was clear from the

transcript of Officer H's interview. He told the Tribunal that it was clear from that transcript, that Officer H was not clear whether he had even been present when the call was made and then that he admitted only hearing one side of the conversation (so that he had assumed it was Officer D on the other end) and noted that he could not recall any mention of anti-ligature clothing.

25. Mr Sword said that Officer I had not been interviewed during the first round of interviews due to lack of availability, but he made sure that he was in the second round. Officer G was interviewed only once because he came forward with evidence after the first round of interviews.

26. Mr Sword believed Officer G was reliable in his evidence that the Claimant had asked that he alter the date of the next review on one of the ACCT documents from 13 to 14 June 2016. The police had raised this potential discrepancy and Officer G came forward as a witness having discussed the issue with Officer D. Mr Sword was aware of that. He thought Officer G had come forward when he learnt that he might have relevant information. Mr Sword recognised that Officer G was inaccurate regarding the time of the chaplain's visit and report. The ACCT recorded this as occurring at 15:30 whereas Officer G placed it as being much earlier. For him the important element was the information provided by the chaplain of which Officer G and the Claimant were aware. The timing of the Claimant having the information, he did not regard as crucial. The information the Claimant had was of a critical nature and needed to be acted upon. He had the information before the ACCT review he was due to hold. The change of the date for the review indicated to Mr Sword that the Claimant had not been going to do the ACCT review that day, but the review was in fact done that day, so that whether or not the Claimant told Officer G to change the date became less relevant. Nor did Mr Sword come to a conclusion as to whether or not the Claimant had met the chaplain in Officer G's presence – the Claimant's initial position before the Tribunal was that he did not speak to the chaplain. The chaplain was not interviewed as the key undisputed evidence was, for Mr Sword, that the Claimant had the information the chaplain had provided before any ACCT review, not how he had received it.

27. Mr Sword denied before the Tribunal that there was an endemic practice in the prison of breaching ACCT procedures, as was put to him in cross-examination. The Tribunal can conclude on the evidence only that ACCT procedures were not always fully adhered to (to the extent accepted by Mr Foweather). Mr Sword said that he focussed on the suspected breaches which had been identified.

28. Marcella Goligher chaired the Claimant's disciplinary meeting on 13 September 2017. The Claimant had the investigation reports of Mr Sword setting out the allegations and attaching evidence he had

gathered. Since October 2016 Ms Goligher had served as the prison's governor. By the time she took up this position, Mr Telfer had therefore already commissioned Mr Sword's investigation. Mr Graham attended as the Claimant's companion. The meeting was again recorded with a transcript produced. It commenced at 10:22 and ended around 18:00. Ms Goligher clarified that the Claimant had been given sufficient time to prepare for the meeting and understood the allegations against him. The Claimant indicated that he accepted that he was responsible for ensuring an ACCT review was carried out on 8 June which had not occurred and that he had not attended the case review on 9 June. He contested the other allegations.

29. At the hearing, Mr Sword went through his investigation findings in detail. He also asked it to be recorded that he had noted what he described as a "*theme*" in the events involving the Claimant, that is to say, a pattern whereby the Claimant had consistently failed to demonstrate any follow-up action after case reviews and relevant events to ensure anything was done. Evidence was then heard from Officers C, H, I, G and D. The Claimant and his representative had the opportunity to ask them questions. The CCTV footage was also viewed and commented on by Mr Sword. The Claimant did not request further time to view this.

30. Ms Goligher then adjourned the hearing to consider her conclusions as regards the allegations. She found the second allegation regarding the failure to carry out an assessment on 8 June not to be proven. An assessment (as opposed to an ACCT review) was required on the opening of an ACCT plan but since one had taken place when the ACCT was originally opened on 27 May she did not feel that a further assessment on 7 June was mandatory. She considered that the other allegations were proven. The Claimant accepted the failure to conduct a review on 8 June and that he had not been present at the 9 June review. She also considered that, despite the Claimant's contentions, there had been misconduct in the lack of a multi-disciplinary review on 7 June and the Claimant's failure to satisfy himself that appropriate actions to safeguard Prisoner A had been taken on 13 June.

31. The Claimant was then given an opportunity to present any evidence in mitigation. The Claimant was given some time to prepare this and Mr Graham, on the hearing being reconvened, read a prepared statement on behalf of the Claimant. Ms Goligher adjourned the hearing again to determine the appropriate sanction. She then reconvened the hearing and informed the Claimant of her decision to terminate his employment on the grounds of gross misconduct. This was subsequently confirmed by letter dated 18 September 2017. She said that she had taken into account the context in which the prison was operating at the time, the challenges and pressures faced by the staff. However, even if there were shortfalls in the prison's operation, she considered that any prison Officer ought to have prioritised the case reviews of a prisoner subject

to ACCT as, by definition, those prisoners were considered to be the most vulnerable and their safety was an absolute priority.

32. Ms Goligher found that the Claimant was responsible for reviews of Prisoner A's ACCT plan, namely on 7, 8, 9 and 13 June. On 7 June no multidisciplinary review had taken place and there was no evidence of follow up work regarding Prisoner A's care such as alerting mental health professionals or undertaking a quality assessment. She was not satisfied that there was sufficient explanation as to why a multidisciplinary review had not been carried out. She noted that the Claimant had accepted that such approach was desirable. The Claimant did not say that on 7 June he had been acting on Officer K's instructions. He did not ask for her to be there as a witness.
33. No review took place on 8 June and none was documented as having taken place. The Claimant had always accepted that he had not carried out the ACCT review on 8 June. Before the Tribunal he referred to that being a very busy day and that the review was missed.
34. The Claimant had then failed to attend the case review on 9 June, instead getting Officer C to attend in his place. Despite having arranged the meeting, he had left the wing and had left Officer C with the sole responsibility for reviewing the care of Prisoner A. Ms Goligher felt that the Claimant, again without sufficient explanation, had then failed to follow up on the review.
35. Before the Tribunal the Claimant said that he could have made a call to arrange for healthcare to attend the ACCT on 9 June but couldn't recollect. He accepted that this review was his responsibility and that there was no evidence that he had tried to ensure the attendance of any other agencies. He said that he had arranged for Officer C to attend to assist him as she had previously worked with Prisoner A as a treatment manager and had a better rapport with him than the Claimant himself. At his subsequent appeal, the Claimant had said that his presence might have inflamed Prisoner A. The Claimant's position before the Tribunal was that Prisoner A did not like him because he, unlike many prison Officers, challenged Prisoner A's behaviour. He said that he had intended to be there and if Officer C had felt unable to conduct the review she could have taken Prisoner A back to his cell and rescheduled the review for later. He was clear however that he was going to conduct the review with C, but with no health care or chaplaincy involvement. He agreed that given his lack of taking any early steps to make arrangements, it was always highly unlikely that this would be a multi-disciplinary review in the circumstances of a prisoner who had previously been highly aggressive (albeit the Claimant said that by then he had calmed down) and was still subject to 5 observations per hour. The Claimant said that he did not wish the review to be missed as had occurred the previous day. It being completed in the way it was, was the

best option available at the time albeit the Claimant agreed that it was not ideal and did turn out to be inadequate. Whilst the Claimant did speak to Officer C about the review after she had carried it out, her evidence in the internal process was that she had contacted the Claimant rather than the other way round. The Claimant, in evidence before the Tribunal, said that he believed he had sought her out, but accepted that there was no evidence that he had.

36. It is noted that Officer C had recorded on 9 June that mental health were to be invited to the next review scheduled for 13 June.
37. Ms Goligher found that on 13 June the Claimant was the responsible supervising Officer on Prisoner A's wing, was aware that a case review was needed and had sufficient time to organise a full multi-disciplinary review. However, he had failed to do so. She found that he had in fact asked Officer G to change the date of the review on the ACCT document to read 14 June. She preferred Officer G's evidence to that of the Claimant in this respect.
38. She noted, however, that the Claimant had recorded a case review performed in any event on 13 June at 17:45 after being informed of concerns held by the chaplain. She had reviewed CCTV footage which in fact showed Prisoner A approach the wing office where the Claimant was sat at 17:55/17:56. On the basis of the footage, she did not feel that any purported review at 17:45 could have been carried out at any time before 17:55.
39. Further, the CCTV footage showed Prisoner A standing in the doorway for around two minutes, which she considered to be at odds with the nature and content of the review recorded by the Claimant on the ACCT form. This cast doubt on the truthfulness of the record. Furthermore, a two-minute review in the doorway of the office, for her, called into question the quality of any review and how the chaplain's concerns could have properly been explored and in the right environment. She considered that any such review did not meet what was expected under the Safer Custody.
40. She did not accept that the Claimant had escalated his concerns to Officer D as he maintained and preferred Officer D's version of events. Ms Goligher, in contrast to Mr Sword's conclusion, did not consider that Officer H had been certain of what he had heard. She noted the transcript of his investigatory interview where he appeared to be in doubt as to whether he had been present and vague as to whether he had heard the conversation. During the disciplinary hearing, Officer H had said that he couldn't remember exactly how the Claimant was trying to get in touch with Officer D and didn't wish to guess. Also, she considered Officer H appeared to be certain only as to the reason the Claimant had

made the phone call, namely about Prisoner A being moved to a safer cell which indicated that the Claimant had intended that he would call Officer D for this purpose. Officer H, she felt, was much less clear about whether the Claimant actually mentioned the recommendation to Officer D. She considered Officer H to be candid in saying that he did not recall any mention of anti-ligature clothing by the Claimant, which conflicted with the Claimant's version.

41. During the disciplinary hearing, she found Officer H had been doubtful on what he had heard about a safer cell, but she concluded Officer H had decided that he thought he heard some mention of a safer cell. She did not consider that Officer H could be sure that he had overheard the Claimant actually speaking to Officer D. She noted him again saying to Mr Sword, when interviewed, that he couldn't be 100% certain that it was Officer D the Claimant spoke to. Again, she found that Officer H appeared to be sure about what the Claimant was trying to do, not what he in fact succeeded in doing. When questioned during the disciplinary hearing, she felt his uncertainty stretched from not being sure as to who the Claimant was speaking to, to not knowing whether Officer D had in fact ever attended the wing in response. It was clear on the evidence that Officer D had attended the wing. She found there to be no other evidence of the Claimant having mentioned anti-ligature clothing or a safer cell than the record the Claimant said he had made in the ACCT form. She weighed Officer H's evidence against that of Officer D's and felt, with no indication of doubt on Officer D's part or Officer D seeking to mislead or lacking credibility, that his evidence ought to be preferred. In addition, as already referred to, she believed that the Claimant had not been truthful and candid about the nature and timing of the review on 13 June which went to his own credibility.
42. In cross examination the Claimant was referred to passages in the investigatory interviews where the Claimant indicated that he had spoken to the chaplain about the chaplain's concerns about Prisoner A, indeed face to face. The Claimant's witness statement evidence, however, was that he was unaware of the chaplain's concerns until he came onto the wing at around 17:25 and read the chaplain's note. Indeed, the Respondent's witnesses had been cross examined on that basis i.e. that he had not spoken to the chaplain. The Claimant was referred to his police statement given on 28 September 2016 in which he said that he had been contacted by the chaplain at around 17:30. The Claimant finally reached a position in his evidence to the Tribunal that he did not deny that he had spoken to the chaplain but could not recall where, when and how.
43. He said that he had been aware from 08:00 that morning that he needed to carry out Prisoner A's ACCT review but accepted that the information from the chaplain was a factor in the review getting done on that day. It was pointed out to the Claimant that he told Mr Sword at his second

interview with him that he did speak to the chaplain: *"in the office about concerns he had with Prisoner A hence why I carried out the review"*.

44. The Tribunal notes that at a coroner's inquest hearing the chaplain is noted as saying that, when he met with Officers on D wing, the Claimant was not present. That information was not before Ms Goligher or Mr Foweather at the Claimant's appeal.
45. In cross examination the Claimant accepted that he had not made any arrangements to ensure any other agencies were in attendance at the review. For the first time the Claimant said that, when he got onto D wing at around 17:25 he spent 20 minutes trying frantically to get people to sit round the table for a multi-disciplinary meeting. The Tribunal considers such evidence to be an invention.
46. The Claimant also insisted that Officers H and I had taken part in the review although he accepted that Officer I had not been in the office throughout. He seemed to conflate their being in the office whilst the Claimant was reading the ACCT log and when he spoke to Prisoner A, in circumstances where they would or might hear what he was saying, with them actually participating actively in the review. The Claimant had recorded them on the ACCT report as having been invited to and therefore part of the ACCT review. He referred in the document to *"the board"* being happy that Prisoner A had no intention to self-harm, but the evidence of those officers in the internal process suggests their own perception was that they were not part of the review and their feelings of disquiet that they were named on the review form. Officer I's account at the disciplinary hearing was that a review would normally take place in a private upstairs room and on this occasion *"it just happened"* rather than that it was planned. He didn't actually see it as being an ACCT review.
47. The Claimant rather incredibly suggested at one point in cross examination that if more than one person was present then that constituted a multi-disciplinary review.
48. The Claimant was unable to explain in what circumstances Prisoner A had refused initially to engage with the review. He advanced no positive account of he himself trying to speak to Prisoner A. The evidence is of the Claimant starting to write out the review document based on a refusal by Prisoner A to engage, but of Prisoner A then coming over to the office doorway. Officer I's account was of him shouting to Prisoner A to come over which is in all likelihood what occurred.
49. The Claimant's witness statement indicated that he spoke to Officer D after the ACCT review. That would put the telephone call to Officer D as occurring after 17:57. In evidence before the Tribunal he said he could

have also spoken to him before the review. When interviewed by Mr Sword he indicated a call after the review. His statement to the police also did. His account to Ms Goligher was that he wanted to speak to Officer D because he felt that Prisoner A “*was offering lip service*” i.e. after the review.

50. Ms Goligher clearly thought that the Claimant would know that he had the authority to move a prisoner to a safer cell without seeking the view of a more senior Officer. The Tribunal concludes that as an experienced prison Officer the Claimant must have been aware of his powers. The Tribunal also concludes that a safer cell and the use of anti-ligature clothing do not go hand in hand as the Claimant suggested. They are separate precautionary measures and the use of anti-ligature clothing, on the evidence the Tribunal has heard, would be rarer than the placing of a prisoner in a safer cell. In his police interview the Claimant made no reference to mentioning anti-ligature clothing to Officer D. The Tribunal agrees with Ms Goligher that whilst the Claimant said that Officers H and I would support his account of a call he made to Officer D, they did not. Mr Sword raised anti-ligature clothing and a safer cell with Officer H asking if they had been mentioned by the Claimant. He replied in the affirmative. Otherwise Officer H referred to a safer cell but not to anti-ligature clothing when describing the conversation and on being questioned at the disciplinary hearing demonstrating an ever vaguer and diminishing recollection. Officer I did not recall any conversation at all between the Claimant and Officer D.
51. Ms Goligher noted that, during the investigation and disciplinary meetings, there had been some instances where the Claimant said that he did not get on with Prisoner A or had a bad relationship with him. She considered such attitude to be unprofessional and that this was likely to have had an effect on whether the Claimant chose to perform his duties fully with reference to Prisoner A. She felt that the Claimant’s attitude seriously undermined trust and confidence
52. A further aggravating factor for Ms Goligher lay in the number of procedural failings over such a short period, which led her to consider that the consistency of failures in the ACCT management of Prisoner A cast further doubt on the Claimant’s integrity.
53. Ms Goligher considered, in the circumstances, that the appropriate sanction was the Claimant’s dismissal. For her, the importance of the safety of prisoner A, especially under ACCT measures, was one of the most important functions of the Claimant’s role, as was well known to all Officers, especially those with the Claimant’s level of seniority and experience. The Claimant was responsible for the safety of Prisoner A and failed repeatedly, she felt, to carry out his responsibilities to ensure that the policy was followed. She agreed with Mr Sword that there was a pattern of behaviour in the Claimant wilfully failing to take steps to

follow up any concerns, again, she felt, at least in part influenced by the Claimant's personal attitude towards Prisoner A. She felt the Claimant to be untruthful regarding the circumstances of the 13 June 2016 case review and the content and timing of the escalation of concerns to Officer D. The sanction of dismissal reflected the seriousness of the proven allegations which she felt ultimately contributed to the death of Prisoner A.

54. Nevertheless, she did consider the Claimant's record and examples of good performance. She took account of the fact that the Claimant had not been suspended during the investigation and there had been no further instances of misconduct. She considered the appropriateness of a final written warning, but came to view that this would be insufficient in the circumstances where she could not be confident that there would not be a repetition of such misconduct, noting what she perceived as a general lack of remorse expressed by the Claimant and a lack of truthfulness.
55. Ms Goligher's outcome letter of 8 September confirmed that the Claimant had the right to appeal her decision.
56. The Claimant appealed against the decision to terminate his employment by completing a Form 11 on 25 September 2017 which stated his grounds of appeal to be an unduly severe penalty, that the disciplinary proceedings were unfair and breached natural justice and that the original findings were against the weight of evidence. He attached to this a 9 page "*Response from SO Rose to the disciplinary outcome letter*" in which he dealt with Ms Goligher's findings in turn.
57. The Claimant attended an appeal hearing on 7 November 2017 chaired by Mr Paul Foweather, Director of Yorkshire Prisons Group. He was assisted by a HR caseworker who in a Case Analysis Submission suggested that the Claimant's return to work might represent a "*high risk to the business*". The Tribunal accepts Mr Foweather's evidence that the decision taken on appeal was his alone and that he did not always agree with case analysis reports and did not regard this as a "steer" but simply a case analysis from a HR expert. In advance of the hearing he had read the Claimant's appeal submissions together with documents including Mr Sword's investigation and the transcript of the disciplinary hearing. He was well aware that a further ACTT review of prisoner A had been missed on 14 June for which the Claimant had no responsibility and that the Claimant's last contact with prisoner A had been more than 24 hours before his death. The Claimant was accompanied by his colleague, Mr Graham.
58. Mr Foweather clarified with the Claimant that he did not see his role as to re-hear all the evidence but to determine whether the Claimant had

been treated reasonably and to look at the issue of the severity of the penalty. On Mr Foweather's direct request, the Claimant confirmed that he was not appealing on the basis that he had done nothing wrong, but on the decision to dismiss him in light of his mitigation.

59. Mr Foweather went through the grounds of appeal in the Form 11 document and gave the Claimant the opportunity to say anything further he wished, including any elaboration of the written comments he had made on Ms Goligher's outcome. The Claimant raised that Officer K had been involved in deciding not to hold a multi-disciplinary ACCT review on 7 June. He considered this to be part of the Claimant's arguments in mitigation (albeit did not feel that much was made of this by the Claimant at the appeal hearing) but that regardless of this Ms Goligher had sufficient evidence to support her conclusion of unprofessional conduct. He noted that Officer K had not been put forward as the decision maker at the earlier disciplinary hearing.

60. The hearing lasted around 1 hour. At one point, there was a break during which Mr Foweather telephoned Ms Goligher to clarify her concern that the 13 June review had been negligent and an observation that the Claimant had walked past prisoner A before it took place. On reconvening, he explained then to the Claimant what she had said before continuing with the hearing.

61. Mr Foweather then adjourned the hearing to consider his decision and wrote to the Claimant on 10 November rejecting his appeal. He noted that during the hearing the Claimant had said that he did not disagree with the content of Ms Goligher's outcome letter, but that he felt the decision was unduly severe. Mr Foweather did not feel that the Claimant had done enough to show mitigation of the seriousness of his misconduct. However, he considered the issue of the pressure on staffing within the prison at the time. He was aware of those pressures which were not unique to the Claimant's prison. His view was that the person responsible for an ACTT review still had to make every effort to ensure that it was multi-disciplinary and there would have to be something exceptional for the review not to comply with that. He agreed that there was evidence, not least from the Safer Custody Review he requested after prisoner A's death, that multi-disciplinary reviews did not always occur. A review would, however, only be multidisciplinary if the person responsible made the necessary arrangements. He also considered the conflicts in evidence between the Claimant and other prison Officers and the Claimant's position that his account ought to be the one preferred. He did so aware that some of those giving evidence in the Claimant's case were themselves subject to misconduct allegations and might have an interest in protecting their own positions.

62. There was no criticism by the Claimant in his appeal of the terms of reference limiting the period under investigation to that from 7 June

rather than the earlier date of 27 May. Mr Foweather did not consider that there had been a need to look at the earlier period. He told the Tribunal that with deaths in custody there was always a question as to how far back to look in determining any operative cause, but there had to be limits. This might expand the issues to be investigated but the question for him was whether the Claimant conducted himself properly over the days within the terms of reference set.

63. He concluded that the Claimant was guilty of misconduct which was serious and had occurred repeatedly over a short space of time. Furthermore, the Claimant's actions he considered had very serious consequences and there was evidence to question the Claimant's truthfulness and integrity in how he had described events during the internal process. The Claimant had expressed that he was sorry that prisoner A had lost his life and that the incident would stay with him for the rest of his life. He did not, however, consider that the Claimant showed any real sense of remorse or ownership of his actions and that he was instead seeking to apportion blame elsewhere. He thought that the Claimant was essentially saying that he would do the same thing again. The Claimant said that he could have done things better, but so could a lot of other people. He said that he had done what he believed right at the time and had never been negligent to any prisoner. Mr Foweather agreed that the Claimant's actions amounted to gross misconduct and that it had been shown that there was an irretrievable breakdown of trust and confidence such that the decision to dismiss was one reasonably open to Ms Goligher. He did not consider that a less severe penalty would have been appropriate given, amongst other things, the risks involved in breaches of procedure of the type the Claimant had committed and, with the Claimant's lack of insight, too great a risk of re-occurrence. He considered that the Claimant, at all stages, had a full opportunity to present his case.

64. The Tribunal has itself heard evidence from Mr Hall, Officer D, in particular, as regards what had occurred on 13 June 2016. Having considered his evidence and all other relevant material against the Claimant's evidence, the Tribunal makes its own factual findings as to what on the balance of probabilities is likely to have occurred on that day. The Claimant, before the Tribunal, was evasive and unwilling, when the Respondent's witnesses were cross-examined, to explain the basis on which his own case was put, preferring, as he saw it, to keep his powder dry. As clear from the foregoing, the Claimant's accounts on a number of key issues were inconsistent over time and he reneged from clear positions he had firmly asserted in his witness statement evidence.

65. Mr Hall was familiar with Prisoner A and regarded him as something of a lovable rogue. Mr Hall had managed a substantial number of ACCTs in the past, particularly as residential custodial manager, and had observed, he estimated, some 160 ACCT case reviews.

66. The Claimant's evidence was that he had conducted a case review with prisoner A at 17:45. He made a case review record which he signed setting out the content of that review. This recorded that Officer D could not attend in circumstances where Mr Hall was clear that he had never been asked to attend a case review. Mr D denied that the Claimant had ever expressed concerns that prisoner A should be considered for a safer cell and anti-ligature clothing during a telephone call on that day.
67. On 13 June 2016 Mr Hall took over as Victor 1, the senior on call Officer, from Mr Robert Jenkinson. His role was not to assume responsibility for any ACCTs, but instead to react to any issues of risk which arose in the prison. He had had no involvement with Prisoner A at any point earlier that day. The CCTV footage, which the Tribunal has viewed, shows the Claimant coming on to the wing where Prisoner A was housed at 17:30. That timing is not indicative that he can only have become aware of the chaplain's concerns at that point. Evidence indicates that he could have been in the wing office earlier in the afternoon (the Claimant's position before the Tribunal was that he did not know), but no CCTV footage exists of the earlier period. If the Claimant had a telephone call with the chaplain it is more likely than not that this occurred before he came onto D wing. The footage shows that no case review can have occurred at 17:45. It can have happened no earlier than 17:55 when the footage shows the Claimant in the wing office with Prisoner A in the office doorway for around two minutes before Prisoner A walks away.
68. Mr Hall maintains that he was certainly telephoned by the Claimant at some point after 17:00 when the Claimant told him that he had had a conversation with the chaplain regarding Prisoner A. He was told that the chaplain had relayed a conversation where Prisoner A had mentioned visions of dying. The Claimant asked Mr Hall to come over to speak to Prisoner A showing some reluctance himself to do so in circumstances where it was known that Prisoner A and the Claimant did not get along whereas Mr Hall and Prisoner A had a better relationship. He told Mr Hall that he was concerned that Prisoner A wouldn't talk to him about the chaplain's concerns. Mr Hall was not being asked to conduct or attend an ACCT review. Mr Hall maintains that the Claimant telephoned him for a second time around 20 minutes to half an hour later to check that Mr Hall had not forgotten to come to prisoner A's wing. He confirmed that he was on his way.
69. Mr Hall's walk from zone 2 where he was based to Prisoner A's wing takes around 15 minutes. He maintains that he left his office sometime after 17:35 and after the second telephone call from the Claimant. Apart from a brief interruption dealing with other staff on route he went over to D wing directly.

70. When Mr Hall got over to the wing he spoke to Officer I in the wing office, who said that he had not seen the Claimant for a little time. In fact, the CCTV footage shows that the Claimant left the wing almost at the exact same moment as Mr Hall arrived on it, at around 18:11, but through different doorways such that they did not meet. The Tribunal accepts that when Mr Hall told Mr Sword he had come onto the wing at 17:45, he was mistaken in his recollection, but does not consider this to impugn his credibility. Mr Hall went to speak to Prisoner A who was on the landing. Mr Hall's evidence was that Prisoner A told him that he was fine. Mr Hall then returned to Prisoner A's cell shortly afterwards when it was time to lock up and took the opportunity again to speak to him privately for around 2 minutes, as he thought more appropriate. Again, Prisoner A confirmed that he was fine. Mr Hall returned to the wing office and updated Prisoner A's ACCT record with a case note timed (he admits inaccurately) at 18:10. He did not notice the Claimant's earlier entry timed at 17:45.
71. Mr Hall then came across the Claimant at the exit gate to the prison at around 18:30, when the Claimant was leaving at the end of his shift. This was not a planned meeting. They spoke briefly and Mr Hall confirmed that he had seen Prisoner A and they agreed that he seemed fine to both of them. Again, there was no mention of any significant concerns which would involve a safer cell or anti-ligature clothing.
72. On balance, the Tribunal concludes that the Claimant during 13 June 2016 decided that he would not carry out a case review of prisoner A on that date and hence the date for the next case review was changed on the ACCT record to the following day, 14 June. Officer G's evidence is likely to be accurate given that his coming forward inevitably called his own conduct into question in circumstances where he would not otherwise have been in the frame. There has been no suggestion that anyone other than the Claimant would have had an interest in the date of the review. Even if no such conclusion could be reached, the Claimant had certainly taken no steps to arrange a review, particularly one of a multi-disciplinary nature. However, the Claimant then received information from the chaplain which he knew ought to be acted upon in terms of Prisoner A's welfare. He hoped that Mr Hall might be able to speak to Prisoner A, hence his first telephone call to Mr Hall and his second call chasing whether he was coming to speak to Prisoner A. On balance, the Claimant did not refer to Prisoner A requiring to be put in a safer cell and/or anti-ligature clothing to Mr Hall.
73. However, before Mr Hall could get to D wing, the Claimant had an opportunity to speak to Prisoner A quite informally, which he did in the doorway to the wing office at the time recorded on the CCTV footage. The Claimant had not expected to have this conversation and had instead determined to record an ACCT review on the basis of a refusal to engage by Prisoner A. As Officer I said, the conversation with

Prisoner A just happened – he was called over to the office and came willingly. The Claimant considered that conversation to be sufficient to constitute an ACCT case review which should have occurred in any event on that day and recorded it as such. He wished to ensure however that it looked more comprehensive, recording the involvement of Officers H and I who were not active participants and a verbal observation from Officer D who was not even aware that a review was taking place. The Claimant was by the time of this conversation satisfied that he had taken all necessary measures under the ACCT plan such that he was no longer concerned to determine whether or not Mr Hall had spoken to Prisoner A or whether or not Prisoner A had been moved to a safer cell or provided with anti-ligature clothing. The Claimant could have taken action himself certainly to ensure prisoner A was taken to a safer cell but did not evaluate the risk as justifying such action. He considered he had taken sufficient action in increasing the observations of Prisoner A. The Tribunal notes that the Claimant says that he was satisfied that Prisoner A posed no risk to himself, yet thought that observations ought to be increased.

Applicable law

74. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 (“ERA”).
75. If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides :-

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

- (a) depends upon whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) shall be determined in accordance with equity and the substantial merits of the case”.*

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

77. The Tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The Tribunal has to

determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

78. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.
79. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.
80. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to his dismissal – ERA Section 123(6).
81. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal.
82. The Claimant is also claiming damages for breach of contract and that his dismissal was without the notice which would have been required to have been given to him to lawfully determine his contract of employment. In such a complaint the Tribunal has to determine whether or not the Claimant's conduct amounted to conduct which could be classified as gross misconduct and a fundamental breach of his contract of employment as to entitle his employer to terminate summarily.
83. Having applied the above principles to the facts as found, the Tribunal reaches the conclusions set out below.

Conclusions

84. The Tribunal accepts that the Claimant was dismissed for a reason relating to conduct. The Respondent genuinely believed that the Claimant had failed to act in accordance with the duty of care the Claimant owed to a vulnerable prisoner and had failed to follow the

Respondent's procedures and protocols, well known to him and in place to seek to safeguard the welfare of a prisoners such as Prisoner A.

85. Did the Respondent then come to such conclusion on reasonable grounds and after reasonable investigation?
86. The ACCT had been reopened on 7 June 2016 and from that point up to the death of Prisoner A there ought to have been 5 ACCT reviews of a substantive nature and, unless it was not possible, conducted by a multidisciplinary team. The Claimant accepted that he was the prison officer responsible for 4 out of 5 of these reviews. The Respondent's conclusions were effectively that the review on 8 June did not occur, whereas the ones which took place on 7, 9 and 13 June were inadequate.
87. The review on 7 June was cursory and conducted by the Claimant alone on the basis, he now says, that he was directed by Officer K not to involve a multidisciplinary team given the volatile and aggressive nature of prisoner A. However, the Claimant did not raise any material involvement of Officer K until his appeal (and even then not to that extent) so that Ms Goligher could only (and did reasonably) conclude that the Claimant had decided that there was no realistic possibility of a meaningful ACCT review with Prisoner A on 7 June and that it ought instead to take place the following day. Mr Foweather did not act unreasonably in considering that the Claimant's account at his appeal did not suggest that Ms Goligher's conclusions were flawed. Even at the appeal stage (in his written submissions and through his representative at the hearing), the Claimant was not saying that he had acted on Officer K's direction, but rather that he had informed her of the situation, she had told him to write up the ACCT and arrange for a multi-disciplinary ACCT review to take place the next day.
88. The Claimant's account before the Tribunal is that Officer K wanted a multidisciplinary review to take place the following day, but of course the Claimant also now contends that multidisciplinary reviews routinely simply did not occur at the Humber prison at this time.
89. Certainly, there is no dispute from the Claimant that the multidisciplinary review, which ought to have taken place on 8 June, did not occur and Ms Goligher's conclusion that the Claimant was responsible for this and had omitted to perform the review could not be contested by the Claimant either during the internal disciplinary case against him or before this Tribunal.
90. The Claimant's explanation for his failure to carry out this review is that he was too busy but he described the volume of tasks to be performed within the prison in general terms and without specific impediments on

him carrying out the review on that day. Ms Goligher reasonably concluded that this review ought to have taken place. This was against a background where she could again reasonably conclude from the Claimant's own evidence that he was not well disposed towards Prisoner A and where this may have affected his judgement. Otherwise, the context for her was of a prisoner, on the Claimant's account so dangerous that on the previous day he couldn't be in a room with others, where an ACCT had just been reopened for him and where there appeared to be a risk of self-harm against a background of previous self-harm and Prisoner A having known mental health problems. Ms Goligher reasonably concluded that this was a task which ought to have been given a degree of precedence.

91. Again, it is uncontested that the Claimant did not himself undertake any review on 9 June and, as described in the Tribunal's findings, this was conducted by Officer C in circumstances where the Claimant had initially intended that she would simply be present to assist him. This was not a multidisciplinary review in circumstances where the Claimant never adduced any evidence that he had taken any steps at any stage on the previous or that day to ensure that it would be, with no evidence of invitations to mental health professionals, healthcare professionals or the chaplain or any enquiries made as to their availability. Again, part of the context for the involvement of Officer C was a consideration by the Claimant that she was more likely to have a better relationship and rapport with Prisoner A than he would. There was no evidence that the Claimant had sought out Officer C after the review but rather, from her evidence, that she had contacted him to tell him what had happened. Ms Goligher reasonably concluded that the Claimant was responsible for a failure to conduct a multidisciplinary review on that date.
92. It is to be noted that Officer C did record on the ACCT record that it was necessary to involve mental health at a subsequent review which was then scheduled for 13 June.
93. Ms Goligher clearly regarded the failings she identified on 13 June as being the most fundamental in her conclusion that the Claimant had been guilty of serious misconduct such to justify his dismissal. The Tribunal has already noted difficulties in the Claimant's evidence about the events on that day with different positions being taken by him as to what had occurred. Ms Goligher reasonably concluded that they could not be reconciled with the versions of others which were reasonably to be preferred to the Claimant's version of events and indeed the unanswerable timings disclosed by the CCTV footage.
94. Certainly, Ms Goligher reasonably concluded that the Claimant had never intended to conduct a review on that day or at the very least had done nothing whatsoever to prepare for it until effectively bounced into a form of review with Prisoner A in the doorway to the office. There was

never any suggestion that any invitations had been issued to third-party professionals to attend an organised review. Ms Goligher reasonably concluded that the Claimant had asked Officer G to change the date of the review to the following day. The date had been changed and she saw no reason for Officer G to come forward making this up, when he might have implicated himself in a matter of serious misconduct. She was reasonably able to come to that conclusion despite Officer G being inaccurate as to the timing of the chaplain's report. This did not render Officer G a "*proven liar*", as is submitted on behalf of the Claimant, whose evidence on any point therefore had to be disregarded.

95. In any event, it was known to Ms Goligher that any form of review which had occurred was in the form she observed from the CCTV pictures of the interaction between Prisoner A and the Claimant shortly before 6 pm. This was different she noted to what was represented by the Claimant as having occurred in the ACCT record. The Claimant took the position that he always knew he had to do this review, but could not point to anything which justified not trying to get anyone else there so as to ensure that a full multidisciplinary review occurred.
96. Only before the Tribunal did the Claimant refer to frantic attempts to contact third-party professionals. Ms Goligher was reasonable in concluding that the Claimant's attempts to organise an adequate ACCT review were effectively too little, too late. The review which took place constituted, what she reasonably evaluated to be, a two-minute conversation with a known vulnerable prisoner in the door of an office with no privacy and other prisoners in the area immediately outside during a period of association shortly before lock-up. She was reasonable in concluding that the evidence pointed to the Claimant considering Prisoner A as problematical arising out of Prisoner A's past reluctance to engage with him and that the Claimant had been bounced into conducting the review by Officer I getting Prisoner A to come over to the office entrance.
97. Despite the flawed recollection of Officer D in terms of the timings of his movements, as ultimately proven by the CCTV footage, Ms Goligher had reasonable grounds for preferring his account of the content of phone conversations with the Claimant. Officer D's account was consistent. Despite the Claimant's suggestion that Officer H and I would completely corroborate his account, Ms Goligher's reasonable assessment was that they did not. As recounted in the Tribunal's factual findings, the Claimant's account of his actions was not consistent.
98. Ms Goligher accepted Mr Sword's proposition that the Claimant's conduct represented a theme in terms of lack of careful compliance with the Respondent's protocols and procedures. On the basis of the above findings, such conclusion was reasonable. It did not amount to a finding in respect of a new allegation which the Claimant had had no opportunity

to answer but rather was another way of viewing the allegations of misconduct brought against the Claimant, when viewed in their totality.

99. The Claimant criticises the Respondent's investigation, but this was an in-depth enquiry. The Claimant during the internal process did not criticise the period covered by the investigation's terms of reference. Ms Goligher and Mr Foweather did not act unreasonably in not being concerned about the time period under consideration. Mr Foweather reasonably was of the view that a line had to be drawn somewhere and not widening the investigation to potentially discover whether or not other prison officers had been guilty of defaults in the care of Prisoner A, did not prejudice the Claimant in that the defaults of others would not reasonably have absolved him of any failings of his own.
100. Mr Sword conducted two sets of interviews with relevant witnesses. He cannot reasonably be criticised for not asking what the '*verbal contribution*' from Officer K was on the reopening of the ACCT. The Claimant had ample opportunity to clarify if he had been operating under her direction and did not. He did not raise the nature of Officer K's alleged involvement at the disciplinary hearing before Ms Goligher.
101. The investigation reports of Mr Sword constitute a genuine summary of his beliefs where he took care to weigh up conflicting evidence and indeed, in respect of the Claimant's conversations with Officer D, came down in favour of the Claimant's account. Ms Goligher came to a contrary conclusion but again on reasonable grounds having made her own careful assessment of the evidence including hearing directly from the officers and noting (accurately) differences and uncertainties in the accounts given before her and to Mr Sword.
102. Mr Foweather's appeal was fairly conducted. He reasonably concentrated on the Claimant's stated grounds of appeal and by going through Ms Goligher's outcome letter in circumstances where the Claimant had a full opportunity to expand on his written representations, which Mr Foweather had read and was fully aware of.
103. As already addressed, the time period considered in the investigation did not prejudice the Claimant or make findings as to his own actions or inactions flawed. There is no evidence that the Claimant was made a scapegoat for Prisoner A's suicide. A number of prison officers were placed under investigation and the Claimant was not the only individual whose employment was terminated. The Tribunal does not agree that the way in which the investigation was conducted was to attribute blame to more junior officers and to avoid adverse findings regarding practices more generally at HMP Humber. The Respondent was mindful of the difficulties within the prison and of the pressures on prison officers. It

could reasonably consider these not to be a factor which ought to point towards a different conclusion regarding the Claimant's culpability.

104. Any lack of wilful intent on the Claimant's part to neglect anyone or expose them to risk did not prevent the Respondent from reasonably coming to a conclusion that he had failed to conduct his duties as required. The Claimant's period of working whilst under investigation and the lack of a disciplinary suspension cannot be viewed as unreasonable or prejudicial to the Claimant. Satisfactory performance of his duties or circumstances in which the Claimant was trusted to perform his duties during the period of investigation did not render it then unreasonable for the Respondent to come to a conclusion at the disciplinary hearing regarding a prior fundamental breach of trust and confidence.
105. The circumstances of a failure to interview Officer K and the chaplain have already been addressed and do not constitute flaws in the investigation such as to render dismissal unfair. Mr Jenkinson's very limited involvement in the investigation did not render it unfair. Suggestions have been made regarding Mr Hall's access to the exhibits store without authorisation and to Mr Jenkinson allegedly leaving the exhibits store in a state of disarray. However, there is no evidence of any tampering with any evidence or of any prejudice caused to the Claimant. Whilst the CCTV footage could have been shown to the Claimant prior to the disciplinary hearing, he did have the opportunity to view it at this stage, did not raise any objections and did not subsequently wish to view the footage. On behalf of the Claimant, it is said that there were 89 interactions with/observations of Prisoner A by prison staff in the intervening period between the Claimant's last involvement with Prisoner A and Prisoner A taking his life some 28 hours later. Failings subsequent to the Claimant's involvement do not, however, render it unreasonable for the Respondent to have viewed the Claimant's own inactions, as reasonably found to have occurred, as blameworthy conduct such as to justify dismissal.
106. The Respondent's belief in the Claimant's misconduct was reached on reasonable grounds after reasonable investigation. There were no procedural failings to render this dismissal unfair.
107. The Respondent's decision to dismiss the Claimant fell within the band of reasonable responses. The Claimant's conduct, as reasonably viewed by the Respondent to have occurred, was of a serious and fundamental nature in terms of expectations on the Claimant as an experienced prison officer. The procedures omitted to be followed adequately by the Claimant were of a fundamental nature, procedures designed to protect vulnerable prisoners – a core function of any prison. A failure to comply with them could have the most serious consequences in terms of prisoner welfare. Whilst not directly causative of Prisoner A's death they represented a lack of care for him in a period where he ought

to have been subject to an effective ACCT process for his own safety. The Claimant was reasonably viewed as showing insufficient insight into his behaviour and as not always giving a straightforward account of his actions. The Respondent could certainly regard trust and confidence in the Claimant as having been destroyed such that the Claimant's dismissal was a sanction reasonably open to it. The Claimant was fairly dismissed.

108. As regards the Claimant separate claim seeking damages for breach of contract the Tribunal relies on its own factual findings separate from its consideration of the reasonableness of Ms Goligher's and Mr Fowweather's decision-making. Fundamentally, the Claimant did not conduct an adequate review of Prisoner A on 13 June and, in failing to do so, failed to carry out a fundamental part of his duties and responsibilities. His account and justification for his actions displayed a marked inconsistency and the Tribunal can only conclude that, on the balance of probabilities, the Claimant had not intended to carry out a review and that, when he did, he did so in a manner which was contrary to policy and good practice. He then acted so as to seek to portray a fuller and more detailed ACCT review than had actually occurred. The Claimant had indeed displayed a pattern of non-compliance over the preceding days with the requirements placed upon him in the care of a vulnerable prisoner subject to ACCT review. This must in the circumstances of his employment amount to an act of gross misconduct so as to justify his dismissal without notice. The Claimant's complaint seeking damages for breach of contract must therefore fail.

Employment Judge Maidment

Date 4 September 2019

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