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EMPLOYMENT TRIBUNALS

Claimant: Mr Richard Harper

Respondent: The Secretary of State for Justice

Heard at: Birmingham **On:** 10 to 12 June 2019 &
29 August 2019 (in chambers)

Before: Employment Judge Broughton

MEMBERS: Mr S G Woodall
Ms J Keene

Representation

Claimant: In person

Respondent: Mr E Beever, Counsel

JUDGMENT

The claimant's claims of wrongful dismissal, unfair dismissal and victimisation fail and are dismissed.

REASONS

1 The facts

1.1 The claimant worked for the respondent as a prison officer at HMP Stoke Heath from 2007.

1.2 Whilst we weren't furnished with many details, we heard that the claimant attended an absence related capability hearing in August 2016 and the outcome of that meeting was that there would be a further review after 12 months. The claimant went on long term sick leave from 19 October 2016. He said this was due to pain caused or exacerbated by the respondent's provision of inappropriate work footwear.

1.3 During his absence, at some point early in 2017, the claimant issued tribunal proceedings alleging disability discrimination in relation to the footwear. We heard that a number of similar claims were pursued against the respondent from various prisons and were handled nationally.

1.4 Whether as a result, or otherwise, in or around April 2017, Deputy Governor Hudson made arrangements for the appropriate footwear to be provided to the claimant.

1.5 Governor Huntington held a formal absence review meeting with the claimant on 20 April 2017 at which the claimant was represented by the Prison Officer's Association.

1.6 It was not unreasonable for the respondent to convene such a meeting given that the claimant's absence was already being monitored and he had then had a period of around 6 months' absence.

1.7 The claimant's entitlement to full sick pay lasted for 6 months. It appears that at around the time it was due to run out, the issue with regard

to his footwear was resolved and the medical advice was that he was fit to return to work.

1.8 As a result, Governor Huntington, quite rightly, determined that the claimant should not be dismissed on grounds of capability and this was confirmed by letter dated 2 May 2017. The claimant was informed that the respondent would continue to support his absence, but that his attendance would continue to be reviewed if he was unable to return to work within a reasonable time frame.

1.9 The claimant returned to work shortly thereafter.

1.10 It was not unreasonable for the respondent to continue to review the claimant's attendance levels and there was no evidence that he was given any formal warnings.

1.11 The claimant claimed that, on his return to work, Governor Huntington had placed him immediately on an attendance improvement plan but this was denied. The claimant could provide no evidence to support this and it appeared that he was, at best, mistaken.

1.12 He further suggested that, 3 months later, he was placed on another period of absence monitoring despite having had no further time off. Again, however, the respondent denied this and the claimant could not support this with any evidence.

1.13 This appears confirmed by the fact that the claimant suggested in his witness statement that, after this further period of monitoring was allegedly imposed, he had expressed an intention to challenge it but that he was suspended before he got the chance. However, he was not actually suspended for several weeks after he allegedly received this further “warning” and so his narrative lacked credibility on this point.

1.14 As mentioned, it was common ground that, around the time of the claimant’s return to work, his disability discrimination claim was settled via ACAS for a financial sum coupled with the right to wear certain footwear.

1.15 The claimant suggested that Governor Hudson had been responsible for refusing to make the adjustments to the claimant’s footwear and had also failed to record his absence as disability related. He went further and suggested that Governor Huntington had also resisted his claim. The respondent’s position, however, was that it was actually Governor Hudson who resolved the footwear issue and the claim was one of a number made locally and nationally that were defended and ultimately resolved on a national basis.

1.16 Specifically, it was the respondent’s evidence that they had relatively little to do with the claimant’s claim, albeit they acknowledged that they were aware of it. Moreover, as it was a national issue, the respondent’s witnesses suggested there was no reason for them to have any negative reaction to the claimant as a result. They maintained that there was no such adverse reaction and that the claimant had been supported throughout.

1.17 It was common ground that this was a national issue and that, ultimately, Governor Hudson had played a part in resolving the claimant's footwear issue.

1.18 The claimant claimed that, on his return to work, Governor Huntington met him at the gate by chance and made a point of clenching his fists in a threatening manner. This was denied by the Governor.

1.19 We note that the claimant did not raise this allegation until, it appears, his appeal hearing. Moreover, in oral evidence before us, he described a similar alleged incident with Governor Hudson that he had not mentioned at any time before, let alone having raised the matters formally, such as via the grievance procedure, with which he was familiar.

1.20 The claimant had said that this had occurred in April 2017, yet he was off sick for the entire month. As a result, we also find this allegation, at best, unproven.

1.21 On 24 August 2017, the claimant was on duty with a very inexperienced female prison officer.

1.22 A prisoner was using the telephone and had been instructed not to do so and, it appears, the prisoner refused to obey the instruction.

1.23 The prisoner was apparently speaking to the care home about his father who was suffering from cancer, although the claimant claimed not to know this at the time.

1.24 The telephone was cut off and it was common ground that the prisoner became verbally abusive to the claimant.

1.25 The claimant and the inexperienced officer began escorting the prisoner back to his cell, following a few steps behind. The prisoner began walking up the stairs and after a few steps, half turned.

1.26 We know this because both sides invited us to view the CCTV footage.

1.27 The claimant claimed that he felt this was a potentially aggressive act and that the prisoner was glaring at him and clenching his fist although this level of detail was not visible on the CCTV and there was no sound recording.

1.28 The claimant could then be seen to put the prisoner in a headlock and pull him down the stairs. The claimant claimed this was a preemptive restraint technique.

1.29 Other officers were then called to assist in restraining the prisoner.

1.30 The claimant claimed to have injured his knee during the altercation.

1.31 The claimant produced a use of force form later the same day in which he claimed that the prisoner had squared up to him and entered his personal space, such that, for his own safety and the safety of those around him, he took control of the prisoner's head.

The next day the prisoner was charged with using threatening abusive or insulting words or behaviour. In response, the prisoner said that the claimant had instigated the incident but he admitted using abusive language and lost privileges as a result.

1.32 It was a further day before the junior officer submitted her use of force form. She described the prisoner as having advanced towards the claimant in an attempt to strike him before the claimant put his arm around the prisoner's head.

1.33 It appeared that, as a result of the alleged injury to the claimant's knee, albeit not one that caused him any immediate material difficulties; he was under the impression that he needed to report to the injury to the police in case the symptoms should develop to the point that he felt warranted making a personal injury claim. Apparently, he attempted to report this at a couple of police stations and also, in the second or third week of September 2017, to the prison's Police Liaison Officer who reported that the claimant had claimed to have been assaulted on duty. The claimant denied saying this. However, ultimately, the claimant was clearly seeking a crime reference number for a potential claim against the Criminal Injuries Compensation Board at some point in the future.

1.34 Having received this report, the Prison Liaison Officer viewed the CCTV of the incident and it was his view that the claimant had used excessive force.

1.35 He, therefore, referred the matter to the respondent's Head of Security and Intelligence at the prison on 18 September 2017.

1.36 The CCTV footage was ultimately passed to Governor Huntington who viewed it on 19 September 2017. He considered the footage to warrant an investigation and so, the following day, he prepared terms of reference for such an investigation. He instructed Governor Hudson to investigate.

1.37 The claimant suggested that the selection of Governor Hudson was because both governors held a grudge against him as a result of his previous claim. However, it was the respondent's evidence that the investigations were distributed on a rota basis and it was simply Governor Hudson's turn. There was no evidence to refute this.

1.39 It is worth noting that the respondent's procedures require a review of all use of force statements at the end of each week and, based on the initial reports, there was no internal action taken at that stage. Had the respondent been looking for any opportunity to investigate, discipline or even dismiss the claimant it may well be that they would have looked more closely into the incident at that time, especially as the prisoner had alleged that he had not instigated the situation himself.

1.40 Ultimately, it only came to the Governor's attention because of the claimant's somewhat surprising attempts to obtain a crime reference number.

1.41 The terms of reference of the investigation were to look into the use of force used by the claimant on the prisoner on 24 August 2017, including the surrounding circumstances, and consider whether the force was necessary, reasonable, proportionate and justified.

1.42 The alleged misconduct was assault and/or unnecessary use of force and the original investigation was to be completed by 18 October 2017. This was subsequently extended due to the claimant's annual leave.

1.43 The female prison officer involved in the incident was interviewed by Mr Hudson on 28 September 2017 where it was established she had only been a prison officer for less than 3 months.

1.44 The officer gave her version of events which was initially akin to her original use of force form but then she was then shown the CCTV footage.

1.45 Having seen the footage, the officer accepted that it looked like the claimant had squared up to the prisoner rather than the other way around.

1.46 She also accepted that, having seen the footage, she did not consider that the use of force was appropriate. She suggested that her inaccuracies at the time were because she was panicking.

1.47 The officer also confirmed that she wasn't the one that the prisoner was swearing at, or being abusive towards. She acknowledged that alternative de-escalation techniques could have been used.

1.48 Mr Hudson interviewed the prisoner on 2 October 2017.

1.49 The prisoner admitted being verbally abusive but said that he only stopped on the stairs because the claimant had called to him. He said he simply stopped and the claimant came up to him and tried to get him in a headlock which appeared to be consistent with the CCTV.

1.50 The prisoner reaffirmed that he didn't square up to the claimant or invade his personal space.

1.51 Mr Hudson wrote to the claimant on 20 October 2017 inviting him to an investigatory interview on 23 October 2017.

1.52 Whilst there was some uncertainty over the actual date, the claimant's suspension letter was dated 19 October 2017 and confirmed that the claimant was suspended on full pay in relation to the allegation around the use of force on 24 August 2017.

1.53 Governor Huntington was the only officer on site with authority to suspend and he gave evidence that he had considered alternatives to suspension but in light of the seriousness of the allegations he did not feel that these were appropriate.

1.54 The claimant was interviewed on 23 October 2017 and he was represented by the Prison Officers' Association.

1.55 At the outset the claimant raised a concern regarding what he called his "past history" with Mr Hudson. Mr Hudson initially did not understand.

1.56 The claimant referenced what he saw as the conflict in relation to his previous footwear issue. Mr Hudson said, at the time and before us, that he was surprised and shocked as he didn't consider there was any conflict and it had all been resolved and, indeed, that he had resolved it. The claimant appeared to accept this explanation at the time, albeit he raised it again before us.

1.57 The claimant was asked about the incident and shown the CCTV footage.

1.58 The claimant accepted that he was at the bottom of the stairs and that the prisoner had not walked towards him. He was asked how the prisoner could therefore have invaded his personal space when it was the claimant who had approached him.

1.59 The claimant said he was getting in between the prisoner and the female officer because he thought the prisoner was going to hit her. That was, however, not supported by any of the other evidence.

1.60 It was put to the claimant that the prisoner was holding a sandwich and his hands were down by his side in a non-confrontational position.

1.61 The claimant put his defence on the prisoner's facial expressions.

1.62 It was established that the claimant had not reported any previous altercations with the prisoner (not in a formal sense).

1.63 The claimant acknowledged that he had never been physically violent to him in the past. He was asked whether he thought this was an appropriate control and restraint technique in the circumstances. For example, whether he should have called another member of staff or attempted to stand back or de-escalate the situation.

1.64 The claimant continued to maintain that he had acted appropriately and professionally.

1.65 The claimant was then asked about why he had reported the matter to the Prison Liaison Officer and he said he thought he needed a crime reference number should he subsequently feel the need to complain to the Criminal Injuries Compensation Board.

1.66 He was then asked about previous claims, but this appeared to relate to previous personal injury claims as opposed to the previous claim about his boots.

1.67 The claimant disputed the police officer's evidence that he attempted to report an assault.

1.68 It was put to the claimant that his version of events in the investigation was different from that on his original use of force form which had suggested that he acted for his own safety after the prisoner had squared up to him.

1.69 The claimant continued to maintain that he didn't think he could have done anything differently albeit acknowledging that he didn't use de-escalation techniques.

1.70 The claimant was then invited to a disciplinary hearing by letter dated 13 November 2017 as Governor Hudson had concluded that there was a case to answer in relation to the alleged use of unnecessary and unlawful force on the prisoner.

1.71 He was provided with a copy of the investigation report and told that the witnesses would be made available at the hearing.

1.72 He was advised the outcome of the hearing could include a potential dismissal.

1.73 The disciplinary hearing took place on 13 December 2017, as a result of a postponement, and was conducted by Governor John Huntington. The claimant chose not to be represented.

1.74 At the outset of the hearing, Mr Huntington set out quite correctly that he must act objectively and reasonably but then he went on to say that he was content that there were reasonable grounds for believing that misconduct had taken place and a sufficient investigation had been undertaken.

1.75 This may well have been an error of language on his part but it did appear to potentially indicate prejudice. That said, having viewed the CCTV it would be difficult not to have formed at least a similar preliminary view; It was not unreasonable for any of those who viewed the CCTV to have come to the conclusions that they did.

1.76 We note that everyone who seems to have viewed it appears to have come to the same conclusion.

1.77 Moreover, Governor Huntington went on to say it was only if it was established that the misconduct had taken place then he must consider the appropriate penalty.

1.78 Given that he then did explore the issues at some length with the claimant it does not appear that he actually meant that he had predetermined the issues, merely that he acknowledged that there were reasonable grounds for having reached the disciplinary hearing.

1.79 In relation to the investigation it was difficult to see what more could have reasonably been done beyond viewing the CCTV and interviewing all of the relevant witnesses.

1.80 The claimant confirmed that he had sufficient time to prepare and again raised the suggestion that he had had “some issues in the past” with Governor Hudson in relation to the disability footwear issue. He asked whether it was appropriate for the Governor to chair the meeting. The Governor confirmed that, in his view, it was and the claimant raised no further objection. He then asked for the matter to be thrown out because he felt the charge should only have been misconduct not gross misconduct. There was then a debate about whether unnecessary use of force amounted to assault. Assault was expressly classified as potentially gross misconduct whereas unnecessary use of force was only down as misconduct. This was perhaps surprising albeit the gross misconduct list was non-exhaustive and the policy expressly stated that serious cases of general misconduct would also amount to gross misconduct, as would a breach of trust.

1.81 It seems to us that unnecessary use of force would significantly overlap with the definition of assault. It appears clear that all those at the respondent who viewed the CCTV considered the allegation to be one of potential gross misconduct and the claimant was aware of that throughout.

1.82 Governor Huntington then went on to state that he was content that the allegations, if proved, would amount to gross misconduct. It was suggesting that he hadn't made up his mind on matters such as severity, mitigation and sanction.

1.83 The claimant was then taken through the allegations and the investigation carried out by Mr Hudson.

1.84 The claimant confirmed that, from his training, he was aware that when faced with a potentially threatening individual his initial options should be to attempt to calm him down and/or get out of the situation and/or call for help but he claimed that he felt these were not viable.

1.85 Mr Hudson countered to say that the claimant did not need to go up the stairs.

1.86 The claimant claimed that it was a preemptive strike but it was clear that the governors did not accept that putting a prisoner in a headlock would be an appropriate response in almost any circumstances and certainly not in the circumstances that they perceived from the CCTV in this instance. In fact, it was the consistent evidence of the governors that they felt that the prisoner's body language was clearly non-threatening, notwithstanding the verbal abuse that was admitted.

1.87 The claimant's evidence was that the prisoner had invaded his personal space but it was clear from the CCTV that the prisoner had only turned sideways on the stairs with his arms down holding a sandwich. It was the claimant who moved up the stairs and into the prisoner's space.

1.88 The claimant attempted to suggest there was a small movement of the prisoner's head that caused the claimant to flinch. Whether that was right or not it wasn't visible on the CCTV.

1.90 It appeared that the claimant may have been attempting to align his evidence with that of the female officer by using this language. If so, it was ineffective as the Governor did not accept this evidence. It was a misinterpretation of the female officer's statement in any event as she was referring to a time after the claimant and prisoner had tumbled down the stairs.

1.91 The governors clearly remained of the view that with an agitated prisoner the right thing for the claimant to have done was to remain a few yards behind him back to his cell and we have no reason to doubt their experience in such matters.

1.92 Mr Hudson reiterated that it was impossible for someone to enter the claimant's personal space when stationary.

1.93 The claimant then again raised the issue about his alleged "history" with Mr Hudson.

1.94 He was asked if he had ever raised a complaint or grievance and confirmed that he had no reason to.

1.95 The claimant said that Mr Hudson had got involved in his footwear claim when ACAS became involved and Mr Hudson reaffirmed that he considered that he had actually resolved the issue and there was no ill feeling which, again, the claimant appeared to accept.

1.96 The claimant was then asked why the police officer would have said that the claimant had reported an assault when he claimed he had not. The claimant again explained that he had reported the incident to the police because he believed he needed to should he want to make a claim against the Criminal Injuries Compensation Board in the future, albeit he couldn't clarify what the alleged criminal act was. The prisoner was then called to give evidence at the hearing and he reaffirmed that he believed that the claimant had been the aggressor because he didn't like what the prisoner was saying.

1.98 The disciplinary hearing was reconvened on 21 December 2017 and the evidence of the Prison Liaison Officer in the form of a letter was considered.

1.99 Ultimately, Governor Huntington, having considered all of the evidence, concluded that the claimant had used unreasonable force that amounted to an assault and that it was so serious as to amount to gross misconduct.

1.100 We heard that he considered that the claimant, in maintaining that he had done nothing wrong, caused a significant loss of trust such that the Governor felt there were no reasonable alternatives to dismissal in the circumstances.

1.101 The Governor placed significant reliance on the CCTV.

1.102 The decision to dismiss was communicated by letter dated 4 January 2018 and the claimant was given the right of appeal which he exercised.

1.103 The claimant was sent an invitation to the disciplinary appeal hearing on 29 January 2018 and that hearing took place on 5 March 2018. It was heard by Theresa Clarke the Regional Governor.

1.104 At the appeal hearing all of the claimant's grounds were considered as, indeed, was all of the evidence in the investigation including the CCTV.

1.105 Governor Clarke did acknowledge that some of the comments of Governor Huntington in the disciplinary hearing could, potentially, indicate pre-judgment of some of the key issues but, ultimately, she was satisfied that the claimant did receive a full and fair hearing, such that Governor Huntington's initial comments could not be taken literally.

1.106 Effectively she accepted what became Governor Huntington's evidence before us. Specifically, that the comments meant that the Governor was satisfied that there was sufficient evidence based on a reasonable investigation for the matter to have been brought to a disciplinary hearing where the potential charge was gross misconduct, rather than a final determination that the investigation was satisfactory or the case to answer was already proven.

1.107 In any event, Governor Clarke considered all the evidence including the CCTV and reached the same conclusion as Governor Huntington and,

indeed, everyone else who had viewed the CCTV. She considered that the claimant had, at best, used excessive force in a manner that was so serious as to warrant a finding of gross misconduct.

1.108 All of the witnesses we heard from described numerous de-escalation and control and restraint techniques that they said ought to have been implemented by the claimant if he believed he or his fellow officer were under threat as claimed. Moreover, they could think of no circumstances where putting a prisoner into a headlock on the stairs would amount to a reasonable use of force.

1.109 Governor Clarke was also very concerned that the claimant failed to acknowledge that he had done anything wrong or that he would do anything different in the future. She considered that this amounted to a serious breakdown in trust such that there was little alternative but to uphold the dismissal.

1.110 Ultimately the claimant was informed of the outcome by letter on 26 March 2018 and subsequently brought the claims that were before us.

1.111 Those are the principal facts as we have found them.

Issues and the law

2 The claimant brought claims of wrongful dismissal, unfair dismissal and victimisation.

3 Specifically, the claimant relied on his previous disability discrimination claim as a protected act and suggested that being subjected to an investigation and, subsequently, a disciplinary and dismissal each amounted to detriments because he had done a protected act.

4 The parties had helpfully agreed a list of issues which are annexed to this judgment and which will be dealt with in turn in our decision.

5 In relation to the wrongful dismissal claim we need to determine whether the claimant's conduct amounted to a fundamental breach of his contract of employment entitling the respondent to dismiss him without notice.

6 With regard to the unfair dismissal claim we needed to consider section 98 Employment Rights Act 1996 and, specifically, whether the respondent had a potentially fair reason for dismissing the claimant. The respondent relied on the potentially fair reason of conduct in relation to the claimant's use of force on a prisoner on 24 August 2017.

7 We need to determine whether this was the reason for dismissal and, if so, whether the respondent had a genuine belief in the claimant's misconduct.

8 We also had to consider whether they carried out a reasonable investigation and whether the belief formed was a reasonable one in all of the circumstances.

9 If so, we then had to consider whether dismissal was in the band of reasonable responses open to the respondent.

10 In considering whether the dismissal was fair or unfair, we are required to have regard to equity and the substantial merits of the case including the size and administrative resources of the respondent.

11 There were a number of specific allegations of unfairness that we will address in turn, including whether or not the respondent failed to comply with the ACAS Code of Practice.

12 In relation to the victimisation complaints under section 27 Equality Act 2010, there was no dispute that the claimant's previous claim amounted to a protected act, nor that the investigation, disciplinary or dismissal could potentially amount to detriments.

13 As a result, the only issue was causation and it was for there to be facts from which we could conclude that victimisation had occurred. If there were such facts, the burden is on the respondent to show that their acts and/or omissions were in no way whatsoever caused by the protected act.

Decision

Unfair Dismissal

14 We shall address the unfair dismissal claim first.

15 We are satisfied that the claimant was dismissed because of the incident on 24 August 2017 and that the use of force by the claimant on that day was a matter related to conduct. As a result, the dismissal was potentially fair.

16 When the respondent carried out their weekly review of use of force documentation it was not surprising that they had no reason to further investigate at that stage.

17 That said, if the governors were intent on removing the claimant it seems likely that they would have been more interested in investigating every potential incident that involved him. The fact that no further action was taken initially, therefore, supports their contention that they had no such ulterior motive.

18 It was only after the claimant's repeated attempts to obtain a crime reference number that the matter came to the Governors' attention.

19 The Police Prison Liaison Officer said that the claimant had reported an assault and was seeking a crime reference number. It was this which triggered the investigation. All those who initially viewed the CCTV felt that there may, in fact, be a case to answer in relation to the claimant appearing to have used excessive force.

20 It is worth noting that none of those additional individuals were alleged to have even known about the claimant's previous disability discrimination claim, let alone that they may have any reason to subject him to a detriment as a result.

21 Governor Huntington was the only officer at the Prison with authority to instigate an investigation and suspend the claimant and, having viewed the CCTV, the Governor felt he had little alternative but to do so.

22 Having viewed the CCTV ourselves we consider that was not an unreasonable conclusion for the Governor to reach.

23 In isolation the CCTV appeared to show the prisoner returning to his cell. It was common ground that the prisoner was being verbally abusive, calling the claimant names, it was also common ground that he was not making any verbal threats.

24 The CCTV showed the prisoner stopping a few stairs up and half turning, leaning against the bannister holding a sandwich in one hand. That did not appear to be threatening. The CCTV then appeared to show the claimant moving swiftly up the stairs and squaring up to the prisoner before putting him in a headlock such that they both ended up at the bottom of the stairs. A tussle then ensued and other officers were called to calm the situation down.

25 It seems to us that there was little or no alternative but to instigate an investigation on that evidence. Whilst there were, potentially, alternative roles away from direct contact with prisoners, as an alternative to suspension, we are also satisfied that the apparent force used, as shown by the CCTV, was such a potentially serious matter that suspension was not unreasonable.

26 It was reasonable to interview both the other prison officer present and the prisoner. It was also reasonable to obtain evidence from the Prison Liaison Officer.

27 It was reasonable to extend the investigation due to the claimant's holiday in October 2017, before interviewing him.

28 There was no evidence that Governor Hudson was selected to carry out the investigation by any means other than the rota claimed by the respondent.

29 There was also no evidence initially that Governor Hudson was in any way prejudiced against the claimant because of his previous claim. It was not disputed that Governor Hudson had helped to resolve the claimant's footwear issue, nor that the issue was a national one.

30 The claimant did suggest in oral evidence that there had been an incident with Governor Hudson at the gate at the Prison following his return from long term sick leave which the claimant suggested supported his allegation that the Governor was prejudiced against him. This was not something that the claimant had ever mentioned before either in the internal proceedings, his Claim Form or his Witness Statement.

31 We do not accept the claimant's evidence on this point.

32 Moreover, when the claimant asked if Governor Hudson was prejudiced at the commencement of the investigatory hearing and the Governor responded in the negative the claimant seemed satisfied by the response.

33 The only thing that potentially linked Governor Hudson to the previous claim, therefore, was his questioning around the claimant's attempted reports to the police to obtain a crime reference number.

34 It was not unreasonable to ask questions around this as the claimant's actions were somewhat surprising and, indeed, had he not made such reports his alleged unreasonable use of force would probably never have come to light.

35 It was the claimant's own case that he was seeking to obtain a crime reference number in case he may want to make any personal injury claim via the Criminal Injuries Compensation Board in the future. It is difficult to see, therefore, how the Governor recording that somehow links the disciplinary process to the claimant's previous claim.

36 It is right that the initial use of force documentation from both the claimant and the other prison officer suggested that the prisoner had effectively instigated the use of force. It is further reasonable, it seems to us, that the evidence of a prisoner in such circumstances should be treated with caution.

37 That said, the prisoner's evidence in relation to the key moments leading up to the initial use of force was largely consistent with the CCTV whereas that of the claimant and, indeed, the other prison officer did not appear to be. Moreover, the other prison officer, on viewing the CCTV, acknowledged that it did appear that the claimant had instigated the use of force.

38 We do not consider that there was any evidence to suggest that she was pressured into such a concession.

39 It was not unreasonable, therefore, for Governor Hudson to conclude that there was a case to answer and, indeed, that the issue was potentially so serious

as to amount to possible gross misconduct i.e. use of force was so excessive as to amount to gross misconduct, whether amounting to an assault or otherwise.

40 An investigation period of around 7 weeks was not unreasonable, particularly bearing in mind the claimant's holiday period.

41 Arranging a disciplinary hearing within a few weeks thereafter was also not unreasonable, nor was adjourning that hearing due to the claimant's hospital appointment. There was also no unreasonable delay in adjourning the disciplinary hearing for a little over a week, nor for the disciplinary outcome letter not being sent for 2 weeks after the disciplinary hearing, given that it was the Christmas and New Year period.

42 Overall, therefore, the respondent carried out such investigation as was reasonable in all the circumstances.

43 In relation to the impartiality, or otherwise, of Governor Huntington the claimant's evidence in relation to alleged absence warnings was, at best, unsubstantiated.

44 The claimant was placed on absence review in August 2016, prior to any disability discrimination claim.

45 It was almost inevitable, therefore, that there would be a further absence review meeting when he was subsequently absent for almost 6 months.

46 Governor Huntington conducted that meeting, which was to potentially consider all outcomes up to and including dismissal, and yet no further action was taken. In fact, the claimant's return to work was supported by both governors from whom we heard.

47 Contrary to the claim both of these meetings took place before the claimant's return to work in early May 2017.

48 There was no evidence of a further review in August 2017 as claimed. In the circumstances it would not have been unreasonable if there was such a review. If there had been such a review, and the claimant had intended to make a complaint about it, he had, at least, several weeks in which to do so and didn't. His suspension did not prevent him from doing so as claimed.

49 As a result a claimant's attempt to link absence management matters to his subsequent treatment fail, not least because we do not accept that such absence management took place. That which did occur supports the fact that the respondent was supportive and not subjecting the claimant to any detriment following his disability claim.

50 We also prefer the evidence of Governor Huntington that there was no altercation with the claimant after his return to work where the Governor clenched his fist at the gate, or otherwise. We prefer the Governor's evidence because the claimant was unreliable in relation to his allegations regarding attendance management following his return to work. In addition, he made no complaint at the time. He also attempted in oral evidence to make a similar unsubstantiated allegation against Governor Hudson that he had never even intimated before. He

did not make this allegation expressly, or at all, during the investigation or disciplinary hearing. Indeed, whilst he questioned the Governor's impartiality at the start of the disciplinary hearing he appeared to accept the answer and move on.

51 That said, Governor Huntington clearly did use language at the outset and, at times, during the disciplinary hearing that could suggest a level of prejudgment in relation to both the investigation process and the claimant's conduct.

52 That was, at best, unwise and/or clumsy but we accept the Governor's evidence that what he was actually recording was his view that it was reasonable that the case had reached disciplinary hearing stage, notwithstanding that his choice of words suggested more. He was reviewing whether there appeared to have been an adequate investigation and it seems to us that there was.

54 Moreover, on viewing the CCTV, it was difficult to conclude anything other than there was at least a case to answer in respect of use of force.

55 The Governor clearly spent considerable time in the disciplinary hearing listening to the claimant's explanations which supports the assertion that he had not already made up his mind. It was not unreasonable for him to reject the claimant's justifications based on the evidence in front of him.

56 It was also not unreasonable for the Governor to conclude that the claimant's failure to acknowledge that he had done anything wrong created a considerable risk for the organisation and contributed to a serious loss of trust in

the claimant's ability to continue to work as a prison officer, notwithstanding his previous good record.

57 Moreover, when Governor Clarke independently reviewed all of the evidence she came to the same conclusion. As already stated, having reviewed all of that evidence ourselves we consider that this was a reasonable belief for the respondent to reach.

58 The respondent did reach a reasonable belief based on a reasonable investigation and the remaining issue is one of the reasonableness of the sanction of dismissal.

59 It does appear surprising to us that unreasonable use of force is not included in the non-exhaustive list of acts of potential gross misconduct. That said, assault and breach of trust are and the policy does expressly state that serious acts of misconduct may also be treated as gross misconduct.

60 On all of the evidence, it was reasonable for the respondent to conclude that the prisoner, whilst he had been verbally abusive, was acting in a non-threatening manner a few steps up the staircase and yet the claimant advanced quickly towards him putting him a headlock such that they both ended on the floor. On those facts, having reasonably discounted the claimant's evidence, and, indeed, any supporting evidence from the other officer it was not unreasonable for the respondent to conclude that this was a very excessive use of force and, indeed, that, on the balance of probabilities, it amounted to an assault also. Either would have reasonably justified a finding of gross misconduct.

61 Moreover, the claimant's failure to acknowledge that he had done anything wrong inevitably would have made the situation even more serious. We accept the respondent's evidence that there may have been a lesser sanction had the claimant done so. However, it was not unreasonable for the respondent to conclude that they could not trust the claimant to remain employed in the potentially highly volatile prison environment.

62 For all those reasons, notwithstanding the claimant's previous record, it was not unreasonable for the respondent to uphold a finding of gross misconduct and hence to dismiss the claimant summarily. That determination was within the band of reasonable responses. The dismissal was fair.

63 To the extent necessary, the outcome of the appeal rectified any defects in the earlier procedure specifically in relation to the alleged prejudgment of Governor Huntington. In any event, even if we were wrong on that, the claimant could, and would, have been dismissed fairly by whoever viewed the CCTV and conducted his disciplinary hearing. As a result, it would not have been just and equitable for him to receive any compensation.

Wrongful Dismissal

64 It may be clear from our earlier findings that, having viewed the CCTV, seemingly in common with everyone else who viewed the same, we would have reached the same conclusion as the respondent on the evidence, notwithstanding the claimant's suggestion that the prisoner was the initial

aggressor and, indeed, the limited support he received from the initial use of force statement by the other officer involved.

65 Further reason for doing so was the claimant's repeated attempts to rely on an alleged flinch invisible on the CCTV. He appeared to be attempting to align his evidence with that of the other officer, notwithstanding the fact that the claimant was seeking to suggest this was before any physical contact whereas the other officer suggested it was much later when both protagonists were on the floor. As a result, he again lost credibility before both the respondent and the Tribunal.

66 We would acknowledge the very difficult job that prison officers do in a challenging environment. That said, it is all the more important, that unreasonable force is not used, as this could destabilise an already volatile environment.

67 We accept the respondent's evidence that there were numerous de-escalation techniques which should have been attempted first including holding back, using words and/or calling for assistance. In addition, if physical contact was necessary then attempting a headlock that resulted in both protagonists falling down stairs on to the floor was probably never appropriate.

68 In those circumstances, including the claimant's failure to acknowledge any wrongdoing, we are satisfied that he had fundamentally breached his contract of employment such that the respondent was entitled to dismiss summarily and his claim for wrongful dismissal must fail.

Specific Issues

69 We have already found that such dismissal was fair in all the circumstances and do not consider that, in those circumstances, there was any material error in treating unnecessary force as potentially amounting to an assault.

70 There was clearly a distinction between those terms in the respondent's handbook but ultimately a serious unnecessary use of force potentially amounted to gross misconduct, it seems to us, would also potentially amount to an assault.

71 A failure to acknowledge wrongdoing would only make a finding of gross misconduct more likely due to a loss of trust.

72 We were not satisfied that there was evidence of bias on the part of Governors Hudson or Huntington and much of the claimant's evidence in this regard we rejected. Governor Hudson did ask a number of questions in attempting to understand the claimant's repeated attempts to get a crime reference number to support a potential claim but, it seems to us, those questions were reasonable in the circumstances.

73 Governor Huntington did make some comments at the disciplinary hearing which potentially suggested pre-judgment. We do not accept that there was any link between these and the claimant's earlier claim, not least because the other matters relied on by the claimant were not well-founded. In any event, we consider that there would not have been any different outcome whoever had heard the case.

74 The respondent did not delay their initial investigation of the events on 24 August 2017 in breach of the ACAS Code of Practice or otherwise.

75 The only reason the incident came to the respondent's attention was because of the claimant's repeated attempts to get a crime reference number. This caused the Prison Liaison Officer to arrange for a review of the CCTV which appeared to show unreasonable force by the claimant and hence triggered an almost inevitable investigation.

76 We are satisfied there was not any unreasonable delay in the investigation, disciplinary or appeal process although would acknowledge that ideally these periods would have been shorter. We are certainly aware of many disciplinary and appeal processes that have taken significantly longer. At least a couple of the extensions were due to the claimant in any event.

77 In all of the circumstances of the case we do not consider that the use of the terms - unnecessary force, assault, loss of trust and unauthorised restraint were unreasonable. They all arose out of the same set of circumstances and the claimant was clearly aware of the case that he had to answer.

78 We do not consider that the decision to dismiss was made before consideration of all the facts. There was some evidence to suggest that Governor Huntington may have formed the view that the claimant had used unreasonable force prior to the disciplinary hearing. It was a requirement that he had at least determined that there was a case to answer on this point and there was a lengthy disciplinary process at which the claimant was given an

opportunity to state his case. Moreover, even if the Governor had formed a preliminary view in relation to the claimant's conduct, that did not mean that it would inevitably be followed by dismissal. We accept that, despite the Governor's unfortunate comments, the claimant was given a fair hearing and, indeed, had his answers differed he may well have not been dismissed.

79 We are satisfied that the claimant's suspension was reasonable and only in place for a reasonable period.

80 As a result, none of those matters alter our view on the fairness of the claimant's dismissal.

81 Finally, in relation to the victimisation complaint, it was common ground that the claimant had done a protected act and had been subject to investigation, disciplinary and dismissal.

82 Once the claimant's attempts to get a crime reference number had brought the matter to the respondent's attention they had no alternative but to view the CCTV and, having viewed it, it was almost inevitable that they would have to conduct an investigation as there was clearly a very serious case to answer on the evidence of the CCTV alone.

83 The claimant's attempts to link the investigation and disciplinary to his earlier claim largely lacked credibility and we accept the respondent's evidence that they had no reason to subject the claimant to any detriment as a result, nor did they.

84 Others who viewed the CCTV appeared to come to the same conclusion as, indeed, did we.

85 As a result the respondent had no alternative but to investigate and, indeed, notwithstanding some level of support from the other prison officer involved, a disciplinary hearing needed to be convened. Having viewed all the evidence it is difficult to imagine that anyone would have come to a different conclusion particularly as the claimant's account did not appear to accord with the CCTV, the evidence the prisoner or, indeed, in significant respects the evidence of the other officer, particularly, as he did not acknowledge any wrongdoing.

86 We do not accept, therefore, that there are established facts from which we could conclude that victimisation had occurred. In any event, we are satisfied by the respondent's evidence that the only reason for his dismissal was his excessive use of force on a prisoner on 24 August 2017, his failure to acknowledge any wrongdoing and that this was a matter so serious as to warrant summary dismissal.

87 As a result, all of the claimant's claims fail and are dismissed.

Employment Judge Broughton

21 October 2019