EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Graham Stretch	AND	Secretary of State for Justice

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD: By Cloud Video Platform **ON** 8, 9, 10 and 11 March 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Mr G Self of Counsel**
For the Respondent: **Miss H Masood of Counsel**

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant's claims for unfair dismissal and for victimisation are hereby dismissed.

REASONS

1. In this case the claimant Mr Graham Stretch claims that he has been unfairly dismissed, and also brings a claim of victimisation. The respondent contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, and denies the remaining claim.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by cloud video platform. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 817 pages, and a supplemental bundle of 72 pages, the contents of which I have recorded. The order made is described at the end of these reasons. The parties also consented to this matter being determined by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employment Tribunals Act 1996.
3. I have heard from the claimant, and I have heard from Mr Tim Hogg who attended under a witness order obtained by the claimant. On behalf of the respondent I have heard from Mr David Daddow, Mr Steve Hodson, Mr James Lucas, and Mr Russell Trent. I have also been shown the relevant CCTV footage of the incident in question which was available to (and considered by) the parties during the procedure explained below.

4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The respondent to these claims is the Secretary of State for Justice on behalf of the Prison Service. The claimant Mr Graham Stretch commenced employment with the respondent on 18 March 1991 as a Prison Officer. He was promoted to Senior Officer in 1998 and to Principal Officer in about 2004. He was promoted to Band 7 Senior Manager in 2010. He has worked as the Head of the Offender Management Unit, Head of Resettlement (on secondment to HMP Dorchester) and then head of Residents and Services. At the times relevant to this claim he worked at HMP/YOI Portland. He has never received any poor appraisals and has enjoyed a good working relationship with the majority of his colleagues. He considers that he is a dedicated and hard-working professional who has devoted the vast majority of his working life to the Prison Service. He intended to continue in his role or something similar until he retired at age 60 in 2025. He was dismissed by gross misconduct with effect from 29 March 2019 following events which occurred on 14 October 2018 in the following circumstances.
6. The respondent has a detailed policy concerning the Use of Force which was updated in 2015. This policy makes it clear that the use of force will only be justified, and therefore lawful, if (i) it is reasonable in the circumstances; (ii) it is necessary; (iii) no more force than is necessary is used; or (iv) it is proportionate to the seriousness of the circumstances. Where one of the respondent's employees is involved in or witnesses the use of force in any circumstances, a written report is required. This is referred to as an Annex A report. The Annex A report is a standard form which explains at the start the only circumstances in which the use of force will be justified, as noted above. It also requires the person completing it to confirm whether he or she has completed Control and Restraint (C&R) basic refresher training within the last 12 months. In addition, the respondent has a different set form, namely Form 213, which is usually completed by a member of staff after any use of force, and normally also signed by a Nurse. The Form 213 also indicates whether the employee completing the form has received training in Control and Restraint techniques.
7. The respondent provides training in Control and Restraint techniques which is usually available on a monthly basis. Senior managerial employees such as the claimant are themselves responsible for arranging and attending the necessary training on a regular basis, which ordinarily would be every year. However, the claimant had not made any such arrangements and had not attended any Control and Restraint training for the previous five years.
8. The respondent also has a disciplinary procedure which is called the NOMS Conduct and Discipline Policy. The non-exhaustive list of examples of gross misconduct which might result in dismissal include serious unprofessional conduct, and assault. The applicable burden of proof in deciding these matters is expressed to be on the balance of probabilities.
9. Before proceeding with a disciplinary investigation, this policy requires the appointment of a Commissioning Manager who then sets the Terms of Reference for that investigation, and then appoints an Investigation Officer to undertake the investigation. The Commissioning Manager also seeks to ensure that adequate resources are allocated to enable the investigation to be conducted within the set timeframe of 28 days which is recommended by the policy. Owing to operational requirements and the fact that many managers cover each other on opposing shifts, it is unusual for an investigation to be completed within 28 days, and normally an extension is sought and granted. The Investigating Officer is empowered to interview members of staff involved in the events, and typed records are provided. All documentation relating to the investigation, including all interview notes and any disagreements recorded, are then compiled in an investigation report which must be forwarded to the Commissioning Manager for a decision as to whether or not to proceed.
10. Before dealing with the events of 14 October 2018 which led to the claimant's dismissal, there are two other sets of proceedings to be addressed. These are a disciplinary and

grievance dispute involving the claimant, and earlier Employment Tribunal proceedings for disability discrimination which the claimant had presented.

11. In June 2018 the claimant was the subject of earlier disciplinary proceedings relating to an alleged breach of professional standards, namely falling asleep on duty whilst in possession of security keys. The respondent considered that the allegations were sufficiently arguable to proceed to a disciplinary hearing on 27 July 2018, but at that hearing Governor Helen Ryder decided that the allegations were nit proven and decided to take no further action. During that process Mr Steve Hodson, from whom I have heard, was the Commissioning Manager, but also attended the disciplinary hearing as a witness for the respondent. Mr Hodson is a Band 10 Governor, and he is currently the Governing Governor of HMP Leyhill based in South Gloucestershire.
12. In February 2018 the claimant then filed a grievance against the officer who had reported that he had fallen asleep, and alleged bullying, harassment and victimisation by that officer. Governor David Daddow from whom I have heard is a Band 10 Governor, and currently the Staff Officer to the Executive for Public Sector Prisons South. At the relevant times he was the claimant's line manager. After some delay and a subsequent grievance meeting, he decided in October 2018 not to uphold the claimant's grievance. The claimant appealed this decision. Mr Hodson was appointed to hear that appeal, but in the event it was never heard because of the incident which arose on 14 October 2018 and which led to the claimant's suspension and subsequent dismissal.
13. The second background matter is that the claimant had presented an earlier Employment Tribunal claim on 3 September 2018, which was served on the respondent on 7 September 2018. The claim was limited to one of disability discrimination, and it complained of the disciplinary and grievance process mentioned above, and the respondent's failure to make reasonable adjustments to shift patterns. The proceedings specifically referred to Mr Hodson, who was notified of them in order to assist with the response by email dated 13 September 2018. These proceedings were eventually dismissed by unanimous decision of the Employment Tribunal dated 27 November 2019, which found that the claimant had been put to a substantial disadvantage because of a disability, but that the respondent had not failed to take reasonable steps to avoid that disadvantage.
14. The incident which took place on Sunday 14 October 2018 occurred in the Benbow Residential Unit at HMP&YOI Portland. The claimant was the Deputy Governor for that weekend acting as the Governor, and he was therefore the most senior managerial employee in the Prison at that time. In short, the claimant pushed a prisoner, referred to as Prisoner A, out of a corridor and into a cell which was being used as an office room. An altercation then took place inside the office with the result that the claimant appeared to have his hands on or around Prisoner A's neck, and several other officers then intervened. The claimant remained in the vicinity of the incident and re-entered the office briefly before leaving. Other officers then escorted Prisoner A to his cell.
15. The CCTV footage shows Prisoner A speaking aggressively to the claimant, and pointing at the claimant's face. The CCTV footage did not record any sound. It shows the claimant acting calmly and seeking to persuade Prisoner A to retreat into a cell which was being used as an office. The claimant then pushed Prisoner A into the office using both of his hands against Prisoner A's chest. The angle of the CCTV camera in question cannot show what happened immediately after the claimant had pushed Prisoner A into the office, until there is subsequently a glimpse on the far side of the office which is difficult to make out, but appears to show briefly that the claimant had pushed Prisoner A against the far wall of the office, and either had both of his hands around Prisoner A's neck, or alternatively had his hands by Prisoner A's head (which could have been in the process of an authorised form of restraint). A number of other prison staff rushed to the scene, as well as some other prisoners. The claimant's son Mr Adam Stretch is a prison officer who was present, and he tried to usher his father away. Other staff tried to ensure other prisoners were removed from the scene. The claimant's conduct and demeanour after he had left the office, and briefly returned to it, also indicate that he had lost his temper.
16. The claimant completed a written report by way of an Annex A Use of Force Statement on the day of the incident. The claimant confirmed in that statement that he had not undertaken

C&R training in the last 12 months, and stated: "… [Prisoner A] came down from the twos landing asking for a plate. Staff had gone to the wing office to get him a plate but he was trying to go to another prisoner's door. I told him several times to get his plate and lunch. He became verbally aggressive and abusive towards me. I followed him towards the office and told him to go inside so I could address his poor behaviour. He turned suddenly and aggressively so I pushed him into the office using open hands on his chest. [Prisoner A] is considerably taller than me and looked like he was going to head-butt me so I slid one hand towards his neck and the other behind his head to pull him downwards. As I pulled him forward and downwards other staff responded and used C&R techniques to restrain him. I immediately released all contact with [Prisoner A] who was now shouting that I had assaulted him by trying to strangle him … I used absolutely the minimum of force and only initiated force because of the threats I believed he posed to me. No more force than necessary was used." This was a signed contemporaneous statement.

17. Prisoner A completed his own statement. He admitted that he had sworn at the claimant, and then said of the claimant: "… He then said get out of my face, when I was at least 5 feet away from him, you could see this for yourself if you watch the CCTV. He then said let's have a chat in the office. As I went to walk in there he pushed me in the chest and I was in the office, then he grabbed my throat and started strangling me and I said loads of times get your hands off my throat. I did not touch him. The SO on one wing yesterday said he heard me saying get your hands off my throat. Personally I think this was uncalled for."
18. A prison officer SO Board witnessed the events and prepared an Annex A statement. He confirmed that he had completed C&R training within the last 12 months and stated: "… I was approached by Prisoner A who asked me for a plate and cutlery as his had been secured in his cell which had been locked off by security. I went to the office to get a plate, bowl and cutlery. I was on my knees getting these items from under the office table, when I became aware of raised voices and a commotion. I stood up to see Governor Stretch with Prisoner A. Governor Stretch was pushing Prisoner A to the back of the office and the prisoner's arms were around Governor Stretch. Governor Stretch then attempted to take control of Prisoner A's head. I assisted and took control of Prisoner A's left arm. I immediately was able to go to a final lock. Prisoner A was shouting "get off my neck". Other staff now joined and took control of the right arm. I asked P.E.I. Browne to relieve Governor Stretch as I was not sure what had gone on. Staff now started to de-escalate the situation. We were able to release locks and move to guiding holds. We returned Prisoner A to his cell 2-22 using guiding holds. He requested to see healthcare as he claimed he had been assaulted. I arrange for healthcare to attend and he was seen by a nurse. This ended my involvement in the incident." This was a signed contemporaneous statement.
19. Another prison officer namely Mr Browne also completed an Annex A Use of Force Statement on the day of the incident. He confirmed that he had completed C&R training within the last 12 months, and stated: "… On hearing this Prisoner A said something back to Governor Stretch and a verbal exchange between the two ensued. I couldn't hear what was being said at this time. I then heard Governor Stretch say to Prisoner A "Lt's go in the office and have a chat about this shall we?" On saying this Governor Stretch manoeuvred Prisoner A into the office. At this time I was about three metres outside the office. As far as I was aware it was only Governor Stretch and Prisoner A in the office at that time. Within a few seconds I heard what I can only describe as a very heated exchange, some shouting and the obvious noise of something within the office falling to the floor. I immediately entered the office and saw Governor Stretch with both hands around Prisoner A's neck against the far wall of the office. I immediately radioed for assistance and approached both of them. I managed to get in between Governor Stretch and Prisoner A and I believe SO Board was there too. I managed to secure Prisoner A's head whilst SO Board was restraining one of his arms. More staff entered the office and someone else, who I was unaware of, secured his other arm. At this time Prisoner A was very agitated. Both SO Board and I were trying to de-escalate the situation. I was trying to get eye contact with Prisoner A and after I found out his first name from SO Board I was trying to utilise this to calm him down. Over the next couple of minutes Governor Stretch twice returned to the office and had some verbal exchanges with Prisoner A. Governor Stretch eventually left

the office and the prisoner called down enough for staff to escort him back to his cell. This was the end of my involvement in this incident with this prisoner." This statement was prepared contemporaneously, but was not signed by Mr Browne.

20. As noted, the claimant had been Duty Governor over that weekend, and as usual there was a morning meeting on the following day, Monday, 15 October 2018. The claimant gave feedback about the incident and other weekend occurrences. There had been some difficult matters to deal with, and in particular a delivery of illegal drugs by drone had been intercepted. Some of the prisoners reacted to this adversely, with some of them smashing up their cells, and in common parlance the prison was said to be "bubbly", meaning potentially excitable and difficult. Mr Daddow as the claimant's line manager did not consider that anything untoward had happened, until the days that followed when Prisoner A made the allegation that he had been strangled and assaulted by the claimant. It was at that stage that Mr Daddow instructed Governor McGowen to conduct a Decision Log into the incident. The Decision Log procedure is an informal fact-finding exercise to assess what might have happened. Governor McGowen's Decision Log did not analyse whether the claimant's use of force had been reasonable, necessary or proportionate, but did conclude that a formal investigation was needed.
21. Mr Daddow was reluctant to commission a formal disciplinary investigation unless it was absolutely necessary and wished to review the CCTV footage of the incident with his Line Manager Governor Hodson. They were not often together in the same establishment, but they were able to review the CCTV footage together on 2 November 2018. They both had serious concerns on doing so because the incident as shown on the CCTV footage appeared to differ from the claimant's report and Use of Force statement. The claimant had suggested that Prisoner A had "turned suddenly and aggressively so I pushed him into the office" when this was not supported by the CCTV footage. They decided that specialist input should be sought to determine whether to proceed to a formal investigation, and if so to assist the Investigating Officer if an investigation were to be commissioned. They decided to seek an expert report from a National Control and Restraint adviser and on about 14 November 2018 they identified Mr Ian Hunt for that purpose. Mr Hunt is a National Control and Restraint Instructor. The earliest that Mr Hunt could attend was on 20 November 2018.
22. Mr Daddow instructed Mr Hunt to prepare a report by email dated 8 November 2018. Mr Daddow gave his version of events and set out his concerns arising from the actions taken by the claimant. These included that the claimant was not up-to-date with his C&R training, and that the initial use of force by the claimant was not justifiable. He agreed to provide Mr Hunt with all of the relevant information which included the witness evidence available at that stage and the CCTV footage, and it was subsequently agreed that Mr Hunt would attend to consider the matter and to prepare a report.
23. It then became clear that the earliest that Mr Hunt could attend was on 20 November 2018. Both Mr Daddow and Mr Hodson were concerned that it would take another week for Mr Hunt to attend and review the matter, and accordingly Mr Hodson took the decision on 14 November 2018 to suspend the claimant on full pay pending the disciplinary process. He explained to the claimant that he was suspended on full pay until further notice whilst the allegations were investigated. Mr Hodson decided that the claimant should be suspended rather than placed on alternative duties or detached duty because of the seriousness of the allegation. He did not consider alternative duties to be appropriate. He also explained in the suspension letter that if there were a change in circumstances then it might be possible for him to return to work before the investigation was completed. In the meantime, he was required to report to his line manager Mr Daddow by telephone weekly and was given information about the respondent's confidential helpline.
24. Mr Hodson also informed the claimant of his right to make representations against the suspension and the claimant did raise an appeal against the decision to suspend him to the Prison Group Director Susan Howard. Ms Howard rejected that appeal and informed the claimant on 23 November 2018 that his suspension was justified. The claimant made a renewed appeal on 6 January 2019 (as he was entitled to do under the policy after a

further 28 days), but Ms Howard upheld the suspension again by way of her decision on 11 January 2019.

25. Mr Hodson became the Commissioning Manager, and he appointed the Deputy Governor from HMP Erlestoke namely Mr Chris Simpson as the Investigating Officer. The investigation was opened on 14 November 2018 and eventually concluded on 31 January 2019. Mr Hodson had arranged for Mr Simpson to be available because it was agreed that he would be able to commit time and resources to concluding the investigation within the 28 days suggested in the relevant procedure. However, because of operational matters as Deputy Governor within his own prison, combined with leave over the Christmas period, he was unable to do so without seeking two extensions of time from Mr Hodson. The claimant was notified on each occasion that this had happened.
26. Mr Hodson had set the terms of reference for Mr Simpson to investigate the incident and in particular to assess whether the type of force applied was reasonable, necessary and/or proportionate. He asked Mr Simpson to ascertain whether the force used could be legitimately and lawfully justified, and to consider all associated contributory factors leading up to and following the incident. He made it clear that Mr Hunt had been requested to provide a specialist evaluation and report on the incident.
27. Mr Hunt attended HMP Portland on 20 November 2018. He reviewed the Use of Force paperwork, the CCTV footage, and prepared a report. In short, his opinion was that the CCTV footage showed that the initiation of force by the claimant even if necessary was still disproportionate and unreasonable in the circumstances, and it demonstrated an extremely poor understanding of restraint minimisation and medical considerations. In addition, the claimant's conflict management and management of the situation was poor.
28. Mr Hunt's report and opinion then fed into the report prepared by the Investigating Officer Mr Simpson which was completed on 31 January 2019. This was a detailed report with a number of annexes including copies of interviews with the other witnesses.
29. Mr Simpson interviewed OSG Ball who was present when the incident occurred. This was on 3 January 2019. Mr Simpson and OSG Ball reviewed the CCTV footage together. Mr Ball confirmed that Prisoner A had shouted in the claimant's face and that the claimant pushed or escorted him into the office. He confirmed that when he got there, Prisoner A was against the wall of the office, but other staff were in control and he then left. He stated that he could not see why the claimant had been suspended and that "I could not see what all the fuss was about". He later agreed that it was clear that the claimant subsequently became irate and had to be restrained by one or more colleagues, and that something "had riled him".
30. Mr Simpson also interviewed Mr Board on 3 January 2019 who confirmed the contents of his earlier statement, and they reviewed the CCTV footage. Mr Board had not seen the claimant put his hands around the claimant's throat, but he did confirm that he heard Prisoner A tell the claimant to get his hands off his throat. He did see the claimant pull Prisoner A's head forwards and down, and he confirmed that he and Mr Browne then took over from claimant in restraining Prisoner A. He confirmed that the claimant subsequently returned and was very angry, and that he was shouting at Prisoner A. Mr Board assisted Prisoner A back to his cell, and he confirmed that Prisoner A alleged that he had been assaulted.
31. Mr Simpson then interviewed Prisoner A on 9 January 2019. Prisoner A acknowledged his earlier contemporaneous statement and confirmed that it was true. He admitted that he was arguing with the claimant and had sworn at him. He then said the claimant came at him all of a sudden and pushed him into the office. He confirmed that the claimant then had his hands around his throat, and that he was telling the claimant to get his hands off his throat.
32. Mr Simpson also interviewed Prison Officer Hignett on 9 January 2019. He was present, but by the time he arrived at the office the claimant was not involved in the restraint of Prisoner A, and Mr Hignett recollected it was probably Mr Browne and Mr Ball. He did not witness the claimant either pushing or restraining Prisoner A. He did recollect that there was an angry exchange of views between Prisoner A and the claimant.

33. Mr Simpson also interviewed another prison officer, namely P.E.I. Sean Phelps on 10 January 2019. They reviewed the CCTV footage. He confirmed that by the time he had arrived the prisoner was under restraint by two other officers, and he had not witnessed the claimant either pushing or assaulting Prisoner A. He did recall that there was an angry exchange and that Prisoner A had accused the claimant of assaulting him.
34. On 10 January 2019 Mr Simpson also interviewed Acting Governor Nantes. They reviewed the CCTV footage. He confirmed that he arrived after the commotion had commenced, and had not witnessed it, but was advised by both Prison Officer Sue Damon, and Prison Officer Board, that he should get the claimant away from the scene. He confirmed that the claimant's son was trying to ask him to leave the wing, and he also asked the claimant to leave the wing.
35. On 10 January 2019 Mr Simpson also interviewed Miss Damon, a Band 4 Prison Officer. She confirmed that by the time she had arrived it was clear that an altercation had taken place, and that the claimant and Prisoner A were having an argument. In order to help de-escalate the situation, she had a discussion with the claimant and asked him to leave the scene. She said that she joined the claimant's son Adam Stretch and they both tried to persuade the claimant to leave. She confirmed that the claimant was agitated at the time.
36. On the following day 11 January 2019 Mr Simpson interviewed the claimant. This was a detailed interview and the transcript runs to 25 pages. The claimant was accompanied by a work colleague namely Mr Hogg whose details are explained more fully below. The claimant confirmed: "I think I used an open hand on his chest and I pushed him backwards into the wing office. I think Mr Ball was either in the office or he was out, I can't remember, but I open palm pushed him into the office … But he came and was shouting abuse. So again I pushed him towards the back of the office and he was still swearing abuse at me and I thought he was going to head-butt me. He was being abusive, threatening and he was resisting so I got one hand up because I couldn't stop him from head-butting, so I put one hand up and then as my other hand came round I tried to pull his head down, then I believe the alarm bell was pressed and other staff responded … I did what I did. I have no concern about what I did. I think it was legitimate, I think it was lawful." The claimant also confirmed that he was attempting to de-escalate the situation, and instigated the hand in the chest, and had instigated a use of force to get him into the office. He confirmed that Prisoner A was screaming threats, and that he had to defend himself. He confirmed that he had pushed the claimant to the back of the office, and he had had to use force. He confirmed that he had not done C&R refresher training for some years.
37. They then reviewed the CCTV footage together. It was put to the claimant that the Prisoner A was two metres away from him, and that he moved to Prisoner A to push him into the office. The claimant confirmed that he had to seek to de-escalate the position. He said that other prisoners seem to be encouraging Prisoner A, and that he wished to protect the other staff. He confirmed that he thought his actions were proportionate. It was then put to the claimant that the versions of others present were not consistent with his version, and in particular Mr Browne's recollection that he had his hands around Prisoner A's throat. They then discussed this other evidence. The claimant also challenged the reliability of Prisoner A's evidence, and informed Mr Simpson that when the nurse attended to interview him, Prisoner A was seen scratching his own neck effectively to create false evidence that he had been strangled, and that Prison Officer Paula Moate might have seen this.
38. The claimant then raised the concern that he was dissatisfied with Mr Hodson acting as the Commissioning Manager and felt that he could not be impartial because of his (Mr Hodson's) involvement in the earlier disciplinary proceedings, and also because he considered that Mr Hodson was assisting in the response to his current Employment Tribunal claim for disability discrimination. Mr Hodson had indeed been involved in assisting with that claim, and he sought advice from the HR Department as to how to proceed. Although there appeared to be no prohibition within the respondent's policies Mr Hodson decided in the interests of fairness to step down because of the claimant's concerns. Mr James Lucas, from whom I have heard, has been a Governing Governor for 10 years in various prisons. Mr Hodson arranged for Mr Lucas to take over from him at that stage in the process.

39. Mr Simpson completed his report on 31 January 2019, and Mr Lucas received it shortly thereafter. The report had recommended that there was sufficient evidence for a disciplinary hearing to be held. More specifically the report had investigated two allegations. Allegation 1 stated: "Was the initiation and type of force used on Prisoner A reasonable, necessary and proportionate? Was the force used legitimate and lawfully justified?" Allegation 2 stated: "Should the employee have known what was expected or required and how?"
40. Mr Simpson's conclusion against Allegation 1 was as follows: "Allegation 1 is supported. The witness statements taken from staff directly involved in the incident, the prisoner's comments within these and his statement, the CCTV footage, the Use of Force Annex A reports available to the investigating officer, and the report from Ian Hunt (NTRG), all lead the investigation team to the conclusion that the overwhelming weight of evidence shows us from these sources that the use of force on Prisoner A at the time it was instigated by Governor Stretch was not reasonable, necessary or proportionate. Governor Stretch states that the instigating factor for use of force was Prisoner A's reaction towards himself. This is referred to in the Use of Force Annex from Governor Stretch. This has been discounted in the report from Mr Hunt which is a view shared with the investigation team and this view is further evidenced in the CCTV footage, which does not support this. Furthermore, observations of the investigation team from information sources of CCTV, Prisoner statement, interview statements and Annex A from P.E.I. Browne prove beyond any reasonable doubt that Governor Stretch did, on the occasion of using force against Prisoner A, have two hands around prisoner A's neck/throat area. The investigation team concluded that the use of force cannot be legitimately and lawfully justified. The only source of evidence against this allocation comes from Governor Stretch himself."
41. Mr Simpson's conclusion against Allegation 2 was as follows: "In an interview on 11 January 2019, Governor Stretch told the investigation team that he had been an operational member of HMPPS for 28 years. In this time Governor Stretch informed the Investigating Officer that he had been trained to a Control and Restraint Level 3 (commonly referred to as C&R Advanced). The HMPPS qualification requires a good level of understanding in all areas of Control and Restraint. This qualification is certified by an initial course under the initial tuition of national Control and Restraint Instructors and requires continuous training to be annually revalidated. It is of note that Governor Stretch although there is no requirement for him to undertake refresher training has not done so for a number of years."
42. Following this report it was Mr Hodson who decided that the disciplinary process should continue, but as noted above the matter was then passed to Mr Lucas because of Mr Hodson's involvement in the claimant's ongoing Employment Tribunal claim. Mr Hodson was no longer involved in the process after this decision.
43. Mr Lucas considered the report, and he also decided that the disciplinary process should continue. By letter dated 13 February 2019 Mr Lucas invited the claimant to attend a disciplinary hearing on 25 February 2019. The claimant was notified that he faced allegations which if proven would constitute gross misconduct. These allegations were explained to be "Assault/Unnecessary Use of Force on a Prisoner", and "Unprofessional Conduct". The exact nature of the alleged unprofessional conduct was not specified. The claimant was notified of his right to be accompanied by a trade union representative or work colleague. That letter enclosed a copy of the investigation report and referred the claimant to the relevant policies. Mr Lucas made it clear that he would ask the following people to attend the hearing, namely Mr Simpson the Investigating Officer, and four witnesses, namely Mr Board, Ms Damon, Mr Nantes, and Prisoner A. The claimant was invited to confirm whether he wished to call any witnesses, and there was an attached pro forma so that Mr Lucas could make the necessary arrangements.
44. As noted above Mr Browne had completed an Annex A statement, but he was suspended from duty and subsequently remanded in custody in connection with a separate incident. Mr Lucas was therefore unable to call him as a witness. In addition, when invited Prisoner A subsequently declined to attend the hearing to give his version of events.

45. I have heard from Mr Tim Hogg who attended under a witness order obtained by the claimant. Mr Hogg is an experienced Grade 9 Governor, and previous chairman and branch secretary of the Prison Officers' Association, and more recently had also been on the Executive Committee of the National Governors' Association. By letter dated 23 February 2019 the claimant confirmed his intention to contest the allegations and informed Mr Lucas that he would be accompanied by a work colleague, namely Mr Hogg. That letter also confirmed that the claimant wished to call the following witnesses: Mr Ball, Mr Stretch (the claimant's son who was also present), Paula Moate, Nurse Hampshire, and Mr Hunt. Mr Lucas agreed that Mr Hunt should be called, but he was reluctant to increase the number of witnesses unnecessarily, and he asked the claimant to confirm why the others were needed. After hearing from the claimant on this point he agreed to call Mr Stretch and Ms Moate as well, but he did not seek to challenge the statements given by Mr Ball or Nurse Hampshire (which he accepted but did not consider to be relevant) and therefore confirmed that there was no need for these two to be present.
46. Mr Lucas also made enquiries of when the claimant had last undertaken Control and Restraint refresher training, and the last recorded date was 10 October 2014. Although attendance is not compulsory, Mr Lucas's view was that it was best practice to complete this training regularly because operational managers often have to supervise Control and Restraint incidents.
47. The decision as to whether to proceed with the disciplinary hearing was that of the Commissioning Manager, who was Mr Lucas. He was not bound by the recommendation made by the Investigating Officer Mr Simpson. However, he noted that Mr Simpson's conclusion was that the claimant's use of force was not reasonable, necessary or proportionate. In addition, at that stage the allegations of assault related to the claimant pushing Prisoner A, and subsequently appearing to strangle him when inside the office. In addition, Mr Lucas was concerned about the apparent difference in accounts which the claimant had given, as compared to the CCTV footage and other statements, which he said "went to the heart of his credibility, and ultimately honesty."
48. The disciplinary hearing took place over three days on 27, 28 and 29 March 2019. The first two days were taken up hearing evidence and submissions made by both the claimant and by Mr Hogg on behalf of the claimant. Mr Lucas spent the third day reaching his conclusion.
49. One of the criticisms raised by the claimant was the slow speed at which the investigation had proceeded. It had taken a month for the claimant to be suspended, and then Mr Simpson had not commenced his investigation until 3 January 2020. Mr Simpson explained the reasons for the delay, namely that as Deputy Governor he was covering for the Governor at HMP Erlestoke at that time; there was other priority work; and that both he and the Governor had pre-booked annual leave at around that time. Mr Lucas considered that in all the circumstances the delay was reasonable.
50. Mr Simpson then gave evidence in detail about the content of his investigation. He was challenged at length by the claimant and Mr Hogg. They were both afforded every opportunity to question Mr Simpson on the evidence which he had gathered and his conclusion. Mr Lucas also challenged Mr Simpson as to the content and findings of his report.
51. In addition, Mr Hunt explained his report and presented his review of the use of force employed in the incident. He confirmed his opinion that the CCTV footage showed that the initiation of force by the claimant even if necessary was still disproportionate and unreasonable in the circumstances, and it demonstrated an extremely poor understanding of restraint minimisation and medical considerations. In addition, the claimant's conflict management and management of the situation was poor. The claimant and Mr Hogg were provided full opportunity to question Mr Hunt and to provide their version of any further context or background to the incident. Mr Lucas also made enquiries of the claimant's Control and Restraint training. The claimant accepted that he had not undertaken the training for a number of years, and Mr Hogg argued that it was not necessary for someone at Governor grade to do such training. Mr Lucas took a different view, namely that although the training was not mandatory, it was strongly encouraged to ensure operational

managers were up-to-date with the most recent techniques because the approved Control and Restraint techniques were regularly changed and updated.

52. The claimant had originally stated in his Use of Force statement that he had used force because of the threat he believed that Prisoner A posed to him, but during the disciplinary hearing the claimant gave a different version, and asserted that he was attempting to de-escalate the situation. Mr Lucas questioned whether the claimant was either protecting himself because of the threat which Prisoner A had posed, or whether he was taking Prisoner A out of the way for the safety of the establishment. The claimant then accepted that he had restrained Prisoner A for the good order of the establishment and to prevent him causing another incident. Mr Lucas put it to the claimant that he was changing his account, and he asked him whether he accepted whether any other options were available. The claimant's view was that there were no other options available, and that he was trying to get Prisoner A in the office, point out the error of his ways, and to make him calm down.
53. Mr Lucas also heard direct evidence from Ms Moate, Ms Damon, Mr Adam Stretch (the claimant' son), Governor Nantes, and Mr Board. The claimant and Mr Hogg were afforded full opportunity to question these witnesses.
54. After concluding the witness evidence Mr Lucas decided to dismiss the allegation that the claimant had put his arms around Prisoner A's throat. The only evidence to substantiate that allegation were the statements of Mr Browne and Prisoner A, and they were not present to be questioned at the disciplinary hearing. Mr Lucas considered that the CCTV footage was inconclusive on this point. Mr Lucas determined that this allegation was not proven on the balance of probabilities. Having made that decision, Mr Lucas then questioned the claimant again, reviewed the CCTV footage again, and allowed the claimant and Mr Hogg to make final representations before he considered the matter for his decision. During this process Mr Lucas suggested to the claimant that his Use of Force statement was incorrect because the CCTV the footage did not show Prisoner A turning suddenly and aggressively towards the claimant as he had claimed. At this stage the claimant accepted that his Use of Force statement should have stated that he only initiated force because of the threats which the prisoner posed "to me and the good order of the establishment". The claimant then accepted that with hindsight he might not do the same thing again, that he should have kept up-to-date with his Control and Restraint training, and that he had made a mistake. This was the first occasion on which the claimant had acknowledged during this process that he would have done things differently.
55. It is agreed between the parties that Mr Lucas accepted that "it was not procedurally the best investigation". Mr Lucas accepted that there was initial delay, and that a number of leading questions had been put to some of the witnesses. Nonetheless Mr Lucas concluded that the investigation was not fundamentally unsafe and that the content of Mr Simpson's investigation report was sufficient to justify his proceeding to the disciplinary hearing. Mr Lucas was satisfied that the allegations against the claimant had been explored thoroughly throughout the hearing and that the claimant Mr Hogg had had ample opportunity to question the witnesses and to state their case against the allegations. Mr Lucas did not agree with the claimant's assertion that the investigation was flawed and biased, and not carried out in compliance with the relevant procedure.
56. Mr Lucas considered the allegations and the evidence and the submissions made on behalf of the claimant in detail and gave his decision on the third day of the hearing on 29 March 2019. On the balance of probabilities he found that the allegations were proven and gave the claimant an opportunity to explain any points which he wished to raise in mitigation. Mr Lucas noted the claimant's substantial 28 year career and his clean disciplinary record. Even though the more serious charge of strangling Prisoner A had been dismissed, Mr Lucas still found that the claimant's evidence lacked credibility. He determined that it had changed from the Use of Force statement, which was not supported by the CCTV, to the claimant's position before the disciplinary hearing.
57. He found that the claimant had failed to take responsibility for his actions until the end of the disciplinary hearing and he did not find the claimant's actions to be reasonable, necessary or proportionate. Mr Lucas explained that he had decided that the claimant had used unnecessary force against Prisoner A which also amounted to unprofessional

conduct. He concluded that this constituted a serious breakdown in trust making any further relationship of trust between the claimant and the respondent untenable. This was because the respondent's values required staff to be open honest and transparent, and to carry out their duties under professional standards loyally, conscientiously, honestly and with integrity. Mr Lucas concluded that the claimant's conduct constituted gross misconduct and that he should be dismissed.

58. Mr Lucas did not find the claimant's explanation that he had pushed Prisoner A to maintain the order of the establishment to be convincing, and concluded that it was more likely that the claimant had lost his temper. Given that there were other options available to diffuse the situation, he concluded that the use of force was not necessary or proportionate. Even though the allegation that the claimant had strangled Prisoner A was not proven, he concluded that the claimant's actions after the altercation in the office were needlessly aggressive. Mr Lucas confirmed in his evidence that he ultimately felt that the matter boiled down to an issue of honesty and lack of credibility. The claimant's contemporaneous account was not the same as the account which he gave during the disciplinary interview and he concluded in essence that the claimant had been dishonest. He had only changed his story at the last moment and Mr Lucas was concerned that he might do the same again if put in the same position.
59. Mr Lucas confirmed his reasons in detail in a letter dated 29 March 2019. The claimant was afforded the right of appeal.
60. The claimant has asserted that Mr Lucas told Mr Hogg that he had had to think long and hard about his decision and that he would personally telephone any appeal authority to confirm that he would not mind if the claimant was reinstated. Mr Lucas denies making that comment. I accept Mr Lucas's evidence that he did not make that comment, but rather he confirmed that a number of options would be open to anyone determining the appeal, including overturning his decision, and that he would not in principle mind if this did happen because it would indicate that a fair process had been achieved. In addition, it is worth noting that Mr Lucas did not find the decision to be straightforward, and he felt that the claimant's actions had only just met the threshold of gross misconduct.
61. Mr Russell Trent, from whom I have heard, is the Prison Group Director of Avon and South Dorset Prisons, and a Senior Civil Servant. He has previously been the Governor of various prisons, and he has held numerous disciplinary and appeal hearings throughout his time with the respondent. As Director of the Group of prisons which included the prison where the claimant had worked, Mr Trent dealt with the claimant's appeal. The relevant Conduct and Discipline policy requires that appeals against dismissal for gross misconduct are considered by a senior manager of at least the rank of Deputy Director of Custody (Prison Group Director) and it was therefore appropriate that Mr Trent should hear that appeal.
62. The claimant appealed by letter dated 4 April 2019. There is a pro forma letter for grounds of appeal (F11) which affords the appellant four options as tick boxes, with the opportunities to support those summary grounds with an attached statement and/or documents. The claimant appealed on the basis of the decision being an unduly severe penalty, and because the original finding was against the weight of evidence. He deleted and did not rely on either of the options that new evidence had come to light which could affect the original decision, or that the disciplinary proceedings were unfair and breached the rules of natural justice. The claimant also relied on written submissions which he produced on 27 June 2019 before the appeal hearing. These written submissions raised a number of issues, including the fact that there had been a one-month delay between the incident in question and his suspension; the involvement of his line manager Mr Daddow; the delay between the commencement of the Investigating Officer Mr Simpson's investigation and his report being produced; various complaints about Mr Simpson's report; the evidence relied upon at the disciplinary hearing; and his personal record and mitigation. Despite raising these points, the claimant confirmed in both his written submissions and at the appeal hearing that he did not pursue his appeal on the basis that the procedure had been unfair and/or had breached the rules of natural justice.
63. Mr Trent had before him the claimant's letter of appeal together with these written submissions; the detailed transcript of the disciplinary hearing held by Mr Lucas from 27 to

29 March 2019 (which runs to more than 200 pages); the report completed by Mr Hunt; and the original report from Mr Simpson including its various annexes and witness statements, and also a copy of the CCTV footage. Mr Trent reviewed this documentation thoroughly, and he wrote to the claimant on 24 June 2019 inviting him to an appeal hearing on 10 July 2019. He confirmed that the claimant had the right to be accompanied by a colleague or trade union representative and afforded the claimant the opportunity to provide any further information to assist the process.

64. On 3 July 2019 the HR Case Manager provided Mr Trent with a "Case Analysis Submission". This is said to be standard practice within the Civil Service HR Department and is intended to provide the appeal manager with the background to the appeal, guidance on the role to be carried out, and the options following the decision. The claimant now argues that the contents go beyond factual statements and are intended to persuade Mr Trent as the Hearing Authority to adopt a preordained course of action and to reject the appeal. Whereas I can see that some of the comments might attract criticism as appearing to point to conclusions, and on the face of it go beyond mere observations, I accept Mr Trent's evidence that he was sufficiently experienced and independent to make up his own mind, and that he did so without being persuaded by the HR Case Manager.
65. The form of appeal under the respondent's Code of Conduct and Discipline is not a full rehearing. Mr Trent's role was not to rehear the full case against the claimant, but was to establish whether the decision-maker Mr Lucas had made a decision which was fair and reasonable. Under the relevant appeal procedure, if Mr Trent were to conclude on the balance of probabilities that Mr Lucas's decision was fair and reasonable, there would be no basis for him to do anything other than to uphold the original decision to dismiss. Mr Trent therefore decided that the areas which he had to consider were whether the disciplinary process was properly applied, and whether the decision to dismiss was reasonable based on all of the evidence in all of the circumstances. Mr Trent determined to consider the matter on its own merits, and in the past had overturned decisions made by Mr Lucas on either substantive or procedural grounds. I accept Mr Trent's evidence that he did not feel bound by Mr Lucas's decision, and that he would have overturned the decision to dismiss if he felt it appropriate to do so.
66. The appeal hearing took place on 10 July 2019. The claimant was again accompanied by his work colleague Mr Hogg. The claimant recounted his version of events, and Mr Hogg made submissions on his behalf. Effectively they sought to dispute the charges and to argue that, even if proven, the decision to dismiss was an unduly severe penalty. Mr Trent reviewed the incident and how the claimant had exercised his judgment in the use of force against Prisoner A. Mr Trent had reviewed the CCTV footage and the claimant declined an opportunity to view it again. Mr Trent ensured that the claimant and Mr Hogg had every opportunity to raise and challenge any point they wished.
67. Mr Trent decided to reject the claimant's appeal and to uphold the decision to dismiss. The claimant accepted at the appeal stage for the first time that he had made an error of judgment. During the whole process of writing his report after the incident, the investigation, and the disciplinary hearing, the claimant had not acknowledged that the use of force was unnecessary until he conceded the same to Mr Trent during the appeal hearing. Mr Trent decided that as a senior manager the claimant had been disingenuous in his account until the very last moment. He no longer trusted the claimant's honesty as a senior manager, and he felt that the claimant had strategically misrepresented the truth and had then attempted to gloss over it. This went to the very heart of the matter in that the respondent's system of justice depends upon trust and the respondent needs to trust the integrity of staff who are deploying force.
68. Mr Trent considered all of the points raised by Mr Hogg on behalf of the claimant. Even though the claimant had confirmed that he was not appealing on the grounds of any procedural deficiency, or that the procedure had offended natural justice, the grounds raised included these: that Mr Lucas had not given enough weight to the fact that the claimant's actions had shown no malice and no intent; two witnesses Mr Browne and Prisoner A were not in attendance at the disciplinary hearing, and could not be questioned; nobody apart from the claimant had taken control of the original incident; there was a

previous investigation into whether the claimant had not controlled or managed an incident properly which would have weighed in his consciousness; and other events and incidents were raised which were different in their severity of penalty. Mr Trent considered all of these matters before upholding the decision to dismiss.

69. The key factors in Mr Trent's decision included these: (i) Mr Trent had accepted during the hearing that the disciplinary process might have been better conducted, particularly at the investigation stage, because there had been an initial delay, and a number of leading questions had been put to some of the witnesses. Nonetheless the respondent had followed its procedures correctly and any delays in the process were not excessive and the claimant had not been materially disadvantaged by any delay. In any event at the appeal hearing the claimant confirmed that he was not appealing against the process and/or because of any procedural issues; (ii) the claimant suggested that he had not been required to undertake Control and Restraint refresher training so could not be held responsible for not being up to date on the correct techniques. Mr Trent considered that the refresher training was not mandatory but was highly recommended, but in any event the issue was about the use of force and techniques. The claimant did not acknowledge that the use of force was unnecessary until he conceded as much at the appeal hearing was which was at the very last stage; (iii) the CCTV footage, as supported by a considerable amount of witness evidence, was clear in showing the claimant's actions towards Prisoner A, which the claimant eventually acknowledged to be an error in judgment; (iv) the claimant had been given ample opportunity to acknowledge that his behaviour had been wrong, but had not done so. In his Use of Force statement, the claimant stated that his use of force was necessary, but at the disciplinary hearing he admitted that there were other options available than the use of force. At the appeal he admitted that the use of force was unnecessary. The claimant had been offered observations in the disciplinary hearing as to how he might have done things differently but had not taken that opportunity. Mr Trent found that this had undermined the claimant's credibility. Mr Lucas had concluded there was a real risk that the claimant could behave in the same way again and together with the discrepancy in his statements, this had resulted in an irretrievable breakdown of trust; (v) the claimant was a senior manager, and as such was held to a higher standard of behaviour than more junior employees. Although dismissal might seem harsh based on one incident, the circumstances were more serious than that given the wider issues concerning honesty and credibility; and in assessing the incident and other matters in the round, including the claimant's 28 years of service, given the lack of credibility and dishonesty in the claimant's statements throughout the process, and given his role as a senior manager, Mr Trent believed that the working relationship between employer and employee had been irretrievably broken.
70. Mr Trent confirmed his reasons in a letter to the claimant dated 12 July 2019 which concluded the respondent's procedures.
71. The claimant presented these proceedings on 22 August 2019 which originally claimed unfair dismissal only. He applied to amend his claim to include a claim for victimisation on 1 June 2020, and subsequently served further Details of Claim in that respect. The respondent filed amended Grounds of Resistance in response to this additional claim. It does not appear that there was any formal amendment application made or granted, but nonetheless the parties were fully on notice of this additional claim, and they have prepared accordingly for it to be determined at this hearing.
72. In addition, I make the following additional findings of fact with regard to the claimant's allegations of collusion between the senior officers of the respondent, and the allegations of victimisation said to arise from the claimant's earlier Employment Tribunal proceedings for disability discrimination.
73. The claimant asserts that he incurred the displeasure of Mr Hodson after he made clear his views about Mr Hodson's and Mr Daddow's capabilities when asked to do so at a meeting in about January 2018. These views were in part disparaging. The claimant and three colleagues also requested at that time to work a compressed week, which Mr Hodson refused (and which led in part to the claimant's first Employment Tribunal proceedings). He asserts a change of treatment from Mr Hobson. He asserts that Mr Hodson accused the

claimant and other managers as being part of a "poisonous vipers' nest". This is said to support his argument that Mr Hodson set out to seek retribution in his treatment of the claimant. Mr Hodson strongly denies that he called the claimant and his colleagues "a poisonous vipers' nest".

74. The claimant suggested at this hearing that Mr Hodson had agreed that he had made this comment at the disciplinary hearing before Mr Ryder. Mr Hodson denies this. This allegation was raised for the first time in oral evidence at this hearing, and had not been raised before. It was not in the claimant's details of claim for the earlier Tribunal claim, and not in the claimant's details of claims for this claim. The respondent argues that is pure embellishment designed to bolster the claimant's account. On balance considering these competing versions I prefer Mr Hodson's version that it was not the sort of comment he would have made, and he did not make it. I find that Mr Hodson did not refer to the claimant and/or his colleagues as a "poisonous vipers' nest".
75. The claimant also asserts that Mr Hodson had tried to arrange his dismissal previously by way of the previous disciplinary proceedings in February 2018. However, these proceedings were initiated because of a complaint by Mr Walker that the claimant had been found asleep in his office while in possession of security keys, which is oversee a serious matter and potentially gross misconduct, and not by Mr Hodson. Mr Walker is the Chair of the Local Prison Officers Association. It was clear the serious allegation which had to be investigated. As the Governing Governor, it was usual for Mr Hodson to be the commissioning manager which is why he commenced the process. However, as a result of the claimant's concerns, he then made arrangements for a different commissioning manager to take over. He would hardly have done this if he was personally seeking to dismiss the claimant. The new commissioning manager Ms Ryder did not reject the proceedings out of hand, and she allowed them to proceed to a disciplinary hearing. She obviously considered that the disciplinary proceedings were merited. She rejected the allegations on the basis that it could not be proven on the balance of probabilities that the claimant was asleep. This clearly contradicts the claimant's assertion that he was being targeted by the institution and/or by Mr Hodson.
76. As further evidence of his assertions that one would incur recriminations if one took on the institution, he asserted that Mr Hodson had said to his representative Mr Hogg after the disciplinary hearing conducted by Ms Ryder that "you've chosen your side". This was taken to be a threat. Mr Hodson denied that this happened, and Mr Hogg also confirmed that Mr Hodson had not said this. Mr Hogg did confirm however that Mr Hodson had commented at the disciplinary hearing words the effect "we choose our sides" and that Mr Hogg had mentioned this to Ms Ryder, and that this comment had made him feel uncomfortable. However, Mr Hogg did not feel sufficiently uncomfortable to refuse to travel with Mr Hodson when he gave him a lift to a conference shortly thereafter. The claimant asserts that Mr Hodson accused Mr Hogg to the effect "you shouldn't have been able to question me at the hearing" which displayed his antipathy towards the claimant. Mr Hogg did not support this assertion, and he said that they had a general conversation about the process adopted, and Mr Hodson merely expressed a comment that he was surprised Mr Hogg was allowed to question witnesses during that process. Mr Hogg confirmed in his evidence that he has suffered no professional repercussions as a result of having represented the claimant.
77. The claimant also asserts that Mr Hodson was angry because he had accused him of discrimination and that his disability discrimination claim had "impugned the actions of Mr Hodson" and had "cited him". However, in his originating application the claimant alleged that it was Mr Daddow who had failed to act on occupational health recommendations. Mr Hodson was not specifically impugned or cited in that application. There is also no evidence to corroborate the claimant's claim that Mr Hobson was angered by that claim.
78. The claimant also asserts that his relationship with Mr Hodson "had been frosty for some time" and that in early October 2018 the claimant was publicly criticised by Mr Hodson in a Senior Management Team meeting and that certain duties were taken away from him without any form of consultation. He says that this change was imposed upon him publicly and that he felt belittled. Mr Hodson denies that this happened. The minutes of that meeting which were produced by the respondent do not refer to the alleged change of duties, but

do refer to a number of structural changes which were being made to the operation of the prison. I accept the claimant's evidence that his duties may have changed as he suggests, but this appears to be against the background of operational changes in the prison at the same time.

79. Finally, the claimant has also asserted that he was the victim of differential treatment by Mr Lucas, and in particular with regard to two earlier similar incidents. One involved a custody manager Mr BB in 2017, and the other involved a prison officer Mr YY in 2019.
80. Mr BB was investigated for unreasonable force after he had struck a prisoner with his knee. This can be an allowable use of Control and Restraint, but it depends upon the circumstances. He had tried to use his knee against the prisoner's thigh, which can be permissible, but he had ended up hitting the prisoner's chest as he struggled. Mr Lucas decided not to proceed to a disciplinary hearing. He explained that the position was different from that involving the claimant. Mr BB was not as senior as the claimant; the prisoner was being violent; Mr BB did not realise that he was already cuffed; and Mr BB was open and honest throughout about the circumstances. Mr Lucas felt detailed discussion about the circumstances was the preferable way forward.
81. Mr YY was investigated for the use of excessive force against a prisoner. Mr YY had accepted that force was unnecessary and that his conduct had fallen short of what was expected. Mr Lucas took into account several mitigating factors. These were that the prisoner was skilled in martial arts; Mr YY had had experience of violent prisoners before; Mr YY thought that his arm was free and that he might have been at risk; there was nothing malicious in his actions; and he was in control of his behaviour and emotions of all time. Mr Lucas decided to deal with the matter by way of issuing a written warning and further Control and Restraint training. Again, he considered the claimant's circumstances to be very different from these.
82. Having established the above facts, I now apply the law.
83. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
84. I have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
85. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
86. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges victimisation.
87. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA.
88. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

89. For the victimisation claim I have considered the cases of: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC; Ayodele v Citylink Ltd and Anor CA [2017]; Nagarajan v London Regional Transport [1999] IRLR 572 HL.
90. For the unfair dismissal claim I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Turner v East Midland Trains Ltd [2013] IRLR 107 CA; A v B [2013] IRLR 405 CA; Hadjioannou v Coral Casinos Ltd [1981] IRLR 352; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.
91. The tribunal directs itself in the light of these cases as follows.
92. Decision: Alleged Collusion and Conspiracy
93. Before dealing with the specific claims of victimisation and unfair dismissal I make the following findings. The claimant has asserted that his suspension and the subsequent disciplinary process which was commenced after the incident which occurred in October 2018 involved collusion and conspiracy between the senior managers involved. He asserts that the whole disciplinary process was a sham, and that through various "back channels" and off the record communications behind the scenes the senior personnel involved colluded and conspired to conduct a sham process in order to comply with Mr Hodson's desire to dismiss the claimant. These are serious allegations that a variety of senior professional prison governors and/or senior civil servants from a range of different institutions have themselves deliberately committed gross misconduct in order to manufacture and orchestrate the circumstances leading to the claimant's dismissal. I have no hesitation in rejecting these allegations for the following reasons.
94. In the first place there is no evidence that there was any collusion or predetermination between the senior personnel involved, which they each deny. Secondly, the decision to commence an investigation against the claimant was entirely reasonable, particularly given Prisoner A's allegation that the claimant tried to strangle him, which was supported at the time by Mr Browne, and arguably by the CCTV footage. That was certainly Mr Simpson's conclusion after a detailed investigation during which the claimant and several other personnel were interviewed. Mr Lucas subsequently conceded that the investigation might have been better conducted in the sense that it might have happened more quickly, and fewer leading questions might have been asked. There is no evidence that these criticisms of Mr Simpson's investigation were caused or encouraged by Mr Hodson.
95. The allegations against the claimant were then examined in detail over an extensive disciplinary hearing lasting three days, and the claimant and his very experienced representative were given the opportunity to question all of the witnesses in detail before Mr Lucas made his decision. The events occurred in HMP/YOI Portland, but the investigating officer, the hearing authority, and the appeal authority were all from different institutions, and the claimant accepted in cross examination that none of these individuals (Mr Simpson, Mr Lucas and Mr Trent) could be said to have had an axe to grind against him. Mr Lucas initially had evidence from the CCTV footage, Prisoner A's two statements, and the evidence of Mr Browne, that the claimant had tried to strangle Prisoner A. Mr Lucas decided to reject that allegation because Prisoner A and Mr Browne were not present to be questioned on their evidence, and he felt it unsafe to conclude on the balance of probabilities that that specific allegation had been proven. This shows that Mr Lucas adopted a thoughtful and considered approach and is contrary to any suggestion that he was doing Mr Hodson's bidding to apply a predetermined outcome. I found the evidence given by the dismissing and appeal officers Mr Lucas and Mr Trent to be measured and credible. The suggestion that an array of senior managers were persuaded by Mr Hodson to act dishonestly or disingenuously to carry out his preferred outcome is in my judgment not only implausible on the facts of this case, but also wholly unrealistic.
96. Against this background I now turn to the specific statutory claims.
97. The Victimisation Claim

98. The respondent concedes that the claimant's Employment Tribunal proceedings claiming disability discrimination which were presented on 3 September 2018 amounted to a protected act for the purposes of s 27 EqA, and I so find.
99. The claimant alleges that he suffered the following detriments because he made this protected act, or put another way because he issued these earlier Tribunal proceedings: (i) the criticism and changing of daily functions at the management meeting in October 2018; (ii) his suspension; (iii) the fact and the manner of the investigation into his conduct; and (iv) his dismissal (inclusive of the rejection of his appeal). I deal with each of these in turn.
100. The evidence with regard to the criticism of the claimant and change in his operational duties at a management meeting in October 2018 is unsatisfactory. This was not part of the claimant's originally pleaded case, but he did raise it in subsequent further and better particulars. He alleges that he was criticised publicly by his senior manager Mr Hodson at that meeting, and that various of his duties were removed without his consent. The respondent's evidence in response was vague. During the course of the hearing they produced minutes of the meeting in question. Mr Hodson denies that he is the sort of manager that would have criticised a colleague publicly, and denies that he did so in this case, but the respondent seems to accept that there was a change in the claimant's duties against the background of a number of organisational changes within the institution. On balance I do not accept the allegation that there was public criticism of the claimant, given Mr Hodson's denial, but I do accept his evidence that his duties changed. I accept that this can well amount to a detriment and given the vagueness of the respondent's evidence on this point I accept the claimant's evidence that it did so in this case. Nonetheless there is simply no evidence that this detriment was imposed as a result of or in retaliation for the claimant's earlier tribunal proceedings, and it was contemporaneous with a number of other organisational changes which were occurring at that time.
101. Secondly, the claimant relies on his suspension. I accept that it is a detriment to be suspended from duty, and that the claimant suffered this detriment. However, in my judgment there is clearly sufficient ground for suspension at that time based on the prisoner's complaint, Mr Browne's statement, the claimant's own explanation, and the CCTV footage. That was the reason for the suspension, and not the claimant's earlier tribunal proceedings even though they had been issued only a few weeks before. The timing of the suspension also undermines the claimant's assertion that it was a knee-jerk reaction to his earlier proceedings. Mr Daddow was reluctant to proceed to a suspension and/or disciplinary investigation, and it was only when he was able to discuss the matter at length with Mr Hodson, and they both then determined that Mr Hunt would not be available for some time, that they reached the decision that suspension was appropriate. In addition, that suspension was reviewed twice by a senior manager namely Ms Ryder who was not implicated in the earlier tribunal proceedings, and she determined that suspension was appropriate in the circumstances given the incident which had arisen in October 2018.
102. Next the claimant complains of the fact that his conduct was investigated, and the manner of that investigation. I accept that it is a detriment to have one's conduct investigated in the context of the potential disciplinary hearing, and that the claimant suffered that detriment. It is also true that there were some criticisms of the manner of the investigation, as conceded by the respondent, being a number of leading questions during the investigation, and the delay beyond the 28 days recommended in the policy. The Decision Log process was commenced by Governor McGowen; and the investigation was conducted by Mr Simpson. The investigation was considered and decided upon by Mr Lucas, who bore in mind the criticisms of the earlier investigation. None of these individuals were named, criticised or impugned in the claimant's earlier disability discrimination proceedings. There is no evidence that any of them even knew of the claimant's earlier proceedings at the time they took their various decisions.
103. Finally, the claimant complains of his dismissal, including the rejection of his appeal. These decisions were taken by Mr Lucas and Mr Trent. Again, neither of these individuals were named, criticised or impugned in the claimant's earlier disability discrimination claim. Both of these senior managers gave measured and credible evidence,

and they each denied that their decisions were in any way influenced by the claimant's earlier Tribunal proceedings. The actions which they both took at the disciplinary hearing and appeal hearing stages were consistent with the investigation report and the available evidence before them.

104. The point is correctly made on behalf of the claimant that these allegations of detriment do not have to be linked and all proven in the round, but rather that each allegation can amount to a stand-alone allegation. I accept this submission, but there is simply no evidence that any of the detriments suffered were because the claimant had issued his earlier proceedings. All of the decisions taken were consistent with and in reliance upon the evidence before the various decision-makers.

105. The burden of proof is on the claimant. The claimant needs to prove some evidential basis upon which it could be said that these alleged detriments were because he had issued these earlier proceedings.

106. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

107. In my judgment the claimant has not discharged the burden of proof upon him. I cannot find on the evidence before me that the detriments suffered by the claimant were because he had issued his earlier Tribunal proceedings. Accordingly, I hereby dismiss the claimant's claim for victimisation under section 27 EqA.

108. The Unfair Dismissal Claim

109. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

110. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

111. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole, see Taylor v OCS Group Ltd.

112. In the first place I find that the respondent did hold the genuine belief that the claimant was guilty of gross misconduct. I accept Mr Lucas's evidence that he held this

genuine belief. Mr Trent reviewed the matter in detail at the appeal stage, and he concluded that it was reasonable for Mr Lucas to have held that belief.

113. Secondly, I find that there were reasonable grounds for the respondent to conclude that the claimant had committed gross misconduct. It is clear that Mr Lucas reviewed the evidence in considerable detail over a three day hearing. He rejected the allegation that the claimant had attempted to strangle Prisoner A because he felt that this was not proven on the balance of probabilities. Nonetheless on the evidence before him he concluded that it was more likely than not that the claimant had lost his temper. Given that there were other options available to diffuse the situation, he concluded that the use of force was not necessary or proportionate. Even though the allegation that the claimant had strangled Prisoner A was not proven, he concluded that the claimant's actions after the altercation in the office were needlessly aggressive. Mr Lucas confirmed in his evidence that he ultimately felt that the matter boiled down to an issue of honesty and lack of credibility.

114. In the first place, Mr Lucas found that the claimant had not used lawful force on Prisoner A when pushing him into the office, and that this use of force was not reasonable, necessary and could not be said to be no more than was necessary and proportionate. He found that the claimant's evidence lacked credibility in this respect. He also concluded that immediately after the altercation the claimant did not have full control of his emotions and he remained aggressive rather than giving his attention to managing the developing operational situation. Mr Lucas was concerned that the claimant had refused to accept responsibility for his actions and acknowledge that the use of force might not have been justified. It was only towards the end of the disciplinary hearing that the claimant accepted that he might have done things differently but still refused to accept that his use of force had been unjustified. At the appeal hearing stage the claimant eventually accepted that the use of force might not be necessary and that there were other options available to him.

115. Given the detailed investigation report, which included the evidence of the witnesses who were present, the specialist report from Mr Hunt, the CCTV evidence, and the fact that the claimant had changed his version of events with regard to the reasonableness of the use of force and justification for it, in my judgment it was reasonable for Mr Lucas to hold the belief that the claimant had committed gross misconduct. That was also the view of Mr Trent on appeal after he considered the matter in detail.

116. The next matter to be considered is the fairness of the investigation. The claimant raises a number of criticisms, which I deal with in turn.

117. With regards to the initial delay, and the fact that Mr Simpson did not complete his report within 28 days as originally directed under the policy, I do not find that this was a substantial, unreasonable or prejudicial delay. There were justifiable operational reasons why Mr Simpson took longer than had been originally envisaged. It was not uncommon for investigations to run over the best practice requirement of 28 days. The delay in Mr Simpson producing the report was about a month, but this did not materially prejudice the claimant, particularly given the fact that there was CCTV footage of the incident in question. Mr Trent considered the matter as requested on appeal, and my judgment was entitled to find that the delays in the process was not excessive and did not materially disadvantage the claimant.

118. Secondly, the claimant criticises the investigation by Mr Simpson on the basis that a number of the questions of the various interviewees were leading questions. This is a fair criticism which was acknowledged by Mr Lucas. Not all of the questions were leading, and the evidence cannot in my judgment be said to be unreliable for this reason. This is because the claimant and his experienced representative Mr Hogg were given every opportunity to question those witnesses in detail, before the decision officer Mr Lucas who was aware of this point and agreed that the witnesses should be tested accordingly. Mr Lucas was entitled to form the view that the original investigation was not fundamentally flawed or unsafe, and he was entitled to reach his decision in the knowledge that this criticism had already been raised, and that he, the claimant and Mr Hogg were all aware of it, and had proceeded accordingly.

119. Next the claimant raises the criticism that he was not involved or questioned at the Decision Log stage. The respondent has provided an explanation for this, namely that the

claimant was on leave and had already provided his contemporaneous Use of Force statement. In any event the claimant was not precluded from giving his account or version of events at any stage during the process.

120. The claimant criticises Mr Daddow's email to Mr Hunt instructing him to prepare his report. The claimant suggests that this did not provide context and impermissibly provided Mr Daddow's opinion rather than a neutral instruction. I do not consider that this renders any subsequent disciplinary process unfair. Mr Hunt was able to view the CCTV footage, and the claimant was able to explain his account to him. There is no evidence that Mr Hunt prepared a report based unfairly on persuasive comments from Mr Daddow, rather than his own specialist knowledge and expertise.

121. Another complaint is that the charges against the claimant were not properly explained. This was raised for the first time at this hearing, and it was not included in the claimant's original criticisms. In particular, it is now argued that the allegation of "Unprofessional Conduct" was not explained, and developed into lack of credibility and dishonesty, which were serious allegations of gross misconduct which were never formally explained to the claimant as charges which he had to meet. The difficulty for the claimant in pursuing this argument is that the respondent was not to know that the claimant would give varying accounts as the process developed. In addition, it is clear that the claimant was given every opportunity, in the presence of his chosen colleague Mr Hogg who was a senior and experienced representative, to give his version of events both in connection with the use of force applied, and his justification for it. In my judgment it cannot be said that the claimant was unfairly prejudiced because he was not informed in advance of the possibility that the respondent might dismiss him because of lack of credibility, dishonesty or a fundamental breakdown in trust when the claimant had not yet changed his version of events. The claimant knew all along that the disciplinary process involved what was perceived to be unnecessary use of force and unprofessional conduct, and he had every opportunity throughout the process to explain his position in full.

122. The claimant complains that at the disciplinary hearing Mr Lucas refused to allow the claimant to call two witnesses namely Mr Ball and Nurse Hampshire. This was true, but it was on the basis that he accepted their evidence which was not directly relevant and which did not need to be challenged. In addition, and in any event, Mr Lucas was prepared to proceed on the basis that the allegations with which they might have helped, namely that the claimant had attempted to strangle Prisoner A, was not proceeding on the basis that the evidence in that connection could not make out that charge on the balance of probabilities. In my judgment this was a legitimate and reasonable way to proceed.

123. Another criticism is that Mr Trent was guilty of a lack of effort or preparation in hearing the appeal. However, Mr Trent's evidence was that he had spent a considerable period of time reading all of the relevant paperwork in detail in advance, including the 200 page transcript of the disciplinary hearing, and he had seen the CCTV footage on the morning of the hearing. His evidence was that he had dealt with the matter conscientiously and responsibly. There is no evidence that Mr Trent failed to engage with the points which the claimant had specifically raised. Indeed, the contrary is the case, because Mr Trent considered various procedural matters even though on the face of it the claimant confirmed that he had no appeal on the basis of inappropriate procedure or breach of natural justice.

124. I also reject the allegation that there was inconsistency of treatment as regards the claimant's dismissal by reference to the sanctions received by Mr BB and Mr YY. For the reasons explained above in my findings of fact, these two cases were insufficiently similar and cannot be said to be truly parallel to the circumstances pertaining to the claimant. In particular, the claimant's case involved a senior manager whom the respondent had considered had failed to take responsibility for his actions, and whose changing version of events that led to an irretrievable breakdown in trust. That was simply not the case with Mr BB and/or Mr YY.

125. In conclusion therefore I find that the respondent's investigation was fair and reasonable in all the circumstances of the case, and within the band or range of reasonable investigations which were open to it. Put another way, I find that at the stage at which the

respondent formed its belief that the claimant had committed gross misconduct, it had carried out as much investigation as was reasonable in the circumstances of the case.

126. Finally, I turn to the issue of whether the sanction was fair and reasonable. It is important that the claimant was a senior manager with 28 years' service and a clean disciplinary record. This was taken into account by Mr Lucas the dismissing officer, and on review at the appeal Mr Trent did not consider the dismissal be unreasonable in the circumstances. Ultimately this matter boiled down to one of credibility and honesty. As confirmed by Mr Trent in his dismissal letter his view on behalf of the respondent was this: "Given the lack of credibility in your statements throughout the process, particularly given your role as Operational Manager, I do believe that the working relationship between employer and employee has irretrievably broken."

127. It is not permissible for this Tribunal to substitute its view for that of the employer. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. In my judgment, given both the unjustified use of force and lack of credibility, I find that dismissal was within the band of responses reasonably open to the respondent when faced with these facts.

128. Accordingly, I find that even bearing in mind the size and administrative resources of this employer the claimant's dismissal was fair and reasonable in all the circumstances of the case, and I therefore also dismiss the claimant's unfair dismissal case.

129. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 81; a concise identification of the relevant law is at paragraphs 82 to 91; how that law has been applied to those findings in order to decide the issues is at paragraphs 92 to 128.

Employment Judge N J Roper
Date: 12 March 2021

Judgment & Reasons sent to Parties: 23 March 2021

FOR THE TRIBUNAL OFFICE