EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Flaxman	**v**	The Secretary Of State for Justice

Heard at: Norwich (by CVP) **On:** 01, 02 & 03 March 2021

Before: Employment Judge Postle

Appearances
For the Claimant: In person.
For the Respondent: Mr Ruck Keene, Counsel.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

1. The claimant was not unfairly dismissed.

2. The claimant's claim for notice pay is not well founded.

REASONS

1. This is a claim for unfair dismissal together with notice pay. The issues before the Tribunal have been agreed in a document headed 'An Agreed List of Issues'. Basically the claimant advances his argument that his dismissal was both procedurally and substantially unfair for the reasons that are set out in the above referred document.

2. In this Tribunal we have heard evidence from Mr Clark the Deputy Governor of Norwich Prison, Mr Reilly at the relevant time was the Director of the Hertfordshire, Essex and Suffolk Prison Group and is now the Deputy Director of Prisons. They all gave their evidence through prepared witness statements. The claimant also gave his evidence through a prepared witness statement.

3. The Tribunal also had the benefit of a bundle of documents consisting in the end of 531 pages and the Tribunal were also assisted by the following written papers; the opening submissions on behalf of the respondent, the chronology prepared by the respondent, the closing submissions on behalf of the claimant and the closing submissions on behalf of the respondent to which I am grateful for.

Findings of Fact

4. The facts of this case are largely agreed save perhaps the interpretation of those facts.

5. The claimant commenced work with the respondents in February 1996. At that stage he was a Prison Officer at HMP Norwich, he was subsequently promoted to the role of Custodial Manager. That was a temporary promotion in August 2017. The claimant was summarily dismissed from the respondents on 14 September 2018.

6. The claimant had been in a relationship with a person known as Person A who was a nurse based also HMP Norwich. As a result of their relationship a child came about, that child at the time or the relevant time was approximately 3 years of age. Sadly the couple's relationship ended in or about middle 2017 and in October 2017 the parties were involved in the family court in relation to proceedings for that child.

7. The respondent received an intelligence report around late 2017 that the claimant was said to have engaged in harassing, intimidating and bullying behaviour towards Person A. Apparently Person A had informed the respondents that she had been threatened by the claimant via email, text messages and other social media, and that she had reported the claimant's behaviour to the police.

8. The respondents were notified in December 2017 that what is described as a harassment pin number had been assigned to the claimant and the prison service were to monitor his contact activity with Person A. Further information was collected in relation to the period May 2017 to November 2017 which suggested numerous emails between the claimant and Person A mostly of a personal nature regarding the care of the child and that some of the material was argumentative in nature.

9. On the 4 January 2018 the police attended the prison in Norwich and arrested the claimant to investigate offences of alleged harassment reported by Person A. The then Governor at Norwich prison,

Governor Clark was subsequently informed by Norfolk police that the claimant had been placed on bail until 1 April 2018 apparently that was incorrect information as part of an ongoing police investigation. As a result of the information received by Governor Clark from the Norfolk police, when the claimant attended the prison for work on 5 January 2018 following being released from police custody Governor Clark met with the claimant, suspended him on full pay. This was in light of his arrest given the surrounding ongoing police investigations. Further that the Governor was under the mistaken belief it is accepted that the claimant was subject to police bail. What is clear is that is what the respondents were informed at the relevant time.

10. It was therefore considered appropriate to suspend the claimant rather than place him on alternative duties and the claimant was duly issued with a suspension letter at page 127 which sets out the obligations and duties whilst on suspension.

11. The claimant emailed at page 129 a Mr Cartwright then the acting Director of East Prison Group. He appealed against his suspension and that was on the basis that he had not been placed on police bail as the respondents had erroneously been informed. The claimant further emailed Mr Cartwright again on 6 January at page 131 and also Governor Clark on 8 January at page 132, again requesting that his suspension be removed.

12. Governor Clark confirmed to the claimant on 8 January that the police had briefed him and confirmed now that the claimant was not in fact subject to police bail and that he had been released pending further investigation.

13. On 9 January the claimant again emailed Mr Cartwright at page 136 together with Governor Clark and a Rachel Martindale who was Operations Manager for East Prisons Group, again requesting that his suspension be lifted.

14. Miss Martindale responded to the claimant on 10 January advising that the claimant's suspension would be reviewed at a meeting on 15 January. That review meeting did take place and the claimant was sent a letter on 16 January at page 141 confirming that his suspension had been lifted and he was able to return to work.

15. In the meantime the claimant emailed the governing Governor Ms Bevan on 18 January at page 142 and set out a detailed account of the claimant's version of events that led to his arrest.

16. The prison security department were informed that the claimant having attended a family court hearing on 7 March in relation to the child, the police attended and shortly after the hearing the claimant was again arrested for harassment in relation to Person A. There were bail conditions this time set and that was the claimant was not to contact Person A except for the purposes of arranging childcare.

17. Once the respondents because aware of the claimant's second arrest and the nature of the bail conditions imposed the claimant was again suspended on 9 March following his release from police custody and at his attendance at Norwich prison. Deputy Governor Clark held a meeting with the claimant suspending him on full pay and at page 144 the letter confirming and the reasons for it, namely his second arrest, the ongoing investigations into his behaviour and the bail conditions which stipulated he should not contact Person A for non-child related reasons. The respondents deemed it was appropriate to suspend the claimant again rather than place him on alternative or detached duties and this in part was clearly due to the fact that Person A worked within Norwich prison.

18. Rachel Martindale again emailed the claimant on 13 March informing him that his suspension would be reviewed regularly by the Governor or the Deputy Governor and we see that at page 146.

19. The claimant emailed Mr Cartwright and Governor Clark on 19 March appealing his suspension and that is at page 147.

20. Governor Clark responded to the claimant on 21 March confirming that his suspension had been reviewed with the outcome that he should remain suspended again on full pay due to the nature of the arrest charges and the fact that there were still live ongoing investigations taking place (page 149).

21. On 29 March the Head of Security informed Governor Clark that the claimant had entered a not guilty plea and the case had now been adjourned to the 4 May. Bail conditions again, not to enter Person A's home road, surrounding roads and not to contact her directly or indirectly until the family court proceedings had come to an end.

22. The claimant again emailed Mr Cartwright on 16 April appealing his suspension and requested a transfer to HM Prison at Bure (page 152).

23. Rachel Martindale responded to the claimant on 17 April confirming that as part of the regular suspension reviews that had taken place detached duty had been considered and was deemed inappropriate due to the potential seriousness of the charge against him along with the risk imposed allowing him access to HM Prison's systems, reference to computer systems (page 154).

24. The criminal hearing listed for 4 May was subsequently adjourned to the 1 June 2018. At the hearing on 1 June the claimant pleaded not guilty to the charge of harassment and it was listed for a full trial at the Norwich Crown Court on 23 August.

25. In the meantime the respondents were informed on 14 August the claimant had been arrested again for alleged breach of bail conditions, apparently Person A had informed the police that she had been receiving calls from the claimant's eldest daughter's mobile phone. The claimant's daughter

who was a prison officer at HMP Bure appears to have informed the police that her father, namely the claimant had been using her phone to contact Person A and it was for this reason that the claimant was arrested. Which phone was used whether it was the claimant's or the claimant's daughter it matters not. A hearing was listed on 14 August and the claimant was remanded in prison due to the breach of his bail conditions which had been previously imposed.

26. HM Norwich Prison is a remand prison the respondent therefore made arrangements for the claimant to be remanded at Peterborough prison to avoid potential problems being a prison officer coming into contact with prisoners that he may have looked after.

27. The two offences of harassment and breaching bail conditions were consolidated apparently at a hearing which was listed at Norwich Magistrates Court for 20 August.

28. On 20 August the claimant having been asked how he wished to plead, wanted to change his plea, and pleaded guilty to both charges and the claimant received a Community Order and at that stage a 5 year restraining order and further was ordered to pay compensation. This appears to be the maximum penalty that the Magistrates could award and perhaps reflects the court's view of the severity of the offences at the time committed by the claimant.

29. The claimant emailed Governor Clark on 24 August stating that he had only pleaded guilty to the offences to avoid his continued remand in custody for an offence which the claimant said could not result in a custodial sentence. He informed Governor Clark that he intended to appeal his convictions which were the subject of his guilty pleas.

30. Governor Clark wrote to the claimant that on 30 August in accordance with the respondent's policies where a person had been convicted of a criminal offence informing him of his intention to summary dismiss from the prison service. The claimant was invited to attend that meeting to discuss the proposed decision to summary dismiss for a meeting on 4 September. The claimant was informed of his right to be accompanied by a Trade Union representative or a work colleague.

31. The claimant responded to Governor Clark by way of a letter dated 2 September at page 188 stating that he was unable to attend the meeting on 4 September or any future meeting at HM Norwich because of his state of mind. In that letter the claimant made lengthy erudite representations regarding summary dismissal which he believed in the circumstances was an inappropriate sanction.

32. Governor Clark emailed the claimant on 3 September at page 186 using the same email address as been previously used for the claimant, stating that in the interests of being reasonable and to assist the claimant the meeting would be deferred to 14 September and could be held at a venue

other than the prison at Norwich which would alleviate any stress that might have been caused to the claimant in having to attend Norwich prison. Governor Clark further stated that if the claimant did not wish to attend the re-arranged meeting that he would then use the claimant's submissions previously submitted and/or the Prison Officers Association representative could attend in the claimant's absence. The claimant was also reminded of the various employer assistance support programmes that were available to prison officers.

33. The claimant nor his POA representative attended the rescheduled meeting on 14 September and Governor Clark did not receive any correspondence confirming that the claimant was not going to attend. The claimant alleges he did not receive Governor Clark's email of 3 September which is odd given that the correct email address for the claimant appears to have been used and apparently the email did not bounce back as an undelivered email. In fact oddly on 14 September the claimant was seen outside HM Prison Norwich for reasons best known to the claimant.

34. Following the meeting which was held in the claimant's absence, Governor Clark then wrote to the claimant on 14 September notifying him that he was going to be summary dismissed from the prison service. Governor Clark confirmed that he had taken into account the claimant's written submissions however due to the criminal conviction which the claimant had pleaded guilty to being a harassment charge coupled with a remand in a prison at Peterborough the future relationship between the claimant and the prison service was now untenable (page 209). The claimant was informed of his right of appeal against that decision and Governor Clark sets out in that letter how an appeal should be submitted. Again the claimant is informed that at, an appeal he could be accompanied by his Trade Union representative or a work colleague.

35. The claimant wrote to Governor Clark on 18 September confirming his intention to appeal the decision to summary dismiss him and requested a hearing in person. The claimant highlighted that the letter which Governor Clark had sent to him on 14 September had not attached the required F15B form, apparently this form was sent to the claimant around the 19 September.

36. Mr Monaghan the Prison Group Director was appointed to hear the claimant's appeal. The respondent's Conduct and Disciplinary Policy stated that the appeal must be by a member of staff one grade superior to whoever made the decision to dismiss so it was appropriate that Mr Monaghan was appointed. However, Mr Monaghan incorrectly believed at that stage that the claimant had been held in custody and therefore dealt with the claimant's appeal on paper by considering all the documentation from the disciplinary hearing and various communications from the claimant.

37. Mr Monaghan did write to the claimant on 24 September informing him that he had reviewed the decision made by Governor Clark to dismiss him and upheld that decision on the basis that his conviction complied with the criteria to dismiss under the summary dismissal procedure. That the claimant was convicted on 20 August of harassment and breach of bail where he received a community sentence and that the claimant had been remanded in HM Prison Peterborough due to breach of bail conditions for continued harassment. Mr Monaghan concluded that the claimant's conduct and behaviour was not fitting of a serving prison officer and as such it made future relationship between the prison service and the claimant untenable.

38. The claimant then wrote a lengthy letter to Mr Monaghan on 11 October detailing the events surrounding his criminal conviction including letters from Norfolk police and suggested that Mr Monaghan's decision to uphold the dismissal decision did not fall within the band of a reasonable response and that Mr Monaghan had not followed the correct procedure within the Conduct and Disciplinary Policy in effect the claimant was saying he was entitled to a hearing in person.

39. Following receiving the claimant's letter of 11 October and advice from HR, Mr Monaghan became aware that firstly the claimant was not in custody and therefore the correct procedure under the Conduct and Disciplinary Procedure would have been to hear the claimant's appeal in person. In order to rectify that error Mr Monaghan agreed the claimant be given a further opportunity to appeal the decision to summary dismiss him and to avoid any perceived unfairness a Mr Reilly was appointed to hold a fresh appeal hearing with the claimant attending in person.

40. Mr Reilly wrote to the claimant on 29 October inviting him to an Appeal Hearing on 13 November in that letter the claimant was informed of his right to be accompanied by a Trade Union representative or work colleague.

41. On 5 November the claimant emailed Karen Edwards Office Co-ordinator for the Prison Group Director attaching two documents for Mr Reilly's consideration prior to the appeal hearing. One of those documents was the letter dated 31 October 2018 which is at page 278. In response to the invitation to the Appeal Hearing the claimant indicated that his representative was going to be a barrister who would attend the Appeal Hearing. The claimant also included lengthy submissions which form the basis of his appeal against summary dismissal. The second document was a lengthy statement focusing on the claimant's grievance which he had now lodged as well and complaints about the criminal proceedings which he felt had been motivated unlawfully.

42. Miss Edwards emailed the claimant on 5 November, informed that whilst the claimant was entitled to bring a Trade Union Representative or work colleague he was unable to bring a barrister to any Appeal Hearing.

43. The Appeal Hearing duly takes place on 12 November. In attendance was; Mr Reilly, a representative from HR, the claimant and Miss Edwards as a notetaker and the minutes of that meeting are page 288.

44. It is clear the claimant stated his ground of appeal was that the penalty was too harsh. Mr Reilly appears to acknowledge the claimant was pursuing an appeal against his criminal conviction and highlighted that whilst the process was continuing the position remained that the claimant was convicted of a criminal offence which resulted in a Community Service Order and at that stage a 5 year restraining order which was a severe penalty probably at the highest end of the scale that could have been awarded in the circumstances. Mr Reilly asked the claimant if he wished to submit any further information in support of his appeal and the claimant referred Mr Reilly to the Conduct and Disciplinary Procedure highlighting the section which relates to staff who receive community orders. The claimant re-iterated that he believed his dismissal was too harsh a sanction in relation to the offence and the sentence which was imposed. The claimant also stated he had no knowledge of the summary dismissal meeting which had been re-arranged for 14 September despite the fact that an email had been sent to the claimant's email address used on previous occasions without problem. The meeting was concluded with Mr Reilly saying that he would confirm his decision in writing.

45. Mr Reilly wrote to the claimant on 13 November confirming his decision to uphold Governor Clark's decision to dismiss from the respondent's service at page 290. The reason for that decision; the claimant had pleaded guilty, he had been convicted of a charge of harassment, as a result of the conviction the claimant received a 12 month community order requiring 250 hours of community service to be completed, to attend a 'Building Better Relationship' course and he had also received a 5 year restraining order. The Conduct and Disciplinary Policy states that the summary dismissal procedure can be used for a member of staff with a criminal conviction and that in Mr Reilly's opinion summary dismissal was proportionate to the offence committed. Furthermore Governor Clark had sufficient concerns about the claimant's continued employability and the implications this would have given the claimant's position as a prison officer. That the conviction was against another member of staff and that this type of behaviour was not acceptable or tolerated by the prison service. The fact that the claimant breached his bail conditions, and there was a breach of trust with the respondents which resulted in his remand to a prison and that the claimant's conviction was serious enough to make any further employment relationship impossible because of the breakdown of trust and confidence.

46. The respondent's policies on conduct and discipline PSI06 2010 does convey a discretion as to the disciplinary procedure that should be applied in the particular circumstances and clearly states at 4.2 that if a member of staff has been convicted of a criminal offence it may not be necessary to undertake an investigation and the summary dismissal procedure may be used. There is an Annex A to the policy which states that for staff

convicted of criminal offences a case by case approach will be adopted but the key questions will be what affect that conviction will have on the individual's employability and any future relationship of trust within the respondent organisation.

47. The policy also states that where a member of staff receives a community sentence it is for the appropriate manager to consider what disciplinary actions or other steps are necessary and proportionate to the offence committed. The summary dismissal procedure within the Conduct and Disciplinary Policy is discretionary and may be used where it is considered proportionate to the conviction the staff member has received.

48. It is also noteworthy that the Conduct and Disciplinary Policy sets out that the respondent's staff are expected to meet high standards of professional and personal conduct and they are personally responsible for their conduct and presumably whether in or outside the workplace at page 408.

The Law

49. The starting point is of course s.94 of the Employment Rights Act 1996 which gives the employee the right not to be unfairly dismissed by his employer and s.98 further provides as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
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> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
> …
> (b) relates to the conduct of the employee,
> …"

Subsection 4 states as follows:

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends 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."

50. The starting point in looking at s.98(4) should always be in applying the section, a Tribunal must consider the reasonableness of the employers conduct not simply whether the Tribunal considers the dismissal to be fair in judging the reasonableness of the employer's conduct. Tribunals must not substitute its decision as to what was the right course to adopt for that of the employer and in many although not all cases there is a band of reasonable responses to the employer's conduct within which one employer might reasonably take one view and another quite reasonably takes another.

51. So the function of the Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell with the band of a reasonable response which a reasonable employer might have adopted. If the reason falls within the band the dismissal is fair, if the dismissal falls outside the band it clearly will be unfair.

52. So, clearly in establishing the reason for dismissal it is trite law following British Home Stores Ltd v Burchell [1980] ICR 303 EAT, that the employer must show that it believed the employee was guilty of misconduct, it had in mind reasonable grounds upon which to sustain that belief and at the stage at which the belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances. This means that the employer need not have conclusive direct proof of the employee's misconduct only a genuine and reasonable belief reasonably tested.

53. So, where conduct is admitted little purpose would be served by an investigation. Indeed, the courts have said and the Court of Appeal, where an employee has pleaded guilty to an offence, a criminal offence it would be ridiculous to conclude that the employer did not have reasonable grounds for believing that the offence had been committed. The Royal Society for the Protection of Birds v Croucher [1984] ICR 604 EAT and P v Nottinghamshire County Council [1992] ICR 706 CA.

54. So where an employee is convicted of a criminal offence and that fact is clearly established, the respondents are only required to make such enquiries or investigations as are reasonable in the case prior to dismissal. However, the reasonable test contained in s.98(4) must still be applied and the employer must consider whether the conduct itself warranted dismissal.

55. It is also worthy of note that conduct of an employee is not limited to the workplace, it will cover conduct or events outside the workplace which adversely impact the employer-employee relationship. The Employment Tribunal reminds itself that the decision of the Tribunal is whether on the facts which were known or ought to have been known to a respondent they genuinely believed on reasonable grounds that the employee was guilty of misconduct.

Conclusions

56. Clearly the potentially fair reason for dismissal was misconduct and there is clear evidence before this Tribunal that the reason for the claimant's dismissal was that conduct.

57. Further, did the respondent genuinely and honestly believe in the claimant's misconduct? He pleaded guilty to two counts of harassment contrary to sections 21 and 22 of the Protection of Harassment Act 1997. Clearly Governor Clark and Deputy Director Reilly genuinely believed that, there is no doubt of that, there may have been some confusion prior to the 14 September as to the exact nature of the charges. However what is clear is that when the decision was taken Governor Clark had in mind that following a period, a reasonably long period of harassment by the claimant and he had been arrested on a number of occasions certainly on one for breaching his bail conditions, he had been remanded in custody, pleaded guilty whatever the claimant's motives in pleading guilty, the fact remains he did plead guilty and was therefore convicted of two charges. That is a fact.

58. So, did the respondents have reasonable grounds for that belief? Clearly they did.

59. Did the respondents conduct or need to conduct further investigation into the claimant's misconduct prior to his dismissal? What further information could have been obtained by conducting an internal investigation? There would have been exactly the same representations the claimant was making in his correspondence to Governor Clark, Governor Bevan and ultimately Deputy Director Reilly.

60. Should Person A have been interviewed/investigated? What purpose would that have served? Person A would simply have repeated her allegations that she had made to police. The police had conducted an investigation, that had been overseen no doubt by the Crown Prosecution Service and charges were proceeded with in the courts and ultimately the claimant pleaded guilty to those charges.

61. Clearly there was no requirement for an internal investigation by the respondents. There was no defect in them not carrying out an internal investigation. It would have been as the Court of Appeal said ridiculous in the circumstances.

62. The respondents also had clear policies, PSI06 2010 at 4.2, that if a member of staff has been convicted of a criminal offence yes it is a discretion, it may not be necessary to undertake an investigation and the summary dismissal procedure may be used. Yes, it is a discretion but in the eyes of Governor Clark he felt on the facts given the conduct that he was aware of, the charges and the fact the claimant had pleaded guilty it was appropriate to use the policy of summary dismissal procedure. The

policy goes on to say that if staff are convicted of a criminal offence they can be dealt with under the summary dismissal procedure.

63. Further, the claimant had prior to dismissal and the appeal provided lengthy submissions about his case and why dismissal in his view was not an appropriate sanction. Furthermore in the claimant's view the offence he had committed was not so serious as to warrant his dismissal.

64. The claimant accepted he had been arrested for breach of bail conditions, he pleaded guilty to charges of harassment and again whatever his motives were in changing his plea the fact remains he pleaded guilty to those charges. The policies clearly state the process that could be followed which is to proceed to summary dismissal and also the offences for which the claimant was charged quite clearly whatever the claimant says do carry the potential for a custodial sentence. Each case one accepts terms on their own facts.

65. Whether the claimant should have been remanded in custody in the course of the proceedings is not a matter for the Tribunal and if it was an error the fact of the matter was that, that information had been passed to the respondents and the respondents were genuine in their belief that he had been remanded in custody. There was no reason why the respondent should believe that that remand in custody was in anyway unlawful.

66. Furthermore, the claimant was given an opportunity to meet with Governor Clark on two occasions. He chose not to do so. On balance the claimant was aware of the second meeting, there is no suggestion that the email address was incorrect or had bounced back as undelivered. In any event the claimant accepted in cross examination there is nothing further by way of mitigation or explanation that he could have advanced had he attended that further meeting.

67. With respect to the Appeal, clearly there was a mistake at the outset by Mr Monaghan. That error was rectified and a new Appeal Hearing in person was afforded to the claimant. The fact that Mr Reilly did not have a proforma regarding the appeal did not affect the process. The claimant made it clear the grounds for his appeal, Mr Reilly clarified the grounds of appeal and those were explored at the appeal meeting and those were the claimant felt the sanction of dismissal was far too harsh. The appeal process the Tribunal is entirely satisfied was fair and Mr Reilly gave due consideration to the claimant's representations and gave clear reasoning for upholding the decision to dismiss in his outcome letter to the claimant at page 290.

68. So to conclude, the respondents clearly did believe the claimant was guilty of misconduct, it clearly had reasonable grounds upon which to sustain that belief and at that stage given the police investigation, the plea of guilty further investigation would have made no difference whatsoever to the outcome.

69. Further, the sanction of summary dismissal was one clearly available to the respondents and fell within the range of a reasonable response open to the respondents given the circumstances and the facts of the claimant's position.

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Employment Judge Postle

Date: 20 April 2021

Sent to the parties on: 27 April 2021

For the Tribunal Office