EMPLOYMENT TRIBUNALS

Claimant: **Mr G Pond**

Respondent: **Secretary of State for Justice**

Heard at: **via CVP** **On: 15/3/2021 to 17/3/2021**

Before: **Employment Judge Wright**

Representation:
Claimant: **Ms A Kennedy – FRU Volunteer**

Respondent: **Ms L Price - counsel**

LIABILITY JUDGMENT

It is the Judgment of the Tribunal that the claimant's claims of unfair dismissal and wrongful dismissal fail and are dismissed.

REASONS

1. The claimant presented a claim of unfair dismissal on 5/12/2019. The respondent claims the dismissal was for the fair reason of conduct.

2. The claimant was a Prison Officer from 11/5/1991 until his summary dismissal on 14/10/2019 following an incident on 26/4/2019. He claims unfair dismissal and wrongful dismissal (notice pay).

3. The Tribunal heard evidence from: Ms Jeanne Bryant Governing Governor at HMP Wandsworth and dismissing officer; and Ms Sarah Coccia Prison Group Director for London Region. For the claimant the Tribunal heard from Mr Callum Dunn a Prison Officer. All of these witnesses have since changed roles, however these were their job titles at the relevant time. The claimant also gave evidence on his own behalf.

4. The claim was listed for a three-day hearing at a preliminary hearing on 16/6/2020. The Tribunal had before it an agreed bundle of 340-pages. The claimant had produced a mini-bundle of 20-pages referred to as 'GP exhibit' shortly before the hearing started. The respondent objected to its inclusion due to the late disclosure, not having had time to deal with it and that it was not in-line with the Order for Directions. As such, Ms Price said there was prejudice to the respondent. Ms Kennedy said that she had only recently been instructed and that was the reason for the late disclosure. The GP exhibit bundle comprised some text messages which would only be relevant to remedy, two three-line GP letters, a list of medication, statements of fitness for work and Occupational Health (OH) reports. The Tribunal allowed the GP exhibit bundle to be included. The majority of the documents had been seen by the respondent, even if they had not been included in the disclosure. Ms Price could take instructions while the Tribunal was reading in and could if necessary, ask supplementary questions of her witnesses in respect of any matters arising.

5. On the second day the respondent produced a further mini-bundle comprising the full OH reports (as the claimant's were incomplete) and one further email it had managed to source. Ms Kennedy pointed out that only documents which had been before the disciplinary or appeal officer were relevant. The complete OH reports did assist the Tribunal and the email was of no real relevance (although reference to it had come up during cross-examination). Ms Kennedy was also granted a short adjournment to take instructions.

6. Both representatives made oral closing submissions, supplemented by a written statement.

Findings of fact

7. The claimant had been absent from work due to ill health in the early part of 2019. There are four statements of fitness for work from the claimant's GP in the GP exhibit bundle (pages 5-8). They are slightly contradictory.

The first dated 8/2/2019 stated the claimant is unfit for work due to ‘arm pain awaiting a neuro assessment from 5/2/2019 until 4/3/2019. The same GP (Waterside Medical Centre) on 8/3/2019 stated the claimant had the condition of ‘shoulder pain’ and he may be fit for work from 5/3/2019 until 11/3/2019 with a phased return to work and altered hours ‘until seen by’ OH.

8. The claimant was also assessed on 12/2/2019 because of shoulder pain and the certificate said that he may be fit for work with amended duties of three shifts per week from 5/2/2019 to 28/2/2019.

9. Another assessment on 14/2/2019 for the claimant’s ‘arm pain under assessment’ stated he may be fit for work with a phased return to work and altered hours, with a ‘return to work on 5/3/2019 working a maximum of three shifts per week for three weeks’ for the period 12/2/2019 to 5/3/2019.

10. In any event, the claimant was seen by OH on 27/3/2019. Page 14 of the claimant’s GP exhibit bundle is dated 27/3/2019, is addressed to Mr Garry Keen Custodial Manager and refers to a referral for the claimant. It states:

> ‘[The claimant] was fit to return to full duties today. No further work adjustment was required.’

11. The claimant returned to work in mid/late March 2019 and he undertook some shifts. He then contracted a chest infection and was off work for a further two weeks[1]. When he returned to work, he did not return to his usual workplace of the Segregation Unit, but he was placed on the Trinity Unit. It is accepted there was no return-to-work meeting. Ms Coccia said that the return-to-work meeting did not necessarily take place immediately upon the return to work and that one would be scheduled in due course. The upshot was that the claimant had returned to work after two periods of sickness absence, OH had however confirmed on 27/3/2019 he was fit for work and no further adjustment was required.

12. The claimant’s fourth shift on the Trinity Unit was on 26/4/2019. The claimant was up to date with his use of force training and said the last time he did the training was probably around eight months before the incident.

13. At approximately 17.45 on 26/4/2019 there was an altercation between the claimant and Prisoner A on level 3 of H Wing. A left his cell after it was unlocked for evening association. A was heading for a shower and was wearing flip flops. This was a breach of health and safety rules and the claimant asked A to return to his cell to put on his trainers.

[1] There was no medical evidence in respect of this period of absence.

14. The CCTV footage of the incident was viewed and what was described, could been seen (without any sound). There was then a period of approximately two minutes when A was inside his cell and the claimant was on the threshold of the cell. Nothing else can be seen from the CCTV footage during that period of time.

15. The next image is of A leaving his cell and the claimant then performed a control and restraint (C and R) manoeuvre on A.

16. It is the claimant's case that A was angry and abusive towards him whilst A was in the cell. The claimant also tried to get A to calm down and tried to close the cell door so that A could calm down, to no avail. The cell door was pulled away from the claimant by A. The claimant tried to close the cell door a second time and again, A reacted aggressively.

17. The claimant then says that when A exited the cell, he barged the claimant in the chest. The CCTV shows A leaving the cell, heading and looking left (he had previously exited and turned right) and then the claimant preformed the C and R manoeuvre on A.

18. There is then a period of approximately 22 seconds during which the claimant restrained A, before another officer arrived to assist.

19. The end result was that A was then taken to the segregation unit and the claimant also went to the unit to complete his paperwork. On the Duty Governor's advice, the claimant attended A and E, however he left at 4am as it was so busy. He attended a walk-in clinic the following day.

20. The claimant was suspended on 29/4/2019.

21. On 8/5/2019 the claimant was informed the incident would be investigated by Governor Ardern who had been the Duty Governor on the 26/4/2019. The letter informed the claimant the alleged misconduct included assault/unnecessary use of force on a prisoner and unprofessional conduct. He was also referred to the Code of Conduct. This was repeated in the letter of 22/5/2019.

22. The claimant was interviewed on 17/5/2019 and on 23/5/2019 which was organised to show him the CCTV footage. Governor Ardern also interviewed A and the first and second responding officers. There were also written statements from prisoners on Wing H. The investigation report recorded the allegations as:

> '9 – Assault/unnecessary use of force on a prisoner
> 37 – Unprofessional conduct'

23. The investigation report also noted A was seen by a nurse and was given an ice pack.

24. The report's conclusion was that there was a disciplinary case to answer that the claimant had used unnecessary force on A and that by doing so, his conduct was unprofessional. The claimant was informed there was a disciplinary case to answer on 25/6/2019. The letter informed the claimant if proven, the allegations would constitute gross misconduct:

> 'The that force you used on [A] on 26/4/2019 was excessive and not proportionate.'

25. Governor Ardern's report set out the accepted alternative options open to the claimant, rather than to have used C and R. They were to have secured A in his cell, let A by and then called assistance or to have retreated from the situation and then to have taken other corrective action against A (put him on report or to have removed his privileges).

26. The Tribunal finds that it was reasonable for Governor Ardern to investigate the allegations. He was not a witness to the incident. He did visit A in the segregation unit after the incident in his role as Duty Governor. He subsequently interviewed all relevant parties as part of his investigation.

27. On 8/7/2019 the claimant was invited to a disciplinary meeting and was informed the three people (in addition to the claimant) Governor Ardern had interviewed would be present; in addition to Governor Ardern and that they 'would make a contribution as required'.

28. One of the claimant's criticisms is that he could not question Governor Ardern about whether or not A was injured. It was put to the claimant and it is accepted that Governor Ardern attended the disciplinary hearing whereupon the claimant could have questioned him. The issue however was not whether or not A was injured (the investigation report noted that he was). The allegation was whether the force used on A was unnecessary or excessive. In any event, the Tribunal finds it can take judicial notice that having viewed the incident on the CCTV footage and putting as neutrally as possible, A was grappled to the floor with some force. A would have suffered some injury as a result; as did the claimant. It is evitable that at the very least there would be some bruising. The claimant admitted he delivered one blow to A's head. Ms Bryant also drew the conclusion, having viewed the CCTV images that A would have been injured as a result of the altercation.

29. The disciplinary hearing took place on 29/7/2019. Ms Bryant commenced the hearing by asking the claimant to confirm he had received investigation report and the letter charging him with gross misconduct and

that the allegation was the force used on A was excessive and not proportionate. At the conclusion of the hearing, Ms Bryant took the decision to dismiss the claimant. Her summary reasons were that the claimant's judgement in restraining A was seriously flawed and as a result trust and confidence had irretrievably broken down. Ms Bryant went onto say that having asked the claimant on four occasions would he, on reflection, act differently; it was only on the final occasion the claimant express any possibility he would have acted differently. The lack of remorse or acceptance of wrongdoing was a concern for Ms Bryant and she could not be confident the claimant would not repeat his actions. Ms Bryant had taken into account the claimant's long service and his clean disciplinary record.

30. The outcome was confirmed in writing to the claimant (undated pages 329-330) and the claimant was offered the right of appeal, which he exercised. The grounds of appeal were the unduly severe penalty and that new evidence had come to light which could affect the original decision.

31. The appeal took place on 8/10/2019 before Ms Coccia. At the start of the hearing Ms Coccia stated that other than the appeal form, no other evidence had been submitted and the claimant agreed this was correct.

32. The claimant claims he attempted to hand a three-line letter from his GP to Ms Coccia during the hearing. The letter was dated 28/8/2019 and it is therefore not clear why it was not provided in advance of the hearing (albeit due to the length of it, it takes no more than a few seconds to read). Or, why it was not referred to when Ms Coccia asked about other evidence.

33. Ms Coccia said the claimant showed her a list of medication (page two of the letter) and asked if she would like to take a copy. She declined and said her note-taker would make a note. By contrast, the claimant said Ms Coccia refused to take the letter from him and so did not consider it.

34. Ms Coccia was a sound and credible witness. The Tribunal finds that having asked the claimant at the start of the hearing whether he had any additional (documentary) evidence to add, if a document was then offered to her, she would not decline to consider it. The Tribunal finds the claimant did no more than show the list of medication to Ms Coccia and she asked her note-taker to record it.

35. In a detailed appeal outcome letter dated 14/10/2019 Ms Coccia set out her reasons for upholding the decision to dismiss. The 'new evidence' from the claimant was considered and Ms Coccia's conclusions for

rejecting it were set out. The date of termination was confirmed as 14/10/2019.

36. The claimant was accompanied at all meetings during the process.

37. Ms Price stated that the reason for dismissal, conduct was not disputed. She invited the Tribunal to find there was a reasonable and genuine belief in the claimant's misconduct and that the respondent had in mind reasonable grounds upon which to sustain that belief. Ms Price submitted that it boiled down to the issue being that the claimant's argument was not accepted by the respondent.

38. There was no evidence that either decision maker had formed a predetermined view or that they did not consider the allegations in a fair manner and an open mind. The investigation was reasonable in all the circumstances. It was submitted therefore there were reasonable grounds for the respondent's belief in the claimant's misconduct.

39. It followed, Ms Price submitted that the decision to dismiss did fall within an acceptable range of responses, was therefore reasonable and fair. The policy sets out that using unnecessary force could be misconduct or gross misconduct. Force is only lawful if necessary if in self-defence or defence of others. Prison Officers are trusted to look after prisoners who as a result of their incarceration are vulnerable. The claimant had other options, he could have retreated (as per the policy) or let A walk away. There was no dispute the policy had been breached.

40. For the claimant, Ms Kennedy's submissions were that the finding of unnecessary use of force did not amount to gross misconduct as per the respondent's policy.

41. The conduct and discipline policy provides:

> '<u>Examples of misconduct</u>
>
> The main areas of potential misconduct in [the respondent] are set out below…
>
> Also see Gross Misconduct below and the <u>Service's Professional Standards Statement</u>
> …
>
> Fighting or assault on any other person;
>
> Use of unnecessary force on a prisoner;
>
> …

> Gross misconduct is repudiatory misbehaviour by a member of staff, i.e. conduct that shows that they no longer intend to be bound by their contract and, due to its serious nature, staff can be dismissed without notice for a first offence of gross misconduct.
>
> …
>
> Some examples of gross misconduct are:
>
> …
>
> serious unprofessional conduct;
>
> assault;
>
> …
>
> Serious cases of general <u>misconduct</u> may also amount to gross misconduct if they are of a nature that makes any further relationship and trust between [the respondent] and the member of staff concerned untenable.
>
> …'

42. The policy clearly states that misconduct and gross misconduct may overlap. The real issue is the severity of the conduct. There is a reference to 'some' examples of gross misconduct. It is fanciful to suggest that using unnecessary force on a prisoner cannot amount to gross misconduct. The severity of the allegation was made clear to the claimant throughout the process and it was also clear, one potential sanction was dismissal.

43. Another criticism from the claimant was the appointment of Governor Ardern as investigating officer. There was nothing in appropriate in this. Governor Ardern was not a potential witness. He was involved, as Duty Governor in the aftermath. He would not doubt have been told about the incident and indeed, he spoke to A (in his role as Duty Governor) in the Segregation Unit. There would have been speculation about the altercation and no doubt there would have been rumours and exaggeration about what had happened. Governor Ardern was alive to this and this was the reason he did not interview any other prisoner apart from A. Governor Ardern took the view that the prisoners had been talking amongst themselves and there was hearsay evidence. It was clear Governor Arden relied upon the CCTV footage and the statements from those involved whom he had interviewed. There was no conflict of interest in Governor Arden being appointed as investigating officer.

44. The claimant also contended that the CCTV footage was not clear when viewed at normal speed. What the CCTV footage did not show (which is accepted) was what happened in the cell and what took place immediately

before A exited his cell. The CCTV footage was never going to assist in this respect.

45. It was submitted it was unreasonable to prefer A's evidence. Ms Bryant is quoted as saying she had heard two different accounts of what had happened in the cell, but that she was not making a judgement on what had taken place. Ms Bryant reached the conclusion that if A had provoked the claimant whilst he was in his cell, that the proper course of action for the claimant would have been to retreat and to summon assistance. The claimant did not do this when he had the opportunity. He said that he could not have retreated once A had crossed the threshold of his cell to leave; however, he could have done so at an earlier point in the two minutes he was in the doorway of A's cell and during which period of time he said A was angry and getting more aggressive, was swearing at him and throwing things around. The claimant said he went to deescalate the situation and it was open to Ms Bryant to decide that could have included retreat before A went to leave his cell.

46. The claimant also said the evidence of the first officer to respond should be disregarded as it was inconsistent. By the time that officer arrived, A was on the ground and was grappling with the claimant. Any evidence that officer had to give was in dealing with the aftermath, it did not go to whether or not the claimant had earlier used excessive or unnecessary force on A.

47. It was submitted there was a lack of support for the claimant upon his return to work and that he should not have spent six years previously in the Segregation Unit. It is disingenuous to now argue the claimant's location during the previous six years had anything at all to do with his conduct on the 26/4/2019. It was acknowledged it was the claimant's first week back after a period of sickness absence and that he was new to H Wing. It was also put to the claimant that the same standards of C and R apply irrespective of where in the prison he was working. The respondent was entitled to take into account the claimant's very many years of service, his level of experience and the fact that when working in the Segregation Unit, the officers receive more extensive C and R training and that it is generally a more pressured environment than H Wing.

48. In respect of the support the claimant received when he returned to work at the appeal hearing he suggested that he had not been fit for work and was on various medications. Ms Coccia considered this and her view was that if the claimant was not fit, he should not have been at work. She also took the view that if the medication the claimant was on impacted on his decision making, then it was reckless of him to be at work. As Ms Coccia said, that was a matter for the claimant bring up as management could not have known this was going on in the background. Even if a return-to-work

meeting had taken place, the claimant would have presented himself as fit for work as that is what he led management to believe at the time and that accorded with the OH report.

49. Indeed, during the claimant's evidence it was concerning to hear him state that he had to time when he took pain medication carefully so that it did not impact upon him driving to work (86 miles each way) and make him dozy. It is not clear whether or not the claimant would then be dozy at work.

50. The claimant was aware of the possibility of adjustments which had been made in the past, such as a phased return to work. He had been signed as fit for work by OH and in the absence of anything contradicting that which the claimant raised (at the time) the respondent was entitled to rely upon that report and the claimant presenting himself for work.

The Law

51. Section 94(1) of the Employment Rights Act 1996 (ERA) provides that 'an employee has the right not to be unfairly dismissed by his employer'. Dismissal is defined by Section 95(1) ERA. Once a dismissal has been established it is for the employer to show the reason or principal reason for the dismissal and 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 the employee holding the position which the employee held.

52. Section 98(2) sets out five potentially fair reasons, one of which is conduct (section 98(2)(b)). Once the reason for the dismissal has been shown by the employer the Tribunal applies Section 98(4) to the facts it has found in order to determine the fairness or unfairness of the dismissal. The burden of proof is neutral. Section 98(4) provides:

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

53. In considering Section 98(4), the Tribunal asks itself whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own view for that of the decision makers in the case. The case of Iceland Frozen

Foods Ltd v Jones [1982] IRLR 439 EAT, established that the correct approach for a Tribunal to adopt in answering the questions posed by Section 98(4) is as follows:

> The starting point should always be the words of section 98(4);
>
> in applying the section, a tribunal must consider the reasonableness of the employer's conduct, not whether the tribunal considers the dismissal to be fair;
>
> in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what the right course to adopt should have been;
>
> in many (although not all) cases, there is a band of reasonable responses in which one employer might reasonably take one view, whilst another might reasonably take another; and
>
> the function of the tribunal is to determine whether in the particular circumstances of the case, 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 of reasonable responses, the dismissal is fair. If it falls outside the band it is unfair.

54. In the case of Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 CA, the court of appeal held that the objective standards of a reasonable employer must be applied to all aspects of the question whether an employer was fairly and reasonably dismissed, including the investigation.

55. In Polkey v AE Dayton Services Ltd [1988] ICR 142 the House of Lords made it clear that procedural fairness is an integral part of the reasonableness test. The House of Lords decided that the failure to follow the correct procedures was likely to make a dismissal unfair, unless in exceptional circumstances, the employer could reasonably have concluded that doing so would have been futile. The question: 'would it have made any difference to the outcome if the appropriate procedural steps had been taken?' is relevant only to the assessment of the compensatory award and not to the question of reasonableness under section 98(4).

56. It is the employer who must show that misconduct was the reason for dismissal. According to the EAT in British Home Stores Ltd v Burchell 1980 ICR 303, EAT, a three-fold test applies. The employer must show that:

> it believed the employee guilty of misconduct;
>
> it had in mind reasonable grounds upon which to sustain that belief; and
>
> at the stage at which that 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.

57. If the Tribunal is satisfied that the respondent conducted matters in accordance with the Burchell guidance it has to decide whether the dismissal was a reasonable response to the misconduct and must not adopt a 'substitution mindset'.

58. The manner in which the employer handled the dismissal is important in considering whether the Respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way, i.e. within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

59. Summary dismissal is a dismissal without notice and is wrongful unless the respondent can show the summary dismissal was justified because of the claimant's repudiatory breach of contract. Unlike unfair dismissal the reasonableness or otherwise of the dismissal is not relevant. The Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the claimant.

Conclusions

60. In terms of the Tribunal's role in determining the fairness or otherwise of the decision to dismiss, there was not a lot of factual dispute. There was factual dispute before the disciplinary and appeal officers, however it is not necessary for this Tribunal to resolve those disputes.

61. The reason for dismissal (conduct) is accepted. The respondent had a reasonable belief in the claimant was guilty of misconduct and it reasonably categorised that conduct as falling within the gross misconduct scale. The unnecessary force was found to be unwarranted and severe enough to amount to gross misconduct.

62. There were reasonable grounds for the respondent to hold that belief. There was no doubt the C and R had taken place, other officers witnessed the aftermath, there were injuries to both the claimant and A and finally, there was the CCTV footage.

63. Although the claimant seeks to claim the investigation was conducted unreasonably so as to render the dismissal unfair, the Tribunal had found the appointment of Governor Ardern was reasonable. There was no conflict and he interviewed all the relevant witnesses. He quite rightly

discounted some of the evidence as it had been contaminated. Finally he attended the disciplinary hearing and the claimant could have put any questions to him about what he (Governor Ardern) had seen in the aftermath.

64. The Tribunal must not substitute its view as to what disciplinary penalty is appropriate in these circumstances. Any rational person would have sympathy for the claimant in being dismissed after 28-years' service, with a clean disciplinary record, over this one incident. Another employer in another industry may have chosen not to dismiss. Another Governing Governor for another one of HMPs may however had taken the same decision as Ms Bryant. It was open to Ms Bryant to reasonably conclude, based upon the evidence she had seen and heard, that when performing the C and R on A, the claimant had used unreasonable force.

65. The Tribunal therefore finds the decision to dismiss did fall within the range of reasonable responses open to this respondent, taking into account its size and the administrative resources available. A finding of misconduct alone is not capable of justifying dismissal and the Tribunal is satisfied in all the circumstances, the respondent was justified in dismissing for that reason (the burden of proof being neutral at this stage).

66. The claimant's dismissal was therefore fair and his claim that it was unfair contrary to s. 94 ERA is dismissed.

67. Finally, the Tribunal finds that the claimant's conduct, in using unnecessary force on A, did amount to a fundamental breach of his contract and that the respondent was entitled to summarily dismiss him. The claimant's wrongful dismissal claim fails and is therefore dismissed.

68. A provisional remedy hearing was listed for 15/9/2021. That date will now be vacated.

19/3/2021

Employment Judge Wright