EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr F Alukwu	**v**	**The Commissioner of Police of the Metropolis**

Heard at: London Central
On: 22 – 26 February 2021

Before: Employment Judge Hodgson
Ms C Marsters
Mr R Baber

Representation

For the Claimant: Ms Wonta Ansah-Twum, counsel
For the Respondent: Ms Kara Loraine, counsel

JUDGMENT

1. **The claim of victimisation was dismissed on withdrawal.**

2. **The claim of unfair dismissal fails and is dismissed.**

REASONS

Introduction

1.1 By a claim presented to the London Central employment tribunal on 6 August 2018, the claimant alleged that he had been unfairly dismissed, and that the dismissal was an act of victimisation.

The Issues

2.1 The issues were discussed on day one. It was agreed that there was a claim of unfair dismissal. In addition, it was alleged the dismissal was an act of victimisation.

2.2 The claimant relied on a previous claim of race and sex discrimination brought in 2010, as a protected act, for the purpose of victimisation. The respondent was able to give a limited concession; it conceded the claim contained allegations of sex and race discrimination. However, neither party had produced and any relevant documentation. It was part of the claimant's case was that the 2010 claim had been admitted and for that reason he had withdrawn it. That was not agreed or admitted, by the respondent. The tribunal confirmed that all of the documentation relating to the first claim and its withdrawal was relevant and should have been disclosed. Ms Ansah-Twum confirmed that the claimant had disclosed to her some documents shortly before the hearing. She asked for permission to serve them. The tribunal noted that as these appear to be relevant documents, permission was not required, and the claimant must disclose them forthwith. It appeared that he was in breach of his duty of disclosure.

2.3 Some disclosure was made on the evening of day one. We received a copy of an ET1, albeit there was no case number and no issue date. We received several emails. The email referred to in the claimant's witness statement of 29 March 2011 was not disclosed; we noted the failure to disclose it.

2.4 From the emails disclosed, particularly the email to the claimant from Mr David Grainger of 5 April 2011, it is clear there was a meeting on 29 March 2011. There is nothing in any of those emails which suggests that the respondent agreed there had been any form of discrimination. It is clear that the previous claim form alleged discrimination.

2.5 In the current case, the respondent alleged it dismissed the claimant because of his conduct. The specific allegations were set out in a letter of 18 April 2018. It was the respondent's case that the claimant initially admitted allegations one to five, as set out in that letter,[1] but disputed allegations six and seven. It is alleged that allegation six was found proven and that allegation seven was found unproven. Allegation six was admitted by the claimant at the appeal hearing.

2.6 Ms Ansah-Twum confirmed that the claimant did not dispute the allegations of misconduct. It was conceded that the respondent had established that the sole or principal reason for dismissal was the six acts of misconduct found by the dismissing panel to be proven.

[1] We are will set out the detail the allegations in due course.

2.7 The claimant alleged the dismissal was unfair. He relied on the following allegations of unfairness.

2.7.1 The sanction was too harsh and was outside the band of reasonable responses of a reasonable employer.

2.7.2 The dismissal was procedurally unfair in the following respects:

a. there was delay in holding the disciplinary hearing.[2]
b. It is said that other individuals were guilty of the same misconduct, but were treated more leniently. The only person named by the claimant, at any time, was PS Sean Tierney.
c. The claimant was allowed to work for over 12 months following the initial accusation.

2.8 In its skeleton argument, the respondent identified the following as being the alleged allegations of unfairness (the accuracy was not agreed or disputed by the claimant):

a. that PS Smith his manager conducted the investigation and also presented the management case at the disciplinary hearing;
b. that the investigation was unduly delayed during which time the Claimant was able to continue working and had his restriction from undertaking overtime rescinded;
c. that his previous disciplinary and performance record was unfairly taken into account;
d. that the decision was outside the range of reasonable responses in light of his mitigation including his family difficulties at the time of the offences and long service.

2.9 The allegations of unfairness where varied and expanded in the claimant's submissions, and will set them out in due course.

Evidence

3.1 The claimant gave evidence.

3.2 For the respondent we heard from Police Sergeant David Smith; Chief Superintendent Simon Ovens; and Mr Steve Padwick.

3.3 We received a bundle of document and a supplemental bundle of documents disclosed by the claimant at the hearing.

3.4 The respondent filed written submissions at the start of the hearing and the claimant relied on written submission filed at the conclusion of the hearing.

Concessions/Applications

4.1 Ms Ansah-Twum conceded the respondent had established a reason for dismissal that was related to conduct. It was agreed the claimant had initially, in the disciplinary hearing, accepted the allegations of misconduct one to five were true. Thereafter, in the appeal, he accepted allegation six. He disputed allegation six at the disciplinary hearing.

4.2 The basis on which the concession was made was not set out.

4.3 During the hearing, Ms Ansah-Twum continued to present the claimant's case on the basis that there had been inadequate investigation, albeit the nature of the inadequacy, or the alleged consequence, was not made explicit. This approach appeared to undermine and at times, contradict the concession. We will consider the consequences in our conclusions.

4.4 On day two, at the end of the day, Ms Ansah-Twum indicated that the victimisation claim may be withdrawn. We were concerned to ensure that the claimant understood the position and that counsel had formal instructions. We adjourned to allow Ms Ansah-Twum to take instructions. When the hearing resumed, the claim of victimisation was withdrawn and dismissed by consent.

4.5 This case proceeded as a CVP video hearing. All were able to access the hearing adequately, except the claimant.

4.6 When the claimant first appeared, he could initially hear the tribunal; his video and microphone appeared to be disabled. The case was adjourned until 11:00.

4.7 When we resumed, the claimant could be seen, but not heard. It appeared he could hear the tribunal. We undertook relevant case management and indicated we would read the statements. We adjourned until 14:00, to allow the claimant to resolve his technical issues. General advice was given, which included the need to download Chrome, to join via the web browser, and to activate his camera and microphone.

4.8 At 14:00, the claimant could be seen, but his microphone appeared not to be working. It was stated he was using his cousin's laptop. It was unclear if he had downloaded Chrome. To assist him, EJ Hodgson sent details of the BT Meet Me telephone conferencing service. The claimant was invited to attend by telephone to resolve his technical issues. The BT Meet Me conference was put on speaker, so that it could be relayed through the video hearing. EJ Hodgson attempted to talk the claimant through the joining process, but was unsuccessful. Time was allowed for further instructions. It was confirmed the claimant would attend his solicitors office the following day. It was specifically confirmed that the solicitor would provide equipment to allow the claimant to join.

4.9 Despite all these attempts, the claimant was unable to use the CVP link. The difficulty was unclear. It was clear that the link worked. His video worked on occasions. It appeared that the input on his microphone worked, to some extent, because failing to mute the computer caused feedback when using BT Meet Me.

4.10 It was agreed that the claimant would attend his solicitor's office on the second day. Ms Ansah-Twum represented that the solicitors had specifically confirmed that they would be able to provide access to the hearing for the claimant. EJ Hodgson directed that the solicitors should ensure, that evening, that they could use the link and ensure that they had a working microphone and camera. Any difficulties should be communicated by email to the respondent and to EJ Hodgson. No such difficulty was reported.

4.11 The difficulties continued on day two. At 10:00 the claimant could be seen but not heard. Ms Ansah-Twum confirmed the claimant had attended the solicitors' office the night before, and the link had been established. It was unclear if he was using the solicitors' equipment, or his own, and counsel was unable to clarify the position then or at any stage thereafter. It was confirmed he was currently at the solicitors' office. It was noted that arrangements had been made, and it was the responsibility of the solicitor to ensure a connection.

4.12 As difficulties persisted, EJ Hodgson noted that it raised a question about whether all reasonable endeavours were being used to join the hearing by CVP. In principle, the solicitors had confirmed that they had appropriate equipment and there was no adequate explanation for why there was a difficulty.

4.13 At 10:35, Ms Ansah-Twum stated she had spoken to a solicitor who had allegedly tested the computer the previous day and found the microphone to be working. She was unable to offer an explanation for the current difficulty. The claimant was able to join. He could be seen, but he could not be heard. Counsel for the respondent raised her concern that the failure of the claimant to join by CVP, having attended at his solicitors who should have appropriate equipment, lacked credibility. She invited the tribunal to conclude that the claimant was not taking all reasonable steps to attend the hearing. At that point, the claimant was able to be heard, but not seen. There was a suggestion that another computer would be used.

4.14 EJ Hodgson invited Ms Ansah-Twum to obtain an explanation from the solicitor. The solicitor could attend by telephone or video to offer an explanation. No explanation was received from the solicitor at any time. EJ Hodgson noted it was difficult to accept that a solicitors' firm could not provide access to the hearing given the numerous forms of equipment which were likely to be available to solicitor.

4.15 The claimant appeared to stop answering questions and appeared to be no longer engaging with the proceedings. He could have remained at the

computer, as it appeared he could at least hear and probably see the tribunal, and could be heard. It was accepted that if the claimant had moved away from his computer, he was choosing not to attend the hearing.

4.16 Both counsel accepted, with some reservations on the respondent's part, that it would be appropriate for the hearing to proceed even if the claimant could not be seen.

4.17 There was a further adjournment to allow counsel to check if the claimant wished to return to proceed with the hearing. Following the adjournment, Ms Ansah-Twum explained that she could not get through to the claimant, but had sent an email and text. She stated she had rung the solicitor and that the claimant would not come to the telephone. EJ Hodgson noted that the effect was the claimant had voluntarily left the hearing, but to avoid any confusion, he should be given one final opportunity to attend. The tribunal adjourned.

4.18 At 11:25, the claimant had re-joined. His video was not working, but he could be heard and he could both hear and see the tribunal.

4.19 We had been invited by respondent's counsel to decide whether the claimant was using reasonable endeavours to attend the hearing. We confirmed that we accepted, on the balance of probability, that he was not. It seemed to us that the following was the position. The claimant had the link to the hearing. He used the same link as everyone else. No one else had had difficulty accessing the hearing. Whilst it was potentially credible that on the first day there was some particular problem with his own equipment, he now alleged that he was using equipment provided by a solicitor. Moreover, the solicitor appeared to confirm, via counsel, that the equipment had been tested and could provide access. In any event, it was not credible to believe that there was no other form of hardware which could be provided either by the claimant or by the solicitor in the form of a different desktop, laptop, tablet, or phone. The inability of the claimant to join with both audio and video, given the amount of time, the explanations given to him, and the potential access to hardware, could not credibly be explained by continuing difficulties with equipment. On the balance of probability, the claimant was not using all reasonable endeavours to attend.

4.20 We did not need to finally resolve whether we would proceed in the absence of the claimant, as he was able to attend by audio. We considered rule 46 Employment Tribunals Rules of Procedure 2013. We all agreed that proceeding as a video hearing was just and equitable. We considered the effect of not being able to see the claimant and whether that was permitted by the rule. The parties and members of the public attending must be able to hear what the tribunal hears and as far as is practicable, see any witnesses as seen by the tribunal. As no one could see the claimant, that was not an infringement of the rule. Whilst it was less than satisfactory for the claimant to be cross-examined when he

could not be seen, no party believed that in itself would prevent it being just and equitable to proceed with the video hearing, and the rule does not require he be seen. We agreed that, in all the circumstances, particularly having regard to the fact that there is no guarantee that if the hearing were adjourned the position would be any different, it was just and equitable to proceed.

4.21 We did consider the effect of our ruling that the claimant had not used all reasonable endeavours to attend the hearing. We were satisfied that he could have attended using video had he chosen to do so. We did not believe he would suffer any prejudice by not being able to be seen, and he did not allege this. In any event the remedy was in his own hands. His failing to use reasonable endeavours to attend the hearing, should not be allowed to put the hearing in jeopardy.

4.22 Any prejudice was potentially to the respondent in not being able to see the claimant when cross-examining him, but we considered this to be minimal. The vast majority of the facts were agreed. It had been conceded already that the reason for dismissal was made out. Therefore, the main dispute concerned fairness. At the time there was a current victimisation claim. But it was accepted that only one person potentially had any knowledge of the protected act, and her evidence was that she had no recollection of the claimant having previously brought a claim.

4.23 If there had been an intricate factual dispute, it may not have been appropriate to proceed. However, in all the circumstances, we considered that proceeding was just and equitable.

4.24 We discussed the timetable on day one. The tribunal noted that much of the evidence was agreed and confirmed initially that the evidence and submissions must be completed by the end of day three.

The Facts

5.1 The respondent employed the claimant, initially as a police community support officer, from September 2002. In June 2010 he became a designated detention officer (DDO). He worked at various police stations. The claimant's dismissal was confirmed by a letter dated 14 May 2018. He was dismissed for alleged gross misconduct said to have occurred on 19 November 2016 and 4 December 2016.

5.2 The claimant was a civilian. DDOs work in police detention centres. They carry out welfare checks on detained persons and they escort detainees. They have no authority to remove a detained person from a cell without express permission from a senior officer. DDOs must maintain the custody record. Maintenance of the custody record is a legal requirement.

5.3 There is no dispute before us concerning the claimant's knowledge of, or understanding, of the nature of the requirements and the nature of his

obligations. The claimant was aware of and understood the July 2014 code of ethics. The code of ethics sets out standards which apply to both police officers and civilians. They include the need for honesty and integrity. The code of ethics specifically directs that no one must "knowingly make false, misleading, or inaccurate oral or written statements on any professional context." They also provide that the rights of all individuals must be respected.

5.4 At all material times the claimant was aware of the standard operating procedure, which included the disciplinary procedure. The procedure, at section 8, refers to disciplinary offences which may result in summary dismissal. Section 8 refers to several matters; they include:

> **Serious breaches of health and safety regulations…**
>
> **Failure to carry out the reasonable instruction of the manager**
>
> **Misconduct likely to bring the MPS into disrepute or to hinder its effectiveness…**

5.5 The list is illustrative, and not exhaustive.

5.6 The procedure provides for the first line manager to undertake investigations. That manager may instigate a disciplinary review or investigation in cases where there is an allegation of misconduct (see section 12). The managers should undertake a fact-finding process. This may result in the matter being referred to a higher authority, usually HR, for review before further action is taken. Where the investigating manager identifies potential allegations of gross misconduct, the case will be progressed and may be ultimately referred to a disciplinary panel.

5.7 From 2015, Police Sergeant David Smith was the claimant's line manager. PS Smiths' line manager was Inspector Tisi.

5.8 PS Smith describes the claimant as "a difficult person to manage: there was lots of conflict with members of the team and also detainees." He goes on to say, "He worked a lot of overtime at various police stations around London and I did receive a number of complaints about him predominantly for sleeping whilst on duty. As a result of these concerns I referred him to occupational health ... and advised him to reduce the amount of overtime he was working." PS Smith describes continuing difficulties with the claimant's performance. He says the following: "I put the claimant on an action plan as a result of his checks and entries (on the custody record) being insufficient. The claimant would improve for a couple of weeks after being spoken to and completed the action plan to [a] satisfactory level but he would always slip back again a few weeks later. I received a number of complaints about this aspect of the claimant's work from custody inspectors at different London custody suites and these spanned across the period of being his manager, most recently in September 2017."

5.9 PS Smith states that where someone is a medical or self-harm risk that individual is put on constant supervision. He spoke to the claimant on numerous occasions, most recently in March 2017, advising him not to use his phone when undertaking constant supervision. It follows that there was a background of concern about the claimant's performance.

5.10 On 12 November 2016, the claimant removed a detained person from his cell without permission. That individual became aggressive and it took four people, including the claimant, to get the detainee back into the cell. This caused significant concern and resulted in an email to the claimant from PS Tony Quinlan which set out the standards expected. It included the following: "You must in future seek authority before you remove any detainee from his/her cell in every circumstance."

5.11 This instruction was clear and unequivocal. The email detailed the difficulties caused by the claimant in failing to obtain authority for the removal of the detainee. The incident was described as a “near miss.” The claimant was told that the incident was now complete and the email constituted words of advice.

5.12 On 19 November 2016, the claimant removed another detainee from his cell without permission. He then left that individual unattended for a brief period, turning his back on the detained person whilst a cleaner was present with cleaning equipment, including supplies and mops. When asked to explain the incident, the claimant stated that the detained person had been within his control at all times. This was untrue.

5.13 The incident was escalated as a formal disciplinary issue which required investigation. However, before the claimant attended an investigation meeting, a further incident occurred.

5.14 On 4 December 2016, the claimant refused to allow a female detainee to make a phone call to her solicitor, contrary to her legal rights, and he failed to document his interactions with her in the custody record. The claimant also failed to carry out proper welfare checks on three detained persons in accordance with relevant procedure. He was required to open the wicket gate door of the cell, rather than look through the spy hole. He failed to do so. He recorded in the custody records that the completed checks had been made properly via the wicket gate. This was untrue. At all material times up to and including the disciplinary hearing, he maintained that the false entry was a mistake which had occurred inadvertently.

5.15 These incidents were escalated as formal disciplinary issues. The incidents were communicated to the claimant by letters of 24 November 2016 and 6 December 2016. There was a fact-finding interview on 30 December 2016, before PS Smith.

5.16 The claimant admitted that the conduct had occurred; however, he disputed the detail. He maintained he had not lost sight of the detained

person on 19 March 2016. He was shown the CCTV demonstrating that he was wrong.

5.17 The claimant did not suggest, at any time, that his actions were caused by any personal circumstances. Instead, he appeared not to accept that removal of the detained person was wrong.

5.18 At the subsequent disciplinary hearing, it remained the claimant's position that removal of the detained person was appropriate and that he was able to undertake his own risk assessment. At no time (prior to the final appeal[3]) did he admit the falsification of records on 4 December was dishonest. Instead, he maintained it was some form of error.

5.19 PS Smith referred his report to HR with a view to proceeding with allegations of gross misconduct. There was then a delay which appears to have been caused by HR. PS Smith was required to produce a final report separating the incidents. He did so, promptly, in September 2017 and concluded that there were seven separate allegations, six of which were at the level of potential gross misconduct and one at the level of misconduct.

5.20 The claimant was invited to a disciplinary hearing by letter of 14 February 2018 which set out the seven specific allegations. At the claimant's request the hearing was rearranged. The letter of 18 April 2018 superseded the previous letter, and the hearing took place on 11 May 2018. The specific allegations were as follows:

> **Allegation 1: On 19/11/2016, whilst working within Wembley Custody, you took a detainee from their cell after being instructed not to do so by management.**
>
> **Allegation 2: On 19/11/2016, whilst working within Wembley Custody, you were negligent in your duty by leaving a detainee unsupervised, potentially placing your colleagues at risk.**
>
> **Allegation 3: On 19/11/2016, when asked to account for his actions regarding the alleged incident, you provided an inaccurate account to management.**
>
> **Allegation 4: On 04/12/2016, whilst working within Islington Custody, you neglected to endorse the custody record detailing visits to the detainee and her requests.**
>
> **Allegation 5: On 04/12/2016, whilst working within Islington Custody, you failed in your duty to carry out the required standard of cell visits, which was a risk to health and safety of detainees.**
>
> **Allegation 6: On 04/12/2016, whilst working within Islington Custody, you made dishonest custody record entries in relation to welfare checks conducted on a detainee.**
>
> **Allegation 7: On 04/12/2016, whilst working within Islington Custody, you provided an account to management, which was dishonest.**

[3] Before us he sought to resile from this admission.

5.21 All but allegation four were put forward as potential allegations of gross misconduct. The disciplinary hearing took place on 11 May 2018 and was conducted by Chief Superintendent Simon Ovens, as the chairperson and Ms Annabel Stone, senior case manager from the DPS (misconduct and hearings unit), as the independent panel member. The claimant was represented by Mr Yuri Onorati from the public and commercial services union and Ms Francis Agomoh also attended as a character witness. PS David Smith was the presenting officer and Ms Janetta Bellis was note taker.

5.22 The claimant formally admitted allegations 1 to 5.

5.23 The claimant disputed allegation six. He admitted the conduct in as far as he had entered false information onto the custody record by completing the record. The false information was he had undertaken the checks by opening the wicket gate when he had checked by looking through the spy hole. He denied that he had made the entry dishonestly.

5.24 He denied allegation seven in its entirety. Ultimately, allegation seven was found not to be proven and we need say no more about it.

5.25 Allegation six was discussed at length. PS Smith presented the management case. The claimant stated that he knew it was wrong to do the checks by the spy hole. He alleged he had intended to complete the custody record confirming that he had looked through the spy hole and not the wicket gate, contrary to expected standards. However, he alleged that, in error, he had wrongly recorded that the checks had been compliant. He stated that the reason for the mistake was that he had cut and pasted other entries, and he did not realise the information was wrong. Chief Superintendent Ovens considered the claimant's explanation. He found the explanation to be contradictory and unconvincing. He concluded that the claimant was lying when he said that any false entry had been made by inadvertent mistake. He considered that the claimant had deliberately falsified the record and had been dishonest in the evidence given to the disciplinary panel.

5.26 The claimant was given an opportunity to provide mitigation. However, in presenting his mitigation, he sought to undermine his own admission. The claimant alleged he was using his own sound judgement when releasing the detained person without permission on 19 November 2016 and, further, that he was able to see him at all times. Only when he was shown the CCTV did he accept that he had lost sight of the detainee.

5.27 At no time did the claimant suggest that any emotional stress, or personal circumstance, had caused any of the actions. He maintained, and has maintained before us in his witness statement, that he exercised his own sound judgement in releasing the detainee. He maintained that his falsification of records was not dishonest.

5.28 The panel adjourned and reached the conclusion that the claimant should be dismissed for gross misconduct. The basis for the decision in relation to each allegation was set out in a 15 page "rationale" document. That was sent to the claimant by letter of 14 May 2018. All of the first six allegations were found to be proven. The letter summarised the allegations and the findings. The panel decided that the claimant should be dismissed for each of allegations one, two, three, and six. Allegation four warranted a final written warning and allegation five a formal reprimand.

5.29 The rationale document set out, in great detail, the nature of the allegations, the investigation findings, the admissions made, and the reason why the disciplinary action was considered appropriate for each.

5.30 The claimant was given an opportunity to appeal. He appealed on 14 June 2018. The claimant cited several grounds. The main points were as follows:

5.30.1 The decision was based on "irrelevant considerations" he alleged there was "real bias" against him.

5.30.2 He said the panellists failed to "consider my circumstances at the time of the incidents." He referred his marital issues.

5.30.3 He stated Inspector Tisi had lifted the ban on overtime and that his remaining performance had been impeccable, which raised the expectation that he would not suffer the penalty of dismissal and this should have been taken into consideration.

5.30.4 He alleged there had been delay and that his continuing impeccable performance should have ruled out dismissal.

5.30.5 He alleged the disciplinary hearing was flawed and that Ms Stone had waived a "brown envelope" and inappropriately referred to issues of poor performance in 2006 which were irrelevant.

5.30.6 For the first time he referred to his previous claim when he had taken claim to "the employment tribunal for race and sex discrimination." He alleged he had withdrawn that claim following "the acknowledgement of the series of wrongdoing by management."

5.30.7 He made reference to "genuine mistakes which happened at the time of my domestic problems." He falls short of saying that the mistakes were caused by domestic problems, a matter he had not suggested, in any event, at the disciplinary.

5.30.8 He referred to the delay of 13 months.

5.30.9 He alleged PS Smith, who investigated the matter, should not have been involved in the disciplinary hearing.

5.30.10 He alleged in general that the decision to dismiss was based on prejudice and it was unfair and was "not in accordance with the relevant code of practice." He did not identify the code of practice.

5.31 The appeal was heard by, Cmdr Julian Bennett, assisted by Mr Steve Padwick, an HR professional.

5.32 The final decision was made by the head of misconduct hearings unit. The grounds of appeal were considered carefully, and each was rejected. The panel considered each of the allegations. It reached the same conclusion that allegations 1 to 6 were all admitted or proven. The sanctions applied were each considered appropriate. The appeal outcome was sent by letter of 13 September 2018. This was supported by a rationale document, which set out the detailed reasoning.

The law

6.1 The relevant provisions of the Employment Rights Act 1996 are set out in section 98, which reads, in so far as it is applicable -

> **(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—**
>
> **(*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,**
> **...**
>
> **(1) 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.**

6.2 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it

relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.3 In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held –

> **A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

6.4 In considering whether the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal should have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

6.5 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, 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 reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each 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 that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.6 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23.)

6.7 Pursuant to section 207 Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code on Disciplinary and Grievance Procedures 2015 ('the Code') is admissible in any employment tribunal proceedings, and the tribunal is obliged to take into account any relevant

provisions of the Code. A failure to observe any provision of the Code shall not in itself render that respondent liable to any proceedings. The key relevant provision in this code relied on is paragraph 11.

> **Hold a meeting with the employee to discuss the problem**
>
> **11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.**

6.8 The parties have referred to several case. We do not need to review all the case referred to. We will refer to any case as necessary in our conclusions.

Conclusions

7.1 We remind ourselves that this is a case where the claimant admitted five allegations of misconduct at the disciplinary hearing and thereafter admitted the sixth at the appeal hearing. In relation to the sixth allegation, the only real dispute was whether he was dishonest when making false entries on the custody record.

7.2 Further, the reason for dismissal is admitted. That said, the approach of the claimant during the disciplinary hearing, and of counsel during this hearing, has undermined the concessions made.

7.3 We have been referred to **Boys and Girls Welfare Society v MacDonald** [1995] ICR] 693 (particularly 700G to 701F). As authority for the proposition that where gross misconduct is admitted, it is not always appropriate for the three-stage **Burchell** test to be undertaken. This is because there is little further scope for investigation once misconduct is admitted. The EAT stated "it is apparent that the threefold Burchell test is appropriate where the employer has to decide a factual contest." This is helpful, but it is guidance, and each case must be considered on its facts.

7.4 The tribunal should not allow itself to lose sight of the statutory tests by formulaically applying principles set out in case law. The case law gives guidance on the approach to be taken but does not replace the statutory language. Each case must be considered on its merits.

7.5 It is for the respondent to establish the sole or principal reason for dismissal. The reason for dismissal is a set of facts known by, or beliefs held by, the individuals who dismiss. The respondent found six allegations were proven and relied on four as justifying dismissal. It is admitted that the sole or principal reason for dismissal was the belief in the alleged misconduct. It is that belief which establishes the reason. It follows the respondent discharges the burden of establishing its sole or principal reason.

7.6 We are next required to apply section 98(4) to determine fairness. We must apply the statutory language. The burden is neutral. It is at this

stage that we may consider the second two limbs of **Burchell**: were there grounds to sustain the belief that the misconduct had occurred; and had there been a reasonable investigation to establish the grounds.

7.7 It is apparent that the investigation was undertaken by PS Smith. There is no criticism, at any stage, of the nature of, content of, or thoroughness of the investigation. Allegations one – five were admitted. There has never been any suggestion that the respondent should look behind the admission. Nevertheless, the admission was entirely consistent with the information provided by the investigation. It follows that there were grounds to sustain the belief, being the investigation and the admission. There is no suggestion that the investigation was inadequate. It was clearly an investigation open to reasonable employer. It follows, in relation to allegations one to five, that there were grounds supporting the findings and that the investigation of allegations one to five was one open to a reasonable employer.

7.8 We note that to the extent the claimant alleged, by way of mitigation, that he had not left the detainee unsupervised, that was clearly contradicted by the CCTV evidence and to the extent this constituted a dispute, there was clear evidence for the finding.

7.9 The claimant disputed allegation six. However, the dispute was limited. There is no suggestion that the dismissing panel did not believe first that the conduct occurred, and second that the claimant had been dishonest.

7.10 The claimant accepted that the custody record entries in relation to the welfare checks were inaccurate. The only significant dispute before the disciplinary panel was whether the entries were made in error, as a result of poor practice in cutting and pasting entries, or were a deliberate attempt to conceal the fact that the claimant had failed in his duty to undertake the checks correctly. The disciplinary panel had before it the CCTV, the claimant's account, and the custody record. The claimant had an opportunity to provide a full explanation, and all the circumstances were considered carefully. The claimant identified no other line of enquiry.

7.11 To the extent it has been suggested that, in some manner, his domestic circumstances were relevant. This was not a matter raised at the investigation, or at the disciplinary. The claimant's excuse was not one of error caused by some form of emotional distress. It was one of simple error caused by poor practice. It was the claimant's case that he always intended to record accurately on the custody record his own breach of procedure.

7.12 Chief Superintendent Ovens did not believe the claimant. The claimant's explanation is inherently unlikely. Chief Superintendent Ovens, and the remainder of the panel, were entitled to conclude that the claimant's explanation was dishonest and that he had deliberately falsified the custody record to hide his own breach of procedure. No further

investigation was required. There were adequate grounds. The investigation was one open to a reasonable employer.

7.13 Was the dismissal within the band of reasonable responses? We remind ourselves that it is not for us to substitute our view.

7.14 The panel concluded that four of the six allegations (allegations one, two, three, and six) each independently warranted a sanction of dismissal.

7.15 Allegation one and two concerned allowing a detainee to leave his cell and then leaving him unattended. The claimant knew he must not let the detainee out without authority. A matter of days earlier he had been formally warned by email. The claimant's excuse was that he had performed his own risk assessment.

7.16 He deliberately ignored the procedure which was known to him and the specific warning given by email. By doing so, he potentially endangered himself and the cleaner. He risked creating a situation where a detainee could become violent and there was risk of injury both to the detainee and to others. Given the clear warnings already given to the claimant, we have no doubt that this was an extremely serious breach and one which the claimant understood could lead to his dismissal. Dismissal was within the band of reasonable responses.

7.17 Allegation three concerned the initial inaccurate account. This concerned leaving the individual unsupervised. It is clear the claimant did not tell the truth. This was a serious matter. The claimant was aware that it could potentially lead to dismissal. Dismissal was within the band of reasonable responses.

7.18 Allegation six concerns his dishonestly making a false entry in the custody record. The claimant understood the importance of the custody record. Keeping an accurate custody record is a legal requirement. It may be used in proceedings. It is designed to ensure that a record is kept which will confirm that a detainee has been treated properly. That includes ensuring that a record is kept of requests made by the detainee, including any request for access to his or her solicitor, and confirmation all welfare checks.

7.19 The claimant knew he must not falsify that record. Having falsified the record, he then continued to mislead the respondent by claiming that there was some form of mistake. That continued denial was dishonest. The respondent was entitled to take the view that his conduct constituted gross misconduct. Given the serious nature of the initial falsification, and his dishonesty in maintaining the falsification was a mistake, dismissal was within the band of reasonable responses.

7.20 The claimant maintains, nevertheless, we should find the dismissal to be unfair and we will deal with the matters raised by Ms Ansah-Twum in her written submissions.

7.21 At paragraph 14 of her submissions Ms Ansah-Twum puts it as follows:

> **14. The Claimant's main complaint of unreasonableness centres around the following:**
>
> **a. whether PS Smith had failed to advocate on Mr Alukwu's behalf in relation to welfare issues to prevent the matter being escalated to the investigation stage in the first place;**
>
> **b. the fact that other Senior Managers such as Chief Inspector Lawrence and Inspector Tisi had been willing to allow him to carry on working within the Custody Suite (email dated 11/12/2017 - p.258);**
>
> **c. the lengthy delay in dismissing him;**
>
> **d. whether sufficient weight was placed on his mitigation;**
>
> **e. the Respondent's failure to investigate PS Tierney for not placing the detainee on 4 R's or investigate the allegation that other DDOs frequently removed detainees from their cells without prior authorisation.**

7.22 We will deal with each point in turn.

7.23 There is no obligation on PS Smith to advocate on the claimant's behalf. What appears to be envisaged is that, in some manner, he should have taken a view that the claimant's domestic circumstances were such that he should not instigate an investigation.

7.24 PS Smith knew of the claimant's domestic difficulties. He discussed them with the claimant. The claimant represented that they were not affecting his work, and the claimant sought to work overtime.

7.25 PS Smith knew the claimant had been warned, a matter of days earlier, not to remove detainees from cells without authority. It is difficult to see what else PS Smith could reasonably have done when presented with further misconduct. There is no merit in this argument.

7.26 We accept that the claimant was permitted to continue working until his suspension in January 2018. However, he was subject to close supervision and there were continuing concerns. PS Smith continued to observe difficulties, as we have noted above.

7.27 There may be occasions when there are allegations of gross misconduct which are so serious that an individual should be suspended immediately. However, it cannot be assumed that suspension is necessary, and it should not be assumed that somebody is guilty of misconduct.

7.28 At no time was the claimant told that he was not facing dismissal for gross misconduct. It was clear that he was closely supervised. The respondent did not waive the right to dismiss.

7.29 It is appropriate that the respondent should exercise its management decision, based on all the circumstances. It is possible that an individual will perform adequately, before committing an act of gross misconduct. That individual may continue to perform adequately thereafter. Sometimes there are specific pressures which lead an individual to behave in a way which amounts to serious misconduct. The respondent is entitled to consider whether allowing an individual to continue to perform duties whilst awaiting a disciplinary hearing is a manageable risk. That does not imply waiver of the right to dismiss.

7.30 We accept there was a lengthy delay between the initial investigation and thereafter the progression of the disciplinary hearing. We have not received a full explanation. Chief Superintendent Ovens was extremely unhappy with the delay, he did not consider it to be justifiable. However, he had only recently taken over the command. It is clear there was some form of failure by human resources.

7.31 We have regard to paragraph 11 of the ACAS code of procedure 2015. The code has been breached as the delay was both lengthy and in large part unexplained. However, that does not automatically lead to a finding of unfair dismissal. Both sides agree that for there to be unfairness there must be some prejudice. The reality is that the misconduct was identified at an early stage. The claimant was able to give his explanation whilst the matters were still fresh in his mind. All the relevant evidence was preserved. The delay did not lead to any unfairness in the final procedure and the claimant was able to adequately present his case.

7.32 It is part of the claimant's case that because he performed adequately for the period following the misconduct up to his dismissal, that this should have been taken into account. In that sense, the ability to demonstrate that he was able to perform his duties without further misconduct was advantageous to the claimant.

7.33 That further good conduct is a matter which could be taken into account when considering whether dismissal was the appropriate sanction. It follows that it is arguable any delay was not prejudicial to the claimant; it was potentially beneficial. Although there is a breach of paragraph 11 of the ACAS code, that does not in this case lead to a finding that the dismissal is unfair.

7.34 It is said insufficient weight was given to mitigation. The mitigation in question revolves around the claimant's domestic difficulties. It was understood that his wife had left him and taken the children. However, it is wrong to say that this was not considered. It was considered carefully. Chief Superintendent Ovens and the panel reached the conclusion that the claimant's domestic difficulties did not, in any sense whatsoever, lead directly to, or cause any of the acts of misconduct. Moreover, his domestic difficulty did not cause him to ignore the specific instruction that he must obtain authority to take a detainee out of the cell, it did not cause him to make false entries, it did not cause him to be dishonest about the

false entries he made. The disciplinary panel was entitled to take the view that the claimant's domestic circumstances did not constitute any or any adequate mitigation.

7.35 The final point raised is a general allegation that the respondent was required to undertake further investigation of allegations particularly against PS Tierney before reaching a decision to dismiss. The way this has been approached has not been consistent. It is alleged before the tribunal that PS Tierney was guilty of some form of misconduct in failing to record in relation to a particular detainee that detainee should have been subject to what is known as the 4R's. The 4Rs is a procedure applied to particularly vulnerable detainees, especially those who are under the heavy influence of drink or who may have swallowed drugs. It is about observation of “rousability, response to commands, response to questions, remember and constant supervision.”

7.36 During the disciplinary, the claimant made no specific allegation against PS Smith. He made no specific allegation at any time prior to then. No allegation was made which could be investigated.

7.37 The claimant also relies on a general allegation that he alleged, during the disciplinary hearing, that DDOs frequently let detainees out of cells.

7.38 It appears to be the claimant's case that there should have been some form of general investigation or enquiry. He made no specific allegation against any specific DDO. He cited no date. It appears to be in a passing reference made by his representative.

7.39 During an investigation and disciplinary hearing, it is possible that individuals, who are subject to disciplinary proceedings, may make allegations against others. Some of those allegations may be specific and particularised. Some of them may be generalised, or even wild.

7.40 It is well established that an inconsistency in sanction may be taken into account when considering the fairness of a dismissal. However, this normally comes about either when there is a history of particular misconduct being treated in a particular manner or when two or more individuals are accused of the same misconduct but are treated differently. There is nothing of that sort here. At no stage did the claimant identify any individual who had behaved in the same way that he did.

7.41 To the extent there is an allegation made against PS Tierney or any other officer, it remains entirely unparticularised. In any event, the claimant's view that an officer should have taken different action in relation to an unnamed detainee at an unknown time is an opinion that he is entitled to have, but it does nothing to establish any fault on the part of PS Tierney or anyone else, let alone any reason to suspect his action amounted to misconduct for which he should have faced a sanction.

7.42 There may be occasions when allegations are made and it would be unfair to proceed without those allegations being investigated. Each case must be considered on its merits. However, it would be unfortunate indeed if we were to apply a standard whereby a dismissal will be unfair when some form of allegation is made – however vague, poorly defined, and lacking in relevance – and it is not investigated.

7.43 The respondent is not required to trawl through every comment made during an investigation and disciplinary to see if there is some form of vague allegation made against, or about, others and thereafter must delay a decision on dismissal until there is some form of general enquiry.

7.44 Although not pursued in the claimant's submissions. We note that, as originally put, it has been suggested that PS Smith should not have been involved in the disciplinary hearing. That is clearly wrong. The disciplinary procedure envisaged that he is involved in the investigation and thereafter may be involved with the presenting officer. There is not unfairness in that approach.

7.45 There has been reference to the claimant's original disciplinary performance record being referred to. This has not been pursued in the claimant's submissions, but we should deal with it for the sake of completeness. During the disciplinary hearing, it is the respondent's practice to consider an individual's overall record when considering sanction. A distinction must be made between using spent disciplinary sanctions as part of the reason to dismiss and the right to consider an individual's overall performance when determining the sanction.

7.46 When considering the reason for dismissal, the claimant's previous record was not considered at all. No spent disciplinary sanction was taken into account. Dismissal was considered to be the appropriate sanction, but the respondent is entitled to look at the historical record of an individual when deciding whether to allow a further opportunity to improve. It was the claimant who wanted the respondent to accept that his historical performance was such that he should be given a further chance. There is no unfairness in this.

7.47 Finally, we should consider the appeal. Ms Ansah-Twum did not, in her submissions, rely on any aspect of the appeal in support of her submission that the dismissal was unfair.

7.48 It was conceded that the appeal did consider the matters raised by the claimant.

7.49 To the extent there could be criticism of the appeal, it might be argued that it failed to identify that the sanction of dismissal was unfair and failed to identify the need for further investigation.

7.50 We find that the appeal was fair and was one which is open to a reasonable employer. The matters raised by the claimant were

considered carefully and the appeal reached conclusions which were open to it on the facts. At the appeal, the claimant did refer to his previous tribunal claim, and he appeared to have alleged prejudice and/or bias. That has not been pursued before us. It has not been suggested that any failure to consider that allegation rendered what may otherwise be a fair dismissal unfair. The reality is the claimant presented no evidence in support of his assertion that any of the individuals who dismissed were influenced by any previous claim. It was established that Chief Superintendent Ovens knew nothing of the original claim. Ms Stone's involvement with the 2010 claim was in an administrative capacity. She did not remember anything about the original claim, albeit it was ultimately established that she had been involved in processing the claim. There was no reason to believe that she remembered anything about the claim, or the fact that the claim had been brought. There was no unfairness in this.

7.51 It follows that we have considered all the matters raised by the claimant. For the reasons we have given, we find that the reason I made out. The reason related to conduct. This dismissal was in the band of reasonable responses. It was a fair dismissal.

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Employment Judge Hodgson

Dated: 16 April 2021

Sent to the parties on:

19/04/2021.

For the Tribunal Office