Case Number: 1404178/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr K Layzell**

Respondent: **Tascor Services Limited**

Heard at: **Southampton by CVP** **On: 10 June 2021**

Before: **Employment Judge Rayner sitting alone**

Representation
Claimant: **Mr K Symms, Lay Representative**
Respondent: **Mr I Ahmed, Counsel**

Judgement

1. The Claimants claim of unfair dismissal is dismissed.

2. The Claimants claim of wrongful dismissal is dismissed

3. The Claimants claim that he suffered an unlawful deduction from his wages is dismissed.

JUDGMENT having been sent to the parties on 26 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 3 October 2019 the Claimant brought complaints of unfair dismissal; breach of contract relating to notice and unlawful deductions from wages.

2. The Claimant was employed by the Respondent between the 11 February 2013 and 16 May 2019 as a custody assistant.

3. A principle part of his job was to escort detained individuals around the custody suite.

4. The Respondent alleged that on 23 February 2019 the Claimant had left a cell door unlocked; allowed the detained person to walk behind

him and then allowed him to pass what proved to be controlled drugs to another detained person under a cell door. Although the Claimant had reported the incident and the drugs were found on a search, the in house (Niche)record had not been completed by the Claimant. The Respondent say that the Claimant failed to report the matter immediately either to the police or management and only reported it when he realised that the incident was likely to come to light.

5. The Claimant was suspended, and a disciplinary hearing was held following which the Claimant was dismissed for gross misconduct.

6. The Claimant challenges that his actions constitute gross misconduct at all and also challenges the adequacy of the investigation; the way it was carried out and the fairness of dismissal. He challenges the fairness of the sanction imposed on him.

7. The Claimants claim in respect of an unauthorised deduction from pay is made in respect of four days' pay in respect of the period between 22nd and 29th of April 2019. The Claimant was suspended and shortly after his suspension he began to suffer with stress and was signed off sick by his doctor. He submitted sick certificates towards the end of April 2019.

8. He claims in respect of 4 days which was a period of time during which the Claimant's period of sickness absence, which had been covered by a sick certificate, had come to an end.

9. Although he was suspended on full pay, once he became sick, he was written to, and told that because he was now signed off sick, he would be transferred to sick leave with its concurrent entitlement to sick pay, rather than being suspended.

10. Subsequently, when his sick certificate ran out, the Respondent contacted the Claimant, asking the Claimant to make contact with them so that he could be allocated work. The Claimant did not contact the Respondent during his absence up until the point when his suspension was re-imposed and this period of time was treated by the Respondent as an unauthorised absence and he was not paid for it. This is the period of time in respect of which the Claimant claims an unlawful deduction from wages.

11. The merits hearing in this case took place over two days I heard evidence from the Claimant, Mr Layzell, on his own behalf and from Mr Steve Wingrove a former colleague of the Claimant and former unison representative .

12. For the Respondents I heard evidence from Miss Lindsay Styles who was the dismissing officer and from Mr. T Leahy, the business director Head Of Service Delivery who heard the Claimants appeal.

Summary of Events and Findings of fact on chronology of events

13. The Claimant worked at the Eastbourne custody suite from July 2018, after he was moved there from the custody Suite at Brighton to begin a secondment in his capacity as detention assistant.

14. On the 22nd of March 2018 Claimant started his shift at 1900 hours. his shift was a 12-hour shift.

15. The custody suite receives individuals who have been arrested and are being held pending processing or pending an appearance in court.

16. At 19.36pm in the evening a detained person was brought into the custody suite and it was explained that he had been arrested.

17. The Claimant was involved in booking the detained person in and the person was placed in his cell shortly after 20:00 PM.

18. The Claimant and other custody officers are required to record each and every interaction and event with every detained person from the time they are brought into the custody suite until they leave. They do this by entering a manual typed record of every event into the reporting system which is known by its initials NICHE. This ensures that there is an accurate log of everything that happens in connexion with each detainee during their entire time during the custody suite.

19. The Claimant as a detention assistant was employed by the private organisation task or services limited.

20. Tascor, the Respondents to this claim are a facilities management business who provide hard and soft facilities management services to public service clients. This includes the provision of facilities management services to Sussex Police, including the provision of custodial services at the custody suites.

21. The Respondents contract manager at the time was Ms Lindsey Styles. She was the first point of contact between the police and the Respondent and was responsible for ensuring that key performance indicators were met.

22. All custody assistants including the Claimant received regular training on the procedures for escorting detained individuals. They were trained on how to safeguard themselves; their colleagues and detainees .

23. Mrs Styles explained in her witness statement and I accept her evidence, that because a number of the people who are detained may have mental health support or needs or may be drug or alcohol dependent, the custody assistants are trained to be particularly vigilant in respect of the potential for violence to other staff or themselves. They are also trained ot be vigilant to the potential of detained people to harm themselves

24. The training and the procedures therefore place significant emphasis on the need to take care of health and safety of everyone in the custody suite.

25. Parts of the common procedures and expected standards, which the Claimant would have been aware of both from his training and from his experience, are set out in Miss Styles' witness statement and I find as fact that they are as follows :

26. Firstly, there is a requirement that officers should always walk behind a detainee when escorting them around the custody suite. The reason for this is a health and safety reason: It makes it easier to react if a detainee tries to abscond; to attack the custody officer or another individual

27. Secondly, all activities and contact with the detained person must be recorded on the NICHE system. This ensures that the police or the custody assistant providing support to immediately detect if there is anything unusual taking place or anything of concern.

28. Thirdly, custody assistants must not use their personal mobile phones whilst they are on duty. The primary reason for this is also a health and safety issue, because the policy minimises the risk that an officer's attention is diverted by phone use.

29. The custody suite in which the Claimant worked was covered by CCTV and the Claimant knew this.

30. I accept the evidence of Miss Styles that she considered that the CCTV evidence of the 23 February 2019 showed the following matters:
    - 30.1. The Claimant opened the detained persons cell door but the individual remained inside.
    - 30.2. the cell door was left unlocked by the Claimant and the Claimant remained outside the cell and used his mobile phone; At one point he walked away from the unlocked cell door to talk to another employee who was cleaning the nearby cell;
    - 30.3. the Claimant then escorted the individual to the showers and whilst escorting him, allowed the individual to walk behind him;
    - 30.4. on the way back to the cell the Claimant allowed the detained person to stop and talk to another detainee. The detainee was allowed to walk freely along the corridor to find the other detainee
    - 30.5. when the detainee being escorted by the Claimant found the cell of the person he wanted to speak to (who I accept was the detained persons girlfriend) the hatch was opened to enable them to speak, but the detained person dropped to the floor on all fours. The Claimant made no attempt to encourage the detained person to get back onto his feet .

30.6. a small package was then passed by the detained person under the door to the person inside the cell. The Claimant did not react and made no attempt to stop the package being passed under the door .

30.7. The Claimant then allowed the detained person to return to his cell, again walking behind the Claimant .At one point the Claimant allowed person to walk so far behind him that the Claimant had to walk back around a corner to prompt the detained person to move along .

30.8. The detained person was then placed back in his cell and left alone.

31. I accept Miss styles evidence that from the CCTV evidence the Claimant was subsequently, and shortly afterwards, seen checking the CCTV footage.

32. I find that the events had occurred as described by Miss Styles, from her viewing of the CCTV footage.

33. I find that at this point in the evening, the Claimant did not inform anyone else that the detained person he had escorted had passed something under the door to another detainee. I also find, having been referred to the NICHE records, that he did not at this point update the NICHE record to record the event. He also did not record that the detained person had been taken for a shower.

34. Shortly afterwards, the second detained person, who was the girlfriend to whom the package had been passed, started screaming ,and it was at this point that the Claimant was heard on the recording stating that he had seen something being passed to her .

35. At this point the Police Sergeant checked the cell of the detainee, who was the girlfriend of the person Mr Layzell had been escorting, and found that that individual was in possession of drugs .

36. The Claimant was asked to give a statement to the police about what happened. He did this but that statement was never provided to the Respondents.

37. What did happen, was that the Detective Sergeant emailed concerns about the Claimant's action to Deborah Stratford, a custody centre manager and Miss Styles's direct line manager

38. In that email the DS raised concerns and as a result of those concerns being raised the Claimant was suspended on full pay pending investigation.

39. The Claimant was sent a letter informing him of the suspension and inviting him to attend an investigation meeting. This meeting was to take place before any decision was made about whether or not to proceed to a formal disciplinary hearing.

40. On the 7 March the Claimant told the Respondent that he did not intend to attend at an investigation meeting and stated that he had nothing further to add to his police statement. The Respondent did not have access to the police statement, but did have the concerns raised and access to the CCTV and NICHE records.

41. On the 7 March the Claimant was sent a letter inviting him to a disciplinary hearing and in that letter, he was told that the hearing would consider allegations of
    a. contravention of company rules
    b. improper practise namely being on his phone whilst the cell door was unlocked allowing I need to walk behind him allowing the detainee to pass something to another detainee and allowing the detainee to keep his towel whilst he was in the cell bringing the company into disrepute
    c. that letter told the Claimant but if the allegations were upheld, they could amount to gross misconduct. the letter also stated that finding of gross misconduct could result in termination of his employment

42. On the 11 March the Claimant submitted a fit note citing stress at work. He did not then attend the disciplinary hearing which had been set for the 13 March.

43. The Respondent therefore rescheduled the disciplinary hearing for the 26 March, which was after the Claimants fit note would have expired, and on 19 March 2019 sent him a letter inviting him to the hearing.

44. The Claimant declined to attend and submitted a further sick note covering absence up until the 8 April 2019. The Respondent therefore rearranged the disciplinary hearing for the 9 April 2019.

45. In fact, the Claimant remained absent on sick leave and provided a further fit note until the 22 April 2019

46. The Respondent asked the Claimant to consent to an occupational health referral.

47. On 18 April 2019 the Claimant raised a grievance about his suspension and how his invitation to the disciplinary had been handled amongst other matters.

48. The Respondent considered that there was some overlap between the grievance and disciplinary and asked Miss Styles to deal with both.

49. It was at that point that Miss Styles first viewed the CCTV footage and reviewed the correspondence.

50. On the 24 April 2019 the Claimant was invited to a grievance meeting. Miss Styles suggested that the disciplinary hearing took place on the same day.

51. The Claimants sick note had expired on the 27 April and no further certificates had been provided. The Respondents attempted to contact him both by email; by letter and by phone.

52. The Claimant did not reply and did not make contact with the Respondent himself.

53. The Claimant attended at a grievance meeting on the 30 April and brought his companion with him. following that meeting Miss Styles spoke to Tina Spink and Matthew Searle about the events, and then wrote to the Claimant on the 16 May 2019 to inform him that his grievance had not been upheld and to provide a summary of her findings. The Claimant was given the right to appeal but did not do so.

54. In his grievance the Claimant raised an issue about his training. He said that he had been seconded into a supervisory capacity without preparatory training. Miss Styles considered this and reviewed the Claimants training log. As a result of that she was satisfied that he had received the training necessary to carry out his role.

55. Miss Styles also noted that in any event, the Claimant had not suggested that the incidents which had led to his disciplinary had arisen from any lack of training as a supervisor. In Miss Styles opinion, having reviewed the training log , the Claimant had received sufficient training in respect of the matters for which he was subsequently disciplined .

56. The Claimant also raised concerns about the timing and manner of his suspension. Miss Styles did not consider that this was appropriate and formed the view that he had been properly suspended.

57. In addition, the Claimant had complained about documents being delivered to a wrong address and about the arrangements made for contacting him whilst he was suspended. Miss Styles considered these matters but concluded that they did not have any impact on the fairness of the process and in particular confirmed that the Claimant had received the relevant documentation in a sealed private and confidential envelope.

58. After Miss Styles had conducted the grievance hearing, the parties took a break and then reconvened for the disciplinary hearing.

59. Miss Styles said in her evidence to the tribunal that she had checked at the start of the hearing that the Claimant understood what the allegations were and had confirmed with him that they were allegations that

    a. the Claimant had not had control of the detained person and
    b. an allegation that the Claimant had allowed the detained person to pass a controlled drug under the door to another detained person.

60. The Claimant was then facilitated to view the CCTV footage.

61. At the meeting, the Claimant declined to answer many of the questions asked by Miss Styles stating that he considered it would be *churlish* of him to do so.

62. Following the meeting, Miss Styles tried to contact the Claimant to set up a further meeting.

63. I find that the reason she did this was that she had become concerned that the Claimant had not properly explained his version of events or explained his actions and that she wanted to ensure that he had a further opportunity to do so before making her decision .

64. She was unable to make direct contact with the Claimant and therefore she wrote to him inviting him to a further meeting on the 8 May 2019.

65. I find that the reason she did this was that she considered that this would ensure that the Claimant had sufficient time to think about and digest the contents of the CCTV evidence and to think about the questions she had asked him, and would then ask again, and the responses he would give. It was intended to be a second hearing, to ensure that the Claimant has every opportunity to say anything he wanted to say in his defence, having had a full opportunity to consider the allegations and the evidence.

66. The Claimant declined the offer of the meeting, but Miss Styles tried again. She offered to reconvene the meeting on the 14 May or alternatively suggested that the Claimant could provide a written statement as he had done for the grievance hearing. She also confirmed that if she did not have any contact from him, she would then proceed to make her decision.

67. The Claimant contacted Miss Styles on the 13 May and declined to meet stating that his GP had told him to avoid stressful situations and that he did not feel that his statement would give him a full opportunity to defend himself.

68. He also stated that he did not consider a decision should be made in his absence but made no suggestions or proposals in respect of any future meeting. I note that he was not, at this point signed off sick, and there was no advice from any GP or other medical advisor before Miss Styles that the Claimant was not well enough to attend at a meeting.

69. At this point Miss Styles considered whether or not the matter could be postponed further. She considered that she had given the Claimant a number of opportunities to provide information and any evidence he wished to be taken into account, and that he had declined to do so. She therefore preceded with a hearing in the Claimants absence on the 14 May 2019 .

70. Miss Styles reviewed the evidence, and it was only at this point that she finalised the grievance outcome. She did this first, before proceeding to determine the disciplinary matter.

71. Miss Styles determined that the Claimant had committed acts of misconduct and considered that they were acts of gross misconduct for which dismissal could be the penalty.

72. When considering what penalty to impose, Miss Styles considered the Claimants actions in the immediate aftermath of the events. She took into account that he had six years experienced as a custody assistant and that he therefore should have known better than to allow a detained person to pass something under a door to another detained person .She considered that he ought to have known that it was a breach of the rules to allow a detained person to walk behind him and that he would have understood that this was a fundamental rule aimed at protecting the health and safety of all persons.

73. Miss Styles told me, and I accept that before deciding whether or not to dismiss the Claimant, she considered whether or not but there was an alternative sanction which could be imposed.

74. She told me and I accept that she considered the individual and combined breaches were so serious, that the Claimants clean disciplinary record was not reason enough to lessen the sanction. The Claimants length of service was taken into account, but she considered that this cemented her decision that the Claimant should be dismissed rather than be given a final warning, because she considered that as an experienced officer with six years practise behind him, he should have been fully aware of the procedures operated by the Respondent and should have known better than to have behaved as he did .

The applicable legal principles

75. I remind myself that the role of the Judge of an Employment Tribunal is not to retry the matter or substitute a view of what they might have done had they been hearing the disciplinary or the appeal but is to assess whether the decision reached by the Respondents officer, in this case Miss Styles, was fair and reasonable in all the circumstances. This is an objective test and I remind myself that I must not substitute my own view either of the evidence that was before Miss Styles and the view she took of it or her assessment of it or of her conclusions.

76. Once the employer has shown a potentially fair reason for dismissal, and in this case the Respondent relies on misconduct which is a potentially fair reason, the tribunal must go on to decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with S.98(4) of the Employment Rights Act 1996 (ERA).

77. That provision states that ‘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'.

78. As S.98(4) makes clear, it is not enough that the employer has a reason that is capable of justifying dismissal. The tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide — *Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT*.

79. I remind myself that I must assess the question of reasonableness under S.98(4) in the context of the particular reason for dismissal I find established by the employer.

80. Whether an employer has acted reasonably is not a question of law. I remind myself that the wording of S.98(4) has the effect of giving tribunals a wide discretion to base their decisions on the facts of the case before them and in the light of good industrial relations practice. As Lord Justice Donaldson put it in *Union of Construction, Allied Trades and Technicians v Brain 1981 ICR 542, CA*: 'Whether someone acted reasonably is always a pure question of fact. Where Parliament has directed a tribunal to have regard to equity…and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.' The appellate courts have, nevertheless, developed certain general principles, some of which have crystallized into principles of law. Thus, the broad, non-technical approach has led to the development of the 'band (or range) of reasonable responses' test as a tool for assessing the reasonableness of an employer's actions.

81. I have also taken into account that whilst the question of reasonableness is broadly objective that there is also a subjective element involved, and that I must take into account the genuinely held beliefs of the employer at the time of the dismissal. However, again I remind myself that I must not put itself in the position of the employer and consider how I would have responded to the established reason for dismissal.

82. 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:
    a. it believed the employee guilty of misconduct
    b. it had in mind reasonable grounds upon which to sustain that belief, and

c. 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.

83. This means that the employer need not have conclusive direct proof of the employee's misconduct — only a genuine and reasonable belief, reasonably tested.

84. What I must do is to consider whether the Respondents had a fair reason for dismissing the Claimant and what that reason was.

85. I have also reminded myself and indeed have been reminded by the Claimant's representative Mr Symms that I will be assisted by taking into account the ACAS guidance and I have done so in this case and I am grateful for the references to it. The ACAS guidance is of great assistance in matters of discipline and procedure.

86. I have reminded myself that a fair procedure requires is that the Claimant is informed of the allegations being made against him in advance , that the Claimant is given a full and fair opportunity to answer those allegations and not the person who hears the disciplinary is unbiased and carries out as much investigation as is reasonably necessary before reaching a conclusion .

Wrongful dismissal

87. An action for wrongful dismissal is a common law action based on breach of contract. It is very different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant: all the court has to consider is whether the employment contract has been breached. If it has, and dismissal is the result, then it is wrongful — but it is not necessarily unfair. Conversely, an unfair dismissal is not necessarily wrongful.

88. The EAT drew out this distinction in *Enable Care and Home Support Ltd v Pearson EAT 0366/09*, where the employee claimed both unfair and wrongful dismissal. The EAT held that the employment tribunal had erred in finding P's dismissal unfair on the basis that a reasonable employer would not have taken so serious a view of the employee's conduct — the tribunal had impermissibly substituted its own view for that of the employer. Turning to the wrongful dismissal appeal, the EAT stated that this question was quite different. The tribunal was concerned not with the reasonableness of the employer's decision to dismiss but with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?

Findings of fact and conclusions

89. I find that the Claimant's conduct and the concerns raised by the police about it was the only reason for the Respondents suspending the Claimant and instigating an investigation into the events of the evening

question. I find that the Respondent put together the CCTV evidence and the evidence from Niche and at that point required an explanation from the Claimant in respect of his actions.

90. I find that the Claimant had to attend at an investigatory meeting. I find that he chose to decline to attend the investigation meeting.

91. I accept the Respondent's evidence that had the Claimant attended at the investigatory meeting there would have been an opportunity to explain to him the concerns that the Respondent had and the allegations that were being made. Similarly, he would have had an opportunity to explain why he had behaved as he did and also to explain why he did not consider his behaviour to have been misconduct if indeed that was his position. Because he did not attend that opportunity was lost.

92. I find that at this stage the Respondent had carried out a reasonable investigation into the events and that on the information before it it genuinely considered that there was a potential case misconduct for the Claimant to answer.

93. It is the responsibility of the Respondent to ensure that an employee knows the allegations against them, and I have considered what the Respondents did once they decided to proceed to a disciplinary hearing. Here the Respondents sent a letter inviting the Claimant to a disciplinary hearing which makes references to the disciplinary procedure and the types of conduct which might be identified as being misconduct .The letter makes reference to breach of the company rules for example but it does not set out the particulars of what it was fat the Claimant was alleged to have done, which the Respondents considered to have been a breach of the company rules for example .

94. However, the Claimant was also provided with additional evidence prior to the hearing. I find that the Claimant was told in broad terms what the allegations were in advance of hearing and on the basis of the evidence from the Claimant himself , I find that the Claimant knew by the time he attended the disciplinary hearing , that it was being alleged that his conduct on the evening of 22 and 23 February amounted to gross misconduct. I find understood that he that this was in connection firstly, with the way that he had escorted the detained person and secondly, with the allegation that he had allowed the detained person to pass something under a cell door to another detained person .

95. Further, I find that when the hearing did take place, Miss Styles who had been allocated to deal with the matter took all reasonable steps to ensure both that the Claimant was comfortable and able to deal with the matters but also that he did, at that point, understand the allegations being made against him.

96. I find that she also made sure that the Claimant understood the possible consequences of the disciplinary hearing and that she made sure that Mr Layzell had a full opportunity to view the evidence of the

CCTV during the course of the hearing. I find that she also read out various parts of evidence that the Claimant thought he had not seen before.

97. I find that Miss Styles conducted the disciplinary hearing in a careful and a considerate manner and that she asked questions which were appropriate and necessary in order for her to investigate and probe the allegations being made.

98. I accept that the Claimant did find the hearing stressful and that he did view some of the questions as being either hostile or difficult. In part, I find that this may have been because of conversations he had had previously with his colleague Mr Wingrove about how the Respondents may conduct a hearing , and in part because he had not seen the CCTV evidence or some of the other evidence in advance of the hearing.

99. I have also taken into account the fact that the Claimant had been suffering with stress for some significant time and that a number of months had passed since the date of the incident.

100. However, whilst I accept that the Claimant was genuinely concerned about the nature of the questioning, I find that the meeting itself was conducted in a fair manner and was reasonable and that Miss Styles did all she could to investigate the allegations which were being made against the Claimant.

101. Miss Styles was undoubtedly hampered by the fact that the Claimant took a decision not to answer most of the questions that Miss Styles asked him. He stated on a number of occasions that he felt it would be churlish to do so. He explained to me and I accept, that this is his honest view, and that what he meant by this was that it would be foolish or silly for him to do so because he had not had a proper opportunity to consider the evidence or the allegations in full before that meeting.

102. I observe that this is in part because the full detail of the allegations being made were only really explained to the Claimant at that meeting. This is not a criticism however of the Respondent. I accept the Respondents evidence that had the Claimant attended at the investigatory meeting there would have been an explanation of the allegations in full at that meeting.

103. Whilst I find expressly that it does not affect the overall fairness in this case, I consider that it would have been preferable for the Respondent to have set out that detail in writing to the Claimant in advance of the meeting.

104. In so far as this was a shortcoming of the Respondents, I find that it was remedied by the explanations and discussion at the meeting by Miss Styles but also what happened subsequently.

105. Mr Layzell was represented at that meeting and I find that both the Claimant and his representative had a full and fair opportunity to take part in it and to ask questions or comment as they chose. A note was taken of the meeting and both the Claimant and his representative and Miss Styles and the notetaker signed the note to confirm that was a fair reflection of the discussion. The Claimant has also candidly and very fairly accepted in his evidence to the Tribunal that it is a fair note of the discussion.

106. I find that the Claimant was not told that either he or his representative could not take notes during the course of the meeting as he has alleged. The Claimant's evidence before me was that he had been told it was not necessary for him to do so or that he did not need to, because the note was already being taken by another.

107. Whilst the Claimant may have misinterpreted this as suggesting that he ought not to take notes, and I accept that in a stressful and difficult meeting he may have believed he was being prevented from doing so, I find as a matter of fact that that is not what happened. Had he or his representative wanted to take notes they were free to do so.

108. In any event I find that there was no prejudice to the Claimant because in fact as the Claimant himself very fairly accepts there was a full and fair contemporary note of the meeting taken.

109. Following the meeting, Miss Styles considered that it was necessary and fair for her to give the Claimant a further opportunity to answer the allegations and to address the evidence now that he had heard what she had to say. I find that this was a particular effort by Miss Styles to ensure that, before started to assess the information she had, and before she started to make her decision, she gave the Claimant a full opportunity to say any more thing her wanted to her, having had the allegations and the evidence explained ot him, and having been told of the possible outcomes.

110. This second opportunity provided by Miss Styles to the Claimant to comment on the evidence she was going to consider or to provide any explanation gave the Claimant a full opportunity to put his case and provide any answers he wanted to the Respondent . The actions of Miss Styles in doing this demonstrate to me that she was approaching the question of misconduct with an open mind and that she genuinely wanted to understand why the Claimant had behaved as he did. She wanted to hear the Claimants explanation and his side of events because she wanted to be sure that she had all the information she needed before she started the decision-making process .

111. The Claimant simply gave no explanation whatsoever of any of his actions.

112. I find that the decision of Miss styles to hold what she has referred to as a re-adjournment meeting was a genuine attempt to ensure that there had been a full and fair investigation and a full and fair hearing before she made her decision.

113. I accept that the Claimant was slightly suspicious of this meeting and did in fact air some of his concerns but I find that it was an entirely reasonable and appropriate thing for Miss Styles to do and that her only objective and motivation was to ensure that the Claimant had a further opportunity to answer what were very serious allegations. The Claimant had been unwilling to answer many of the questions put to him in the first meeting and Miss Styles therefore took the view that a second opportunity should be provided.

114. The Claimant declined to attend and did not chose to provide any further statement at this point. Miss Styles therefore went ahead with the meeting as a formality in his absence.

115. Miss Styles carried out all reasonable investigations into the allegations against the Claimant . She had all the evidence which had been collated for the purposes of the investigation. This included the CCTV evidence which she had reviewed; as well as the mobile phone policy and the company's policy on escorting a detained person, and the Claimant's training records for example.

116. I find that she reviewed the information provided by the Claimant to her during the course of the disciplinary and I conclude that she carried out as much investigation as was reasonably necessary or appropriate before she proceeded to make her decision.

117. I find that Miss Styles first considered whether or not the Claimant had committed any acts of misconduct and I conclude that she reached an honest conclusion that he had breached the company's policies both in respect of escorting the detained person and in respect of the use of his mobile phone.

118. I accept her evidence that she genuinely believed that the CCTV evidence did show what she has told me it showed her.

119. I find that she honestly concluded having viewed the CCTV evidence that it demonstrated serious shortcomings in the Claimant's way of working with a detained person on the night in question and in particular demonstrated a failure by the Claimant to follow various company procedures and rules.

120. I conclude that she was not only honest in her belief that the Claimant had committed misconduct but reached her conclusions on reasonable grounds.

121. Further and in any evert, I find that the Claimant does not in reality dispute that he did not follow company procedure in a number of respects.

122. What he has said in his evidence before this Employment Tribunal but did not say to Miss Styles before she made her decision, was that he had reasons for behaving as he did.

123. The Claimant has explained to me that he had been working a very long shift and had been unable to take a break. He suggests that this was not unusual and that he had used his mobile phone whilst at work in order to call his partner to explain that he would be late coming home. He also said in his evidence that he had taken the decision to escort the detained person in the way that he had, that is by allowing them to walk behind him, and not insisting that they walk in front of him as was required by his employer , because he had taken into account the demeaner of the detained person.

124. The Claimant told me that he also took into account what he described as the detained persons rights to privacy. The Claimant clearly took pride in treating all the detainees he had dealings with respect. he was at pains to tell me that he thought it was important to respect their dignity.

125. The Claimant told me, although he did not tell Miss Styles, that he knew that the detained person he was escorting was facing a custodial sentence and that he considered it a kindness to allow him to say goodbye to his girlfriend. the detained persons girlfriend was also detained in the same custody suite that night.

126. The Claimant does accept that the way he escorted the detained person did not follow the strict letter as the rules as set out but suggested that it was necessary and appropriate for him to be able to use his own discretion and judgement to deal with detained people as individuals depending on the circumstances.

127. I find that this is not what the rules say and I conclude that Miss Styles was entitled, on the basis of the information she had before her, to draw the conclusion that the Claimant was in serious breach of the rules in the way that he had escorted the detained person and the way that he had behaved on that evening, and that this amounted to misconduct.

128. The Claimant had six years' experience and a clean disciplinary record. He had received adequate training on safety procedures and procedures for escorting detained people. He was well aware of the reason for the rules requiring a prisoner to walk in front of the custody assistant rather than behind them and was also aware of the importance of the no mobile phone use at work. Both are important and basic rules designed to protect the health and safety, not only of the Claimant but also of the detained person.

129. I conclude from the Respondent's evidence, that both sets of rules are considered fundamental to the safe operation of the custody suite, not only for Tascor staff but also for the detained people and for the police officers working alongside them, as well as for any other staff who may be present. I accept that the Respondents reasonably considered that either a breach of the mobile phone policy or a breach of the policies and procedures in respect of escorting prisoners could, in any circumstances, be viewed not only as misconduct but also potentially as gross misconduct.

130. I conclude that this was a view that Miss Styles held and held very strongly. In this case I find that Miss Styles, having determined that the Claimant had committed the misconduct in question considered that the combination of events and that the sequence of failures by the Claimant to abide by what she considered to be fundamental and basic rules well known to all members of staff was so serious that it did amount to gross misconduct and that the Claimant should be dismissed without notice.

131. She stated that she took into account the Claimant's length of service but felt that this cemented her decision that the Claimant should be dismissed rather than given a final warning. She refers to the fact that as an experienced officer he should have known how to escort the detained person and should have known not to use his mobile phone in the workplace and that she could not be satisfied that he would not ignore the rules again.

132. Miss Styles stated and I accept that because the Claimant had failed to explain to her why he had behaved as he had done and because he had failed to offer any insight into whether he would behave in the same way in the future or whether he might recognise his poor practice and improve, she felt she had no option but to dismiss him for gross misconduct.

133. I accept Miss Styles' evidence that she was significantly concerned about the context of the incident taking place within the custody suite and the potential for the health and safety instances that might occur and the potential impact it had on the relationship of the police force. I conclude that Miss Styles reached a conclusion to dismiss the Claimant that was open to her and which did fall within the band of reasonable responses, taking into account the nature of the business and the administrative resources available.

134. I conclude therefore that Miss Styles reached a decision on the information before her following reasonable investigation which was within the range of reasonable responses. The reason for the dismissal of the Claimant was gross misconduct and was for the reasons set out in the dismissal letter. Misconduct is a potentially fair reason.

135. I find that the Claimant was offered an appeal and that he took up the opportunity for appeal and at this stage he did take the opportunity to provide further information, he did not however attend at the appeal hearing. I find that Mr Leihey who heard the appeal took into account all the information before him including the Claimant's additional submissions and I find that he reached his conclusion having carried out sufficient investigation and having reviewed all the information available to him. I find that his decision that the finding of gross misconduct and the sanction of instant dismissal should stand were reasonable in all the circumstances.

136. I conclude that the process followed by the Respondents up to and including the dismissal of the Claimant's appeal was a fair process which was reasonable and proportionate in the all the circumstances.

137. I observe that it is unfortunate that the Claimant was not or did not feel able to make the statement to the Respondent at an earlier stage in the process explaining why he had behaved as he did. I would observe that the Claimant has presented as an honest and genuine individual who tried, to the very best of his ability, to treat detained people within his temporary care with dignity and respect and also with kindness. In doing so he broke the rules.

138. The Claimants failure to provide the information about his reasons for behaving as he did, was a choice made by the Claimant and was not the result of any unfairness in the Respondent's procedure. Whether it would have made any difference to the outcome does not matter because Miss Styles was not able to take it into account because she did not have it before her. She reached her decision on basis of the information she did have before her as she was quite entitled to do.

139. I have also considered the Claimant's claim in respect of an unlawful deduction from his wages. I find that he was contacted following the cessation of his sick certificate and I find that he failed to respond to the clear request to make contact with the Respondent. I find that he had been informed that he was no longer technically suspended but was on sick pay an email sent in March 2019.

140. I find that the email, whilst written in a very unclear way, did technically inform the Claimant that he was, from that point, not on suspension but on sick leave and therefore had the associated entitlement to be paid by way of sick pay and not by way of full pay whilst on suspension. I find that the Respondent did as a matter of fact reinstate the suspension of the Claimant and that suspension was for the same reason as when originally imposed in February 2019.

141. I find on the evidence before me that there was a period of a few days when the Claimant was not certified as sick and was therefore not entitled to sick pay, and nor was the Claimant subject to an ongoing suspension and he was, at that point, available for work.

142. The email sent to the Claimant by Tina Spink on 25 April 2019, states "I need to know whether you have obtained or not a certificate or are now fit for work. I tried to call you this morning as it is one of your agreed contact days but had no response. Please can you contact me and keep me informed of your intentions so that I can organise duties." This is an obvious reference to the organisation of work duties. The Claimant did not do so.

143. The Claimant was written to again on 26 April 2019, in a letter headed unauthorised absence stating that "Today would have been a workday for you but you have not attended or contacted us to inform us of your status. Therefore, you may not be eligible for sick pay from today. In

addition, this is a breach of company procedures." The Claimant is urged to contact the Respondent urgently.

144. The Claimant did not make contact with the Respondent and it is agreed that the Claimant was subsequently placed back onto suspension. There was a period of a few day when the Claimant ought to have either have been at work or signed off sick or suspended and he was neither. The Claimant has a responsibility for reporting a sickness absence and also an obligation to remain in touch with his employers. He was asked to make contact and did not do so and as a result of which deductions were made for his pay.

145. An unauthorised deduction arises in law when the pay properly payable to an employee is not paid. In this case I have therefore considered what pay might have been properly payable under the contract and not what may have been fair in the circumstances.

146. I find that because the Claimant had not informed the Respondent of his availability for work, that the Respondents were entitled to treat those days as unauthorised absences in respect of which no pay was therefore due.

147. I therefore dismiss the Claimant's claim in respect of an unlawful deduction from wages.

148. The Claimant has also claimed wrongful dismissal. I find that there is sufficient evidence before me for me to conclude that gross misconduct was committed by the Claimant. I accept the evidence from Miss Styles as to the actions of the Claimant and the events of 22 and 23 February and find that although the Claimant has given explanations and that there are some slight differences of recollection, that overall he does not disagree with much of what the Respondent alleges.

149. On that basis I find that the Claimant did allow the detained person to walk behind him instead of in front of him, that he did use his mobile phone whilst at work whilst leaving the cell door open and that a detained person was unsupervised, that he did lose sight of the detained person at one point and that he did fail to report matters in the log, as required, amongst other matters.

150. I conclude that these facts are sufficient to support a finding of gross misconduct and on the balance of probabilities that the Claimant has not therefore been wrongfully dismissed and is not entitled to notice pay.

151. I therefore dismiss the Claimant's claim that he has been unfairly dismissed. I dismiss the unauthorised deduction from wages and I dismiss the claim for wrongful dismissal.

Employment Judge Rayner
Date: 8 September 2021

Reasons sent to parties: 7 October 2021

FOR THE TRIBUNAL OFFICE