Case No. 2501601/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Hutton**

Respondent: **Sodexo Limited**

Heard at: **Newcastle CFCTC** **On: 16 & 17 February 2022**

Before: **Employment Judge Newburn**

Members:

Representation:

Claimant: **Ms Cheetham (Counsel)**
Respondent: **Ms Gould (Counsel)**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is not well founded and is dismissed.

2. The Claimant's complaint of unauthorised deduction from wages pursuant to section 13 of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

The Hearing

3. This hearing was conducted by video over 2 days. I had before me an agreed bundle of documents running to 983 pages.

4. The Claimant was represented by Counsel and gave witness evidence. The Respondent was represented by Counsel and Mr Eaton gave evidence for the Respondent.

The Issues:

5. The issues in this matter were as follows:

6. Unfair dismissal

   6.1. What was the principal reason for dismissal? The Respondent says it is some other substantial reason.

   6.2. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

   6.3. In this particular case, the Respondent was relying upon third party pressure as being the fair reason for dismissal. I indicated therefore that it was necessary to have regard to whether the Claimant faced a potential injustice as a consequence of the third-party pressure to dismiss, and if so whether the Respondent had taken reasonable steps to avoid or mitigate against any injustice.

   6.4. Was the dismissal procedurally fair.

7. Unauthorised deduction from wages

   7.1. Did the Respondent owe sums to the Claimant with respect to the period after 10 May 2021.

Findings of fact

8. The Respondent is a facilities management company delivering a range of services to clients throughout the United Kingdom and Ireland.

9. The Claimant was employed by the Respondent from 11 February 2008 until his dismissal on 10 May 2021. He worked as a Prison Custody Officer ('**PCO**') and was based at Her Majesty's Prison Northumberland (the **'Prison'**). The Prison is run by the Respondent on behalf of Her Majesty's Prison and Probation Service ('**HMPPS**'). HMPPS is the Respondent's client.

10. HMPPS rules and Prison Service Instructions apply to the Respondent in its operation of the Prison. The relationship between the Respondent and HMPPS is governed by a commercial services agreement dated 23 July 2013 (the '**Agreement**') between the Secretary of State for Justice (the '**Authority**') and

the Respondent (pages 55 – 59). The Agreement includes contractual terms regarding the Respondent's staff and their operation within the Prison.

11. Relevant clauses of the Agreement are as follows:

"40.3.2 The Contractor shall notify the Authority's Representative immediately of any behaviour of any Prisoner Custody Officer which would cast doubt on his or her fitness for certification as a Prisoner Custody Officer, including if any member of the Contractor's Staff receives a police caution, a Conviction or an ASBO.

41.3 ***Approval of Contractor's Staff***

Subject to clause 41.4 (Authority Transferring Employees), the Contractor shall: ensure that it obtains the Authority's Representative's Approval to any member of the Contractor's Staff who is not required to be certified as a Prisoner Custody Officer (including, for the purposes of this clause 41. 3 (Approval of Contractor's Staff)) at the Prison; and provide to the Authority's Representative such details of those members of the Contractor's Staff who are not required to be certified as Prisoner Custody Officers as may be required by the Authority's Representative for the purposes of deciding whether to give the Authority's Representative's Approval, provided that the Authority's Representative may exempt certain categories of the Contractor's Staff from the requirements of this clause 41.3 (Approval of Contractor's Staff)

41.8 ***Suspension of Staff***

41.8.1 Without prejudice to clauses 39 (The Director) and 40 (Certification as Prisoner Custody Officers), if, in the opinion of the Authority's Representative, any member of the Contractor's Staff is guilty of misconduct, incapable of efficiently performing his or her duties or it is not in the public interest for such individual to work in the Prison, then the Authority's Representative may, by notice to the Contractor require the Contractor to immediately suspend such individual from his or her work and refuse the admission of such individual to the Prison (except, with the Authority's Representative's Approval, in connection with disciplinary matters) (a "Suspended Member of Staff') and shall, immediately on being required to do so, remove such Suspended Member of Staff from the Prison.

41.8.3 The Contractor and the Authority's Representative shall, following the suspension, refusal of admission and/or removal of such Suspended Member of Staff pursuant to clause 41.8 (Suspension of Staff), consult in good faith to ascertain whether the Suspended Member of Staff should be allowed to recommence his or her duties in the Prison.

41.8.5 Following receipt of any Cessation of Suspension Notice by the Authority's Representative, the Authority's Representative shall be entitled, by giving notice in writing (a "Continued Suspension Notice'? to the Contractor within ten (10) Business Days after receipt of the Cessation of Suspension Notice, to require continued suspension and refusal of admission to the Prison of such Suspended Member of Staff for a specified period or permanently."

12. Further to complaints raised by from residents in the Prison and another PCO regarding the Claimant's behaviour in October 2020, an investigation was conducted concerning 3 allegations:

12.1. On 20 October 2020 - inappropriate conduct with a female colleague, specifically picking her up and cuddling her for 20 seconds in front of colleagues and residents of the Prison in breach of social distancing rules (which were in place at this time due to the Coronavirus pandemic) and the Respondent's expected standards of professional behaviour;

12.2. On 22 October 2020 - simulating a sexual act (sexual thrusting motions) on a female colleague; and,

12.3. On 27 November 2020, being in possession of an e-cigarette within the Prison in breach of HMPPS rules (pages 467 – 492).

13. The Claimant was suspended whilst an investigation took place. The investigation meetings with the Claimant took place on 27 November 2020 and 4 December 2020, the Claimant was accompanied and advised throughout the process by a Trade Union Representative and a Representative was present at each meeting. A copy of the Investigation Report was at pages 71 - 78. The bundle did not contain a copy of the letter inviting the Claimant to his disciplinary meeting, or minutes of the disciplinary meeting.

14. A disciplinary meeting was held on 13 January 2021. The outcome of the disciplinary was sent to the Claimant in a letter dated 3 February 2021 (pages 86 – 86). The letter confirmed that:

14.1. the disciplinary officer, Ms Rule, found the Claimant guilty of gross misconduct with respect of all 3 allegations;

14.2. Ms Rule reduced the sanction from dismissal to a 12 month final written warning because she had taken account of the Claimant's long service and clean record, and because he had shown remorse for his actions;

14.3. the Contract Management Team at the Prison had the ultimate decision over whether the Claimant's PCO badge would be returned to him, and they would be reviewing the investigation and disciplinary documentation; and,

14.4. the Claimant had a right to appeal against the decision within 5 working days.

15. The Claimant had been a PCO for over 13 years and confirmed in oral evidence that he was aware that he required a PCO badge to be able to work as a PCO in the Prison. He confirmed that he was aware that the Prison would review his disciplinary and decide whether to re-issue his PCO badge or not, and that in making this decision the Prison had access to the investigation and disciplinary documentation. As such, the Claimant was aware that his PCO badge might not be returned to him and if that happened, he would not be permitted to work as a PCO at the Prison.

16. The Claimant confirmed that he also understood he had a right to appeal the Respondent's disciplinary decision. The Claimant stated in oral evidence that he discussed this with his Trade Union Representative further to the disciplinary meeting, and on 12 February 2021, and thereafter. The Claimant stated that he believed the deadline for him to appeal against the disciplinary outcome was 12 February 2021. The Claimant chose not to appeal against the disciplinary decision. He stated that having a 13-year unblemished record, he was confident he could keep his head down for a year and get passed the matter.

17. On Friday 5 February 2021, Mr Johnstone, the Authority's representative and Contract Manager for the Prison (the '**Controller**'), emailed a copy of his decision letter regarding the Claimant's PCO badge to Ms Pariser, Director of Justice Services with the Respondent, and Ms Barr, the Respondent's HR Business partner (pages 89 – 90).

18. Mr Johnstone confirmed he had "*reviewed the investigation report, record of disciplinary hearing, and available CCTV footage with regard to the conduct allegations that resulted*" in the Claimant's suspension.

19. In his letter Mr Johnstone stated:

> "*Whilst mitigation was given in regard of PCO Hutton's length of service, clean disciplinary record and reported remorse, the behaviour concerned was entirely unacceptable from a public servant. Given the relatively short space of time between the first incident (20/10/20) and the second incident (22/10/20), this can be reasonably considered to reflect a pattern of behaviour, concealed by outward presentation of friendliness and banter. It is further noted that it is recorded that he was challenged by SPCO Dobson after the first incident, but this did not prevent his subsequent actions in initiating the second incident.*"

20. Mr Johnstone set out his position with respect to the evidence he had reviewed and specifically highlighted the attention he paid to the witness statements of two PCO's who described seeing the events underpinning the second allegation and how it was perceived as a simulated sexual act, albeit one that was discounted as friendly banter. Mr Johnstone also linked the first and second allegations and

determined in his mind that this demonstrated a pattern of behaviour which was not acceptable for a public servant and that he could not agree to the return of the Claimant's PCO badge.

21. Mr Johnstone concluded by asking the Respondent if it was content to accept his decision or if further dialogue would be required.

22. 9 minutes after receiving this email, Ms Barr responded to say:

> "*I will leave it to* [Ms Pariser] *to respond formally, but I just wanted to clarify, are you saying that* [the Claimant] *cannot be a PCO, or that he is not approved to work on site at all?*"

23. On Monday 8 February 2021, Mr Johnstone replied to this email stating:

> "*Just replying for the benefit of the copy list to reflect our comms over the weekend.*
>
> *The decision made reflects my judgement that Mr Hutton's proven misconduct is sufficient that I cannot agree that his PCO badge should be reinstated to him. Therefore the next steps fall to Sodexo in determining what this means in relation to Mr Hutton's employment with the company.*"

24. On 8 February 2021, the Claimant had a meeting with Ms Thompson a Governor of the Prison. The Claimant asserted that she informed him that he was suspended from the site however she suggested that this was simply "*whilst they ironed out the politics of the situation*" and indicated to him that this his job was safe.

25. Mr Forster the Claimant's Trade Union Representative (who was also a PCO and employee of the Respondent), was present at the meeting with Ms Thompson and confirmed to Mr Eaton that he did not agree with the Claimant's interpretation of the conversation; in particular, he did not agree that Ms Thompson had assured the Claimant that his job in the Prison was safe (page 180). The Claimant accepted in oral evidence that his recollection of Ms Thompson's words may not have been accurate, and he had simply heard what he had wanted to hear at that time.

26. On 9 February 2021, Ms Barr sent an email to Ms Pariser stating she has taken legal advice regarding the Controller's decision and proceeded to outline the same stating that:

> "*We should not appeal the decision not to return the PCO badge, and when we write back to the client we should make it clear that this is because we have spoken to the dismissing manager and it was a borderline decision anyway, only swayed by length of service and remorse, otherwise it would have been dismissal. We should also say that the disciplining manager did not take proper account of other similar cases, and had they done so the advice they received from the people centre would have been different. We can also make some*

reference to the fact that reputationally, we don't feel it is right to push back when we have clearly dismissed in other similar circumstances

We then should ask the client if they would consider us placing [the Claimant] *in a role on site which is not a PCO role.*"

27. The Respondent's evidence was that having considered the matter, they believed that it was not reasonable, appropriate, or justifiable in the circumstances to challenge the Controller's decision. Due to the sensitive nature of the case involving 3 findings of misconduct, which included a finding that the Claimant had simulated a sexual act on a female PCO, the Controller's clear decision on the issues, and his evident concern over the leniency of the Respondent's disciplinary sanction in the circumstances of the case, the Respondent believed that challenging the decision may have had consequences for the commercial relationship with the Prison and its reputation.

28. On 10 February 2021, Ms Pariser emailed Mr Johnstone with a copy of her letter dated 9 February 2021. In this letter she informed him that she did not intend to appeal his decision to withhold the Claimant's PCO badge. She explained the reason for this was that she appreciated all three allegations of gross misconduct were upheld and that;

"*this was a borderline case where the disciplining manager was minded to dismiss the employee, and it was only the length of service and remorse shown during the disciplinary hearing which resulted in the decision to give a final written warning as an alternative.*

I further note that the disciplining manager did not take full account of our zero-tolerance approach to such matters or of other cases we have dealt with which involved similar behaviours.

Given the above I do not feel that it is reasonable, appropriate or justifiable for me to appeal the decision to revoke the PCO badge in this case".

29. Ms Pariser asked Mr Johnstone if the Respondent would be permitted to offer the Claimant an alternative role at the Prison.

30. On 11 February 2021, Mr Johnstone responded to say it would consider whether the Authority would permit the Claimant to return to site in an alternative role and it would revert to her with that answer (page 100).

31. On 12 February 2021, Ms Barr wrote to the Claimant (pages 104 – 105). The subject of the letter was "*Confirmation of Client Request for Removal*". In the letter, Ms Barr confirmed that the Prison would not be returning the Claimant's PCO badge due to his "*inappropriate conduct towards two colleagues".* The Claimant was informed he would be on suspension while the Respondent sought to resolve the situation however this was not to be considered as a disciplinary action. She advised the Claimant that if they were not able to resolve the matter, then his employment may be terminated due to some other substantial reason,

that being third party pressure, but the Respondent would seek to avoid that and that they were awaiting further information regarding what options would be available to the Claimant and would invite him to a meeting to discuss those options. She confirmed that the Respondent had appointed Mr Martin, the deputy head of Residence, as a welfare support contact.

32. The Claimant stated that he did not receive this letter until Monday 15 February 2021. The Claimant stated in oral evidence that he had talks with his Trade Union Representatives on 12 February 2021 further to receipt of this information. Notwithstanding receipt of the Controller's decision, and further to these discussions with his Trade Union, the Claimant did not request to appeal against his disciplinary outcome. The Claimant stated in oral evidence that he did not believe that he was entitled to appeal the disciplinary decision after the deadline for appeal which passed on 12 February 2021.

33. On 22 February 2021, Mr Johnstone responded to Ms Pariser's question as to whether the Claimant could remain on site in another role. He stated that he had carefully considered whether it would be acceptable to allow the Claimant to work in an alternative role at the Prison, however he confirmed the Claimant was not permitted to work on the Prison site at all (page 109 – 110) stating specifically that:

> "*I have come to the conclusion that the severity meets the threshold where it cannot be judged to be in the public interest for him to continue to be employed at HMP Northumberland as a public servant. There can only be a transparent expectation that unprofessional and sexualised behaviour towards a colleague, even in the alleged context of banter, is incompatible with continued employment in delivering professional services on behalf of HMPPS.*"

34. Mr Johnstone stated that the Prison operates a zero-tolerance approach towards the type of behaviour established through the investigation and subsequent disciplinary hearing to have been perpetrated by the Claimant.

35. The Respondent's evidence was that further to this confirmation that the Claimant was not permitted to work on the Prison site in any capacity, the Respondent began to consider alternative employment elsewhere within the company.

36. The Respondent appointed Mr Eaton, one of the Respondent's Heads of Residence at the Prison to handle the "third party pressure" situation. Mr Eaton stated that the Respondent was following, and complied with, its policy for handling "third party pressure dismissal" situations (the relevant extracts were at pages 494 – 495). The policy states that in the first instance the Respondent should ask the Client whether the employee can return to the site. If not, the policy states that before there is a meeting resulting in dismissal for some other substantial reason all attempts must be made to establish whether that are any suitable alternative roles at another site within the Company.

37. On 2 March 2021, Ms Barr took advice from the People Centre regarding how the third-party pressure dismissal process would run (page 115). Ms Barr, or a colleague, must have asked how long the process should take and whether 2 weeks was an adequate time frame. Ms Barr was advised that the time the process would take would depend upon the circumstances of the case. She would need to take enough time to explore all avenues before a dismissal should occur but, if she found 2 weeks was enough time to do that, then 2 weeks would be acceptable and thereafter, she would need to invite the Claimant to a dismissal meeting.

38. On 3 March 2021, the Claimant and Mr Foster attended a meeting with Mr Eaton. The purpose of the meeting was to discuss the Mr Johnstone's decision not to permit the Claimant back into the Prison and how they would move forward.

39. During this meeting Mr Eaton informed the Claimant about the process regarding a dismissal for some other substantial reason, and that the Respondent wished to avoid this where possible so they should look for alternative roles within the company. It was discussed at this meeting that this process may take 2 weeks.

40. On 5 March 2021, the Claimant wrote to the Respondent's People Centre making a request to formally appeal against the outcome of the disciplinary decision outlined to him in the letter of 3 February 2021, which he received on 5 February 2021. He concluded the letter stating that "*all I want to do is return to work*".

41. Mr Eaton's evidence was that initially he considered that the Claimant should be given the opportunity to appeal, although he did not believe the appeal was likely to be successful in his opinion. His evidence was that he spoke to Ms Barr and the People Centre explaining his position. HR informed Mr Eaton that this would not be appropriate because the appeal was considerably out of time. The Claimant's aim was to have Mr Johnstone change his decision to revoke his PCO badge and allowing an appeal of the disciplinary would mislead the Claimant, as appealing against the original disciplinary, in which he was not dismissed, would not be an appeal against Mr Johnstone's decision.

42. On 15 March 2021, Mr Eaton wrote to the Claimant following up on their meeting. In this letter he confirmed the Respondent had received his letter requesting an appeal dated 5 March 2021, which was received 10 March 2021. Mr Eaton confirmed that the deadline for the appeal was 12 February 2021, 5 working days from receipt of the outcome letter on 5 February 2021. The request for an appeal was rejected as it was significantly out of time.

43. Mr Eaton explained to the Claimant that the disciplinary process was separate to the current process regarding the third-party pressure. The current process carried with it the possibility of dismissal, and the Claimant would be permitted to appeal that decision if it were made.

44. The letter set out that Mr Eaton would seek to locate a suitable alternative role for the Claimant and provided a link to the Respondent's job vacancy website. He asked the Claimant to register on the site and to let him know if any roles were of interest to the Claimant. He asked that the Claimant send him a copy of his recent CV. The letter confirmed that if the Claimant was unable to locate an alternative role this may result in dismissal.

45. On 25 March 2021, Mr Eaton and the Claimant, along with Mr Foster, had a further meeting with the aim of seeing how progression was going with regard to seeking alternative employment. Mr Eaton set out notes of this meeting in an email to the Respondent's People Centre on 26 March 2021 which detailed Mr Eaton's account of the meeting (page 180 -181).

46. During the meeting the Claimant raised issues he had regarding the decision not to permit his out of time appeal and his disappointment. The Claimant stated he had not appealed in time because Ms Thompson had led him to believe his position was secure, however during this meeting Mr Foster confirmed that he had been present during that meeting and did not agree that Ms Thompson had said this to the Claimant.

47. The Claimant had also requested that he have a meeting with Mr Johnstone. Mr Eaton explained that despite there being no direct right for the Claimant to speak to Mr Johnstone with respect to his decision, he spoke to Mr Johnstone to seek to persuade him to meet with the Claimant. Mr Johnstone however declined to meet with the Claimant, because he felt that he had clearly set out the reasoning for his decision in his letters, he had taken advice through his chain of command as he understood the seriousness of the consequences for the Claimant, they all agreed with his conclusion, and he did not feel the decision could be any different.

48. At this meeting the Claimant had stated he had seen a job regarding COVID testing but was unable to access the portal to get to the site. Mr Eaton advised the Claimant to access the vacancy via the external website link he had provided and that if the Claimant still had troubles with access to the site to let him know.

49. Mr Eaton's oral evidence was that he was concerned that the Claimant was not engaged with the process of looking for alternative roles as he was focussed on appealing Mr Johnstone's decision and was aiming to have his PCO badge reinstated. Mr Eaton's evidence was that he tried as best as he could to focus the Claimant on looking for alternative jobs and impressed upon the Claimant the importance of him engaging with looking for alternative work and represented that he wanted him to let him know if he found any roles. Mr Eaton stated that he had contact with Mr Martin, the Claimant's support manager, and Mr Martin confirmed that the Claimant was more interested in asking him questions regarding the authority of the Controller rather than considering alternative roles.

50. Whilst the Claimant stated in his oral evidence he had no contact with his appointed support officer Mr Martin, the bundle contained emails from Mr Martin which stated he had made contact with the Claimant during this process. On 22 March 2021, he emailed Mr Eaton to confirm he had had tried to call the Claimant but did not receive an answer and therefore left a voicemail asking for a call back (page 167), on 28 April 2021, Mr Martin had written an email to Mr Eaton (page 278) regarding a call he had just had with the Claimant during which they had discussed alternative roles.

51. On 5 April 2021, the Claimant raised a grievance (pages 185 – 186). The grievance related to the initial disciplinary matter, asking about the manner in which the allegations came to light, the delay in the investigation, the removal from duties and suspension, the failure to return him to his position further to the outcome of the proceedings, and the refusal to allow an appeal out of time.

52. Mr Eaton was appointed as grievance manager and the Respondent wrote to the Claimant on 19 April 2021 to confirm the same, setting up a further meeting to discuss the progress surrounding the search for an alternative job, and the Claimant's grievance. The Claimant wrote to confirm his attendance at this meeting and at this point did not challenge Mr Eaton's appointment as the person who would investigate his grievance.

53. On 5 April 2021, the Claimant also wrote to Mr Johnstone asking him to review his decision and raising a grievance in relation to it. On 19 April 2021, Mr Johnstone wrote a response to the Claimant's letter of 5 April 2021. In this letter Mr Johnstone gave a two-part reply. The first part was a confirmation that with respect to the grievance the Claimant raised against his decision, he has passed the letter to the Senior Contract Manager Ms Lund to review.

54. Mr Johnstone explained the second part reflected the Claimant's "*appeal for* [Mr Johnstone] *to reconsider* [his] *original decision*." Mr Johnstone explained that he had "*revisited the thinking behind this but still arrived at the same conclusion.*"

55. On 22 April 2021, Mr Eaton and the Claimant, with Mr Foster, had a further meeting. During this meeting Mr Eaton asked the Claimant if he had considered any alternative roles. The Claimant informed Mr Eaton that he was in the process of looking for alternative roles and had identified some. The Claimant confirmed that he had not informed Mr Eaton about his application for the roles.

56. Mr Eaton agreed to adjourn the meeting to allow the Claimant to progress with looking for alternative roles.

57. On 23 April 2021 Ms Barr asked the Respondent's resource manager if she could check on any applications the Claimant had made, and Ms Barr was informed that the Claimant had applied for 5 roles. The email chain between Ms Barr and the resource manager at pages 236 – 238 showed Ms Barr asking for details of

the relevant manager recruiting for those jobs so that she could contact them to explain the situation in order to get interviews sorted for the Claimant and push him through the first sift.

58. Thereafter I was directed to numerous emails in the bundle dated 26 April 2021 (pages 247 – 256) which demonstrated Ms Barr and the resources manager were chasing up the managers involved in the roles the Claimant had applied for. Ms Barr sent an email to the resources manager and Mr Eaton to confirm that further to their chasing on of the managers she had contacted had called the Claimant regarding a secondment opportunity in Shropshire. Mr Eaton stated in his evidence that this was described as a secondment because at that time the Claimant did not have the relevant skills however, the Respondent would seek to train the Claimant and this role would develop into a permanent role if he showed he could learn the skills. The Claimant rejected this role his evidence was that he felt it was not suitable as it was only temporary and based in Shropshire and he did not wish to relocate for a temporary position.

59. On 5 May 2021, Ms Barr chased the Claimant's outstanding applications and where they were in the process.

60. On 5 May 2021, Ms Gadsden emailed Ms Barr stating that a Ms Neill from her team would be contacting the Claimant about a position and that normally she would do a pre-screening for and then a phone interview, however she had flagged the Claimant up in light of the situation and he would skip the pre-screening and they would arrange the phone interview. Ms Gadsden stated the role is casual, but they were moving towards a fixed term contract for some of the team commencing at the start of June for 12 months.

61. Approximately 20 mins later, Ms Neill emailed to Ms Barr by email to confirm that she had contacted the Claimant to arrange a telephone screening for a role in her resource team however she stated that the Claimant informed her that:

> "*he had ongoing issues at his current role which need to be resolved before he can decide what he is doing*".

62. On 4 May 2021, the Claimant sent a further letter to Mr Johnstone, and asked that he pass the letter to Ms Lund as he had not received a response from her. In that letter he again challenged Mr Johnstone's decision and took the opportunity to provide offer his further comments on the evidence provided in the investigatory documentation regarding his disciplinary, addressing points made by Mr Johnstone in his decision.

63. On 29 April 2021, Mr Eaton wrote to the Claimant to invite him to a meeting on 5 May 2021. The letter set out the history of the matter and confirmed that the process had been ongoing for 11 weeks, during which time Mr Eaton had been trying to support the Claimant in looking for alternative work. The previous meeting had been adjourned to allow the Claimant to pursue the application he

had identified, and a further meeting was required to discuss his progress. The letter confirmed that if no alternative position could be found for the Claimant the outcome of the meeting outcome of the meeting could be dismissal.

64. On the morning of the meeting of 5 May 2021, the Claimant contacted the Respondent to confirm that he would not be able to attend the proposed meeting due to being ill with increased stress and anxiety and that speaking to Mr Eaton was adding to his stress and anxiety. Mr Eaton spoke with the Claimant's wife with the Claimant's authority and notes of their meeting were recorded in Mr Eaton's email of 5 May 2021 (page 317). Mr Eaton noted that he explained that the process had been ongoing for approximately 12 weeks and it needed to come to a conclusion however he would adjourn the meeting in light of the Claimant's position and send a further invite for another meeting to the Claimant and that he would of course consider any adjustments that could accommodate Claimant.

65. On 6 May 2021, the Claimant sent an email to Mr Eaton attaching his fit note stating that Claimant was not fit for work due to depression, and the Claimant detailed how the process was causing him stress.

66. On 6 May 2021, Mr Eaton wrote again to the Claimant to reschedule the previous meeting for 10 May 2021. Mr Eaton explained that he understood the Claimant was suffering stress because of the process. In light of that, Mr Eaton stated that in his view it would be in the best interest of all parties to resolve this matter in the hope that this will also help to alleviate the Claimant's stress. Mr Eaton stated that he would be happy to accommodate adjustments in order for the Claimant to participate, and suggested a video call, or permitting the Claimant to provide written submissions ahead of the meeting.

67. On 10 May 2021, the Claimant sent a further email to Mr Eaton in which he attached his GP fit note stating he was not fit to attend work until 6 June 2021. He explained the process had caused anxiety which was having an effect on his mental health. He asked if Mr Eaton had considered ill health retirement as an alternative to dismissal and mentioned he had been considering applying for ill health retirement due to his back and hip issues.

68. Further to receipt of this email Mr Eaton responded to the Claimant addressing both his emails of 6 and 10 May 2021. Mr Eaton informed the Claimant that he had looked into ill health retirement, and he understood that it was not an available option because ill health retirement could only be considered where there had been an ongoing long-term issue of ill health which was continuing and preventing the individual from conducting his role; that was not the case for the Claimant. Mr Eaton had looked into the matter and noted the Claimant's previous absence relating to his back occurred several years ago and since that time he had returned to work and successfully been completing his job as PCO.

69. Shortly after on 10 May 2021, the meeting with Mr Eaton went ahead with Mr Forster in attendance on behalf of the Claimant. The meeting had been delayed for an hour as Mr Eaton wanted to permit the Claimant an opportunity to consider his last email and discuss the same with Mr Foster. The Claimant made comments on Mr Eaton's email and provided the same to Mr Foster to discuss with Mr Eaton during the meeting.

70. The Claimant had confirmed in his response to Mr Eaton that he had not found alternative employment or other posts of interest to him. Accordingly, Mr Eaton decided that the process had been extended to accommodate the Claimant as far as possible, but he was satisfied all alternatives had now been considered and accordingly he decided to dismiss the Claimant for some other substantial reason. Mr Eaton's evidence was that he spoke with Mr Foster about communicating the decision. Mr Foster asked Mr Eaton if he could tell the Claimant he had been dismissed as he believed this would be a better way to break the news to him given the Claimant's stress related illness and that he was not on good terms with Mr Eaton. Mr Eaton considered the Claimant's current mental health and agreed to this action as it would probably be preferable for the Claimant.

71. The Claimant confirmed in oral evidence that on 10 May 2021, he received a call from Mr Foster further to the conclusion of the meeting, Mr Foster informed him that Mr Eaton had dismissed him and he stated that he did feel a degree of relief that the process had concluded.

72. On 10 May 2021, Mr Eaton wrote the Claimant with the outcome of the grievance he raised on 22 April 2021 (page 383 388). This was a lengthy and detailed letter which addressed the 10 points the Claimant had raised in his grievance.

73. On 14 May 2021, Mr Eaton further wrote to the Claimant to confirm the outcome of the disciplinary.

74. On 14 May 2021, Ms Lund wrote to the Claimant in response to his letter of 5 April 2021 regarding his grievance against Mr Johnstone's decision. Ms Lund stated that that she had reviewed the decision made by Mr Johnstone and she had considered the evidence available and confirmed that she supported his decision to rescind his PCO badge and not to permit him back to work on the prison site.

75. The Claimant appealed the decision to dismiss him on 21 May 2021, and he appealed the grievance outcome on procedural grounds and sent a lengthy letter outlining his appeal points.

76. The Respondent decided that because there was an overlap between the Claimant's appeals they should be heard together.

77. The appeal meeting was heard by Mr Hill, acting Deputy Director for the Respondent on 9 June 2021. During this meeting the Claimant advised that he had just received the Data Subject Access Request documents, and this might result in him raising further issues. Mr Hill therefore agreed that the Claimant should review those documents and submit any further issues arising as a result of doing so to him by 21 June 2021. The Claimant accordingly submitted a further letter to Mr Hill on 21 June 2021.

78. On 16 July 2021, Mr Hill sent a lengthy appeal outcome letter (pages 455 – 461) to the Claimant. In this letter Mr Hill identified and separated each of the complaints raised by the Claimant and responded to them. Mr Hill did not uphold the Claimant's appeal against his dismissal.

79. Further to leaving the company, the Respondent completed an employee leaver's form (page 458) which included a checked box stating the Claimant's position was "delimited". The Claimant asserted that as his position was no longer to be used for new starters or replacements his role was redundant.

80. The Respondent's evidence was, because the Claimant had transferred by operation of the Transfer of Undertakings Protection of Employment Regulations 1996 (TUPE) he had retained his public sector terms and conditions and did not have the Respondent's terms and conditions. However, all new starters or replacements would not be able to work on the same terms and conditions as the Claimant and would be required to work under the Respondent's own terms and conditions.

81. The Respondent's evidence was that had the Claimant not been dismissed he would have continued in is role, no redundancy exercise had been carried out since the Claimant's dismissal, and there had been no reduction in the requirement for PCOs at the site.

The Relevant Law

82. I was grateful for the submissions from the parties' representatives during which I was referred to a number of authorities which I have included below.

<u>Unfair Dismissal:</u>

83. Section 98 of the Employment Rights Act 1996 ("ERA") provides:

> "*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 … some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

84. Section 98(4) ERA provides:

> "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*"

85. Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT confirms that the Tribunal must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds. Iceland Frozen Foods held that: "It is the function of the [Employment Tribunal] 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 the band it is unfair*."* There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

86. Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, confirms that the band of reasonable responses test applies to procedural requirements as well as to the substantive considerations.

87. Taylor v OCS Group Limited [2006] IRLR 613, confirms that it is possible that procedural defects in an initial disciplinary hearing may be remedied on appeal, provided that the appeal is sufficiently comprehensive.

Some other Substantial Reasons Dismissals:

88. In *Scott Packing & Warehousing Co Ltd v Paterson [1978] IRLR 166*, the Scottish EAT confirmed that third-party pressure to dismiss could constitute SOSR.

89. Dobie v Burns International Security Services (UK) Ltd [1984] 3 All ER 333 Sir John Donaldson MR held:

> '*In deciding whether the employer acted reasonably or unreasonably, a very important factor of which he has to take account, on the facts known to him at that time, is whether there will or will not be injustice to the employee and the extent of that injustice. For example, he will clearly have to take account of the length of time during which the employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may*

face the employee in obtaining other employment and matters of that sort. None of these is decisive, but they are all matters of which he has to take account and they are all matters which affect the justice or injustice to the employee of being dismissed.'

90. Henderson v Connect (South Tyneside) Ltd [2010] UKEAT/0209/09/SM, Per Mr Justice Underhill stated

"*13. … It must follow from the language of s. 98(4) that if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously, by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair: the outcome may remain unjust, but that is not the result of any unreasonableness on the part of the employer.*"

18 … however much the employer "takes into account" the injustice to the employee caused by the third party's stance, he may still reasonably decide to dismiss - see in particular Sir John Donaldson's recognition in Dobie (at p. 817 C-D) that the factors to which he draws attention cannot be decisive. As we understand it, the effect of Dobie is that in a case where the client's stance appears liable to cause injustice, the tribunal must consider with special care whether the employer had indeed done all that he could to avoid or mitigate that injustice: in a case of patent injustice it may be necessary for an employer to "pull out all the stops".

Unauthorised Deduction from wages:

91. In Robinson v Bowskill and ors 2014 ICR D7, EAT the EAT held that the principle in Gisda Cyf v Barrett ([2010] ICR 1475), that dismissal is not effective until the employee knows of it or has had a reasonable opportunity to do so, did not operate so as to exclude communication of the dismissal to the employee by a third party, in that case the Claimant's solicitor.

92. The Claimant directed me to the following paragraph from McMaster v Manchester Airport Plc [1997] EAT/149/97 with respect to the Claimant's claim for unauthorised deduction from wages:

"*It is common ground between the parties that in order to be effective, the fact of dismissal needs to be communicated by the employer to the employee, whether it is a summary dismissal or a dismissal on notice, and whether the dismissal was in breach of contract or not.*"

Redundancy

93. Redundancy is defined in section 139 ERA which says dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact the requirements of the business for employees to carry out work of a particular kind,

either generally or in the particular place, have ceased or diminished or are expected to cease or diminish permanently or temporarily, for whatever reason.

Conclusions

94. I will deal with the Issues in dispute applying the relevant legal principles to the facts as I have found them to be.

What was the reason or principal for dismissal?

95. The Respondent says the principal reason for dismissal was HMPP's refusal to permit the Claimant to return to work on its site, the removal of his PCO badge, and thereafter the subsequent unsuccessful attempts to find a suitable alternative role for the Claimant which amounted to some other substantial reason.

96. The Prison had clearly confirmed the Claimant could not return to site and the Claimant accepted there were no suitable alternative roles for him within the Respondent business.

97. Case law has established that circumstances such as these where a third party asks for an employee to be removed, and subsequently no alternative employment can be found is capable of amounting to the potentially fair reason of some other substantial reason for dismissal as envisaged by s98(2) ERA.

98. I am satisfied the principal reason for dismissal in this case was the fact that Mr Johnstone had made a decision to remove the Claimant's PCO badge and refused permission for him to work at the Prison, and there had been an unsuccessful search thereafter for suitable alternative employment within the Respondent organisation.

Considering the injustice to the Claimant, and the extent of the injustice

99. In cases of third-party pressure, the authorities focus on the employer's duty to take reasonable steps to avoid or mitigate any injustice to the employee caused by potentially being dismissed further to pressure from a third party. Dobie and Henderson confirm that I must consider the injustice to the Claimant and that I need to consider whether or not the employer had done all that it could reasonably be expected to do to assist the Claimant and prevent him from losing his employment.

100. Henderson further reminds me that in a case of patent injustice, it may be necessary for an employer to "pull out all the stops", however if the employer has done everything it reasonably can to avoid or mitigate any injustice brought about by the stance of the third party, but has failed, any eventual dismissal will be fair.

101. I do not find that this was a case of "patent injustice' in which Henderson would require the employer to "pull out all the stops". The Respondent had carried out an investigation and disciplinary process and determined the Claimant was guilty

of 3 acts of gross misconduct and the Claimant had taken part in that process with Trade Union representation throughout. The Claimant knew the Prison had the right to revoke his PCO badge and was reviewing his case by looking at the investigation and disciplinary documentation.

102. The Respondent was contractually obliged to inform the Prison of the Claimant's suspension and the Controller was entitled to revoke the Claimant's PCO badge and deny him access to work on the site. Given the Claimant's length of service, and the fact that he was represented by his Trade Union throughout the process, I find it likely that the Claimant was fully aware that the Controller could revoke his PCO badge in circumstances such as his, and he ought reasonably to have been advised as much by his Trade Union Representative. Regardless of whether he ought reasonably to have known this, in the Respondent's letter of 3 February 2021, the Claimant was explicitly informed of this. It confirmed that the Controller had the right to revoke his PCO badge and that he was making this decision having reviewed the investigatory and disciplinary documentation.

103. This is not the same as a case in which the third party had exerted pressure on an employer to remove an employee from site without warning or good reason, or that the Claimant was not aware that the Controller had this right.

104. Nevertheless, I do however find that there was, as is often the case in third party pressure cases, a procedural injustice because there was no process available for the Claimant to follow to appeal against the Controller's decision as the Controller was not his employer.

Did the Respondent take all reasonable steps to mitigate/avoid the injustice?

105. The Claimant submitted that the Respondent did not do all it reasonably could do to mitigate or avoid this injustice and listed specific examples of things it submits that the Respondent unreasonably failed to do. I will review each point raised by the Claimant in turn.

The Respondent did not have a process in place for the Claimant to defend his position to the Prison:

106. There was no process at the time that permitted the Claimant to challenge the Controller's decision to revoke his PCO bade. This process simply did not exist at the relevant time. I understand the Claimant stated one has subsequently been implemented, however that takes us no further; it was not argued by the Claimant that the Respondent acted unreasonably because it ought to have waited until such a procedure was implemented, no doubt because such a process is unlikely to have been implemented within a time frame whereby it could be considered reasonable for the Respondent to continue to employ and pay the Claimant without further alternative work for him.

107. Notwithstanding the fact that no such process existed at the relevant time however, Mr Eaton did seek to address this injustice and spoke to Mr Johnstone in an attempt to persuade him to meet with the Claimant to discuss his decision. Mr Johnstone refused, as he did not see how his decision could be altered.

The Respondent did not appeal the Controller's decision on the Claimant's behalf.

108. Both parties highlighted the relevant paragraph in Henderson quoted above at paragraph 90 which reminds me that the Respondent had to do all that it reasonably could to avoid/mitigate the injustice to the Claimant. The Claimant submitted that appealing the Controller's decision was the most obvious step envisioned by case law that the Respondent could and should have taken because it could not be said that it would have been impossible to change the Controller's mind.

109. In the Respondent's submissions it laid emphasis on the word "reasonably" in the Henderson quote. The Respondent argued that in the circumstances of this case it was not reasonable, appropriate, or justifiable to appeal Mr Johnstone's decision. Mr Eaton also stated that there would have been reputational damage given the allegations were found to be proven and this was a case in which dismissal was a likely outcome, and the Respondent understood that the Prison had a zero-tolerance approach to actions involving sexual misconduct.

110. The relevant circumstances were that this was a matter in which gross misconduct was found, dismissal was a likely outcome of the Claimant's disciplinary given the nature of the misconduct, and the penalty was only reduced to a final written warning because the Claimant showed remorse and had a long and clean record. Mr Johnstone had expressed shock at the disciplinary outcome reached by the Respondent and provided details as to why his findings differed, focussing on his review of the evidence provided in the witness statements. He informed the Respondent that the Prison adopted a zero-tolerance approach to misconduct involving sexualised behaviour. It is not surprising that the Controller, acting as a representative for the Secretary of State for Justice, would take this approach. Mr Eaton's unchallenged evidence was that it would have been damaging to the Respondent's reputation to appeal the decision in circumstances.

111. The Claimant had submitted that he believed the Prison had not previously adopted a zero-tolerance approach as he believed it had not acted similarly in other cases involving misconduct involving sexual behaviour. I was not presented with documentary evidence regarding these other cases; however, even if the Prison had not adopted that policy previously, it was not unreasonable for it to begin to adopt that approach.

112. I find that in these circumstances, it would not have been reasonable for the Respondent to seek to challenge Mr Johnstone's decision.

The Respondent did not seek to persuade the Controller as to the reasoning behind Mr Rule's decision, or have the Controller speak with Ms Rule directly.

113. The Claimant's submission was that the Respondent disassociated itself from Ms Rule's disciplinary decision and did not seek to have Mr Johnstone speak with Ms Rule.

114. The Controller had been provided with all investigation and disciplinary documentation. This included the minutes of the disciplinary meetings with Ms Rule's findings and the disciplinary outcome with her explanation as to her decision. The Respondent had no contractual right to make the Controller speak with Ms Rule, and it seems the Controller was in receipt of the information she would have provided in any event.

115. In response to the Controller's decision letter of 5 February 2021, expressing shock at Ms Rule's sanction, the Respondent informed the Controller that Ms Rule had not taken account of the Respondent's zero-tolerance policy in these circumstances, and in that respect did disassociate itself with her decision, which is likely to have been for reputational reasons and to maintain relations with its client who had expressed shock at the disciplinary outcome.

116. Given that Mr Johnstone was in receipt of documentation outlining Ms Rule's findings, that Mr Johnstone had expressly informed the Respondent that the Prison operated a zero-tolerance approach to sexual misconduct, and that Mr Johnstone was clear in his decision letter that he strongly disagreed that the outcome of the disciplinary was commensurate with the facts of the case, I do not find that the Respondent acted unreasonably by not seeking to defend Ms Rule's decision to the Controller. I consider, given the strength of Mr Johnstone's disapproval of Ms Rule's decision, that this action could likely have resulted in reputational damage to the Respondent and was unlikely to have resulted in Mr Johnstone changing his mind.

<u>The Respondent did not "sell" the Claimant for an alternative role on the Prison site;</u>

117. The Respondent had asked if the Claimant were permitted to return to site and work in another role that did not require a PCO badge. The Respondent did not seek to persuade the Controller as to the merits of doing so, and the Claimant was critical of this, suggesting it was a reasonable step the Respondent should have taken.

118. I repeat my findings at paragraphs 108 - 111. In light of the Respondent's position, it would not have been appropriate or reasonable for the Respondent to attempt to "sell" the Claimant for an alternative role on site.

<u>The Respondent did not establish if there were suitable alternative roles for the Claimant.</u>

119. The Claimant submits that the Respondent's own policy, and <u>Henderson</u> provides authority that the Respondent should find suitable alternative work for the Claimant and not put the onus on the Claimant to find work.

120. I do not believe that <u>Henderson</u> places an onus on an employer to provide an employee with suitable alternative work where none exists in the circumstances.

121. The Respondent's approach to finding an alternative role for the Claimant began by the Respondent providing the Claimant with access to all of the roles within

the company and allowing the Claimant to review them in order to determine which was interested in.

122. It seems, in part, that the Claimant's criticism of this approach is that the Respondent did not approach the Claimant with a list of suitable alternative roles for the Claimant. Whilst the Respondent could have reviewed the roles and considered which it believed the Claimant might wish to apply for, and then have provided him with a more limited list of roles which it believed to be suitable for him, this would have involved the Respondent limiting the potential vacancies open to the Claimant without giving him the chance to register his interest in all potential roles within the company.

123. The approach taken by the Respondent was to allow the Claimant to review all possible roles and then to offer as much support as it could to assist the Claimant where he showed interest in roles.

124. The Respondent's internal emails demonstrate that as soon as the Claimant informed Mr Eaton of roles he had applied for, there were a number of people at the Respondent company involved in trying to fast track his applications. Most notably the evidence demonstrated Ms Barr and the resource manager's attempts to contact the relevant team managers in charge of recruiting for each role to explain the situation in an effort to progress the Claimant's applications, and thereafter they updated both Mr Eaton, and Mr Martin regarding the position.

125. The Claimant submitted that Mr Eaton had not told him he should contact Mr Eaton about the roles he was interested in, and his submissions were that it was left to him to find a role. He was also critical in his evidence that one of the links to a vacancy that Mr Eaton had provided did not work. Mr Eaton's letters to the Claimant confirm that he asked the Claimant to contact him regarding any roles the Claimant was interested in and with regards to the broken link, Mr Eaton had explained how the Claimant could access the link on another page but to revert to Mr Eaton if this did not work or he had further problems.

126. I found Mr Eaton to be sincere when giving his evidence. specifically regarding the efforts he made to seek to assist the Claimant to find alternative roles and his attempts to focus the Claimant on this task. His genuine desire to help the Claimant, and disappointment that he had not succeeded in his task, was apparent in his oral evidence.

127. I find that the Claimant was not focussed on engaging with the process of searching for alternative work. The Claimant had focussed his attention on challenging Mr Johnstone's decision. Many of the meeting notes with Mr Eaton demonstrate that this was largely the Claimant's focus. He continued to challenge the Controller's decision both by raising grievances internally about the process, and by raising grievances to Mr Johnstone and Mr Johnstone's manager Ms Lund requesting a review of the decision and thereafter raising a grievance about the same. This is not a criticism of the Claimant's determination in this respect, however this left him with little room to consider alternative roles. Furthermore, as he had himself stated, he simply wanted his old job back.

128. It is important to note that at this time the country was still facing the uncertainties of the Coronavirus pandemic, COVID restrictions, and lockdown measures which has vastly reduced the employment market. In these circumstances, it is unsurprising that the Respondent could not find suitable alternative roles.

129. Having reviewed the Respondent's internal emails and meeting notes between Mr Eaton and the Claimant, and considered the oral evidence from the parties, I find that the Respondent made considerable efforts to find alternative employment for the Claimant. Given that the Claimant was unable to wholly engage with the Respondent on this front, as he had chosen to focus elsewhere, and the limited vacancies available because of the issues caused by the Coronavirus, I find that the Respondent had done all it reasonably could do, to assist the Claimant however, having done that, where no vacancies could be found, that did not render the steps taken by the Respondent as unreasonable notwithstanding the injustice to the Claimant.

Was the dismissal procedurally fair?

130. The Claimant submitted that the process followed by the Claimant was procedurally unfair, for a number of reasons which I will review in turn.

The Respondent did not follow its own third-party pressure dismissal policy.

131. The Respondent's policy regarding dismissals for third party pressure stated that before dismissal, all attempts must be made to find suitable alternative roles for the employee and dismissal would only occur when all possible alternative to termination had been considered and ruled out.

132. The Claimant submits that the Respondent failed to comply with this policy because the onus was on the Respondent to find the Claimant a suitable alternative role and because the only alternative roles available were not suitable.

133. The Respondent's policy states:

> "*all attempts must be made to establish whether there are any suitable alternative roles at another site location within the Company for the employee*."

134. This does not state that the Respondent must find the Claimant a suitable alternative role.

135. With respect to following its policy, I repeat my findings regarding the Respondent's approach to finding an alternative role at paragraphs 121 – 129 above. The Respondent's attempts were considerable, the process was extended and lasted for 12 weeks; during this time, in the circumstances as I found them to be, I find that all attempts had been made to establish whether there were any suitable alternative roles.

136. The Claimant further submitted that, in breach of its policy, the Respondent did not consider all possible alternatives to termination as it did not consider redundancy or ill health retirement.

137. With respect to the redundancy element of this submission, the Claimant relied on the employee leaver's form. The Respondent confirmed if the Claimant had not been dismissed, he would not have faced a redundancy, the Respondent did not carry out a redundancy exercise thereafter for this role and its requirements for people carrying out the Claimant's PCO role had not reduced.

138. Considering the requirements of section 139 ERA there was no redundancy situation and the Claimant's role was not redundant. Accordingly, the Respondent could not consider making the Claimant redundant and it was not unreasonable not to have considered this.

139. With respect to ill health retirement, the Claimant stated that everyone knew he walked with a slight limp due to his hip and back concerns; given this and his mental health issues that had arisen through this process, he did not consider it reasonable that the Respondent did not consider ill health retirement as an alternative.

140. Mr Eaton had however considered whether ill health retirement would be possible for the Claimant. The evidence shows that he spoke with Ms Barr and received information regarding the Claimant's previous sickness record and time off work with back pain in 2018, since then the Claimant had returned to work in his role as PCO and had not reported further problems relating to this matter with the Respondent. Furthermore, there was no evidence that his recent mental health problems were long term issues, and they were not recorded in the Claimant's health record.

141. Having considered this information and taken advice on the matter from Ms Barr, he determined that it was not suitable.

142. Accordingly, the Respondent did comply with its policy in considering alternatives, and it had not acted unreasonably in this respect.

<u>The Respondent appointed Mr Eaton to chair the Claimant's grievance</u>

143. The Claimant argued that it was not within the band of reasonable responses to have Mr Eaton chair the Claimant's grievance, since part of his grievance related to the decision not to permit an appeal for his disciplinary out of time and Mr Eaton had been involved in that process.

144. Whilst I appreciate that Mr Eaton was not involved in the original disciplinary issue which the Claimant's grievance related to, the grievance included the Claimant's complaint regarding the decision not to permit the appeal against the disciplinary out of time. This was an issue Mr Eaton had been involved in.

145. Considering all the circumstances of the matter, I appreciate why the Claimant did not feel that it was within the band of reasonable responses to appoint Mr Eaton to chair this meeting and that the Respondent could have appointed someone who had not been involved.

146. I am reminded by the case of Taylor however that I must look at the procedure as a whole, which involved considering whether any procedural defects were rectified by the appeal.

147. The Respondent stated that the appeal process was thorough, and that Mr Hill had specifically been considered a suitable person to hear the appeals because he had no prior involvement in the events. The Claimant appealed against the grievance, and the Claimant was informed his appeal would be chaired by Mr Hill. The Claimant had not raised an issue with Mr Hill as the chair for this appeal in his witness statement however in oral evidence he suggested Mr Hill might not be considered independent as he was Mr Eaton's superior.

148. Given that Mr Hill was superior to Mr Eaton, he was not burdened with a concern for his role when making decisions that might be contrary to those taken by Mr Eaton. The Claimant was able to attend the appeal meeting and did so with his Trade Union Representative. The Claimant confirmed that Mr Hill had addressed all the issues he raised in his grievance and that he had had been able to raise all the of the issues he had wanted. The Claimant had been afforded extra time to add further points to his appeal after he had received the Subject Access Request documentation. The appeal process was lengthy and fair, it gave the Claimant additional time to add further points, and the appeal outcome letter was substantial and clearly addressed the points raised by the Claimant.

149. In these circumstances I find that any procedural defects caused by Mr Eaton's appointment were rectified by the appeal process. I find that the grievance procedure taken as a whole, was therefore within the band of reasonable responses and did not render the dismissal unfair.

10 May 2021 Meeting

150. The Claimant submitted that it was not within the band of reasonable responses for the Respondent to hold the final meeting with the Claimant in the Claimant's absence when he was not well enough to attend.

151. The Claimant accepted in oral evidence that he had been given the opportunity raise everything he had wanted to raise before this final hearing. He was given the opportunity to suggest reasonable adjustments that could be made to accommodate him, he was given the opportunity provide any further representations in writing, and he undertook these opportunities, submitting further comments in writing to Mr Eaton to consider and having Mr Foster, who had attended each meeting with him throughout the process, attend on his behalf.

152. Mr Eaton had determined that he had permitted the process to be extended as far as possible so that he could be sure all alternative avenues had been explored. The Claimant had confirmed to him that there were no further alternative roles he wanted to pursue. The process had lasted over 12 weeks in total and in circumstances where its protracted nature had been one of the contributors to the Claimant's stress, resulting in him being unable to attend the initial meeting planned for 5 May 2021, Mr Eaton felt it was in all parties' interests to continue with the hearing. Indeed, this was somewhat vindicated by the Claimant's oral evidence that he felt a sense of relief the process was concluded further to receiving confirmation of the dismissal from Mr Foster.

153. In these circumstances I find it to have been within the band of reasonable responses for the Respondent to hold this meeting in the Claimant's absence.

154. I note further that the Claimant was given the opportunity to appeal the dismissal decision which he took. The appeal meeting was held in conjunction with the grievance appeal by Mr Hill as detailed above at paragraphs 147-149 above, and the Claimant was able to attend at that meeting and make representations. Given my findings at paragraphs 147-149, if there were any procedural defect in respect of holding the 10 May 2021 meeting in the Claimant's absence, this would have been rectified with the appeal procedure.

155. In summary, I found that the Respondent had followed a thorough procedure that accorded with its own policy with respect to the Claimant's dismissal. The procedure was extended from what was initially envisaged to be a process that could last 2 weeks, to a process that took over 12 weeks, ultimately because Mr Eaton had tried to listen to the Claimant's concerns regarding the Controller's decision and the disciplinary, as well as encouraging the Claimant to look at alternative roles. This gave the Claimant time to write to the Controller to ask for an appeal of his decision. During this time Mr Eaton had also sought to persuade Mr Johnstone to speak to the Claimant, again notwithstanding the fact that there was no right for the Claimant to engage with Mr Johnstone about his decision. In this respect I find the Respondent had demonstrated that is had considered the injustice to the Claimant and had taken all reasonable steps to mitigate that injustice.

Was the decision to dismiss substantively fair, did the Respondent act reasonably in treating dismissal as the reason for dismissal?

156. The Claimant submits that the dismissal was substantively unfair for a number of reasons, and I will review with each in turn.

<u>Delay in informing the Claimant of the Controller's decision</u>

157. The Claimant submits that the Respondent had deliberately delayed in confirming the Controller's decision to revoke the Calamint's PCO badge until after the window for his appeal against the disciplinary had passed. The Claimant avers

that the Controller's decision had the effect of amending the Respondent's disciplinary sanction, and the Respondent therefore ought to have permitted an out of time appeal relating to the Respondent's disciplinary sanction.

158. Reviewing the timeline of events, it does not appear that the Respondent has deliberately delayed the matter in order to withhold the Controller's decision from the Claimant until after the appeal deadline. Whilst the Respondent received the Controller's decision on 5 February 2021, it continued a dialogue with the Controller regarding whether it would permit the Claimant to return to work at the Prison in any capacity on 9 February 2021, and when the Controller confirmed it would consider this point on 11 February 2021, the Respondent thereafter wrote to the Claimant to confirm the Controller's decision the following day. During this timescale, the Respondent was taking advice internally and speaking to the Controller about other options. I find it unlikely that the Respondent had deliberately set out to communicate the Controller's decision to the Claimant until after the appeal deadline had passed; the Respondent would not gain from that course of action; moreover, if it had wanted to get rid of the Claimant, the more obvious solution would have been to dismiss him at the disciplinary.

159. In any event, the Claimant confirmed he received confirmation of the Controller's decision on 15 February 2021. At this point, the Claimant confirmed that he was receiving advice from his Trade Union. The Claimant suggests he had decided not to lodge an appeal against the disciplinary at this point, when it would have been only slightly out of time, because he believed the deadline to appeal had passed and he would therefore not be permitted to do so. I do not find this to be likely since that time, notwithstanding this suggestion, the Claimant did go on to make an appeal out of time much later, also he had the benefit of Trade Union advice who ought reasonably to have informed him that if he wanted to appeal the disciplinary decision, he should do so as soon as possible.

160. The Claimant had a right to appeal against the findings in the disciplinary outcome and he chose not to do so. This decision was made in full knowledge of the fact that the disciplinary upheld all 3 findings of gross misconduct, which included the finding that he had simulated a sexual act on a female PCO, the Controller would be making a decision based on the same investigation and disciplinary paperwork, and he had the benefit of advice from his Trade Union Representative.

161. The Respondent submitted that the Claimant chose not to appeal because he was aware that further to his disciplinary, given the nature of the allegations, he was lucky to remain employed, which was a result of the Respondent taking into account his good record, long service, and remorse. The Respondent further submitted that the Claimant understood that had he appealed, this would have removed the mitigation achieved by his remorse. The Claimant denied this and stated he accepted the disciplinary decision because he believed he felt he could get his head down and work through a 12-month warning and put the matter behind him.

162. I find that it is likely, given the circumstances of this matter, that all of those reasons were considered by the Claimant when he took his decision not to appeal the disciplinary; they were obvious considerations and therefore things that were likely to have been discussed by his Trade Unions Representatives. Importantly however, the Claimant confirmed that had accepted the disciplinary outcome and confirmed that he had chosen not to appeal it.

163. The Controller's decision did not change the Respondent's disciplinary outcome. The Claimant remained employed. Notwithstanding that, when the Claimant received confirmation of the Controller's decision to revoke his PCO badge, he did not seek to appeal the disciplinary at this stage when it would have been only slightly out of time. This is likely to be the case because he had accepted the disciplinary outcome. The Claimant did not accept however and was aggrieved by the Controller's decision, and the fact that he did not have a right to appeal that decision.

164. The Claimant's discontent about not having a right of appeal against the Controller's decision was clear throughout his dismissal process. I do not criticise the Claimant for feeling a sense of procedural injustice in that respect, as this situation is often the case in third party pressure dismissal situations. However, that process of appeal to the Controller simply did not exist.

165. In any event as detailed, at this stage it was open to the Claimant, with advice from his Trade Union, to ask for an appeal shortly after receiving the Controller's decision. The Claimant did not do this and did not appeal thereafter for nearly 3 weeks by which point the Respondent did not accept the appeal as it was significantly out of time, and that the appeal against the disciplinary was not an appeal against the Controller's decision which was the Claimant's real aim.

166. Whilst I accept that some employers might have agreed to permit the appeal, and in fact Mr Eaton himself agreed with that approach, this did not render that decision one which fell outside of the band of reasonable responses. In the circumstances as I have found them to be, I find that the Respondent's decision not to permit the Claimant's out of time appeal against the disciplinary was within of the band of reasonable responses, and did not render the decision to dismiss substantively unfair.

Alternatives

167. The Claimant also submitted that decision to dismiss was substantively unfair because the Respondent had failed to offer the Claimant suitable alternative employment, and it had failed to consider the alternatives of ill health retirement and redundancy.

168. However, for the reasons set out above at paragraphs 119-125 and 137-142, I do not find this to have made the decision to dismiss substantively unfair.

Assessment of the Injustice

169. The Claimant avers that the Respondent did not make an assessment of the injustice and the extent of that injustice that would be suffered by the Claimant if he were to be dismissed.

170. I do not find this to be the case, I repeat my findings at paragraphs 107 and 155. It is apparent through Mr Eaton's actions that he had considered the injustice to the Claimant and sought to mitigate that injustice to him.

Tick box exercise

171. The Claimant submits that the decision to dismiss was simply a 'tick box exercise'. The Claimant alluded to several places in the correspondence in which the Respondent had referred to the process as the "dismissal" process, and averred that those letters demonstrated that the Respondent was simply going through the motions.

172. Whilst the emails do refer to the process as the "dismissal process" reading the context of those emails, I do not find that indicated this was because the process was simply a box ticking exercise. The emails demonstrate the Respondent was taking advice on the process and needed to give it a name. Furthermore, the Respondent was initially advised that the process could last only 2 weeks if the Respondent felt that was enough time to have considered all alternatives however, the Respondent did not simply seek to "tick a box" as it is likely that it would then have followed held a considerably shorter process. Instead the process was extended to 12 weeks while efforts were made to assist the Claimant during that time. Additionally, I repeat my findings with respect to Mr Eaton's heartfelt evidence at paragraph 126 above and the Respondent's effort to assist the Claimant in chasing up his applications detailed in paragraph 124. These circumstances do not indicate that the Respondent was carrying out a box-ticking exercise.

173. Having addressed the Claimant's specific concerns, I have also considered the position overall. Having done so I find the dismissal was substantively fair. I find that the dismissal fell within the band of reasonable responses open to the Respondent and that the procedure was thorough and fair. Consequently, I do not find that the Claimant was unfairly dismissed.

Unauthorised Deduction From wages

174. The Claimant relies on the following paragraph of McMaster v Manchester Airport plc 1998 IRLR 112, EAT with its emphasis underlined:

> "*It is common ground between the parties that in order to be effective, the fact of dismissal needs to be communicated by the employer to the employee, whether it is a summary dismissal or a dismissal on notice, and whether the dismissal was in breach of contract or not.*"

175. The Claimant submitted that this paragraph demonstrated, in order to be effectively communicated, the Respondent must inform the Claimant of dismissal. The Claimant argued that Mr Foster, acting as the Claimant's Trade Union representative could not be regarded as "the employer" for these purposes

and accordingly, despite having informed the Claimant on 10 May 2021, the Claimant submits that he had not received notice from the Respondent until he received its letter some days later and was therefore due wages for that period.

176. In Robinson v Bowskill and ors 2014 ICR D7, EAT the EAT held that the principle in Gisda Cyf v Barrett ([2010] ICR 1475), that dismissal is not effective until the employee knows of it or has had a reasonable opportunity to do so, did not operate so as to exclude communication of the dismissal to the employee by a third party, in that case the Claimant's solicitor.

177. In the case before me, the Claimant had given his authority for Mr Foster to attend the meeting on his behalf. Mr Foster had suggested to Mr Eaton that he should inform the Claimant of the decision to dismiss, and Mr Eaton agreed that Mr Foster could do so. The Claimant had confirmed in his oral evidence that after the meeting of 10 May 2021, Mr Foster contacted him to confirm he had been dismissed. Applying Robinson, since nothing precludes communication of the fact of dismissal by a third party, I find that this communication was effective and the Claimant's dismissal date was 10 May 2021. Accordingly, the Claimant did not suffer an unauthorised deduction from wages.

Summary

178. The Claimant's claim for unfair dismissal is not well founded and is dismissed.

179. The Claimant's claim for unauthorised deduction from wages is not well founded and is dismissed.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 5 April 2022

Format of the Hearing
The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not possible in light of the Government Guidance in connection with the coronavirus pandemic and it was in accordance with the overriding objective to do so