



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103012/2023**

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**Held in Glasgow on 4 – 7 September 2023**

**Employment Judge Campbell**

**Mr T McGregor**

**Claimant**

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**The Scottish Ministers**

**Respondent**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the tribunal is that the claimant was not unfairly dismissed and his claim is therefore dismissed.

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### **REASONS**

#### **Background**

1. This claim arises out of the claimant's employment with the respondent which ended with his dismissal. The respondent is the Scottish Ministers, having responsibility for maintaining a prison service in Scotland via the Scottish Prison Service. The claimant worked within the Service.
2. The hearing of evidence in the claim took place over four days. Owing to pressure of time the parties provided submissions in writing at a later date by agreement. At the hearing the respondent gave evidence first and led two witnesses, namely Mr Michael Stoney, Governor in Charge of Her Majesty's Prison, Barlinnie, and Ms Sharanne Findlay, Acting Divisional Head of Operational Support. The claimant himself gave evidence, and called three former colleagues – Pawel Bender, Lisa Dunachie and Neil Hainey. All were prison officers who worked alongside the claimant.
3. Pursuant to case management directions issued at an earlier hearing the respondent had combined the parties' documents into a joint bundle.

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References to numbers in square brackets below are references to page numbers of the bundle. Additionally, the respondent provided a video clip taken from CCTV cameras in the prison yard on the day of the events which led to the claimant's dismissal. Both parties referred to the clip in the course of examining the witnesses. A series of still photographs, i.e. screenshots, was also provided.

4. The hearing was to decide remedy if appropriate as well as questions of liability. The claimant had prepared a schedule of loss.
5. Each witness including the claimant was found to be generally credible and reliable in giving their evidence. In the event the claim turned less on conflicting evidence and more on the evaluation of the claimant's observed actions.
6. As a preliminary matter the respondent applied for an order seeking that one of its documents produced for the hearing be subject to confidentiality restrictions by way of the hearing being in private and there being no reference to its contents in this judgment. This was granted for reasons given orally at the hearing.

### Issues

7. The tribunal had to decide the following legal issues:

1. Did the respondent dismiss the claimant for a fair statutory reason according to section 98(1) and (2) of the Employment Rights Act 1996? The respondent argues that the claimant was dismissed because of his conduct.
2. Did the respondent act reasonably in dismissing the claimant for the reason it relied on, in accordance with section 98(4) of the same Act?
3. If the respondent did not meet the requirements of the above provisions, and the claimant's dismissal was therefore unfair, what remedy should be granted to him? The claimant sought reinstatement, failing which re-engagement.

**Applicable law**

1. By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.  
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2. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.  
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3. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.  
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**Findings of fact**

- 20 The tribunal made the following findings of fact based on the evidence before it and as relevant to the issues to be determined:

*Background*

1. The respondent is the Scottish Ministers. They are responsible for operating a public prison service in Scotland via the Scottish Prison Service. The claimant was employed by the respondent between the dates of 8 May 2008 and 15 December 2022. Latterly he acted as a Residential Prison Officer, based at HMP Barlinnie, which is Scotland's largest prison and deals with adult male prisoners. He reported to a First Line Manager. There is a Deputy Governor and a Governor in Charge at the prison.  
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2. As a Residential Officer the claimant worked among prisoners. His role was to provide security and discipline, to uphold the prison rules and to identify any particular needs that a prisoner may have. He had to maintain a rapport with the prisoners but be mindful of his obligation to maintain order.

5 *The respondent's Code of Conduct and Use of Force Policy*

3. The respondent has a 'Code of Conduct' (hereafter the 'Code') [78-110] which outlines its expectations and rules in relation to the conduct of all of its employees. It has been developed in dialogue with representative trade unions. It contains procedures for responding to conduct concerns and examples of conduct which is deemed not acceptable. Some examples of conduct considered potentially to be gross misconduct include serious breach of matters listed in section 8 of the Code. Section 8 lists neglect of duty, breach or disregard of rules and policies governing security standards and breach of health and safety rules among other examples.

4. The respondent has a 'Use of Force Policy' (hereafter the 'Policy') [131-144] which applies to all officers. Its purpose is said to be *'to demonstrate the SPS commitment to providing an appropriate and proportionate response to the management of difficult, confrontational and threatening situations as effectively and safely as possible'*. The policy emphasises that staff should use communication skills and other non-physical techniques to de-escalate any situation wherever possible and practicable. The use of force is only prescribed 'when all other means have been exhausted or are deemed unlikely to succeed'. Even where the use of force has been warranted, *'de-escalation must still be considered at the earliest opportunity, after force has been deployed.'*

5. The Policy outlines types of technique which may be used when intervening in a prisoner incident. Those include Personal Protective Training (PPT) techniques and Control and Restraint (C&R). Broadly, PPT involves evasive or defensive measures to protect the officer by creating space or an exit strategy and C&R involves restricting prisoners, in some cases inflicting pain in a controlled way, in order to stop them behaving in an inappropriate

manner. It is recognised that in extreme situations staff may have to use non-approved techniques to protect themselves or bring a situation under control.

6. The Policy makes staff aware that all circumstances where force is deployed may be subject to investigation, and that the chosen course of action may have to be justified in line with the Policy rules and principles of necessity, proportionality and reasonableness.

7. A key principle governing the use of force is contained in Rule 91 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011, which is quoted in the Policy and states:

**'91. Control of Prisoners**

*In the control of prisoners, an Officer must seek:*

(a) *To influence behaviour by example and leadership; and*

(b) *To enlist the willing cooperation of prisoners.*

*An Officer may only use force against a prisoner when it is necessary to do so taking into account all of the circumstances of the situation and the force used must be:*

(a) *Proportionate to the risk posed by the prisoner in that situation; and*

(b) *No more than necessary for the purposes of that situation.*

*Where an Officer uses force against a prisoner that Officer will keep a written record of that use of force.*

*An officer will not deliberately provoke a prisoner.'*

8. Officers receive training on techniques such as PPT and C&R when they start working in the role, and periodically receive refresher training. The techniques themselves have not substantially changed in the last 20 years. The claimant had last received refresher training in 2019.

*Incident on 31 July 2022*

9. Prisoners are permitted one hour per day of exercise, which can be taken outdoors if they wish. There are prison yards which can be used. The prison is organised in accommodation blocks, each with a number of floors. One or more floors will be allowed to use the yard for a given hour of the day, staggered throughout the day to prevent overcrowding. Typically, there may be up to 30 or 40 prisoners using the yard in each one-hour slot. There would be around 4 to 6 officers in the yard at the same time.
10. On 31 July 2022 the claimant was on duty. In the afternoon of that day he was in the A-Hall exercise yard when an incident occurred with a prisoner – referred to at the time and also in this judgment as 'Prisoner B'. The claimant's conduct became the subject of a disciplinary investigation which led to his dismissal. At that time there were initially four officers including the claimant and around 30 prisoners.
11. The relevant events were recorded on the respondent's CCTV system and played back during the hearing. It was therefore possible to determine with a high degree of detail what had occurred. There was little dispute between the parties over those events. However, the footage had no sound, and so it was not possible to tell what people were saying and whether for example they were talking or shouting.
12. The following occurred as it is relevant to this claim.
- a. Approximately 20 prisoners and around six officers could be seen in the yard. A prisoner who was behaving erratically and suspected of being under the influence of a substance was restrained by two officers next to a covered shelter similar to a bus shelter, where officers normally sit in bad weather. He is led off the yard into the prison building via a door at the top of the shot;
  - b. A minute or two later, prisoners gather under a window looking onto the yard on the right-hand side of the shot. It was confirmed in evidence that the prisoner who had been removed from the yard was in a cell on the other side of this wall, and was complaining as he was being searched. This caused some of the prisoners in the yard to

become agitated as they believed the prisoner inside was being mistreated;

5 c. The claimant escorted Prisoner B away from the area next to the window. Two other officers take over from the claimant who moves away. As Prisoner B is being escorted towards the exit door he breaks free of the officers escorting him. He runs around to the other side of the shelter. He moves to stand facing the officers he has just escaped from, who are still near the door at the top of the shot. By this point there are five officers in a line, side by side. Prisoner B's back is therefore to the camera. A number of other prisoners have moved over 10 to where he is, so that he is in the middle of a group of around sixteen other prisoners;

15 d. The claimant, who had moved out of the bottom of the shot, is seen running towards Prisoner B from behind. At the point of contact the claimant has both hands raised to the level of his head, or just above. He attempts to grab Prisoner B from behind, holding him around the neck area briefly, but Prisoner B ducks out of the hold and the claimant falls over him and onto the ground. As the claimant loses his balance, another prisoner attempts to punch him but does not quite reach to 20 make contact;

e. The claimant lands on the ground next to the line of his fellow officers, who slowly approach the prisoners, some with their batons drawn. They attempt to move the group of prisoners back and disperse them;

25 f. The claimant gets to his feet and moves through the cordon of fellow officers in front of him, towards Prisoner B. Another prisoner (referred to here as Prisoner M) stands between Prisoner B and the claimant, and appears to be deliberately blocking the claimant. He is taller and heavier built than the claimant. The claimant strikes him on the left shoulder with his right hand. Prisoner M turns away from the claimant, 30 who reaches around him from behind at Prisoner M's neck level.

Another prisoner steps in and tries to push the claimant off balance. Another officer steps in to prevent him from taking any further steps;

5 g. The claimant manages to partially reach round Prisoner M and make contact with Prisoner B using a left-handed punch or open handed strike. He appears to make contact with Prisoner B's face around the jaw or neck area. The claimant continues to struggle with Prisoner M in order to get directly at Prisoner B. Other officers are spread out to either side of him and adopting defensive stances;

10 h. The claimant tries one more time to reach past Prisoner M to grab Prisoner B. Officers by this point have dispersed most of the other prisoners and two officers are able to assist the claimant in restraining Prisoner B on the ground, before he is escorted to the door into the building where he was originally being taken before he broke free.

15 13. Some of the officers who entered the yard had been summoned as a result of an alarm being triggered, either by one of the officers originally in the yard of a member of staff reviewing the CCTV in real time. Evidence later gathered confirmed that at least two officers used their personal radios to request help from additional officers.

20 14. An 'Immediate Incident Report' was prepared by a Front Line Manager named Gary Sweeney, recording the details of the events which had just occurred [152-153]. The Front Line Manager asked all staff who responded to the incident to provide their own reports. The claimant prepared a report approximately two hours after the incident [160-163]. Other officers provided reports but those were not produced to the tribunal. Those steps were  
25 standard procedures for the respondent in dealing with a prisoner incident.

#### *Disciplinary investigation*

30 15. The various reports were reviewed by Sean McFedries, the Deputy Governor. He considered that there may be a disciplinary case for the claimant to answer. He decided to ask for an investigation to be carried out by an



independent manager from the respondent's Conduct Investigation Unit (CIU). The unit is a specialist team who investigate potential misconduct complaints within the Service. A Mr Darren Moss was identified from that unit to carry out the investigation. Mr Moss had no previous connection with the claimant.

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16. Mr McFedries wrote to the claimant on 19 August 2022 to inform him that an investigation would be taking place and that Mr Moss would be undertaking it [154-158]. He directed the claimant to the Code. The letter contained a note of the specific allegation, which was:

10 *'It is alleged that on Sunday 31<sup>st</sup> July 2022 you conducted yourself improperly. Initially you ran at a prisoner [name] from a distance of approximately ten yards. You attempted to restrain the prisoner however you missed him and fell to the ground. On rising to your feet you again pursued [him] and used inappropriate techniques to try and restrain the prisoner.*

15 *This incident occurred in the A Hall exercise yard.'*

17. Mr Moss undertook an investigation into the events of 31 July 2022 by viewing the CCTV footage and interviewing the officers present, including the claimant himself. Between 2 and 27 September 2022 he interviewed the following officers – Pawel Bender, Gary Sweeney, Lusa Dunachie, Michael Kane, Gary Brown, Ryan Bilton, Vina Grierson and Edward McGrath. He also interviewed Prisoner B, another prisoner, and a Grant Wilson, who was a Learning and Development Manager specialising in operational training on control and restraint methods. On 29 September 2022 he interviewed the claimant and on 3 October 2022 he interviewed Officer Neil Hainey. In each case he recorded the conversation and a transcript was prepared [164-228]. These were signed by Mr Moss although not every interviewee. They were provided to each interviewee to review. The claimant countersigned his transcript on 18 October 2022.

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18. The accounts given by the officers present during the incident are similar in describing what each individual saw and did. Some officers arrived in the yard after the main events had already happened, and so could only give partial

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accounts. There was a consistent theme in that some of the prisoners were said to have used hostile and threatening language, although that was not in itself uncommon. None said that they saw the claimant using inappropriate techniques. Owing to the nature of the incident, no officer saw everything that occurred.

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19. Prisoner B said that the claimant had hit him 'a couple of times', including on the side of his head near his temple. He said the other officers were trying to contain the situation.

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20. Mr Wilson's statement was given after he had viewed the CCTV footage. He identified a number of actions by the claimant which he said were inappropriate techniques or steps in the circumstances, and not trained by the Service. Those were the claimant's initial hold on Prisoner B as he rushed at him from behind, the claimant moving through his cordon of fellow officers to approach Prisoner B, holding Prisoner M in a headlock, and attempting to land a punch on Prisoner B. He believed the claimant had placed himself at unnecessary risk in taking those steps. He believed the claimant had become 'perp(etrator)-fixated' – preoccupied with apprehending Prisoner B to the point of not assessing the wider situation and its risks rationally.

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21. The claimant himself denied using a rear headlock on Prisoner B, saying that he reached around his shoulders. He said he was not aware a cordon of fellow officers had formed whilst he was on the ground, as he was focussed on reaching Prisoner B. He said he didn't know whether Prisoner B had a blade, or whether someone else would pass him one, or whether he had contraband on his person which he would try to dispose of. Rather than try to punch Prisoner B, he said he was trying to grab his clothing. He appeared to accept that he was strongly focussed on Prisoner B throughout.

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22. Mr Moss prepared an investigation report in which he summarised the remit he had been given, explained the process he had followed and discussed the evidence he had gathered. The report was dated 27 October 2022 [229-247]. He referred to the SPS Professional Charter of 2018 [349-350] which was said to define how the Service expects its employees to behave when on and off

duty. He suggested that if the case against the claimant was proven, he may be in breach of the 'Belief', 'Respect' and 'Integrity' elements of the charter which he quoted, along with Rule 91.

23. Michael Stoney, Governor in Charge at HMP Barlinnie reviewed the investigation report and CCTC footage, considered there was a case to answer, and took the decision to arrange a disciplinary hearing for the claimant. He wrote an invite letter on 16 November 2022, arranging a hearing for 8 December 2022 [248-251]. He re-stated the allegation, which was the same as before and advised the claimant to review the Code. He included a copy of the investigation report and offered the claimant the opportunity to put forward any further evidence, to nominate any witnesses to attend the hearing and to be represented at the hearing. He offered the claimant the opportunity to review the CCTV footage again.

24. It is noted here that the prisoner name given in the disciplinary invitation letter, and report of Mr Moss, was incorrect. However, the claimant was aware which prisoner was being referred to – namely Prisoner B – and was not prejudiced by the error which was corrected at the disciplinary hearing described below.

#### *Disciplinary hearing*

25. The claimant attended the disciplinary hearing as scheduled on 8 December 2022. He was accompanied by a trade union representative named Michael Mulholland. Mr Stoney chaired the meeting and a Human Resources Business Partner was also present. The meeting was audio recorded and a transcript was produced [252-257]. It is accepted as a sufficiently complete and accurate summary of the discussion which took place.

26. The claimant and Mr Mulholland had prepared a statement before the hearing which was read out, and a copy was provided to Mr Stoney [258-259]. They did not wish to call any witnesses.

27. A large part of the hearing involved the playback of the CCTV footage of the incident. The film was paused and the claimant was given the opportunity to comment on what was happening at various points.

28. The claimant said that he was uncertain if Prisoner B had a blade. He later said that he suspected that the prisoner had contraband.
29. There was discussion about the various attempts the claimant made to restrain Prisoner B, and his manoeuvres to negotiate past Prisoner M. The claimant was asked to explain what he did and why at various stages. There was detailed discussion about his attempt to restrain Prisoner B from behind, his subsequent pursuit of Prisoner B and how he interacted with Prisoner M who was obstructing him, leading to the point where Prisoner B was finally restrained.
30. The claimant said that when approaching Prisoner B from behind his intention was to catch him around the shoulders, but he slipped due to poor technique. He denied punching either Prisoner and said he was trying to grab hold of Prisoner B's collar. He also denied trying to kick Prisoner B, saying that he was instead trying to sweep his legs away to unbalance him. A leg sweep is not a trained technique and is considered potentially unsafe. He did not accept that he had put Prisoner B in an unauthorised headlock as he was finally being restrained. He said he was trying to force the prisoner to the ground.
31. Mr Stoney believed he had the claimant's own account of the events and asked him if he wished to add anything else. The claimant referred to the statement of officer Hainey who had said the claimant grabbed a prisoner, not punched him. Mr Stoney agreed to look back over the statements when reaching his decision. The claimant emphasised that he was acting with the best of intentions.
32. At the end of the hearing Ms Stoney said he had a lot to consider and would adjourn to reach a decision. He brought the hearing to a close.
33. By 15 December 2022 Mr Stoney had reached a decision. On that day he wrote to the claimant to indicate that he had decided the claimant should be summarily dismissed for gross misconduct [260-263].
34. Mr Stoney did not think it plausible that the claimant instantly formed the belief that Prisoner B was carrying a weapon, and so felt a need to apprehend him

as quickly as possible. He accepted the evidence of the officers present at the incident that there was a tense atmosphere in the yard. However, he did not consider that to be justification for the claimant's actions. In his view, had there been a genuine suspicion of a prisoner carrying a weapon then other back up officers should have been summoned. None of those already present should have attempted to apprehend that prisoner by surprise.

35. He substantially agreed with the assessments made by Mr Wilson. He believed that the claimant had carried out acts which involved undue risk to himself and others, and had used potentially dangerous techniques which were not prescribed when there was no requirement to do so. In the process there was excessive use of force and multiple breaches of Rule 91. He did not think that this was excused by a lack of recent training, as he believed the claimant's actions were counter to basic training which would have been reinforced over the whole of the claimant's period of service. He felt that he would be unable to trust the claimant to conduct himself appropriately if he was allowed to return to his duties. That could put the safety of the claimant, other officers and prisoners at risk. This was his view at the time of dismissal, and also by the date of the hearing. He believed that it would not be appropriate to reinstate the claimant for the same reasons.

36. Mr Stoney was aware of the claimant's length of service when reaching his decision. He had assumed that the claimant had a clean disciplinary record, which was the case.

37. Mr Stoney confirmed that the claimant had the right to appeal against his decision under the rules of the Code, and that if he wished to do so the respondent's Internal Dismissal Appeal Board (IDAB) would consider the appeal.

#### *Appeal against dismissal*

38. The claimant appealed against the decision to dismiss him. He was given until 31 January 2023 to submit a note of his grounds of appeal.

39. The claimant was invited by letter dated 10 February 2023 to attend an appeal hearing on 10 March 2023. The IDAB panel of three members was confirmed to be Louise McGahan, HR Business Partner, David Abernethy, Governor in Charge at HMP Edinburgh and Sharanne Findlay, Acting Divisional Head of Operational Support, Headquarters. The letter recorded that the claimant had not yet submitted his grounds of appeal, but would be given until 14 February 2023 to do so. This was further extended to 17 February 2023.
40. The claimant provided written grounds of appeal [272-279]. By this point he had instructed his solicitor Ms McDairmant and it was she who provided them to the respondent on his behalf. The panel also viewed the CCTV footage and reviewed the documents gathered and created in the disciplinary process to date.
41. The grounds of appeal drew attention to the fact that before additional officers arrived at the yard, there were four officers outnumbered by around 30 prisoners. They emphasised more strongly the claimant's fears, and those of his fellow officers, that the situation they were in would escalate to the point of a prisoner attack on them. They also raised the point that the guards' personal alarms were not working on the morning of that day. They accused both Mr Moss the investigator and Mr Stoney of making their mind up in advance by placing too much reliance on what he could see of the CCTV. They said that Mr Wilson's views were unquestioningly accepted. The evidence of the officers present was not given due weight.
42. Both Ms Findlay and Mr Abernethy had operational experience of the Policy and techniques prescribed by the Service to motivate, control and restrain prisoners.
43. The appeal hearing proceeded on 10 March 2023 at the respondent's Headquarters in Edinburgh. The claimant was represented by his solicitor at this hearing. Mr Mulholland was also present as an observer. The three panel members attended and were assisted by a note taker from HR.
44. Again a recording of the meeting were taken and converted into a typed note which was uncontested, and is accepted as an accurate and reliable summary

of the discussion [281-327]. The meeting lasted between an hour and 90 minutes. The issues were discussed sufficiently thoroughly.

5 45. Immediately after the meeting the panel deliberated and reached preliminary conclusions in relation to each of the appeal points. Ms McGahan incorporated the findings in a draft outcome letter which the other two panel members approved in the following days. The panel unanimously believed that dismissal was an appropriate sanction for the claimant's conduct.

10 46. On 17 March 2023 Ms McGachan wrote to the claimant to state that the conclusion of the appeal board was to uphold the original decision to dismiss him. They agreed that Mr Stoney's finding of gross misconduct was merited.

47. This decision concluded the respondent's internal disciplinary process.

*Post-termination activity, mitigation and losses*

15 48. The claimant made attempts to find other work following his dismissal. He did not begin looking in earnest until after his appeal had been dealt with, in March 2023. He believed that his appeal would be successful, and did not want to secure a role, only to leave it at short notice it permitted by the respondent to return to his officer's duties.

20 49. He secured a role with the Morrisons supermarket chain beginning on 2 May 2023. He was told on the day of his interview in late April 2023 that he would be given the job, and so did not look for any other roles. He is engaged for a minimum of 24 hours per week, with the opportunity to work extra hours if required. By contrast, he worked 37 hours per week with the respondent. He was enrolled in an occupational pension scheme in July 2023.

25 50. The claimant took the option to begin receiving a Civil Service pension and monthly payments began on 27 June 2023. He had already been receiving a military pension since 2003. The combination of those payments plus his earnings from Morrisons are sufficient such that he can work extra hours through choice, but not necessity.

51. The claimant indicated that if this claim were unsuccessful he would possibly seek full time work elsewhere. His primary aim is to be reinstated to his former role at HMP Barlinnie. As an alternative he would work as an officer in another Scottish prison such as Greenock or Lowmoss. He would work in another role if permitted and the only option. He accepted that the respondent believed its trust in him was broken, but he did not feel the same way in return.

### Discussion and decision

*Was there a fair statutory reason for the claimant's dismissal?*

52. The respondent contended that the claimant was dismissed for his conduct. The claimant correctly stated that the onus fell on the respondent to establish that dismissal was for a fair statutory reason. He also accepted that the respondent had discharged this onus as conduct was the genuine reason for dismissal. Section 98(2)(b) confirms that conduct is a fair reason for dismissing an employee.

53. It was clear that the claimant was dismissed because of his own actions. He was perceived to have deliberately disobeyed the respondent's rules of behaviour. It was not considered that he lacked capability, experience or training. Conduct was the reason for his dismissal.

*Did the respondent act reasonably in implementing the dismissal?*

54. Both parties recognised that the onus is neutral in relation to this issue, and that the longstanding authority of ***British Home Stores v Burchell [1978] IRLR 379*** is still the primary precedent. According to that authority three things must be established for a conduct related dismissal to be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

*Burchell part 1*



55. The respondent maintained that it genuinely believed the claimant was guilty of misconduct. Ms McDairmant in her submissions helpfully confirmed that the claimant accepted that this was the case, and that the respondent had therefore satisfied the first part of the **Burchell** test.

5 56. The tribunal was similarly satisfied that the respondent – firstly through Mr Stoney and later via the disciplinary appeal panel – genuinely believed that the claimant had committed one or more acts of misconduct.

*Burchell part 2*

10 57. The respondent argued that it had reasonable grounds on which to form its belief in the claimant's misconduct. On this point the claimant disagreed.

15 58. The respondent's position was that there was sufficient clear and reliable evidence of the claimant acting contrary to both the general principles of his training and more specifically the Policy, including Rule 91. In the process he was believed to have put himself and those around him – officers and prisoners – at increased risk. This evidence came primarily from the CCTV footage which Mr Stoney reviewed repeatedly and carefully.

20 59. The claimant's position was that Mr Stoney unquestioningly accepted the CCTV footage. He did not critically consider whether it told the whole story. In particular, it did not have any sound, and did not convey fully the atmosphere in the yard. Any threatening behaviour by prisoners could not be fully appreciated. Mr Stoney could therefore not properly appreciate the level of risk of prisoner unrest at the time the claimant acted. He erroneously believed that the situation was more calm and closer to normality. The tribunal noted however that Mr Stoney acknowledged in evidence that the CCTV footage was limited by not conveying sound. He accepted the testimony of all of the officers who said that the atmosphere was hostile and that some of the prisoners were using threatening language towards them. In his mind this did not excuse the actions the claimant took, and potentially it made them seem more reckless, in that any prisoners who were on the verge of a violent or aggressive act might have been provoked by him. This was a view which the tribunal considered Mr Stoney was entitled to reach.

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60. The claimant also argued that Mr Wilson, the Learning and Development Manager and C&R instructor, erroneously reached the view that the claimant had used inappropriate restraint techniques on both Prisoner B and Prisoner M. He did so as a result of relying on the CCTV footage from one angle, which was inconclusive. This error led to the investigator Mr Moss adopting his view, and then in turn Mr Stoney being unduly influenced in thinking that the claimant had acted inappropriately. On viewing the relevant parts of the CCTV footage a number of times in the hearing, the tribunal considers that the images were clear enough for both Mr Wilson and Mr Stoney to reach their conclusions given their respective experience. The tribunal accepted that Mr Stoney was guided by Mr Wilson's statement, but ultimately formed his own view about whether the claimant's actions involved the use of appropriate trained techniques or not.
61. A further criticism of the involvement of Mr Wilson was that he was not given copies of the claimant's or his colleagues' statements about the events on the day. Mr Stoney's position on that was that he only relied on Mr Wilson's statement to help him decide whether the claimant had used recognised techniques at different points, and nothing more. Mr Wilson was not relied on to help Mr Stoney decide whether the various decisions the claimant took showed good judgment, for example.
62. The tribunal was satisfied, on the evidence and considering the parties' submissions, that the respondent had met the requirements of the second limb of the Burchell test. There were reasonable grounds for holding a belief that the claimant committed an act or acts of misconduct. The CCTV evidence was clear and reliable. The views of Mr Wilson were also plausible. Mr Stoney was entitled to rely on them and to consider that any limited evidence tending to contradict the picture they painted was partial and less reliable.

*Burchell part 3*

63. The third limb of **Burchell** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in

order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every stone, but no obviously relevant line of enquiry should be omitted.

64. The legal test, as emphasised in *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.
65. The respondent submitted that a sufficiently adequate investigation had been undertaken.
66. The claimant did not raise any specific criticisms about the extent of the investigation, beyond those noted above in relation to part 2 of the *Burchell* test. It was not suggested, for example, that the respondent should have spoken to any other witnesses or followed other lines of enquiry. The claimant's case was more about the conclusions drawn from the available evidence and how seriously the claimant's actions were treated, rather than there being obvious gaps in the evidence-gathering process itself.
67. The tribunal was satisfied that the respondent's investigation was reasonable. It took into account such factors as:
- a. An initial report of the events was prepared quickly after they occurred, and written accounts of the officers present were obtained within hours;
  - b. An independent investigator from a specialist internal team was appointed, who spoke to all, or almost all of the individuals present (he did not interview prisoner M, although that one omission was not thought to have been material enough to render the entire investigation unreasonable);
  - c. Accurate statements were taken and provided to those who had given them to review;

- d. An independent internal expert on trained techniques was asked for his opinion on the claimant's attempts to apprehend Prisoner B;
- e. There was clear CCTV footage of the whole incident, albeit without sound;
- 5 f. The investigator prepared a report drawing together his findings with reference to relevant standards of conduct and operational behaviour;
- g. The claimant was given a copy of the report and access to the CCTV in order to prepare his response; and
- 10 h. The process as a whole was carried out within a reasonable timeframe, during which the claimant was not suspended or subjected to any other sanction or restriction.

68. Therefore the tribunal accepted that a sufficiently thorough and competent investigation had been carried out to render the respondent's conclusions sound.

15 *The band of reasonable responses*

69. In addition to the Burchell test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***.

70. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

71. It is also important that it is the assessment of the employer which must be evaluated. As Ms Campbell raised in her submissions, whether an

employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge  
5 the employer's own choices against the above standard.

72. On the evidence heard, it is found that dismissal of the claimant was within the band of reasonable responses. There was sufficient evidence via the clear CCTV footage, the assessment of Mr Wilson and the accounts of those who were present to allow Mr Stoney to reach the view firstly that the claimant had  
10 used inappropriate techniques on two prisoners and secondly that he had behaved in a way which increased the risk of harm to himself, colleagues and prisoners rather than de-escalating the situation. As such, the claimant was fairly assessed to have acted in breach of Rule 91 and the Policy more generally.

15 73. Mr Stoney accepted that the atmosphere was tense and that some of the prisoners were using hostile language, but concluded that the claimant was at times not fully in control of his actions or working properly in collaboration with his fellow officers. He did not believe, as was put to him in cross-examination, that something akin to a riot was about to begin. He was entitled  
20 to reach that view on the evidence he had, and knowing that there had only ever been one riot at that prison in its history. His view was that had the situation been on the verge of a riot, it was even more important for the claimant not to provoke prisoners or otherwise escalate tensions, which his actions were liable to do.

25 74. Similarly, he believed that the claimant did not instantly suspect Prisoner B of carrying a weapon just because he evaded other guards in the yard. His evidence was that even if that had been in the claimant's mind at the time, he should have adhered to the established practice of summoning back up and not engaging directly when outnumbered. Again those appeared to be  
30 reasonable conclusions to reach. In any event, he believed, again reasonably, that had the claimant thought Prisoner B had a weapon, his conduct was even more inappropriate.

75. Mr Stoney was also entitled to form the view that the claimant, having worked in the Service for 15 years, could not be fully trusted to act according to protocol in the future were he to be allowed to return to his role. The claimant confirmed himself at the hearing that he would act the same way with the benefit of hindsight should such a situation arise again.
76. Mr Stoney made his decision based on the evidence available to him. It is noted that the claimant did not say to him that the officers' individual alarms were not working on the day in question – matters which were put to him in cross-examination. The point was raised in the claimant's appeal, and the evidence of Ms Findlay was that officers could still use their radios to seek help if their alarms were not working – something which the witness Lisa Dunachie said she did at the time and officer McGrath was observed to do in the CCTV footage. The panel did not therefore see it as a valid justification for the claimant's course of action.
77. The claimant's own evidence to the tribunal was that he felt that Prisoner B was trying to avoid being escorted from the yard as he would be searched when back in the prison building. He believed Prisoner B had an improvised weapon on his person that he did not want to be found, and was 'galvanising' other prisoners to create disorder. He believed that Prisoner B presented a danger to the officers in the yard, and took an opportunity to try to restrain him as quickly as possible and force him into the building. Even if so, he acknowledged that his training would advise firstly making verbal attempts to de-escalate any tensions, but that he went with his gut feeling which suggested immediate physical action. In evidence he said that his training was one thing, but the situation on the day was 'real life'. Later he said that the situation required a decision in a split second, and was 'not a classroom'. He didn't lack training, but chose to depart from it. He accepted that he was fixated on Prisoner B because he believed he had a weapon.
78. Even accepting as genuine that the claimant believed Prisoner B to have been carrying a weapon (something he said to Mr Stoney with less conviction than he did in the tribunal hearing itself), he could not justify continuing to pursue Prisoner B after his initial unsuccessful attempt to restrain him from behind

which resulted in him falling to the ground. He had the option to remain behind, or part of, a line of fellow officers who waited in a defensive position for further colleagues to arrive, but instead moved clear of the other officers and continued to pursue Prisoner B unprotected. If Prisoner B had had a weapon, the claimant was putting himself at unnecessary risk of it being used against him.

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79. Whilst the claimant had the best of intentions, his evidence merely reinforced the concerns that Mr Stoney, and later the appeal panel, had with his conduct on that day and with the prospect of allowing him to return to duty. His actions may have been focussed on protecting others but they were not thought out and poorly executed. As a result they were unsuccessful and could have had the opposite effect, inflaming existing tensions. They created unnecessary additional risk. If the claimant disregarded his training once in favour of following gut instinct, it is reasonable to assume he could do so again.

15 80. The claimant made the point in his evidence that Control and Restraint techniques were useful and relevant, but only after a prisoner had been apprehended. He said they did not explain or govern how a prisoner should be brought under control first. Whilst that might be true in a strict sense, it did not give the claimant licence to 'follow his gut' and adopt techniques of his own which appeared unorthodox at best and reckless at worst. On the evidence led, the respondent required officers to use de-escalation techniques first such as verbal suggestion and coercion, followed by the principles of Personal Protective Training. That involved undertaking more defensive manoeuvres and creating space if under threat, if necessary making time while back up could be summoned. Control and Restraint would be used as a last alternative, and usually with at least two and ideally three officers to one prisoner after they had been isolated from others. This was consistent with Rule 91 which stressed only using force when necessary, and ceasing to use it as soon as the need subsided. If a prisoner was suspected of holding a weapon then wearing additional protective equipment was advised. Given that, it was reasonable for Mr Stoney to reach the conclusion

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that the claimant had departed from established procedure in a significant way.

### Conclusions

5 81. The respondent has satisfied the tribunal that the claimant was dismissed by reason of his conduct. The tribunal also concludes that the respondent acted reasonably in the process it followed from investigation, to dismissal and through to appeal.

10 82. It is not necessary to discuss in detail matters such as contributory fault, whether a *Polkey* reduction is appropriate, mitigation of loss or ultimate remedy. The claim therefore is unsuccessful and requires to be dismissed.

15 **Employment Judge: B Campbell**  
**Date of Judgment: 03 November 2023**  
**Entered in register: 03 November 2023**  
**and copied to parties**