



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Billy-Joe Dixon and Mr Craig Smith

**Respondent:** Secretary of State for Justice

**Heard at:** Croydon (by CVP)

**On:** 18-20 December 2023

**Before:** Employment Judge Richter

## REPRESENTATION:

**Claimants:** In person

**Respondent:** Mr James (Counsel)

# JUDGMENT

The judgment of the Tribunal is as follows:

1. The Claimants' were employed by the Respondent as prison officers and were based at His Majesty's Prison Belmarsh. They both accept that in December 2022 they were dismissed on the grounds of gross misconduct after a disciplinary process.
2. Dismissal for conduct is a potentially fair reason for dismissal as set out in s.98(1) of the Employment Rights Act 1996 ("the Act") but both Claimants' claim that they

were unfairly dismissed and have submitted claims to this Tribunal which, as they raise common issues of fact and law, have been heard together .

3. In summary the Claimants' allege that the investigation into an incident which led to the disciplinary process and the disciplinary process itself were not fair and tainted by irregularities.
4. At this hearing I have had reference to 3 bundles prepared for the hearing, 2 by the Respondent in respect of the individual claims and 1 additional bundle prepared by Mr Dixon himself. I have heard evidence from the witnesses set out in those bundles and from the Claimants'. I have heard submissions made by each Claimant and those made on behalf of the Respondent.
5. Towards the outset of the hearing Mr Smith indicated that he had a diagnosis of dyslexia. I asked if there were any adjustments to the Tribunal process which he would wish and he asked for some extra time for reading documents should he need to. I also had regard to the Equal Treatment Bench Book and as such have allowed additional breaks, extra reading time for Mr Smith and have checked his understanding of written materials and the tribunal process on occasions. Both Mr Smith and Mr Dixon appear as litigants in person and I have ensured that each step of the Tribunal process has been explained to them.

### The Law

6. The core principles which this Tribunal must follow are well established.

Section 98(4) of the Act sets out that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

- i. 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

ii. shall be determined in accordance with equity and the substantial merits of the case."

7. A dismissal on the grounds of conduct will only be fair in the following circumstances (British Home Stores Ltd v Burchell [1980] ICR 303 (EAT)) if :
  - (a) At the time of dismissal, the employer believed the employee to be guilty of misconduct.
  - (b) At the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct.
  - (c) At the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
  
8. When considering the investigation conducted the issue for the tribunal is not whether it would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. In particular:
  - (a) The tribunal must assess the reasonableness of the employer's conduct, not the level of injustice to the employee (see, for example, Chubb Fire Security Ltd v Harper [1983] IRLR 311).
  - (b) The tribunal may only take into account facts known to the employer at the time of the dismissal (W Devis and Sons Ltd v Atkins [1977] IRLR 314).
  
9. Finally and importantly it is not a case of this Tribunal re-litigating the disciplinary hearing and it is not for the Tribunal must not substitute its own view (London Ambulance Service NHS Trust v Small [2009] IRLR 563).

10. In particular when considering the decision to dismiss I have to determine not whether that would have been the decision of this Tribunal but whether in dismissing the employee "*the employer has acted within a 'band or range of reasonable responses'*" to the particular misconduct found of the particular employee" (Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT); Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470)

### The Facts

11. Taking the issues in turn it is convenient to firstly consider the background and the investigation. Much of the evidence and detail in this case is agreed.

12. It is common ground that on 16<sup>th</sup> January 2022 at shortly before 10 a.m. both Claimants' were working within a cell in what is known as 'Houseblock 1'. Whilst present there they became involved in a physical interaction with a prisoner who will be referred to by the initials GK.

13. After the incident both Claimants', along with other staff who had been involved, completed 'Use of Force' forms to describe what had taken place. Both Claimants' asserted that GK had punched Mr Smith first requiring them to use force to protect themselves and then restrain GK. In that initial paperwork they both described that they had delivered several strikes to GK in that process.

14. As the incident had involved the use of force it was discussed at a 'Scrutiny meeting' on 26<sup>th</sup> January 2022 when the completed forms and the Body Worn Camera footage which existed was examined. No concerns were highlighted by the meeting save a learning point that staff should activate body worn cameras earlier, as the available footage did not capture the start of the incident or the initial use of force.

15. Just prior to the scrutiny meeting however, on 24<sup>th</sup> January 2022, GK filed a formal complaint about what had happened. He complained that he had been verbally abused and assaulted by Officer Smith and other officers in his cell. He also alleged that he been assaulted by an Officer Hardy and others once he had been relocated after the initial incident from his cell to the segregation block. He asked for a formal investigation.

16. That complaint was in due course passed to Deputy Governor Golder who tasked a prison manager Rachel Gill to conduct what is known as a 'management enquiry' to establish the facts and present any evidence in relation to the incident and allegations. Ms Gill had been on duty at the time of the incident and had in fact attended the scene and debriefing afterwards albeit her attendance at the cell was after the key events had taken place.

17. She reviewed the available paperwork and then set about interviewing the key parties:

- She interviewed GK who alleged he had been assaulted by Mr Smith who had placed him into a headlock before he was taken to the floor and punched and kicked. GK further described the incident in the segregation unit and said that although he felt the restraint by Officer Hardy was unjust he was not assaulted.
- She interviewed Senior Officer Churchill who had been present in the cell and involved in the incident. She described that GK had punched Mr Smith first and so was then restrained.
- She interviewed Mr Smith who gave a similar account to SO Churchill namely that he had been struck first.

- She then interviewed Prison Officer Fabian who had been present at the scene. He gave a contrasting account namely that Mr Smith had, without provocation, grabbed GK and placed him into a headlock.
- Ms Gill also noted making enquiries into CCTV and BWV. She records in her investigation report 'CCTV evidence and BWV footage has been burned onto disc and placed in evidence bag M22227660.'

18. Given the account she had taken from Officer Fabian Ms Gill did not complete the management enquiry, instead she submitted it on 24<sup>th</sup> March 2022 with a recommendation that a formal enquiry should be commenced.

19. The Claimants' were then suspended on full pay whilst the investigation was progressed by Sharon Atkins, Head of Reducing Reoffending and at Band 8 in seniority within the Respondent's organisation.

20. Following receipt of Ms Gill's report Deputy Governor Golder wrote formal terms of reference for a 'Code of Discipline Investigation' into the Claimants' and SO Churchill. Mr Golder commissioned Colin Davies, Head of Internal Operations, to investigate.

21. The terms of reference prepared were focused upon 'The circumstances surrounding the allegation of GK being verbally abused and physically assaulted by HB 1 staff on 16<sup>th</sup> January 2022.....'

22. Mr Davies appointed Ms Gill to assist him in his investigation. As part of the investigation Mr Davies interviewed the Claimants. The interviews were recorded and both had a union representative at the interview. He also interviewed SO Churchill, who it should be noted maintained an account that she had seen GK punch Mr Smith first. He also interviewed Officer Fabian as well as GK and the other prisoner occupant of the cell who was present that day. He reviewed the body worn footage which was available.

23. Significantly Mr Davies commissioned a 'Subject Matter Advisory Report' from Gareth Wheeler who is an expert in use of force. Mr Wheeler completed a report dated 10<sup>th</sup> June 2022 which analysed the available paperwork and the body worn footage which he had been provided with in detail. He provided his expert commentary and conclusions. He identified in particular that, in his opinion, the use of multiple strikes by the Claimants had not been justified by them during the incident and Mr Dixon's use of a pain inducing technique through the operation of rigid bar handcuffs when GK was on the ground was similarly inappropriate.

24. When submitting his report Mr Wheeler also separately emailed Mr Davies to highlight that he was concerned about other conduct he had observed from staff on the body worn footage. This had occurred whilst GK was being moved from the cell to the segregation section and then in the segregation unit itself.

25. Mr Davies completed his investigation report on 22<sup>nd</sup> June 2022. Mr Davies concluded on the evidence he had gathered that there was insufficient evidence in relation to the allegation of verbal abuse made by GK. Mr Davies did however conclude that, in his view, a second allegation was made out and there was therefore a case to be tested at a disciplinary hearing in respect of assault/unnecessary use of force on a prisoner in respect of all three officers.

26. As far as the investigation stage is concerned the primary issue that is raised in dispute at this hearing relates to the availability of any CCTV recording.

27. I have heard evidence from Mr Davies as to his investigation. Both claimants identify a significant failure of the investigation was the fact that it did not obtain, or alternatively retain, CCTV footage. It is common ground that a CCTV camera was present which would have captured the landing area outside of the relevant cell itself. It is common ground again that CCTV cameras are positioned not to capture the inside of the cells for privacy purposes.

28. Mr Davies gave evidence that the system records images for a period of 28 days before they are overwritten so any capture of the images needs to be completed within that period. He confirmed that he had not seen any CCTV in connection with this incident as it had been overwritten prior to his investigation commencing. As I have set out however within the note from Ms Gill's management enquiry there is a reference that CCTV images were obtained and secured in an evidence bag.

29. Mr Davies gave further evidence that his investigation had made contact with the Emergency Control Room which was responsible for the CCTV system. Evidence, in the form of a letter, from an officer who had viewed the CCTV had been obtained stating that, in that officer's view, the CCTV did not show anything of relevance. When Mr Dixon gave evidence he confirmed that he had seen the CCTV at an early stage. He disagrees with the suggestion that it was of no relevance. He indicates that it would demonstrate the demeanor of GK before the key incident in question and, more importantly, would have provided evidence of Officer Fabian's



whereabouts and so his ability to see into the cell and observe what he was to describe happening.

30. Given the conflict in evidence I can not make a finding as to whether the CCTV was simply never obtained by the investigation or retained by it once it had been. It is clear, as I shall discuss later, it was not available at the disciplinary or any subsequent hearing.

31. As I have set out what the law requires me to do is assess whether the failure to secure the CCTV renders the investigation so flawed as to make it 'unreasonable'. In my judgment whilst it was a failure to secure and/or retain the CCTV that does not make the investigation process unreasonable. It is common ground that the CCTV would not have captured the inside of the cell and so the key incident which was under investigation. The investigation as a whole was otherwise detailed, thorough and complete. It secured relevant evidence, properly interviewed the appropriate staff and the Claimants in line with proper procedures and the requirements of fairness. It commissioned expert evidence to assist on the central issues in the case. It came to a considered opinion on the evidence it had gathered, discounting one allegation and progressing the other to a disciplinary hearing. The law does not require a 'perfect' investigation but one that was reasonable in the circumstances. I am satisfied and find as fact that this was a reasonable investigation albeit one which ultimately led to an evidential weakness that the disciplinary decision maker would have to assess.

32. The Disciplinary process

Again almost all of the facts of what occurred are agreed. Governor Jenny Louis was responsible for hearing the allegation and she sent formal invitations to each officer to attend separate disciplinary hearings. The invitation letters sent identified that the claims under investigation were verbal abuse and assault of GK. The letters warned that the allegation, if proved, would constitute gross misconduct and that dismissal was a possible sanction. The letters sent a pack of enclosures which contained the evidence gathered in the investigation including the use of force report from Mr Wheeler. It did not however enclose the partially completed 'management enquiry' report.

33. On 15<sup>th</sup> November 2022 Mr Dixon attended his disciplinary interview together with his union representative and on 16<sup>th</sup> November 2022 Mr Smith attended his disciplinary interview together with his union representative.

34. In both cases the proceedings were recorded and transcripts are available. In both cases Mr Davies presented the investigation. Mr Wheeler was called to give evidence as was Mr Fabian, Mr Smith and SO Churchill. Both claimants were able to question the witnesses and give their own evidence to the hearing. The hearings were each adjourned at the end of the evidence as the other hearings were still outstanding.

35. On 17<sup>th</sup> November 2022 SO Churchill attended a disciplinary hearing. At the hearing she gave an account in which she now stated that she could not confirm that she had seen GK punch Mr Smith first. She also accepted the allegation against her of excessive use of force.

36. The change of account by SO Churchill is a key issue in this case. I heard evidence from Governor Louis and it is clear from the paperwork that having received Officer's Churchill's changed account Governor Louis adjourned her disciplinary hearing and on 17<sup>th</sup> November she wrote to each of the Claimants outlining the change which had occurred. The letter was in brief terms but set out the key change of account by Officer Churchill. It invited both Claimants to attend a reconvened hearing on 28<sup>th</sup> November 2022 when they would have a chance to respond to the change in evidence since their own hearings.
37. On 28<sup>th</sup> November both claimants attended the reconvened hearing and were able to question Officer Churchill. They provided their submissions upon the evidence. Governor Louis then found the allegation proved and invited submissions from the Claimants upon an award of sanction. Having heard the representations Governor Louis took some time to consider matters but then dismissed both claimants for gross misconduct. On 2<sup>nd</sup> December 2022 Governor Louis wrote detailed letters to both claimants setting out the reasons why she had found the allegations proved and why she had dismissed them.
38. Both were given an opportunity to appeal in respect of the findings and sanction and both Claimants exercised that right. On 6<sup>th</sup> February 2023 both Claimants attended an appeal hearing convened by Mr Will Styles a Deputy Director with the Respondent. Both appeals against the findings and sanction were dismissed. No real issue turns in this case on the appeal process. The focus of complaint is upon the investigation, the initial disciplinary process and matters of procedural fairness. No issue is directed toward the conduct of the appeal hearing itself.

39. With that background set out I turn to the key issue – did the Respondent act in a procedurally fair manner?

40. A number of complaints are made by the Claimants' as to procedural fairness in this case:

A – Role of CM Gill

41. The use of CM Gill to assist the disciplinary investigation is criticized by the Claimants given that she had:

- 1) been involved in the incident on the day; and
- 2) had had the conduct of the management enquiry before the discipline investigation.

42. The Claimants' submit that this is not in line with policy and, as such, it was inappropriate for her to have been involved at all. Mr James for the Respondent submits that even if her involvement was a breach of policy no unfairness from CM Gill's involvement has been identified by the Claimants. That this is not a situation, for example, where she had learnt of impermissible matters at any early stage which might 'infect' the later investigation.

43. Having considered the position with care I am satisfied and find as a fact that there is no unfairness which flows from the involvement of Ms Gill in this case. Her initial involvement on the day was not during the key passage of time which is at the center of the dispute between the parties. She did not conclude the management enquiry given her recommendation that it be progressed to a discipline investigation and the evidence she had gathered was repeated without any significant alteration in that discipline investigation. The Claimants have not identified or established any unfairness in connection with her involvement.

B – Management Enquiry Report

44. The Claimants' both submit that they had not been provided with a copy of the management enquiry report until these Tribunal proceedings despite their requests for access to it. It is again submitted by Mr James that no unfairness flows from that fact. The management enquiry was not concluded, it reached no settled position other than that the matter needed a more formal investigation and so any failures in the management enquiry, not that any are accepted, were rectified by the through discipline investigation which then followed.

45. A review of the management enquiry paperwork which has now been supplied demonstrates that there was no material difference in the evidence gathered at that stage to that which was then gathered in the more formal setting of the discipline investigation. There were no contradictory statements by witnesses, for example, which might have been used by the Claimants to advance their case at the later discipline hearings. Given this and the fact that it did reach no conclusion which again might have assisted the Claimants I again am satisfied that no unfairness flows from the fact that no access was provided to this material until these Tribunal proceedings.

C – Issues concerning the suspension of the Claimants

46. The Claimants highlight that their suspension in March 2022 was undertaken by a Band 8 Governor. The suspension policy makes clear that a member of staff of Band 9 or above is required. The Claimants highlight that the policy requires reviews of suspensions to be conducted every 28 days. In this case the suspensions were reviewed but at intervals that varied from 29 to 40 days.

47. It is right to observe that in law suspension is not a disciplinary step. It was the clear intention of the Respondents to suspend the Claimants whilst the discipline investigation took place and I am satisfied and find as a fact that had the matter been referred to a Governor at Band 9 level the suspension would have been properly authorised. There is then, in my judgment no real unfairness to the Claimants. More importantly there is no evidence that this error had any impact at all upon the investigation or the procedural fairness of the discipline process.

48. The position is the same with the reviews of suspension. It is clear that the suspension of the Claimants was regularly reviewed, most often it seems on the 4<sup>th</sup> day of each month. This is not a review every 28 days as set out in the policy but the reviews which were conducted however did meet the objective of routinely subjecting to scrutiny whether there is a continuing need for suspension.

49. Again whilst I find that this was a failure by the Respondent to comply with its own policy it in my judgment could not and does not have any bearing upon the overall procedural fairness of the separate discipline process. The Claimants submit that these breaches of policy should lead the Tribunal to be cautious in its approach and to consider what other breaches might have occurred in their investigations and hearings - although they are not able to specifically highlight any. I have had that caution in mind when considering the issues in this case.

#### D - CCTV

50. As already discussed both Claimants rely upon the failure to provide the CCTV recording from the landing area outside the cell in question. As I have noted there is a conflict of evidence as to whether the CCTV recording of events on the landing was ever obtained during the investigation or not. Mr Dixon understandably places considerable weight upon this failure having been able, at any early stage, to view

the CCTV himself. He is clear that it could have assisted his case in particular to discredit Mr Fabian and demonstrate that Mr Fabian could not have seen what he described.

51. Loss of important evidence can of course affect the fairness of disciplinary proceedings. Here the recording is said to go to an important matter which was in issue. Again my role however is to assess whether the failings in relation to the CCTV undermine the reasonableness of the disciplinary process as a whole. Mr Smith invites me to conclude that they do not. The issue of Mr Fabian's physical position was a matter which could be and was tested by the Claimants in the disciplinary interviews. Mr Fabian was challenged about his view and provided his answers. The Claimants were able to give evidence and make submissions about the impact of the loss of the CCTV. The lack of CCTV was clearly a matter considered by Governor Louis who weighed it in the balance when considering the evidence. Ultimately though Mr James submits that it was not of central importance to the proceedings given that the key issue under investigation was the alleged assault and the use of force within the cell itself which would not have been captured on the footage.

52. Overall I understand the complaints' dissatisfaction with the loss, if I can term it that, of the CCTV footage but ultimately I am satisfied that it does not render the disciplinary process unreasonable. The issue of the CCTV could be and was explored at the discipline hearing. Whilst I appreciate Mr Dixon feels he was 'shut down' from exploring the issue it is agreed that it would not have shown the actual incident itself or the key matters which came to be the focus of the hearings, namely the use of multiple strikes to GK and the use of the rigid bar handcuffs. Whilst the loss of it may perhaps have weighed more heavily with some decision makers that

is not the ultimate matter for me as I do conclude it was a matter which could be and in the circumstances of this case was, addressed in a procedurally fair way.

#### E - Collusion

53. Both claimants raise the possibility of improper collusion having occurred which renders the discipline process procedurally unfair. Mr Smith raised at his appeal hearing whether Governor Louis had a personal connection with Officer Fabian. At this hearing Governor Louis raised that issue and Mr Smith in due course gave evidence that he had heard (from an unspecified source) that Governor Louis had once had a family member who worked at the prison and who was friends with Officer Fabian. Governor Louis confirmed that she once had a nephew who had worked briefly at the establishment but she denied any connection, beyond that in her professional capacity with Officer Louis. I entirely accept Governor Louis evidence and find as a fact that she did not have any inappropriate connection with Officer Fabian, indeed Mr Smith could not and did not identify any evidence to support this possibility beyond the unidentified hearsay remarks identified above.

54. More significantly both Claimants draw attention to the fact that when GK was spoken to as part of the management enquiry he identified Officer Fabian as being a witness to what had happened to him in the cell. They both suggest that this demonstrates that there may have been improper collusion between GK and Officer Fabian. There is no other evidence to support that proposition. Nor can I find that the proper inference to be drawn from the statement made in the initial complaint is that there has been collusion. In that complaint GK is clearly identifying an officer who was present and who those who investigate his report should speak to. I understand that GK was still confined within the segregation block at the time he made his complaint and I am satisfied and find as fact, given that there is no



evidence of the same, that there was no collusion which would affect the procedural fairness of the discipline process.

F – Change of account by SO Churchill

55. A key matter raised by the Claimants is that there was unfairness in the way in which the change of account by Officer Churchill was dealt with. Up until her discipline hearing on 17<sup>th</sup> November 2022 Officer Churchill had provided a number of accounts in which she described seeing GK punch Mr Smith first which then led to the use of force by both Claimants. At her hearing she said she was unable to confirm that anymore. As set out above both Claimants were invited to attend on 28<sup>th</sup> November to the reconvened discipline hearing in their cases and were able to question SO Churchill about the change of her account.

56. The key complaint made is that the letter sent by Governor Louis setting out the change and inviting them to a further hearing was insufficient to inform them properly of the change of account and that they should have been provided with 1) a formal statement from SO Churchill; or 2) a transcript of her disciplinary interview where the change had occurred.

57. As far as 1) is concerned I heard clear evidence from Governor Louis that there was no written statement made by SO Churchill when the account was changed but that the change of evidence occurred during her hearing itself. Whilst it might perhaps have been advantageous to have explained this in the letter sent alerting the Claimants to the change, so they were not left with the impression that there was a further document which they did not have, the fact that there was no 'new' document obviously means that there was procedural unfairness in it not being disclosed.

58. As to 2) again it might have been advantageous if a transcript had been prepared so that the Claimants when they came to re-attend on 28<sup>th</sup> November had the full context in which the change of SO Churchill's evidence had taken place, but I have to consider whether the failure so to do renders unreasonable the discipline process. I am satisfied that it does not. Here the key change in evidence was clear. That change was accurately provided to the Claimants. The Claimants were given time to consider it and prepare to meet it at the reconvened hearing. The Claimants were given the opportunity to ask questions of SO Churchill and to make submissions about it. In my judgment the steps taken by Governor Louis did safeguard the reasonable standards of fairness required of the proceedings.

#### G – Consistency

59. A considerable part of the complaint made by the Claimants and their dissatisfaction with the process is the failure by the Respondent to address behaviour by other officers whilst escorting GK to the segregation block and within it.

60. There is an entirely understandable basis for this complaint. Firstly GK made an allegation concerning his treatment in segregation and yet it was not included in the terms of reference for this discipline investigation or made subject to its own investigation. Secondly in the email attaching his use of force report Mr Wheeler specifically commented upon what he had observed on the body worn footage and highlighted very similar conduct to that which was alleged against the Claimants. Set against that background it is understandable that the Claimants have a feeling of procedural unfairness. Mr Dixon submits that the decision not to proceed may have been borne because of the rank of those involved, as they were more senior than himself and Mr Smith (although it is to be noted SO Churchill was also subject to discipline in this investigation), he also suggests it demonstrates that reasonable lines of enquiry were not followed.

61. Mr Davies gave evidence as did Mr Golder that they had examined these matters concerning other staff and considered them. Mr Davies said that he had watched the footage of these other incidents closely. Mr Golder gave evidence that a police liaison officer had been invited to attend had also examined the recordings of these events with them in order to determine if further action by the police was necessary. Mr Golder said that the officer had concluded that there was insufficient evidence for a police investigation. Mr Golder further explained that there was no complaint made about those actions given GK's answers in the management enquiry and there was no other witness reporting any allegation, as was distinct from the Claimants' cases where Officer Fabian had.

62. I can see how those answers would not easily displace the feeling of grievance by the Claimants' but again what I must assess is what effect a failure to investigate other potential misconduct has upon the fairness of these proceedings. Does it mean that there was procedural unfairness in the Claimant's cases? Mr James submits that there was not. The Tribunal should focus on the procedures adopted in the Claimants' cases. There is force in that submission. I am satisfied that there is no evidence which has been put before me which is capable of establishing procedural unfairness stemming from the decisions not to formally investigate the conduct of other officers. I accept the evidence of Mr Davies and Mr Golder that they did examine the matter and whilst it might be regarded as curious that no further formal internal investigation into those actions then took place, I have to look at the procedural fairness with regards to what happened with these Claimants. As I have set out I am satisfied that a reasonable investigation was perused in this case and that reasonable procedures were followed to ensure that a reasonably fair disciplinary procedure was followed.

H – Complaints raised by Mr Dixon

63. Mr Dixon makes separate complaints in relation to matters from his own discipline hearing. He cites the use of leading questioning by Governor Louis when she would initiate evidence from a witness by ‘setting the scene’ and that she prevented him from exploring as he would have wished topics such as the failure to investigate the matters set out above or the CCTV.

64. I have examined the transcript of Mr Dixon’s hearing and have heard evidence from Governor Louis. Again it is not my role to replace the decision maker or consider how the hearing might have been conducted I must assess whether the hearing was conducted with due regard to reasonable procedural fairness. I am satisfied and find as a fact that it was. It was clear that Governor Louis was focused on addressing the main issues at the hearing and that she conducted the hearing in a way which sought to focus upon those. Mr Dixon did have an opportunity to engage meaningfully in the process, questioning witnesses and giving his own evidence and making submissions.

65. Mr Dixon questions how the burden of proof was satisfied at the hearing given that in his analysis the case concerned himself and Mr Smith effectively giving evidence ‘one way’, Officer Fabian and GK providing evidence the other and SO Churchill ending in an evidentially neutral position. As I have said several times it is not for me to replace the decision maker or make my own assessment of how I might have found the facts. I note that there was of course also the expert evidence of Mr Wheeler and the body worn footage as evidence for Governor Louis to consider. Making a determination upon evidence however involves weighing and assessing that evidence, not all evidence has equal weight. Having reviewed Governor Louis findings it is clear she did set about analyzing and assessing the evidence as against the burden of proof in this balanced case. There is no evidence of any

procedural unfairness in the way that she made her decision in relation to the evidential assessment which was ultimately hers to make.

#### Conclusion on complaints raised

66. Having considered all the matters raised at this hearing individually and found that individually they do not in my judgment effect the overall fairness of the procedures adopted, I have also them all into account again and considered their combined effect when assessing the overall picture of fairness. Overall then I am satisfied that Governor Louis did believe that the Claimants had committed misconduct and that her belief was based upon reasonable grounds following the investigation and the disciplinary process.

#### Sanction

67. Finally I must consider whether dismissal was within the range of reasonable responses that an employer might have to the facts as they had found them to be in each Claimants case.

68. Governor Louis gave clear evidence to me that she had considered the issue of sanction with care. She determined in the case of Senior Officer Churchill that she should be issued with a final written warning and prevented from being eligible for promotion for two years. In respect of these Claimants' she set out that she considered that overall there was an issue of integrity given her findings that they had assaulted GK and had denied the same through the discipline process.

69. In her outcome letter to the Claimants' Governor Louis made clear that she regarded the now proven allegation as one of gross misconduct. Assault of a

prisoner is clearly so defined within the policy and it is readily understandable why that must be the case. Mr Dixon makes reference to the fact that 'unnecessary use of force' might be a matter just of misconduct but Mr James submits that the categories between the two are not 'closed'. In my judgment Governor Louis was well placed to determine where the conduct she had found proved fell. As I have observed the initial letter inviting the Claimants to the disciplinary hearing had set out that the allegation was one of gross misconduct and that dismissal was a possible consequence.

70. In the letters sent giving reasons for the findings and sanction Governor Louis indicated that she had considered the mitigation that each Claimant had put forward but ultimately she was satisfied that the relationship of trust between the Claimants and the Respondent had broken down.

71. Again it is not my place to decide the sanction or even to decide whether other decision makers might have come to a different conclusion. My role must be to assess whether dismissal was within a reasonable range of responses to the findings that had been made and the circumstances of each Claimant. I am satisfied that it was. As set out, an assault on a prisoner on any view would be an example of serious misconduct and I can not say that dismissal should not be considered a reasonable response to the findings made by Governor Louis.

72. For these reasons I therefore dismiss the claims brought.

**Employment Judge Richter  
18 January 2023**