EMPLOYMENT TRIBUNALS

Claimant: **Mr A Kirby**

Respondent: **Secretary of State for Justice**

Heard at: Reading **On:** 11, 12, 13, 14 December 2023, 26 March 2024 (Tribunal in Chambers), 27, 28 March 2024

Before: Employment Judge Shastri-Hurst, Ms L Farrell and Ms B Osborne

Representation
Claimant: in person
Respondent: Mr Serr (counsel)

CORRECTED RESERVED JUDGMENT

1. **The claim of unfair dismissal is not well-founded and fails;**
2. **The claim of wrongful dismissal is not well-founded and fails;**
3. **The claim of sex discrimination is not well-founded and fails;**
4. **The claim of breach of contract in relation to annual leave and TOIL totalling 116.7 hours) is well founded and succeeds.**

REASONS

Introduction

1. The claimant commenced employment with the respondent on 25 September 2017 as a Prison Officer. He was dismissed for unprofessional conduct on 26 August 2021, the end of his service being 15 October 2021.

2. The ACAS early conciliation process commenced on 2 December 2021 and ended on 3 December 2021. The claim form was presented on 30 December 2021.

3. The claimant sought to bring the following claims:

    3.1. Unfair dismissal
    3.2. Wrongful dismissal
    3.3. Unauthorised deduction of wages;
    3.4. Direct sex discrimination

4. In summary, the claimant was given a final written warning ("FWW") for an incident that occurred on 17 September 2019. This FWW was imposed on 16 November 2020, was live for 24 months, and was to span the period of 25 March 2020 to 24 March 2022.

5. Then, a further disciplinary process arose out of an incident on 12 April 2021, the result of which was that the respondent found the claimant guilty of unprofessional conduct.

6. Taking into account the live FWW, the respondent decided that dismissal was the appropriate sanction.

7. These are the brief facts around the claimant's unfair and wrongful dismissal claims. In terms of the discrimination claim, the alleged less favourable treatment relates to aspects of the 2021 disciplinary procedure.

8. Finally, in relation to the unlawful deduction of wages claim, the claimant says he has not been paid for outstanding holiday pay, time off in lieu ("TOIL") and expenses known as "bedwatch subsistence payments" (from 27 November 2020 to 8 April 2021).

9. In reaching its decision, the Tribunal has had the benefit of a bundle and index, the last page of which is numbered 1915. We have heard evidence from the claimant, and three supporting witnesses:

    9.1. Mr Jason Watts ("JW") – Custodial Manager at HMP Coldingley;
    9.2. Mr Michael Byrne ("MB") – Prison Officer at HMP Coldingley;
    9.3. Mr Colin Ellis-Vowles ("CEV") – Use of Force expert and Training Director for COVIC Training Solutions.

10. From the respondent, we heard evidence from the following witnesses:

    10.1. Mr Niall Bryant ("NB") – Governor of HMP Coldingley at the relevant time, Disciplinary Officer
    10.2. Ms Susan Howard ("SH") – Prison Group Director, Appeal Officer
    10.3. Ms Sarah Tait ("ST") – Head of Business Assurance

11. We also have a witness statement from Ms Esther Dainton ("ED"), Deputy Governor of HMP Ford at the relevant time, and Investigation Officer. ED did not attend to be cross-examined. We therefore are invited by the claimant to give her evidence less weight.

12. On Day 1 of the hearing, the claimant applied to strike out the respondent's response, and asked for witness summons to be granted in relation to two of his witnesses. The strike out application was based on the claimant's argument that the respondents had failed to comply with case management orders regarding disclosure, leading to it being impossible to have a fair trial. We rejected this application for reasons given orally on Day 1. In short, we were not satisfied that there had been any breaches of tribunal orders that impacted the fairness of the final hearing and that it would be disproportionately onerous on the respondent for us to strike out the response, meaning that the claim would be undefended. Instead, the tribunal held that a more proportionate way to deal with the issue would be for the claimant to be able to cross-examine the respondent's witnesses on the alleged failure to disclose certain documents.

13. In terms of the requested witness summons, we were informed by the claimant that his witnesses were willing to attend the hearing to speak to their statements. As such, we found that summonses were not necessary and so rejected the application. We told the claimant that if the situation changed, and one or both witnesses were reluctant to attend without a summons, we would review the situation.

14. This final hearing was originally listed for four days, 11-14 December 2023. Unfortunately, we were unable to conclude all the evidence in that timeframe. The matter therefore was listed as part-heard: the tribunal had 26 March 2024 to read back into the case, and then the parties attended on 27 and 28 March 2024.

15. During the 3-month period between the part heard hearings, the claimant sent in an unredacted version of emails that appear in the bundle at [307/308]: those pages were added at [308a/b]. Along with this email, the claimant made some points about the respondent's honesty and credibility given how he alleges it had not been truthful in the manner it dealt with disclosure. The tribunal took those points as being submissions that it weighed into its deliberations to the extent they were relevant .

Preliminary hearing 26 January 2023

16. The tribunal considers it necessary to set out the facts around a preliminary issue that arose at a preliminary hearing in January 2023 which, incidentally, was heard by Employment Judge Shastri-Hurst.

17. At that hearing, the claimant applied to amend his claim to include the allegation that the FWW he received on 16 November 2020 was manifestly improper, and was made in bad faith. This would be relevant to the claimant's unfair dismissal claim. The application was rejected for reasons given at the time. The claimant applied for the tribunal to reconsider its decision; that application was unsuccessful. No appeal was made to the Employment Appeal Tribunal as far as this tribunal is aware.

18. This matter is recorded here, as the claimant has remained adamant throughout the final hearing that the FWW was unfair, and should be interrogated as being manifestly inappropriate. We have had evidence from CEV, whose evidence is only relevant to the allegation upheld in the disciplinary that led to the FWW.

19. The tribunal considers it necessary to make it clear again that, in light of the failed amendment application, the tribunal cannot go behind the FWW.

20. The relevant law on this topic was set out in the Case Management Order that followed the January 2023 hearing. For completeness a summary is included below.

21. The tribunal is only allowed to go behind the decision to impose a FWW if it has been made in bad faith, with no *prima facie* (on the face of it) grounds, and/or it is manifestly inappropriate – Stein v Associated Dairies Ltd 1982 IRLR 447, and endorsed by the Court of Appeal in both Gayle v Sandwell and West Birmingham Hospitals NHS Trust 2012 ICR, and Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374. In Davies, Lord Justice Beatson stated that it would be a rarity for a tribunal to be able to legitimately go behind a FWW.

22. The tribunal therefore reiterates at this stage two matters:

    22.1. The issue of whether the FWW was manifestly inappropriate or imposed in bad faith is not one that the tribunal will consider, given that the claimant's amendment application failed;

    22.2. As such, the tribunal cannot go behind the decision to impose the FWW in 2020. In other words, the tribunal is stuck with the fact that there was a live FWW at the time of the 2021 disciplinary process.

Issues

23. The issues to be determined by the tribunal were discussed at the beginning of the hearing, using the respondent's List of Issues at [162] as a starting point for discussion.

24. Two points arise in relation to the issues, having now heard all the evidence and submissions on this matter.

25. First, during the evidence, it became clear that the respondent had been working on the basis that the effective date of termination ("EDT") was 15 October 2021. This is despite the respondent initially drafting the list of issues as stating that the EDT was 26 August 2021.

26. This means that the issue as to whether the unfair dismissal and wrongful dismissal claims were in time fell away. With the EDT being 15 October 2021, the claimant had until 14 January 2022 to present his claim. He did so on 30 December 2021, and so those claims are in time. The tribunal therefore did not need to consider the issue of time limits in relation to those two claims.

27. Second, in relation to the unlawful deduction of wages claim, Mr Serr headed the section of his closing submissions on this claim as "unlawful deduction of wages/BOC [breach of contract]". The tribunal raised with him that, if the pay claims were framed as an unauthorised deductions claim, that claim would be outside the primary time limit and we would need to consider whether we had jurisdiction to deal with that claim. However, if the claim were framed as a breach of contract claim, that claim would have been presented in time, as time starts to run from the termination of the employment contract (15 October

2021). The tribunal suggested to Mr Serr that this claim be dealt with as a breach of contract claim. Mr Serr did not argue with that suggestion.

28. To the extent necessary, we amended the claim of unauthorised deduction of wages to be one of breach of contract, which, if anything, is a relabelling exercise only.

29. The list of issues relating to liability set out below is therefore slightly amended from its original form, and is as follows:

1. ***Jurisdiction – direct sex discrimination***

    1.1. What was the last act of discrimination relied upon?

    1.2. When did this alleged last act of discrimination take place?

    1.3. What was the last act of detriment relied upon?

    1.4. When did this alleged last act of detriment take place?

    1.5. On what date did the Claimant contact ACAS in order to commence Early Conciliation?

    1.6. When was the ACAS Early Conciliation certificate issued

    1.7. On what date was the claim lodged?

    1.8. Has the Claimant's claim for sex discrimination been brought in time?

    1.9. Is it just and equitable for the Tribunal to extend time for the Claimant to bring their claims of discrimination?

2. ***Unfair Dismissal – section 94 ERA***

    2.1. Does the Respondent concede that the Claimant was dismissed?

    2.2. What was the effective date of termination (EDT)? [now agreed as 15 October 2021]

    2.3. What does the Respondent assert was the potentially fair reason or principle reason for dismissal? The Claimant's behaviours on 12 April 2021 demonstrated a breach of the professional conduct standards of a prison officer.

    2.4. Did the Respondent genuinely believe the gross misconduct occurred?

    2.5. Did the Respondent have reasonable grounds for believing that the Claimant was guilty of the misconduct in question?

2.6. Did the Respondent carry out a reasonable investigation prior to taking the decision to dismiss the Claimant?

2.7. In all the circumstances of the case (including the size and administrative resources of the Respondent) did the Respondent act reasonably in treating the reason for the Claimant's dismissal as a sufficient reason for dismissal?

3. ***Direct Sex Discrimination- Section 13 Equality Act 2010***

3.1. What is the protected characteristic relied upon by the Claimant?

3.2. Who is the actual comparator relied on? The Claimant relies on Rachel Daly and Officer Harvey as the appropriate comparators.

3.3. Which alleged incidents of direct sex discrimination does the Claimant rely upon?

3.3.1. That he was not offered the chance to provide a written statement in regards to the events that took place on 12 April 2021.

3.3.2. That the interview technique during the investigation meetings was biased and sympathetic towards Rachel Daly.

3.3.3. That there was an emphasis on the Claimant's state of mood as being angry, whereas similar emphasis was not placed on Rachel Daly's mood.

3.3.4. That the Claimant was not offered support throughout the disciplinary process in comparison with Rachel Daly.

3.3.5. That disciplinary proceedings were brought against him for being irate while no such proceedings were brought against Officer Harvey for similar or worse behavior.

3.3.6. When Officer Harvey shouted at 2 male officers towards the end of 2020 she was offered mediation rather than having disciplinary action taken against her.

3.3.7. When Officer Harvey shouted at two female officers in mid 2020 she was offered mediation rather than having disciplinary action taken against her.

3.4. Did the Claimant suffer the treatment in the manner alleged?

3.5. If so, did the Respondent treat the Claimant less favourably than it treated or would treat a real or hypothetical comparator in circumstances that were the same or not materially different including their abilities?

3.6. If so, did the Respondent treat the Claimant less favourably because of his sex or for another reason?

3.7. If the Respondent treated the Claimant less favourably because of another reason, unconnected with the specified protected characteristic, what was the reason for the Claimant's treatment?

4. ***Breach of contract (wages)***

4.1. At the time of termination of the employment contract, had the respondent breached the claimant's contract of employment by failing to pay him all the figures he was contractually due. The claimant alleges that the respondent had failed to pay him the following sums:

4.1.1. £1,641.53 in unpaid annual leave;

4.1.2. £299.37 in unpaid TOIL; and

4.1.3. £271 in bedwatch subsistence payments.

5. Wrongful dismissal

5.1. Was the claimant guilty of gross misconduct, such that the respondent was entitled to dismiss him without notice?

5.2. If not, is it agreed the claimant should have been paid his contractual notice pay?

Findings of fact

30. The tribunal has restricted its findings to those that are relevant to our consideration of the claims in this matter. We have not made findings on every

point in dispute between the parties; only on those points that are relevant to the list of issues.

31. The claimant commenced employment with the respondent on 25 September 2017 at HMP Coldingley, as a Prison Officer – [168]. He remained at HMP Coldingley throughout his employment, other than a brief detachment to HMP Lewes in 2019. This detachment was due to last 8 weeks; however, in the seventh week, an incident led to a disciplinary process resulting in the FWW mentioned above and expanded upon below.

Final written warning 2020

32. On 17 September 2019, the claimant was involved in an incident that led to a disciplinary process: he was suspended on or around 17 September 2019.

33. The matter was investigated and on 18 March 2020 a disciplinary hearing was held. That hearing had to be adjourned to the following week. However, in the interim, the country entered into a national lockdown as a result of the COVID-19 pandemic. As such, the hearing could not be reconvened until 4 November 2020.

34. The claimant's suspension was lifted on 6 April 2020, at which point he returned to work at HMP Coldingley.

35. At the reconvened disciplinary hearing in November 2020, the claimant was found guilty of using inappropriate Use of Force against a prisoner and of unprofessional conduct.

36. On 16 November 2020, a final written warning lasting 24 months was imposed on the claimant by Governor Lane of HMP Lewes.

37. The letter issuing this warning is on [1412]. At [1414], the letter states:

> "...it is my belief this hearing would have been reconvened a week after the original hearing, as was hoped when we adjourned. Therefore, in the interest of fairness I will be backdating the penalties to 25th March 2020. This means they remain live until 24th March 2022. Should you commit further proven acts of misconduct during the life of the final written warning, the likely outcome will be dismissal."

Incident on 12 April 2021

38. An incident occurred on 12 April 2021 which led to the claimant's dismissal. The incident was between the claimant and Ms Rachel Daly (a fellow Band 3 Officer at HMP Coldingley, "RD").

39. On 12 April 2021, the claimant and Officer Derek Clint (a fellow Officer, "DC") were detailed to be on G Wing. It is prison policy that the two officers detailed to a wing are not permitted to leave that wing during the course of that shift. Each wing is therefore assigned a Runner/Officer Assist to help with any tasks that require leaving the wing. MB was detailed to reception that day, but attended G Wing briefly in order to drop something off for a prisoner.

40. On 12 April, the claimant needed to get in touch with the assigned runner, who was RD on that day: he could not get hold of her. RD was in fact on "RPE

training" (first aid/CPR training) between 0930 and 1030hrs. Once she returned to the prison, she received a call on her radio asking her to go to G Wing, which she duly did.

41. We find that, in advance of RD's arrival on the wing, the claimant was becoming worked up about RD, in his view, shirking her duties. This was to the extent that DC told him "we're just officers, let the management manage it" - [227]. We accept this evidence from DC's investigation interview, as well as his evidence that the claimant was becoming irate in advance of RD's arrival on the wing - [227]. DC had no loyalties or biases that we have heard about; we find that he had no reason to make up evidence during the investigation process.

42. When RD arrived at G Wing, there followed an exchange between her and the claimant; we will refer to this as "Exchange 1".

43. In relation to Exchange 1, we find that the conversation started by the claimant demanding to know where RD had been. There was then some back and forth, with RD saying something along the lines of "we are both officers, you don't tell me what to do". In short there was a confrontation between the two of them.

44. We find that RD was abrupt and curt in this exchange, cutting across the claimant and interrupting him. This is based on the evidence of MB to ED during the investigation interview. MB, we find, was a neutral bystander and had no reason to lie or take sides. MB told ED the following in his investigation meeting:

    44.1. MB reported that the claimant "was trying to say some things and [RD] kept kind of cutting him off, kind of mid-sentence, before he could have an opportunity to kind of respond or engage" - [197];
    44.2. RD said something like "Well, you're a one stripe. You don't tell me what to do" - [198];
    44.3. MB was given the impression from RD that "she had the hump" - [202];
    44.4. MB told ED that, whilst he was there, the claimant had tried to engage with RD – [202];
    44.5. MB told RD that "more importantly, she spoke to him in front of us in a demeaning manner" - [202].

45. Afterwards, both DC and MB told the claimant to let it go and gently teased him about RD - [228/203]. We find that both the claimant and RD were irritated with each other following this conversation. Specifically in relation to the claimant, we find that he was wound up and, in his own words, upset and frustrated. Although we accept that MB and DC were trying to make light of Exchange 1, we find that the claimant was worked up after this exchange. Again, we base this on the evidence of MB and DC to ED in the investigation:

    45.1. Once RD had left, the claimant was "not very happy". MB teased him saying "[o]h, nice one" and "[t]hat went really well, didn't it?", trying to "lighten the load", with DC joining in - [198];
    45.2. Once RD left, DC "took the piss out of" the claimant saying RD "mugged him right off..." - [228];
    45.3. The claimant was "still irate" and DC told him to "just let it go", as did MB - [228];

45.4. The claimant "told [MB and DC] he was fuming" and was "walking up and down the office like a lion in a cage" - [232].

46. We find that he felt embarrassed in front of his colleagues by the way RD had spoken to him, and was not ready to let the issue with RD rest. As he told us, he wanted a chance to say his piece; he felt he had not had that chance during Exchange 1. The claimant himself told NB in the disciplinary hearing that he was "upset, so I'm not saying I was completely calm and collect [sic], ..." - [331].

47. Following this exchange RD left the Wing, returning at around noon, at which point a second exchange ("Exchange 2") took place.

48. There is a dispute as to whether there was a third exchange during the course of the morning between the claimant and RD. We do not consider that this exchange adds anything to our findings, and therefore we do not make findings about whether there was such an exchange. All relevant conduct took place in Exchanges 1 and 2 in any event. We therefore move on to consider what happened during Exchange 2, which both the claimant and RD agreed lasted no more than a couple of minutes.

49. The claimant was in the G Wing Office when he saw RD approaching the wing. He beckoned her into the office (a portacabin) to talk to her: RD obliged. The claimant locked the door behind RD. We have been told by various people that this was common practice to some, but not all, officers; that some officers choose to lock doors for a private conversation. We rely upon the evidence from the claimant in his investigation meeting [242], JW in that same meeting [242], MB in his investigation meeting [206], and DC in his investigation meeting [229]. We find that some officers would routinely lock the door, and that in the claimant's action of locking the door on this occasion, there was no intended malice or threat towards RD on his part. It was common ground that the key for the office was in the office itself, meaning that no-one could get in from the outside. We find that this is relevant to RD's perception of events in that office.

50. In terms of what happened during the course of Exchange 2 in the portacabin office, the only two people able to speak to those events are RD and the claimant.

51. We have four accounts from RD, all of which are consistent:

51.1. Email of 12 April 2021 - [176/177]:

51.1.1. The claimant locked the door to the office door upon entering;
51.1.2. He stood with his back against it, blocking RD's exit;
51.1.3. RD asked why the claimant had locked the door, and the claimant replied "to stop prisoners coming in and annoying me among other reasons...";
51.1.4. The claimant said "I do not want to lose my shit with you but you're making it difficult";
51.1.5. RD felt threatened;
51.1.6. Once the claimant had moved away from the door, RD went towards it, unlocked it and left.

51.2. Statement of RD 15 April 2021 - [182]:

51.2.1. This captures the same detail as at [176/177]. There were some additions, as follows;

51.2.2. A suggestion that the claimant had been verbally aggressive to RD earlier in the day;

51.2.3. That she was on her own in the office with the claimant and was aware that the door could not be opened from the outside;

51.2.4. That RD was afraid for her safety and that the claimant was making her uncomfortable;

51.2.5. After she had left the office, she left G Wing as she felt "shaken up".

We find that, although there is slightly more detail in this statement than in the 12 April email, the two documents are not inconsistent. RD explained in the disciplinary hearing that the 12 April email arose following a request from Mark Wilson (Custodial Manager – Alpha Wing, "MW") to quickly explain what had happened in an email – [350]. She was then asked a few days later to write her statement. She therefore included more detail in that second account. We accept this as the reason why there is an expansion of the account in the 15 April version: there is no good evidence to challenge this explanation.

51.3. Investigation:

51.3.1. RD said that she went into the office when asked by the claimant, as she thought he was going to apologise to her - [213];

51.3.2. RD reported that the claimant stood with his back to the door - [213];

51.3.3. She asked the claimant "why are you locking the door?" to which he replied "to stop prisoners coming in and annoying me ... among other reasons" - [214];

51.3.4. The claimant threw his hands in the air and placed them on his head "like he was really wound up, and said "I'm trying not to lose my shit with you, Rachel, but you're making it very difficult"" - [214];

51.3.5. RD told the claimant that he was making her uncomfortable and she found his conduct inappropriate – [214].

51.3.6. The claimant then moved away from the door to talk to RD, at which point RD walked out and left the wing – [214];

51.3.7. RD mentioned to ED that she was aware that the claimant had done something like this to another female previously - [218]. On this point, we make no finding as to whether in fact the claimant had done something similar previously. However, we accept that RD's belief that there had been a prior incident was genuine and would add to her perception of

events. We have no good reason to doubt that her belief was genuine;

51.3.8. RD told ED she did not feel safe, she felt threatened and, on ED's scale of one to ten, the claimant was at "an eight or something" - [218];

51.3.9. RD said that she thought she had been in shock for the first couple of hours after the incident – [218].

51.4. Disciplinary [345]:

51.4.1. RD repeated what she had said in the investigation hearing – [345];

51.4.2. She explained that the claimant stood with his back to the door for about a minute - [345];

51.4.3. She told NB that she felt scared and threatened, "he was very irate and ...his body language was quite threatening" - [345];

51.4.4. She explained that, when she told the claimant he was making her uncomfortable, it was at that point he moved away from the door, and RD made to leave the office – [346];

51.4.5. She referred to the claimant as being "ten out of ten" - [347];

52. In terms of the timing of events during Exchange 2, we accept RD is consistent in the order of events. She says the claimant said the "lose my shit" comment, then moved from the door, during which time RD was saying "you are making me uncomfortable, we are not going to agree" and so on. She then left.

53. In terms of the claimant's accounts, he has provided several versions of Exchange 2, as follows:

53.1. Investigation:

53.1.1. The claimant told RD that she was not where she should have been. He stated that they "agreed to disagree" - [241];

53.1.2. The claimant denied the specific suggestion from RD (put to him by ED) that he had put his hands on his head in an exasperated fashion – [244];

53.1.3. He initially stood to the side of the door and then moved to RD's side – [244]. He denied standing in front of the door, although he accepted that the lay out of the room "could give the impression somehow that I'm stopping her leaving if she wants to..."– [245];

53.1.4. He said that they just spoke to each other normally – [249];

53.1.5. He said to RD "I don't want to lose my shit with you" - [243]. We note that the claimant's admission that

he said the words "lose my shit" was only proffered in response to ED putting the allegation at [243]. In other words, the fact that the claimant said those words was not volunteered by him in his initial recounting of Exchange 2;

53.1.6. The claimant also accepted that he was "upset" and "disappointed" with RD - [241];

53.1.7. The claimant informed ED that RD's boyfriend, Ryan Jones ("RJ") had, the following day, seen him in the car park. RJ said "I don't want to speak to you because if I say something to you I'm going to say something that I regret and I want nothing to do with you" - [255].

53.2. In the disciplinary hearing:

53.2.1. The claimant wanted to talk to RD again to "[draw] a line under it..." - [326];

53.2.2. He locked the door but did not stand in front of it – [326];

53.2.3. The size of the office meant that he was standing near the door, but not standing in the way of the door – [352];

53.2.4. The claimant told NB that he said to RD in the office "I don't...want to get upset with you, I like you ..." - [330]. Notably at this stage, he did not volunteer to NB that he had said "I don't want to lose my shit with you", although this phrase was discussed later in the disciplinary hearing;

53.2.5. RD disagreed with the claimant's view, and the claimant then said we'll agree to disagree, and that was the end of it – [330];

53.2.6. The claimant denied that RD told him she felt uncomfortable - [352].

53.3. Witness statement (C/WS/37):

53.3.1. "At no point did I stand in front of the wing door where if [RD] wanted to leave she could...";

53.3.2. "Neither did I shout or get aggressive or wave my arms around";

53.3.3. The claimant said to RD "I don't want to lose my shit with you because I like you" in a calm manner;

53.3.4. RD "wasn't willing to listen";

53.3.5. The claimant said to RD "we should agree to disagree", at which point RD left the office.

53.4. Cross-examination:

53.4.1. The claimant told us that RD said "I have taken on board what you have said";

53.4.2. The claimant also told us that he ended the discussion with "RD, is there anything further you want to say".

54. Across these four accounts from the claimant, there is some divergence. Specifically, we note that RD's reaction relayed to us in cross-examination of "I have taken on board what you have said" seems at odds with the claimant's account elsewhere that RD was not willing to listen.

55. Also in cross-examination, it was the first time the claimant had said that he ended by asking RD if there was anything more she wanted to say.

56. The only other person who can shed any light on Exchange 2 is DC. In his investigation meeting he told ED that he "heard the door lock" and did not hear any shouting - [228]. He explained that he thought the portacabin was double glazed and insulated – [223]. DC stayed just outside the office until RD came out and left the wing: she did not say anything to him, but just walked away – [230]. He recounted the same version of events at the disciplinary hearing – [339]. He also stated that, following Exchange 2, RD said nothing to him and her body language suggested nothing untoward had taken place – [343].

57. We note in JW's summing up on behalf of the claimant in the disciplinary hearing he said "[the claimant] calmly shut the door and we're not taking anything away from [RD]. Yes, she felt threatened, that's the whole reason we're here" - [357]. He also stated that it was not the claimant's intention to breach any rules or regulations; he was informed by NB that the claimant's intention is irrelevant – [357].

58. On the basis that RD's accounts are more internally consistent than the claimant's, where there is a difference in account we accept RD's version of events. However, we note that a fair amount of the facts about Exchange 2 are not in dispute. In the main, the dispute is about how these facts should be interpreted.

59. Specifically, we make the following findings of fact regarding what happened during Exchange 2:

59.1. The claimant went into the office with RD in a state of being worked up, frustrated and upset. The claimant wanted to have the last word on this matter and wanted RD to agree with him that she had been in the wrong. We accept it is important for colleagues to discuss differences amongst themselves, but when it is a matter of performance, this would be more appropriately dealt with by management. This was what DC recommended to the claimant;

59.2. There was no need for the claimant to beckon RD into the office and shut the door when, if the conversation was a calm, professional one, it could have been had in front of DC;

59.3. Having locked the door, the claimant was initially standing in front of the door, by the very fact he had just shut and locked it. This was not a deliberate move to block RD's exit but was a result of the space available in the office. We find that, given the limited space, RD was given the impression that her exit route was blocked; as was in fact conceded by the claimant in the investigation as recorded above. The claimant moved away from the door at some point during the exchange, at which point RD made to leave the office. In other words, RD left when she felt her path was clear;

59.4. The claimant said, "I don't want to lose my shit with you". The claimant has made the point repeatedly that the full quote was "I don't want to lose my shit with you because I like you". He argues that this full sentence puts a different light on his meaning or tone, than the quoted sentence from RD of "I don't want to lose my shit with you but you are making it difficult". We are not satisfied that there is any distinction to be made between the two phrases. The key point we find is that, even if it is said at a low volume and not in a shout, the natural reaction to being spoken to this way would be to put someone on notice that the speaker was near to losing control;

59.5. The claimant did not shout during Exchange 2. In fact, RD never suggested that the claimant had shouted. A lot has been made of DC being within earshot, and not hearing any shouting. This point does not take us any further, given that there was no allegation of shouting. The claimant has focused on shouting due to (a) ED's reference to a scale of 0 – 10 in which 10 may include shouting and (b) RD saying that the claimant was 10/10 - [218]. However, we do not find that RD, in scoring the claimant as such, was alleging that the claimant had shouted. In any event, we find that one does not have to be shouted at to feel threatened;

59.6. The claimant did place his hands on his head in an exasperated manner. This is consistent with our findings, and his admission, that the claimant was upset and frustrated. It is also consistent with the actions of someone near to "losing their shit". We do not find that he waved them about or made any other notable physical gesture;

59.7. We find that RD's feelings of being uncomfortable and threatened were genuine. She was consistent throughout on that, and was upset enough to inform her boyfriend of the incident. We accept that those feelings were reasonable in the circumstances: those being the claimant making the "shit" comment when evidently

upset and frustrated with his hands on his head, in the confines of a small locked space, in which the claimant was (unintentionally) in the line of her exit route.

60. In reaching these findings, we have also reminded ourselves of the following:

    60.1. It is common ground that there was no animosity between the claimant and RD prior to 12 April 2021. Although they had had one previous minor altercation, this had occurred months prior and was water under the bridge. Although we have heard about some matters within RD's private life that were causing her some distress at work, we are not satisfied that there is sufficient evidence to demonstrate to us that this caused, or was likely to cause, her to make up allegations against the claimant. We therefore find that there is no good reason why RD would make up this allegation against the claimant;

    60.2. It is also common ground that there was an altercation between the claimant and RJ, RD's partner, on 13 April. This demonstrates to us that RD had been sufficiently upset by whatever had happened in Exchange 2 to speak to her boyfriend, and for him to be mad at the claimant.

Following the incident on 12 April 2021

61. Later on 12 April 2021, RD sent to MW a summary about the incident - [176/177]. That statement was in turn forwarded to David Breen (Deputy Governor of HMP Coldingley, "DB").

62. DB took the decision to suspend the claimant on 14 April 2021. He completed the Pre-Suspension Check Sheet at [178], and wrote to the claimant to inform him of the decision to suspend by letter on [180]. The allegation set out in the suspension letter was:

> "That you acted unprofessionally and inappropriately towards Officer DALY within G-Wing Office."

Investigation process

63. On 15 April 2021, RD provided another statement covering her recollection of the incident on 12 April 2021, at [182].

64. ED was appointed as Investigation Officer by DB. The Terms of Reference for the investigation were set out in form SOP-TOR1, the allegation being one of unprofessional conduct - [185-187].

65. By letter dated 26 April 2021, ED introduced herself to the claimant via the letter at [188], in which she reiterated that the incident she was investigating was:

> "the circumstances surrounding an incident at HMP Coldingley on the 12th April 2021 where it is alleged that Officer Kirby [the claimant] acted in an unprofessional manner towards Officer Daly [RD] in the G Wing Office".

66. ED conducted the following interviews:

    66.1. MB – 19 May 2021 - [194]
    66.2. RD – 19 May 2021 – [209]
    66.3. DC – 20 May 2021 – [225]
    66.4. The claimant – 20 May 2021 - [235].

67. Following those investigations, ED produced the investigation report at [271]. At the conclusion of that report, ED made the recommendation that the matter proceed to a disciplinary hearing ("Recommendation 2") – [284]. She also made two other recommendations:

> "Recommendation 1: Guidance to be issued around management expectations of the duties and responsibilities of the G Wing runner;
>
> ...
>
> Recommendation 3: Guidance to be issued by management regarding the custom and practice of locking office doors from the inside. Appropriate signage to be placed outside office doors asking prisoners to knock and wait".

68. We find that ED's investigation was thorough. We note that she went to see the portacabin office, to establish how it locked – [242]. ED interviewed all witnesses present at the time of both Exchange 1 and 2. She set out in her report the evidence she had obtained. The recommendations she made fell within her remit as investigating officer.

<u>Sex discrimination claim – criticisms of the investigation process</u>

69. Certain criticisms are made by the claimant of ED, which we deal with below (relating to both the fairness of the investigation, and the claimant's discrimination claim):

    69.1. **Issue 5.3(a)** - the claimant was not offered the chance to provide a written statement. It is correct that ED did not ask the claimant for a witness statement, however there was nothing unfair about this. The normal process for a disciplinary process is to obtain a statement from the alleged victim and then to hold a fact finding investigation meeting with the accused. There is nothing unusual about ED not asking the claimant to provide a written statement. RD was asked for a statement because she was the alleged victim; the claimant was not asked for a statement as he was the accused. The claimant had every opportunity at the investigation and the disciplinary hearing to give his account. We find that the reason for ED not offering the claimant the chance to do a witness statement is that this is the usual process for a disciplinary matter.

    69.2. **Issue 5.3(b)** - the interview technique was biased and sympathetic towards RD. We accept that ED asked questions of RD relating to her welfare in the investigation meeting, which does demonstrate a level of sympathy towards her. However, we find that this was due to the difference in status between the claimant as the accused and RD as the alleged victim. Had the

claimant wished to file a complaint about RD, he could have done so, but this process was a disciplinary against him, arising from her complaint. There was nothing unfair about ED's interview technique.

69.3. **Issue 5.3(c)** - there was an emphasis on the claimant's state of mood as being angry, whereas similar emphasis was not placed on RD's mood. We accept there was discussion around the claimant's mood and emotions; we find that this discussion was relevant as it would play into the claimant's conduct within the office portacabin. There was however also discussion around RD's mood, as would be reasonable given her reaction to the claimant's conduct was relevant to the disciplinary process. There was discussion about both individuals' emotions, but those questions were relevant to the investigation process. It was relevant to understand the claimant's state of mind, and RD's emotional reaction. We find there was no difference in emphasis so as to lead to any unfairness, and that the questions on mood and emotion were relevant.

69.4. **Issue 5.3(d)** - the claimant was not offered support throughout the disciplinary process in comparison with RD. We reject this assertion. Within the claimant's suspension letter at [180] he was given the employee support number. The claimant also had his Prison Officer Association representative (JW) available to him throughout. Finally, in ED's introduction letter at [188], she points him to Employee Assist. We therefore find that the claimant was offered support and there is no unfairness here. To the extent that there was a difference in support offered to the claimant and RD, we find once more that this reflects the difference in their status of being the accused and the alleged victim.

70. The claimant makes further allegations about the disciplinary process as a whole as part of his discrimination claim, comparing his treatment to that afforded to Officer Harvey. The allegations are as follows:

70.1. **Issue 5.3(e)** - disciplinary proceedings were brought against him for being irate while no such proceedings were brought against Officer Harvey;

70.2. **Issue 5.3(f)** - when Officer Harvey shouted at two male officers towards the end of 2020, she was offered mediation rather than having disciplinary action taken against her;

70.3. **Issue 5.3(g)** - when Officer Harvey shouted at two female officers in mid 2020, she was offered mediation rather than having disciplinary action taken against her.

71. We have heard very little about Officer Harvey (see [149], [160] para 46/47) and been taken to no evidence in the bundle about the incidents involving Officer Harvey as set out in Issues 5.3(e)-(g). The claimant did not cross-examine the respondent's witnesses about the difference between how Officer Harvey and he were treated. In fact, in discussion with the Tribunal, the

claimant said that "the only sex part" related to ED's management of the investigation process.

72. NB's unchallenged evidence on the issue of Officer Harvey, which we accept, was as follows:

> "I am aware of this incident [with Officer Harvey]. However, the circumstances of this situation merited advice and guidance for Ms Harvey, rather than disciplinary action. There was no conclusion in this situation that Ms Harvey had breached the standards of bullying and intimidation, but did warrant informal action in relation to her conduct. The difference in approach was as a consequence of the conduct of the individuals in each situation, and was not influenced in any way by their gender".

73. From this evidence, we accept that Officer Harvey's situation was treated differently to that of the claimant's arising from 12 April 2021. However, the reason for that difference in treatment, we find, was that the two cases/incidents were not comparable; neither were the two individuals' (Officer Harvey and the claimant's) circumstances. We accept that the incident involving Officer Harvey only warranted informal action, and that she did not breach any of the respondent's standards. We find that the claimant's disciplinary process was not rendered unfair due to the difference in the way it was handled compared to the case of Officer Harvey.

Other criticisms of the investigation process

74. The claimant also made criticisms of the investigation process that are not part of his sex discrimination claim. We deal with these below.

75. The claimant alleges that ED asked leading questions of RD. We accept that ED did ask leading questions of RD, which may have been unwise. However, ultimately, we do not consider that ED's style of questioning led to any unfairness within the investigation process; neither were we pointed to any specific unfairness.

76. The claimant also complained that MW and Casey Owens ("CO") were not interviewed as part of the investigation process. MW, albeit he was the officer in charge on 12 April 2021, was not in attendance at any point during the relevant events on that day. Regarding CO, his involvement was limited to the claimant telling him that RD had not attended for runner duty in the morning. Further, he is said to have had a laugh and joke with RD after Exchange 1. He was not a witness to Exchange 1 or 2.

77. We are satisfied that neither gentleman could add anything of relevance to the investigation: they were not witnesses to the key issues in the case, namely Exchange 1 and 2.

78. In any event, the attendance of MW and CO was discussed at the disciplinary hearing. At [354], JW stated that he and the claimant had wanted to question MW and CO. Yet at [358] NB had an exchange with JW, which went as follows:

> "NB: [MW] and [CO], is there anything within their statements that would change the direction of the questioning to change the fact of you going in the door, which you do agree to, locking the door, which you do agree to, having the conversation with [RD], which you do agree to, is there anything that they would offer that would change those facts?

JW: No

NB: So do you wish for me to call them?

JW: No we don't"

79. We find that this was JW and the claimant's opportunity to state that they would consider it unfair if MW and CO did not attend, and why. Yet instead, JW did not take up to opportunity presented to him to get MW and CO involved in proceedings.

80. There is no good evidence that MW and CO could have added any information of relevance or importance that could have had an effect on the result of the disciplinary process. In any event, the claimant was offered the chance for MW and CO to be called. There was no unfairness in their lack of involvement/questioning.

81. The claimant further complains about the delay in the process. The disciplinary process, from the time of the incident through to a decision by NB took around four months.

82. We accept that ED did, on 30 May 2021, have to ask for an extension for filing her report, as can be seen at [262], but we note that the claimant was informed of the need for an extension - [264]. The extension was for one month, from 26 May to 26 June 2021, and was within the remit of the respondent's policies and procedures. We find that a 4-month period from the incident to the dismissal is not an unreasonable or unfair time frame.

83. The claimant raises the complaint that he was not aware of the specific factual nature of the disciplinary allegation against him. He told us that he was only told it was "unprofessional conduct" and was not informed of the factual matrix. The claimant informed us that he looked up the definition of "unprofessional conduct" in the respondent's disciplinary procedure and understood it meant the following - [788/789]:

"Trafficking: i.e.

- Any unauthorised monetary or business transaction with, or acceptance of gifts or favours from prisoners, ex-prisoners or friends or relatives of prisoners or ex-prisoner;
- Bringing into, or carrying out of, a prison establishment, without proper authority, any items for or on behalf of a prisoner or ex-prisoner; or knowingly condoning such action;

Failure to obtain proper authority for actions or relationships in connection with prisoners or ex-prisoners or the friends or relatives of prisoners or ex-prisoners, which could otherwise be open to abuse, misinterpretation or exploitation on either side (Prison Service Rule 66)."

84. First, we find that the definition of unprofessional conduct in the disciplinary policy is not exhaustive: it falls under a heading of "Examples of misconduct". At the beginning of the text under that heading, it reads:

"The main areas of potential misconduct in NOMS are set out below, Any behaviour which is not specifically mentioned below but which is in clear breach of established standards of conduct expected of members of staff may also lead to disciplinary action..."

85. Second, ED sent to the claimant a letter on 26 April 2021, introducing herself, in which the broad factual allegation was set out as follows:

> "The alleged incident is "the circumstances surrounding an incident at HMP Coldingley on the 12th April 2021 where it is alleged that Officer Kirby acted in an unprofessional manner towards Officer Daly in the G Wing Office"."

86. Therefore, by the time of attending the investigation meeting on 20 May 2021, the claimant was aware that the allegation related to his alleged treatment of RD on 12 April 2021.

87. Third, by the time he went to the disciplinary hearing, the claimant had already been through an extensive investigation interview and had all the evidence available, including the investigation report.

88. In light of all that information, we do not accept he was unclear about the allegation he was facing by the time he entered the disciplinary meeting. We also accept he had sufficient time to prepare for that meeting. The claimant was sent the investigation report on 2 July 2021, and the disciplinary hearing was held around 6 weeks later, on 16 August 2021. We also remind ourselves that the claimant was represented by JW, his POA representative throughout the process. If the claimant or the POA representative held any concern about a lack of information, we find that it would have been raised by JW. No such concern was raised, and nothing was said on this topic at the investigation or disciplinary meetings.

89. The claimant also had concerns about the level of involvement of Jo Lupton (Head of Reducing Reoffending at HMP Ford, "JL") as the "Assist" at the investigation meeting. We accept that JL did ask questions of the claimant in that meeting. However there is no good evidence before us that she was part of any decision-making process. Therefore, we are satisfied that no unfairness resulted to the claimant from JL's involvement. We note again that JW was present and raised no objections to JL's level of involvement.

Disciplinary process

90. The claimant was informed that he was required to attend a disciplinary hearing by letter of 2 July 2021 – [292]. This letter stated that the allegation was one of unprofessional conduct which, if proven, would constitute gross misconduct. An invitation to the disciplinary hearing was sent to the claimant by letter of 27 July 2021, which set out that five people were expected to attend the hearing - [301]:

    90.1. ED as investigation officer;
    90.2. RD as witness;
    90.3. MB as witness;
    90.4. DC as witness;
    90.5. JW as the claimant's POA representative.

Criticisms of the disciplinary process

91. In the event, ED did not attend the hearing. This was because she was on annual leave at the time of the hearing. She did offer to attend by MS Teams,

but NB instructed that she need not attend – [307/308/308a/308b]. The fact that ED was not going to attend was not communicated to the claimant or his representative, JW, before the disciplinary hearing.

92. Although we accept that the claimant may have had questions for ED, and may have been disappointed by her lack of attendance, we are not satisfied that any unfairness flows from this absence. There is no good evidence that, had ED attended the disciplinary hearing, this would have had any effect on the outcome of the disciplinary process.

93. The disciplinary hearing was held on 17 August 2021, and was chaired by NB: the transcript of the hearing is at [320].

94. We find that there was no unfairness in the manner in which the disciplinary hearing was conducted. In fact, we accept that NB went above the necessary requirements of a fair disciplinary hearing by inviting the witnesses to be in attendance and to be subject to questioning again. Many establishments would rely simply on the investigation report and investigation meeting notes at the disciplinary hearing stage.

95. The claimant alleged that NB was not impartial and so should not have been the hearing officer, but this was not raised by JW or C at any stage before or during the disciplinary hearing.

96. In any event, we note that the disciplinary policy at [789] paragraph 7.12 states:

> "there is no requirement for the Hearing Authority to approach the case de novo, i.e. have no previous knowledge of the case..."

97. We accept that NB did contact RD before the investigation process – RD interview [223] "Neil phoned me shortly afterwards..." and "the support have [sic] been really good, from Pete and from Neil" - [223].

98. NB was asked about this support by the claimant in his cross-examination: his answer was as follows:

> "you [the claimant] would have had a support person. I adopted your support and contact in Lewes. My support to RD is referral and offer, I don't meet with her personally"

99. We find that NB's involvement with RD in terms of support was high level: it was not such close support so as to make the process unfair or demonstrate that NB was biased towards RD in any way.

100. The claimant criticises NB's decision to accept RD's account over his (the claimant's), leading to NB's decision that the claimant was guilty of unprofessional conduct. The claimant makes the point that this was a case of one person's word against another in terms of Exchange 2. The claimant argues that it was therefore not fair for NB to favour RD's account over the claimant's.

101. We accept the respondents' submission on this point that, ultimately, the weight to be given to evidence in a disciplinary process is a matter for the disciplinary officer. The Tribunal cannot substitute its own decision, and will not disturb a decision maker's finding unless that finding falls outside the band of

reasonable responses; which means no reasonable employer would reach the same conclusions as the respondent.

102. We find that NB's apportionment of weight to the evidence before him was not outside the band of reasonable responses. We find this for the following reasons:

    102.1. NB was not given any good explanation as to why RD would make up this allegation, there was no suggestion made to him that RD was motivated by any pre-existing animosity;

    102.2. There were differing accounts placed before him from the claimant and RD, but NB was entitled to reach the decision he reached. This is particularly in light of the claimant's admission that he was upset and frustrated, that he had locked the door to the portacabin, and that he had said the "shit" comment.

Sanction – decision to dismiss

103. The outcome of the disciplinary process was conveyed to the claimant in a letter dated 26 August 2021 - [317]. This letter stated that the claimant was given a written warning for the unprofessional conduct found to have occurred on 12 April 2021.

104. However, NB stated in his letter that, due to the claimant's pre-existing live FWW, and the cumulative effect of the two written warnings, NB had decided to dismiss the claimant.

105. The letter then goes on to state that "the proven charge constitutes gross misconduct".

106. In an email of 1 September 2021 to an unknown recipient, NB stated "I issued [the claimant] a final written warning, however due to the accrual of warnings he had received, meant summary dismissal" - [319]. Although this email has been redacted to hide the author's name, we find that this email must have been written by NB, as he was the dismissing officer.

107. The respondent's disciplinary policy is at [763] and sets out possible penalties at [781] for both misconduct and gross misconduct, stating that "penalties must be determined on a case-by-case basis".

108. The policy also includes examples of misconduct, although it makes clear that the examples given are a non-exhaustive list, stating – [788];

> "Any behaviour which is not specifically mentioned below but which is in clear breach of established standards of conduct expected of members of staff may also lead to disciplinary action...".

109. The examples of misconduct are broken down into subheadings, including "unprofessional conduct"; two specific examples are given of unprofessional conduct (set out above), neither of which applies to this case.

110. Examples are also given of matters that would amount to gross misconduct, including "serious unprofessional conduct" - [790].

111. On [791] of the Disciplinary Policy, it is stated that:

> "...a repeat offence of general misconduct during a review period may also amount to a charge of gross misconduct".

112. We find the respondent's language confusing across the different communications sent about the claimant's dismissal, given the reference to issuing a FWW versus the reference to just a written warning. There is also discrepancy between whether the conduct on 12 April 2021 was gross misconduct on its own, or whether it is the FWW plus the 12 April 2021 incident that, taken together, amount to gross misconduct.

113. We accept that the language of the respondent's policy regarding the "totting up" of warnings could be made clearer. However, taken with the FWW letter content at [1414], we find that it is objectively clear that dismissal is the likely result when any misconduct (whether gross misconduct or relatively minor misconduct) is found to have occurred within the review period or a pre-existing FWW. As such, we are satisfied that dismissal in these circumstances was appropriate, whether the 12 April incident alone was classified as gross misconduct or "just" misconduct.

Appeal process

114. The claimant notified the respondent of his intention to appeal his dismissal on 3 September 2021 – [360].

115. On 14 September 2021, the claimant was invited to an appeal hearing, to be chaired by SH – [372].

116. The appeal hearing took place on 8 October 2021; the transcript of that hearing is found at [397-413]. The claimant was again supported by JW, his POA representative. Of note is JW's admission at [400] that:

> "...on [NB's] justification of dismissal letter so [sic]. It states that you admit to locking the office door, securing keys, so [RD] inside while state to [RD] "I don't [sic] didn't want to lose my shit with you" when presenting your opinions over her performance on the day in question. ... So what we would like to add to that is we do it once. We agree it's not ideal. Him saying I don't want to lose my shit with you because I like you. It technically breaches professional standards to work"

117. On 10 October 2021, the claimant sent to SH his further written submissions following the appeal hearing – [382-386].

118. SH sent her appeal outcome letter on 15 October 2021, rejecting the appeal and upholding the decision to dismiss the claimant; the letter is at [417].

119. SH's evidence was that the appeal was a review rather than a rehearing. She also said this to the claimant in the appeal. We accept that this was the process followed by the respondent.

120. SH told us that she had read all relevant documentation before hearing the appeal. We are satisfied that this was the case, given that there is nothing to suggest to the contrary.

121. We are content that the appeal was procedurally fair. No particular points were made to us about any failures within the appeal process. The criticism is more that the respondent should not have accepted RD's account, and should have reached a different conclusion on the evidence before it. As we have already found, we repeat that NB was entitled to place weight of the evidence before him in the manner he did. Further, in reviewing NB's work, and the rest of the disciplinary material, it follows that we find SH's rejection of the appeal was equally fair and reasonable.

Reason for dismissal

122. The tribunal accepts that the reason for the claimant's dismissal was misconduct. The claimant has not put forward any ulterior motive for the respondent's decision to dismiss, but arguing primarily that the sanction was unfair.

123. We find that NB had a genuine belief that the claimant was guilty of the misconduct alleged to have occurred on 12 April 2021. Even on the claimant's own version of events, we conclude NB genuinely believed the claimant to be guilty of unprofessional conduct. We note the following remark that NB made in the disciplinary, recounting a summary of the claimant's own evidence: - [358]:

> "What I will say is what's very difficult to defend, very difficult to dismiss, is that you did go into that room slightly irate, you did lock the door, you did have the conversation about losing your shit with her, and it was after, after being told by other members of staff to let it go".

124. We also accept that, following the disciplinary policy and letter on [1414] regarding the FWW, NB genuinely believed that the claimant being guilty of misconduct on 12 April and having the FWW meant that dismissal was the appropriate sanction.

Leaving the service

125. A "Leaving the Service" SOPHR114 form was completed by ST on 26 November 2021 in relation to the claimant's dismissal – [419]. This form stated that the claimant's leaving date was 15 October 2021. We note also that there is confirmation that the claimant's final day was 15 October 2021 – [471].

126. We note that the Disciplinary Policy states that at [782]:

> "...in cases where the member of staff has been dismissed and an appeal has been lodged, the member of staff's pay will be stopped with effect from 6 weeks from the date of the original decision to dismiss. However, if the delay in hearing the appeal is attributable to NOMS then this period must be extended".

127. As set out above, when asked by the tribunal, Mr Serr clarified that the respondent's position was that the effective date of termination was in fact 15 October 2021, not 26 August 2021.

Outstanding annual and TOIL payments

128. The claimant confirmed that, in terms of his wages claim, he was claiming the following:

    128.1. Bedwatch subsistence payments;
    128.2. Annual leave; and
    128.3. Time off in lieu ("TOIL").

129. Form SOPHR114 at [419] recorded that the claimant was due 235 hours of annual leave and 35 hours of flexi leave or TOIL.

130. The claimant's payslip for December 2021 is at [1046]. We understand from the respondent that payment of the 235 hours and 35 hours was made within this December payment. The claimant is unaware as to how the figures at [1046] would break down, but has not denied that those sums of 235 hours and 35 hours were paid in that December pay.

131. On 11 May 2022, ST completed another form regarding the claimant, the Payment or Recovery of Annual Leave, Flexi/TOIL for Leavers SOPHR177 – [422]. This recorded the claimant as being owed 98.7 hours of annual leave and 18 hours of Flexi/TOIL. The claimant's evidence is that he did not receive any pay after December 2021, and certainly did not receive any sum in May 2022 that would reflect the hours recorded in the SOPHR117.

132. The respondent provided the Tribunal with no evidence that the claimant had been paid for these hours set out at [422]. The respondent's case was simply "the claimant has been paid all he is due". Before the hearing was adjourned as part heard in December 2023, Mr Serr told the tribunal that he would use his best endeavours to find out the respondent's position relating to the figures set out in the SOPHR177. At the reconvening of the hearing, Mr Serr was unable to give us any further information when specifically asked the outcome of his enquiries. He was only able to repeat to us his instructions that "the claimant had been paid all he is due".

133. On the evidence we have before us, we find that the respondent itself acknowledged that 98.7 hours of annual leave and 18 hours of TOIL had not been paid to the claimant and were due to him in May 2021. The respondent has provided no evidence to show that these hours were ever paid, and the claimant's evidence is that he did not receive any pay after December 2020.

134. We therefore find that the total of 116.7 hours' pay is owed to the claimant for annual leave and TOIL.

Outstanding bedwatch subs payments

135. We heard evidence from ST that bedwatch duty is when officers escort a prisoner to hospital either for the day or overnight. ST's evidence in her witness statement (ST/WS/6) was that bedwatch payments (and therefore

bedwatch subs payments) ceased to be paid in July 2020. This evidence was not challenged, and we accept that evidence.

136. Looking at the claimant's Schedule of Loss at [1268-1269], his claims for bedwatch subs prior to his dismissal all post-date July 2020. Therefore, those figures, we find, are not due to the claimant as, post-July 2020, bedwatch subs were not payable.

Grievance

137. On 28 October 2021, the claimant submitted a grievance form – [256]. He then submitted a second grievance form on 2 November 2021 – [426]. The grievance process is not relevant to the findings we need to make in order to address the List of Issues. As such, we make no findings about the grievance process.

Law – time limits for discrimination

138. The time limit in which a claimant is to present a claim for discrimination is set out in s123 EqA:

> "Subject to s140B, proceedings on a complaint within s120 may not be brought after the end of –
>
> a. The period of 3 months starting with the date of the act to which the complaint relates, or
> b. Such other period as the employment tribunal thinks just and equitable."

139. The issue as to whether a claim is brought within such time as is just and equitable has been established to be one of fact for the first instance tribunal.

140. It is well established that, despite the broad scope of the "just and equitable" test, it remains the case that time limits should be applied strictly, and to extend time remains an exception to the rule – Robertson v Bexley Community Centre [2003] EWCA Civ 576. However, the tribunal's discretion is wide: the Court of Appeal commented in recent years that "Parliament has chosen to give the employment tribunal the widest possible discretion" - Abertawe Bro Margannwg Universtiy Local Health Board v Morgan [2018] EWCA Civ 640.

141. The accepted approach to be taken to exercising the tribunal's discretion is to take into account all the factors in a particular case that the tribunal considers relevant, including the length of and reasons for delay – Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23. The strengths and weaknesses of the claim may also be relevant (but not definitive) to a decision on extending time – Lupetti v Wrens Old House Ltd 1984 ICR 348.

142. The tribunal must also consider the balance of prejudice to the parties if the extension of time is granted or refused – Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283.

Law – unfair dismissal

Reason for dismissal

143. The relevant legislation is found at s98(1), (2) and (4) ERA.

144. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent. In Gilham and Ors v Kent County Council (No2) 1985 ICR 233, the Court of Appeal held as follows:

> "The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness."

Substantive fairness

145. Regarding conduct cases, the case of British Home Stores Ltd V Burchell [1978] IRLR 379 encompasses the relevant test for fairness:

    145.1. Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged by the respondent?
    145.2. If so, were there reasonable grounds for the respondent in reaching that genuine belief? and,
    145.3. Was this following an investigation that was reasonable in all the circumstances?

146. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

Procedural fairness

147. Following the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) ERA. It is not relevant at this (the liability) stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy (the issue in Polkey is set out below).

148. If there is a failure to adopt a fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this may render a dismissal procedurally unfair.

149. Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.

150. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – Taylor v OCS Group Ltd [2006] ICR 1602. It is, ultimately, a view to be taken by the tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss. It may therefore be that in a serious case of misconduct, it may be fair to dismiss, even if there are slight procedural imperfections. On the other hand, where the conduct charge is less serious, it may be that a procedural issue is sufficient to tip the balance to make the dismissal unfair.

Law – direct sex discrimination

151. Employees are protected from discrimination by s39 EqA:

> "(2) An employer (A) must not discriminate against an employee of A's (B) -
> …
> (d) by subjecting B to any other detriment."

152. Direct discrimination is set out in s13 EqA:

> "(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

153. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate these two issues so neatly. The tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

154. In terms of the required link between the claimant's sex and the less favourable treatment he alleges, the two must be "inextricably linked" - Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

155. The test is not the "but for" test; in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – James v Eastleigh Borough Council [1990] IRLR 288.

156. The correct approach is to determine whether the protected characteristic, here sex, had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

157. If there is more than one reason for the treatment complained of, the

question is whether the protected characteristic (in this case, sex) was an effective cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Burden of proof under the Equality Act 2010

158. The burden of proof for discrimination claims is set out in s136 EqA:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

159. In Laing v Manchester City Council and anor [2006] ICR 1519, Mr Justice Elias held that:

> "the onus lies on the employee to show potentially less favourably treatment from which an inference of discrimination could properly be drawn".

160. This requires the tribunal to consider all the material facts without considering the respondent's explanation at this stage. However, this does not mean that evidence from the respondent undermining the claimant's case can be ignored at stage one – Efobi v Royal Mail Group Ltd 2021 ICR 1263. It is not enough for the claimant to show that there has been a difference in treatment between him and a comparator, there must be "something more". In Madarassy v Nomura International plc 2007 ICR 867, Lord Justice Mummery held:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

161. In terms of comparators, the definition is at s23 EqA:

> "(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case".

162. In Virgin Active Ltd v Hughes 2023 EAT 130, it was highlighted by the Employment Appeal Tribunal that the consideration of whether there are material differences in the circumstances of an actual comparator compared to those of the claimant needs to take place before applying the shift in the burden of proof. Regarding a hypothetical comparator, the claimant must show that the comparator would have been treated more favourably. This requires the tribunal to be able to draw inferences of likely treatment of a hypothetical comparator from the evidence before it.

163. It is only if the initial burden of proof is reached that the burden shifts to the respondent to prove to the tribunal that the conduct in question was in no sense whatsoever based on the protected characteristic – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931.

Law – breach of contract

164. Breach of contract claims are provided for within the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** ("the 1994 Order"). Article 3 provides as follows:

> "Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –
>
> (a) The claim is one to which section 31(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
> (b) The claim is not one to which article 5 applies; and
> (c) The claim arises or is outstanding on the termination of the employee's employment."

165. Any breach of contract by an employer will enable an employee to claim a cause of action in damages.

Law – wrongful dismissal

166. This claim requires the tribunal to perform a different exercise when compared to the test under s98 ERA. Here, the question is, as a matter of fact, was there a breach of contract in that the employer failed to pay the employee their contractual notice pay?

167. This requires a tribunal to consider first whether the employee acted in a way so as to fundamentally breach their contract to enable the employer to summarily terminate the employment contract. In other words, "did the employee so breach the contract, meaning that the employer could treat itself as released from its contractual obligations?".

168. Unlike under a claim for unfair dismissal, regarding a wrongful dismissal claim, it is for the tribunal to make findings of fact as to the nature and extent of the employee's conduct. The reasonableness of actions by the employer is irrelevant.

169. Therefore, a wrongful dismissal is not necessarily unfair, and an unfair dismissal is not necessarily wrongful – Enable Care and Home Support Ltd v Pearson EAT 0366/09.

170. Where there are more than one acts of misconduct, the question is whether, at the time the employer terminates the contract, the employee should be considered as being in fundamental breach of his contract.

CONCLUSIONS

Unfair dismissal

Reason for dismissal and genuine belief

171. We have already found that the reason for dismissal was misconduct and that this was based on a genuine belief – see paragraphs 122-124 above.

Reasonable grounds following a reasonable investigation

172. We refer back to our findings relating to the investigation, set out at paragraphs 69-89 above. In light of those findings, we conclude that the investigation was within the band of reasonable responses available to a reasonable employer.

173. The results of that investigation, coupled with the evidence gleaned and concessions by the claimant during the disciplinary hearing are sufficient for us to conclude that there were reasonable grounds upon which to base NB's genuine belief.

Sanction

174. Turning to the sanction of dismissal, we have found at paragraph 113 above that, in light of the FWW and the disciplinary policy regarding repeat misconduct during a review period, it was appropriate to dismiss the claimant. Considering the legal test, we conclude that it was within the band of reasonable responses open to a reasonable employer to dismiss the claimant.

175. The claimant argued that one penalty open to the respondent to impose on him would have been demotion, particularly given RD had left by the time of the outcome of the disciplinary process. However, the relevant question for us is not whether another sanction would have been suitable, but whether dismissal was appropriate and within the band of reasonable responses: we have found that it was.

176. Some may consider that to dismiss was a harsh decision, but that is not the question for us. The question can be phrased as "would no reasonable employer with the same knowledge, in the same circumstances, as the respondent dismiss the claimant?". We are not satisfied that no reasonable employer would dismiss the claimant in the same circumstances.

177. We therefore conclude that the decision to dismiss the claimant was substantively fair.

Procedural fairness

178. In terms of procedural fairness, we have found that none of the claimant's criticisms of the process render the process unfair. Specifically:

    178.1. In terms of the matters of alleged unfairness that overlap with the discrimination claims, we refer back to our findings at paragraphs 69-73;

    178.2. Regarding further allegations of unfairness relating to the investigation process, we refer to our findings at paragraphs 74-89;

    178.3. In relation to specific concerns about the disciplinary process, we refer back to our findings at paragraphs 91 to 102 above.

179. In terms of the appeal process, we refer back to our findings at paragraphs 114 – 121. We have found that the appeal process was fair and reasonable. We conclude that it fell within the band of reasonable responses available to a reasonable employer.

180. We conclude that there was nothing within the disciplinary process so as to render the disciplinary process or dismissal unfair.

181. Therefore, the claim of unfair dismissal is rejected.

Wrongful dismissal

182. We must consider the claimant's conduct during the course of his employment and whether, taken as a whole, that conduct is in fundamental breach of his contract.

183. As above, we must not look behind the FWW. We have found that, during Exchange 2, the claimant:

    183.1. Took the conscious decision to hold a further conversation with RD (Exchange 2) when he was worked up and frustrated;
    183.2. Chose to have that conversation in an enclosed space, without other colleagues around;
    183.3. Locked RD in the portacabin and stood in a position that made RD feel as if she was unable to leave;
    183.4. Said "I don't want to lose my shit with you";
    183.5. Placed his hands on his head;
    183.6. Came across as someone on the edge of losing control;
    183.7. Acted in such a way as to cause RD to reasonably and genuinely feel threatened and unsafe.

184. Taken as a whole, and bearing in mind the effect of "totting up" the FWW and misconduct arising on 12 April 2021, we conclude that the claimant was in fundamental breach of his contract. Taken together with the FWW, this conduct was gross misconduct which equates to a fundamental breach of contract.

185. As such, we conclude that the respondent was entitled to treat itself as released from the obligation of paying notice pay.

186. The wrongful dismissal claim is therefore dismissed.

Sex discrimination

187. We conclude that the alleged comparators of RD and Officer Harvey are not appropriate comparators under s23 EqA:

    187.1. There were material differences between RD and the claimant; namely a difference in status between the claimant as the accused and RD as the alleged victim during the course of the disciplinary process.

    187.2. In terms of Officer Harvey, we have found that there was a difference between the claimant's disciplinary and Officer Harvey's

situation, in that the individuals' circumstances were different, and the factual matrix of the two scenarios were different – see paragraphs 71-73 above. We have not been told that Officer Harvey had a live FWW on her record at the time she allegedly shouted at colleagues.

188. Turning to consider a hypothetical comparator. This, we find, would be a female officer of the same rank as the claimant, with a live FWW on her disciplinary record. This hypothetical woman would be guilty of:

188.1. Taking the conscious decision to hold a further conversation with RD when the comparator was worked up and frustrated;
188.2. Choosing to have that conversation in an enclosed space, without other colleagues around;
188.3. Locking RD in the portacabin and standing in a position that made RD feel as if she was unable to leave;
188.4. Saying "I don't want to lose my shit with you";
188.5. Placing her hands on her head;
188.6. Coming across as someone on the edge of losing control;
188.7. Acting in such a way so as to cause RD to reasonably and genuinely feel threatened and unsafe.

189. We have no good evidence to suggest to us that such a hypothetical female officer would be treated differently to the claimant. There is no good evidence from which we could safely draw an inference of discrimination from the evidence before us.

190. We therefore conclude that we do not have evidence from which we could decide, in the absence of any other explanation, that the respondent discriminated against the claimant in the manner alleged at **Issue 5.3(a) to (g)**.

191. As such, we conclude that the burden of proof does not shift to the respondent to provide us with a non-discriminatory reason for its treatment of the claimant.

192. In the event that we are wrong, and there is sufficient material facts to shift the burden of proof, we will consider whether the respondent has demonstrated that its conduct was in no sense whatsoever because of the claimant's sex.

193. In terms **of Issues 5.3(a)-(g)**, we have found that the respondent's reasoning for any difference in treatment was non-discriminatory (see paragraph 69-73 above), specifically:

193.1. **Issue 5.3(a)** – ED did not offer the claimant a chance to provide a written statement regarding the events of 12 April 2021, as this is not the usual process for a disciplinary hearing. ED followed the standard process of obtaining a statement from the alleged victim, and then inviting the accused to an investigation meeting. The difference in treatment between RD and the claimant was due to the difference in status: RD was the alleged victim and the claimant was the alleged perpetrator.

193.2. **Issue 5.3(b)** – The reason for ED's sympathetic style of questioning towards RD was because RD was the alleged victim in this specific scenario. The reason for any difference in treatment was again the disparity in status: RD was the alleged victim, the claimant was the accused.

193.3. **Issue 5.3(c)** – There was no difference in treatment between RD and the claimant as there was emphasis on both the claimant's and RD's mood and emotions.

193.4. **Issue 5.3(d)** – We are not satisfied that there was a difference in the level of support offered to the claimant compared to RD: the claimant was offered support. To the extent there was any difference, we are satisfied that this again was due to the difference in status between the two: RD was the alleged victim, the claimant was the alleged perpetrator.

193.5. **Issues 5.3(e)-(g)** – Any difference in treatment was due to the difference in the claimant's and Officer Harvey's individual circumstances, coupled with the difference in the factual scenarios leading to the disciplinary action taken against both individuals.

194. We therefore conclude that, in relation to Issues 5.3(a)-(g), the claimant's sex was not an effective cause of any difference in treatment.

195. Given that we do not uphold this claim on its merits, we need not consider the jurisdictional issue of whether the discrimination claims are in time.

196. We dismiss the sex discrimination claims.

Breach of contract (wages)

197. We have already found that 116.7 hours of pay is owed to the claimant for outstanding annual leave and TOIL at the date of termination of his contract of employment. We are not satisfied that any monies were due to the claimant for bedwatch subs.

198. We therefore uphold the breach of contract claim in respect of outstanding pay for 116.7 hours of work.

Employment Judge Shastri-Hurst
Original Date 18 April 2024
Corrected Date 20 May 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 1 May 2024

FOR EMPLOYMENT TRIBUNALS