

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4103912/2023 & 4104188/2023

5 **Held in person in Glasgow on 18, 19, 20, 21, 22 & 25 March 2024**

Employment Judge: C McManus
Members : F Paton
J McCaig

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Mr M Andrew

First Claimant
Represented by:-
Mr C Harrington
(Solicitor)

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Mr F Kerr

Second Claimant
Represented by:-
Mr C Harrington
(Solicitor)

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Scottish Ministers, acting through their
Agency, The Scottish Prison Service

Respondent
Represented by:-
Ms A Armstrong
(Solicitor)

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Tribunal is that:-

E.T.Z4 (WR)

- The first claimant's dismissal by the respondent was a fair dismissal and his claim under section 98 of the Employment Rights Act 1996 is dismissed.
- The second claimant's dismissal by the respondent was a fair dismissal and his claim under section 98 of the Employment Rights Act 1996 is dismissed.

REASONS

Background

1. Both claimants were dismissed for alleged conduct arising from the same incident, which occurred during the course of the claimants' employment with the respondent. It was not disputed that both claimants were dismissed for alleged gross misconduct. The reason for their dismissals was not disputed. The claimants alleged that their dismissals were unfair because of the extent of the investigation and because the decisions to dismiss were outwith the band of reasonable responses for the employer to take.
2. The reason for each of the claimant's dismissal was their alleged unreasonable use of force on a prisoner during an incident within a prison cell. It was agreed that this prisoner would be referred to in this judgment as 'Prisoner X'.
3. It was agreed that the findings in fact in this judgment would refer to the reason for the respondent's decisions with reference to documents in the Bundle, without unnecessary detail or specific mention of extracts from the respondent's Use of Force Manual.

Proceedings

4. Both parties were professionally and ably represented at the Hearing. No issue arose from both claimants having the same representative. Parties

relied on documents contained in a Joint Bundle, with items 1 to 146 numbered consecutively with pages [1] to [775]. The numbers in square brackets in this Judgment refer to document page numbers in this Joint Bundle. There was a considerable amount of duplication in the Bundle as the Investigation report was produced additionally as part of the papers for the Disciplinary and Appeal Hearings. Reliance was also placed on CCTV footage around the incident ('videos 1 – 3'). These videos showed events outwith the prison cell where the incident took place.

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- 10 5. Evidence was heard on oath or affirmation from Scott Watson (Governor in Charge HMP Inverness, who took the decisions to dismiss) and Melanie Bowie (HR Business Partner and Chair of the Internal Dismissal Appeal Board ('IDAB'), then from both claimants.
- 15 6. The reason for the claimants' dismissals was their alleged unreasonable use of force on a prisoner. It was agreed that this prisoner would be referred to in this judgment as 'Prisoner X'.

Issues

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7. We required to determine whether each of the claimants' dismissals was a fair dismissal in terms of the Employment Rights Act 1998 ('ERA') section 98(4) and with regard to the extent of the investigation and the band of reasonable responses.
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8. If a dismissal were found to be unfair, we would require to determine the appropriate remedy.

Findings in Fact

- 30 9. The following material facts were admitted or found by the Tribunal to be proven:

10. The respondent is a public service- led delivery agency that is legally required to deliver custodial and rehabilitation services for those sent to courts in Scotland. It has key responsibilities to ensure delivery of secure custody; safe and ordered prisons, decent standards of care and opportunities for prisoners to develop care so as to aid their transfer back to the community. The respondent has a Code of Conduct ('the Code') [95 – 127] setting out their disciplinary rules and procedures. Section 1 of the Code states:-*'SPS sets certain standards of conduct for its employees, which in some instances are significantly higher than those expected in other employment relationships. The standards that SPS employees are required to meet are detailed in various documents, staff notices and policies, which include, but are not limited to, the Professional Charter, Civil Service Code, 7 Principles of Public Life and Prison Rules as maybe amended or replaced.'*
11. An exemplary standard is expected from the respondent's employees because of the nature of the respondent's role in ensuring a safe custodial environment, where security is paramount. Examples of gross misconduct are set out in the Code at section 12, with reference to section 8. In some circumstances within the prison environment, use of force is required on prisoners. The Use of Force Policy lays out how to use 'Use of Force' and gives context to the Use of Force Manual [128 – 135]. That sets out the extent of force which should be used in a physical intervention and the roles and responsibilities of each number in the core restraints team [132]. Prisoner Management Officers whose work responsibilities may include Use of Force are required to have appropriate Control and Restraint ('C & R') training [133]. All officers involved in the Use of Force have a responsibility to complete the relevant sections of the Use of Force report form as soon as possible, as outlined in the policy [133]. In an unplanned physical intervention, a Supervising Officer requires to attend as soon as possible *'to ensure that interventions are legal, safe and in compliance with current training standards.'*[133]. Any use of force should be followed by a health examination of the person restrained [134]. The Head of Operations has responsibility for ensuring use of force forms have been *'completed to the*

appropriate standard and submitted, and that relevant video recording is securely stored. [135]. Control of prisoners should be in accordance with the Prisons and Young Offenders Institutions (Scotland) Rules 2011 [136], [224].

- 5 12. Both claimants were employed by the respondent as Prisoner Management Officers. Fraser Kerr had eleven years' service. Martin Andrew had eight years' service. Both had clean disciplinary records prior to their dismissal.
- 10 13. On 18 August 2022 there was an incident with Prisoner X which required use of force to be applied by the claimants and two other prison officers. That incident began within the cell occupied by Prisoner X. CCTV video footage ('videos 1 – 3') show parts of that incident, when Prisoner X was being removed from one cell to another. Use of Force forms were completed in respect of the restraint of Prisoner X by the claimants and the two other prison officers involved in the restraint. Prisoner X was examined by a nurse following the incident on 18 August and on 19 August 2022. Prisoner X had no visible injuries on 18 August. On 19 August, Prisoner X had visible injuries and was taken to hospital for further medical treatment. Prisoner X made a complaint that he had been assaulted by staff the previous day. On 22 August 2022 Prisoner X was interviewed in respect of that incident. The record of that interview is at [269 – 270]. The photographs at [244 – 248, 250 – 254] ('the photographs') were taken on 22 August 2022 and show injuries sustained by Prisoner X. This includes showing a medical dressing on Prisoner X's body.
- 15 14. A Violent Incident Review ('VIR') was carried out by Peter Russell (then Acting Deputy Governor). Peter Russell considered that the completed initial reports (Use of Force forms) did not indicate events which would have caused injury to the extent shown in the photographs. A Violence Investigation Report was completed [265 – 267]. As part of that investigation, Peter Russell interviewed the duty nurse who had had examined Prisoner X following the incident, and the following day. The notes in relation to that interview are at [272 – 273]. Peter Russell also
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interviewed the nurse who had attended the meeting with the Prisoner X on 22 August. The record of that interview is at [271]. Martin Andrew was interviewed as part of that VIR. In that process, he was able to give more information about the incident. His position is recorded in the VIR form at [278 - 279]. Andrew Kerr was on leave at the time when the VIR was completed. He did not get the opportunity to give further information about the incident in that VIR process. The other two officers involved in the incident were interviewed as part of the VIR process and as part of that process had the opportunity to give further details of the incident.

10 15. Peter Russell considered that the Use of Force forms in respect of that incident were incomplete, with regard to what was shown in the Immediate Incident Report, videos 1 – 3, the Use of Force form and the photographs. He instructed that the supervising officer provide further detail in relation to the use of force [147].

15 16. Due to concern about the level of injuries shown on the photographs, compared to what was indicated in the initial Use of Force forms, Alan Strachan was appointed Investigating Manager in respect of the incident. A Gross Misconduct Investigation meeting was held with Martin Andrew on 8 November 2022. Martin Andrew was accompanied to that meeting by a trade union representative. The note of that interview is at [301 – 310]. He was given the opportunity to give further information about the incident. A Gross Misconduct Investigation meeting was held with Fraser Kerr on 15 November 2022. Fraser Kerr was accompanied to that meeting by a colleague. The note of that interview is at [311 – 318]. He was given the opportunity to give further information about the incident.

25 17. The notes of Alan Strachan's investigation interviews show that he sought to establish the facts surrounding an allegation of gross misconduct on the 18th of August 2022 [337]. The investigation report [137 – 373 & 374 – 434] lists the evidence considered [138]. The report shows that in his investigations, Alan Strachan:-

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- Considered the Civil Service Code and SPS Standards of Conduct and Behaviour.
- Considered the content of the Use of Force reporting forms completed in respect of the incident with Prisoner X on 18 August 2022 [144 – 146]
- Considered evidence on Breaches of Discipline and Adjudication documents relating to Prisoner X on 17 August, when items had been found in Prisoner X's cell. .
- Obtained and considered intelligence reports on Prisoner X
- Viewed videos 1 – 3
- Interviewed the four officers involved in the restraint of Prisoner X in that incident (which included both claimants).
- Considered the applicable Rules and the Use of Force Manual
- Interviewed Prisoner X [329 – 336]
- Interviewed Craig McKeich (Control and Restraint Training Manager) [337 – 345]/
- Interviewed Peter Russell [346 – 353]
- Interviewed the Charge Nurse who had attended Prisoner X at HMP Low Moss on 18 August 2022 [354 – 362]
- Emailed the nurse who had been present when the photographs were taken to seek to interview them [363].
- Reviewed the transcript of intercom calls from Prisoner X to prison officers on 17 and 18 August 2022 [365 – 371].

- Considered the documents completed in the VIR process.

18. The notes of Alan Strachan's interview of Craig McKeich (337 – 345) show that Craig McKeich was given the opportunity to review videos 1 – 3 and that Craig McKeich had “*..no concerns from the CCTV that you could visually see..*” Videos 1 – 3 did not show events inside the cell, where the misconduct was alleged to have occurred. The notes show that Alan Strachan asked Craig McKeich “*Do you think that that type of injury could be consistent with an initial struggle?*” and that Crag McKeich's reply was “*Yeah*”.
19. The notes of Alan Strachan's interview of Peter Russell (346 – 353) show that it was Peter Russell's position that the extent of the injuries shown in the photographs ‘*..wouldn't be explained even in a really violent struggle.*’ (351). Those notes show that it was Peter Russell's position that if there had been a particularly violent struggle, than that would be expected to be drawn to the attention of the duty nurse, in respect of possible injury having been sustained by the prisoner, and that that hadn't been done in respect of this incident with Prisoner X. It was Peter Russel's position that training on that reporting procedure was given to prison officers in Control and Restraint ('C & R') training.
20. Alan Strachan prepared his investigation report [137 – 198]. This was sent to each claimant. Each was invited to a separate disciplinary hearing [459 – 460 INSERT]. All four of the prison officers involved in the incident were invited to a disciplinary hearing.
21. Scott Watson (Governor) was appointed to hear the disciplinary hearing in respect of each claimant. Prior to these disciplinary hearings, Scott Watson reviewed the content of Alan Strachan's report. Scott Watson has over 27 years of operational experience within the prison service. In his experience, including experience of reviewing the conduct of prison officers through the Violent Incident Review process, Scott Watson had never seen a prisoner

sustain injury to the level shown in the photographs as a result of a restraint by prison officers.

22. Each claimant was accompanied by a trade union representative at their disciplinary hearing and had the opportunity to put forward any mitigating factors they felt were relevant. It was not disputed by or on behalf of either claimant, either at their Disciplinary Hearing before Scott Watson or at the IDAB that:-

- Prisoner X had sustained the injuries shown in photographs at (244 – 248, 250 – 254) and as described;
- Those injuries had been sustained as a result of the incident as alleged;
- The extent of the injuries was as set out in the investigation report
- The initial Use of Force reporting forms did not indicate that the Prisoner X would be likely to have sustained injury to the extent shown in the photographs.
- No detailed explanation had been given for the cause of the injuries

23. During the internal proceedings it was not the position of either claimant that:-

- Prisoner X was particularly liable to bruise (although it was stated by Martin Andrew that some people bruise more easily than others [472])
- Prisoner X was or may have been under the influence of a substance
- Any particular further investigation should be carried out
- They had not received appropriate training on control and restraint, on reporting procedures in circumstances where there had been a violent restraint when a prisoner may be liable to have been injured or on completion of completion of Use of Force reporting forms.

- That there was any aspect of the circumstances which was shown in the investigation and had not been properly taken into account (e.g. their demeanour as shown in the videos).

5 24. Scott Watson took the decision to dismiss Martin Andrew. Martin Andrew was informed of that decision by letter to him from Scott Watson of 8 March 2023 [475 - 476]. His reasons for taking that decision are set out in his 'Rationale' dated 8 March 2023 (at [477 - 480]). That document was sent to Martin Andrew with the dismissal letter and a transcript of the disciplinary hearing [462 – 473]. Those documents show that in making his decision to dismiss Martin Andrew, Scott Watson took into account:-

- Sections 12 and 17 of the SPS Code of Conduct Policy and SPS Professional Charter [477 & 480]
- SPS Use of Force Manual and Use of Force Policy [480]
- 15 • Martin Andrew's description of events causing Prisoner X's injuries [477].
- The time period within which the evidence showed that the injuries were likely to have occurred [477 & 478]
- The extent of injuries [478]
- 20 • The representative's position that the injuries sustained were proportionate to the high level of violence and resistance offered by the prisoner [478].
- What he considered to be anomalies in no additional staff being called to assist [478]
- 25 • Craig McKeich's position [478]
- The representative's position that lack of detail provided in the Use of Force form was because of lack of injuries recorded by the nurse and lack of support for report writing [478]
- Andrew Kerr's position at the VIR compared to subsequent interviews [478]
- 30 • The representative's position on the quality of the investigation report [479].
- What had been discussed at the Disciplinary Hearing [479].

- That initiation of Use Of Force had been appropriate [479]

25. Those documents show that Scott Watson took the decision to dismiss Martin Andrew on the balance of probabilities, taking into account the evidence in the investigation report and presented at the disciplinary hearing, with his rationale being set out at [479] – [480]. On that basis Scott Watson believed that it was more probable than less probable that Martin Andrew had used a disproportionate level of use of force on 18 August 2022.

26. Scott Watson took the decision to dismiss Fraser Kerr. Fraser Kerr was informed of that decision by letter to him from Scott Watson of 8 March 2023 [452 - 453]. His reasons for taking that decision are set out in his 'Rationale' dated 8 March 2023 (at [454 - 458]). That document was sent to Fraser Kerr with the dismissal letter and a transcript of his disciplinary hearing [442 - 450] Those documents show that in making his decision to dismiss Fraser Kerr, Scott Watson took into account:-

- Sections 12 and 17 of the SPS Code of Conduct Policy and SPS Professional Charter [454 & 458]
- SPS Use of Force Manual and Use of Force Policy [457]
- What had been discussed at the Disciplinary Hearing [454 - 455].
- Fraser Kerr's description of events causing Prisoner X's injuries [454 , 455, 457].
- That Fraser Kerr had not taken part in the VIR due to being on annual leave [455 & 456]
- Fraser Kerr's position in relation to having sustained bruising himself, but not having documented that [455]
- Fraser Kerr's responsibilities as 'Number 1' [455]
- The representative's position that the injuries sustained were proportionate to the high level of violence and resistance offered by the prisoner and that '*anyone with operational experience*' would agree the injuries are consistent with a violent restraint' [455].

- The time period within which the evidence showed that the injuries were likely to have occurred [455 & 457]
- That he considered there to be anomalies in relation to the extent of the injuries against no assistance being called for and in respect of the length of the incident [455]
- Craig McKeich's position [455]
- The extent of injuries [455, 456, 457]
- That initiation of Use Of Force had been appropriate [457]
- What had been recorded initially in the Use of Force Reporting form [456, 457]
- Fraser Kerr's lack of explanation of the extent of the injuries sustained by Prisoner X [457]
- That Fraser Kerr's explanation could account for some of the injuries sustained by Prisoner X [457]
- What Scott Watson considered to be anomalies in no additional staff being called to assist [455]
- The representative's position that lack of detail provided in the Use of Force form was because of lack of injuries recorded by the nurse and lack of support for report writing [456]
- The representative's position on the quality of the investigation report [456].
- That there were '*gaps in the report that the Investigating Officer should have followed up during the investigation*' and that '*these areas were covered at the hearing*'. [456]

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27. Those documents show that Scott Watson took the decision to dismiss Fraser Kerr on the balance of probabilities, taking into account the evidence in the investigation report and presented at the disciplinary hearing, with his rationale being set out at [454] – [458]. On that basis Scott Watson believed that it was more probable than less probable that Fraser Kerr had used a disproportionate level of use of force on 18 August 2022 and had failed in some of his responsibilities as Number 1.

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28. Prior to making each decision to dismiss, Scott Watson considered section 17 of the respondent's Code of Conduct Policy in relation to the options available to him. He considered that in all the circumstances the decision to dismiss was the appropriate sanction. The claimants' trade union representative intimated on 9 March 2023 that an appeal would be pursued in respect of both claimants [481]. Scott Watson took no part in the appeal process. The claimants were both legally represented at the appeal stage, by the same representative.
29. Melanie Bowie is employed by the respondent as HR Business Partner. Melanie Bowie was the Head of Human Resource nominee and appointed Chair of the Internal Dismissal Appeal Board ('IDAB') panel which heard each claimant's appeal. The other members of that panel were senior operational managers. The purpose of the IDAB panel is to review the reasonableness of the decision taken at the disciplinary hearing stage, and to consider the points of appeal made. The options open to the IDAB are, to confirm the dismissal (i.e. uphold the decision to dismiss), to overturn the dismissal, or to substitute a lesser penalty which is consistent with the Code of Conduct and the levels of warning set out therein [497, 611].
30. Fraser Kerr's Grounds of Appeal were set out by his legal representative [487 – 494]. His IDAB hearing took place on 24 July 2023 [495]. Written submissions were provided on his behalf at the IDAB [499 – 507]. The transcript of his IDAB is at [508 – 564]. Fraser Kerr was notified of the IDAB outcome by letter dated 2 August 2023 [565 – 567]. For the reasons set out in that letter, the appeal was unsuccessful and the decision to dismiss was upheld.
31. Martin Andrew's Grounds of Appeal were set out by his legal representative [601 – 608]. His IDAB hearing also took place on 24 July 2023 [609]. Written submissions were provided on his behalf at the IDAB [613 – 621]. The transcript of his IDAB is at [622 – 661]. Martin Andrew was notified of the IDAB outcome by letter dated 2 August 2023 [662 – 664]. For the reasons set out in that letter, the appeal was unsuccessful and the decision

to dismiss was upheld. A response was separately given by Melanie Bowie to Martin Andrew in respect of each particular point of appeal [665 – 689].

32. In upholding each decision to dismiss, account was taken of each claimant's length of service and of the standard of conduct within the respondent
5 *'being significantly higher than in other employment relationships'* [567, 664].

Relevant Law

33. The law relating to unfair dismissal is set out in the Employment Rights Act
10 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 – 122 with regard to compensation. In these cases it is not in dispute that each dismissal was for a potentially fair reason in terms of section 98(2)(b) (conduct). It was not in dispute that the respondent had shown the reason for each dismissal (section 98(1)).
15 Section 98(4) states:-

[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

20 *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and,*

(b) shall be determined in accordance with equity and the substantial merits of the case.

25 This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

34. Where the dismissal is by reason of the employee's conduct, consideration
30 requires to be made of the three stage test set out in *British Home Stores - v- Burchell* 1980 ICR 303, i.e. that in order for an employer to rely on misconduct as the reason for the dismissal there are three questions which

the Tribunal must answer in the affirmative, namely, as at the time of the dismissal:-

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- i. Did the respondent believe that the claimant was guilty of the misconduct alleged?
 - ii. If so, were there reasonable grounds for that belief?
 - 10 iii. At the time it formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

15 35. What has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal. Tribunals must not substitute their own view for the view of the employer (Sainsbury's Supermarkets Ltd -v- Hitt [2003] IRLR 23 and London Ambulance Service NHS Trust -v- Small [2009] IRLR 563) and must not consider an employer to have acted unreasonably merely because the Tribunal would not have acted in the same way. Following Iceland Frozen Foods Ltd -v- Jones 1983 ICR 17 the Tribunal should consider the 'band of reasonable responses' to a situation and consider whether the respondent's decision to dismiss, including any procedure prior to the dismissal, falls within the band of reasonable responses for an employer to make. The importance of the band of reasonable responses was emphasised in Post Office -v- Foley [2000] IRLR 827.

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30 36. Where the Tribunal makes a finding of unfair dismissal it can order reinstatement or in the alternative award compensation. In this case both claimants seek compensation. This is made up of a basic award and a compensatory award.

37. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with

reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation.

5 38. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)).

10 39. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. In terms of Section 123(6) where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such
15 proportion as it considers just and equitable having regard to that finding.

40. A compensatory award may be reduced to reflect the possibility that there would have been a fair dismissal in any event (*Polkey v AE Dayton Services Ltd [1987] IRLR 503*).

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Submissions

41. Each of the parties' representatives spoke to their own substantive written submissions. There was substantial agreement on the substantive law and
25 on the material facts. Parties' representatives' submissions are addressed in the Decision section below.

42. The respondent's representative relied upon:-
Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94
30 (particularly at paragraph 23)
Polkey v AE Dayton Services Ltd [1987] IRLR 503

43. The claimant's representative relied upon:-
British Home Stores -v- Burchell 1980 ICR 303,

Clark v Civil Aviation Authority [1991] IRLR 412

Iceland Frozen Foods Ltd –v- Jones 1983 ICR 17

44. The claimants' representative relied on the extent of the investigation not
5 being reasonable in the circumstances and on the process followed by the
respondent prior to dismissal. Their submission was that the investigation
process was so fundamentally flawed that it could not be said to satisfy the
requirement of a reasonable investigation.

10 **Comments on Evidence**

45. Evidence was heard on oath or affirmation from all witnesses.

46. All witnesses were straightforward, credible and consistent in their
15 evidence. It was noted that Melanie Bowie is not operational and so do not
have first-hand experience of injuries which could be sustained with
appropriate use of force.

47. Much of what was relied upon by the claimants in respect of the
20 unreasonable extent of the investigation had not been put to the respondent
prior to their dismissals, or at appeal. Matters not put for consideration
during the respondent's internal proceedings could not be material to the
reasonableness of the decision to dismiss. As stated during these
25 proceedings, we must not substitute the employer's decision but rather
consider the reasonableness of that decision in the particular
circumstances.

48. It is well established that 'contemporary documents are always of the
utmost importance' (*Onassis and Calogeropoulos v Vergottis* [1968] 2
30 Lloyd's Rep 403, at para 431). Applying the above guidance, significant
weight was attached to the position in relevant contemporaneous
documents.

Decision

49. We accepted the respondent's representative's reliance on it not being put at the stage of either claimant's disciplinary hearing that the prisoner's injuries were not genuinely sustained. We were careful to consider what had been the position before the respondent, and not to re-hear the disciplinary hearings. It was not for us to consider whether the claimants were each in fact guilty of misconduct. We accepted the respondent's representative's submissions that we must decide whether the respondent's decisions to dismiss each claimant fell within the reasonable band of responses that a reasonable employer, in those circumstances and in that business, might have adopted.

50. We did not accept the claimants' representative's submission that in the particular circumstances the respondent failed to conduct an adequate investigation and so caused unfairness, in circumstances where :-

- there was evidence of injury to Prisoner X, as shown in the photographs referred to in the Findings in Fact,
- the initial Use of Force reports were considered to not indicate events which would have caused injury to that extent
- during the internal proceedings neither claimant challenged the evidence on the extent of the injuries sustained by Prisoner X
- during the internal proceedings it was considered that neither of the claimants gave an explanation for the extent of those injuries
- during the internal proceedings neither claimant suggested that Prison X was particularly liable to bruise.
- During the internal proceedings neither claimant suggested that any further investigation ought to be carried out
- During the internal proceedings neither claimant suggested that there was a possibility of Prisoner X having been under the influence of a substance (which may have affected his strength)
- During the internal proceedings, neither claimant suggested that there was an aspect (such as their demeanour as shown in the videos, or possible motive) which had not been properly taken into account.

- Each claimant was represented by a trade union representative during the internal disciplinary proceedings.

51. In circumstances where during the internal proceedings the claimants did not dispute the extent of Prisoner X's injuries, it was reasonable for the disciplinary proceedings to proceed without obtaining a medical report setting out details of the full extent of the injuries or viewing Prisoner X's medical records. In these circumstances, it was reasonable for the respondent to take the photographs to show the extent of the injuries.

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52. We accepted the claimants' representative's submission that the employer only has the burden of proof in relation to the first element of *Burchell*, with the second and third elements falling within the scope of section 98(4). We accepted his submission that the employer must have some form of objective evidence on which to base their reasonable belief. In circumstances where it was not disputed during the course of the internal proceedings, the photographs were such objective evidence, taken together with the other evidence relied upon, particularly the extent of completion of the Use of Force forms. We did not accept the claimants' representative's position that this was not objective evidence. It was not in dispute that the prison officers had required to initiate Use of Force techniques on Prisoner X. The alleged misconduct was in relation to the extent of the force used i.e. the proportionality of Use of Force, with regard to and in terms of the applicable policies. The basis for the belief in the alleged misconduct was the level of injuries shown in the photographs taken into consideration with the explanation provided in the initial Use of Force reporting forms. It was believed that the reporting of the incident was not consistent with the level of injuries shown in the photographs, and that the claimants had not provided sufficient explanation for injuries having been sustained to that extent.

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53. The approach suggested in *Clark v Civil Aviation Authority* had been followed. Although some valid considerations were sought to be suggested by the claimants' representative in his cross examination, these had not

been put during the course of the internal proceedings. We were careful not to substitute our view for the view of the respondent.

54. In the circumstances where the claimants had each been provided with the details in the investigation report, we did not accept that the claimants did not have sufficient detail of the allegations. There was no suggestion that the claimants did not both have sufficient information on which to answer the allegations. We did not accept that the allegations ought to have included the respondent's belief as to what had actually happened inside the prison cell. In the circumstances of this case, the respondent did not reach a determination on what exactly had occurred inside the cell.

55. We did not accept the claimants' representative's submission that the investigating officer came to conclusions in his report which were unsupported by evidence. In circumstances where the points now relied upon were not made either at the disciplinary hearing or at the appeal, we did not accept that what was relied on by the claimants' representative in his submissions mean that the investigation was fatally flawed. In the circumstances, we accepted that the extent of the investigation was within the reasonable band.

56. We did not accept the claimants' representative's submissions in respect of there having been procedural unfairness. As suggested in Clark v Civil Aviation Authority, there was an investigatory meeting, the claimants had representation, they were informed of the allegations, they were informed of the evidence relied upon, they were allowed to ask questions and to present additional evidence, their representative stated their cases, their positions were considered, the decision was issued in writing, with the rationale for the decision and there was an appeal, at which the claimants were again represented.

57. We did not accept that Scott Watson had unreasonably rejected the evidence of Craig McKeich. To determine that Scott Watson had put undue weight on an element of the evidence before him would risk a substitution mindset. We had to consider the reasonableness of the extent of the

investigation and the reasonableness of the decision to dismiss, in both taking into account the particular circumstances. The nature of the respondent was very significant. On application of BHS v Burchell, it would be wrong for us to carry out our own assessment. Both decisions to dismiss were made on the basis of a genuine belief, on reasonable grounds, following a reasonable investigation. On application of Iceland Frozen Foods, and taking into account the particular nature of the respondent's organisation, the decisions to dismiss were each within the band of reasonable responses. For these reasons, the claimants' claims of unfair dismissal are unsuccessful and are dismissed.

Employment Judge: C McManus
Date of Judgment: 16 May 2024
Entered in register: 16 May 2024
and copied to parties

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