



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4105164/2024**

**Held in Aberdeen on 24, 25 & 26 September 2024**

**Employment Judge Campbell**

**Ms K Johnston**

**Claimant  
In Person**

**The Scottish Ministers**

**Respondent  
Represented by,  
Ms E Campbell,  
Solicitor**

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. The claimant was fairly dismissed;
2. The clamant was not wrongfully dismissed (i.e. dismissed without adequate notice and thus in breach of her contract of employment);
3. The complaints of unfair dismissal and wrongful dismissal are therefore dismissed.

## **REASONS**

### **Introduction**

**E.T. Z4 (WR)**

1. This claim arises out of the claimant's employment with the respondent, the Scottish Ministers, in their capacity as providers of prison services in Scotland via the Scottish Prison Service. The claimant worked as a Residential Officer at His Majesty's Prison Grampian in Peterhead, also referred to in this judgment as 'the prison'.  
5
2. It was agreed that the claimant began her period of service with the respondent on 24 August 2015 that her contract was ended by the respondent dismissing her on 12 January 2024 without giving notice or making any payment in lieu. The respondent asserted that the claimant was dismissed by reason of her conduct.  
10
3. The hearing took place over three days. Evidence was heard from the following individuals:  
15
  - a. For the claimant, herself and Mr Andrew Wilson, a former colleague now retired; and
  - b. For the respondents, the following (their titles at the time of the relevant events in brackets): Stuart Campbell (Head of Operations, HMP Grampian), Brian McKirdy (Governor, HMP Grampian) and Tommy Watt (Deputy Governor, HMP Lowmoss).  
20
4. A joint bundle of documents was prepared. Numbers in square brackets below correspond to page numbers of the bundle.  
25
5. The hearing was to determine remedy if appropriate as well as liability, and the claimant provided a schedule of loss as well as documents vouching her efforts to secure new employment.
- 30 6. The claimant represented herself. The respondent was represented by Ms Campbell, a solicitor. The respondent's witnesses were heard first, given that it had the legal onus of showing the reason for dismissing the claimant.

7. After the evidence was heard the parties provided their closing submissions, which were considered before a decision was reached.

### Relevant law

- 5     1     By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.
- 10    2     Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the
- 15           requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.
- 20    3     Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.
- 25    4     At common law, an employee will be entitled to a certain amount of notice of termination of their employment. That amount will be the greater of whatever is provided in their contract, and their statutory entitlement under section 86 of the Employment Rights Act 1996. If they are not given adequate notice, or an equivalent payment in lieu if the contract allows, the employer will have
- 30           breached their contract, often described as 'wrongful dismissal'. An employer may be released from the obligation to provide notice if the employee has materially breached the contract. It may rely on that breach to end the contract immediately.

**Legal issues**

The issues which the tribunal had to decide were as follows:

- 1 Did the respondent dismiss the claimant for a fair statutory reason according  
5 to section 98(1) and (2) of the Employment Rights Act 1996? The respondent  
argues that the claimant was dismissed because of her conduct.
- 2 Did the respondent act reasonably in dismissing the claimant for the reason  
it relied on, in accordance with section 98(4) of the same Act?  
10
- 3 Did the respondent breach the claimant's contract of employment by not  
paying her in lieu of her entitlement to notice of termination of her  
employment?

**Findings of fact**

The tribunal made the following findings, based on the evidence provided and as  
relevant to decide the above legal issues. The findings were made on the balance  
of probability.

***Background***

20

1. The respondents are responsible for the provision of prison services in  
Scotland. The claimant was employed at one such prison, HMP Grampian.  
She worked there from 2018 until her last day of service, 12 January 2024.  
Latterly she was based in the prison's Ellon Hall, on the top floor of three  
25 floors. It is for male prisoners.
2. The prison engages just over 100 staff. It has a Governor, Deputy Governor,  
Head of Operations, a number of Unit Managers and other officers, such as  
Residential Officers who deal with prisoners on a day-to-day basis. The  
30 claimant was a Residential Officer. At the relevant time the Head of  
Operations was Stuart Campbell, who reported to the Governor.

3. When recruited, officers will undergo an induction and training programme which lasts around six or seven weeks.
4. The respondents gather and record intelligence reports in relation to prisoners. This can cover information provided from parties outside of prisons or from within. This is contained within a larger searchable database which contains a record of each prisoner. The degree of access a member of prison staff will have to this information is dictated by their seniority.
5. The respondents place great importance on protecting the confidentiality of its prisoner records, and ensuring that the information they contain is not accessed or shared inappropriately. When logging on to the relevant system a standard message is displayed which the user must agree with in order to proceed. It says that by logging on, the user understands and acknowledges the rules which apply, and agrees to comply with them fully. It goes on to say that use of the system entails consent to monitoring, including for protection against improper or unauthorised use or access. Inappropriate use may lead to disciplinary action up to and including dismissal.
6. Prison officers may access prisoner records for a number of reasons, such as to manage a transfer to or from another prison, or to move them within the prison, or to help them access money. During the induction programme for officers they are trained on the use of the prisoner database system. If an operational officer is promoted to Residential Officer they are given additional training as their level of access is enhanced.
7. The respondents have a Code of Conduct which covers all prison officers [94-126]. In its introduction it is stated that the Scottish Prison Service '*sets certain standards of conduct for its employees which in some instances are significantly higher than those expected in other employment relationships*'. This is viewed as necessary in order to give the public confidence in the service.

8. The Scottish Prison Service also operates a Professional Charter [127-128]. This sets out the expected standards of behaviour of officers both on and off duty. It groups those standards under the headings “Belief”, “Respect”, “Integrity”, “Openness”, “Courage” and “Humility”. Under “Integrity” it is stated  
5 *“I will act with integrity ensuring I do not compromise my professional standards” and “I will uphold the highest levels of confidentiality in line with the values of the Scottish Prison Service.”*

9. There is also an Information Security policy [438-477]. In its introduction it is  
10 said that:

*“A loss of information or a breach of information security could result in distress or personal injury to an individual held in custody or a member of staff, or financial loss, serious inconvenience, embarrassment, or even legal  
15 proceedings against the SPS or the individuals involved. Appropriate levels of information security must therefore be achieved and maintained in order to ensure:*

- *Confidentiality: Information must only be available to those authorised to have access.*
- *Integrity: The accuracy and completeness of information must be safeguarded.*
- *Availability: Authorised users must be able to access information  
20 when required.”*

25 *Prisoner “AB”*

10. There was a particular prisoner within Ellon Hall who will be referred to in this judgment as “AB”. In January 2023 the claimant reported him for not carrying  
30 out a cleaning and tidying job adequately. If found to be correct, as it was the third such occasion, the prisoner was liable to lose this role which came with the benefits of additional time out of his cell and wages. The claimant knew this was the likely consequence for him. A senior manager reviewed the case and allowed prisoner AB to carry on in the role. This created a degree of  
35 friction between him and the claimant.

11. Around 20 January 2023 there was an incident outside the claimant's home. A man was reported to be outside in a car and taking photos. It was suspected, but not proved, that this was ordered by prisoner AB. The claimant was absent from work for a month due to the anxiety this caused, and then  
5 returned. She was offered the opportunity to work in a different hall housing female prisoners, but declined. She therefore went back to work in Ellon Hall.
12. Matters largely were back to normal until May 2023 when the claimant's car was damaged while parked outside her home overnight. There was stronger  
10 evidence to link this to prisoner AB, and the claimant herself believed he was behind the act. As a precaution he was transferred to another prison. Mr Campbell reported the matter to the police, who added a note against the claimant's address and mobile number in their database as an additional security precaution.

15

*Investigation into the claimant*

13. Around the same time or shortly after, informal reports were made about the claimant, suggesting that she was passing information about prisoners to  
20 other prisoners. It is not uncommon for accusations of impropriety to be made against officers, but the number of reports was unusually high. It is possible for information on a prisoner's record to be of value to others, for example by disclosing who their next of kin were and where they lived, or whether they were users of drugs, or in financial debt. For this reason, the respondents  
25 take seriously any credible report of an officer disclosing prisoner information in an unauthorised way.
14. In response to the reports, Mr Campbell contacted the respondents' remote Investigations Unit, also known as the Public Protection Unit, in August 2023  
30 to ask for the matter to be looked into. The Unit specialises in investigation of staff-related matters. He asked for her system use between 25 May and 28 August 2023 to be audited. The first of those dates fell just after the claimant's car had been damaged, prompting the transfer of prisoner AB.

15. The unit prepared an "Audit Report" which was six pages long [167-172]. It disclosed that the claimant used the respondents' system to search for 310 different prisoners, some on more than one date. 51 of them were not at HMP Grampian and seven of those were searched for on more than one date. Their names were listed, and included prisoner AB who had been searched for on eight different days, seven of which fell after he had been transferred away from HMP Grampian and thus out of the claimant's purview. There is no obvious reason why a Residential Officer would need to access the records of a prisoner who was not in the prison where they themselves were based.
16. The report went on to say that the claimant's partner, also an employee of the respondents at HMP Grampian, had been suspended following an allegation that he had also accessed the system in an unauthorised way by making a copy of prisoner AB's photograph which he then shared with other individuals who did not have access to the system.
17. The report concluded by saying that the claimant's system access as highlighted appeared disproportionate, particularly in relation to prisoner AB, and that further investigation was required in order to determine whether she had committed acts of gross misconduct by breaching the respondents' policy for accessing the system.
18. Mr Campbell received the report in October 2023. He went to the Governor, Brian McKirdy, to explain that he had requested the report, and what it said. Mr McKirdy decided that the matter had to be taken forward and referred to the respondents' Conduct Unit, who deal with more potentially serious disciplinary cases. He also took the decision to suspend the claimant pending further investigation.
19. A Mr Darren Moss of the respondents' Conduct Unit interviewed Mr Campbell on 2 November 2023. This was recorded and later transcribed [173-129].



20. Mr Moss interviewed the claimant on 13 November 2023, and again the discussion was recorded and transcribed [180-195].

21. Both Mr Campbell and the claimant were sent a copy of their interview transcripts to approve and sign.

*Disciplinary hearing*

22. The claimant was sent an invitation to attend a disciplinary hearing on 19 December 2023. The hearing was proposed for 9 January 2024. The allegation was framed as her having inappropriately accessed prisoner records without a legitimate operational need or authorisation to do so. Mr McKirdy was to be the chair and the claimant was permitted to bring a trade union representative or fellow employee. The hearing was later rescheduled to 8 January 2024 and proceeded on that date.

23. The disciplinary hearing was attended by the claimant, Lorna Fawcett as the claimant's trade union representative, Mr McKirdy, an HR officer, and a note-taker. Mr Campbell attended to answer questions. Minutes of the meeting were later provided in typed form [239-251].

24. The claimant's position in essence was that all of the occasions when she had accessed prisoner records as shown in the audit report could be explained as either her carrying out her normal duties, such as arranging for a prisoner's mail to be redirected, a change of cell or a transfer to or from the prison, or they were simply occasions when she had made an error by putting the wrong prisoner number into a search box.

25. Mr McKirdy reached a decision on the outcome after the hearing date. On 12 January 2024 he sent a letter to the claimant confirming that his decision was to summarily terminate her employment. He enclosed a separate document which outlined his reasoning behind the decision [252-255].

26. Mr McKirdy's rationale, in summary, was that the number of occasions of the claimant accessing the records of prisoners who were not within her part of the prison or responsibility was significantly and excessively high, and could not be explained by the claimant having valid reasons for doing so, or by her making mistakes when entering prisoner numbers. He considered that the number of situations requiring access to a prisoner's records would be much fewer than the claimant had suggested, and would not include some situations she had described, such as a transfer to or from another prison. He also did not find credible the suggestion that some of the entries were accidental and caused by the claimant using the wrong prisoner number. He believed that she would either have known the numbers of the prisoners she was searching for, or would have used another search criterion such as the prisoner's name if she was unsure. In any event these suggested reasons did not account for the high number of prisoners who had no connection with the claimant, her hall, or in some cases the prison at all.
27. Mr McKirdy considered the Code of Conduct and the principles within the Professional Charter. He reached the view that there had been a breach of honesty and integrity on the claimant's part, and the risk of allowing her to return to her role was too great.

### *Appeal*

28. The claimant exercised her right of appeal by sending an email to that effect to Human Resources on 15 January 2024. This was acknowledged on 17 January 2024. The claimant later provided detailed grounds of appeal [262-268].
29. The respondents' approach to dealing with dismissal appeals is to convene an Internal Dismissal Appeal Board (IDAB) normally comprising three people. The IDAB for the claimant was made up by Elizabeth Connelly (HR Business Partner, HMP Shotts), Gillian Walker (Governor in Charge, HMP Shotts), and

Tommy Watt (Deputy Govern, HMP Lowmoss). Each was provided with a set of papers covering the process up to that point.

5 30. By letter dated 2 February 2024 the claimant was given details of her appeal hearing [271-277]. It was to take place on 26 February 2024.

31. The appeal meeting proceeded as scheduled. It was recorded and later transcribed [286-294]. The claimant was given the opportunity to provide comments on the transcript, which she did.

10

32. The IDAB reached a decision by 8 March 2024 when Ms Connelly wrote to the claimant to confirm that Mr McKirdy's original decision to dismiss her would be upheld [308-310]. Along with that was sent a document titled "Internal Dismissal Appeal Board (IDAB) Response to Points of Appeal", in which the board gave a more detailed point-by-point response to the claimant's appeal grounds [313-332].

15

33. There was no further right of appeal against the IDAB decision, which therefore marked the end of the respondents' disciplinary process, in keeping with the Code of Conduct.

20

### **The parties' submissions**

34. The parties provided oral submissions. Ms Campbell produced a note which she spoke to. The parties' submissions are not reproduced in full, but are summarised below.

25

35. The claimant's arguments were as follows:

30

- a. There was a lack of firm proof that she had used the system inappropriately. There were many ways in which she could have accessed prisoner data legitimately in the course of her duties, or by accident. The investigation into her was not forensic enough to show

what information she had accessed, or how long she had spent viewing each record on each occasion, only that she had gone into a particular prisoner's records on each date.

- 5           b. There was no clear policy rule that an officer could not access the records of a prisoner when they were not in that officer's establishment.
- 10           c. There was no clear definition of what was "authorised" or "legitimate" use of the system.
- 15           d. There are dozens of policies within the respondents' intranet and it would be unrealistic to expect an officer to be familiar with them all. There is a lack of refresher training and it could not be assumed with any certainty that what is covered in the induction for new officers was also part of the claimant's own initial training some nine years before. The Information Security Policy was out of date as it was due for review in 2021.
- 20           e. Mr Campbell had a vendetta against her and was looking for an opportunity to build a case against her. It was he and not Mr McKirdy who really took the decision to escalate the claimant's case by referring it to the Conduct Investigation Unit. This would be a breach of the Code of Conduct if so as he did not have authority to do so.
- 25           f. Given the level of intimidation the claimant had experienced in her personal life, which reasonably could be traced back to prisoner AB, she was justified on checking up on his whereabouts after he had been transferred from HMP Grampian. The Service had failed to protect her and so this action was warranted.
- 30           g. Dismissal for unauthorised use of the system was disproportionately severe, and in the past a more common sanction had been a warning,

as evidenced by a response she had received to a Freedom of Information Act request [376] she had made.

5 h. The outcome of the disciplinary hearing was predetermined and proper consideration of her position was not given at that time, or in her appeal.

i. She had a clean disciplinary record over her eight and a half years of service and dismissal was too harsh a sanction.

10

36. The respondent's key points were as below:

a. The respondents' witnesses were more credible and they successfully established that they were trying to help the tribunal;

15

b. By contrast, aspects of the claimant's evidence lacked credence;

c. It was not credible for the claimant to suggest that the idea of what was unauthorised use of the system had not been clearly enough spelled out for her to understand;

20

d. There was no evidence of Mr Campbell pursuing a vendetta against the claimant, and by contrast there was evidence of him trying to support her;

25

e. The provisions of section 98 ERA were discussed, as well as renowned case law authorities in relation to dismissal by reason of conduct;

30 f. The claimant understood and had agreed to work to higher standards than most employees by virtue of the nature of her public-facing civil service role;

- g. She was experienced and well trained, and knew what rules governed her actions;
- 5 h. The volume and nature of her system access attempts could not be explained by the reasons she gave, namely legitimate work-related reasons or accidental log-ins;
- i. The investigation was thorough and impartial, and was warranted based on the preliminary evidence;
- 10 j. The claimant admitted at the appeal stage that to check the system for updates on prisoner AB after he had left her care was wrong; and
- k. The respondents had acted within their own rules and standards, and also the ACAS code.
- 15

### Discussion and decision

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

1. The onus fell on the respondents to establish that the claimant's dismissal was for a fair statutory reason. The respondents argued that the claimant was dismissed for her conduct. The claimant accepted that the respondent had dismissed her because of her conduct. Section 98(2)(b) confirms that conduct is a fair reason for dismissing an employee.
- 25
2. The respondents have discharged the onus of proving that the reason for dismissal was potentially fair. The evidence clearly showed that the claimant was dismissed because of her own deliberate actions. She was viewed as having deliberately acted outside of the respondent's rules in relation to the use of its electronic systems. She was not seen as having a lack of experience or training. Conduct was the reason for her dismissal.
- 30

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

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

*Burchell part 1*

4. The respondents maintained that they genuinely believed the claimant was guilty of misconduct. The claimant did not dispute that this was the case. She did not argue that the respondent only pretended to believe that she had committed acts of misconduct.
5. In any event, all of the evidence presented to the tribunal suggested that there was a belief in the minds of first Mr McKirdy and then the appeal panel that the claimant was guilty of manipulating the prison record system. This included the documents provided and the oral evidence of Mr McKirdy and Mr Watt. There was no evidence of any materiality to suggest this was not the case.
6. Accordingly, the first requirement under *Burchell* is met.

*Burchell part 2*

7. The respondents argued that they had reasonable grounds on which to form a belief in the claimant's misconduct. On this point the claimant disagreed. She believed that the respondents had not followed the correct process in terms of the Code of Conduct, they had applied rules or standards which has

not been properly communicated or enforced, there was bias in some of the decisions which were particularly influenced by Mr Campbell, and the investigation was not sufficiently thorough. The belief they held in her guilt could not therefore have been reasonably arrived at.

5

8. The tribunal found no evidence of Mr Campbell being biased against the claimant. Nor in any event did he take a decision or step which manifested such bias. He was reasonably entitled to request an audit of the claimant's activity regarding prisoner records after receiving an unusually high number of reports of her accessing them in unauthorised ways. It is spelled out in the Professional Charter and Information Security policy that prisoner information is highly confidential and should only be accessed when necessary. It is also made clear that such information has value and can cause damage in the wrong hands.

15

9. The claimant did not dispute that Mr Campbell had received the reports as claimed, and in any event there was documentary evidence to support what he said. Having been justified in those circumstances to request an audit report, he was equally justified in taking it to Mr McKirdy for discussion, given its contents. The report could reasonably be read as at least suggesting the possibility that the claimant was making unauthorised and otherwise unjustified use of the prisoner record system. This was borne out in particular by the number of occasions of access, but more importantly the identities and circumstances of the prisoners whose records were accessed. Those included prisoners in parts of the prison where the claimant was not based, and individuals who were not within the prison at all.

25

10. The claimant clearly strongly suspected that Mr Campbell was working hand in hand with the Investigations Unit to produce an audit report which would support further disciplinary procedure. However, there was no evidence of this and Mr Campbell himself denied this. The claimant did not and could not say that the core data within the report was wrong. She focussed on explaining what the report said.

30



11. Similarly, the tribunal was not persuaded that it was Mr Campbell and not Mr McKirdy who took the decision to proceed with a disciplinary process by handing the matter over to the Conduct Unit for more detailed investigation. Mr McKirdy clearly listened to what Mr Campbell said, the latter having been based in the prison for significantly longer than the former, but in the end Mr McKirdy agreed with Mr Campbell on his own terms and not out of any sense of obligation.
12. When the investigation of the Conduct Unit was completed, and its findings considered by Mr McKirdy along with the claimant's own representations at the disciplinary hearing, the tribunal was satisfied that he reasonably reached the belief that the claimant was guilty of gross misconduct as he set out in the dismissal letter.
13. As regards the investigation itself, that is discussed immediately below in relation to the third limb of the Burchell test.
14. The tribunal was satisfied, on the evidence and considering the parties' submissions, that the respondents had met the requirements of the second limb of the **Burchell** test. There were reasonable grounds for holding a belief that the claimant committed an act or acts of misconduct. The evidence of her accessing certain prisoners' records on particular dates was not challenged. Mr McKirdy was entitled to find the claimant's account of how that had occurred less plausible than the alternative – i.e. that she had deliberately accessed prisoner records for personal gain.

### *Burchell part 3*

15. The third limb of **Burchell** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. No obviously

relevant line of enquiry should be omitted, but there will be limits on the scope of any investigation in terms of time and resources.

16. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt***  
5 ***[2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.
17. The respondent submitted that a sufficiently adequate investigation had been  
10 undertaken. The claimant directly disputed that this was the case. She said that, although she accepted the accuracy of the information contained in the audit report, it did not explore in enough detail aspects such as which part or parts of a given prisoner's record had been viewed on each occasion, or for how long. This meant, she said, that nobody could reasonably conclude from  
15 each entry whether it was an innocent and justified check or an accidental one as she claimed, as opposed to a nefarious act.
18. Considering all of the evidence presented, the tribunal was satisfied that the  
20 respondent's investigation was reasonable. It took into account such factors as:
- a. An initial audit report was prepared by the independent Investigations Unit;
  - 25 b. The claimant did not dispute the genuineness of the evidence contained in that report;
  - c. The matter was referred to another specialised independent body, the Conduct Unit to complete a more thorough disciplinary investigation;
  - 30 d. The Conduct Unit gave the claimant an adequate opportunity to explain and comment on the evidence which had been gathered, and

a detailed written transcript was prepared which the claimant was given the opportunity to read and check;

e. They followed a similar process in interviewing Mr Campbell; and

f. The process as a whole was carried out within a reasonable timeframe.

19. Therefore, the tribunal accepted that a sufficiently thorough and competent investigation had been carried out to render the respondents' conclusions sound.

*The band of reasonable responses*

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

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

22. It is also important that it is the assessment of the employer which must be evaluated. As Ms Campbell raised in her submissions, whether an employment tribunal would have decided on a different outcome such as applying a lesser penalty is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the

requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer's own choices against the above standard.

5     23.     On the evidence heard, it is found that dismissal of the claimant was within  
the band of reasonable responses. Firstly, there was sufficient empirical  
evidence via the contents of the audit report. Added to that there was the  
claimant's account of why the records had been accessed and thirdly, there  
was the framework of policies and procedures which set general expectations  
10     and standards of conduct, and more specifically set out the respondent's  
position on the unauthorised use of the prison records system. In particular,  
the respondents made clear that they held prison staff to an especially high  
standard of personal conduct.

15     24.     It was noted that the claimant argued as part of her case that various warnings  
and directives that the respondents had given about irregular use of the  
prison record system were either too historic to be reasonably known about,  
or buried within a mass of principles and policies within the staff intranet.  
Similarly, she made the point that, save for some induction training upon her  
20     promotion to Residential Officer, she had received no further refresher  
training on the policies and procedures around accessing prisoner records.  
Whilst this may have been the case up to a point, it could not realistically be  
argued that the claimant was unaware of the need to keep prisoner details  
confidential and the reasons for doing so. Furthermore, each time the system  
25     was accessed there was a clearly worded prompt designed to serve as both  
a reminder of that principle and a warning of the consequences of misuse. In  
that context it could not credibly be argued that the claimant was oblivious to  
the respondent's likely response to an apparent case of manipulation of the  
system.

30

25.     The claimant also argued that dismissal was an uncharacteristically harsh  
sanction for any sort of breach of data security protocols. The tribunal was  
not satisfied that this was the case. It decided that there was no sufficiently

clear pattern of employees in comparable circumstances being treated more leniently. The statistics which the claimant pointed to were not clear in supporting her argument that this was the case.

5 26. All in all, Mr McKirdy, when provided with the evidence he had, was entitled to reach the view that the claimant had been guilty of a breach of the Code of Conduct and that a suitable sanction was to dismiss her summarily. Dismissal fell within the band of reasonable responses (i.e. outcomes) open to him for consideration. By extension, when it came to the appeal stage, the panel  
10 were similarly entitled to conclude that Mr McKirdy had approached the situation appropriately, and for them to agree with his decisions.

27. The respondent therefore satisfied the requirements for a fair dismissal under section 98 of the Employment Rights Act 1996.

15

### **Breach of contract/unlawful dismissal**

28. The additional claim of wrongful dismissal must be considered separately. This has to be evaluated on a different common law basis to the approach  
20 taken in the unfair dismissal claim, which is statutory. Not all of the relevant principles and considerations are common to both.

29. A fundamental difference is that the question of whether there has been a breach of the claimant's contract is a question the tribunal itself has to decide.  
25 This is different from the test for unfair dismissal under section 98 ERA, where the tribunal should examine and evaluate what the employer did and thought, rather than make its own determination of whether misconduct actually occurred.

30 30. The tribunal's finding is that the respondents were not in breach of the claimant's contract by dismissing her summarily and without notice pay. This is because she had already materially breached her contract herself,

releasing the respondent from its own obligations, and because the respondent ended her contract for that reason.

- 5 31. The tribunal makes a finding that the claimant fundamentally breached her contract with the respondent by accessing, on multiple occasions, the records of prisoners who were not within her area of responsibility, and doing so knowing that she was breaching the respondents' rules. The tribunal found it more probable than not that she was aware that she should not be accessing those records, but that she did so nevertheless both to satisfy herself as to what was happening to prisoner AB after transferring out of the prison, and to obtain information about other prisoners to use or to pass on to others for personal gain.
- 10
- 15 32. In acting in this way the claimant breached the fundamental underlying obligation of mutual trust and confidence underpinning her contract of employment. The respondent brought the contract to an end because of it. It was therefore released from the obligation to give notice or payment in lieu.

### Conclusions

- 20 33. The respondents have satisfied the tribunal that the claimant was dismissed by reason of her conduct. The tribunal also concludes that the respondents acted reasonably in the process they followed from investigation, to dismissal and through to appeal.
- 25 34. It is not necessary to discuss in detail matters such as contributory fault, whether a **Polkey** reduction is appropriate, mitigation of loss or ultimate remedy. The unfair dismissal claim therefore is unsuccessful and requires to be dismissed.
- 30 35. Separately, the tribunal is satisfied that the claimant materially breached her contract of employment with the respondents, and that when they concluded this occurred they terminated her contract summarily for that reason. They

were entitled to do so under common law and the claimant was not wrongfully dismissed, or entitled to notice or any payment in lieu. That claim must therefore also be dismissed.

5

**Employment Judge: Campbell**

10

**Date of Judgment: 7 January 2025**

**Date Sent to Parties: 8 January 2025**

15