EMPLOYMENT TRIBUNALS (SCOTLAND)
Case numbers: 4103512/2023,4103563/2023 and 4103520/2023

Final Hearing in Edinburgh on 18, 19, 20, 21, 22 August and 6, 7 November 2025

Employment Judge A Jones
Tribunal Member L Brown
Tribunal Member T Lithgow

Mr B McTague	**Claimant** **In person**
Mr S Milne	**Claimant** **In person**
Mr K O'Hara	**Claimant** **In person**
The Scottish Ministers	**Respondent** **Represented by** **Ms E Campbell, solicitor**

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimants were all unfairly dismissed and that they contributed to their dismissal by 20%.
2. Mr McTague was unfairly dismissed, and the respondent is ordered to reinstate him to the role of Residential Officer from 5 January 2026 and reinstate any benefit which he might have expected to have received (including pension and any pay rise) between the date of termination of his employment and 5 January 2026 and treat him in all respects as if he had never been dismissed. In addition, the respondent is ordered to pay to the claimant compensation for loss of earnings between the date of his dismissal and reinstatement of £24,061 net.
3. Mr Milne was unfairly dismissed, and the respondent is ordered to pay to Mr Milne compensation of £27,464.36 net and a basic award of £2284.
4. Mr O'Hara was unfairly dismissed, and the respondent is ordered to reinstate him to the role of Residential Officer from 5 January 2026 and reinstate any benefit to which he might have expected to have received (including pension and any pay rise) between the date of termination of his employment and 5 January 2026 and treat him in all respects as if he had never been dismissed. In addition, the respondent is ordered to pay to the claimant compensation for loss of earnings between the date of his dismissal and reinstatement of £20,159.54 net.

INTRODUCTION

1. The claimants all lodged claims in June 2023. Their claims were sisted pending decisions being taken by the Procurator Fiscal regarding the potential of criminal proceedings being brought against them. While criminal proceedings were raised, the case did not proceed to trial and once the position on criminal proceedings was clarified, the sist was lifted.
2. All claimants were employed as residential prison officers in HMP Edinburgh. The were employed principally as Physical Training Instructors but also worked overtime in the Hall of the prison carrying out general prison officer duties. They were all dismissed summarily following an allegation made by a prisoner that they had assaulted him. The claimants claimed that they had been unfairly dismissed. They alleged that the investigation was not fair and that dismissal was not within the band of reasonable responses. Mr McTague, while not formally representing the other claimants, took the lead in proceedings and conducted the cross examination of the respondent's witnesses. The respondent led evidence

from Mr Moss ('DM'), the investigating officer, Mr Abernethy ('DA'), who had been the Governor of the prison at the time but is now retired and took the decision to dismiss, and Mr Whitehead ('IW') who had been a member of the panel who heard the claimants' appeals against dismissal. The claimants all gave evidence on their own account and Mr Young a trade union representative gave evidence on their behalf, which was interposed after that of Mr Moss to allow him to provide support to the claimants in the presentation of their cases. The respondent's agent had no objection to this. A joint bundle of documents was lodged, and parties gave oral submissions. The respondent's agent helpfully also provided a copy of her written submission.

3. The Tribunal also viewed CCTV footage of events around the time of the alleged assault on the prisoner throughout the proceedings and the Tribunal wishes to record its thanks to Ms Campbell who took responsibility for showing the various clips of CCTV when required.

ISSUES TO DETERMINE

i. Were any or all of the claimants unfairly dismissed?
ii. What remedy if any should be awarded in respect of each claimant?

RELEVANT LAW

Unfair dismissal

4. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed. For a dismissal to be fair:

(a) it must be for one of the potentially fair reasons contained in the ERA; and

(b) the employer must have acted reasonably in treating the potentially fair reason as a sufficient reason for dismissing the employee in accordance with equity and substantial merits of the case in terms of section 98(4) of the ERA.

It is for the Respondent to show the reason (or principal reason if more than one) for the dismissal (section 98(1)(a) of the ERA).

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5. The ACAS Code of Practice on Disciplinary and Grievance Procedures should be considered when determining the matter of fairness or otherwise

of a dismissal in certain cases. In addition, a Tribunal should be mindful of not substituting its own view as to the whether a claimant ought to have been dismissed but focus on whether a respondent's conduct was within a band of reasonable responses.

6. The case of **British Home Stores Ltd v Burchell [1978] IRLR 379** remains one of the leading cases in determining whether a dismissal was fair or otherwise in circumstances where a claimant has been dismissed for conduct. The **Burchell** test is in three parts:

   i. Did the employer believe the employee to be guilty of misconduct?

   ii. Did the employer have reasonable grounds for believing that the employee was guilty of that misconduct?

   iii. At the time it held that belief, had the employer carried out as much investigation as was reasonable.

7. It is important to note that an employer is not required to extensively investigate every line of defence advanced by an employee during the course of an investigation **[Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94]**.

8. The more serious the allegations against an employee and the more serious the potential consequences for the employee (such as ending a career or potential criminal proceedings), may be relevant to consideration of the extent to which the nature and extent of investigation carried out by an employer was fair (see for instance **Salford Royal NHS Foundation Trust v Roldan [2010] ICR**). However, it is always important to remember that an assessment of fairness in a dismissal will depend upon the particular facts and circumstances of each case.

FINDINGS IN FACT

9. Having considered the evidence, the documents to which reference was made and the submissions of the parties, the Tribunal made the following findings in fact.
10. The claimants were all employed as residential prison officers at HMP Edinburgh. They were generally based in the gym at the prison but would also work shifts, when necessary, on the prison floors.
11. At the time of their summary dismissals, Mr McTague (BT) had almost 10 years' service, Mr Milne ('KM') had almost 5 years' service and Mr O'Hara (KO') had almost 21 years' service. None of the claimants had any disciplinary record.

12. The respondent has a Code of Conduct in place which sets out the disciplinary rules and procedures. The Code was introduced following negotiation with the relevant trades' unions, including the Prison Officers' Association.
13. Rule 91 of the Prison Rules which are referred to in the Code provides that an officer must seek to influence behaviour by example and leadership and enlist the willing co-operation of prisoners and that "an officer may only use force against a prisoner when it is necessary to do so taking into account all of the circumstances of the situation and the force used must be (a) proportionate to the risk posted by the prisoner in that situation; and (b) no more than necessary for the purposes of that situation." The rule also provides that any use of force ought to be recorded in writing.
14. A physical altercation took place between two prisoners on level 2 of Hermiston Hall in HMP Edinburgh on 6 September 2022. That area houses mainly prisoners who are either on remand or have been sentenced for sexual offences. Officers are trained that sex offender prisoners may be more manipulative than other prisoners.
15. An emergency alarm was sounded and available officers attended to deal with the disturbance. The prisoners who were fighting were subdued, and all prisoners were required to return to their cells, which were locked. The altercation had taken place during a recreation period where prisoners can associate with each other out of the cells.
16. The claimants together with other officers had attended to deal with the incident.
17. The prisoners who had not been involved in the altercation were generally unhappy at being required to return to their cells during their recreation period. One prisoner, B, shouted at SM who was one of the officers supervising the return of prisoners to their cells words to effect of "just you fuck off back to the gym" and made a racist comment about SM being from South Africa.
18. SM wished to challenge the behaviour of B. One of the first line managers ('FLM'), Mr Buick called SM back from going towards B's cell to challenge him as the altercation between the other prisoners had not yet been fully dealt with. Once all the prisoners were locked in their cells, SM asked Mr Rowe another FLM who was present, whether he could now go and speak to B in his cell. Mr Rowe gave permission for this.
19. SM, BM and KO all went towards the cell. At the same time, there were still a number of other officers in the area. There was nothing unusual about three officers going into a cell, particularly when the cell was joint rather than single occupancy. Officers regularly went into cells for various purposes.
20. B shared a cell with another prisoner, C. SM, KO and BM went into B's cell and C was removed from the cell and sat immediately outside in a seating

area with four other officers. The cell door was opened for approximately 5 and a half minutes. During that time, prisoner C was outside the cell, with between four and six officers immediately outside the cell, one of whom spent some of the time in the cell or at the doorway with the three claimants and B. The cell door was not fully closed at any point during the period and was either wide open or ajar during the time the claimants were in the cell.

21. The area was covered by CCTV cameras although no cameras are in individual cells.
22. SM left the cell for a short period prior to returning to the cell during that 5.5-minute period. SM and BM were wearing gym clothing, including t-shirts, whereas the other officers were wearing uniforms which includes shirts. KO was working overtime on the day and based in the Hall rather than the gym. When briefly outside the cell, SM readjusted his headset which had been attached to his t-shirt and come loose. This happened often because of the difficulty attaching the headset to a t-shirt rather than shirt. In addition, officers regularly detached their headsets when speaking to people on an individual basis so as not to be distracted by other voices or being made aware of what was going on elsewhere in the prison.
23. SM left the cell as matters had become heated between himself and B who was still presenting in an aggressive manner.
24. During the period the claimants were in the cell, other prisoners in the area were all locked in their cells and the Hall was relatively quiet. There was nothing obvious on the CCTV footage in the conduct of the officers or prisoner C who were immediately outside B's cell to suggest that an assault was taking place on B in his cell. Anyone outside the cell would be able to hear what was going on in the cell and would have been able to hear an assault taking place.
25. After the claimants left B's cell, prisoner C returned to the cell and the cell was locked. All prisoners were let out of their cells around 9 minutes later.
26. No injuries could be seen on B in CCTV footage prior to the claimants entering his cell. When B left the cell, a mark could be seen to B's left temple. SM's position was that he might have caught B on the head when B had put his hand on him and SM turned round towards him to effectively shake him off.
27. None of the claimants formally reported the conduct of B which led to them going to his cell or their interaction with him in the cell. Where a prisoner behaves inappropriately, they can be "written up", in that they can be reported for their conduct where they can lose privileges or may be referred to the Governor of the prison. There is discretion on the part of the officers as to whether they "write up" such behaviour. There is no discretion however on the part of officers to report where force has been used on a prisoner.

28. After the cells were opened and the period of recreation recommenced, B left the cell and spoke to a number of other prisoners. He later attended a small gym area, which was not the main gym where the claimants worked.
29. B asked to see a manager later that day. A FLM, Mr Rowe attended his cell, and C was again asked to step out the cell. Mr Rowe subsequently stated to the investigating officer that B had said that six officers had allegedly assaulted him earlier that day. B had named the claimants and indicated that he did not recognise the other officers. Mr Rowe told the investigating officer that B had told him that he (B) had raised his hands prior to the alleged assault but had not touched anyone. Mr Rowe stated that he noticed a mark on B's face when B pointed it out to him but had not noticed it earlier that day when he had seen him after the alleged incident. Mr Rowe stated that B had informed him that the assault was on his body and stated that B had wanted to phone the police. Mr Rowe also told the investigating manager that prisoners made complaints all the time and that he doubted that B had been involved in an incident. Mr Rowe stated that "I can honestly say there was no visible marking on his nose at all at that point and I'm quite sure Steph Kuczara could verify that." Officer Kuczara accompanied Mr Rowe during his discussion with B. Mr Rowe informed B that he could call the police later that evening, but he could not do it at that point in time.
30. B saw a nurse later that evening, when he was being given his medications. B claimed in a statement during the course of investigation, that he told the nurse that he had been assaulted. He reported that the nurse asked him if he had a rash. He was not examined by the nurse who did not take any further action. The investigating manager did not take any steps to identify that nurse and she was never interviewed during the course of the investigation.
31. B's sister made a call to 101 that evening reporting that B had told her that he had been assaulted on 6 September. B had no means of contacting his sister unless he had a mobile phone which was not permitted under prison rules. No investigations were carried out to determine whether and if so, how B had contacted his sister. No statement was taken from B's sister in the course of the investigation.
32. The allegation made by B's sister was reported to Mr Buick on 7 September. He contacted the Deputy Governor who was also the acting Head of Operations at that time and he, the Deputy Governor and Mr Hayes who was the unit manager all viewed the CCTV footage for the previous afternoon around the cell of B. A pack of information was subsequently passed to the police in relation to the allegation. A briefing paper was drafted by Mr Buick. The police did not attend at the time to obtain statements or take photographs of any injuries. No one else took any photographs of B's injuries at that or any other time.

33. On the morning of 7 September 2022, B had a prearranged appointment with a Trainee Clinical Psychologist, Ms Harrison whom he had met around 25 times before. B reported to her that one of the claimants had called him a "beast" and that BM had pinned him down while SM and KO repeatedly punched him in the head for around 5 minutes. He also reported to her SM had attempted to choke him at one point, that he had then been thrown on his chair and then the officers had left. He reported that there were 4 officers present, being the claimants and one other officer.
34. In a statement given during the course of the investigation, Ms Harrison indicated that when she saw B, he had "some movement in his wrists, but there was visible swelling."
35. Another nurse, Ms Leighton provided the investigation with a report on 12 September regarding the interactions she had with B on 7 September after he had seen Ms Harrison on that day. She reported that B had asked to see her. She reported that B had told her on 7 September, that he had been kicked and hit in the head. She reported that B had bruising to the bridge of his nose and scratches over the side of his head. She said that there was "substantial bruising to his ears and behind his ears". She reported that B had said that his lawyer was going to come in the following day to take pictures of his injuries.
36. An Advanced Nurse Practitioner had been asked to see B on 7 September following his interactions with Ms Harrison and Ms Leighton. She noted that B had bruising on the left side of his head and that he had said his wrists had been sore but weren't any more. She noted that there was no redness to his wrists.
37. The claimants were all informed that they were suspended from duty by letters dated 12 September 2022 from DA. The letters all enclosed a "Notification of Investigation (Gross Misconduct) which outlined the allegation against each claimant which was exactly the same in nature. It stated "It is alleged that on Tuesday 6th September at approximately 14.25 whilst on duty in Hermiston Hall Level 2, HMP Edinburgh, you used inappropriate force against Prisoner B. It is also alleged you did not report the use of force. It is further alleged this matter is being reported to Police Scotland as alleged assault. If proven, this could be considered to be a breach of the SPS Code of Conduct Police and SPS Professional Charter." It was stated that the investigation should be concluded by 28th November 2022.
38. On the same day, DA wrote to DM appointing him to conduct an investigation into the allegation outlined in letters to the claimants. The officers who were present outside the cell at the material time were also suspended and informed of investigations being carried out in relation to allegations that they had not intervened when there had been unnecessary use of force or reported such force. Mr Rowe was also subject to potential

disciplinary action for failing to report what B had told him initially. The investigation which was carried out by DM concerned all the allegations against all officers.

39. An investigation report was produced on 12 December 2022 in respect of each claimant. The reports were almost exactly the same in their terms. The report itself was 62 pages long with the addition of various appendices. The appendices included various "information papers" provided by witnesses around the time of the commencement of the investigation, an article from the Scottish Sun newspaper, 38 still images from CCTV and 20 interview transcripts which were taken between 22 September and 18 November 2022. Those interviewed included the claimants, medical staff, the other officers present at the time and various prisoners including B. The interviews were recorded and then typed up by administration. The appendices were the same in respect of each claimant and formed the investigation into the entire incident.
40. The article from the Scottish Sun had been provided to DM by the Deputy Governor. The article appeared on 26 September 2022 under a headline "Cover-up claim – 8 Staff Axed at "Beaten" con jail. Guards probed on attack". As well as an appendix, the article was incorporated into the body of the report in the section "summary of evidence" and the report made reference to "media interest in the alleged incident". There was no evidential value to the media report being included in the report whether by way of appendix or being incorporated into the report. There was no explanation as to why media interest in the alleged incident was relevant to the investigation.
41. HMP Edinburgh has been subject to particular media scrutiny over recent times in relation to the death of a prisoner in their custody.
42. The respondent's policy states that an investigating manager should conduct "a comprehensive investigation process which provides the Commissioning/Adjudicating Manager with a well-constructed, fully researched, comprehensive analytical assessment of incidents and events that contains all relevant facts, evidence and information." The policy also states that "Any witness statements that are to be relied upon must be signed and dated by the individuals submitting them."
43. None of the statements from the prisoners relied upon in the report including that of B and his cell mate were signed. DM could not say in evidence before the Tribunal what efforts had been made to ask for these statements to be signed.
44. When DM had taken a witness statement from Mr Buick there was a discussion regarding why photographs hadn't been taken of B's injuries and DM asked Mr Buick to agree with the statement that "But we obviously have what Kate Harrison has written about B" to which Mr Buick agreed.

DM was then recorded as stating "So we have her first-hand account of that".

45. When interviewing Ms Harrison, DM said to her "And can you just confirm that B said at no point that he had raised his hands or attempted any violence of his own".
46. DM was of the view that it was not common for officers to enter cells. This view was inaccurate. There was no investigation carried out in relation to the circumstances in which officers enter cells.
47. The statements taken noted various different accounts of the alleged assault having been given by B to various people. Ms Harrison noted that she had been told there were four officers and that B had said he was assaulted by four officers and was pinned down by the wrists and repeatedly punched in the head. Mr Rowe was recorded as indicating that B had told him there were six officers who had assaulted him and that they had "rained blows on his body". Nurse Leighton had provided a note stating that B had told her that he had been kicked and hit in the head and that four officers were involved. No statement was taken from her as she was no longer at HMP Edinburgh when DM was conducting the investigation. Mr Kuczara, another officer was recorded as stating that B had told him that he had been assaulted by officers earlier in the day, and that he had said it was 4 officers, then it was 5, 6 and then 7. "And then later, a couple of minutes down the line during the conversation with Jason, I can remember he had said that he got knocked unconscious." At different times, B said that his hands were pinned behind his back and that his wrists were held at each side of his body and that SM had tried to choke him.
48. The statements of the medical staff reported different injuries, in particular in relation to B's wrist.
49. The reports in relation to the claimants set out a summary of the findings on the allegation of inappropriate force. Various opinions of DM are set out in the report such as "The CCTV also shows the immediate concern by prisoners N and A for B". DM did not specify on what basis he could come to that opinion. The CCTV did not have sound. The report stated "B gave a detailed account of the interaction he had in the cell, first to Ms Harrison, and then as part of the investigation interview. His account at interview was consistent with that noted in detail by Ms Harrison." and "It is clear that B could not have sustained the level of injury and bruising observed by Ms Harrison, Mr Hayes and the 2 NHS nurses from one instinctive swing of Officer Milne's arm alone." DM did not ask for any medical opinion on whether B could have caused any of the injuries seen by the medical staff himself, or whether the mark on his head could have been caused by SM in the way that was suggested by him.
50. In respect of each of the three claimants, it was concluded that there was a case to answer, but in respect of the other four officers there was no case

to answer. The reasoning for this was at least in part that none of the other officers crossed the threshold of the cell, which was not accurate. The allegations against Mr Rowe were dealt with by way of training.

51. The reports in relation to the claimants made reference to text messages said to have been sent between Mr Watson, one of the officers outside the cell and a member of staff who was off sick. The text was said to have said that B "went for SM and the PTIs kicked the fuck out of him". It was also said that a further text the following day said "to forget about what was previously said." The alleged texts were not obtained during the course of the investigation. Mr Watson's position during the investigation was that the text was "taken out of context", and that he shared black humour with the recipient of the text. DM did not ask for sight of other text message exchanges between Mr Watson and his colleague. DM stated during the interview "Now to end this in a positive light you know, I do want to tell you that I've information that you're a trusted Officer and in terms of B and C you know, that it was of great comfort to B to hear you assure him assure him about in all the years that you've worked in HMP Edinburgh about you know, an Officer does not raise his hand to a prisoner and that allowed that trust to continue. Okay".
52. In the report reference is made to comments made by various prisoners in the course of the investigation and does not mention that the statements to which those comments relate had not been signed.
53. In the section of the report where the logic of there being a case to answer is set out, there is no reference to B having provided inconsistent accounts of the assault to different people. The report states "B's long description at interview of events at the cell were consistent with the description he gave to Ms Harrison on 7 September, and which Ms Harrison faithfully put in her statement on the same day." The report then went on to set out the claimants' version of events. It noted that while BM and SM had said that B had been shaking and that he told them it was because he was ready for fight, that KO "conversely, did not remember B shaking and stated he did not ask B why he was shaking".
54. The investigation did not seek evidence which might have supported the claimants' position such as the identification of the nurse who saw B shortly after the alleged assault. It did not explore whether there might have been any motive for B to make an allegation of assault or whether he had any history of making such allegations. It did not provide any information in relation to the extent to which he might be a credible or reliable witness or the nature of any criminal convictions. It did not explain why the statements of the officers outside the cell or that of Mr Welsh who was also in the cell were not accepted. Mr Welsh stated that he had not seen anything inappropriate happen in the cell.

55. The report did not set out any analysis of the evidence, other than state "The investigating Manager cannot prefer one account over another, or dismiss evidence without clear and compelling reasons to do so. As such, with there being reliable evidence from the CCTV of marks to B immediately after the resumption of recreation, the immediate concern of fellow prisoners, his detailed description to Ms Harrison, and at interview, of the alleged inappropriate force from Officer Milne, Officer O'Hara and Officer McTague. Additionally, there is the immediate concern shown by Ms Harrison upon seeing him at 9am the next morning (7 September), and the supporting professional evidence from the 2 NHS Nurses who examined B, also on 7 September. The Investigating Manager must conclude that there is a case to answer against Officer Milne in order to allow the Adjudicating Manager to make an assessment of the relative weight of evidence, the credibility and reliability of the witnesses concerned and ultimately, on the balance of probability, what occurred." That summary is not at all balanced, and for instance, does not make reference to the marks being one mark to B's head, does not make reference to the signed statements of the other officers all of which support the claimants' denial that inappropriate force was used.
56. By letter of 20 December 2022, the claimants were all required to attend disciplinary hearings on the same day, 23 January 2023 at 10am, 12.30 and 2.30pm. The hearings were all chaired by DA.
57. DA took the decision as to whether disciplinary hearings should proceed in relation to the claimants and the other officers who had been suspended.
58. Prisoner C, B's cell mate wrote a letter on 29 December 2022 indicating that he wished to withdraw his statement. The letter stated that he was withdrawing what he had previously said as B had been moved to another location in the prison and "had I not have been sharing a cell with him when I was asked to make the statements I would have declined to do so." The letter was not referred to DM for further investigation or to update his investigation report prior to the disciplinary hearing. It was not provided to DA in advance of the disciplinary hearings, and although reference was made to C having withdrawn his statement during the course of the disciplinary hearings, DA did not ask for any further investigations to be carried out in this regard.
59. The claimants' representative also highlighted to DA during the disciplinary hearings that there was further intelligence that B had said to an officer in the visiting room words to the effect of "anymore of that, I'm going to get you done like I did the other ones and I can get you sacked."
60. The representative also suggested during the hearing that B had all night to make the mark on his head worse. DA responded by stating "But that's what happens with bruises". The representative also pointed out the inconsistencies in the reporting of the alleged assault by B and when one

inconsistency was mentioned during the hearing, DA stated "I must have missed that".

61. At the disciplinary hearings, the claimants' representative pointed out that there was no mention of an alternative version of events to that given by B until page 47 of the investigation report.
62. In the hearing concerning KO, KO's representative pointed out that B had in past perhaps told untruths and was recorded as stating "that won't be a surprise to the Governor, a prisoner telling untruths, given that he's been in and out of jail several times so he must have at some point told an untruth at court or certainly a judge detailed that". As the representative went on to raise an issue about other intelligence he was aware of, DA interrupted him and stated "He maybe pled guilty" and subsequently was recorded as saying "Sorry I shouldn't have said that."
63. DA's failure to request further investigation into issues raised on behalf of the claimants during the hearings, and comments made by him during the hearings were indicative of him having already come to a view as to the findings of the claimants' guilt and outcome of the hearings.
64. DA was influenced in his decision making by the media coverage of the incident.
65. DA decided to summarily dismiss all claimants. He issued a letter dated 31 January 2023 with a "reasons for dismissal paper". The letters and reasons papers were almost identical in their terms in respect of each claimant.
66. The paper provided with the letters first set out a response to the various points made on behalf of the claimants during the course of the hearings.
67. It had been suggested that the allegation against the claimants was too vague as it simply referred to "inappropriate use of force". DA responded by indicating that this term "could cover a number of eventualities but that the investigation might have uncovered the same and therefore it would have been difficult to be more specific when the allegation was being drafted". The allegation made in respect of each claimant was never further specified once the investigation had been concluded. The allegation was vague.
68. The reasons paper stated that DA had concluded that B had been held down by KO and BM and repeatedly punched around the head by SM. He stated that the "injury" to B's wrist indicated the level of force used to hold B down as he was assaulted
69. The reasons paper also stated in response to the suggestion that the various statements from prisoners only recounted what B had told them, that in addition the account of a prisoner in a cell one floor down and along from B had made reference to hearing banging.
70. DA put no weight on C having withdrawn his statement by the time of the disciplinary hearings.

71. DA also stated that the statements of the medical professionals indicated that the cause of the injuries of B "in their professional opinion was consistent with him having received blunt trauma strikes on the front and back of his head and face." That was not what the statements had said.
72. In response to the point made on behalf of the claimants that there were inconsistencies in B's account DA stated "whilst it is accepted that there may have been an element of exaggeration in the accounts be relayed to parties including the reference to possibly having become temporarily unconscious, it might be worth emphasising the evidence collated during the investigation supports there being a verbal exchange and an altercation in the cell lasting in total around 5 – 5.5 minutes." The allegation against the claimants was not that there had been "an altercation" but that there had been an inappropriate use of force and a failure to report that.
73. DA's interpretation of the CCTV footage was that B had "winced in agony". DA watched the CCTV footage after he had read the investigation report. The claimants did not have access to the CCTV footage other than when they were shown copies of it at their investigatory meetings and at the disciplinary hearings. DM had access to high resolution CCTV during the course of his investigations, which allowed him to zoom in at high resolution. It would have been possible for DM to have zoomed in to determine whether there were any marks on B's wrists but he did not do so. The quality of the CCTV footage to which the claimants had limited access was inferior to that to which DM had access.
74. In response to the reference to the intelligence regarding B threatening to get other officers into trouble, DA stated "This is one fairly non-specific piece of uncorroborated intelligence submitted less than a week after the incident on 6 September. There have been no further incidences recorded and I do not believe it is strong evidence of KB being motivated to get Officers in trouble with no reason."
75. All claimants appealed against their dismissals. Prior to the appeal hearings being arranged, prisoner C submission a PCF2 form, which is a prisoner complaint form on 9 February 2023. The form stated "In regards to the B situation, would like to get one point across to you governor, B tried attacking officers, for that reason they restrained him till he calmed down, they left the cell I went back in and saw B rubbing his face and scratching it to make it make out he been attacked by officers which never happened."
76. DA produced a paper in response to this matter which outlined the chronology of events. He stated in that paper that C did not explain how B "came by his sore wrist". He stated that he had not taken into account C's statement at the time of his decisions as he had been informed it had been withdrawn.
77. DA concluded his paper by stating "Why he has submitted this information now is open to interpretation. It could be to set the record straight, or

because he has fallen out with B, or because he has been asked/coerced by colleagues of the PTI's."

78. DM then interviewed the claimants to put this information to them. They all stated that they felt that the information backed up what they had originally stated.
79. Detailed grounds of appeal were lodged in respect of each of the claimants. The grounds of appeal suggested that DM did not critically assess various matters during the course of his investigations including the injuries sustained by B, inconsistencies in B's account, B's credibility, failed to ask any of the nurses whether B could have inflicted injuries on himself; put too much weight on hearsay statements and failed to place weight on the statements of the other officers present who all said they did not hear or see any assault.
80. Appeal hearings were arranged for 12, 14 and 15 June 2023. The claimants were represented by a solicitor at these hearings. The panel was made of IW, who was Divisional Head of Operations, Mr Hodge Governor at HMP Perth and Ms Andrews Head of HR Operations. The appeal hearings were not rehearings, but reviews of whether the appeal panel were satisfied that the decisions taken by DA were open to him. The appeal panels could order further investigations into any matters they thought necessary.
81. Although DA had not taken into account the text messages which were said to have been sent by Mr Watson in coming to his decision, the appeal panel took the information provided in relation to these texts into account in upholding DA's decisions. The panel discounted any of the information in relation to prisoner C including him withdrawing his statement and alleging that he had seen B causing himself injury.
82. The appeal panel provided outcomes to all the claimants dismissing their appeals. In the outcomes they responded to the various points raised on behalf of the claimants.
83. The appeal panel noted that they considered that DA had taken "into account slight inconsistencies in statements" which referred to B's retelling of the alleged assault.
84. The appeal panel took into account in their deliberations that the claimants had not identified a motive for B to make up allegations against them.
85. Appeal panels have in the past reinstated officers when they have upheld appeals against dismissal.
86. The claimants were advised that their appeals were unsuccessful in letters of 15 and 16 June 2023.
87. All three claimants had intended to continue in the prison service as their chosen careers.
88. BM has been employed at Pizza Hut, J &J Warehouse and Mondelez International since his dismissal. The respondent's agent agreed the

figures set out in BM's schedule of loss were accurate. BM wished to be reinstated to his previous role if he was successful in his claim.

89. SM has been employed in a number of capacities since his dismissal and is now employed by John Lewis. He does not seek reinstatement. The respondent's agent agreed with the figures put forward by SM in relation to losses since his dismissal. SM's loss of income to 3 November 2025 was £25,236.45 and he has ongoing losses of £113 per week. He has suffered losses in respect of pension contributions of £162 per month. He was 39 at the date of his dismissal and his gross weekly pay was £671.13.
90. KO has also been employed in various roles since his dismissal and the figures relating to his loss of earnings since his dismissal were agreed. KO sought to be reinstated to his previous role. His loss of income to 3 November was £24,384.41 net and he has ongoing losses of £90.57 net per week.

Observations on the evidence

91. The Tribunal found DM to be a generally credible and reliable witness. He made concessions about inadequacies in his investigation and while he sought to maintain that his investigation was fair, he accepted that there were additional steps he should have taken. He also accepted that some of his questioning when taking statements was leading.
92. The Tribunal found DA to be somewhat argumentative under cross examination. His language in evidence and in the notes of the hearings and his decision was sometimes unnecessarily emotive. He appeared to be surprised that his view of events or decision making could be questioned. He was easily offended by questioning and indeed stated that he was offended by such questioning. The Tribunal formed the view that he had reached a decision at an early stage that the claimants would be dismissed. The Tribunal concluded, contrary to the evidence he gave, that he was influenced by the media coverage of the incident in the context of the ongoing media scrutiny on the prison because of the death in custody. The Tribunal could not understand how he could reconcile a decision that there was no case to answer in disciplinary terms for the officers outside the cell and the officer who was in the cell for some of the time with the claimants in respect of a failure to intervene in or report unnecessary use of force and his findings in relation to the claimants. His evidence was that the failure to sign the statements was an "administrative error" and he refused to accept that this was a breach of the policy. His evidence before the Tribunal was effectively that he did not believe the position of the officers outside the cell or Mr Welsh who was in it, in that DA stated that Mr Welsh may have chosen "not to see what happened" yet he had accepted their positions in relation to the issue of proceedings being brought against them. It

appeared to the Tribunal that his approach to the evidence was to look for evidence which supported the conclusion he reached that someone would have to take the blame for the alleged assault rather than take a neutral approach. The Tribunal formed the view that by the time DA viewed the CCTV footage of the relevant period, he had come to the view that the claimants would be dismissed and interpreted the CCTV from the prism of that decision. At one point in his evidence, he turned to the Tribunal seeking assurances that the Tribunal was interpreting the events in the CCTV footage in the same way as he had done. There was nothing in DA's evidence or the notes of the disciplinary hearings which suggested to the Tribunal that he had given genuine consideration to whether the claimants' version of events was accurate or not and appeared to require them to prove their innocence rather than determine whether the allegations against them could be substantiated.

93. IW accepted that he would have approached the decision-making process in relation to the disciplinary hearing differently from DA. In that respect IW did make concessions where appropriate to do so. It appeared from IW's evidence that the panel members took into account matters to support DA's conclusions, which DA himself had discounted.

94. The claimants' evidence was straightforward. All claimants gave evidence in a straightforward and balanced manner, and the Tribunal found them to be credible and reliable. They all made concessions when appropriate to do so.

Discussion and decision

Was there a potentially fair reason for dismissal?

95. There was no dispute that the reason for dismissal of the claimants was conduct. The main issue in dispute was whether the dismissal was fair in all the circumstances.

Was the investigation fair?

96. In the first instance, the Tribunal considered whether the investigation was fair. The Tribunal was mindful that not every procedural defect in an investigation will render a dismissal unfair. An investigation requires to be considered as a whole, and the Tribunal should determine the implications of any procedural defect. As recognised by the then Mr Justice Langstaff in **Sharkey v Lloyds Bank plc EATS 0005/15**, it will generally be possible for a claimant to identify some flaw in the process. The Tribunal requires to determine whether any such flaws, when considered within the context of the overall investigation are such that unfairness arises.

97. One relevant question to be determined is whether or not the respondent complied with its own internal policies and procedures. While a failure to follow a policy may be indicative of unfairness, again this must be considered in the round and in the context of the overall investigation.
98. The respondent did not comply with its own procedure in a material respect. A number of statements were not signed. The procedure required that any witness statements to be relied upon had to be signed. The Tribunal did not accept DA's evidence that this was "an administrative error". Most importantly the statement from B himself was not signed. This was all the most important given the different versions of events B had given to different people at different times. The statements of the other prisoners who reiterated what B had told them and one who said that he heard noises in B's cell, which was on a different floor to B, were not signed. It was also of concern to the Tribunal that DM did not appear to have recognised when he submitted the report that there were statements which had not been signed. DM stated that he kept a spreadsheet with details of who had been interviewed, and what stage their statement was at. However, he did not chase up the signing of important statements which were clearly relied upon both in the report and by DA in reaching his decision.
99. Moreover, DA himself did not appear to have noticed that statements had not been signed until it was pointed out to him at the Tribunal hearing itself. This too led the Tribunal to the conclusion that DA was not approaching matters with an open mind. The Tribunal came to the view that the failure to follow the procedure in this regard was material and of itself rendered the dismissal unfair.
100. Even if the Tribunal were wrong in that however, there were a number of other procedural matters which when taken together caused the Tribunal to conclude that the investigation was not fair.
101. The Tribunal readily accepted that the investigation which was carried out was extensive, in that 20 people were interviewed. However, it was not comprehensive. It was not analytical in the way in which the policy envisaged. The Tribunal found merit in the submission made on behalf of the claimants in the internal procedures that there had been no critical analysis carried out in the course of the investigations. The order in which the statements were taken appeared somewhat random and while the Tribunal accepted that this may well be linked to the availability of potential witnesses, there was no effort to cross check or explore any points raised in the statements with others from whom statements had already been taken.
102. In particular, there were various different versions of the alleged assault said to have been given to different witnesses by B. However, there was no attempt in the investigation to set out those inconsistencies and analyse them and there was no effort to go back to B and put the terms of the

statements given to him for comment. It appeared to the Tribunal that what was said by B in his statement was simply taken at face value. That was reflected in the way in which the report was constructed and the language used.

103. As highlighted by the claimants in the internal procedures, the alternative version of events, which is given by the claimants is not even mentioned until very late in the report. On the one hand that might seem like a minor matter in relation to structure of the report, however, a report ought to be balanced particularly when it concerns such serious allegations as were relevant in the present case. A report ought to be careful not to be constructed in such a way that by the time the reader gets to the version of events put forward by employee accused of misconduct, there is a realistic possibility of the reader having already been drawn to a conclusion of guilt on the part of the employee. While this may appear to be asking too much of the author of an investigation report, the Tribunal notes that in the respondent's organisation, investigations are carried out by specially trained staff who are employed for that purpose in a specialist unit called the Conduct Investigation Unit, which has three managers who will be called upon to conduct investigations into any allegations of gross misconduct. The Tribunal concluded that the report was not balanced either in the way information was presented, the information which was presented or the way in which any analysis was set out.
104. The report also sought to highlight inconsistencies in what the claimants said yet failed to adequately highlight the inconsistencies in what B had said to various people. There was nothing in the report to suggest that thought had been given to whether the injury which could be seen on B when he left his cell (which was a mark to his left temple) was consistent with the version of events he gave. The claimants are all PT instructors. As highlighted by DA, in his evidence they are 'burly men'. There is nothing in the report which considers whether an assault by three men in the physical condition of the claimants which involved allegedly being punched repeatedly by one while being held down by two others was likely to result in a mark to B's left temple, which was all that could be seen from the CCTV footage.
105. Much weight appeared to be placed by DA on B being said to be seen on CCTV as 'wincing in agony' in relation to his wrist. However, the Tribunal viewed that CCTV footage, and even if it could reasonably be said that B had 'winced" (which was not at all obvious to the Tribunal) it was clear that B was also seen leaning on his arm and moving his arm. There was also footage of B shortly after the alleged assault showing his arms and no evidence of any bruising. B may have been to the gym after the alleged assault which of itself seemed at least worthy of a question as to how he could go to the gym after having been subjected to the assault he alleged.

The CCTV stills record B as returning from the gym while wearing a t-shirt with no apparent injury to his wrist and a further still later that evening in a t-shirt with no apparent injury other than the mark to his temple. There was simply no analysis at all of the injuries described by B and whether these were consistent with what he had alleged. There was no consideration given to any alternative interpretations of the CCTV footage which was seen. The evidence before the Tribunal suggested that the CCTV footage had been viewed by DM and DA with a view to establishing the guilt of the claimants rather than viewing it in a neutral manner.

106. The appeal panel refused to consider C's statement stating that he had seen B trying to mark himself, because it would amount to picking and choosing aspects of his statement despite this aspect being the only direct evidence C was said to have witnessed. It took into account evidence to support the original decision, which had been discounted in reaching that decision.
107. DA accepted that there may have been some "exaggeration" on the part of B as to the alleged assault. However, there was no analysis either in the report or during the internal proceedings as to what exaggeration and the extent to which that exaggeration and the inconsistencies of his reporting of the alleged assault had on the credibility of B or the extent to which the exaggeration was taken into account in the decision-making process.
108. The Tribunal also noted that DM was carrying out an investigation into the entire matter. He was investigating not only the allegations against the claimants but also the allegations against the other officers that they had failed to intervene and had failed to report the alleged use of unreasonable force.
109. The investigation report did not analyse the extent to which the officers outside the cell would have been able to hear or see an assault such as that alleged by B. One officer was in the cell with the claimants for some of the time and at the doorway for some of the time. It was apparent from the CCTV footage that various officers could see into the cell at various times. While the Tribunal did not have sight of the reports in relation to the other officers, there was no dispute that none of the other officers were required to attend a disciplinary hearing. The reports in respect of the claimants did not explain at any stage why the statements of the other four officers who were present were not accepted (or that of Mr Rowe), while the statement of B did appear to be accepted. That failure was all the more curious when the other officers' statements must, as a matter of logic, have been accepted in relation to the allegations against them, given that there was a finding that they had no case to answer.
110. The allegations against the claimant were vague and no effort was made to specify what it was they were accused of doing.

Did the employer have reasonable grounds for believing the claimants were guilty of the conduct alleged?

111. The Tribunal came to the view that DA wanted to ensure that action was taken against some officers, at least in part because of the media interest in relation to this issue and the death in custody which was still being investigated.
112. The allegation made by B was never subject to any scrutiny, in that there was no consideration of whether there might be a motive for him to make allegations against officers. While the Tribunal is not at all suggesting that just because an allegation is made by a prisoner, it should not be believed, it appeared to the Tribunal that this allegation was taken at face value and B was never asked to explain the inconsistencies in the accounts he had given, or the allegation made by C that he had injured himself. There was no investigation into whether B had made other allegations or why he was in prison in the first place. There was no explanation as to why his evidence was favoured over that of seven prisoner officers.
113. In addition, it was DA's evidence that he concluded any incident between the claimants and B did not last very long, he said around 90 seconds, but that some kind of violence had taken place.
114. DA did not accept the evidence of the other officers present that they did not fail to intervene when unreasonable force was being used or fail to report it in so far as it related to the claimants but did accept that in so far as it related to the individuals. It was suggested in the Tribunal that the other officers might have not told the truth, as part of the "thin blue line" of those in such services refusing to make allegations against their colleagues. However, what the Tribunal could not reconcile was that if this was why DA had not accepted that the statements of the other four officers that they had not seen or heard anything that ought to have been reported, how a decision that there was no case to answer in respect of this allegation against them could be taken. It seemed to the Tribunal to be entirely inconsistent to find no case to answer against the other officers, but to form the view that the statements should not be relied upon in relation to the claimants' cases because the officers may have lied. That inconsistency was never explained.
115. There was also nothing to suggest that DA had taken into account the claimants' length of service or clean disciplinary record when reaching a decision as to their credibility and reliability as opposed to that of B.
116. On that basis the Tribunal concluded that DA did not have reasonable grounds for believing that the claimants had committed the conduct alleged.
117. The respondent made submissions on the authorities on the question of consistency of treatment. While relevant, the Tribunal formed the view that

the present case was not about why others had not been dismissed in similar circumstances, but why a decision maker appeared to accept and place weight on statements for one purpose, being whether to take disciplinary action against them but not in respect of allegations against others arising out of the same facts.

Conclusion

118. In all these circumstances, the Tribunal concluded that the dismissal of all claimants was unfair. The investigation which was carried out was fundamentally flawed and not a reasonable investigation in the circumstances of the particular case and the respondent's policy was not adhered to in a material respect. In addition, the decision was not within the band of reasonable responses given that there were not reasonable grounds for having concluded that the claimants had committed gross misconduct.

Remedy

119. SM did not want to be reinstated to his role. BM and KO did both wish to be reinstated. There was very little evidence from the respondent as to the reasonableness of reinstatement. The evidence was limited to DA stating as he had dismissed the claimants for having allegedly assaulting a prisoner he would not wish to re-employ them. DA has now retired, and a new Governor is in place in HMP Edinburgh.
120. There was agreement between the parties as to the schedules of loss which had been produced by the claimants.

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121. The respondent's position was that even if the Tribunal found that any of the claimants' dismissals was unfair, then any compensatory award should be reduced to zero. It was submitted that there was no evidence of any procedural failure which was likely to have affected the outcome.
122. The Tribunal did not accept that submission. The Tribunal concluded that the investigation was manifestly unfair in a number of material respects and that DA did not have reasonable grounds on which to find that the claimants were guilty of the alleged misconduct. In these circumstances, the Tribunal concluded that it would not be appropriate to reduce any compensation on the basis that the claimants would have been dismissed in any event.

Contributory conduct

123. It was also submitted that the Tribunal should find that the claimant contributed to their dismissal in terms of section 123(6) ERA. In particular, it was said that on the balance of probabilities, an inappropriate level of force was used on B, that the claimants had entered the cell to speak to B who was in an angry frame of mind, shouting abuse.
124. The Tribunal did not accept that this amounted to contributory conduct in terms of section 123 ERA. However, the Tribunal did come to the view that the failure of the claimants to report the conduct of B in the appropriate manner timeously, contributed to the disciplinary proceedings which were taken against them. The Tribunal took into account the evidence heard that reports can be made within 48 hours of any alleged conduct. However, had the claimants followed that course of action, which the Tribunal accepted was the correct course of action, there would have been a contemporaneous record of why the claimants had found cause to go in the cell and of what occurred in the cell. The Tribunal came to the view that a reduction of 20% to both the compensatory and basic awards of the claimants would be just and equitable in all the circumstances.
125. The Tribunal then went on to consider whether or not BM and/or KO should be reinstated to their former roles. In the first instance, the Tribunal took into account that a finding of contributory conduct would not be inconsistent with an order for reinstatement.
126. The only evidence put forward that it was not practicable to order reinstatement was the evidence of DA and his opinion. It was not suggested that there were no roles available.
127. The Tribunal formed the view that it would be practicable to reinstate BM and KO. While there is no statutory presumption in favour of practicability in these circumstances, the Tribunal took into account that there was no apparent breakdown in relationships with colleagues or management, and the claimants had clean disciplinary records. The Tribunal found that the investigation into the claimants was so unfair, and that no reasonable employer could have come to view that there was sufficient evidence to find the claimants guilty of gross misconduct.

Compensatory awards

128. In respect of BM, figures were agreed. BM had losses to 3 November of £28,695.23 and ongoing weekly loss of £153.43 net. His losses between 3 November and 5 January are £153.43 x 9 = £1380.87. He has a total loss of income of £30,076. Applying a reduction of 20% for contributory conduct is £30,076/20% = £6,015 which results in a total award of £24,061 net.

129. In respect of SM, he has a total loss of income of £25,236.45 to 3 November and ongoing losses of £113 per week. He also has pension loss of £162 per month. The Tribunal concluded that it would be just and equitable to award SM future loss of 6 months. His losses from 3 November are therefore £113 x 26 = £2938 and his total pension loss of 38 months of £6156, giving a total loss of £34,330.45. the reduction for contributory conduct is 20% which is £6866.09, giving a total compensatory award of £27,464.36. On the basis of his age and length of service he would be entitled to a basic award of £2,855 which when reduced by 20% would amount to £2284.
130. In respect of KO figures were agreed. He has a loss of income to 3 November of £24,384.41 net and ongoing weekly losses of £90.57. His losses between 3 November and 5 January are therefore 9 x 90.57 = £815.13. He has a total loss of earnings of £25,199.54. reduction for contributory conduct is therefore £25,199.54/20% = £5040 which results in an award of £20,159.54.
131. The claimants had suggested that there should be an uplift on compensation because of a failure to follow the ACAS code of practice. The Tribunal did not accept that the failures of the respondent in relation to the investigation would justify any such uplift.

Date sent to parties 09 December 2025