THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

sitting alone

BETWEEN:

Mr G Lown

Claimant

and

Secretary of State for Justice

Respondent

ON: **9 & 10 January, 21 June**

22 June & 21 July 2017 (in chambers)

Appearances:

For the Claimant: **Ms N Motraghi, Counsel**

For the Respondent: **Ms C Darwin, Counsel**

JUDGMENT & ORDERS

The claimant was both unfairly and wrongfully dismissed.

Remedy will be considered at a hearing on **8 September 2017**. The claimant indicated during the liability hearing that he will be seeking re-employment. A mitigation bundle has already been submitted. The claimant shall update that bundle and his schedule of loss on or before **1 September 2017**. The parties shall also exchange by the same date any witness statements that they wish to rely upon on the issue of both re-employment and financial compensation.

REASONS

1. In this matter the claimant complains that he was both unfairly and wrongfully dismissed.

Evidence

2. I heard evidence for the respondent from Mr D Lewis, investigating manager, Governor G Hawkings, dismissing manager, and Mr N Pascoe, appeals manager. I also heard from the claimant and had before me an unsigned witness statement from a Mr B Whatling, his former colleague. I read that statement but accorded it very little weight. No reference was made to it in submissions for the claimant. I also had before me an agreed bundle of documents.

3. The video footage taken of the incident that led to the claimant's dismissal was also played on a number of occasions during the hearing.

Relevant Law

4. Unfair dismissal: By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

5. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

6. In **t**his case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

7. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:

    a. genuinely believed the claimant was guilty of misconduct;

    b. had reasonable grounds on which to sustain that belief; and

    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

8. Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

9. The approach in Burchell is modified to the extent that even if the respondent fails to establish one or more of the three limbs above the Tribunal must still ask itself if the dismissal fell within the range of reasonable responses referred to below (Boys and Girls Welfare Society v Macdonald 1997 ICR 693).

10. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23).

11. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

12. In coming to these decisions, the Tribunal must not substitute their own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

13. Wrongful dismissal: Any summary dismissal of an employee will be in breach of the right to notice of termination (either through the contract of employment or the statutory minimum) and therefore a wrongful dismissal unless there has been repudiatory conduct by the employee justifying that summary dismissal. Gross misconduct on the part of the employee would amount to such repudiatory conduct.

14. In contrast to unfair dismissal it is a question of fact for the Tribunal to decide if the contract has been so breached rather than considering whether the employer was reasonable in its conclusions. In reaching that decision the Tribunal is entitled to consider all relevant evidence whether it pre or post dates the dismissal.

Findings of Fact

15. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.

16. The claimant commenced employment with the respondent as a prison officer on 28 November 2005. At the time of his dismissal he was the Discipline Officer for B wing in Brixton prison.

17. Policies & training

18. Control and restraint (C&R) is a compliance technique that enables officers to take control of a violent or non-compliant prisoner delivering pain compliance if needed. All officers receive an initial 32 hours of training on appropriate

techniques as well as annual refresher training. The claimant had also been trained in advanced C&R again with annual refreshers. He had taken part in many C&R interventions over the years and had just been selected to become a C&R instructor. He was fully aware of and familiar with the C&R manual. Since 2006 he had also been a member of the Tornado national response team (NTRG) which deals with any mass indiscipline, riots or similar and had received appropriate and extensive training as a result.

19. The respondent's Use of Force policy sets out in detail the rules and associated provisions relating to use of force. In particular it provides:

    a. Use of force will be justified, and therefore lawful, only if it is reasonable in the circumstances, if it is necessary, if no more force than is necessary is used [and] if it is proportionate to the seriousness of the circumstances. Guidance is then given to interpreting each of those factors. It is emphasised that the particular circumstances faced in each incident needs to be carefully assessed and what is reasonable, necessary and proportionate etc will vary from case to case. Ultimately where force has been employed the individual concerned must be able to account for their own decisions and actions.

    b. In relation to types of force and personal safety techniques, these can be used when it is lawful and necessary to prevent harm to officers or a third party. They are taught for use in the very rare circumstances when all methods of trying to control or evade a violent situation have failed and the individual concerned is acting in self defence or for the protection of the third party and should only be used when C&R is impractical. They must use only the force necessary in the circumstances and the use of a defensive strike must be regarded as exceptional.

    c. When force is used a report justifying its use must be completed - commonly referred to as an annex A form.

20. The respondent's Conduct and Discipline policy sets out the standards of behaviour expected of staff and specifically states that in relationships with prisoners:

    'Staff must exercise particular care to ensure that their dealings with prisoners… are not open to abuse… Staff relationships with prisoners must be professional. In particular staff must not… Provoke, use unnecessary or unlawful force or assault a prisoner.'

21. The policy sets out examples of misconduct and gross misconduct. Use of unnecessary force is used as an example of the former and assault appears as an example of the latter. It also states that serious cases of misconduct may also amount to gross misconduct if they make any further relationship and trust between the parties untenable.

22. It states that if misconduct is proven the decision maker must take into account the individual's disciplinary record, general record, position and length of service; any mitigating circumstances; the nature and seriousness of the misconduct involved and further that penalties must be determined on a case-by-case basis.

23. It also sets out the disciplinary process to be used including, in relation to an appeal, that in making their decision the appeal authority must consider, inter-alia, whether the disciplinary finding was consistent with the written and oral evidence, whether any arguments in mitigation were given due weight, whether the penalty was reasonable and proportionate and the member of staff's disciplinary record, general record, position and length of service.

24. Grievance against A/Gov Russell

25. On 5 November 2012 the claimant and another officer raised a grievance in respect of Acting Gov Russell. An investigation was launched and one conclusion of that investigation was that the claimant had lied. The recommendation of the investigating officer was that no action was taken in respect of the allegations against Ms Russell and that the claimant, and others, were given advice and guidance as to their unprofessional behaviour during a conversation in October 2012. The investigation closed on 24 December 2012.

26. The claimant's evidence was that he was not informed that the investigation had concluded nor was he told that he was due to receive nor did he ever receive any advice or guidance. In his later investigatory interview with Mr Lewis on 25 February 2013, the claimant stated that he understood the grievance was resolved after his suspension because the other members of staff involved got their paperwork through then but he had still not received his and that as far as he was concerned the grievance was still outstanding. On the evidence before me, I find that although it was the respondent's intention to give advice and guidance to the claimant about unprofessional behaviour, this had not been actioned. In any event, there is a reference to 'advice and guidance' in the respondent's conduct and discipline policy which expressly states that advice and guidance, even if it contains a cautionary element, is not a disciplinary penalty and should be incorporated into the training and development section of that individual's record. When disciplinary proceedings were commenced against the claimant, therefore, he had a clear conduct record.

27. January 2013

28. On 28 January 2013 the claimant was part of a planned intervention by a three man team that removed prisoner B from his cell to specialist accommodation that would reduce the risk of self harm and damage to the cell. The cell he was being removed from was small and the doorway into it smaller than a standard sized door. The claimant had also been part of an intervention on prisoner B two days before with no problems.

29. The other two members of the team were Officers Streek and Pooley. Also present was Supervising Officer Gridley (a C&R instructor for nine years who had trained the claimant on occasion) and Officer Barrett who was operating a video recorder. All those gentlemen were inside the cell or in its doorway during the incident. Just outside the doorway was a nurse, Ms A Tobella, an employee of Care UK who provide health services to the respondent, present to observe the wellbeing of the prisoner and Officer Stanley – orderly officer on the day. Standing just further outside the cell but looking in were Ms Russell and Ms Williams, chair of the Independent Monitoring Board. It is important to note

however that this was a fast moving and fluid situation. Nobody was static and a number of those present later described moving around and/or ducking down to see into the cell.

30. Prior to entering the cell the claimant had been identified as the number one officer which meant that he would go into the cell first whilst carrying a large shield, give instructions to the prisoner, take control of his head and generally lead the intervention. As the incident unfolded, however, it did not prove possible for him to take control of the prisoner's head and instead attempted to restrain his kicking legs. The prisoner was highly resistant to the intervention and was violent in response. The team eventually managed to restrain him and removed him from the cell.

31. In accordance with the Use of Force policy, all members of the team wrote their accounts of the intervention on annex A forms. They did this separately from each other and straight away – whilst still in their kit and, in the words of the claimant, whilst still 'dripping wet'. In Officer Gridley's annex A form he referred to the fact that the claimant had made contact with the prisoner's leg area on more than one occasion in an attempt to protect himself as he tried to get past the prisoner's thrashing legs. The claimant's annex A form stated:

    'the prisoner… attempted to kick myself in the face, but on the 3 attempt his tried I struck his leg with an open hand palm and continued to instruct the prisoner to comply.'

32. Immediately after the intervention Ms Russell raised concerns regarding the behaviour of one officer (later identified as the claimant). Having subsequently discussed the incident with others she then sent an email to Gov West alleging that during the intervention the claimant had struck the prisoner with a clenched fist three times on his back. Unfortunately the date and time of this email has been redacted and the original version showing these details is not available.

33. <u>Investigation</u>

34. The matter was then referred to Gov Tullett who commissioned Mr Lewis to investigate. The terms of reference for that investigation stated that it was in to the allegation that the claimant had assaulted a prisoner on 28 January. The objective was to establish the facts and present any evidence in relation to the incident, allegation or complaint in accordance with the code of conduct and discipline. It further stated that the investigation would not require specialist input. It required a completed investigation report by 8 March 2013.

35. Also on 29 January the claimant was suspended by Mr Tullett. That suspension was reviewed and extended in May.

36. Mr Lewis conducted investigatory interviews with the prisoner, the claimant and all those mentioned above who were present at the intervention. These interviews were conducted between 1 February and 18 March.

37. On or about 5 March Mr Tullett authorised the extension of the investigation period until 31 March. The claimant was informed of this by email on 5 March.

38. Mr Lewis produced his investigation report on 22 March. It set out the background and who was interviewed, the allegation and evidence for and against it, a summary, conclusion and recommendations. The overall conclusion was that Mr Lewis believed the allegation that the claimant assaulted the prisoner should be tested at a disciplinary hearing as there were three witnesses suggesting he punched a prisoner during the restraint. He also made four recommendations in respect of best practice by other individuals involved in these sort of incidents. The transcripts of the investigatory interviews together with other relevant documentation were annexed to the report.

39. Having considered the transcripts of the investigatory interviews and the summary of that evidence in this report, I conclude that it is flawed in some respects. In particular in the section setting out the evidence supporting the allegation, Mr Lewis states that Ms Williams explained she saw an officer punch the prisoner. In fact what Ms Williams said was:

> 'I heard more than a I saw (sic). There was a lot of noise… I did see an elbow go up as if it was punching but I couldn't see the hand… It went three times… To me it looked as if it was excessive force. But as I haven't got expertise in this area and I don't know what would be considered excessive force I couldn't have absolutely said that it was.'

40. Later, when asked if she thought the prisoner was assaulted she answered:

> 'On balance yes. But as I didn't physically see a fist go in or anything like that-I wouldn't want to swear to it. My reason for saying I think it took place was less to do with what I saw-because my view was obstructed-that it was more to do with my conversation subsequently with the prisoner.'

41. To summarise that evidence as saying that Ms Williams saw an officer punch a prisoner is simplistic and potentially misleading.

42. Further, there is no reference in this section of evidence against the allegation, or indeed anywhere in the report, of what Ms Tobella said in her investigatory interview in support of the claimant (it does refer to her later medical notes). What she had said included:

> 'I would like to add that I saw a really good team working in a very hard situation. To be honest it was one of the best that I have seen here in this present-because it was really, really hard situation and the prisoner was really out of order. I think they did a really good job. I want to say that because you know I was there.'
>
> 'There was a lot of people and I was ducking down because I wanted to see properly. You know-obviously I want to protect him as he is my patient.'

and when asked 'did you see anybody punch him? Was he hit by anybody?' She answered

> 'No, no, no.'

43. The omission of that evidence again makes the report potentially misleading.

44. <u>Disciplinary</u>

45. On 10 April Mr Tullett wrote to the claimant informing him of three allegations of gross misconduct; namely acting in a seriously unprofessional manner by hitting

the prisoner, using unnecessary force on the prisoner and assaulting the prisoner. The letter set out the claimant's right to be accompanied at the forthcoming disciplinary meeting although no date was set at this stage. A copy of the investigation report was enclosed together with information about how to view the video recording of the incident. The letter also set out the list of 10 people that Mr Hawkins 'may ask' to attend the hearing and in what capacity. That list included Ms Tobella and prisoner B. The letter also specifically set out that there was a range of decisions open to Mr Hawkins ranging from taking no further action and taking formal action including dismissal.

46. Mr Tullett asked Mr Hawkings to chair the disciplinary hearing as he was independent of Brixton prison. He was provided with a copy of the investigation report with the appendices and a DVD of the video footage. Having reviewed these Mr Hawking commissioned a view on the appropriateness or otherwise of the claimant's behaviour during the incident from Mr Jonathan Collier, Litigation Manager in the NTRG. Mr Collier reviewed the DVD and provided a report by email dated 23 April. Mr Collier was not provided with the annex A forms. Mr Colliers's report was sent to the claimant by email on 7 May.

47. In summary the report stated, having reviewed the video footage, that the officer controlling the mid section/leg area could be seen to deliver what would appear to be two strikes to the upper leg area and that the prisoner commented that he had been struck. He confirmed that there are no techniques within C&R that involve the striking of a prisoner.

48. Mr Hawking's decision to commission Mr Collier's opinion was outside the scope of the terms of reference set for the investigation. This was not however unreasonable. There is nothing in those terms of reference to suggest that the later discipline process would be limited by them and it was not in itself unreasonable for Mr Hawkings to so widen the scope of the investigation. Indeed, it was entirely reasonable to seek the view of an expert in the area under consideration.

49. On 6 May Mr Tullett wrote to the claimant informing him that the disciplinary hearing would be heard on 17 and 18 June and the process that would be followed. He listed the people asked to attend the hearing stating:

    'These names were outlined in my letter of 10th April'

50. This was inaccurate as Ms Tobella and prisoner B were listed in the 10 April letter but not in that of 6 May. Further, Mr Collier had been added.

51. As far as the attendance of prisoner B was concerned, there was an exchange of emails on 1 & 7 May, between Mr Hawkings and Mr Hart (who was assisting with administration of the hearing) where Mr Hawkings said that he did not intend to call the prisoner as a witness but asked Mr Hart to ask the claimant whether he wished him to be present. There is no evidence of whether Mr Hart did that but the exchange is consistent with Mr Hawkings evidence that his understanding was that the claimant did not want the prisoner present.

52. The claimant's evidence to the Tribunal was that he expected the prisoner and Ms Tobella to be at the disciplinary hearing. Given the, no doubt unintentionally, misleading statements by Mr Tullett and lack of clarity about prisoner B, I accept that evidence as truthful.

53. As far as Ms Tobella is concerned, there is no apparently logical reason why she was not called to the disciplinary hearing. Mr Tullett had clearly envisaged she would be when he wrote to the claimant on 10 April. At Tribunal some suggestion was made that she was not called because she was not an employee of the respondent. Given that she was interviewed as part of the investigation and had apparently had no problem in cooperating with that, this seems a weak suggestion. Mr Hawkings accepted in cross-examination that he had made a mistake by not hearing from her. He was unable to recall if Mr Tullett had told him that he was taking her off the list and if so, why.

54. The disciplinary hearing took place as planned on 17 and 18 June. After dealing with preliminary matters, Mr Lewis presented the investigatory report, and answered questions from both Mr Hawkings and the claimant/his representative. The following witnesses then attended on day one and were asked questions as required: Officers Streek, Pooley, Barrett, Gridley and Stanley. The thrust of Officer Gridley's evidence was that he did not see anything untoward on the day and when he looked at the video footage he characterised the claimant's strikes as defensive.

55. On day two Ms Williams, Ms Russell and Mr Collier all attended. Ms Williams confirmed that the transcript of her investigatory interview was an accurate recollection and later when describing the action she had witnessed she said

> 'it would seem like it would be a punching action - definitely rather than restraining action or something like that.'

and later she described it as a pumping action but she did not see a hand. She also said that she had a very obscured view and a lot of what she felt was from what she heard and seeing the prisoner afterwards. Later she said that she thought that the strikes were probably punches and that it was unlikely they were blocking actions.

56. Ms Russell, when asked what she said to Officer Gridley after the incident, said she was not sure at the time but it looked like three punches. She later confirmed that she saw a clenched fist. When asked by Mr Hawkings how she could be sure, she said because she saw it. Mr Hawkings did not explore with Ms Russell how good her view was at that point.

57. Mr Collier's evidence was lengthy. He viewed the video footage - confirming when he did that watching it on a larger screen was much clearer than when he viewed it on a small screen when he wrote his report – and said that in his opinion the strikes were not necessary and that other options were available. He accepted that it was totally reasonable for someone to control the legs but the argument was whether it was necessary to deliver strikes to do so. He also accepted that in this sort of situation a split-second decision had to be made in

the heat of the moment and that it is easier to analyse options available in hindsight (not his word) rather than dealing with the live threat at the time.

58. The claimant then gave his evidence and finally concluding representations were made. The hearing then adjourned. It is not recorded for how long although just before it Mr Hawkings indicated that it would be approximately 30-40 minutes. The hearing reconvened at 16.55 and Mr Hawkings read out his summation. This included:

> 'What has been crucial to the hearing is not the whole C&R incident but a small element of the early part of the intervention where it is clearly evident that you used force using two downward motions with impetuous (sic). Through the hearing that evidence is now down to whether that aspect of force was necessary, proportionate and justified. I have concluded it was not and as a consequence the charge of assault with unnecessary force are proven. In respect of the first charge, I intend to dismiss the charge based on the earlier submission of merging charges one and three.'

59. He then set out the evidence he had taken into account in coming to this conclusion. He said that Officers Pooley, Streek and Stanley offered no substantive evidence that they saw any of the two strikes but he was clear that the claimant did strike the prisoner. He also said that Ms Williams was clear that while she had no substantive knowledge of use of force, she characterised his actions as a punch and that he took from this that some force was used to deliver the strike and the audio on the DVD indicated that also. He said it was not clear whether this was with a closed or open hand but that Ms Russell was clear he had punched him with a clenched fist.

60. He then dealt with the conflicting evidence of Mr Gridley and Mr Collier but gave greater weight to the evidence of Mr Collier based on skills, knowledge and training. He concluded that the weight of the evidence was that it was an offensive strike. It was with force, at speed and directed at the offender's body and that a parry or a block would not have needed such force or impetus. He therefore concluded that Mr Gridley's evidence that the actions were defensive was wrong.

61. He then invited the claimant to make any mitigation or representations before he decided on an appropriate penalty.

62. The claimant said that he could not see how the assault charge could be true, on reflection if he could have done or delivered the downward motion of the parry in another way he would have done, that he read the situation accordingly, that he did not carry malice and is not aggressive. He said he had a great working persona with the majority of staff but believed that because he had an outstanding grievance against Ms Russell this had led to the situation. He said it was never his intention to use and has never used excessive force, that he only ever did his job to the best of his ability and he had never previously been through the disciplinary process and that if given the opportunity to carry on with his duties, with this experience and what he had been through, he would be mindful and cautious and his way of thinking would be different. But on the whole he did not see what he had done was wrong. He said that he had sat for the last five months at home pondering with this hanging over his head and replaying the whole incident. He said that in his heart of hearts he could not see how the

charges laid could apply to this situation. His representative then asked for Mr Hawking to be lenient. Mr Hawkings adjourned again which is described in the notes as a 'brief adjournment'.

63. The meeting resumed at 17.30. Mr Hawkings said that he had considered the claimant's mitigation, reviewed the disciplinary policy and reflected on the case. He said the crucial aspect was whether he thought the claimant could be reasonably trusted in similar circumstances and whether the issue was so serious as to make any future relationship between the respondent and the claimant impossible. He concluded that that test had been met and that he had seen no evidence of acceptance of what he did was wrong including a denial even through to mitigation that he had assaulted an offender. He stated that if the claimant was not prepared to act within the boundaries of his training there remains a potential that offenders may be at risk in any future incidents. He said he had viewed a record of similar charges and that dismissal fell within the reasonable range of penalties and that therefore dismissal was appropriate.

64. A letter confirming the decision was sent to the claimant on 25 June. This substantially repeated the reasons that the claimant had been given orally but further it stated that the claimant had demonstrated he was prepared to act in an unlawful and wholly wrong manner which placed not only offenders but colleagues at risk. The letter did not expressly state that the dismissal was without notice but that is in practice what happened.

65. <u>Appeal</u>

66. An appeal against dismissal was submitted by the claimant on 3 July. In summary the grounds were that the penalty was unduly severe, the disciplinary proceedings were unfair and breached natural justice and the original finding was against the weight of evidence. In relation to penalty the appeal specifically referred to the claimant having received a citation for bravery in 2008 and an acknowledgement of his professional actions in preventing an escape in 2012.

67. Mr Pascoe was appointed to chair the appeal. He was provided with and read all the previous interviews, reports, correspondence and watched the video. In addition he had a summary document prepared by Ms Lucie, an HR case manager. That document cannot reasonably be described as completely neutral. In particular in the section under consideration of options, it set out the possible outcomes to the appeal (including upholding it or imposing an alternative penalty) but then stated:

> 'However, by reducing the penalty of dismissal…the concerns in relation to trust will still exist and this can not be mitigated. Furthermore, it may set an unhelpful precedent for future cases.'

68. It then summarised the approach a Tribunal would take on a claim for unfair dismissal and concludes:

> 'Therefore the appeal authority may wish to satisfy themselves that the above [a brief statement of the Burchell principles] was achieved if they choose to uphold the decision.'

69. The appeal was heard on 22 July. It was not recorded and no proper minutes were taken or produced – brief handwritten notes made by Ms Lucie were in the

bundle. Mr Pascoe made no notes. No further enquiries or investigations were carried out after the hearing. Mr Pascoe did not consider that was part of his role as the appeal is not a rehearing.

70. The handwritten notes are not easy to read or follow but in some respects they do suggest a lack of familiarity by Mr Pascoe with the detail of the matter e.g. at one point he asked if the nurse was present at the scene.

71. An appeal outcome letter was drafted by Ms Lucie for Mr Pascoe to consider and amend as necessary which he did before signing and sending it. There was no evidence to suggest that he did amend it in any way. The letter dealt with and responded to each of the three main grounds of appeal but overall concluded that that the claimant had provided no reason during the appeal to consider the decision to dismiss was unfair or inappropriate and it was therefore upheld.

Submissions

72. Detailed and helpful submissions were made by Counsel for both parties which I have carefully considered. The respondent in particular invited me to find that the claimant was evasive in his evidence and on a number of occasions was not truthful giving ten alleged examples of this. Whilst I agree that at times the claimant's evidence was not entirely consistent, and given the passage of time since the events in question this is not totally surprising, I did not form the view that he was being evasive or deliberately untruthful.

Conclusions

73. Unfair dismissal It is clear that the reason the claimant was dismissed was conduct, a potentially fair reason.

74. I am satisfied that the respondent, through Mr Hawkings and Mr Pascoe, had a genuine belief in the guilt of the claimant in relation to the disciplinary charges of using unnecessary force on prisoner B and assaulting prisoner B.

75. Turning to whether there were reasonable grounds for that conclusion, I have considered in detail the extensive written and interview evidence before the respondent, and of course had the opportunity to watch the video footage of the incident myself. I explicitly remind myself, particularly because I have watched that video footage, that it is impermissible to substitute my view for that of the respondent.

76. Mr Hawkings' conclusion that the claimant struck the prisoner is clearly reasonable as the video footage shows that. His summation and subsequent letter are clear that the grounds for his conclusion that that strike was offensive rather than defensive were based on the evidence of Ms Russell, Ms Williams and Mr Collier. The evidence of all three is open to at least some criticism.

77. As far as Ms Russell is concerned (even discounting the possibility that she was motivated by revenge because of the earlier grievance as this was not particularly argued before Mr Hawkings) her evidence that she saw a closed fist must be open to considerable doubt. She had an obscured view which, as Mr Hawkings

accepted in cross-examination, is highly unlikely to have been better than that shown by the video evidence which does not show the claimant's hand when making the strikes. Her evidence was also that she saw three strikes when it is clear that there were only two.

78. For the reasons set out above, the description of Ms Williams' evidence as "she characterises your actions as a punch" is simplistic. The strength of her evidence before Mr Hawkings varied depending on how the questions were put to her.

79. Mr Collier's written report was based solely on his viewing of the DVD on a small screen. When he answered questions at the disciplinary hearing, his evidence was more nuanced albeit that overall he remained of the view that the strikes were not defensive. In preferring the evidence of Mr Collier to Officer Gridley, Mr Hawkings discounted the obvious factor that would suggest Officer Gridley's evidence should be preferred as he had been present during the incident and had written an account on the day.

80. Furthermore, Mr Hawkings did not hear from Ms Tobella at the hearing. Her evidence was strongly in favour of the claimant. It is correct that Mr Hawkings had the transcript of her interview with the investigatory report but that report had also not accurately summarised her evidence.

81. Another key part of Mr Hawkings' findings was his conclusion, in the dismissal letter, that it was implausible that the claimant's actions were a block or a parry because he delivered strikes which were offensive. He said that within C&R strikes are only legitimate as part of personal protection but in this case personal protection was not being used. This approach seems to overlook the basic right of a prison officer to defend him or herself against attack, which of course is what the claimant says he was doing by using an open-handed downward strike to block or parry the claimant's flailing legs.

82. Clearly Mr Hawking assessed the competing evidence in front of him and came to a conclusion as he was required to do. As stated, whether or not I would have come to the same conclusion is irrelevant to assessing whether it was a reasonable conclusion. Significant doubt has been cast however on the evidence supporting his conclusion and I find that he did not have reasonable grounds for that conclusion. The appeal process, which I find was approaching superficial, did nothing to resolve any of those doubts or improve upon the grounds for the conclusion.

83. Turning to the third limb of Burchell, I conclude that the respondent did carry out as much investigation into the matter as was reasonable in the circumstances of the case. All relevant witnesses had been interviewed, at least at the interview stage, and almost all of them were reinterviewed at disciplinary stage. The evidence of those who were not reinterviewed, the prisoner and Ms Tobella, was available to Mr Hawkings and Mr Pascoe. Additional evidence from a recognised expert was obtained and all the relevant paperwork that was available was considered. It is correct that during Mr Hawkings' interview with the claimant he spent relatively little time asking him direct questions about his version of the incident itself and why he felt he needed to defend himself. However, the

claimant was represented at that interview and had given a full account of his actions at the investigatory interview with Mr Lewis.

84. I then consider whether overall a reasonable disciplinary process was used by the respondent and conclude that in general terms there was. The claimant was interviewed at the investigatory, dismissal and appeal stages with the benefit of representation throughout. An investigatory report was produced which was provided to the claimant in advance of the disciplinary hearing and he was given the opportunity to question all those witnesses who attended at the disciplinary hearing. Ideally the claimant would have had Mr Collier's report in advance of the disciplinary hearing but he had a full opportunity to question Mr Collier and this failing had no substantive adverse impact on him or his ability to present his case. There were no other significant procedural flaws.

85. The final issue to consider is whether dismissal was within the band of reasonable responses to the claimant's alleged misconduct.

86. There is no doubt that if the respondent reasonably concluded that the claimant used unnecessary force on a prisoner and assaulted a prisoner, that would amount to gross misconduct. That does not automatically mean however that dismissal is appropriate and the respondent's discipline policy, as described above, sets out in detail what must be taken into account before making a decision on penalty.

87. Mr Hawkings appeared to make his decision very quickly having heard the claimant's mitigation. There was no apparent consideration of his record or service in detail, the circumstances of the event itself or the comments made by the claimant about his reflection on the incident and how he would behave in future. Indeed to the contrary Mr Hawkings concluded from those comments that as the claimant had denied that his conduct was wrong he was not prepared to act within the boundaries of his training and that there was potential for offenders to remain at risk and that he put not only offenders but colleagues at risk. This approach is clearly open to criticism. Given that the claimant had throughout denied any wrongdoing, it was not surprising that he continued that denial in his mitigation. To then conclude from that that he put others at risk is not a conclusion I would make but I cannot find that it was outside the bounds of reasonable responses for Mr Hawkings to make that conclusion.

88. The appeal in this respect was cursory.

89. Overall, therefore, I conclude that the only criticism of the respondent's approach that could potentially lead to this dismissal being unfair is the lack of reasonable grounds for the conclusion that the claimant was guilty of the alleged misconduct. I remind myself that, even if the respondent fails to establish one or more of the three Burchell limbs, the issue remains whether the dismissal fell within the range of reasonable responses. In all the circumstances of this case, and failure to establish reasonable grounds is so fundamental to the question of fairness, I conclude that that dismissal fell out with that range and therefore was unfair.

90. Wrongful Dismissal Having considered very carefully the evidence collected at the time and given at this hearing, and in particular having watched the video

footage of the incident, I do not conclude that the claimant was guilty of misconduct, gross or otherwise. The video is inconclusive as to whether the strikes were with an open hand or closed fist and therefore offensive or defensive. The witness evidence that supports it being offensive is not, in my view, sufficiently compelling to support that finding. I therefore conclude that the claimant was wrongfully dismissed.

91. Contributory conduct Having reached that conclusion on wrongful dismissal, it follows that I consider there is no appropriate reduction to be made to any compensation payable to the claimant on account of any contributory and blameworthy conduct on his part.

Employment Judge K Andrews

Date: 21 July 2017