



EMPLOYMENT TRIBUNALS

Claimant: Marc Fallows

Respondent: Sodexo Limited

Heard at: Manchester via CVP

On: 26 January 2024

Before: Employment Judge Serr

Representation

Claimant: In person

Respondent: Ms R Kight of Counsel

JUDGMENT

1. The complaint of unfair dismissal is not well-founded. The claimant was not unfairly dismissed.

REASONS

1. By a claim form presented on 4 September 2023 the claimant brings a claim for unfair dismissal.

The Issues

2. At the outset of the hearing the tribunal endeavoured to identify with the parties the issues in the claim. The claimant had previously intimated a challenge to the reason for the dismissal. The respondent relied on conduct and the claimant had suggested the real reason for the dismissal was his sickness absence. The claimant confirmed to the Tribunal however that the reason given by the respondent, that of conduct was not challenged.
3. The claimant identified the following issues which he said made his dismissal unfair:

- (i) The respondent placed too much emphasis on the account from his line manager Bruno Sosa particularly given his previous history with the claimant.
 - (ii) The respondent failed to obtain various pieces of evidence being CCTV from the wing; witness statements from Toni Williams, Jill Francis, prisoner m and cleaners on the landing on 23/3/23; a copy of prisoner N's complaint from the incident on 17/10/22.
 - (iii) The claimant was not aware of prisoner N's complaint until March 2023 although the incident had taken place in October 2022.
4. During the course of the hearing it also became clear that the claimant generally challenged the decision to dismiss on the basis that dismissal fell outside a band or range of reasonable responses open to the employer and that he had been denied an appeal.
5. The tribunal stated that it would deal with liability, Polkey and contributory fault. The issue of remedy would be addressed at a later hearing if appropriate.

The Procedure before the tribunal

6. The claimant represented himself and the respondent was represented by Ms Kight of Counsel. The tribunal had a file running to 198 pages and during the course of the hearing the claimant submitted a further additional witness statement from his Trade Union representative Mr Tomkins and some text messages from another person said to be a potential witness, who did not give evidence, explaining why. It also received a chronology from the respondent. The tribunal heard evidence from Marie Durning head of security at HMP Forest Bank who made the decision to dismiss the claimant on 20 July 2023. On behalf of the respondent it also heard evidence from Rebecca Burt the respondent's HR business partner at the prison who primarily gave evidence related to the appeal against dismissal. As will be seen, there was ultimately no appeal that took place in this case. The claimant gave evidence on his own behalf.
7. The tribunal is grateful to both parties for the economy of their submissions and questions which allowed the evidence to be concluded in the allotted time.

The Facts

8. The respondent is a facilities management company. Amongst the services it provides it runs seven prisons across the UK on behalf of the Ministry of Justice. This includes HMP forest bank a category B prison said to accommodate a range of prisoners including long-term and high security prisoners.
9. The claimant commenced employment as a prison custody officer at Forest Bank on 8 May 2017. The claimant's employment was governed by rules of conduct set out in an HR guidance document headed rules of conduct. Under the heading miscellaneous at item 4 the guidance documents states that employees must follow all reasonable and proper requests by or on behalf of supervision and management. Under item 6 it states employees must not engage in any insubordinate, threatening, insulting or violent behaviour be it verbal or physical and must not injure or attempt to injure any other person. Both of these paragraphs are asterisked which according to the policy means a breach of these rules would normally be considered gross misconduct.
10. Sometime after 17 October 2022 (likely to have been a week or two after this date) the respondent received a complaint from a prisoner N. The complaint stated that on 17 October 2022 prisoner N was stood at the open door of E1 landing looking out when the claimant shouted over to another officer, an officer Toni Williams "he's not coming on here". Officer Williams replied "no he's on standard". Prisoner N said "that wing is not for me" at which point prisoner N said that the claimant gave him a torrent of abuse accusing him of sexually touching his friends. The prisoner presume that this related to an earlier incident in 2018 when he was prosecuted for assaulting female officers but found not guilty at trial. The prisoner went on to complain that following the treatment by the claimant he snapped and gave the claimant a torrent of abuse before being told to go in which he did. He stated that the claimant's behaviour was unprofessional and sought an apology.
11. The chronology of what occurred next is slightly complex. Ms Wright a prison governor prepared some terms of reference "to establish if PCO Mark Fallows acted in an unprofessional manner, breaching any of Sodexo's codes of conduct, on the 17/10/2022 when addressing prisoner N in the hub area in the presence of other staff and prisoners, which potentially put the prisoners and staff at risk".
12. This original terms of reference was dated 11 November 2022 but no investigating officer appears to have been identified at this point. The claimant was off sick with knee pain on 17 November 2022 until 13 February 2022 and then off sick with work-related stress from 19 February 2023 to 19 March 2023. The terms of reference (TOR) had been reissued on 6 January 2023 and Stuart Forster from the prison had been identified by this point as

the investigating officer. It seems that he was not over this period notified of either the complaint or the subsequent investigation.

13. Mr Forster's only action in respect of the TOR was to hold a fact finding meeting with a prison officer I Ahmed on 31 January 2023. PO Ahmed in interview stated that on the day in question they were stood watching the medication round and prisoner N and they recall the claimant making a comment of something like I am not taking him. This caused prisoner N to become irate saying that he was not guilty and is proven not guilty. Prisoner N was ushered back in and told PO Ahmed that he had been accused by prison officers in the past of sexually assaulting them. PO Ahmed while stating that they believed the claimant had acted professionally also said that they would not have shouted over and at a prisoner like he did.
14. The Claimant returned to work on 20 March 2023 following the lengthy period of sickness absence previously referred to. On 23 March 2023 Ms Wright received an email from Bruno Sosa the D wing manager and the claimant's manager. The email stated:

During lock up, a prisoner was talking to another at the door, Mr Fallows shouted and used emotive language totally unnecessarily. This created a situation. I intervened and removed the prisoner from the landing and escorted him to his cell with the assistance of PCO Seager.

SPCO Robson was on shift and heard loud voices. Mr Fallows was shouting at the prisoner "I will see you!!".

I spoke to Mr fallows in BH D2 manager's office and asked what had happened. He told me that the prisoner was being noncompliant. I did say to Mr Fallows that this type of approach was not necessary. He then changed the topic of the conversation and told me that my welfare calls to him during his sick period were harassment. That's what his partner told him. Mr Fallows continued to display volatile behaviour whilst I was trying to speak to him and tried to speak over me.

I told Mr Fallows to go to wherever he needed to be for his pm shift. He stood up and walked out of the office and down the stairs. He shouted on the landing "I am not fucking working with this prick; I can't work with this prick". He was clearly referring to me.

This was witnessed by SPCO Robson and multiple prisoners on the landing.

15. The claimant also wrote an email on the same evening stating that due to this evening's events he could no longer work or be around Bruno. He would not be coming in the following day to work.
16. The claimant went off sick again with work-related stress on 24 March 2023. On 27 March 2023 Ms Wright sent updated terms of reference to Mr Forster. The updated terms of reference now included the alleged incident on 23

March 2023 referred to in Mr Sosa's email of the same date. Mr Forster was additionally asked

To establish if PCO Mark Fallows acted in an unprofessional manner, breaching any of Sodexo's codes of conduct, on the 23/03/2023 when addressing prisoner m on houseblock D2 in the presence of other staff and prisoners, which potentially put the prisoners and staff at risk.

To establish if PCO Fallows acted in an unprofessional manner, breaching any of Sodexo's codes of conduct, on the 23/03/202 on houseblock D2 when addressing a member of the management team.

17. Ms Wright received two emails on 29 March related to 23 March incident. A Sally Robson stated that she was in the office when she heard shouting and when she came out of the office she found the claimant and prisoner M nose to nose and Mr Sosa meeting between them. The two were shouting at each other. She saw the claimant enter Mr Sosa's office after prisoner M was locked up and a couple of minutes later come out storm down the stairs and stated that he could not work with that prick and was going home. Mr Sosa was said to be stood right behind at this time.

18. Natalie Seager stated

Just before the incident we had shouted lock up and I had started at cell 31 and was working my way down to cell 17, as I got there, I shouted to M who was stood outside cell 15 and I asked him to make his way to his door as it was bang up. He replied to me "Nat I will be at my door before you get there" and he said this in a joking manner. As I made my way up the stairs, I could hear PCO Fallows shout make your way to your door now and started walking toward M at this point I just carried on locking up not thinking anything of it but then as I looked back, I could see PCO Fallows and M were head-to-head, but I was unable to hear what was being said. As I made my way back down Mr Sosa was there, and we managed to get in the middle of them and we escorted M back to his cell where he was compliant.

After the incident Mr Sosa asked Marc for a chat in his office about 5 minutes later Marc came out the office and down the stairs to the staff office where me and Sally was sat shouting "I'm not working for that prick anymore". However, there was all the cleaners on the landing, and they were watching. Marc then got his bang and walk off the landing.

19. The claimant returned to work on 11 April 2023. On the same day he attended a fact-finding interview with Mr Forster. The tribunal accepts it was on this day for the first time that he learned about the details of the complaint in respect of prisoner N. The incident in respect of 17 October had been referred to in the invitation to the fact finding meeting sent to the claimant on 29 March 2023 while he was off sick.

20. Within the fact-finding interview the claimant accepted in respect of the first incident on 17 October 2022 that he did say in respect of prisoner N "I am not having him" and did point at the prisoner. He accepted that he said "I know what you did" when the prisoner turned round to him and said I ain't no nonce (prison slang for a sex offender). Then prisoner N started shouting

at the claimant, he accepted that he repeated "I know what you did". He was later told by Toni Williams that the prisoner had told her he was going to sniver him.

21. In respect of the second and third incidents (those that occurred with prisoner M and Mr Sosa on 23 March 2023) the claimant stated that prisoner M tried to walk into another prisoner's cell during lock-up to get a vape. There was then an altercation with the claimant and prisoner M as he was being uncooperative. The prisoner refused to return to a cell and the claimant physically squared up to him. Prisoner M started rubbing his forehead against the claimant's nose. Shortly afterwards the claimant entered Mr Sosa's office to discuss the incident with prisoner M. The claimant stated that Mr Sosa was being hostile towards him. There was a discussion about how Mr Sosa had dealt with the claimant's sickness absence which was suggested to have been inappropriate. The claimant accused Mr Sosa of not listening to him. He admitted to calling Mr Sosa a prick repeating that on the stairs in front of cleaners and staff as he left.
22. The claimant later said that within this fact-finding interview he was asked if any other staff members should be interviewed and stated SPCO Williams as she could confirm that prisoner N had made threats against him. The tribunal does not find that this witness was asked to be interviewed by the claimant during this interview. This does not appear in the notes of the fact-finding interview which are otherwise not challenged.
23. Mr Forster undertook fact-finding interviews with a number of other people. He interviewed a PO Tomlinson on 13 April 2023. Mr Sosa himself on 19 April 2023 and PO Robson on 19 April 2023.
24. Tomlinson was interviewed because he had been named as somebody present by the claimant during the first incident with prisoner N. Tomlinson witnessed something of the argument and stated at the fact-finding interview that he told the claimant to go on the wing and chill out which he did.
25. Officer Sosa witnessed something of the altercation between the claimant and prisoner M. The claimant said to prisoner M "get to your fucking door now" the claimant was shouting at prisoner M, was in his face and was being aggressive. Mr Sosa had to get between them. The Claimant and prisoner M were separated the claimant followed prisoner M as he was being ushered away pointing over and shouting loudly I will get you. Mr Sosa stated that the claimant was inciting the prisoner and trying to get a reaction. Mr Sosa said that the use of this language was unnecessary and created a situation that could have resulted in force being used on the prisoner. This particular prisoner had a record of staff assaults with weapons used and Mr Sosa believed that the claimant through his actions put himself and the staff at risk. Mr Sosa said that he asked the claimant to come into his office to discuss the incident after it had been de-escalated. The claimant alleged

that Mr Sosa had harassed him while he was off sick. Mr Sosa asked him to leave the office but he initially refused. He then stood up as he exited he called him a prick which was heard by the cleaners on the landing. As he made his way down the stairs out of the office he shouted in full view of prisoners and staff I'm not fucking working with this prick I can't work with this prick.

26. PO Robson heard raised voices and saw the Claimant and M nose to nose. PO Robson separated them along with Mr Sosa who walked prisoner M back to his cell. She heard the claimant say "I will see you" to prisoner M. She heard the claimant call Mr Sosa a prick and she confirmed that the prisoners on cleaning duty were present when this was said. She said that the incident was unprofessional and should not have happened in front of staff or prisoners.
27. On 20 April 2023 the claimant submitted a grievance in respect of Mr Sosa. The subject matter of the grievance was similar to that in respect of the disciplinary issue that the claimant faced in respect of Mr Sosa by this point. The tribunal was told in evidenced by Ms Burt the email used by the claimant was an incorrect one. The claimant should have received an out of office showing the email address was not in use. The tribunal accepted the evidence of Ms Burt on this point.
28. Mr Forster produced his investigation report in or around late April 2023. He concluded that all the allegations were supported through the fact-finding interviews which were carried out. Due to the evidence gained from the interviews and the claimant's own admissions he stated that the claimant had breached the respondent's rules of conduct. The three incidents were said to be properly characterised as gross misconduct and that a disciplinary hearing should be convened.
29. On 3 May 2023 the claimant was invited to a disciplinary hearing to take place on 11 May 2023. That letter attached to it included a pack of information which the tribunal finds included the complaint by prisoner N in respect of the incident of October 2022. The pack was resent on 5 May 2023.
30. The disciplinary hearing was rescheduled on a number of occasions but eventually took place on 18 May 2023. The hearing was conducted by Ms Durning. The claimant was represented by a trade union official. At the hearing the claimant complained of suffering from a headache, he was offered the opportunity to adjourn but wanted to continue. He later complained again of being unwell and that he could not think properly. The claimant confirmed that he did not feel well enough to continue but was happy for the matter to be concluded based on a written statement that he provided and there was nothing else to be included.
31. The statements provided by the claimant are relatively lengthy although they appear to add little of substance in respect of the facts to that already

indicated in the fact-finding interviews. The claimant raised a number of matters which he said ought to have been investigated by Mr Forster. In respect of the incident of October 2022 with prisoner N he stated this should have been raised earlier with him and that PO Toni Williams should have been interviewed. In respect of the second and third incidents on 23 March 2023 he asked that CCTV footage be obtained of the incident with Mr Sosa. He asked why PO Francis (designated Oscar One) who he had spoken to after the incident with Mr Sosa and who had calmed him down and sent him home had not been interviewed and also the prisoners on cleaning duties had not been interviewed.

32. The claimant had a discussion with Ms Durning on 14 July 2023 by telephone. She enquired about his welfare and asked about an occupational health referral. He stated this was not necessary as he had received assistance from his GP. He confirmed that he wanted the disciplinary proceedings to be concluded based on his written statements and had nothing further to submit.
33. By letter dated 20 July 2023 the claimant was dismissed. The reasons for dismissal are contained in a letter of 20 July headed 'disciplinary hearing outcome dismissal without notice' and a document 'disciplinary meeting case outcome and rationale for decision'. In respect of the incident of October 2022 the claimant on his own admission had shouted I'm not having him and I know what you did. These statements were provocative towards the prisoner and could have placed both the prisoner and staff in the area at risk if the situation escalated. The claimant did not deny the statement but demonstrated no understanding or remorse during the disciplinary process. In respect of allegations 2 and 3 occurring in March 2023, she noted that he did not deny shouting at the prisoner, the escalation was in response to the claimant's actions, his actions were antagonising towards the prisoner and put the prison staff in the area at risk. There was also an exchange with another prisoner following the incident whereby another prisoner has stated to the claimant he fucked with the wrong person and the claimant had responded "yes" which was inappropriate and unprofessional. The claimant had shown no remorse or understanding about his conduct. In respect of the exchange with Mr Sosa the claimant admitted to saying Mr Sosa should shut his mouth open his ears and listen to what he has to say and calling him a prick. This showed a lack of respect and the fact that he had not learned from his actions.
34. The claimant appealed against his dismissal on 1 August 2023. That appeal was wrongly rejected on 9 August as being out of time by the respondent as it had failed to take into account an extension which had been granted by Ms Durning due to the claimant's annual leave (it seems the Respondent erroneously believed the claimant was due to return to work earlier than he was). The claimant followed that up with an email of 9 August to the respondent's HR department saying that his appeal was not out of time as he had been provided with an extension. A further mistake by the respondent meant that the email of 9 August was never followed up. On 12 October 2023 the respondent through Ms Burt wrote to the claimant

apologising and offering an appeal hearing under the disciplinary procedure (which indicated or ought to have done to the claimant that it would be to an independent decision maker). He was to contact HR by 20 October in order to make arrangements. The claimant replied on 17 October 2023 declining the offer of an appeal as by now he had issued a claim to the tribunal and wished to simply pursue that.

The Law

44. The Claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2) or failing that some other substantial reason.
45. The potentially fair reasons in Section 98(2) include a reason which (b) relates to the conduct of the employee.
46. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "...the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case". the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or outwith that band.
47. The starting point in most cases where misconduct is found to have been the reason for dismissal is the approach formulated by Arnold J in *British Home Stores Ltd v Burchell* [1978] IRLR 379. At 304 he stated:

'What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which

to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

49. In *Boys and Girls Welfare Society v McDonald* [1997] ICR 693, the EAT pointed out that *Burchell* had been decided when the burden of proving reasonableness rested with the employer, rather than neutrally as is the position today.

50. The range of reasonable responses test applies both to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances and well as to reasonableness of the decision to dismiss- *Sainsburys Supermarkets Ltd v Hitt* [2002] EWCA Civ. 1588.

Conclusions

Relying on the evidence of Bruno Sosa

51. Despite the claimant asserting to the tribunal that Mr Sosa had been unreasonable towards him or harassed him during his period of sickness there was no evidence that the claimant had ever formally raised a grievance or complaint about Mr Sosa to the respondent. Mr Sosa was the claimant's line manager the evidence that he provided both in his seemingly unprompted email of 23/3/23 and the subsequent fact finding interview accorded to a large extent with the evidence given by others. Accordingly the respondent was entitled to rely on the evidence of Mr Sosa and its decision to do so does not render the claims dismissal unfair.

The CCTV

52. The respondent has a policy of wiping the CCTV within the prison after 14 days. The respondent says that by the time of the hearing with Ms Durning it was no longer available. That itself may not have been an answer to the claimant's objection given that it was incumbent on the respondent to secure and preserve the CCTV if it thought it appropriate following the complaint and incident in respect of 23 March. However Ms Durning said that the CCTV would not have been of any assistance in any event. Most of the conduct around 23 March was admitted by the claimant. Further during the course of the hearing before the tribunal it was confirmed that the CCTV had no audio to evidence what the parties were saying to each other. Accordingly, the failure to preserve the CCTV and interrogate it did not render the claimant's dismissal unfair.

A statement from PCO Toni Williams

53. In her evidence to the tribunal Ms Durning stated that she did not consider it necessary to interview PCO Toni Williams as the claimant had admitted to making the alleged comments and even if she could confirm prisoner N had subsequently threatened the claimant (by saying he would sniver him) that did not justify the claimant's actions. She was entitled to come to this view.

A statement from PO Francis and the Prison Cleaners

54. The Respondent was of the view that PO Francis should have been interviewed as well as the prisoners on cleaning duty. Again Ms Durning's evidence to the tribunal was that given the admissions of the claimant coupled with the evidence from Mr Sosa and the other witnesses it was not necessary to interview any of these persons who would not have added anything material. The tribunal considers that the respondent was entitled to hold this view which did not fall out with that of a reasonable employer.

Prisoner N's complaint

55. The tribunal has found that the claimant did receive prisoner N's complaint as part of the disciplinary pack sent to him or around 3 May 2023. Miss Durning in her evidence told the tribunal that it was not the practice of the respondent to provide staff with any written copies of any complaints raised by prisoners pending the completion of the investigation. This maybe correct but it is unclear why it would not have been possible or indeed advisable to have at least informed him of the gist of the complaint. However the tribunal reminds itself that the claimant was absent for most of this period from work. The tribunal is quite satisfied that the complaint in respect of prisoner N was the subject of an investigation from at least January 2023. While that investigation was never actually concluded prior to the second and third incident in March 2023 occurring it was not the case, as was suggested by the claimant, that incident 1 in October 2022 was simply revived and added to incident 2 and 3 to make the case against the claimant stronger. The way prisoner N's complaint was handled by the respondent did not render the dismissal unfair.

Lack of an Appeal

56. Denying an appeal to an employee against dismissal will often result in a finding of unfair dismissal. The ACAS Code of Practice includes the right to appeal as one of the basic elements of fairness and see *West Midlands Co-operative Society v Tipton* [1986] AC 536 where the House of Lords emphasised the central importance of such a right. The failure to offer an appeal before October 2023 was the Respondent's as it concedes. However the claimant was subsequently offered an appeal when the mistake became known following receipt of the claim to the Tribunal. That offer made clear it would be to an independent decision maker but was

refused by the claimant. Accordingly, the Tribunal is not of the view that in these circumstances the dismissal was rendered unfair by the Respondent's mistakes.

Dismissal a reasonable response

57. The tribunal finds in the circumstances that dismissal was a reasonable response to the misconduct as identified. The claimant had no authority or justification to accept the custody of prisoner N irrespective of what he thought N may have done to his colleagues and his actions risked undermining security in the prison.
58. There was a series or pattern of conduct involving the claimant and prisoners and staff said to be rightly categorised as inflammatory and confrontational. Rather than de-escalate matters the claimant's actions in respect of prisoners N and M were liable to inflame them and the tribunal accept the assertions by the respondent and its witnesses that given the nature of the prison environment particularly in a category B prison and the propensity to violence for some of these prisoners that the claimant's actions in respect of prisoners N and M were liable to threaten the good order and discipline of the prison. The actions of the claimant towards Mr Sosa his line manager was seriously insubordinate, and further the fact this was repeated in front of both co-workers and prisoners charged with cleaning duties was again liable to undermine the authority of prison officers in the eyes of the prisoners thereby undermining good order and discipline. The tribunal further notes that the actions of the claimant could rightfully be said to constitute gross misconduct within the meaning of the employer's policy and further that the evidence of the decision-maker Ms Durning was that the claimant had demonstrated no real insight reflection or remorse during the disciplinary process.
59. For these reasons the claimant's claim for unfair dismissal is not well founded and is dismissed.

Employment Judge Serr

Date 29 January 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

5 February 2024

FOR THE TRIBUNAL OFFICE

Notes

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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