



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms K Lennon

**Respondent:** The Secretary of State For Justice

**HEARD AT:** CROYDON

**On:** 2, 3, 4, 5 May 2017; (Chambers) 7 July 2017

**BEFORE:** EMPLOYMENT JUDGE HALL-SMITH

**MEMBERS:** Ms Y Walsh  
Mr M Sparham

## Representation

**Claimant:** Mr N Toms, Counsel

**Respondent:** Mr J Wayte, Counsel

## JUDGMENT

THE UNANIMOUS JUDGMENT OF THE TRIBUNAL is that:

1. The Claimant was fairly dismissed by the Respondent and accordingly the Claimant's complaint of unfair dismissal is dismissed.
2. The Claimant was not subjected to any detriment on grounds of making protected disclosures.
3. The Claimant was not automatically unfairly dismissed on grounds of making protected disclosures.

## REASONS

1. By a claim form received by the Tribunal on 7 April 2016 the Claimant Ms Kim Lennon brought complaints of unfair dismissal and detriment on

grounds of making a protected disclosure against the Respondent, the Secretary of State for Justice.

2. At the hearing the Claimant was represented by Mr N Toms, Counsel, who called the Claimant to give evidence before the Tribunal. Mr Toms also called Mr Mike Rolfe, National Chair of the Prison Officers Association, to give evidence on behalf of the Tribunal. The Tribunal also read statements of Mr Paul Laxton, Formerly Deputy Governor of Lewes Prison, and Luke Kelly.
3. The Respondent was represented by Mr J Wayte, Counsel, who called the following witnesses on behalf of the Respondent, namely Mr David Breen, Head of Residents and Services Band 7, Prison Governor, Mr Tony Burrows, Head of Security and Intelligence at Lewes Prison, Mr Michael Orchard, Intelligence and Information Manager at the Child Abuse Team at NOMS, Mr James Bourke, formerly Governing Governor of Lewes Prison and Michelle Jarman-Howe, formerly Deputy Director of Public Sector Prisons. There was a bundle of documents before the Tribunal contained in three lever arch files.
4. The issues to be determined by the Tribunal involved the following.
  - 4.1 The Claimant alleges that she made the following disclosures, namely:
    - (a) From September 2013 onwards she raised concerns regarding unsafe working/safety conditions for prisoners on F Wing both verbally and by way of text messages to her line manager, Michael Brown.
    - (b) A Series of incident reports (on the Mercury Intelligence System) between January and August 2014 raising concerns about prisoners distributing drugs and in particular a prisoner knowing her address and overlooking her home from his cell.
    - (c) An email dated 24 January 2014 to residential Governor David Breen raising health and safety concerns.
    - (d) A telephone conversation with Deputy Governor Bob Schewn requesting this prisoner should be moved from F Wing after threatening behaviour and language,
    - (e) A verbal conversation with her line manager Mike Brown in May 2014 namely that a prisoner had threatened her on a regular basis and that the prisoner had been allowed to get away with it because of the Prison Services delays in dealing with a matter.
    - (f) Filing an incident report in May 2014 alleging a prisoner was running rings around Governors because an adjudication hearing had been adjourned.

- (g) A conversation with a Security Governors Tony Burrows in June 2014 regarding the issue of broken CCTV cameras in the visitors' hall.
  - (h) A telephone conversation with Governor Nigel Foote on 7 August 2014 informing him that her line manager was not doing his job and was dishonest.
  - (i) Contacting a local newspaper, The Argus, disclosing information about safety on or before 13 August 2015.
  - (j) Contacting the BBC South East News Team and disclosing information about safety matters on 14 August 2015.
- 4.2 Were the above disclosures, qualifying disclosures of information within the meaning of Section 43B of the Employment Rights Act 1996?
- 4.3 Did the Claimant have a reasonable belief that the information disclosed caused a danger to the health and safety of any individual and/or that she had made a disclosure of information pursuant to Section 43B(1)(a), (b) and (f)?
- 4.4 Did the Claimant reasonably believe that the disclosure was in the public interest?
- 4.5 In relation to the disclosure to the media, was the disclosure a protected disclosure?
- 4.6 Was the Claimant subject to a detriment on grounds of making protected disclosures, in the form of suspension during the period of investigation to allegations of misconduct?

***Unfair Dismissal.***

- 4.7 The Respondent contends that the Claimant was dismissed for the potentially fair reason of conduct.
- 4.8 Was the Claimant fairly dismissed within the meaning of Section 98(4) of the Employment Rights Act 1996?
- 4.9 Was the Claimant automatically unfairly dismissed on the grounds of making one or more of the alleged protected disclosures Section 103A of the 1996 Act?
- 4.10 Was the Claimant wrongfully dismissed by being summarily dismissed in breach of her contract of employment?

## The Facts

5. The Claimant, Ms Kim Lennon, commenced her employment with the Respondent, the Secretary of State for Justice, as a Prison Officer at HMP Lewes (The Prison).
6. The Claimant was a dedicated Prison Officer and there was no issue that she valued her role as a Prison Officer. The Tribunal noted the following in an appraisal dated 29 September 2012, page 104:

**Kim continues to show her commitment to the Unit and is always looking at ways of progressing the Wing, evening exercises, for example. She has a strong sense of right and wrong and believes that prisoners deserve to receive their entitlements. She will go out of her way to ensure this; she will also challenge wrongdoing or inappropriate behaviour. Kim has good prison craft skills and is now using her experience in an effective and positive way.**

7. The Claimant conceded that she had a problem with alcohol. In 2010 the Claimant was suspended following her arrest and charge of being drunk and disorderly, page 95.
8. On 10 August 2010 the Claimant was given a final written warning as a result of a conviction for being drunk and disorderly.
9. On 24 January 2014 the Claimant emailed David Breen Head of Residents and Services – Prison Governor stating that she was becoming stressed and feeling vulnerable and unsafe on her Wing, F Wing and that she feared for her safety and that of her colleagues, page 113. The Claimant's email was detailed and clearly set out her concerns and included the following:

**My other concerns are the mornings on F Wing. I cannot speak for other Wings. We have two officers taken from us for visits three mornings a week and one officer to the IPR.**

**That leaves two officers on the 2's where it can be extremely busy with phone calls, apps collecting newspapers and other twos duties. This does not take into account transfers that need to go to reception, prisoners who need to be taken to the segregation for adjudications. This leaves one officer on the landings where they can not be heard by officers in the tombs and there are no other officers as they have gone to visit IPR.**

**When I find myself in this position I can at times feels vulnerable as some prisoners are being put on the Wing by staff early and not being put behind their door by officers. Prisoners can be put back on the Wing from other areas of workplaces but the twos are not informed on many occasions and I find myself in a position where I am on the landings on my own and challenging prisoners to go behind the door and getting plenty of abuse for doing so! I am not going to change as this is my job I guess, I do**

**feel unsafe and I am sure that some of my colleagues do whom I've spoken to. As I say, I am not going to change and will remain robust in dealing with prisoners' behaviour but I feel physical assault is most definitely a possibility!**

10. The Tribunal found that David Breen did not respond to the Claimant's email, although he alleged that he had spoken to the Claimant's line manager Michael Brown about his contents.
11. The Tribunal was not impressed by David Breen's failure to respond to the Claimant's email. We considered that the Claimant had raised serious issues about her working conditions and her potential vulnerability, and we were surprised that David Breen had failed to communicate directly with the Claimant or to even afford her the courtesy of a reply or acknowledgement.
12. On 17 March 2014 the Claimant emailed Paul Stevens, Health and Safety Officer, pages 116 – 177 stating that she was becoming stressed and feeling vulnerable and unsafe on the Wing and that she feared for her safety and that of her colleagues. The Claimant concluded her email with the following:

**I believe this to be a management issue around the jail which I feel needs to be addressed. I know I am not the only person amongst us officers to talk about this and I don't know any other members of staff who have raised this but I feel it needs to be raised.**

**Lewes staff are brilliant at coming together when there is a crisis but there is much infighting going on amongst staff and I feel that we are just being thrown into new ways of working and its put up or shut up!**

13. Paul Stevens neither replied nor acknowledged the Claimant's email.
14. The Tribunal found that the Claimant had raised wholly genuine concerns and that she was feeling increasingly stressed and vulnerable as a result of the Respondent through its management failing to take any steps either to reassure her or to address her concerns, a failure which we considered inexcusable.
15. Prior to sending her email to Paul Stevens, the Claimant had been on sick leave and she was referred to the Respondent's Occupational Health, ATOS.
16. On 13 February 2014 ATOS produced its report on the Claimant, pages 114 – 115, based on an assessment of the Claimant. The report confirmed the Claimant was fit for her substantive role but it advised management to undertake a risk assessment to raise the specific concerns the Claimant had raised in relation to work related issues. The Claimant attributed her sickness absence to work related issues.

17. The Respondent failed to undertake a risk assessment of the Claimant recommended in the ATOS report. It was the Respondent's case that risk assessments were undertaken and in his evidence to the Tribunal Mr David Breen said that he had felt that there was sufficient risk assessment in place and although the ATOS recommendation had been taken seriously he said the advice was misguided.
18. The Tribunal considered that the Respondent's approach to the concerns raised by the Claimant and to the recommendation in the ATOS report evidenced a reaction which we felt fell far short of what should reasonably have been expected of an employer, such as the Prison Service, following concern raised by a member of staff.
19. On 9 May 2014 and 11 May 2014 the Claimant submitted intelligence reports relating to incidents involving conduct of prisoners pages 120 and 128. The intelligence reports were submitted electronically and were intended to identify issues to prison intelligence which would make recommendations. We found that the intelligence reports were routinely generated and that Lewes Prison intelligence received about three hundred and fifty to three hundred and seventy such reports per month, namely about four thousand per annum.
20. The Tribunal noted that in the intelligence report dated 11 May 2014 the Claimant alleged that she had been seriously threatened to be assaulted by a prisoner.
21. In further intelligence reports dated 11 May 2014 and 21 May 2014, pages 132 and 141, issues were raised about the availability of the drug 'spice' based upon smells of such drug coming from cells. In the report dated 21 May 2014 the Claimant alleged that she had put in a report previously and that she was aware that a particular prisoner knew where she lived and that he could see where she walked from his window, page 141.
22. On 12 May 2014 the Claimant texted her line manager, Mike Brown requesting to come off F Wing. The Claimant's text contained the following, page 134:

**Mike. I would like to request I come off F Wing. I feel as if some people are trying 2 break me! Best I ask 2 come off even though I actually love that Wing. Had enough! X X.**
23. In June 2014 the Claimant had spoken to Tony Burrows, the Security Governor in relation to broken CCTV cameras in the visiting hall.
24. The Tribunal found that the Claimant was becoming increasingly stressed about her working environment on F Wing, involving the conduct of some prisoners towards her and her concerns about the availability of the drug spice. The Tribunal accepted that the role of a Prison Officer in the Prison Service is a challenging role but that a Prison Officer such as the Claimant should be afforded some reassurance that at the very least their employer, the Prison Service, appreciated the challenges which we considered were likely to surface as reflected in the intelligence reports.

25. The documentary evidence revealed a number of texts, emails and intelligence reports generated by the Claimant, in which she raised concerns about her working environment. The Tribunal did not consider that it was necessary to refer to each and every issue raised by the Claimant before August 2014, but they evidenced the fact that the Claimant had raised genuine concerns about her working environment and her safety.
26. On 13 August 2014 the Press Officer at the prison was informed by a local newspaper, The Argus, that it had received information from a Prison Officer. It is common ground that the Claimant was the provider of the information to the Argus.
27. On 11 August 2014 the Claimant was signed off sick with stress, page 168. The Claimant never returned to work for the Respondent.
28. On the same day 11 August, the Claimant telephoned the prison and spoke to Operating Support Grade Alison Murphy. The reason for the Claimant's call was that she wanted to obtain the home telephone number of the Governor Footee.
29. In an email dated 13 August 2014 Alison Murphy emailed Tony Burrows, page 162, but complaining about the Claimant's conduct over the telephone. Alison Murphy's email included the following:

**The caller was Officer Kim Lennon who was drunk demanding Governor Footee's home phone number.**

**I told Ms Lennon that I wasn't prepared to give her number as was confidential and also inappropriate for me to do so. She put the phone down.**

**Approximately five minutes later she was on the phone again, swearing and asking why and put the phone down.**

**I was then subjected to abuse, her saying, you have to give me Nigel's number, I again refused too. With this she told me I do not understand her and that she was sick of being treated like dirt, being called a slag by prisoners on F Wing. I suggested that she approach her line manager about it, she then said what was the point as everyone was fucking useless. Anything I did suggest was met with further abusive language. I said there was nothing more I would or could do. That then opened up again to verbally abuse me personally saying that I shouldn't be on the care team as I walk around the prisoners as if I own the place and said who the fuck do you think you are. She stated I didn't know what it was like as I was only an OSG and I was only a member of the care team she wouldn't come to me as I was useless and would repeat everything.**

**I found that this most offensive as I undertake my duty as a member the care team with utter respect for the staff. I told her that I was not prepared to put up with anymore and decided then to terminate the call.**

30. On 8 August 2014 the Claimant telephoned Nigel Footee, the Governor, Governor at Lewes, complaining about her line manager, Mike Brown and about the conditions on F wing where she worked, which she described as dangerous. The Claimant also raised a number of further issues including pencils were being broken off in locks at each end of the landing which caused doors to be jammed shut, thereby preventing both officers and prisoners in being able to get in and out of the landing. The Claimant also stated that the Drug and Rehabilitation Therapy Team (the TAR Team) would not go onto the landing because it was dangerous. The Claimant alleged that Governor Footee asked her if she had been drinking and that she had replied that it was only 11.15am. Nigel Footee proposed that the Claimant should come and see him on the following Monday Morning.
31. The Claimant did not take up Governor Footee's invitation to see him on Monday 11 August 2014, but on Wednesday 13 August 2014 the Claimant contacted the Argus and provided it with her concerns about health and safety at the prison.
32. On 14 August 2014 Alison Murphy emailed Tony Burrows, page 184, stating that she had received a phone call from the Claimant asking to speak to the duty Governor. Alison Murphy's email continued with the following:

**I asked her what for and she replied it was none of my business. Unless it was an emergency I would not put the call through.**

**Again she stated it was important as she had to tell you that the shit was going to hit the fan sometime tomorrow. She remained calm throughout the call but I did say it was sad as I am incapable of doing my job and if that is the way I want to play it good.**
33. On 14 August 2014 the Claimant was interviewed by the BBC pages 185 – 186.
34. In the interview the Claimant stated that the smuggling of drugs was rife and that the Wings resembled a war zone. The Claimant also compliant of insufficient staff and that she feared that a member of staff would be killed unless action was taken to address a shortage of staff.
35. On the same day 14 August 2014 the Argus published an article about conditions at the prison based on information provided by the Claimant.
36. On 18 August 2014 Governor Nigel Footee wrote to the Claimant, page 195, informing her that he had commissioned an investigation into a number of issues involving the allegation that she had failed to meet the required



standards of behaviour expected of National Offender Management Service staff.

37. On 24 August 2014 the Claimant telephoned Michael Brown in the early hours of the morning. In an email of the same date 24 August 2014 to Governor Nigel Foote Michael Brown set out an account of the calls. The Claimant herself was unable to remember the content of her telephone calls with Michael Brown. Michael Brown's email contained the following:

**This morning at approximately 00:15 hours on 24/08/14 I received a call on the ordinary office phone from Officer Lennon. She asked me to get you on the phone immediately as she wants to talk to you. When I refused she insisted that I contact the duty Governor and that she would talk to them and who it was. I informed her that it was Tony Burrows and that whilst he was duty Governor, he was not in the jail. She stated that something was going to blow and when I pressed her for more information she refused stating that she did not trust me and to get the duty Governor. I informed her that I would not and that unless it was urgent I would leave a message for him in the morning.**

**At 00:30 hours I received a second phone call. Kim stated she was going to report me in the morning for obstruction as I would not get the duty Governor for her on the phone. Again I informed her that unless she told me why she wanted to speak with the Governor or indeed, unless it was urgent then I would leave a message for him in the morning.**

**At 01:15 I received the third phone call accusing me of being a liar to both to staff and prisoner, and stating that she read the text and that she cared more for me than I did of her. I asked her when did she become this nasty horrible person and stop being abusive to me but she continued with her on slaughter at which point I told her I was hanging up.**

**At 01:25 hours I received a fourth call of the night again she stated that she did not trust me, that I was a liar and that Nigel told her that I had gone to him stating that I had received drunken phone calls from her at night. She then accused me of wanting to sleep with her which I found totally inappropriate and wholly offensive. I again asked when did she turn into this horrible person. She then called me a manipulator and a liar. I asked her not to contact me again either at work or on my mobile. I then put the phone down. Please see the log of calls confirmed by the COMMS Officer Mr Page. I have copied in Tony Burrows as he was duty Governor on the morning in question."**

38. The Claimant did not challenge Michael Brown's account of the telephone calls but alleged that he did not want to take up the matter further and he agreed that he had not wanted to take the matter further, which was inconsistent with the conclusion of his email in which he requested an

injunction against the Claimant in contacting him either on his mobile phone or while he was on duty at the prison.

39. The terms of investigation of the Claimant, page 196 involved the following:

**Officer Kim Lennon has potentially discredited the Prison Service by disclosing official information to both the Argus local press and whilst being interviewed on television for the BBC news both published on 14 August 2014.**

**Officer Lennon has also used abusive language over the telephone to OSG A Murphy during 13 – 14 August 2014 causing distress.”**

40. For reasons unexplained at the Tribunal hearing no active steps were taken into the investigation until 2015, when Michael Orchard, intelligence and Information Manager at the Child Abuse Team at NOMS was appointed in January 2015 to carry out an investigation into the Claimant's conduct. Lesley, Giles Band 8 Head of function had been originally appointed to undertake the investigation but she was replaced by Michael Orchard for reasons he understood had involved her availability. In any event the Claimant had been away on sick leave from 13 August 2014 to 3 January 2015.
41. On 2 January 2015 the Claimant was suspended, page 263. The letter informing her of her suspension stated that she had been suspended rather than being placed on alternative duties or detached duty, because of the seriousness of the allegation and the risks it could pose to any prison establishment.
42. On 26 January 2015 there was an incident at the prison in which David Breen, alleged that the Claimant had been verbally abusive to him when he was duty Governor. The incident was contained in an email dated 27 January 2015 from David Breen to the Governor in which he alleged abusive, offensive and aggressive conduct on the part of the Claimant involving the Claimant pointing and shouting directly into his face. The email also stated that CCTV Footage clearly showed a two minute confrontation between the Claimant and David Breen. The Claimant disputed the allegations, but the Tribunal noted that David Breen had recorded his account of the incident on the day following the alleged incident.
43. On 29 January 2015 Tony Williams, Deputy Governor wrote to the Claimant informing her of her alleged conduct to David Breen on 26 January 2015 which had been captured on CCTV Footage and that further conditions had been imposed on her suspension, restricting her access to the prison precincts.
44. In January 2015 further issues surfaced about the Claimant's conduct involving alleged inappropriate comments the Claimant had made through social media, Facebook and she had also published her suspension letter on Facebook and had made comments about the disciplinary process. This

conduct was also included in the investigation. Michael Orchard also viewed the CCTV Footage of the incident involving the Claimant and David Breen, and although it did not include sound, Michael Orchard considered that it revealed the Claimant being verbally and physically aggressive towards David Breen.

45. There was subsequently a delay in the investigation involving the closure of HMP Blantyre House where Michael Orchard was deputy Governor. The closure involved the immediate transfer of long-term prisoners to another establishment. The Claimant was informed that there would be a delay in the investigation.
46. The delays in the progress of the investigation we found were caused by a number of genuine reasons, such as the closure of Blantyre House but the Claimant was informed of the reasons. Thus in correspondence between the Claimant and Michael Orchard between 24 and 27 April 2015 pages 395(a) and (c) reasons for the delay were explained and it was proposed that the Claimant herself should be interviewed on 5 May 2015 when her Union representative would be available.
47. On 29 April 2015 Michael Orchard sent the Claimant and her Union representative Mark Johnson proposed questions he intended to ask the Claimant during her interview.
48. On 5 May 2015 when Michael Orchard attended the location for the interview with the Claimant he was informed by Mark Johnson that the Claimant would not be attending. The Claimant was referred to Occupational Health and was absent on sick leave from 14 May 2015 until 7 July 2015.
49. The Occupational report on the Claimant dated 14 May 2015 stated that the Claimant had a psychological condition and that she was currently unfit for work in any capacity.
50. Michael Orchard was informed that the Claimant was fit for duty by the beginning of July 2015 and Michael Orchard made arrangements with the Claimant's Trade Union representative, page 512, and it was agreed that the Claimant would be available for an interview on 5 August 2014.
51. On 12 July 2015 the Claimant turned up at the main entrance to the prison and came into the foyer at about 21:30. The Claimant had previously telephoned the prison and was abusive to staff and had been warned by the duty Governor that the police would be called if this should happen again.
52. The Claimant swore at a number of Prison Officers and she was abusive using offensive language. One of the officers requested the police to be contacted in order to enforce the Claimant's removal, but the Claimant left before the police attended. The Claimant herself had no recollection of that incident.
53. At paragraph 112 of her witness statement the Claimant stated the following:

- **I am ashamed of my behaviour, or at least what the Respondent has told me about it, after my suspension, when I went to the gate in July 2015 I had had a few drinks, hadn't thought about it. I have been sober for many months but the suspension was taking a toll on my mental health. Unfortunately, one of the consequences of the investigation taking so long was the impact that this had on me and my mental health. The Respondent was fully aware of my history in this regard and yet did nothing to help me during this time.**
54. The Claimant had been informed on a number of occasions about the Respondent's support services and had herself been away sick from May 2015 until July 2015.
  55. There was a further incident on 4 August 2015 when the Claimant telephoned the prison asking to be put through to the duty Governor. During the course of the conversation the Claimant threatened to kill herself and she subsequently made over twelve telephone calls over a short space of time in the early hours of the morning, none of which were answered, page 575. The incident which took place on 23 July 2015 was not included in Michael Orchard's investigation.
  56. The Claimant was interviewed by Michael Orchard on 3 September 2015 it was a long interview and the transcript covered twenty-two close typed pages, pages 617 – 638.
  57. On 4 September 2015 the Claimant emailed Michael Orchard, page 639 stating that both she and her representative Mark Johnson were happy with the way the interview had been conducted.
  58. The Tribunal noted that the Claimant was asked whether she had been aware of the reporting wrongdoing policy and the Claimant replied *I don't trust the system I'm afraid*", page 627.
  59. Michael Orchard completed his report on 28 September 2015, pages 656 – 664 and he recommended that there was sufficient evidence to test all the allegations against the Claimant apart from the allegations involving Mike Brown at a disciplinary hearing.
  60. James Bourke, who was then Governing Governor of Lewes Prison conducted the Claimant's disciplinary hearing. By letter dated 2 October 2015 James Bourke informed the Claimant of the following:

**It is alleged that you have behaved in a manner which is in breach of the standards set out in the NOMS Code of Conduct and discipline and you are therefore required to attend a disciplinary hearing. The following claims have been made against you and have been investigated in accordance with NOMS policy. If proven these allegations would constitute gross misconduct.**

**Bringing discredit on the Prison Service abusive language/behaviour towards staff.**

61. The Tribunal noted that at paragraph 7.12 of the Respondent's conduct and disciplinary policy at paragraph 7.7 – 7.13, pages 1129 – 1130 provided the following.

**“7.7 In establishments, the authority for hearing cases were the potential penalties include dismissal resides with the Governing Governor.**

**7.12 There is no requirement for the hearing authority to approach the case de novo, ie have no previous knowledge of the case. However, the hearing authority must not:**

- **Be the person who investigated the alleged of the suspected misconduct.**
- **Be a probable witness at the hearing.**
- **Seek to unduly influence the findings of an investigation prior to the hearing.”**

62. The disciplinary hearing commenced on 9 November 2015 and was heard over four days, namely 9, 10, 16 and 17 November 2015, pages 704 – 852.

63. The Tribunal found that the hearing was very thorough and afforded the Claimant the opportunity to explain her position, in circumstances where there was no issue that the matters under investigation and subsequently concluded in the charges to be concluded at the hearing, were not challenged by the Claimant.

64. On 17 November 2015 James Bourke informed the Claimant that she was to be dismissed from the Prison Service.

65. On 20 November 2015 James Bourke wrote to the Claimant, pages 860 to 863, confirming his decision to dismiss the Claimant and set out in detail his reasons for his decision.

66. In relation to the allegation of bringing discredit on the Prison Service by the unauthorised disclosure of official information James Bourke's letter stated the following:

**You accepted the allegation and accordingly I found the allegation proven. My reason for finding the allegation proven are that you presented defence that you had no choice but to take this action and sought to portray yourself as a “whistle blower”. We heard evidence from the Investigating Officer Mr Orchard who made it clear that you understood the policy on sharing privileged information and that you clearly placed in the public domain information without any authority.**

**Mr Tony Burrows Head of Security explained when he gave evidence to the hearing that your actions increased the risk to staff. Mr Mike Brown, Residential Band 5 Custodial Manager also confirmed his view that your actions increased the risk to your colleagues. Placing the public domain information about trafficking methods, staff shortages and weaknesses in the CCTV system increased the risk to staff and prisoners.**

**Both Mr Burrows and Mr Breen as members of the SMT were clear in their evidence that when staff raise concerns about matters of safety these concerns are addressed. The email that your representative produced at the hearing and asked Mr Breen to comment on demonstrated that Mr Breen had indeed discussed your concerns with your line Manager Mr Brown.**

**I am also satisfied that appropriate action was taken based on the concerns raised by you and other staff. Undoubtedly the prison was going through a difficult time as staff numbers were reduced to save money and preserve the future of the public sector prison service.**

**The Health and Safety Manager Mr Paul Stevens gave evidence where he was clear that the safe systems of work were in place and despite any changes to structure staff deployment, systems of work were satisfactory to ensure the safety of staff. I do not accept your defence that you were a whistleblower. You did not follow any of the policies outlined. You demonstrated conviction that your opinion was more important than any other. You then took your concerns straight to the press and in doing so damaged the safety and security of your colleagues and the reputation of HMP Lewes and the service. I also note that during the investigation process you placed private correspondence between you and the investigation commissioner in the public domain. I am not confident that you would not repeat this behaviour in the future. There has been irrefutable breakdown of trust between your employer NOMS and you as an employee.”**

67. In relation to the allegation of abusive language/behaviour towards staff James Bourke accepted OSG Murphy’s account of the Claimant’s conduct towards her and that the Claimant had been rude, abusive and threatening to staff at the gate on 12 July 2015.
68. In relation to the charge involving Mr Breen, James Bourke decided not to give a disciplinary penalty because he noted that although the incident took place on 26 January 2015 it had not been added to the terms of reference until 21 July 2015.
69. The Tribunal considered that James Bourke’s letter clearly set out both James Bourke’s findings and conclusions and his reasons for his conclusion that the appropriate penalty should be one of dismissal.

70. The Claimant appealed against the decision to dismiss her. The claimed grounds of appeal. The Claimant's grounds of appeal, pages 883 to 885 involved undue severe penalty, evidence which could have affected the outcome was not take into account, the proceedings were unfair and breached the rules of natural justice, and the original finding had been against the weight of the evidence
71. The Claimant's appeal was heard by Michelle Jarman-Howe, acting Executive Director of Public Sector Prisons (South). The hearing took place on eighth of January 2016 and the Claimant attended accompanied by her PA oh a representative Mike Rolfe. The transcript of the appeal hearing is at pages 976 to 1005.
72. The Claimant accepted that she had admitted some misconduct and she stated that she believed that the reason for her dismissal was the series of protected disclosures that it she had made and her contact with the media. The transcript of the hearing evidence the fact that the claimant was able to address and expand her grounds of appeal.
73. Michelle Jarman-Howe upheld the decision to dismiss the Claimant and on 27 January 2016 she wrote to the Claimant informing her of the outcome of her appeal pages, 1030 to 1035. The Tribunal found that the letter considered the Claimant's grounds of appeal in significant detail and fully set out the reasons why she was unable to uphold the Claimant's appeal. By way of example in relation to the ground of appeal that the original finding was against the weight of the evidence Michelle Jarman-Howe's letter included the following:

**You state that much of what you disclosed to the media is in the public domain, with the exception of the security cameras and visits.**

**I think that it is legitimate for you to report any alleged wrongdoing but there is a well structured process in place to do this and there were number of alternative steps that should have been followed which you failed to do. The policy says the employee does not feel that it is appropriate to raise the issues through their management chain they can, exceptionally, raise their concerns through the NOMS reporting wrongdoing hotline, the civil service commission or, in highly exceptional circumstances Carol Carpenter, Louise Spence and Alison Turner. Instead you chose to report your personal concerns regarding the prison to the media. In addition to the options above, you confirm that at no time did you seek to raise these issues by your union, the Independent Monitoring Board (IBM) or Her Majesty's Inspectorate of Prisons (HMIP).**

**Specifically it is of note that despite a clear invitation to meet with Mr Foote to discuss your concerns, you reported sick and within days spoke to a newspaper. I also note there were clear examples of where the prison had responded to concerns raised by you in intelligence reports. You state that you felt you had no option other than to go to the press but I do not agree. You could have**

rescheduled the meeting with the Governor, spoken with your union, raised your concern during a staff engagement event, or written directly to the Governor. Indeed, you admitted yourself that it was a big jump from dealing with your concerns internally to go to the press.

You express regret at your decision to get the media in this instance and undertook that you would not do this in future. This assurance is somewhat undermined however by your later decision, taken during a period when you were deemed fit and well, to also share details of your subsequent dismissal with the press. Your decision to play out your personal grievance in the press following dismissal had no bearing on conditions in the prison and again seriously brings into question our trust in you as an employee

74. Michelle Jarman-Howe's letter also stated that the Claimant's abusive language/behaviour towards staff individually warranted her dismissal and that if either of the charges had been considered in isolation they each would have resulted in her dismissal. The letter concluded by stating

**I also concur with Mr Bourke's view that the prison services trust in you as an employee is broken down and therefore alternative penalties including the transfer of post would not be an appropriate option.**

### **Submissions**

75. The Tribunal heard submissions from Mr Waite on behalf of the Respondent and from Mr Toms on behalf of the Claimant. Both Mr Waite and Mr Toms supplemented their oral submissions with written submissions.

### **The Law**

76. Section 40 3B of the employment rights act 1996 provides:

***(1) in this part a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-***

***(d) that the health or safety of any individual has been, is being or is likely to be endangered.***

77. Section 43G of the act provides under the heading 'Disclosure in other cases':

***(1) A qualifying disclosure is made in accordance with this section if –***

***(b) the worker reasonably believes that the information disclosed, and any allegation contained in it are substantially true,***

***(c) he does not make the disclosure for purposes of personal gain,***



- (d) any of the conditions in subsection 2 is met, and**
- (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.**
- (2) The conditions referred to in subsection 1DR –**

  - (a) that, at the time he makes a disclosure, the worker reasonably believes that he would be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,**
  - (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure,, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or**
  - (c) that the worker has previously made disclosure of substantially the same information –**

    - (i) to his employer, or**
    - (ii) in accordance with section 43F,**
- (3) in determining for the purposes of section 1E whether it is reasonable for the worker to make disclosure, regard shall be had, in particular, to –**

  - (a) the identity of the person to whom the disclosure is made,**
  - (b) at the seriousness of the relevant failure,**
  - (c) whether the relevant failure is continuing or is likely to occur in the future,**
  - (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,**
  - (e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and**
  - (f) in a case falling within subsection 2(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.**
- (4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by previous disclosures mentioned in subsection to**

***see even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.***

78. Section 43H provides

**Disclosure of exceptionally serious failure**

***(1) A qualifying disclosure is made in accordance with this section if***

–

***(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,***

***(c) he does not make the disclosure for purposes of personal gain,***

***(d) the relevant failure is of an exceptionally serious nature, and***

***(e) in all the circumstances of the case, it is reasonable for him to make disclosure.***

***(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make disclosure, regard shall be had, in particular to the identity of the person to whom the disclosure is made.***

79. Section 103A of the 1996 act provides:

***An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employer made a protected disclosure.***

80. The Respondent contended that the Claimant was dismissed for the potentially fair reason of conduct.

81. The Tribunal has to remind itself that in a conduct dismissal it is not its role to substitute its own view for that of the Respondent employer, but to review the entire process undertaken by the Respondent employer which led to the Claimant's dismissal and to determine whether the Respondent acted as a reasonable employer throughout the entire process namely whether the steps undertaken by the Respondent, including the sanction of dismissal, fell within the range of reasonable responses available to a reasonable employer.

82. The guidelines of the Employment Appeal Tribunal in ***British Home Stores Ltd-v-Burchell [1980] ICR 303*** are relevant, namely that the employer has to hold a reasonable belief that the employee concerned was responsible for misconduct alleged, that he had reasonable grounds upon which to sustain that belief and that at a time when the employer formed that belief it had undertaken a reasonable investigation into circumstances.

83. Further even if the Respondent's employer has complied with the **Burchell** guidelines, the sanction of dismissal must be a reasonable sanction in the circumstances, namely one that falls within the scope or range of reasonable responses available to a reasonable employer. It does not follow that a harsh sanction is necessarily an unreasonable sanction. The statutory framework is set out in s.98(4) of the Employment Rights Act 1996 which provides:

***(4)...the determination of the question whether dismissal is fair or unfair (having regard to the reason 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 shall be determined***
- (b) shall be determined in accordance with equity and the substantial merits of the case.***

## Conclusions

84. The Tribunal reached its conclusions having regard to the evidence, to the parties submissions and to the relevant law.
85. In the circumstances of this case there is no issue at that the Claimant made a number of disclosures relating to concerns about safety at the position at the prison and also concerns about her own safety.
86. It is common ground that a number of the Claimant's disclosures were made to her employer. We found that the disciplinary process leading to the Claimant's dismissal was triggered by the Claimants disclosures to the Argus newspaper and to the BBC.
87. The Claimant had been interviewed by the BBC on 14 of August 2014 and on the same day the Argus published an article about conditions at the prison based on information supplied by the Claimant. It was only following the disclosures to the Argus and to the BBC that Governor Nigel Foote wrote to the Claimant informing her that he had commissioned an investigation into issues involving allegation that she had failed to meet the required standards of behaviour expected of National Offender Management service staff.
88. By this stage the Claimant was away on sick leave and she was not fit for work until third of January 2015. It was then that the Claimant was suspended on second of January 2015. We concluded that there were valid grounds for her suspension having regard to the Claimant's conduct involving the information she had provided to at the Argus and to the BBC.

89. the Tribunal has expressed its concerns about the Respondent's apparent lack of reaction to at the serious issues raised by the Claimant in relation to conditions at the prison and her own concerns about her safety. However we considered that there was force in the submissions of Mr Wayte on behalf of the Respondent, that the Claimant as an experienced prison officer was likely to have had awareness of the wider implications of revealing security information, such as the the fact that the camera system was not operating effectively. In our judgement revealing such information to the wider public could have led to very significant security implications.
90. We considered that was no justification for the Claimant in making the disclosures to the Argus and to the BBC before she had met the prison Governor Nigel Foote. A meeting had been arranged to take place on 11 August 2014 but the Claimant chose not to attend that meeting and went straight to the media.
91. The Claimant accepted in cross examination that she agreed that she had disclosed official matters to the media and had not received permission to do so. In addition at she accepted at that she had not given the Respondent any chance to prepare for the impact of the disclosures and that she had given the Respondent no advance notice. Further the Claimant accepted and that she had been in breach of the Respondents outside activities policy at paragraph 2.11.
92. It was also put to the Claimant that did she not think that Governor Foote deserved the opportunity of speaking to her before she meant to the media and the Claimant agreed that she could have done a grievance. The Claimant also maintained that she had not known that she was a whistleblower when she was asked what steps she had taken to find out about wrongdoing on the whistleblowing policies.
93. The Tribunal found the Claimant's explanation for not meeting Governor Nigel Foote on the following Monday unconvincing. In her witness statement at paragraph 66 the Claimant stated it just one out of my head. The trust and confidence I had had disappeared. I was raising very serious concerns but instead of them being investigated, I was being accused of drinking.
94. Although the Claimant, as we found, had raised genuine concerns, in circumstances where the Claimant had failed to consider the internal policies available to her and to take up Governor Foote's invitation to meet her on 11 August 2014, we were not satisfied that the Claimant held a reasonable belief that the disclosure at that stage was in the public interest. On the Claimant's own evidence she appears to have been piqued by the Governor's enquiry whether she had been drinking, a reasonable enquiry having regard to the Claimants alcohol problems and to the fact that in cross examination at the Claimant stated *'after I had had a rant with him, he said come and see me on Monday'*.
95. Further we considered that as an experienced prison officer the Claimant ought to have taken on board the fact that a media exposure of her concerns about security and the potential impact upon staff and prisoners in

the particular environment of the prison was unlikely to achieve any benefit at least in the short term. We considered that there were alternative steps the Claimant could have taken, and we found that there was no justification for the Claimant in failing to meet Governor Foote, as he proposed, or to use the available policies, having regard to the particular security implications in her working environment.

96. The Claimant's media exposures were made to an outside entity. We concluded that in all circumstances it was not reasonable for the Claimant to have made such disclosures. The Claimant had failed to explore the alternative approaches available to her before she went to the media. In addition to the proposed meeting with Governor Foote, there were available the reporting wrongdoing policy, the grievance procedure, and when it was put to the Claimant that she could have approached HM Inspectorate, the Claimant replied that she could have done a lot of things.
97. In relation to a number of the disclosures to the media, we considered that there was little or no grounds for a contention that the prison had been at fault. By way of example the non-detectability of the drug spice was, as submitted by Mr Wayte, a recent problem which the prison was doing its best to address and there was no need for the Claimant to publicise through the media that there was no means of testing for the drug. Again we did not consider that there was any justification for the disclosure to the media of the problems experienced with the cameras.
98. In our judgment James Bourke's letter to the Claimant informing her of her dismissal clearly set out the Respondent's reasons. We considered that the Respondent was justified in its conclusions that the Claimant's actions had increased the risk to staff and to her colleagues. The letter clearly stated the following
- ‘.. placing the power in the public domain information about trafficking methods, staff shortages, and weaknesses in the CCTV's sister system increase the risk to staff and prisoners.**
99. In the concluding paragraph to his letter James Burke pointed out the following,
- I do not accept your defence that you are a whistleblower. You did not follow any of the policies outlined. You demonstrated conviction that your opinion was more important than any other. You then took your concern straight to the press and in doing so damaged the safety and security of your colleagues and the reputation of HMP Lewes and the service. I also note that during the investigation process you placed private correspondence between you and investigation Commissioner in the public domain. I am not confident that you would not repeat this behaviour in the future. There has been irrefutable breakdown of trust between your employer and OMS and you as an employee.**
100. The disclosures were not the only reason for the Claimant's dismissal. The Claimant's language to OS G Murphy on 11 of August 2014 was abusive

and offensive, particularly in circumstances where OS G Murphy was a more junior colleague. We concluded that a reasonable employer would have regarded such conduct in itself as amounting to gross misconduct.

101. Although there was delay in undertaking the investigation, we found that for the most part there were genuine reasons for the delay, and the last incident under investigation was 12 July 2015. The Claimant was in any event absent through sickness from August 2014 until the beginning of January 2015.
102. We concluded that the Claimant was fairly dismissed by the Respondent for reasons of gross misconduct having regard to section 98(4) of the Employment Rights Act 1996. In other words, we concluded that the Respondent acted as a reasonable employer in its decision to dismiss the Claimant.
103. Accordingly, it is the unanimous judgment of the Tribunal that the Claimant's complaint of unfair dismissal is dismissed.

Employment Judge M Hall-Smith

Date: 10 October 2017