EMPLOYMENT TRIBUNALS

Claimant: Mr L Burns

Respondent: Nottingham City Council

Heard at: Nottingham

On: Monday 3 December to Thursday 6 December 2018 inclusive
Reserved to 11 December 2018

Before: Employment Judge Blackwell
Members: Mr R Jones
Mr C Goldson

Representation
Claimant: Mr R Rixon, Legal Representative
Respondent: Miss C Jennings of Counsel

RESERVED JUDGMENT

The unanimous decision of the tribunal is:-

1. The claim of unfair dismissal succeeds.

2. The claim of discrimination pursuant to the protected characteristic of disability fails and is dismissed.

RESERVED REASONS

1. Mr Rixon represented the Claimant, who he called to give evidence. Miss Jennings ably represented the Respondent and she called Jeffrey Surgay (the investigating officer), Peter Mitchell (the dismissing officer), Gordon Thomson (who heard the appeal and Mr Shakeel Khalil and Ms Sheila Birch from the Council's Human Resources Department. There was an agreed bundle of documents and references are to page numbers in that bundle.

Issues and the law

Unfair dismissal

2. It is for the employer, Nottingham City Council (NCC) to prove a potentially fair reason for dismissal as is required by section 98(1) and (2) of the Employment Rights Act 1996 (the 1996 Act). If the employer proves such a potentially fair reason for dismissal, then it is for the tribunal to apply to that reason the statutory test of fairness set out in subsection (4) of section 98. The issues were set out in a structured way in EJ Evans's case management summary which was sent to the parties on 23 June 2018. As follows:

> "…
>
> *a. Was the reason for the Claimant's dismissal misconduct?*
>
> *b. Did the Respondent act reasonably in dismissing him for that reason?*
>
> *c. Was the final written warning dated 6 June 2016 given in good faith or was it manifestly inappropriate/plainly ought not to have been imposed?*
>
> *d. Was the final written warning dated 19 January 2017 reasonable in all the circumstances:*
>
> *i. Was there a reasonable belief in the misconduct?* (We have added held on reasonable grounds)
>
> *ii. Did it follow a reasonable investigation that fell within the band of reasonable investigations?*
>
> *iii. Did it fall outside the band of reasonable responses open to a reasonable employer?*
>
> …"

Discrimination

3. Mr Burns brings a single claim under section 15 of the Equality Act 2010 (EqA). With the agreement of the parties, EJ Evans set out the rationale for the claim as follows:-

> "*i. The Claimant relies on the questioning of his honesty and his consequent dismissal as unfavourable treatment.*
>
> *j. Was any such unfavourable treatment on the ground of something arising as a consequence of the Claimant's partial hearing loss?*

k. The Claimant relies on the 'something arising' as "not having taken an active part in the locker room conversation" as a result of his alleged "tendency to zone out of conversations in noisy/difficult environments".

The third data protection issue

4. This was a matter raised by Miss Jennings in that between Mr Burns' dismissal and the outcome of his appeal hearing, there was an alleged third data protection breach (see 719) which NCC argue would have led to Mr Burns' dismissal in any event should the tribunal find that his dismissal was unfair.

5. It is common ground that that is a matter we have to decide on the basis of such evidence as is before us and such decision will inevitably involve a degree of speculation. The decision we reach should be expressed in percentage terms, ie what is the likelihood of Mr Burns being dismissed.

Findings of fact

6. Mr Burns was employed from 2 February 2004 as a Community Protection Officer (CPO) until his dismissal with notice with an effective date of termination of 13 April 2017.

7. NCC is a large employer with its own HR Department.

The first data protection incident

8. In October 2014, NCC were informed that a number of CPOs were disclosing confidential material accessed from the police computer system to trade union officials who were not authorised to receive it. The disclosures were apparently made to assist the trade unions in dealing with what they saw as health and safety issues for their members. This led to an investigation (see 157) and to Mr Burns being issued with a final written warning (see 303 to 308). The investigation was thorough and the disciplinary letter issued by Mr David Walker is comprehensive and balanced.

9. The final written warning at page 308 contains the following paragraph:-

> "…
>
> *If during the time that the warning remains live, your conduct and performance have been satisfactory and there have been no further incidents of misconduct, the warning will be considered 'spent' and removed from your file.*
> *If during the time that the warning remains live there is any further misconduct, it may lead to your dismissal.*
>
> …"

10. That warning was to be live from 26 March 2015 to 25 March 2016.

The second data protection incident

11. On 11 July 2015, the Centre Manager of the Sheila Roper Community Centre contacted the Community Protection headquarters to say that CPO Burns had left papers at that Centre. Mr Burns used that Centre as a temporary office because it was on his beat. Amongst the documents found were fixed penalty notice books which contained the personal details of those who had been issued with such penalty notices. The documents dated back to July 2014.

12. Mr Burns was suspended on 19 August 2015.

13. We should note at this point that Mr Burns had lengthy periods of absence from work as follows –
    (a) from 22 December 2014 to 30 September 2015 through stress and depression;
    (b) from 7 December 2015 to 11 March 2016 mainly as a consequence of Mr Burns suffering a heart attack;
    (c) from 15 July 2017 until his dismissal, again with stress and depression.

14. There began an investigation which led to six witnesses being interviewed, including the two permanent employees of the Sheila Roper Community Centre. One of these alleged that Mr Burns had been keeping papers there since 2011. The papers were kept in a locked cabinet; that both permanent members of the staff had access to that cupboard and it also appeared that on the few occasions that the Centre was rented to the public, members of the public would also have had access to the cupboard.

15. We should note at this point that throughout his disciplinary hearings and before us, Mr Burns makes much of the alleged discrepancy between when Mr Mitchell said that he first reported the data protection breach (see 149, ie July 2015) 'verbally' and the freedom of information response at pages 540 and 541. In our view, the two are consistent and we accept Mr Mitchell's evidence that he did verbally report the breach in July 2015 and we note that the Freedom of Information Act disclosure records that informal verbal notifications were not recorded prior to February 2016.

16. On 6 June 2016, Mr Burns was issued with a second final written warning, again by David Walker, which we see at page 526. Again, Mr Walker's disciplinary letter imposing the second final written warning is both careful and balanced. Mr Burns' main point of mitigation, whilst admitting that he had left the material in the cupboard, was that they had been there only that day, 11 December 2014, and he was prevented from retrieving them by events and his subsequent illness. Mr Walker understandably did not believe that explanation in the face of the evidence from the witnesses at the Centre.

17. Mr Walker went on to explain that the decision whether to issue another final written warning or to dismiss was finely balanced. However, he came

to the conclusion that a final written warning was appropriate. The letter contained the same paragraph as we have set out above warning Mr Burns as to his future conduct.

18. We have carefully reviewed the extensive material in the bundle relating to both final written warnings and we are satisfied that a thorough and careful disciplinary process was carried out on both occasions. We are also satisfied that Mr Walker's conclusions in both cases are plainly not manifestly inappropriate and that both final written warnings fell well within the band of reasonable responses. Indeed, many employers would have dismissed in relation to the misconduct that led to the second written warning of 6 June 2016.

19. We also note that throughout both disciplinary proceedings Mr Burns was represented by his trade union.

The locker room incident

20. On 20 April 2016, Staff Officer Butler overhead a conversation in the locker room at the Central Police Station at Byron House. He recorded what he had overheard in a written statement which he compiled (pages 569 and 570) the day after the incident. His evidence was to the effect that he saw CPOs Romero, Stephenson and Burns getting changed and talking amongst themselves. He heard Romero and Stephenson talking loudly, discussing how other CPOs who had worked at Canning Police Station had caused issues and made complaints in order to get a move away to another station. He heard Romero make reference to CPOs Lefkelis and Graley who had both made complaints and moved. He states that when Romero made reference to Graley getting his way by causing trouble, he heard Burns and Stephenson laugh in response. His statement goes on:-

> "*CPO STEPHENSON then asked if CPO HARGREAVES had got his move away. CPO ROMERO replied by saying. "HE'S GONE BROTHER. HE GOT OUT. HE'S THERE NOW".*
>
> *CPO STEPHENSON said "WHERE IS HE NOW". CPO ROMERO replied with "HE'S AT OXCLOSE . HE'S THERE AS WE SPEAK".*
>
> *CPO STEPHENSON then said IT'S YOUR TURN TO CAUSE TROUBLE NEXT MANNY"* (ie Romero) *CPO ROMERO replied by saying "HELL YEAH BROTHER. MY TURN TO GET OUT NEXT".*
>
> *I heard CPO BURNS laugh, then say "BYE" and I saw him leave the locker room. …*"

21. On the basis of that report, Mr Mitchell (as we find he was entitled to do) held fact finding meetings with Mr Stephenson, Mr Burns and Mr Romero and we see the results respectively at pages 572, 573 and 574. The record of the meeting with Mr Burns is very brief and reads in its entirety as follows:

"*PM* (ie Mitchell)	*Introduction, fact find following locker room conversation, Overhead Lol B and 2 colleagues telling about WH* (ie Wayne Hobbs).
LB (ie Burns)	*Not guilty. I have not got an axe to grind. Will go on record saying Wayne has been wonderful to me.*
PM	*Do you think that is a plan against Wayne, with the "Your turn next" comment?*
LB	*I wasn't present to that. Didn't hear that find it quite bizarre.*
PM	*Do you know of any systematic attempt to bully Wayne*
LB	*I know nothing. I would remember hearing that. I was in the locker room but don't know why I have been dragged in*
PM	*You were 3 together*
LB	*Whatever, I didn't hear it*
PM	*Please don't discuss this with anyone else.*"

22. Again, in accordance with NCC policy, Mr Mitchell quite properly instructed Mr Surgay to carry out a disciplinary investigation and his report is at pages 552 to 599 and was completed on 31 July 2016.

23. On 8 July 2016, Mr Burns raised a formal grievance against Mr Mitchell setting out a number of complaints, mainly centring on Mr Mitchell's attempts to move Mr Burns from the Canning Circus Station to the Central Police Station. He also alleges that Mr Mitchell has "*treated me differently from my peers"*. He says that he would submit further details in due course. In fact, despite many requests from NCC's HR Department, he never did.

24. On page 546 Mr Burns alleges that Mr Mitchell's actions are designed to force Mr Burns to resign.

25. As a consequence of an occupational health report, Mr Burns' complaint about being moved was resolved in that he was allowed to stay where he was. The other elements of the grievance were never formally dealt with but we accept that that was mainly as a consequence of Mr Burns not setting out detailed grounds upon which his grievance was based.

26. It is important to set the context in which the disciplinary action against Messrs Burns, Romero and Stephenson was taken. To do that, we have noted that part of Mr Surgay's report which records his summary of an interview SCPO Hobbs at pages 559 and 560.

27. It seems to us that this is another example of the 'new broom syndrome'. SCPO Hobbs took over the station at which Mr Burns worked in October 2014 and undoubtedly ruffled a number of feathers by changing working practices. As a consequence, according to Mr Hobbs "*He had received no support. He had had his car scratched and his office chair urinated on and an allegation had been made which led to a criminal investigation."* According to Mr Hobbs, the campaign against him had been going on for

18 months. We have no doubt that this background would have been the subject of much locker room gossip and would have been known to senior management. We accept that it was NCC's duty to protect SCPO Hobbs against any such behaviour as is recorded in SCPO Hobbs' interview.

28. On 9 August 2016, Mr Burns was suspended and invited to attend a disciplinary hearing. There was a charge of gross misconduct expressed as follows:

> "…
>
> *On 20 April 2016 you were overheard in the male locker room at Byron House colluding with colleagues to raise a malicious grievance against your line manager, Senior Community Protection Officer, Wayne Hobbs. And that subsequently, on 22 April 2016 a GRV-1 form against SCPO Hobbs was received alleging victimisation, bullying and harassment.*
>
> …"

29. That was Mr Mitchell's formulation, assisted by HR. The same charge was levelled against Messrs Romero and Stephenson. Romero was dismissed and Stephenson was issued with a final written warning. Mr Mitchell conducted both of those disciplinary processes.

30. Mr Romero's grievance begins at page 563 and is a lengthy document ending at 567. It makes a number of serious allegations against SCPO Hobbs, the main one being that Romero had been victimised as a consequence of supporting two other CPOs in bringing grievances against SCPO Hobbs. On the face of the document, there is nothing to indicate that the grievance is malicious, although plainly an investigation might have established that it was. In fact, there was no investigation into Romero's grievance because of the disciplinary process which led to his dismissal.

31. The disciplinary hearing eventually took place on 9 January 2017. Mr Burns supported by his trade union had made a number of attempts to remove Mr Mitchell as the disciplinary officer. However, we note that the first such attempt was made after a hearing date had been fixed and had passed because of the unavailability of the trade union representative. We also note that the long delay in having a disciplinary hearing was mainly caused by Mr Burns' ill health and the unavailability of a trade union representative.

32. Returning to Mr Surgay's investigatory report, he interviewed Mr Stephenson (pages 574 to 579), Mr Burns (580 to 583), Mr Romero (584 to 591) and Mr Butler (597 to 599). Mr Butler stood by his original statement but we note that the allegation that Mr Burns had laughed was not specifically put to him, notwithstanding that Mr Burns had denied laughing in response to comments by his colleagues. We note also that Mr Burns raised for the first time at page 581 that he was slightly hard of hearing in his left ear but "*I still pick up most things*". Mr Burns' evidence

throughout was that he had no recollection of the locker room conversation. In summary, Mr Stephenson accepted that it had taken place but that it had been locker room banter. Mr Romero initially denied being a part of such a conversation but later accepted that it had taken place but he also described it as locker room banter.

33. The notes of Mr Burns' disciplinary hearing begin at page 660. Mr Surgay was present and was questioned by Mr Needham, Mr Burns' trade union representative. It is common ground that Mr Butler had never met Mr Burns and Mr Burns queried how Butler could have recognised his laugh given that he did not see him laugh and had never met him before. That point was put to Mr Surgay and then again to Mr Butler, who was also present to be questioned. Mr Butler was again challenged on how he could have recognised Mr Burns' laugh. Also put to him was that there were two PCSOs, Proudley and Sandhu, present in the locker room who Mr Butler had not seen and it was put to him "*It wouldn't be out of the realms of possibility that they could have laughed"*. Again, Mr Butler is not recorded as answering that point.

34. We should note that the reference to Proudley and Sandhu arises because prior to the disciplinary hearing, Mr Burns' trade union representative requested that they be interviewed. Stephenson, in his fact finding meeting with Mr Mitchell in answer to Mr Mitchell's question "*who else was there"*, replied "*Manny, Lol and PCSOs Nick Proudley and Amadeep Sandho"* (Sandhu). Neither Mr Mitchell nor Mr Surgay ever sought to interview Proudley or Sandhu.

35. Returning to the disciplinary hearing, Mr Burns is repeatedly questioned on the premise that he must have heard what was said and had laughed in response to the remarks recorded by Mr Butler. Although Mr Needham at 661 said that Mr Burns accepted he laughed as he left the locker room, Mr Burns later repeated that he had no recollection of laughing at any time and again repeated that he had no recollection of the conversation between Romero and Stephenson.

36. Mr Mitchell adjourned the hearing with a view to bringing Proudley and Sandhu to the resumed hearing. In fact, both declined to attend, Sandhu saying he had no recollection of the event, which was now some 9 months away. Proudley initially said that he would give a statement but then retracted.

37. Thus, the disciplinary hearing was reconvened on 19 January without any evidence from Proudley or Sandhu. The reconvened notes begin at 669. The trade union allege that Sandhu and Proudley had been got at. We think that is highly unlikely.

38. Mr Mitchell adjourned to consider his decision and returned with the decision that he would issue a further final written warning which would have the consequence that Mr Burns would be dismissed. Mr Mitchell is recorded as stating as follows:-

> "… t*hat he believed a conversation did take place in the locker room and he believed Lol* (Burns) *heard it. PM went on to say that Lol had made matters worse by claiming he had not heard anything.*
>
> *PM stated that had Lol been honest and open from the beginning in that he had heard the conversation and had admitted that he had laughed given he was in the middle of the alleged conversation "I would have got the truth from you from the beginning" PM stated that the other two colleagues subject to the disciplinary had at no stage mentioned Lol was not part of the conversation. PM stated that "and I don't think you have been truthful with us on this ".*
>
> *…"*

39. We note that the conclusion that Romero and Stephenson had at no stage mentioned that Burns was not part of the conversation is, at best, an inference because neither was asked that direct question. Indeed, though it is in the context of whether Mr Burns was a part of the group harassment SCPO Hobbs, Mr Stephenson says that Burns was not a part of that group. So, if there is an inference to be drawn, it is contrary to that of Mr Mitchell's.

40. Beginning at page 105 is Mr Mitchell's decision letter of 30 January 2017.

41. In relation to the failure to interview Sandhu and Proudley, Mr Mitchell says:-

> "*…*
>
> *The PCO's had had no involvement in the alleged conversation, the investigation, nor were they witnesses to the alleged incident so could not, in my view, substantiate the report. …*"

42. Plainly, Mr Mitchell could not support those contentions. They were said to be present by Stephenson. They might or might not have heard the conversation and thus they might or might not provide relevant evidence. Given that they had a different employer and were not managed by SCPO Hobbs, they might have provided unbiased evidence. He then goes on to blame Mr Burns and his trade union for not calling them earlier, notwithstanding that it was he who was informed by Mr Stephenson two days after the incident that the PCSOs were present.

43. Mr Mitchell goes on to record that he regarded the key questions as follows:

> "*Whether on balance the conversation in the locker room took place as reported and whether you were part of the conversation and Whether on balance the subsequent grievance submitted by your colleague on 22 April against Wayne Hobbs was as a result of the conversation."*

44. He appears to have concluded that the answer to the first question was yes. He says as follows at the top of page 108:-

> "*When specifically asked in his Disciplinary Hearing who was telling the truth about what happened in the locker room, Jordon Stephenson stated that you were lying about not having heard anything in the locker room …*"

45. We note that in relation to that statement, there is nothing in the contemporaneous documents to support it. It was certainly never put to Mr Burns during the disciplinary process. In cross-examination, Mr Mitchell asserted that he remembered it being said. In our view, he is mistaken. We prefer the contemporaneous records.

46. Mr Mitchell went on:-

> "*In his statement, Mike Butler said that he had heard you laugh twice;*
>
> - *Once when Manuel Romero made a comment that CPO Graley 'got his way by causing trouble' and again*
> - *When Manuel Romero shortly after made the comment 'Hell yeah brother my turn to get out next'.*
>
> *In the Fact Find meeting you stated that you were not present when the comment 'Your turn next to cause trouble' was made by Jordan and that you 'know nothing' and that you would remember hearing the comment. You did not at that early stage mention deafness in one year.*
> *Jordan Stephenson stated in his Disciplinary Hearing that he had worked with you for 8 years and that he had never heard you mention that you were hard of hearing. …*"

47. Again, there is no reference to this statement from Mr Stephenson in the contemporaneous records. Again, it was not put to Mr Burns. Again, Mr Mitchell asserts that he did make the statement and again we consider that he is mistaken.

48. Mr Mitchell went on:-

> "*Both Jordan Stephenson and Manuel Romero both admitted that a conversation had indeed taken place in the locker room but you maintain throughout that you did not hear anything. …*"

49. Mr Mitchell then concluded:-

> "*Based on the evidence presented to me within the Investigation Report, the witness statements and in light of what I have heard in the Disciplinary Hearing, I have concluded that on balance the conversation within the male locker room did take place and that you deliberately gave a false statement on two occasions when asked about this. This has seriously brought into question your honesty and demonstrated lack of integrity on your part.*

> *In light of the above I have also concluded that the subsequent Grievance against your line manager, Wayne Hobbs, submitted on 22 April 2016 was, on balance, malicious. …*"

50. We assume that Mr Mitchell in reaching that final conclusion about the grievance is referring to the disciplinary process brought against Mr Burns. We can see little or no basis on those documents for reaching the conclusion that the grievance was malicious.

51. Mr Mitchell makes reference to the final written warning issued on 6 June 2017 and he takes that into account in reaching his decision. Once again, he says:-

> "*It is disappointing therefore to find you in a similar situation where your integrity is once again under question. As I stated at the hearing, I find it difficult to believe that you were not involved in the locker room conversation. That conversation was held to discuss bringing a series of planned grievances against your manager which is a serious matter. …*"

52. It is far from clear therefore whether Mr Mitchell concluded that the grievance brought by Romero was "*as a result of the conversation*". He does not refer to that part of Mr Surgay's report which points to a number of emails indicating that Romero had been contemplating and preparing a grievance several weeks before the locker room conversation.

53. As he was entitled to do, Mr Burns appealed on 23 February 2017 and we see that lengthy document beginning at page 688.

54. There was some confusion during the hearing as to whether the appeal hearing which took place before Mr Thomson (a manager from a different department) on 24 March 2017 was entitled to distil the lengthy grounds of appeal submitted by Mr Burns to the six set out at 115 wherein Mr Thomson records the six points of appeal that he would deal with. Mr Burns accepted in cross-examination that he was bound by Mr Needham's decision to condense the grounds of appeal.

55. At page 114, Mr Thomson sets out the purpose of the appeal, which he has taken directly from the appropriate appeals procedure. In summary, the appeal was to take the form of a review and not a re-hearing.

56. The first ground of appeal is "*That the Management Rationale provided by PM did not follow procedure and the process was therefore unfair*".

57. That rationale was a summary by Mr Mitchell of his reasons for dismissal and he also commented upon the grounds of appeal.

58. We agree with Mr Thomson that there is nothing in that ground of appeal that renders the dismissal unfair.

59. The second ground of appeal is that PM had a conflict of interest to act as disciplining officer due to an outstanding unresolved grievance filed

against him by LB and should not have been allowed to conduct the disciplinary hearing. Mr Thomson does a lengthy and thorough trawl of the relevant documents and Mr Thomson in dismissing this ground of appeal relies principally on the basis that the Council's procedures do not expressly prohibit it. In our view, he misses the main thrust of the argument, namely that in the interests of natural justice Mr Mitchell should not have conducted the disciplinary process, which could lead to Mr Burns' dismissal, whilst there is an unresolved grievance raised by Mr Burns against Mr Mitchell. We find it surprising that in an organisation of this size, Mr Mitchell was not substituted, if only to protect him and prevent the matter being raised as a ground of appeal. We recognise that it is a common tactic for employees to raise a grievance so as to avoid a particular disciplining officer and as a means of delay.

60. Our conclusion is the same as Mr Thomson's but for the reasons advanced by Miss Jennings in her written submissions at paragraph 17, principally that there was no basis for the grievance.

61. The third ground of appeal is "*That discipline procedure was not followed because PM took part in the Fact-Find investigation and was also the Disciplining Officer.*"

62. We agree with Mr Thomson that there is no basis for this ground. Mr Thomson was the only available manager at the relevant time and his involvement was to do no more than carry out three initial interviews. All three of these witnesses were re-interviewed by Mr Surgay and we therefore conclude there is no basis for this ground of appeal.

63. The fourth appeal point is "*That disciplinary procedure was not followed because LB's requested two (2) witnesses be interviewed during the Disciplinary Hearing and this was denied by PM.*"

64. This ground of appeal is perhaps not expressed as well as it might be. The allegation could perhaps have been better expressed as follows: 'That there was a failure to interview PCSOs Proudley and Sandhu, notwithstanding that Stephenson had informed Mr Mitchell on 22 April that they were present in the locker room'.

65. Mr Thomson states at page 134:-

> "…
>
> *On the second point, although only JoS stated that PCSO's NP/AS were in the locker room, the Workplace Investigator could have interviewed them during the Investigation. As per the policies and guidance, it is reasonable to assume PCSO's NP/AS may potentially have been relevant witnesses. JeS did not interview them and did not reference why in the Workplace Investigation Report. Although the impact these witnesses would have had cannot now be ascertained, their involvement at that time would have removed all the current doubt.*

,,,"

66. Notwithstanding this conclusion, Mr Thomson's final view was that that ground of appeal could not be upheld because the likely impact appeared to be low. We disagree with that conclusion and will explain why in our conclusions.

67. The fifth point of appeal is as follows: "*That LB was not privy to information referred to by PM in his disciplinary hearing decision letter, that LB had not had a right of reply thereon and that the process was therefore unfair.*"

68. We have referred to this issue above in our findings of fact at paragraphs 43 to 47.

69. Mr Thomson at 137 says the following:-

> "*…*
>
> *Given the complexities of this case and the fact that there are two other disciplinary actions connected to the same case a degree of cross-over is inevitable. It would appear that the three statements above have been made by PM to triangulate his conclusions as to what, on balance, happened in the locker room on 20 April 2016.*
>
> *…*"

70. With respect, Mr Thomson does not address the point raised by the ground of appeal, nor has he picked up on the point that the two alleged statements by Stephenson are not recorded in the contemporaneous documents that relate to Mr Burns' dismissal. He also fails to deal with the fact that Mr Mitchell clearly relied upon those two statements in concluding that Mr Burns was lying and that the statements were never put to Mr Burns. We disagree with Mr Thomson's conclusion and will expand in our own conclusions.

71. Ground six is "*That the allegation that LB was colluding with other colleagues is simply not true and that the disciplinary action is wholly unjustified*".

72. Mr Thomson's conclusions are set out at page 143 but he, like Mr Mitchell, does not directly answer the question whether Mr Burns is guilty as charged. As to whether Mr Burns was lying, he says:-

> - "*The differences of the three accounts of those involved raised genuine doubts in PM's mind as to the honesty and integrity of the people involved. This is reasonable conclusion.*
> - *LB has not been able to answer questions put to him to PM's satisfaction as Disciplining Officer.*
>
> *…*"

73. We disagree with Mr Thomson's conclusion and will explain why in our conclusions but we view it as a significant failure on Mr Thomson's part that he has not got to the heart of the matter, namely was Mr Burns guilty of colluding as set out in the allegation of gross misconduct against him.

Conclusions

Unfair dismissal

74. Miss Jennings correctly cautions us as follows by quoting Mummery LJ in the case of ***London Ambulance -v- Moore [2009] IRLR 563*** at paragraph 43:-

> "*It is all too easy, even for an experienced ET to slip into substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.*"

75. We take that warning on board but would say that in reaching our conclusions, we have relied almost entirely on the contemporaneous documents and our interpretation thereof. We also accept that the band of reasonable responses test applies not only to the decision to dismiss but also to the investigation. Further, the burden of proof on this point is neutral.

76. The first matter to determine is whether Mr Mitchell was entitled to rely upon the final written warning issued on 6 June 2016. For the reasons advance in our findings of fact at paragraphs 8 to 19 we conclude that he was.

77. The second matter is therefore whether NCC have proved a potentially fair reason for dismissal. Mr Rixon made a rather half-hearted attempt at relying upon Mr Mitchell's alleged bias against Mr Burns based upon the grievance raised by Mr Burns. We do not believe that Mr Mitchell was biased against Mr Burns and we conclude that he certainly believed that Mr Burns had lied throughout the disciplinary process in that Mr Mitchell believed that he had heard the conversation between Romero and Stephenson and had laughed as a way of showing support twice during that short conversation. Although Mr Mitchell in cross-examination did assert that he believed that Mr Burns had been colluding with Romero and Stephenson, it is hard to see that emerging from either the record at page 670 and the subsequent letter confirming the dismissal beginning at page 105. On balance, we accept that a potentially fair reason has been made out, namely conduct and that Mr Mitchell at least genuinely believed that Mr Burns had lied about his involvement.

78. We turn now to whether Mr Mitchell had reasonable grounds to hold that belief at the time of dismissal. We start with the allegation made against Mr Burns. While it might just have been appropriate to the alleged conduct of Romero and Stephenson, it is in relation to Mr Burns; a gross exaggeration on the basis of Mr Butler's evidence, which is the sum total of the evidence levelled against Mr Burns. Again, we remind ourselves that in relation to the reasonable grounds question, the burden of proof is neutral and that we must not substitute our judgment for that of the objectively judged reasonable employer.

79. Whether an employer is entitled to hold a view on reasonable grounds also depends upon whether there has been an investigation that is reasonable in all the circumstances. In that regard, the major criticism we have of the investigation is the failure to interview the PCSOs Proudley and Sandhu. This is a disciplinary process that led to the dismissal of two employees and the issue of a final written warning against the third. We are mindful of the context in relation to SCPO Hobbs as set out in Mr Surgay's report.

80. Again, we remind ourselves that the test is does the investigation fall within the band of reasonable responses. In our view, it does not because Mr Stephenson told Mr Mitchell two days after the locker room conversation that there were two other potential witnesses present, neither Mr Mitchell nor Mr Surgay pursued that avenue of investigation and in our view the reasons given by Mr Mitchell for not doing so are plainly spurious. It is not credible that Nottinghamshire Police would not have responded to a request from the City Council to interview two of their PCSOs. Further, we note that eventually Mr Mitchell did seek to interview the two PCSOs but it was too late. This is a large organisation who appointed a dedicated investigating officer. We therefore conclude that the investigation was significantly flawed because of the failure to interview Sandhu and Proudley.

81. We turn now to the matter of the alleged statements by Stephenson relied upon by Mr Mitchell in both his dismissal letter and his rationale which was presented to the appeal. We have concluded above that these two statements were not made and it is common ground that they were not put at any stage to Mr Burns. Given that they were relied upon by Mr Mitchell, that failure alone would have rendered the dismissal unfair.

82. We turn now, however, to the central issue in this case which is whether NCC had reasonable grounds to conclude that Mr Burns was guilty of the misconduct set out throughout the disciplinary process.

83. In our view unfortunately because the charge of gross misconduct is plainly grossly exaggerated, we nonetheless have to remind ourselves that we should not forensically examine such wording but seek to understand what was in the employer's mind. We think Mr Mitchell believed that Mr Burns had heard the conversation between Romero and Stephenson and that he had in some way supported/participated in the conversation by laughing twice.

84. However you put the point, the first question to ask is whether or not it was likely that Mr Burns would either actively or passively participate in furthering the type of serious misconduct perpetrated against SCPO Hobbs as described in Mr Surgay's report.

85. In our view, the evidence on that point is clear. The very first remark of Mr Burns in the disciplinary process in response to "O*verheard Burns and two colleagues telling about WH Burns replies 'Not guilty. I have not got an axe to grind. Will go on record saying Wayne has been wonderful to me."*

86. The next piece of evidence emerges from the interview of Mr Stephenson at page 577. Mr Surgay asked a number of questions about the campaign against SCPO Hobbs and then asks: "*What about CPO Burns*", Stephenson replies: "*He's had very little input to do with Wayne*". Surgay asks: "*Is he part of it or not".* Stephenson replies: "*No"*.

87. More tellingly however is the evidence of SCPO Hobbs himself recorded at pages 560 and 561. Hobbs describes CPO Burns as having done "*nothing but impress me*".

88. Hobbs is also recorded as saying:-

> "*However, despite the alleged content of the locker room conversation and not disputing the veracity of Staff Officer Butler's account he* (Hobbs) *did not feel that CPO Stephenson or CPO Burns had colluded against him adding that both officers had been through difficult times in the recent past.*"

89. Thus, the evidence that Burns would be a part of any act aimed against Hobbs is conclusively to the contrary.

90. It seems to us that neither Mr Mitchell nor Mr Thomson in his review have had any regard to that evidence and that has led them into error.

91. No reasonable employer could have concluded on the basis of Butler's evidence at its highest that Burns would have been party to any form of act against Hobbs.

92. Another matter which does not seem to have been put in the balance was the evidence that Romero had for some weeks prior to the locker room incident been planning to raise a grievance against Hobbs. Further, we can see no basis on the documents that have been disclosed to us that Romero's grievance was malicious. We accept that it may have been, but we do not consider that Mr Mitchell was entitled to come to the conclusion on what he had seen that it was.

93. As we have noted, Mr Mitchell, particularly at page 670, appears to rely heavily on his belief that Burns had lied. We think it likely that Mr Mitchell was forced to rely upon that conclusion because he appreciated the weakness of the actual charge against Mr Burns. In our view, the assertion "*that he must have heard*" and he must have laughed based as

they were entirely on Mr Butler's evidence, in the absence of two potential witnesses, cannot amount to reasonable grounds for holding the belief that Mr Burns had lied.

94. For these reasons, we find the dismissal to be unfair. The principal reason for so finding is the lack of reasonable grounds upon which to hold the belief that Mr Burns was guilty of gross misconduct.

95. We also find on the basis of the evidence we have heard and read, that Mr Burns did not contribute to that dismissal. Further, in the light of the finding that the dismissal was in substance unfair, ***Polkey*** issues do not arise.

Disability discrimination

96. We have set out above EJ Evans' careful clarification of the Claimant's case but we still find it hard to follow.

97. The unfavourable treatment is clearly the questioning of Mr Burns' dishonesty and his consequent dismissal.

98. The difficult question is, was any such unfavourable treatment on the ground of something arising as a consequence of the Claimant's partial hearing loss. The Claimant relies on the something arising as "*not having taken an active part in the locker room conversation*" as a result of his alleged "*tendency to zone out of conversations in noisy, difficult environments*".

99. However, in cross-examination, that latter allegation which had been formulated by his advisers was not supported by his evidence. This appears to remove an essential element in the logic that would lead to a finding in Mr Burns' favour.

100. We appreciate that the question of whether the unfavourable treatment was on the grounds of something arising as a consequence of the Claimant's partial hearing loss has only to be a much looser connection than the normal direct consequence necessary for direct discrimination. But on the evidence we have heard, we do not think that the accusation of lying or the dismissal arise out of the Claimant's partial hearing loss.

101. In essence, the accusation of lying and the dismissal are simply a consequence of Mr Mitchell's belief that Mr Burns was lying.

102. We can therefore find no basis for this claim and it is dismissed.

The third data protection breach

103. On 26 April 2017, Mr Mitchell wrote to Mr Burns the letter at pages 719 to 720.

104. The two relevant paragraphs reads as follows:-

> "*The caretaker at the Sheila Roper Community Centre alerted us to this latest breach. It consisted of documents you had left in the boiler room at the Community Centre. The documents included FPN booklets containing information on FPN's issued to residents, minutes of GMB meetings and other union paperwork, and a copy of a licensing application with details of an applicant's name. All of this paperwork dates back to 2013.*
>
> *As you know previous disciplinary action was taken against you regarding a similar matter, the outcome of which was that were issued with a final written warning on 26th May 2016* (This is an error, it should read 6 June 2016)*. That disciplinary matter also involved data being left at the Sheila Roper Community Centre in the kitchen area. It is disappointing that you did not mention that there were further documents in another area of the community centre when you had the opportunity to do so.*
>
> *…*"

105. Mr Mitchell in evidence confirmed those two paragraphs. He also said that for understandable reasons, ie that Mr Burns had already been dismissed, the matter was not fully investigated but that a thorough search of the premises was carried out to ensure that there were no other documents.

106. Mr Mitchell also said that he thought a disciplinary process in relation to that particular breach would have taken some 6 weeks to conclude. Miss Jennings concedes that therefore puts any disciplinary sanction outwith the live period of the final written warning issued on 6 June 2016.

107. Mr Burns was invited to comment during this cross-examination and his reply was that "*it was a load of cobblers*".

108. What he might have said was that it was in fact essentially the same offence for which he had been disciplined on 6 June 2016.

109. We are obliged to ask the question whether as a consequence of this latest allegation what are the prospects expressed in percentage terms that Mr Burns would have been dismissed.

110. Plainly, we have very limited facts and we are required to speculate.

111. On balance, it is likely that the facts as described in the letter will be proved and it is hard to see how Mr Burns could mitigate, other than to say that he has already been disciplined for this particular offence.

112. As to the likely conclusion that the final written warning of 6 June would no longer be live, in our view having regard to the decisions in ***Sweeney -v- Strathclyde Fire Board [2013] UKEAT/0029/13, 12, 11*** and ***Stratford -v- Autolink UK Ltd*** the fact that the June 2016 final written warning had expired would not prevent NCC from taking into account, not only that final written warning but also the first written warning in respect of the first data

protection breach. Doing the best we can, we come to the conclusion that there is a 60% chance that Mr Burns would have been dismissed as a consequence of the data breach discovered in March 2017.

Remedy

113. We appreciate that have heard no evidence or submissions on the point but we are mindful that Mr Burns expressed the wish to be either reinstated or re-engaged. Having regard to our finding in respect of the third data breach our provisional view is that it is unlikely that such an order would be found to be just. Thus, the only issue for a remedy hearing would be compensation.

114. We hope that the parties can come to terms having regard to the limited range of issues which could arise. However, if that is not possible, then the Claimant has liberty to apply to the tribunal for a remedy hearing within 28 days of the date that this decision is sent to the parties. If no such application is made, then the Claimant's rights to a remedy will be dismissed on deemed withdrawal.

Employment Judge Blackwell
Date 18 December 2018

JUDGMENT SENT TO THE PARTIES ON
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FOR THE TRIBUNAL OFFICE

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