



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr J Korpan

and

Respondent

Magnox Limited

**Full Merits Hearing
held at Reading on**

2, 3 and 4 September 2019

Representation

Claimant: Mr J Boyd, counsel
Respondent: Ms A Niaz-Dickinson, counsel

Employment Judge

Vowles (sitting alone)

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Unfair Dismissal – section 98 Employment Rights Act 1996

2. The Claimant was dismissed on 9 January 2018 and that was the effective date of termination. The dismissal was unfair. This complaint succeeds.

Wrongful Dismissal – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

3. The dismissal was wrongful. This complaint succeeds.

Remedy Hearing

4. The case will now be listed for 1 day remedy hearing. The parties are to provide dates to avoid for this hearing.

Reasons

5. This judgment was reserved and written reasons are attached. All judgments and reasons for the judgments are published, in full, online at

www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant and Respondent.

REASONS

SUBMISSIONS

1. Claimant On 23 April 2018 the Claimant presented complaints of unfair dismissal and wrongful dismissal to the Employment Tribunal.
2. Respondent On 12 June 2018 the Respondent presented a response and the complaints were resisted. The Respondent claimed that the Claimant had been fairly and lawfully dismissed on 9 January 2018 by reason of misconduct.

EVIDENCE

3. The Tribunal heard evidence on oath on behalf of the Respondent from Mr Jim Payne (Investigating Officer), Mr Ian Cuthbert (Dismissing Officer) and Mr Tim Dunham (Appeal Officer).
4. The Tribunal also heard evidence on oath from the Claimant Mr Jon Korpan.
5. The Tribunal also read documents in a bundle provided by the parties.
6. From the evidence heard and read the Tribunal made the following findings of fact.

FINDINGS OF FACT

Background

7. The Respondent is a management and operations contractor responsible for 12 nuclear sites and one hydroelectric plant in the United Kingdom.
8. The Claimant was employed from 2 January 2007 until 9 January 2018 as a Nuclear Decommissioning Waste Charge Hand / Operative at the Harwell site in section B462.27.
9. The Respondent engaged Interserve PLC to provide cleaning services at the Harwell site. One of the female cleaning operatives assigned to clean the B462.27 section was Ms LC. [Throughout this judgment 3rd parties have been referred to by initials where it is unnecessary to refer to their full names].
10. In July 2017 Interserve PLC informed the Respondent that Ms LC had submitted a written complaint containing allegations of physical assault and sexual harassment by the Claimant.

Investigation

11. Mr Payne, the infrastructure manager at the Respondent's Berkeley site, was appointed to investigate the allegations made by Ms LC. In total, Mr Payne conducted 21 interviews with 17 witnesses including Ms LC and the Claimant. During the course of the investigation, Ms LC made allegations about the conduct of three employees towards her - Mr ER, Mr IB, and the Claimant. Mr Payne interviewed all three of them during the course of the investigation.
12. Mr Payne interviewed Ms LC on 27 July 2017. He was clearly impressed by her accounts of events and referred to her in his witness statement as *"a nice straightforward individual", "somewhat younger than her actual age", "she came across as particularly innocent and was referencing issues without seeming to grasp how serious they were". ... "When speaking to Jon Korpan, his approach was to deny everything which was put to him. Generally, I would say he was not particularly co-operative with the process and resistant to providing evidence to support his denials." ... "Overall, however, as per my recommendation that the matter be taken forward to a disciplinary hearing, my sense from the investigation which I had undertaken was that Ms LC was a credible witness who was likely to be telling the truth and I had serious doubts as to the position set out by a number of the other witnesses during the case including Jon Korpan. In particular, he failed to present much if anything at all by way of defence of his position other than general denials of the allegations against him. Recognising, therefore, that the case was only likely to be decided on the balance of probability between these two accounts, the conclusion which was ultimately reached by Ian Cuthbert is one that I would be perfectly comfortable with."*
13. During the course of the first interview with Ms LC, she made two allegations against the Claimant. Firstly, that on 6 June 2016 the Claimant had pushed her up against a wall pushing his forearm against her throat. Secondly, she was outside the tea room checking hand towels when the Claimant was on his mobile phone watching a pornographic film and showed it to her.
14. Ms LC also mentioned that she had a "black book" which she said contained her notes of events in support of the allegations she had made. After a short break, Ms LC produced her black book which contained details of further incidents which formed the basis of six allegations against the Claimant which Mr Payne then proceeded to investigate. They were as follows:

"Allegations against Jon Korpan

1. *24th Dec 2015 Jon Korpan is alleged to have physically touched a female worker by trying to undo her bra.*
2. *12th Jan 2016 Jon Korpan is alleged to have physically touched a female worker by touching her bottom.*

3. *6th Jun 2016 Jon Korpan is alleged to have assaulted a female worker by pinning her up against the wall.*
 4. *2017 Jon Korpan is alleged to have assaulted a female worker by strangling her from behind.*
 5. *20th Apr 2017 Jon Korpan is alleged to have carried out inappropriate behaviour by showing offensive material on his mobile phone to a female worker.*
 6. *20th Apr 2017 Jon Korpan carried out inappropriate behaviour by making an insult to a female worker for reporting the phone incident earlier that day."*
15. Mr Payne produced an investigation report on 26 September 2017 headed "*Formal Investigation of allegations of bullying and harassment in B462 of a female employee.*" The investigation report contained the following summary:

"Summary

These incidents appear to be very random in date and one would need to have a good understanding of the shift rotas and shift logs to establish if the accused individuals were present on all of the alleged dates. Ms LC doesn't present herself as someone that is able to plan at this level of detail or have support from anyone to help her source the information to fabricate these allegations.

During the interview there was little evidence/understanding of the impact to the victim of such incidents. The investigations panel explained that their role was fact finding however, they didn't necessarily understand the impact to Ms LC or show any remorse towards Ms LC. The feedback from a few of the individuals interviewed was similar and suggests there has been some collusion. For example the 20th Apr 2017 incident, Jon Korpan is alleged to have offensive material on his mobile telephone, four witnesses can't recall this! However, both Jeff and Eddie confirm that this event happened. Three people also believe that these allegations are as a result of what happened to Ms LC's dad and this was an opportunity to 'get back at the Company'.

The situation has not been helped by the way they individuals received their letters on the first day i.e. 5 letters left on a desk and they opened them in front of one another.

On the balance of probability, regardless of dates and the denial by the accused, there is evidence that some or all these events may have happened:

- *Jon Korpan – 20th April 2017 inappropriate behaviour by showing offensive material on a mobile phone to the female worker.*

- *Mr ER / Mr IB – 21st June 2017 inappropriate sexual comment to a female worker. A witness states Mr ER said “I hear you fancy such and such, I bet you want to go to bed and give him a blow job”*
 - *Mr IB confessed during the interview that he has made inappropriate comments i.e. becoming prostitutes and potentially racial comments e.g. Hinjabs/Punjabs or Burkha.*
 - *A witness states “become family on shifts, shifts understand its shift. Nights more banter, boys on shift! e.g. “pulled kecks down and rubbed his bottom on the locker”*
 - *A witness states “they used to tease MS about his virginity”*
 - *A witness states “culture on shift a bit childish (younger shift) banter about football, Brexit – immigrants on telly, strong views, racial remarks about Muslims*
 - *A witness states “Brexit, select core that have views that Muslims should go back to their own country!”*
16. The report also dealt with wider concerns about the “culture” within B462.27. The investigation report stated:

“...The investigation panel haven’t been into the facility however have concluded after talking to a small number of people (see examples listed above) that this isn’t a professional working environment that the panel would expect people to work in.

Examples given by some interviewees, depending on the circumstances, could have been considered bullying, harassment or sexual harassment however Blue shift regard this as “horseplay or banter” and staff have become immune and not easily offended therefore there is the level of acceptability of what is “normal” with very little challenge. The investigation panel can only therefore conclude that this behaviour is seen as normal by those working within this facility, “if they don’t like what they see or hear they ignore it, turn a blind eye”, a comment made by a number of Blue shift members during the investigation interviews.”

17. At the end of the report, it was stated:

“It is also worth noting that this hasn’t been easy for Ms LC having the courage to raise a complaint of this nature in the first place and then having to deal with the speculation and subsequent rumours afterwards. The investigation panel would like to take this opportunity to personally thank Ms LC for her open and honest approach throughout this fact finding investigation. Ms LC has proven to be a consistent and very credible individual and has been very open with her responses and willing to help were she is able to do so by giving the panel access to any information that she might have. The panel conclude that Ms LC is not trying to hide anything.”

Disciplinary Hearing

18. Despite the investigation report concluding that there was evidence that only one of the allegations against the Claimant may have happened, namely allegation 5 regarding the mobile phone incident, in fact, all six allegations against the Claimant proceeded to a disciplinary hearing on 15 November 2017 chaired by Mr Cuthbert. The Claimant was accompanied by Ms Smith, Trade Union representative.
19. The six allegations were put to the Claimant. He had previously been sent a copy of the investigation report, accompanying statements and the Respondent's disciplinary and bullying/harassment policies. The statements had, however, been heavily redacted. It was not clear why the redactions had been made, and they were later removed. During the course of the disciplinary hearing, the Claimant continued to deny the allegations against him. The hearing was adjourned in order that Mr Cuthbert could consider the evidence and read a detailed, pre-prepared statement by the Claimant and his Trade Union representative. Mr Cuthbert also met with Ms LC on 7 December 2017 to ask her about any witnesses to the alleged incident and to seek clarification of dates. In his witness statement, he said the following:

"I have to say that having conducted this interview with Ms LC my opinion of the situation changed significantly.

Ms LC became very distressed during the meeting and we had to stop a few times. Nonetheless, I found her to be a completely credible and trustworthy witness who was very clear about what had happened. I found it a difficult meeting and was upset by what Ms LC told me. In doing so, she gave me no reason to believe that she was not being truthful. In short, I believed what she was saying. I also found it telling that her manager was so concerned about what had happened, clearly believed what Ms LC was saying and reported his own concerns regarding general behaviour on the shift in question. Having spent 13 years in Kent Police as a special officer, I feel my experience gave me a good sense that Ms LC was telling the truth and I believe my experience qualified me to make such an assessment."
20. Mr Cuthbert also interviewed the Claimant's supervisor who said that Ms LC sometimes told fanciful stories but he said that he would be surprised if she had made up the allegations.
21. The disciplinary hearing reconvened on 9 January 2018.
22. On 10 January 2018, Mr Cuthbert issued a dismissal letter to the Claimant which included the following:

“Justification of Outcome of Disciplinary Hearing

I refer to the disciplinary hearing held yesterday in accordance with PRC 0151 the Company’s Disciplinary Procedure. This was reconvening the disciplinary hearing that was held on 15th November 2017 that was adjourned. You were accompanied by Krystal Smith from the Independent Democratic Union on both occasions. As you are aware, this hearing was held in relation to the allegation that you were in breach of your contract of employment and the Code of Conduct for employees, due to the alleged physical assault and sexual harassment of a female worker in B462, Harwell Site.

Following investigations carried out by the Company and carefully considering your representations at the hearing, I have concluded that your conduct had serious consequences to warrant summary dismissal, in relations to the following:-

- Making unwanted contact, including unnecessary touching of a female employee*
- Showing offensive material on your mobile phone in the presence of a female worker*
- Verbal sexual harassment of a female worker*
- Physically assaulting a female worker*

On the balance of probabilities I believe some, if not all, of the incidents occurred, whilst I have taken into account your mitigation with regard to corroboration of evidence it also seems quite clear that there has been some collusion of evidence through the shift. I have concluded after meeting with the female worker, who is a vulnerable individual, that the allegations she has made are plausible. The same view has been confirmed by another Senior Manager involved in the initial investigation and also her own Line Manager.

You have been summarily dismissed, i.e. without notice. Your last day of service with the Company is 9th January 2018 and all terms and benefits associated with your employment ceased as of that date.”

Appeal Hearing

23. On 11 January 2018 the Claimant lodged an appeal, which was extensive and detailed, under the following headings:
- 1. Not setting out the allegations clearly;*
 - 2. Lack of evidence and discrepancies within the evidence obtained;*

3. *Reliance on one particular source of evidence with no corroborative evidence;*
 4. *Threatening behaviour from those involved in the disciplinary process; and*
 5. *Pre-determined outcome.*
24. On 12 February 2018 the Claimant attended the appeal hearing accompanied by Ms Smith, his Trade Union representative. The meeting was chaired by Mr Dunham and the management case was presented by Mr Cuthbert who explained the decision he had reached at the disciplinary stage. Ms Smith presented the appeal case on behalf of the Claimant.
25. On 14 February 2018 Mr Dunham sent an outcome letter to the Claimant dismissing his appeal and the letter included the following:
- "I have now considered the matter fully and addressed each of the reasons for your appeal as set out below.*
1. *Not setting out the allegations clearly*
Although no specific date has been provided for the incident in 2017, I have concluded that this does not mean that an incident did not occur. I believe, on the basis of the evidence that on the balance of probability, this incident did take place.
 2. *Lack of evidence and discrepancies within the evidence obtained*
Viewing offensive material on site is not permitted by Magnox. You have had opportunities to provide a full browser search history and failed to do so. I have therefore concluded that you did not fully co-operate with this process and have withheld evidence both during the investigation and disciplinary hearing.
 3. *Reliance on one particular source of evidence with no corroborative evidence*
*An independent person was appointed to conduct the investigation and a further independent was appointed to conduct the disciplinary hearing. I have found no reason to doubt their integrity and believe that the evidence collated is factual and represents the events that took place.
I have found no reason to doubt the account of the Female Worker and believe her to be a credible witness. On the other hand, it appears that you have not fully co-operated with the process and have withheld evidence. Further, you were not contactable throughout the period of your suspension and I have found no evidence of you informing Magnox that you would be unavailable for a period of time due to your child undergoing surgery.*

Whilst I accept that the corroborative evidence is limited, taking all matters into account, I found no reason to doubt that the incidents in question occurred.

4. *Threatening behaviour from those involved in the disciplinary process*
I have found no evidence to support this claim. Such behaviour would be contrary to the standards and expectations of the organisation and would themselves be the subject of investigation.

5. *Pre-determined outcome*
I have found no evidence to support this claim. The Investigating Officer was independent to the site and had no prior involvement with your case. Although the Chair of the disciplinary panel is now based at Harwell, this only became effective from December 2017 and he had no prior involvement with your case. Personally, I can assure you that the decision I have made is mine, mine alone and one I reached after your appeal hearing following full consideration of the evidence presented to me.

Having considered your comprehensive submission carefully, I have decided to dismiss your appeal and uphold the Company's previous decision, that is to say that the penalty of dismissal with notice with effect from 9th January 2018 should remain."

RELEVANT LAW.

Unfair Dismissal – section 98 Employment Rights Act 1996

26. *Section 98. General*

- (1) *In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
 - (a) *the reason (or if more than one the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

- (2) *A reason falls within this subsection if it-*
 - ... (b) *relates to the conduct of the employee, ...*

- (3) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the 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

(b) shall be determined in accordance with equity and the substantial merits of the case.

27. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.
28. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.
29. Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.
30. Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.
31. Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses test. That test applies to all stages in the procedure followed by the employer, including the investigation, the dismissal and the appeal.
32. In Santamera v Express Cargo Forwarding [2003] IRLR 273 the EAT said that fairness does not require a forensic or quasi-judicial investigation for which the employer is unlikely in any event to be qualified and for which it may lack the means. In each case the question is whether or not the employer fulfils the test laid down in British Home Stores v Burchell and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair.
33. In Taylor v OCS Group Ltd [2006] ICR 1602 the Court of Appeal held that an Employment Tribunal is required to assess the fairness of the disciplinary process as a whole. Where procedural deficiencies occur at an earlier stage

the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker. Accordingly, defects in the original disciplinary procedures may be remedied on appeal. It is irrelevant whether the appeal hearing takes the form of a rehearing or a review, so long as it is sufficiently thorough to cure the earlier procedural shortcomings.

34. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.

DECISION

35. The Tribunal found that the investigation and the disciplinary process at both the disciplinary hearing and disciplinary appeal stages were seriously flawed such as to make the dismissal unfair.
36. It was clear, as submitted by the Claimant, that contrary to the terms of reference for the investigation, Mr Payne and Mr Cuthbert pursued an enquiry into the “general culture” of the workplace in section B462. This significantly influenced Mr Payne’s investigation and Mr Cuthbert’s findings. It contributed to their conclusions that witnesses had colluded when they said they did not witness events alleged by Ms LC. They also ignored the views of witnesses Mr ID, Mr MS, Mr GB, Mr TW and the Claimant, who suggested that Ms LC had a motive for making up the allegations because her father, who also worked at the same site, had had similar allegations raised against him. There was no basis, apart from supposition, for them to conclude there had been collusion between witnesses. Their relevant evidence was ignored as a consequence.
37. It was clear that both Mr Payne and Mr Cuthbert, both having met Ms LC, immediately formed the view that her allegations were credible and true. There was no reliable basis for them having reached that conclusion, particularly when set against the Claimant’s consistent denials and the confirmation of witnesses that they had not witnessed the events which Ms LC had said they had witnessed. Mr Payne and Mr Cuthbert proceeded from the position that Ms LC was telling the truth and anything which contradicted her account was rejected.
38. Mr Cuthbert appears to have placed no weight on what Ms LC’s manager, Mr SW, had said regarding her having told him that a military plane had on one occasion landed within the site, which was a physical impossibility. Ms LC’s credibility was not questioned in this respect.

39. The investigation report had concluded that only one of the allegations (No. 5) was supported by evidence, and yet all six allegations were forwarded for consideration at the disciplinary hearing.
40. Mr Cuthbert's outcome letter, dated 9 January 2018 (quoted above) does not repeat the six allegations which were referred to in the investigation report. Instead, he referred to four different allegations. Even then, it is not clear which of the incidents he found proved, stating "*I believe some, if not all, of the incidents occurred*". He said that he had concluded that the allegations made by Ms LC were "plausible". He did not say why they were plausible other than that view had been expressed by Mr Payne and also by the Claimant's line manager. Accordingly, the Claimant had no way of knowing from the dismissal letter which of the six allegations were found proved by Mr Cuthbert.
41. In his evidence before the Tribunal, Mr Cuthbert he said that in fact he found allegations 1, 4 and 5 were made out but that in his "*heart of hearts*" he thought that 2, 3 and 6 had also taken place. Neither the outcome letter nor Mr Cuthbert's witness statement explained what evidence he relied upon to reach these conclusions. Only 4 bullet point allegations were referred to in the letter. So far as the 3rd bullet point was concerned, Mr Cuthbert accepted in cross-examination that that had never formed part of the disciplinary allegations and the Claimant was never asked about it.
42. Both Mr Payne and Mr Cuthbert relied upon the contents of Ms LC's black book in support of her allegations. Even the most cursory examination of the relevant entries shows that it could not have contained a contemporaneous record of events because of the order of the dates. All the pages from the black book were equally disjointed in terms of the order of dates. Mr Cuthbert said that he had noticed the odd structure of the black book and tried to get to the bottom of it with Ms LC at the interview on 7 December 2017 but because Ms LC kept breaking down, he was unable to do so and so he gave up.
43. Crucially, regarding the incident involving Ms LC's bra, she told Mr Cuthbert, for the first time, at their meeting on 7 December 2017 that there were two witnesses to the incident, namely Mr GB and Mr IF. Mr Cuthbert did not then go on to interview those two witnesses about the matter. No reasonable employer would have failed to do so.
44. Also, Ms LC said that she had reported the bra matter to Mr ER (a supervisor) but Mr ER was never asked about it even though he was interviewed on two occasions.
45. It appears that no weight was given to the fact that 7 witnesses said that Ms LC had been effectively "stalking" the Claimant for a period of time.

46. In the allegation regarding “touching Ms LC’s bottom”, she said that the incident was witnessed by Mr GB and Mr IF but they both denied seeing the incident. Their evidence was discounted on the grounds of collusion.
47. The allegation of “pinning Ms LC against a wall” was clearly marked in the black book as having occurred on “6.6.16”. When it appeared that the Claimant was not in work on that date and could not have carried out the alleged assault on that date, Ms LC changed her account and said that it might not have occurred on that date. This again should have cast serious doubt on the accuracy of Ms LC’s account and the contents of the black book.
48. So far as the 2017 “strangling from behind” allegation was concerned, Ms LC had said in her interview with Mr Cuthbert on 7 December 2017 that the incident was witnessed by Mr OD. Mr Cuthbert did not go on to interview Mr OD about the event. No reasonable employer would have failed to do so. Mr Cuthbert said it had been “*an oversight on my part*”.
49. In the allegation of showing “offensive material” to LC (allegation 5), she was very specific about what it was that was shown to her. She said: “*It was a lady with her legs open showing her sexual organs*”. She said that the event was witnessed by Mr IB, Mr OD, Mr DM and Mr JK. However, when this matter was put to those witnesses, they were asked only about “inappropriate material” and the specifics were not put to them.
50. The Respondent relied particularly heavily upon allegation 5 as being supported by independent evidence. It was said that it was an event which, if proved, would by itself have been sufficient to dismiss the Claimant summarily for gross misconduct. However, that conclusion was flawed. During cross-examination, Mr Cuthbert said he was under the impression that other witnesses had confirmed that the showing of pornographic material had in fact occurred. When questioned he accepted that that was wrong. It was said that Mr JS (supervisor) confirmed that Ms LC did make a complaint to him on 20 April 2017 of the Claimant viewing inappropriate material on his mobile phone and that Mr JS also went to speak to Mr ER (supervisor) who confirmed that Ms JS had raised the issue with him. It was said that this was corroborative evidence.
51. In the investigation report, Mr Payne said: “*However, both Mr JS and Mr ER confirmed that this event happened*”. That conclusion was misconceived. They did not confirm that the event happened. They only confirmed that Ms LC made the allegation to them just as she made the allegation to her own managers. The people who were said by Ms LC to have witnessed the event denied that it occurred. They said that they believed Ms LC had made these allegations up as a result of what happened to her father and that this was an

opportunity to get back at the company. That evidence was discounted as collusion by Mr Payne and Mr Cuthbert.

52. The Respondent also placed considerable weight on the Claimant's refusal to offer up his mobile phone for examination. The Claimant said that he was reluctant to do so because Mr Payne had told him that the police could examine the telephone and also search his house and his family's possessions. Mr Payne denied making this threat but it was clear that there was a reference to police in Mr Payne's interview with the Claimant. Importantly, the Claimant did offer up his mobile telephone for examination at the disciplinary hearing but Mr Cuthbert declined to accept it. Additionally, the Claimant provided a printout of his browser history at the disciplinary hearing.
53. At the appeal stage, Mr Dunham did not conduct a re-hearing but simply reviewed what Mr Cuthbert had decided and upheld the decision to dismiss. In his witness statement, Mr Dunham said:

"It was clear to me that this was a case where some of the details were rather unclear and there were some conflicting accounts of events. There was a lack of corroboratory evidence regarding the detail of some of the allegations and so it was necessary to form a view as to who you believed. It appeared to me that Ian Cuthbert had undertaken this assessment properly when making his decision. I shared his concerns as to the evidence which Jon Korpan had presented during the procedure. He had shown himself to be difficult during the disciplinary procedure and throughout seemed to have been focussed on trying to pick holes in the procedure which had been followed rather than addressing the substantive issues against him. This is not the approach I would have expected from someone who was completely innocent of such serious allegations. Given the nature of the allegations and the available evidence it was a difficult case to decide."

54. Mr Dunham placed considerable weight upon the Claimant's refusal to co-operate with the disciplinary process as had Mr Cuthbert during his investigation and decision-making. There was clearly a view shared by Mr Cuthbert and Mr Dunham that the Claimant should have done more to assist the Respondent other than simply denying the allegations. However, not unreasonably, the Claimant pointed out that if he was not guilty of the allegations, there was not much more he could do than to deny them. It was a matter for the Respondent to conduct the investigation, to identify reliable evidence and to reach a decision on a balance of probabilities. There was no obvious similar obligation on the part of the Claimant.

Summary

55. Mr Payne and Mr Cuthbert both formed the view that Ms LC's account was true and credible before the investigation was complete. This was despite evidence that she was prone to fantasise, that the black book contents were clearly not contemporaneously made, that there was evidence of an ulterior motive of revenge for her father's treatment, that she had changed a key date clearly noted in the black book, and despite the Claimant's denials.
56. Relevant eye witness accounts were discounted on the grounds of collusion without any evidence of collusion.
57. No account was taken of the delay in reporting the events of 2015-2017 until July 2017.
58. Potential eye witnesses were not interviewed. Some eye witnesses were interviewed and not asked about key events.
59. Only one allegation was referred by Mr Payne to Mr Cuthbert but Mr Cuthbert considered six allegations. The allegations investigated were different to those referred to in the dismissal letter. It was not clear which allegations were found proved. In the investigation report it was said "*some or all of these events may have happened*" and in the dismissal letter "*some if not all of the incidents occurred*".
60. The Claimant was criticised for simply denying the allegations.
61. The appeal conducted by Mr Dunham appears to have been an uncritical confirmation of Mr Cuthbert's decision.
62. The investigation and disciplinary process was deeply flawed. It was incomplete and unreasonable. No reasonable employer would have conducted the process in this manner. This was despite the serious consequences of dismissal for an employee with an unblemished record over 11 years, and the effects on his prospects of future employment in the nuclear industry, due to reporting of this matter to the nuclear watchdog.
63. The outcome was predetermined at the point at which Mr Payne, and then Mr Cuthbert, having spoken to Ms LC, concluded that her account of the alleged incidents was true. A finding of guilt and dismissal thereafter was inevitable.
64. In summary, there was no reasonable investigation and no sufficient reliable evidence upon which the Respondent could have believed that the Claimant was guilty of the misconduct complained of and no reasonable grounds existed for any such belief.

65. The dismissal fell outside the range of reasonable responses. It was procedurally and substantively unfair.

Wrongful dismissal

66. The test for wrongful dismissal is different to the test for unfair dismissal. In the former the reasonableness or otherwise of the employer's actions is irrelevant. The question is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.
67. The Tribunal looked objectively at the evidence placed before it and could find no reliable evidence of gross misconduct such as to justify summary dismissal. Indeed, there was a considerable amount of evidence indicating that the Claimant was not guilty of any wrongdoing
68. The dismissal was wrongful.

Polkey/Contributory Conduct

69. The Tribunal does not consider that any further evidence is required but it would benefit from more focussed submissions on these matters. That could usefully be done at the remedy hearing. The parties should come to the remedy hearing prepared to deal with these matters.

Employment Judge Vowles

Date: 30 October 2019

Sent to the parties on:

.....

.....
For the Tribunals Office