EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
A		B

HELD AT Birmingham **ON** 24th and 25th November 2020

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: In person

For the respondent: Mr E Gold - Counsel

RESERVED JUDGMENT

The claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Background

1. The claimant brought a claim for unfair dismissal following the termination of his contract of employment by the respondent on 15th January 2019 by reason of gross misconduct.

2. The respondent is the Chief Constable of the West Midlands Police.

3. At the start of the hearing, following an application made by Mr Gold, I made a restricted reporting order pursuant to Employment Tribunal Act 1996 section 11 and rule 50(3)(d) of the Employment Tribunals (Constitution and Rules of Procedures) Regulation 2013. For the purposes of this Judgment the individual subject to the restricted reporting order shall be referred to as "A".

4. The "Code V" in the heading indicates that this has been a remote hearing which has not been objected to by the parties. The form of remote hearing was via Cloud Video Platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Evidence and documents

5. I was presented with an agreed bundle of 714 pages.

6. I heard evidence for the respondent from Detective Police Constable Kuldip Singh, Detective Superintendent Nicholas Walton (retired) and Assistant Commissioner Louisa Rolfe OBE. I also heard evidence from the claimant.

7. I was also provided with a chronology and written submissions by Mr Gold.

Issues

8. The issues for the Tribunal to consider were as follows :

8.1 What was the reason for the dismissal and was it a potentially fair reason for the purposes of section 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent relying upon conduct as the reason for dismissing the claimant ?
8.2 Did the respondent carry out a reasonable investigation ?
8.3 Did the respondent reasonably believe that the claimant had committed an act of gross misconduct, namely accessing police systems for non-policing and/or personal purposes and for making an unauthorised disclosure of information?
8.4 Was dismissal a sanction within the range of reasonable responses?
8.5 Was the dismissal procedurally unfair ?
8.6 If the dismissal was procedurally unfair, what difference, if any would a fair procedure have made?
8.7 Did the claimant contribute to his dismissal ?
8.8 If the respondent is found to have unfairly dismissed the claimant, has the claimant mitigated his losses, and to what extent ?

9. The claimant accepts that the reason for his dismissal was conduct but states that his decision to dismiss unfair as (i) the claimant continued to work for two years between being served with his notice of misconduct and the disciplinary hearing such that he could not be considered a security risk; (ii) a defence statement was not considered; and (iii) the claimant's personnel record was altered to show fewer commendations than existed.

Facts

10. I make the following findings of fact :

10.1 The claimant commenced employment with the respondent on 23rd June 2008 as a Police Community Support Officer ('PCSO').

10.2 On 10th July 2008, the claimant underwent training on the use of police computer systems and handling police data, known as "Handle with Care".

10.3 In March 2009, the Claimant was informed of updated Standards of Professional Behaviour for police staff, mirroring the Standards of Professional Behaviour for police officers as enacted in the Police (Conduct) Regulations 2008 (and re-enacted in the Police (Conduct) Regulations 2012 and Police (Conduct) Regulations 2020). These Standards of Professional Behaviour includes "Honesty and Integrity" which requires police staff to be honest, act with integrity and not to compromise or abuse their position.

10.4 On 22nd October 2009, the Operational Command Unit Commander for Dudley South, Peter Monroe, sent a letter to the claimant, advising him that there had been a number of instances where PCSOs had improperly accessed police force systems and that he was not to access force systems without proper authorisation or to access any information for personal use. In this letter the claimant was reminded of the Standards of Professional Behaviour and the fact that breach of the standards could result in disciplinary and criminal action being taken. A copy of the letter was sent to all PCSOs in West Midlands police and was copied to the trade unions.

10.5 On 17th October 2016, the respondent's domestic abuse team received a complaint from a female who informed them that the claimant was the nephew of a person about whom she had made allegations of domestic abuse which were live, and that the claimant had provided evidence to the suspect (the claimant's uncle) about the case using police systems.

10.6 In light of this, on 18th October 2016, Chief Inspector Bailey of the Sandwell Local Policing Unit asked the Professional Standards Department ('PSD') to conduct an audit of the Claimant's use of police systems.

10.7 The complaint fell within the definition of a complaint pursuant to Police Reform Act 2002 ('PRA') s12(1) and

s12(7)(aa). The respondent, as the chief officer, was the appropriate authority ('AA') pursuant to PRA s29(1)(a)(ii) and schedule 3 para 2(6)(b).

10.8 The AA determined that the complaint was not suitable for local resolution, such that it was required to make arrangements for the matter to be investigated, pursuant to PRA schedule 3 paragraphs 6(3) and (5). On that determination, the investigation fell to be conducted pursuant to PRA schedule 3 para 16(1)(a).

10.9 The AA was required to appoint an investigator pursuant to PRA schedule 3 paragraph 16(3) and appointed DS Longden as the investigating officer ('IO'), assisted by DC Jones.

10.10 On 5th December 2016, DC Jones asked for the revoking of the claimant's access to all force systems from where he could access intelligence or information.

10.11 On 9th December 2016, the claimant was served with a police misconduct notice, in which it was alleged that, in August 2016, he had misused police computer systems to obtain and disclose personal sensitive data. On the same day, the IO suggested that the claimant's vetting status be reconsidered as he was due to commence employment with West Mercia police as a regular police officer on 23 January 2017. On 12th December 2016, the Claimant's vetting clearance was revoked pending the conclusion of the investigation.

10.12 On 14th December 2016, the Claimant's access was revoked for all intelligence systems.

10.13 On 16 March 2017 the Claimant was invited to attend a fact finding interview on 22nd March 2017. The Claimant was advised that the allegations against him were potentially of gross misconduct and if, following the interview, he was invited to attend a disciplinary hearing any sanction could include dismissal. At the start of the hearing the Claimant was advised that the allegations had been assessed to be of a criminal and gross misconduct nature. As such, he was being interviewed criminally. The four allegations against the Claimant were that he had accessed the police systems for non-police work on the following occasions:

10.13.1 on 22nd August 2016;

10.13.2 on 19 December 2014;

10.13.3 on 18th January 2016 and 21st January 2017; and

10.13.4 on 31st May 2017.

10.14 In relation to the access on 22nd August 2016 ('offence one'), the Claimant stated that:

10.14.1 on 22nd August 2016 at 14.45, he had accessed the Crime Portal to look up an incident concerning an investigation of common assault, where the suspect was his uncle Malcolm Johnson, the complainant was his partner Charmaine Johnson and where, after the

incident and whilst off duty, he had taken his uncle to Bushey Fields psychiatric hospital;

10.14.2 he looked up the incident to check that it was noted on the investigation log that he had signed a pocket notebook entry of the attending sergeant to say that he would take his uncle to hospital and, also, to see who was the officer dealing with the matter;

10.14.3 he believed that this was for a policing purpose but did not update anything on the investigation portal or make any supervisor aware that he had accessed the records or otherwise inform any other colleague or inform any family member;

10.14.4 he could instead have obtained this information by speaking to a supervisor or a union representative or he could have notified his supervisor about the access. The Claimant indicated that he had checked the file because he was a worrier, but did not check the record on the same day of the incident – 14th August 2016, or the day of its being reported on 16th August 2016 but rather than a week later on 22nd August 2016;

10.14.5 the records made no mention of him taking his uncle to the hospital but he thought that it had said this when he read them. The Claimant indicated that he had perhaps inferred that the record had mentioned him when it had not, and so he had taken no action to ensure that this was recorded, even though this was the sole purpose of his accessing the information in the first place;

10.14.6 a normal member of the public would not have access to this information but he saw himself as half PCSO, half relative of his uncle, so believed that there was a policing purpose for the access;

10.14.7 if he had been taking his uncle to the hospital whilst working as a PCSO then the access would have been in the course of his duty and although off-duty, he still felt a little bit of responsibility for a “PCSO side”;

10.14.8 he had not updated the crime portal with his access because he was off duty and did not understand that if he accessed the portal for a policing purpose, it would technically put him on duty;

10.14.9 he should not have had access to the material and should have told someone of his access, because the report contained confidential information including PNC (Police National Computer) checks and information concerning his aunt and A which he would not otherwise know;

10.14.10 he was entitled to his opinion that his access was for a policing purpose even though the IO held the contrary view;

10.15. In relation to the access on 19th December 2014 ('offence two'), the Claimant stated that :

10.15.1 he could not recall viewing a crime report and an investigation log relating to an allegation of sexual assault relating to A on 19th December 2015 at 08.40am nor had he realised that the report referred to A.

10.15.2 he could not give a reason as to why he was looking at these crimes on the computer system because he could not recall looking at those specific matters. He did not recall looking at the record in sufficient depth to realise that it concerned A;

10.15.3 he could not say what the policing purpose for looking at this record was because he could not recall it;

10.15.4 he would have no reason to look at the specific offence or any reason to look at this particular offence;

10.15.5 he had accessed the crime report and investigation log, insofar as the computer showed this "in black and white";

10.15.6 he could not recall accessing the information despite his having to click on the investigation log to open it;

10.15.7 he did not know what would have been his rationale or justification for looking at the investigation log when he did, this being two months after the incident.

10.16. In relation to an access on 18th January 2016 and 21st January 2016 ('offence three'), the Claimant stated that:

10.16.1 on 18th January 2016 at 08.49am and 21st January 2016 at 16.10 and 16.12, he accessed the investigation log relating to the theft of a motor vehicle from his mother;

10.16.2 his mother suffered from mental health issues, had taken an overdose and he wanted to make sure that the police records stated all the property that had been taken;

10.16.3 his second access was because he understood the CCTV footage had not been collected, so he wanted to check if it had been;

10.16.4 he "got completely caught up in the moment" and he should not have accessed the information;

10.16.5 he had accessed the information when this did not relate to a policing purpose.

10.17. In relation to an access on 31st May 2017 ('offence four'), the Claimant stated that:

10.17.1 on 31st May 2017 at 16.03, he viewed the investigation log relating to a sexual assault;

10.17.2 he was not aware that the suspect for the sexual assault was a member of his family by being married to his uncle's niece/his cousin;

10.17.3 he was looking at the information to see if there was any information he could add to the records. He submitted no intelligence because there was nothing more that he could add;

10.17.4 he had no reason to discuss the information with any family members, as he did not know that the suspect was a family member.

10.18. The Claimant stated that he understood that the transcript of interview would be used for both the criminal investigation and any resulting misconduct proceedings. As to the misconduct element, rather than any criminal elements, the Claimant accepted that his behaviour was not acceptable and that it amounted to a breach of the Standards of Professional Behaviour.

10.19 On the conclusion of the investigation, the AA submitted all the evidence to the CPS on 28th March 2017.

10.20 There were some delays in the CPS making a final decision on whether or not to charge the Claimant until finally on 24th October 2017, the CPS authorised the Claimant to be charged with offences two and three. The disciplinary process was put on hold pending the outcome of the criminal process.

10.21 On 23rd November 2017, the Claimant pleaded not guilty and elected for trial upon indictment by judge and jury. On 22nd December 2017, a trial was set for the week commencing 14th May 2018. In the event the hearing was non-effective and re-fixed for 26th November 2018. This hearing was also non-effective and re-fixed for 28th May 2019.

10.22 As the criminal matter was delayed until 2019, the IO signed the misconduct investigation report on 4th January 2019, stating that in his opinion that there was a case to answer in relation to an allegation of gross misconduct pursuant to IPCC Guidance paragraphs 11.29-11.35 and referred it to the AA, pursuant to PRA schedule 3 paragraph 22(2). On receipt of the report, Detective Chief Inspector Bruton acting with the delegated authority of the AA considered the Code of Ethics and Standards of Professional Behaviour and determined that there was a case for the Claimant to answer in relation to an allegation of gross misconduct, pursuant to PRA schedule 3 paragraph 24(6) and IPCC Guidance.

10.23 As such, on 28th December 2018, the Claimant was invited to a disciplinary hearing on 15th January 2019.

10.24. The Claimant was served with a hearing bundle. The allegations against the Claimant were that he had (i) between December 2014 and January 2016 repeatedly

misused the Respondent's computer systems; and (ii) that information obtained through the misuse of the Respondent's computer systems was knowingly or recklessly disclosed to a third party without the consent of the data controller, contrary to the Data Protection Act 1998. It was alleged that through his actions the Claimant had breached (i) the Police Staff Standards of Professional Behaviour; (ii) Instructions to abide by all reasonable instructions and abide by force policies and his contract of employment; (iii) confidentiality. The investigation report then set out the particulars of the four accesses and the evidence gathered.

10.25 The disciplinary hearing took place on 15th January 2019, chaired by Supt Walton. The AA was represented by DC Sikham. The Claimant was represented by trade union representative Liz Curnew.

10.26. In the hearing, the Claimant stated the following for offence one:

10.26.1 It looked like he had offered nothing evidentially, but his goal was continuity;

10.26.2 He signed his own pocket notebook entry for transparency;

10.26.3 He believed he was acting in a police capacity when his sergeant (who was on duty) asked him to take his uncle to the hospital (whilst he, the Claimant, was off duty);

10.26.4 He accessed the police records because he was struggling with the "*whole worry-side of it*";

10.26.5 Instead of accessing the police computer systems, he would now consider contacting the sergeant to clarify the situation and accepted that there were obviously different avenues that were available and which he should have taken. But, at the time, he thought that he was acting appropriately;

10.26.6 He had accessed the crimes portal rather than Oasys because this was the first thing that came into his head;

10.26.7 He accepted that he could have checked Oasys rather than the crime investigation log, he could have spoken to the sergeant and he could have spoken to a supervisor;

10.26.8 He disclosed none of the information that he read.

10.27 For offence two, the Claimant said:

10.27.1 Before his interview, when he had been provided with all the disclosure, he had not realised that he had made the accesses. At the time of the accesses, he had returned from paternity leave, his sergeant had asked him to know the offenders of stuff that was going on, that was not normally a PCSO's duty but he was given a list of crimes at which to look, so he accessed the record

concerning sexual assault of A together with the other crimes;

10.27.2 He was aware that everything left a footprint and he would not have left himself in that position, open to criticism;

10.27.3 He could not remember who had given him the list of crimes or what else was on the list. There were ten or eleven offences on it. He had made no reference to the list of crimes anywhere;

10.27.4 He would ordinarily brief himself by looking on Corvus but he did this in addition to accessing the crime report and investigation log;

10.27.5 It would be an unusual practice for someone to give him a list of crimes to review and for him then to look at them as he had described;

10.27.6 If he had realised that the crime report concerned his family member, he would definitively have disclosed his access of it to his sergeant;

10.27.8 He had briefed himself on the report even though he had looked at it for only a minute, he did not recognise the name of the person on the record and he had not flagged it with anyone.

10.28. For offence three, the Claimant stated:

10.28.1 The investigation report stated that he had accessed the records concerning the theft of his mother's vehicle because he was frustrated but he had never said that he was frustrated;

10.28.2 His mother was vulnerable and he had done the right thing by a victim of crime and West Midlands police by making the access. He had done what was necessary to protect his mother as a vulnerable victim of crime and to help the police;

10.28.3 Despite accessing the records to see whether his mother's property had been recorded and/or the CCTV collected, he had no conversation about this afterwards with either of his parents;

10.28.4 He could instead have contacted the investigating officer but he would have accessed the report on a request from any member of the public. He struggled with the fact that he should not access the reports where the victim was related to him. Nowhere in his training did it say he could not look at police records pertaining to a family member.

10.28.5 He had accessed the records because his mother had asked him to do so, so he did this rather than her having to call the access desk. He could see no issue with his performing the quick check;

10.28.6 Although he was not aligned to the investigation, he disputed that he had no professional rather than a personal interest in the investigation because he would

have done the same thing for any person, so that there was no personal reason involved;

10.28.7 He would have done the same for any other person on the street, the fact that the victim was his mother did not affect that she was still a vulnerable victim of crime, he accepted now that it was different but there was nothing for him to gain, he had not told anybody anything about the contents of the record he had viewed and he was only trying to help a vulnerable victim of crime, despite possibly accepting that he could have done this differently;

10.28.8 Although his mother had asked him to perform the check as to what had been done on the investigation, he did not tell her anything of what he had read, as it would have caused her more angst. He also did not tell his father as he had no interest in the matter. His mother had only asked him to put a property list on the file and asked him to look at whether the CCTV had been collected.

10.29. For offence four, the Claimant stated that he did not know that Robert Parkes was related to him. He accessed the records to see if there was anything that he could offer about him.

10.30 Overall, the Claimant stated that he believed that all his accesses of the police computer systems were for honest reasons, he had performed his role for ten and-a-half years and he had done nothing for personal gain.

10.31. Supt Walton considered the evidence and made the following findings:

<u>Offence one</u>:

10.31.1 The Claimant received training relating to data protection and his responsibilities regarding information held within policing systems;

10.31.2 The Claimant made a clear admission as to having access to the crimes portal system, shown by the audit and entry in his pocket notebook;

10.31.3 The Claimant said that he undertook the check to bring him peace of mind as he was worried about the fact that his uncle had been placed in his care and said that this was a policing purpose;

10.31.4 A policing purpose was protecting life and property, preserving order, preventing and detecting the commission of offences, bringing offenders to justice and any duty or responsibility arising from statute or common law;

10.31.5 Accordingly, the Claimant's access of the computer systems was not in line with a policing purpose;

10.31.6 The Claimant had other options available to him to satisfy his query, by contacting the supervisor or the sergeant who attended the scene, without having to access the crime records;

10.31.7 There was no conclusive evidence of onward disclosure;

10.31.8 In those premises, the Claimant's access was a breach of the Standards of Professional Behaviour.

For offence two:

10.31.9 The Claimant's explanation that on his return from absence he was given a list of crimes to review, that the sexual crime concerning his family member was on the list and that he skimmed the report and recognised no link to his cousin was hugely questionable;

10.31.10 The report relating to the sexual assault was made eight weeks before the Claimant's access of it. It was difficult to believe that the Claimant would have been tasked with reviewing a crime that had taken place historically and where it was not directly relevant to his role as a PCSO;

10.31.11 Normal practice would be to for an officer or member of police staff to self-brief via Corvus following a return from absence whilst the Claimant had accessed the crime report and an investigation log;

10.31.12 He could not see how the Claimant's accessing of the computer system was in line with a policing purpose;

10.31.13 The Standards of Professional Behaviour stated that police staff should treat information with respect and access or disclose it only in the proper course of their work;

10.31.14 The victim's mother had provided a statement indicating that the Claimant had disclosed information relating to a potential suspect. He strongly believed that the Claimant accessed the information upon a request from a family member and potentially disclosed sensitive information contained within the report;

10.31.15 In those premises, the Claimant's access and disclosure were breaches of the Standards of Professional Behaviour.

For offence three:

10.31.16 The Claimant admitted to accessing and viewing the police records as alleged;

10.31.17 The Claimant stated that he accessed the records for a legitimate policing purpose and had made no disclosure of the information to either of his parents;

10.31.18 There were other options available to the Claimant for him to resolve his queries;

10.31.19 The Claimant's access of the police records was not in the course of his work;

10.31.20 He found it hard to believe that the Claimant had not made a further disclosure of the information to either of his parents;

10.31.21 It was concerning that the Claimant considered that his actions in accessing the records were justified;

10.31.22 As such, the Claimant's access and disclosure were breaches of the Standards of Professional Behaviour.

For offence four:

10.31.23 There was insufficient material to doubt the Claimant's account;

10.31.24 The matter was not proven;

10.31.25 Supt Walton found that the breaches of the Standards of Professional Behaviour in their totality amounted to gross misconduct.

10.32 In determining the sanction Supt Walton indicated that he needed to consider the Claimant's references; his length of service (ten years and six months); his awards (the Claimant had received a Team Quality Achiever Award in February 2009 and a Quality Achiever Award in February 2009); his disciplinary record (the Claimant had no current outstanding warnings or any outstanding disciplinary matters). There was no other relevant information on the Claimant's personnel file;

10.33 The Claimant was asked if he had any other submissions that he wanted Supt Walton to take into account when making his decision. The Claimant apologised for his actions.

10.34 After retiring to make his decision Supt Walton advised the Claimant of his decision as follows:

10.34.1 the matter of some gravity;

10.34.2 He had considered the Claimant's service record and the content of the references that he had provided;

10.34.3 He was not convinced that the Claimant understood the seriousness of the offences;

10.34.4 The offences came to light only after a complaint alleging the disclosure of sensitive information and not through the Claimant voluntarily disclosing his own wrongdoing;

10.34.5 Despite the Claimant's suggestion that the complaint was malicious, there was a pattern of behaviour;

10.34.6 The handling of information was the responsibility of all West Midlands Police employees, and public confidence was undermined by any breach of trust in that regard;

10.34.7 The findings against the Claimant made the Claimant's future with the police service untenable;

10.34.8 In those circumstances, the sanction was that of dismissal without notice.

10.35 On 21st January 2019, the Claimant gave notice that he wished to appeal the outcome of the disciplinary hearing. His grounds were as follows:

10.35.1 For offence two, there was fresh evidence in the form of a witness statement from his uncle, provided to his solicitors in the criminal action, showing that his uncle learned the information about the case of A from a school teacher, not from;

10.35.2 For offence three, the AA had failed to present the witness statement from Rhiannon Hutton on his disclosing the details of four suspected offenders to his parents, where the reports contained no offender details;

10.35.3 Also for offence three, the investigation report had referred to his accessing the record due to frustration with the progress of the investigation whereas he had never used those words;

10.35.4 The finding that he had not appreciated that his actions were wrong was unfair. He had accepted that there were different ways of obtaining the information, for which he had apologised but he thought at the time that he was doing the right thing;

10.35.5 His references were not read-out in the hearing and/or were given inadequate weight;

10.35.6 The record of service failed to show some of his quality achievers awards, which appeared to have been improperly altered, where the disciplinary sanction was unreasonable in light of his exemplary record and achievements.

10.36 On 1st February 2019, the Claimant was invited to an appeal hearing to take place on 15th February 2019, to be chaired by Deputy Chief Constable ('DCC') Rolfe.

10.37 At the hearing, the Claimant repeated his grounds of appeal, adding nothing materially new to them.

10.38 During the hearing, the Claimant stated: (i) He accepted accessing the information for offence two but that he had not disclosed what he read; (ii) He had not put forward the point in the disciplinary hearing concerning the AA's not providing the statement of Rhiannon Hutton, stating that he had "*completely missed the point*"; (iii) His inspectors and chief inspectors did not see him as a threat, such that he had still been dealing with jobs and logs.

10.39 The Claimant did not provide any new evidence.

10.40 Supt Walton addressed the Claimant's grounds of appeal as follows: (i) The Claimant had not disputed or challenged that the allegations, if proved, amounted to gross misconduct; (ii) For offence two, the Claimant had not provided the witness statement from his criminal defence proceedings. However, it transpired that Claimant would have had access only to the suspect details rather than the other information that was alleged to have been disclosed; (iii) For offence three, the AA had not provided him with the statement of Rhiannon Hutton. Notwithstanding this, the Claimant had accessed the police records to check the property list and CCTV collection. He considered it likely that the Claimant would have disclosed the information on this to his parents and that the access was not for a policing purpose; (iv) The reference to the Claimant's being "frustrated" was not particularly relevant and the issue was

addressed during the hearing; (v) He disagreed that the Claimant's accesses were appropriate. He noted the Claimant's apology and hindsight recognition but he had stated on more than one occasion that his accesses were appropriate and in accordance with training; (vi) On the issue of references, he had sat on a number of disciplinary hearings for police officers and police staff and references had never before been read-out. He had considered the references and stated this during the hearing; (vii) He now understood that the record of service failed to show some quality achievement awards but their absence was not a deliberate act, there was no evidence of anyone having tampered with the service record and the additional awards would have made no difference to the sanction; (viii) With the exception of the potentially successful ground of appeal concerning the disclosure of information for offence two, he remained confident in both the finding and sanction; (ix) Specifically, it would have made no difference to the overall finding of gross misconduct or the sanction of dismissal if he had had the correct information for offence two. With respect to that matter, there was no justification for the Claimant to access the documents when he had been off work for six weeks and there was no legitimate reason for him to access the specific record that he did. He did not accept that it was a coincidence that the records concerned the Claimant's family member with the same surname.

10.41 DCC Rolfe provided her decision and reasons on the appeal by a letter dated 11th March 2019. She determined: (i) On offence two, whilst it was possible that the disciplinary panel would have reached a different conclusion in relation on the allegation of disclosure, this would have made no material difference to the overall decision of gross misconduct or the sanction; (ii) On offence three, despite the non-provision of the statement of Rhiannon Hutton, there was no basis for stating that this was a purposeful withholding of relevant information. The Claimant had accepted accessing the police records and Supt Walton was entitled to find that onward disclosure of the material that he had viewed was likely, particularly where his mother had asked him for the outcome of his checks and had a conversation with him regarding the properly list; (iii) The word "frustrated" had been discussed during the disciplinary hearing and had no influence on the decision making process; The Claimant's apologies and his stating that he had learned from the matter was retrospective remorse rather than a true understanding of his actions; (v) The Claimant's references had been considered and it was not common practice to read them out; (vi) The two awards that were missing from the service record would not have affected the sanction of dismissal

without notice; (vii) The Claimant had a number of options open to him to deal with the queries that he said he had, but instead he had taken it upon himself to access confidential systems for a non-policing purpose. His actions amounted to gross misconduct and summary dismissal was reasonable.

Applicable law

11 Section 98 (1) Employment Rights Act 1996 provides that 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 principle reason for the dismissal).

(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.

A reason falls within the subsection if it –

(b) relates to the conduct of the employee,

12 Section 98(4) provides that 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 reasons shown by the employer) -

(a) *depends on whether in the circumstances (including the size and administrative resources of the employers 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.

13 The guidelines set out in the case of ***British Home Stores Limited -v- Burchell [1978] IRLR 379*** applies to this case in that the test to be satisfied is that:-

- The respondent honestly believed that the claimant was guilty of the misconduct alleged;
- The respondent had reasonable grounds on which to sustain that belief; and
- The Respondent had carried out an investigation that was reasonable in the circumstances.

14 The Tribunal must finally consider whether dismissal was a reasonable sanction for the alleged misconduct. In determining whether the respondent's decision to dismiss for conduct is reasonable pursuant to Section 98(4) of the ERA, the Tribunal is assisted by the band of reasonable responses approach which is proved in the case of ***British Leyland (UK) Limited -v- Smith [1981] IRLR 91***. It was stated that:-

"the correct test is:

was it reasonable for the Employer to dismiss [the Employee?]. If no reasonable Employer might reasonably have dismissed him, then the dismissal was unfair. But if a reasonable Employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all cases, there is a band of reasonable responses within which one Employer might reasonably take one view whereas another might reasonably take a different view".

15 The Tribunal cannot substitute its own decision for that of the Respondent (affirmed by the Court of Appeal in ***Sainsbury's Supermarkets Limited -v- Hit [2003] IRLR 23*** even if it believed that the decision to dismiss was harsh in the circumstances,. The dismissal will be fair unless the respondent's decision to dismiss was one which no reasonable employer could have reached.

16 The case of ***Polkey –v- A E Dayton Services Limited 1987 IRLR 503 HL*** indicates that generally an employer will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless or until it has carried out certain procedural steps which are necessary, in the circumstances of that case, to justify the course of action taken. In applying the test of reasonableness in Section 98 (4) the Tribunal is not permitted to ask whether it would have made any difference to the outcome if the appropriate procedural steps had been taken, unless doing so would have been "futile". Nevertheless, the **Polkey** issue will be relevant at the stage of assessing compensation. **Polkey** explains that any award of compensation may be nil if the Tribunal is satisfied that the Claimant would have been dismissed in any event. However, this process does not involve an "all or nothing" decision. If the Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.

17 Tribunals are also obliged to take the provisions of the ACAS Code of Practice on Discipline and Grievance Procedures 2009 into account in that it sets out the basic requirements of fairness which are applicable in most cases of misconduct.

18 Section 123(6) of the ERA states:

"where the Tribunal finds dismissal was to any extent the cause or contributed to by any action of the complainant, it shall reduce the amount of compensation by such proportion as it considers just and equitable having regard to that finding".

Submissions

19 The Claimant was succinct in his submissions. He took the view that his actions were at low risk of harm. The Claimant submitted that he had legitimate policing purposes for accessing the information relating to his mother and uncle. In relation to the information relating to A he argued that accessing this information was accidental and he had not realised that he had accessed this information until he had been asked about it at the investigatory meeting. He did not believe that his actions was so serious that they warranted his dismissal without notice after 10 years of service. The Claimant submitted that his dismissal was unreasonable in the circumstances.

20 Mr Gold for the respondent pointed out that the Claimant's grounds for unfair dismissal were as set out in section 8.2 of his claim and to which I have referred in paragraph 9 above. The Claimant has made no application to amend or add to those grounds.

21 In response to the Claimant's case Mr Gold submitted that (i) the Respondent acted reasonably in finding that the severity of the Claimant's proven conduct amounted to gross misconduct pursuant to section 98(4) of ERA; (ii) that the Respondent acted reasonably in treating the Claimant's conduct as justifying dismissal pursuant to section 98(4) of ERA; and (iii) the errors to which the Claimant referred gave no rise to no unfairness, were cured on appeal and/or had no material impact upon the Respondent's decision to dismiss pursuant to section 98(4) of ERA.

22 Mr Gold pointed out that the Respondent's policies from the Security Operating Procedures, Data Protections Policy and Standards of Professional Behaviour make it clear that all persons are expected to use police systems for lawful policing purposes only and that it is prohibited to use police information for anything other than the force's lawful business.

23 Furthermore, Appendix M of the Staff Misconduct Policy provides that matters falling within the description of gross misconduct include "*unauthorised access and/or release of information from computer systems*".

24 Mr Gold argued that the Respondent's treatment of the Claimant's actions as a matter of gross misconduct was reasonable as: (i) The disciplinary process found that the Claimant had accessed computer records for purposes that formed no part of his policing duties, where this was for a non-policing and/or was for a personal purpose and where it involved the access of records relating to personal family members and where the

content of those records was highly sensitive in content, in containing information about sexual assaults and/or the personal details of suspects; (ii) The accessing of information other than in accordance with police policy and without a policing justification was categorised as gross misconduct in the disciplinary policy and was a breach of the Standards of Professional Behaviour, Code of Ethics and the DPA. Further, the Respondent's Data Protection Policy expressly prohibited access to information systems where this was not necessary in the course of a 26 person's official duties, in respect of a matter involving them when they were off-duty, for a private purpose or when concerning a family matter or member; (iii) The disciplinary hearing was entitled to consider that the Claimant had performed four separate accesses, that this was notwithstanding his training on the acceptable use of police systems and where he was under an obligation as a police staff member to ensure that he was up-to-date on police data security and access policies, the Standards of Professional Behaviour and the Code of Ethics and where the fact of his accesses arose not due to his self-disclosure but a public complaint; (iv) The disciplinary hearing was further entitled to note that the Claimant could have satisfied his queries by contacting the relevant sergeant, supervisor or investigator, that it did not necessitate his access of the police crime reports and/or that he could have used lower-level computer systems such as Oasys or Corvus; (v) The Claimant's actions in accessing the data was aggravated by the disciplinary hearing's finding that he had disclosed information to his parents in the police investigation of the theft of their mobile home; (vi) Furthermore, the Claimant worked as a member of police staff, appointed to the role of a Police Community Support Officer. Although not a warranted officer, the Claimant performed policing functions and had access to police computer systems. The expectations of him would be no less than that of a police officer in respect of the data access and handling; (vii) That offences two and three were sufficiently serious for the Crown Prosecution Service to invite the Claimant to accept a caution and then to authorise charge for a criminal offence, to be heard in the Crown Court before judge and jury.

25 Mr Gold argued that the decision to dismiss was within the bands of reasonable responses. The Respondent, as the Chief Constable, was required to maintain public confidence in the police service, uphold high standards and deter misconduct, and protect the public as set out in paragraph 2.3 of the Guidance on outcomes in police misconduct proceedings.

26 Mr Gold submitted that Supt Walton's decision to dismiss was reasonable as the Claimant's actions were serious; the Claimant failed to demonstrate adequately that he had appreciated the gravity of his actions; the Claimant had made no voluntary disclosure of his actions and the matter came to light when a public complaint had been made; and the Claimant had changed his account in respect of complaint three by admitting that he had no policing purpose but then stating otherwise in the disciplinary hearing. Whilst the Claimant's long service and four recommendations were relevant

but any personal mitigation could have had limited weight where it was considered that the public interest required the Claimant's dismissal.

27 The fact that the Claimant had continue to work for two years did not render the dismissal unfair as the Claimant was not informed by senior management that they did not see him as a security threat nor did the Claimant adduce any evidence of this. Furthermore, the revoking of the Claimant's access to the police computer systems was never restored nor did the Claimant "*get round*" these restrictions by his supervisor printing off information. Mr Gold asserted that this was done to prohibit and restrict the Claimant's ability to access any information other than that which he was expressly given by managers and/or supervisors.

28 Furthermore, Mr Gold submitted that the Claimant's not being suspended was in line with police practice where the risk of his improperly accessing police data could be managed by the revoking of his access to all police computer systems pending resolution of the misconduct proceedings. On the misconduct finding the fact that the Claimant had improperly accessed police data and/or disclosed it, amounting to a breach of the Standard of Professional Behaviour of Confidentiality and Honesty and Integrity, meant he was no longer able to work within any evidential chain or be trusted with access to police data in the future, regardless of his having continued working for two years with revoked access.

29 Mr Gold argued that it would have been unreasonable for the Respondent to have had to keep the Claimant as a member of police staff when he was unable to perform his duties and would have required more intensive supervision in consequence of his misconduct, due to his inability to access police computer systems or otherwise work within the evidential chain.

30 Mr Gold further submitted that the errors to which the Claimant referred namely (i) the error on the issue of disclosure on offence two; (ii) the panel allegedly ignoring a statement in the Claimant's defence; and (iii) the alleged alteration of the Claimant's record to show fewer commendations than he actually had did not render his dismissal unfair and had no material impact on Supt Walton's findings.

31 Finally, Mr Gold pointed out that other matters to which the Claimant had referred in his witness statement were not in his details of claim, no application to amend his claim had been made and the Respondent, therefore, was not in a position to call evidence as to the same. In any event the decision to offer the Claimant a caution then being charged was a decision of the Crown Prosecution Service and not the Respondent. Similarly, the Claimant's later acquittal in the criminal case was irrelevant to the misconduct finding and sanction as decisions of a disciplinary tribunal differ from those of a criminal court.

Conclusions

32 In reaching my conclusions I have considered all the evidence I have heard and the pages of the bundle to which I have been referred. I also considered the oral submissions made by and on behalf of both parties and the written submissions made by Mr Gold.

33 I am satisfied that the reason for the claimant's dismissal was conduct namely the Claimant's unauthorised accesses of and disclosure of police information. I note that the claimant did not dispute that the respondent's reason for dismissing him was not real or genuine.

34 I am therefore satisfied that the respondent had a potentially fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996.

35 As such, the first issue I need to consider is whether the respondent followed a fair procedure. In this particular case, whether the respondent had reasonable grounds for holding a belief that the claimant had committed an act of gross misconduct and having conducted as much investigation into the circumstances as was reasonable.

36 I am satisfied that the investigation was a thorough as the circumstances warranted given that the Claimant himself admitted access 1 and 3. Turning to the points made by the Claimant that i) the error on the issue of disclosure on offence two; (ii) the panel allegedly ignoring a statement in the Claimant's defence; and (iii) the alleged alteration of the Claimant's record to show fewer commendations, I am satisfied that these matters do not render his dismissal unfair. I am satisfied on the evidence before me that the panel allegedly ignoring a defence statement and the Claimant's record showing fewer commendations than he had achieved would not have made a difference to the outcome where it was considered that the public interest required the Claimant's dismissal given the seriousness and repeated assess and disclosure of police information that the Claimant had made. In any event each of these matters were considered and remedied on appeal.

37 I am also satisfied that the fact that the Claimant continued to work for two years after his unauthorised access to police records came to light does not render his dismissal unfair. The disciplinary process was delayed as a result of the concurrent criminal proceedings in relation to the Claimant's unauthorised access and disclosure of police information and not for any other reason. The Respondent took steps to limit the Claimant's access to police information whilst he continued to work. I agree with Mr Gold's assertion that the Claimant not being suspended was in line with police practice where the risk of his improperly accessing police data could be managed by the revoking of his access to all police computer systems pending resolution of the misconduct proceedings.

38 I also agree that the Claimant's later acquittal in the criminal case was irrelevant to the misconduct finding and sanction as decisions of a disciplinary tribunal differ from those of a criminal court. Further, I agree with Mr Gold that

the other matters to which the Claimant had referred in his witness statement were not in his details of claim, no application to amend his claim had been made and the Respondent, therefore, has not been in a position to call evidence as to the same. As such, these are not matters which I should consider in reaching my decision. Even if I am incorrect in relation to whether or not these matters should be considered in reaching my decision, I am satisfied that they do not render the Claimant's dismissal procedurally unfair.

39 I must also consider whether the dismissal within the bands of reasonable responses reminding myself that the Tribunal must not substitute its own decision for that of the Respondent. Given the claimant's position of responsibility and the need for the Respondent, as the Chief Constable, to maintain public confidence in the police service, uphold high standards and deter misconduct, and protect the public, I am satisfied that dismissal was within the bands of reasonable responses open to the respondent. In the circumstances, I am satisfied that a fair process was followed and that the dismissal is a fair and reasonable one taking into account equity and the substantive merits of the case. The claimant's complaint of unfair dismissal therefore fails and is dismissed.

Signed by Employment Judge Choudry

on 10 May 2021