



EMPLOYMENT TRIBUNALS

Claimant: Mr N W Burke

Respondent: The Chief Constable of Essex Police

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 21 March; 1 & 2 July 2021 and (in chambers) 19 July 2021

Before: Employment Judge B Elgot

Representation

Claimant: In person

Respondent: Ms K Loraine, Counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

The Employment Judge having reserved her decision now gives judgment as follows:-

JUDGMENT

- 1. The claim of unfair dismissal does not succeed and is dismissed.**
- 2. The complaint of wrongful dismissal does not succeed and the Claimant is not entitled to damages in relation to breach of contract (failure to pay notice pay) because he was fairly dismissed without notice for gross misconduct.**
- 3. Reasons for this judgment are attached.**

REASONS

1. The Claimant was a Police Community Support Officer (PCSO) in the Essex Police Force for 17 years since 2003 and previously had exemplary service in the Army for 23 years. He was summarily dismissed on 23 June 2020 in relation to two allegations of misconduct which were found proven and which were found to be incidents of gross misconduct justifying immediate dismissal without notice.

2. He has been the subject of a barring order by the College of Policing which prevents his employment in any other police, law enforcement or public security force (page 334 of the bundle). I am conscious that this is a case which has had very serious implications for the Claimant's professional career and I accept that there is an unequivocal obligation on the employer to carry out a reasonable investigation into the alleged misconduct which involves consideration of evidence which might exonerate or excuse the Claimant as well as looking at factors which, as the Claimant's Submission states, 'point towards guilt'.

3. The Claimant gave evidence on his own behalf and represented himself; he told me that he is known by family, colleagues and friends as Wayne, his middle name, and that is how he is frequently identified in the documents. The Respondent had three witnesses. I heard from Chief Inspector (Community Policing Team) Jon Evans who was the Investigating Officer, Chief Superintendent Andy Mariner who was Chair of the disciplinary panel which took the decision to dismiss and Assistant Chief Constable Rachel Nolan who heard the appeal.

4. There is an agreed bundle of documents together with a supplementary bundle consisting of a number of the Respondent's relevant policies and procedures which was admitted into evidence on 1 July 2021 together with a supplemental explanatory witness statement from Chief Superintendent Mariner. The Claimant was given time to read these documents (he is familiar with the policies having received regular and recent training) and prepare cross examination. In accordance with the usual practice of the Tribunal I read only those documents to which my attention was specifically directed by the parties, the representative and the witnesses.

5. The Claimant submitted a written submission and informed me that he has had some professional legal advice both from solicitors and from Stevenage Citizens Advice Bureau which prepared his Submission although he was not represented at the Hearing. Ms Loraine, on behalf of the Respondent, prepared written Outline Submissions and both parties had the opportunity to make further verbal submissions at the end of the case.

6. There is no agreed List of Issues and there has been no case management intervention in this case by the Tribunal save that the Claimant was permitted by Employment Judge Gardiner to amend his Claim to include a claim for wrongful dismissal consisting of a complaint that there was a breach of contract in dismissing him without notice for which he claims damages (notice pay). That claim has also failed.

7. It was agreed between the parties and explained by me to the Claimant that the central issue in this case is what is sometimes called the 'fairness' question. The Claimant has agreed that he was dismissed for reasons relating to his conduct. This is one of the potentially fair reasons in section 98(2) Employment Rights Act 1996. Section 98(4) requires me to determine the question whether the dismissal for that reason was fair or unfair and the answer to the fairness question '*depends on whether in the circumstances (taking into account 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*'. I am also obliged to have regard to equity and the substantial merits of the case.

8. Unquestionably therefore I have no power to substitute my own decision on guilt and/or sanction in this case or to decide these complaints on the basis of what I would have decided if I had been the decision maker. The question is whether the Claimant's dismissal in all the circumstances was within the range of reasonable responses open to the Respondent.

9. The conduct for which the Claimant was dismissed.

I find that the Claimant was dismissed for two acts of proven misconduct which I summarise as follows:-

- i) That on 20 July 2017 he accessed police data/'records' from the STORM system relating to his grandson for non-policing purposes and thus misused that data because he was unable to show that each incident of access was for a proper policing purpose within the meaning of the Respondent's Appropriate Access Policy.
- ii) That in a family court witness statement dated 14 November 2019 relating to the access and care arrangements for his grandsons he made false statements i.e. that his ex- daughter in law had made false allegations of harassment against him and that he had been shown an entry in the Police Pocket Notebook (PNB) of a colleague which recorded this fact. He later admitted that he had seen no such notebook entry. The relevant court document is paragraph 15 on page 548 of the bundle. My findings of fact concerning the Claimant's differing accounts of his family court statement are set out further below.

10. The disciplinary outcome letter dated 23 June 2020 at pages 336-341, to which is attached a copy of the adjudication rationale given at the disciplinary hearing, confirms a finding by the disciplinary panel, consisting of Chief Superintendent Mariner, Chief Inspector Anthony Alcock and HR Partner Linda Garner, that they find breaches of the Police Staff Standards in relation to Confidentiality, Honesty and Integrity. There are two allegations found proven on page 338:-

' Point 2 -You accessed police held information on STORM on repeated occasions for a non- policing purpose'

'Point 3-You have provided a written statement to the family court which was false and provided an account during interview that was different to the written statement. You have admitted this to be the case'.

11. The Appeal.

The appeal which took place on 21 July 2020 is an integral part of the disciplinary process and in this case consisted of a review of the disciplinary decision based on the grounds of appeal put forward by the Claimant at pages 351-354 in an email dated 25 June 2020. The appeal also fully considered the mitigation and explanation put forward by the Claimant in the context of the extremely challenging personal and family difficulties he was experiencing at the relevant times.

For completeness the appeal outcome letter at page 450 dated 22 July 2020 confirms ACC Nolan's finding that *'every viewing of the [STORM] incident further to the second occasion when you advised you were certainly aware it related to your grandson was not for a policing purpose'*. She found that not only had the Claimant admitted providing a false statement to the family court but that [the disciplinary panel] *did not accept that you 'mixed up your words' within the letter to the family court and I concur with this view. Whilst you were experiencing personal difficulties as we discussed in detail, I am not convinced by your explanation and can see no honest reason for describing a conversation with an officer and sight of his pocket notebook'*

12. ACC Nolan therefore also concluded, on review of the Claimant's case, that *'the seriousness of the proven allegations brought into question the faith, trust and confidence that the Force had in you'*. I refer to the rational conclusions in paragraphs 38 and 49 of her witness statement regarding her reasons for concluding that gross misconduct had occurred warranting summary dismissal. In her oral evidence under cross examination she made it clear that she had empathised with his family circumstances and was *'moved by his public service commitment'* and *'decorated history'*. She paid due regard to the mitigation put forward by the Claimant when she upheld the decision to summarily dismiss for gross misconduct.

13. ACC Nolan is a very senior police officer with extensive experience in disciplinary matters and, for the avoidance of doubt, I find that she was unbiased, she had no previous professional involvement with the Claimant or his work, she has no personal ties of 'good friendship' with Chief Superintendent Mariner as the Claimant alleges and she undertook the appeal conscientiously without 'rushing' her decision given that she had been supplied with a comprehensive pack of documents, had undertaken thorough advance preparation and had the benefit of professional Human Resources advice. There was no new evidence to consider at the appeal. There was no unfair practice or procedure connected to the conduct of the appeal.

14. The supplementary bundle and supplemental witness statement of Chief Superintendent Mariner.

_These documents clarify the data protection policy of the Respondent governing Appropriate Access and Use of Police Information under the W2013 Procedure. The document in place at the time of the events in 2017 in relation to which the Claimant faced disciplinary allegations is at pages 1-6 of the Supplementary Bundle. Chief Superintendent Mariner identifies this as the relevant policy utilised by him at the disciplinary hearing and states *'Mr Burke was well aware of the respondent's rules about this issue and understood that it was not appropriate for him to access our systems in relation to an incident he was not assigned to and which involved his grandson'*

15. I am satisfied that the W2013 Procedure did apply to the actions of the Claimant on 20 July 2017. I am equally satisfied that the Claimant knew of the data protection and appropriate access requirements placed upon him as a 'user' of police information. He confirmed in cross examination that he had been trained. His training record at p25 of the Supplementary Bundle shows that he completed courses in Information Security in 2014 and Data Protection Act training in December 2018. There is comprehensive guidance regularly issued by the College of Policing as to Authorised Professional Practice in this regard.

16. I find that in July 2017 the Claimant was aware of the reporting requirement that , as formally stated in section 3.6 of W2013, *'a user, as part of their role, may be required to access or use police information concerning...friends, acquaintances, neighbours or family members. Where this occurs the user must report the circumstances to their supervisor or line manager who will reallocate the task to another user unless such a course of action is considered impracticable'*. Section 3.7 refers in similar terms to 'Overheard Conversations'. I accept that a failure to report is a failure to comply with the police force's obligation to restrict access to police information and is potentially both a disciplinary matter and maybe a subject of criminal prosecution.

17. I also find that users accessing STORM via police mobile devices as the Claimant did on 20 July 2017 see an initial data protection warning displayed which cautions against unauthorised use and refers to *'prosecution, disciplinary action or both'* in the case of access for any reason other than an authorised policing purpose. A copy of the 'pop up' warnings are at pages 26 and 27 of the supplementary bundle and page 28 shows the warning screen which appears when logging on to police mobile devices as the Claimant did on 20 July 2017.

18. The findings of the disciplinary panel and of the appeal officer in relation to the meaning, nature and extent of 'valid' or 'proper' 'authorised' 'legitimate' policing purposes as compared to 'non policing purpose' or unauthorised access/use are set out below. 'Valid policing purpose' is defined in section 3.2-3.4 of W2013.as set out in paragraph 10 of Chief Superintendent's supplemental statement. There is a useful series of three questions for any police officer to ask him or herself in section 3.3.

19. Section 3.2 makes it clear that access to police information is only permitted for legitimate policing purposes and that access is limited only to the extent that it is *'necessary*

or required by their official role, to achieve the police force's operational or support purposes'. Any other access is misuse of that information.

20. There is therefore no necessity for the Respondent to prove 'harm' resulting from unauthorised access to police information or to show that the police officer who has misused police data has in any way gained from his actions. I accept and adopt the submission made by Ms Loraine on behalf of the Respondent at her paragraph 42 Outline Submissions and do not agree with the analysis in the Claimant's Submission 3 where he refers to the lack of 'discernible benefit' or advantage.

21. It need hardly be stated that, as a police force, the Respondent must uphold the most stringent standards and protections in relation to the sensitive and confidential data which it holds and to which it has access. Every police officer has an individual responsibility to comply with those very high standards.

22. Did the Respondent have a genuine belief based on reasonable grounds that the misconduct had occurred?

It is necessary for any dismissing employer to establish this element of a fair and reasonable dismissal process although in this specific case the Claimant made significant admissions of his own guilt as set out below.

23. The Respondent became aware of the misconduct alleged against the Claimant when it received a letter of complaint from a member of the public (KC) who is also the Claimant's estranged ex daughter in law and the mother of his two grandsons. That letter dated 30 December 2019 is on page 132 of the bundle and was sent following a contested family court hearing on 14 November 2019 at which the Claimant gave evidence on behalf of his son and against KC.

24. KC complained of two serious matters. First that her father in law, the Claimant, had stated untrue facts in his family court witness statement dated 14 November 2019 when he said that she had made unjustified complaints of harassment against him and that he had been made aware of those accusations because he saw them written down in the police pocket notebook (PNB) of a colleague. If the PNB was found to be the true source of this alleged information then the Claimant would not only be misusing police information obtained through his office as a PCSO but also implicating his colleague in potentially unlawful conduct and exposing him to sanction. In fact the Respondent eventually found both parts of the court statement to be false.

25. Secondly KC complains that, on the evening of 20 July 2017 after her elder son was returned home following an episode when he was recorded as a missing person and there was a police search, her ex-husband (the Claimant's son) called at her home and appeared to have information about the incident which she believed could only have been disclosed by the Claimant in his capacity as a police officer involved in the search. Again this was an allegation of serious misuse of police information and data.

26. KC supplied a copy of the Claimant's family court statement. The crucial paragraph numbered 16 is at page 247 of the bundle and states, by reference to a date in December 2018 '*he showed me his ...PNB which had an entry of alleged harassment from me towards K. I informed him that I had only gone round to see my grandson and offer support*'. I find that the content of this statement led the Respondent to have a genuine belief based on reasonable grounds that misconduct had occurred amounting to unauthorised access and use of police information. The initial disciplinary allegation set out at page 219 of the bundle in a letter dated 26 February 2019 from Inspector Evans therefore focussed on the Claimant having been improperly shown the PNB and refers to the court statement which implicated a fellow officer (later identified as PC Hubbard). There was thus, upon sight of a copy of this document, a genuine belief based on reasonable grounds, that misconduct had occurred.

27. KC requested an investigation into the Claimant's alleged activity in looking at 'records' relating to her and her sons going back to 1 December 2014 when she and the Claimant's son separated.

28. There followed a wide ranging search including an audit of the Claimant's access to police systems named Athena (crime recording and intelligence system) and Storm (command and control system). The results dated 24 January 2020 are at page 138 of the bundle which states '*these are matters of breach of DPA and disclosure. The results of the disclosure have had serious consequences to the complainant and her family. An audit of Athena and Storm shows that the subject of the allegation has accessed police systems for an unaccountable reason at this stage. Therefore it is submitted for investigation*'.

29. Inspector Evans was formally appointed to carry out a 'gross misconduct investigation of police staff' on 5 February 2020. He had HR Support and it should be noted that in accordance with the procedure of Essex Police Force the Police Standards Department (PSD) monitors and checks the severity assessment stage pre-investigation (pages 150-152) and authorises the appropriate disciplinary route in cases where an investigation identifies misconduct indicating a 'case to answer'. All those stages were complied with in relation to the Claimant's case. Inspector Evans set out the five allegations he was intending to investigate in a letter to the Claimant dated 26 February 2020 on page 219 of the bundle.

30. The Storm Log 20/7/17

The relevant Storm log is at page 240-241 of the bundle and is a document which was found to be integral to the investigation. I find that its content reasonably led the Respondent to have a genuine belief that the Claimant had misused police information and accessed police data for invalid non policing purposes as described in Procedure W 2013. The log shows the Claimant to have viewed the missing person log relating to his grandson 5 times i.e an additional 4 times after having received the initial notification of a missing person who he immediately realised was his grandchild. The Respondent in possession of this information formed a reasonable view that the Claimant had initially accessed police records relating to a family member, failed to immediately report the personal relationship and/or restrict the incident, was not attached or allocated to the incident and that subsequent viewings

of the STORM log, after at most the first two views, were therefore unauthorised and police information had been misused.

31. The Investigation and the flaws alleged by the Claimant. I am satisfied that the Respondent carried out a comprehensive and conscientious investigation as described in Inspector Evans' witness statement. He produced a written Report which begins at page 188 of the bundle. He interviewed KC as described in paragraphs 14 and 15 of his witness statement. On 26 February 2020 (page 219) he notified the Claimant of the initial five matters which were under investigation and thereafter invited him to attend an investigation meeting on 12 March 2020. He obtained the Claimant's response to the allegations and undertook supplementary investigations including interviewing PC Hubbard who denied showing the Claimant his PNB. He also spoke to PCSO Mark Hibben whom the Claimant told him was in the police car with him on 20 July 2017 and he interviewed the duty Inspector Stuart Colbert because the Claimant said that on 20 July 2017 he had told Inspector 'Colbear' (the Claimant misspelt his name) that the missing person was his grandson and that the incident should be restricted.

32. Neither PCSO Hibben nor Inspector Colbert recalled the events of 20 July 2017 or the Claimant's account of their involvement at all and PCSO Hibben's PNB, which was obtained, contains no entry which is relevant to the missing person report on that date.

33. As Ms Loraine's submission at paragraphs 8, 11 and 12 of her Outline Submission helpfully clarifies it was only when the Claimant himself was interviewed on 12 March 2020 in connection with having been improperly shown PC Hubbard's PNB that it became apparent that the Claimant had lied in his family court statement not only about where and in what circumstances he saw the PNB but also about the content of the PNB entry. The Claimant told Inspector Evans that he had '*mixed up his words*' in the family court statement, had not been shown the PNB directly by PC Hubbard but had in fact seen the PNB entry amongst a '*huge bundle of statements*' which were in his son's possession in connection with the court case. The Claimant did not tell Inspector Evans that the PNB entry in fact contained no allegations of harassment by KC.

34. The Claimant submits that the investigation was flawed and not reasonable. First he asserts that at the investigatory interview on 12 March 2020 the five allegations of which he was notified became seven allegations. I do not agree that this occurred and I am satisfied that the Claimant was fully informed of the matters which he was asked to address and was enabled to provide full facts and explanations during his investigatory interview.

35. In fact Inspector Evans concluded that only one of the original allegations (Strand 4) as set out in paragraph 42 of his witness statement constituted a 'case to answer' which should go forward to the PSD final assessment in order to determine whether there should be a misconduct hearing. (The 'personal records' referred to therein are, for the avoidance of doubt, the STORM log relating to the Claimant's grandson's temporary disappearance on 20 July 2017).

36. He did not uphold Strand 2 as described on page 194 of the bundle because the Claimant admitted that his family court statement was incorrect; he admitted that he had not

been shown the PNB by PC Hubbard personally. However having interviewed PC Hubbard and having seen the relevant PNB entry (the text of which is set out in full below) on page 244 of the bundle which he describes as being 'so *extremely different*' from what is written in the Claimant's family court witness statement Inspector Evans recommends that the disciplinary misconduct panel should also look at a potential breach of the Honesty and Integrity provisions of the Code of Ethics.

37. This is the origin of the second allegation which the Claimant was notified would be considered by the disciplinary panel as potentially amounting to gross misconduct. The relevant letter is dated 28 May 2020 and is at page 203 of the bundle.

38. Detective Superintendent Rob Kirby of the PSD confirmed this course of action on 14 May 2020 as can be seen from pages 186-187 of the bundle.

39. It should immediately be noted that the two cases to answer set out in the letter on page 203 seem to include a linked allegation that the Claimant not only improperly accessed confidential police data on 20 July 2017 but also that he shared that information. It is axiomatic that to share such information without legitimate policing reasons following unauthorised access makes the misconduct allegations even more significant and serious.

40. However this is an error. In fact the investigating officer Inspector Evans had concluded that the sharing aspect could not be proven and thus the more serious aspect was dropped.

41. The Claimant submits that part of the investigation was unfair because of the separation of the 'accessing' and 'sharing' elements of Strand 2. He describes this as two allegations becoming three and '*re-arranging the goalposts*'. I cannot agree that the investigation was unreasonable in this respect. The Claimant understood the two parts of the allegation as is quite clear from the Investigation Report because he robustly denied any disclosure of police information to his son SB. The separation of the two linked allegations simply made matters clearer and permitted Inspector Evans to discount the disclosure element and recommend that the allegations should proceed to a disciplinary panel on the basis of a) accessing confidential information for a non- policing purpose and b) providing a false witness statement to the family court.

42. I conclude that there was no procedural or substantive unfairness by reason of the error in the letter summoning the Claimant to a disciplinary hearing. By that time the Claimant had a copy of the full Investigation Report which sets out in clear terms the misconduct allegations which must go forward to the disciplinary panel. On page 194 '*improper disclosure of information [summer of 2017]*' is recorded as *NOT UPHELD*. The Claimant had a complete bundle of the relevant documentation. He saw the PSD Report at page 198. At page 301 the allegations are recorded as summarised verbally by Inspector Evans who presented the case. I am satisfied that the Claimant knew the case he had to answer and was able to fully and meaningfully respond. He agreed in response to cross examination that he was aware of the exact nature of the allegations and of the risk of summary dismissal. It cannot be the case that it is unfair to drop a serious allegation of disclosure and only proceed with the access case.

43. The record at pages 304 -311 demonstrates that the Claimant was fully aware that the substance of the misconduct allegations included a breach of the prohibition on accessing police information about family and friends without immediately reporting the connection. The Claimant's submission numbered (vi) that this was a *'makeweight, never put to the Claimant as a formal allegation and should be discounted'* is incorrect. It is integral to the allegation of repeated improper access for invalid reason.

44. Key Facts found by the Respondent during the Disciplinary Process including the Appeal

i) Family Court Statement.

There were **no** allegations of harassment made by KC against the Claimant in late December 2018. The colleague of the Claimant (subsequently identified as PC Hubbard) who was said to have disclosed these allegations in his PNB produced the notebook itself during the investigation. The extract is on page 244 and is difficult to decipher but I conclude that the relevant wording states' *I gave every opportunity to [KC] to let me know if there were offences or issues to do with harassment that needed to be dealt with and she did not suggest or state any. I have obtained a PNB stating she was not harassed by [the Claimant] and in fact he had showed(sic) concern for her ill health and offered her support and was only showing that he was keen to see his grandson'.*

It is clear that the Respondent reasonably and fairly concluded that the Claimant's family court statement was false about content where it refers to an entry in his colleague's PNB of alleged harassment from him to KB.

ii) The Respondent also reasonably found therefore that the Claimant was never personally shown a PNB notebook entry by a colleague (PC Hubbard or any other) and that therefore his statement to the family court was untrue both in relation to the content of the notebook entry and the source of the Claimant's information.

iii) The Claimant retracted that part of his family court witness statement which referred to the information source. During the investigation he immediately referred to his mistake under stress and said that he had *'mixed up his words.* Instead he recalled that he had in fact seen the PNB entry not in an exchange with a colleague but as one of the documents in the court bundle shown to him by his son. He did not however retract his false description of the content. To reiterate, the PNB entry says the exact opposite of the Claimant's allegation. PC Hubbard wrote that there were specifically no claims of harassment by KC against the Claimant.

- iv) The Respondent thus reasonably concluded that the Claimant had still provided the family court with false information even if his recollection of the exact source of that information had been unwittingly inaccurate under pressure.
- v) Then there was a further inconsistent statement given by the Claimant to the Disciplinary Panel on 23 June 2020. At page 313-316 he says that he did not actually see a PNB entry at all. Instead he had received a verbal 'tip off' from an unnamed colleague that *'KC has put in an accusation against you mate, mate just be careful'*. He goes on to confess to Chief Superintendent Mariner at page 314 that he effectively covered up the 'whisper in his ear' by falsely stating that he had seen the harassment allegations in a PNB. When Chief Superintendent Mariner asks the Claimant *'so to cover up that you say this in the Court papers which was then opened up a whole can of worms around PC Hubbard'* the Claimant answers 'yes'. He admits that he made a false statement. When asked, as recorded at page 317 *'did the fog clear and you realised that you'd not told the truth in your Family Court statement?'* the Claimant compounds his deception by saying *'I didn't give it any thought'* and goes on to confirm to a panel member Chief Inspector Ant Alcock (AA) that he did not even think to mention it to Inspector Evans when he found himself the subject of a serious misconduct investigation.
- vi) The inconsistent and untrue accounts given by the Claimant in relation to his family court statement are misconduct which the Respondent reasonably found on the balance of probabilities to be proven. In all the circumstances and on the basis of the proven facts the Respondent was also entitled to treat the Claimant's actions as gross misconduct justifying summary dismissal. ACC Nolan eloquently described the Respondent's reasoning *'the dishonesty element was shocking...in a role where every day you could be part of the evidential chain[in court] needing the highest levels of integrity and honesty'*
- vii) The events of 20 July 2017.

The Respondent was satisfied by reference to the evidence provided by the STORM log that the Claimant accessed police information about his missing grandson 5 times. The Claimant by his own admission realised after viewing the information the first or second time (at 16:49 and 17:19) that it was his grandson who was reported missing. The evidence of the Respondent's witnesses is clear, as is the content of the Respondent's policies set out above, that upon this realisation a police officer must be transparent in notifying a supervisor or the incident control room of the family connection; and attaching to the incident if any further participation involving access to confidential information is to take place. At page 306 the Claimant told the disciplinary panel *'on hindsight I could have said that's my grandson, you know, I'll go of which perhaps they'd have said no you're not or, yes go, I don't know and that's just speculation on my part'*.

- viii) The Claimant gave various accounts of what he did that afternoon/early evening none of which were supported by the evidence of PC Hibben or Inspector Colbert who was his supervisor that day. Neither could recall the Claimant disclosing his personal connection to the missing boy. Neither witness confirmed the Claimant's contention that he had visited Colchester police station at some time in the afternoon/evening and asked Inspector Colbert to restrict the incident because it involved the Claimant's grandson. In fact it appears that the incident was not restricted until much later at 19:50 pm. The Respondent has adduced no evidence as to how and why it was restricted or by whom. Certainly, following the return home of the missing boy there was a further altercation at his home around 19:30 pm which was attended by police officers and it may hypothetically have been those officers who restricted the incident not least because KC has stressed several times in correspondence with Essex Police that she wishes all such matters connected to her and her sons to have the restricted status.
- ix) However an important development occurred during the Claimant's evidence to the Disciplinary Hearing when he admitted breach of the access to information rules for police officer. From the foot of page 319 over to page 320 is an interchange between Inspector Evans and the Claimant (the original punctuation is used in the quotations). Inspector Evans asks *'is it normal protocol that if an incident involved a family member it would be pertinent to you to raise that right at the start of the incident so that everything was transparent and people were aware so that Essex Police couldn't send you with any personal interest to an incident so to protect you'*. The Claimant replies *'yes that's a really really valid point. I can only say that I did not call up because we would normally review the incident, you call and get yourself attached, I didn't call out because at some stage I knew it was my grandson...I believe we were nearest to finding my grandson and had I called up and said this is my grandson, this should be restricted I was fearful that they would have said don't go...I was a bit afraid that if I called up on the radio they might have said to detach yourself which is what we do'*.
- x) The exchange continues in the same vein including extra detail on page 324 and during the dialogue it becomes clear that the Claimant knew of his strict obligation to be transparent, open and honest about the family connection. He knew that he should have called and got himself detached. He did not seek permission to attach to the incident, he did not report his family connection to the missing boy, and he clearly states his reason of concealment.
- xi) I am satisfied that once the Claimant, on his own admission, took the decision not to report his close personal connection and not to attach to the incident, despite knowing that this was the proper action, he had made a decision to attend personally and not in an official policing capacity where he could be directed and monitored by the control room and/or a supervisor whether Inspector or Sergeant on duty.

- xii) The Claimant viewed the STORM log three more times at 17:30, 17:38 and 18:24 pm. The fifth time was after his grandson had been safely returned home at around 17:40 pm. The Claimant was unable to say why he looked at the log that fifth time.
- xiii) I accept the Respondent's conclusions, summarised on page 331 of the bundle when the disciplinary panel's decision was announced verbally after several hours' consideration, that after the first one or at most two viewings, in the absence of transparent disclosure by the Claimant as required and without permission to carry on searching and viewing the live incident log on STORM the subsequent three or four views were unauthorised and defined as being for a non-policing purpose. The Claimant by his own admission in fact deliberately concealed his close family connection to the missing boy because he was afraid that his supervisors may refuse to exercise their discretion to permit him to carry on searching and/or may decide that sufficient police resources were already allocated to the task. The panel alluded to '*an element of dishonesty*'.
- xiv) The correct course of action was described again by ACC Nolan in her response to cross examination, '*it's happened to me- you must flag up your personal interest then maybe you will be taken off the incident or maybe left on and monitored...then you protect yourself from allegations of inappropriate access, you get integrity of approach and a proper co-ordination of resources*'. It was concerning that, as stated on page 425-6 of the bundle, the Claimant told ACC Nolan that he would '*go along*' with a colleague in a similar situation who was not attaching to an incident because it was a family member. This statement suggested to her that he had a lack of insight and may not be compliant himself in future despite the experience of the serious disciplinary trouble in which he found himself.

45. Further complaints by the Claimant of failure of investigation

- a) The Claimant says that the Respondent should have further investigated various matters and obtained documents and records which might have established his innocence or at least mitigated his guilt. First he contends that the Respondent should have sourced the GPS (global positioning) records in relation to his movements in the police car on 20 July 2017 because the GPS would have shown him undertaking a '*spider webbing*' search of the local area to find the missing person, his grandson. I find that this was not a failure of investigation in relation to the allegation of unauthorised and invalid access to police information. The point was that the Claimant wrongly and repeatedly accessed that information beyond the stage at which he was authorised to do so; his subsequent actions then became non-policing activity. He had access to data he thereafter was not entitled to see. It did not therefore matter where he was and what he was doing by way of a search.

- b) The Claimant wanted Inspector Evans to investigate the average number of times he would ordinarily access STORM when searching for a missing person. His argument was that most police officers would need to look at the data several times in order to process all the available information for an individual incident and thus five times might not, on average, be excessive. All the senior officers from whom I heard evidence on behalf of the Respondent proffered the opinion that five is a high number of views. Be that as it may, the Claimant's request for this information was irrelevant. He was asking for information about his previous actions in relation to missing persons who were not family or close friends. The 20 July 2017 incident was exceptional because, at the risk of repetition, once the Claimant knew it was his grandson then he was required to cease accessing the police information unless he was authorised to continue in the face of a potential conflict of interest; Chief Superintendent said '*every single use of the system must be justified*'. There was thus a cut off which may well not apply in previous cases where the same family involvement did not apply.
- c) The Claimant wished the Respondent to obtain and produce his PNB from 20 July 2017. Inspector Evans correctly declined to search for it and referred to the need for the investigation to be proportionate. I accept his rationale that no notes made by the Claimant would succeed in contradicting the content of the STORM log showing at least three unauthorised views one of which was undertaken after the Claimant's grandson was found. This is particularly the case given that the Claimant admitted that he did not attach to the incident or carry out a proper reporting procedure for reasons of deliberate deception. Nothing in his PNB would therefore show that he had reported, attached or requested restriction on the incident because he admitted that he did not.
- d) The Claimant wished there to be further interrogation of PC Hibben and/or Inspector Colbert. Of course he could have called either or both officers to give evidence to the Disciplinary Panel but he did not do so. The Panel were entitled to exercise their discretion that they believed both officers' statements; neither could recall the actions which the Claimant described in relation to 20 July 2017. The appeal officer ACC Nolan declined to permit PC Hibben to be called to give evidence at the appeal and she says at paragraph 33 of her witness statement that the Claimant was unable to identify anything which PC Hibben might say which would assist at the appeal. It should be noted that at page 424 the Claimant agreed during the appeal hearing that neither he nor his colleague PC Mark Hibben had attached to the missing person report on 20 July 2017. The Claimant conceded that it was not PC Hibben's responsibility to report the existence of the personal connection between the Claimant and the missing boy. He agreed that he took no steps to ensure that his colleague reported the conflict of interest.
- e) Finally I agree with paragraphs 36-39 of Ms Loraine's submission in relation to the limited scope of additional investigation once an employee has admitted misconduct and in this case, at least in relation to the false court statement, admitted to gross misconduct.

46. The Respondent acted reasonably in treating these incidents of proven misconduct as gross misconduct because, as stated succinctly at page 333 '*Nigel Burke holds a privileged position where access to sensitive information is afforded. The Panel consider on the balance of probabilities that he has lied and cannot be confident that if allowed to remain in the employment of Essex Police he can be relied upon to do the right thing*'. Put another way, the Respondent had reasonable grounds to believe that the Claimant's breaches of its important policies around the use of confidential information might have a serious effect upon public trust and confidence in the police.

47. In all the circumstances of this factually complex case I find that the Respondent conducted a thorough, unbiased and reasonable investigation, adopted fair procedures including a conscientiously conducted appeal, and the decision to dismiss the Claimant without notice for gross misconduct was within the band of reasonable responses of a reasonable employer. I am satisfied that the disciplinary panel and the appeal officer paid careful attention to the matters of mitigation raised by the Claimant including his excellent Army and police service record and took account of his difficult personal circumstances. Nevertheless the answer to the fairness question set out in paragraph 7 above is that the Respondent acted reasonably in treating the Claimant's proven misconduct as sufficient reason to dismiss him.

48. Accordingly the claim of unfair dismissal does not succeed and is dismissed. The claim for wrongful dismissal also fails and is dismissed.

**Employment Judge B Elgot
Date: 2 August 2021**