EMPLOYMENT TRIBUNALS

Claimant: Ms H Meadows

Respondent: Cherry Tree Lodge Private Retirement Home Limited

Heard at: Manchester by CVP **On:** 25th May 2021

Before: Employment Judge Humble

REPRESENTATION:

Claimant: Ms Cornaliga, Consultant
Respondent: Mr Lonegan, Consultant

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was unfairly dismissed.

2. The claimant was dismissed in breach of contract.

3. The claims under Regulation 4 Working Time Regulations 1998 are dismissed on withdrawal.

4. The claim under Regulation 11 Working Time Regulations 1998 is out of time and therefore dismissed.

REASONS

The Hearing

1. The hearing took place on 25th May 2021 by CVP video link. The claimant was represented by Ms Cornaliga of Counsel, and the claimant gave evidence on her own behalf. The respondent was represented by Mr Lonegan, a consultant, and evidence was given by Ms Vanessa Garrett, the manager of the respondent's retirement home, Ms Ann Nelson, another manager at the home, and Mr Gordon Ferguson, the

respondent's managing director. There was an agreed bundle of documents which extended to 259 pages.

2. The hearing was initially convened before a full tribunal with the members, Mr A Murphy and Dr H Vahramian. Following determination upon the Working Time Regulations claims at the outset of the hearing, the case was converted to a sit alone hearing for reasons which are outlined below.

3. Evidence in chief was taken as read based on the witness statements provided by the parties. The evidence and closing submissions were concluded late on the afternoon of 25th May 2021 and Judgment was reserved.

Procedural Points

4. The claimant had indicated in her pleadings that she was pursuing claims for unfair dismissal, wrongful dismissal and under the Working Time Regulations for alleged breaches of Regulation 4, in respect of maximum weekly working time, and Regulation 11, in respect of weekly rest periods. At the outset of the hearing, Counsel for the claimant conceded that the tribunal did not have jurisdiction to determine a free standing complaint under Regulation 4 and that claim was dismissed on withdrawal with the claimant's consent.

5. In respect of Regulation 11, in the preliminary discussions it was established that the period relied upon by the claimant in relation to alleged failure to provide rest breaks ended on 1 May 2020. ACAS was notified of the claim on 1 July 2020 and the certificate was issued on 2 July 2020 but the claim form was not issued until 7 September 2020 and therefore the claim was out of time. The claimant had not pleaded that it was not reasonably practicable to bring the Working Time Regulations claim within the applicable time limit and Counsel indicated that she did not have any instructions to present evidence or to advance any argument to that effect. Accordingly, following a short adjournment, the tribunal held that it did not have jurisdiction to determine that claim and the Working Time Regulations claims were dismissed in their entirety.

6. This left the claims for unfair dismissal and wrongful dismissal, which did not require a full tribunal. The tribunal therefore proposed that the members be stood down and the case proceed for determination with the Judge sitting alone. This was in furtherance of the overriding objective, in particular in the interests of saving costs where it seemed quite likely that the case might go part heard. The parties were in agreement with that course of action and the case proceeded thereafter with the Judge sitting alone.

The Issues

7. The issues in respect of the unfair dismissal claim were identified and agreed upon at the outset of the hearing as follows:

7.1 Whether the respondent was able to show a potentially fair reason for the dismissal in accordance with Section 98(1) and (2) Employment Rights Act 1996. In this case the respondent relied upon conduct as the potentially fair reason for dismissal.

7.2 If the respondent could show that the dismissal was for a potentially fair reason, whether the respondent acted reasonably under section 98(4) ERA 1996 having particular regard to:

7.2.1 whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

7.2.2 whether the respondent followed a fair procedure having regard to the ACAS Code of Practice; and

7.2.3 whether the decision to dismiss was within the band of reasonable responses of a reasonable employer.

7.3 If the claimant was unfairly dismissed, whether any award of compensation should be reduced for contributory fault and/or by way of a Polkey reduction.

8. There was also a claim for wrongful dismissal, the claimant was seeking her notice pay.

The Law

9. The Employment Tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"*In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

a) the reason (or, if more than one, the principal reason) for the dismissal, and

b) that it is either a reason falling within sub-section (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."

Then by sub-section (2):

"*A reason falls within this sub section if it:*

b) relates to the conduct of the employee…"

Then by sub-section (4):

"*Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

10. In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold a genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

11. The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the respondent only bears the burden of proof on the first limb of the Burchell guidance, which addresses

the reason for dismissal, and does not do so on the second and third limbs where the burden is neutral.

12. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT) as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

"*It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

13. The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA.

14. The Tribunal must take into account whether the employer adopted a fair procedure when dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the Tribunal hold that the respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR 503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation, referred to as a Polkey reduction. The only exception to that principle is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA).

15. The Tribunal should also give consideration as to whether, if the dismissal is procedurally unfair, the employee contributed to her own dismissal. If so, to what extent did she contribute to that dismissal such as to reduce the level of any compensation to which she would otherwise be entitled having regard to the principles in Nelson v BBC (No.2) [1979] IRLR 346, CA.

16. In respect of the unfair dismissal claim, the Tribunal were also referred to the cases of Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94, [2015] IRLR 399; Khanum v Mid-Glamorgan Area Health Authority [1978] IRLR 215, [1979] ICR 40, EAT; Bentley Engineering v Mistry [1978] IRLR 436, [1979] ICR 47; Louies v Coventry Hood and Seating Co Ltd [1990] IRLR 324, [1990] ICR 54. Distillers Co (Bottling Services) Ltd v Gardner [1982] IRLR 47; W Brooks & Son v Skinner [1984] IRLR 379, Meridian Ltd v Gomersall [1977] IRLR 425, [1977] ICR 597; Bendall v Paine and Betteridge [1973] IRLR 44; Paul v East Surrey District Health Authority [1995] IRLR; and Post Office v Fennell [1981] IRLR 221.

17. The test in a wrongful dismissal, or a breach of contract claim, is quite different. The burden is on the respondent to show on the balance of probabilities and relying not only on matters known to it at the time but if necessary on after acquired evidence (Boston Deep Sea Fishing –v- Ansell), that the conduct of the claimant was such as to fundamentally repudiate the contract of employment. This is commonly called gross

misconduct and was explored by the Court of Appeal decision in Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 AU ER 285, CA among others.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal made findings of fact only on those matters which were material to the issues to be determined and not upon all the evidence placed before it):

18. Cherry Tree Lodge Private Retirement Home Limited (”the respondent”) is a company which owns and operates a care home referred to as Cherry Tree Lodge, which is situated in Southport, Merseyside (“the care home”). In 2020, the care home had approximately 31 residents and 16 staff. Ms Helen Meadows (“the claimant”) commenced work for the respondent on 29 April 2016, initially as a kitchen porter and from late 2019 or early 2020, as Chef. In this latter post, she was also referred to as the Catering or Kitchen Manager.

19. During the week commencing 23 March 2020, as the country was placed into “lockdown” by the government in an attempt to control the spread of the Covid-19 pandemic, Gordon Ferguson a director of the respondent held a meeting with staff at the care home. The tribunal found the claimant to be a credible and consistent witness and held that her recollection of the meeting on that day was broadly accurate. In essence, Mr Ferguson said that members of management were moving into the care home for the duration of the lockdown and that other staff would also be required to move in or otherwise their jobs would be at risk. This was consistent with a memorandum which was circulated on 26 March 2020 (page 67 of the bundle) in which Mr Ferguson described arrangements which were being made for members of management to live within the care home, including the care home manager Vanessa Garrett and her family, and went on to state:

“Each member of staff now needs to make a serious decision as to whether they are in or out. It is planned to completely lockdown the home with all working staff remaining within the home and be[ing] paid all their working hours. Other staff who for their own personal reasons cannot or do not wish to come into work and remain with us will be classified as self-isolating and will be paid statutory sick pay.”

20. In the event, a number of staff said that they could not live within the confines of the care home due to their personal circumstances, and Mr Ferguson retracted his original requirement that only staff within the care home would be allowed to continue to work. Instead, a number of members of staff were allowed to travel to and from the care home and to observe the lockdown requirements from their own homes. The claimant however decided that she would live within the care home during the period of lockdown. The claimant was living at home with members of her family, one of whom was working in a different care home, and she took the view that there would be a reduced risk of bringing Covid-19 into the family home, or the care home, if she observed lockdown within the confines of the care home. The initial period of lockdown of three weeks was later extended for several more weeks and the claimant continued to reside within the care home.

21. On 17 May 2020, the claimant was working in the kitchen when she received a message from her son-in-law, Darren Skidmore, to the effect that her daughter had given birth in hospital. Mr Skidmore said that he was going to visit his wife (the claimant’s daughter) in hospital and he asked whether she would look after her

grandchildren whilst he was visiting the hospital. The claimant explained this to Teresa Fusco, a colleague and manager within the care home, who said that she would ask Mr Ferguson whether he would drop claimant off at her daughter's house. A short time later, Mr Ferguson came through to the kitchen and congratulated the claimant on the arrival of her grandchild and said that he would give the claimant a lift. Mr Ferguson then drove the claimant to her daughter's house at about 1:30pm on 17 May 2020.

22. There was some dispute on the evidence as to whether Mr Ferguson was aware that he was taking the claimant to her daughter's home. Mr Ferguson said that he assumed he was taking the claimant to her own home whereas the claimant said that she told both Ms Fusco and Mr Ferguson that she was going to her daughter's home. There was no dispute over the fact that Mr Ferguson was aware he was taking the claimant to look after her grandchildren in the absence of her daughter.

23. Upon arriving at her daughter's home the claimant briefly spoke with Mr Skidmore in the kitchen of the house and the tribunal accepted her evidence that the conversation lasted a couple of minutes and that she was socially distanced from him for the duration of it. The claimant then went upstairs to take care of her grandchildren until Mr Skidmore returned to the house some time later whereupon she walked back to the care home. It was not clear on the evidence how old the claimants grandchildren were but it was accepted that they were not of an age where they could look after themselves without adult supervision.

24. On 18 May 2020, the claimant was called a meeting with Mrs Garrett where Mr Ferguson was also present. Mrs Garrett said words to the effect that she was not happy to have heard that the claimant had visited her daughter's house. The tribunal accepted the claimant's evidence that Mr Ferguson appeared to be taking the matter lightly at that stage and said, "*We're not chastising you.*" The claimant replied with words to the effect of that she was not happy with Anne-Marie's husband and son being in the care home. This was a reference to another member of staff whose husband had visited the care home on a number of occasions and who worked as a window fitter and was also attending other people's homes. The claimant also made reference to some other people who she said were coming in and out of the care home. Mrs Garrett replied, "*We're not talking about other people*" and said that she was intending to take some legal advice on the matter.

25. A short time later, the claimant was asked to return to Mrs Garrett's office and was told by Mrs Garrett that she was to self-isolate with immediate effect for 14 days, during which time she would be on statutory sick pay. The claimant returned to her own home and self-isolated as instructed, from 18 to 31 May 2020.

26. Mrs Garrett's particular concern was that Mr Skidmore worked at a different care home at which there been an outbreak of Covid-19 and a number of deaths from the virus. This was borne out by a logbook entry made by Mrs Garrett on 18 May 2020 which stated:

"On coming into work this morning I was made aware that Helen [the claimant] *had been to babysit her grandchildren yesterday (17.5.2020). Gordon and I spoke with Helen and advised that this was a high-risk as Helen had previously informed us that her son-in-law (the father of the children) worked at a home in Southport where a lot of residents had died from Covid along with a member of staff. I have spoken with Rebecca at Chroner* [the respondent's external adviser] *who advised due to our concerns we can advise Helen to self-isolate at home as the risk is high more so for*

Helen with her underlying health conditions, Helen was advised she would be paid SSP as per government guidelines and went home."

27. A letter was sent from Mrs Garrett to the claimant on 18 May 2020 (page 110) which stated, amongst other things:

"I was disappointed to hear from you that on your days off, without informing us, you spent some days off visiting your immediate family. What has most seriously tipped the balance, is the fact that your son-in-law works in a care home where there's been a number of deaths from coronavirus. That is a very serious consideration.

Under these circumstances, having obtained legal advice from Chroner we have been advised that it is appropriate that you should be asked to comply with the legal advice you've been given and self-isolate."

28. On 27 May 2020 Mrs Garrett wrote to the claimant to invite her to an investigation meeting (page 111). The letter stated:

"The purpose of this meeting is to give you the opportunity to provide an explanation for the following matters of concern:

- *Breaking government guidelines,*
- *Giving false information to staff on your days off,*
- *Associating with a person who you have advised us works in a care environment which has had numerous cases of Covid-19."*

29. Prior to the investigation meeting, the claimant sent a letter dated 28 May 2020 to the respondent (page 112-113) which stated:

"When the government announced that the UK was going to lockdown I agreed to move into Cherry Tree Lodge. At no point was I informed that there were rules to abide by and I did not receive a risk assessment on my living arrangements here. I remained in isolation on the property as per the government guidelines. When I did leave the building for exercise etc. I adhered to social distancing set out by the government. I did this for six weeks, of which I did not have a day off."

The claimant then went on to set out various breaches of the government guidelines, as she perceived them on the part of other employees of the respondent, including *"colleague's family members were visiting and entering the building whilst the home was on lockdown and social distancing was not been adhered to…senior members of staff are allowed and encouraged to bring family members into the home…This to me appears and feels to be a case of one rule for one and one rule for another and shows proof of blatant favouritism. As I mentioned earlier, at no point was I informed of any rules regarding my living arrangements at Cherry Tree Lodge. If these guidelines provided by the home were concrete, I would like to see a written copy of them please….this should have been provided to me, along with my risk assessment and they should have been made clear."*

30. The claimant then went on to set out that, in her particular case, she was required to provide childcare for vulnerable children and stated, "*government guidelines state that during lockdown, a vulnerable child is an exception to the rule* [that you should not leave your home]", and "*My grandchild was, at that time, vulnerable due to having no childcare as my daughter had just given birth.*" The claimant also pointed out that she received a lift to her daughter's from the owner of the care home and that he did not raise any objections.

31. At the bottom of the claimant's letter of 28 May 2020, which was received by the respondent, there was a handwritten note made by Mr Ferguson, initialled GF (page 115), which stated,

"No other member of staff has:

1, lied [Mr Ferguson's emphasis] *about their personal circumstances in respect of who they are associating with out of work.*

2, visited households where a member of it is working in a highly contaminated environment."

32. The claimant attended an investigation meeting at the care home on 29 May 2020 which was conducted by Mrs Garrett. There were no notes available from that meeting and Mrs Garrett did not give any account in her witness statement of what questions were asked or what answers were given by the claimant. She did confirm however that she had read the claimant's letter of 28 May and had seen the note of Mr Ferguson, the director and owner of the home, which stated that the claimant had "*lied*". The claimant could not recall the details of the meeting, but she did say that Mrs Garrett kept asking her, "*would you say you have done something wrong*" to which she responded, "*Yes, I did.*" In the absence of any evidence to the contrary, the tribunal accepted the claimant's evidence that she felt pressured into giving this response by Mrs Garrett, who repeatedly questioning her as to whether she accepted she had done something wrong, when in fact the claimant believed she had permission from Mr Ferguson to visit her grandchildren.

33. Following the investigation meeting, a letter was sent to the claimant on 29 May 2020 (page 116) which stated that she was suspended from her employment on full pay *"pending investigations into-*

- *breaking government guidelines,*
- *giving false information to staff on your days off,*
- *Associating with a person who you have advised that works in a care environment which has had numerous cases of Covid-19."*

34. On 1 June 2020, Mrs Garrett wrote to the claimant inviting her to a disciplinary hearing to take place on Thursday, 4 June 2020 (page 117). In addition to the three allegations relied upon in the suspension letter, a further allegation was added which was stated to be "*admitting wrongdoing in your letter dated 28 May 2020*". It was not stated what specifically the claimant had admitted by way of "*wrongdoing*" in her letter of 28 May 2020, nor was this explained either in the respondent's evidence or its pleaded case. The tribunal was unable to discern any admission of wrongdoing from the letter of 28 May. On the contrary, the claimant stated in the letter that she believed visiting her daughter's house was in line with government guidelines, that there was no written policy in place within the home which forbid it, and that she believed she had permission from the owner to make the journey.

35. The disciplinary hearing took place on 4 June 2020 in a Gazebo in the grounds of the care home where the participants were socially distanced. The disciplinary hearing was chaired by Mrs Garrett, who had made the initial allegation and who had also conducted the investigation. The hearing itself lasted only a few minutes and the minutes from the hearing (page 118) shows that the claimant was asked only two questions by Mrs Garrett in relation to the allegations against her. Firstly: "*Can you please tell me who you feel has been breaking the rules and going off?*" to which the claimant replied, "*staff in general that don't live on site, Becky and Jane and staff like*

them that go and come into work, I don't know where they have been". Secondly, "*Do you understand the risks you took?*" to which the claimant replied, "*Yes, I do."* At the end of the hearing Mrs Garrett asked the claimant whether she had arrived in a taxi and the claimant confirmed that she had.

36. On 8 June 2020 Mrs Garrett wrote to the claimant to advise her of the outcome of the disciplinary hearing (page 119-120). The letter set out that the Hearing was arranged to discuss the same four allegations in the letter inviting the claimant to the hearing and then went on to state:

"After the hearing and subsequent adjournment, I give my decision which is as follows:

- *You have admitted to wrongdoing*
- *You have put the residents and staff at risk*
- *You advised you have been in self-isolation but came to the hearing on public transport.*

I have therefore decided to take the severest sanction an employer can take against an employee and to summarily dismiss you with effect from 8 June 2020. This is a dismissal with notice."

This last sentence was said to be an error and in fact the claimant did not receive any notice pay. The claimant was given a right to appeal against the dismissal.

37. It was an unusual feature of the case that the respondent did not make specific findings in respect of the four allegations relied upon at the disciplinary hearing but instead cited three reasons for the dismissal which were not consistent with the allegations made. The respondent's pleaded case stated that "*the allegations were upheld*", but that was not what was stated in the dismissal letter or in the witness evidence of Mr Garett who only recited the same three reasons as relied upon in the letter of dismissal: "*You have admitted to wrongdoing*", "*You have put the residents and the staff at risk*"; *"You advised you have been in self-isolation but came to the hearing on public transport"*. The tribunal find therefore that these were the reasons relied upon by the dismissing officer which it was required to assess. We do however consider the allegations made before the hearing before turning our attention to the reasons which were relied upon.

38. Mrs Garrett did not, in making her decision, seek to rely upon the first allegation that the claimant broke any government guidelines. This seemed to the tribunal to be wise since the respondent had failed to identify the government guidelines which the claimant was alleged to have breached. No such guidelines were put to the claimant during the disciplinary process and the tribunal was not drawn to any government guidelines relied upon by the respondent. The claimant's case was that she had not broken any government guidelines since one of the exceptions to the "stay at home order", she said, was caring for vulnerable children. This appeared to be supported by a document which the claimant put before the Tribunal (at page 242), which stated that one of the limited reasons for which an individual could be away from their home was *"to provide care or to help a vulnerable person."* The source of that guidance was not provided, but the tribunal was not required to examine the matter further since it was not one of the reasons relied upon by the respondent for the dismissal.

39. The second allegation made prior to the hearing, "*giving false information to staff on your day off*" was also not relied upon by Mrs Garrett as a reason for dismissal. It appeared from Mrs Garrett's evidence that this was a reference to the claimant having previously visited her daughter's when going on "*self-isolation walks*". It was

not clear on the evidence before the tribunal, nor was it explained in the allegation itself, when and to whom the claimant had said she was going on "*self-isolation walks*" or when and to whom she had allegedly admitted she was in fact visiting her daughter. Nor were the circumstances in which she was said to have visited her daughter set out, and there was no evidence before the tribunal that this formed any part of the investigation. Again, given that it was not relied upon as a reason for the dismissal, the tribunal was not required to examine it further.

40. The allegation of, "*associating with a person who you have advised works in a care environment which has had numerous cases of Covid-19"* broadly matched with the reason given for dismissal by Mrs Garrett as, "*You have put residents and staff at risk."* This it seemed to the tribunal was the crux of the respondent's case: that the claimant had put residents and staff at risk by visiting her daughter's home and coming into contact with Mr Skidmore. It was the only consistent allegation which was put to the claimant and relied upon as a reason for dismissal.

41. Mrs Garrett relied upon an admission of "*wrongdoing*" as a reason for dismissal, which appeared to be the same as the allegation put to the claimant prior to the disciplinary hearing of, "*admitting wrongdoing in your letter dated 28 May 2020."* It remained unexplained however as to what precisely the claimant was alleged to have admitted doing wrong, or indeed why this was a reason for dismissal. An admission of wrongdoing might, in some cases, be conclusive evidence of a gross misconduct offence or, in others, a mitigating factor to take into account when considering a gross misconduct offence but "*admitting wrongdoing*" is not in itself a reason for a dismissal.

42. The final reason relied upon by Mrs Garrett for the dismissal was, "*you advised you have been in self-isolation but came to the hearing on public transport*". This was an entirely new matter which was not relied upon at all prior to the disciplinary hearing and was not put to the claimant. The claimant was not given an opportunity to respond to it, nor was it clear when or whether in fact the claimant had advised the respondent that she had been in self isolation. The claimant's case, which the tribunal accepted, was that she had not "*advised she had been in self-isolation*" but rather had been instructed by Mrs Garrett, and no-one else, to self-isolate from 18 May for 14 days because she had been in contact with Mr Skidmore. This meant that by the time of the disciplinary hearing of 4 June she was no longer under the respondent's imposed isolation. In more general terms, the claimant had a medical condition which meant that she was required to shield but the respondent had been fully aware of this fact since the end of March 2020 when the claimant provided a letter to Mrs Garrett which confirmed that she was required to shield due to her underlying medical condition (page 133).

43. Further, it was not said by the respondent why arriving at the hearing in a taxi put anyone at the care home at risk in circumstances where the meeting took place outdoors at a social distance and the claimant wore a mask. The tribunal were not drawn to any government regulations or guidance to the effect that there was a prohibition on care sector staff using public transport or taxis, nor was there any policy or guidance specific to the respondent to that effect. It was also significant that the respondent had not given the claimant an opportunity to have the disciplinary or investigation hearings dealt with remotely, either by video link or telephone. Given the brief nature of the meetings and the very limited number of questions that were put to the claimant there was no apparent reason why the hearings could not have been dealt with in that manner.

44. Following receipt of the dismissal letter, the claimant drafted a letter dated 11 June 2020 to Mr Ferguson (page 121) in which she stated that she was appealing the decision to terminate her employment for gross misconduct and stated:

"These are exceptional and confusing times. I had no choice but to leave the premises on that day to attend to my grandchildren's needs. Their mother, my daughter, was rushed into hospital to give birth and no other childcare was available. Even under normal circumstances, one does not always behave with total clarity.

You appear to have not taken into consideration the fact that I was driven to my daughter's house by the owner of business. It would have seemed reasonable to expect that he would have carefully advised me not to return to my place of work.

You appear to be relying heavily on the fact that I attended the disciplinary meeting by public transport. I advise you that this was the only means available to me at the time. As you requested the meetings, you should have made the necessary arrangements for the meeting to be conducted in a safe way and fully compliant with Government Guidelines.

I believe these two issues make your decision to terminate my employment gross misconduct unsafe, give me the right to challenge the fairness of the decision at an employment tribunal.

I will provide details of my appeal when I am in possession of my copy of the minutes from previous meetings and a copy of the 'live in' rules."

45. No copy of the '*live in rules'* was provided to the claimant since, the respondent accepted in evidence, no such written rules were in place at any time prior to the claimant's dismissal. There were several references by Mr Ferguson and Mrs Garrett to the "*Cherry Lodge Bubble*" and, according to Mr Ferguson: "*All staff who moved into the Home including* [the claimant] *knew it was on the understanding that they were to join and stay within the Cherry Tree Lodge Bubble ("the bubble") and only associate with those within that bubble."* He added, "*for practical and pragmatic reasons and out of necessity the bubble extended to the staff's own homes and households on the clear understanding that every person within each household conducted themselves responsibly and adhered to strict isolation procedures and no family member came into contact with any persons or environments at high risk."*

46. The terms of the policy, if it can be described as such, were less than precise even in the form described by Mr Ferguson. It was not said for example what was meant by household members "*conducting themselves responsibly*" and "*adhering to strict isolation procedure*s", or which "*environments"* were deemed by the respondent to be "*high risk*". Nor was it said how or when this unwritten policy was communicated to the respondent's staff, its existence was never documented. There were only two documents issued to staff in relation to the pandemic which were relied upon within these proceedings, both of which were brief emails. The first of 16 March 2020 (page 66) stated, "*Policies and procedures that have been updated need to be read as a matter of urgency i.e. infection control and panden policy and procedure* [sic]" - it is assumed that the latter was a reference to a pandemic policy and procedure but it was not produced to the tribunal. The second email of 18 March 2020 (page 67A) stated simply: *"We are advising staff to make themselves familiar with the GOV.UK website."*

47. The claimant prepared a more detailed letter of appeal on 19 June 2020 (page 123-125) in which she reiterated some of the points in her letter of appeal and gave more detail about other staff coming and going from the premises. She stated, among other things, *"Other staff get driven to and from work in other people's vehicles*

whereby I know the driver is not a member of their own household, and consequently they are breaking lockdown regulations…this occurs on a daily basis…I am fully aware of management's families having free rein on entering and leaving the building when they so wish…everybody should be following the guidelines that were imposed on me." She further stated, *"Staff, spouses, family and friends and friends that were leaving and entering the building were not asked to leave and to self-isolate as I was. The close circuit television that was recently installed on the premises will show the free movement in and out of the building by management, their spouses, their children and other staff, during the full duration of lockdown, contrary to the guidelines set out in the* [Admission and Care of Residents during COVID-19 Incident in a Care Home] *document. If they are abiding by the rules I was expected to maintain, this should not be allowed and is a complete contradiction to your reasons for my dismissal. This may be an issue that needs to be brought up with management, to ensure that all staff are made aware of the guidelines so other employees do not end up in a position I find myself today."*

48. The appeal hearing took place on Friday, 19 June 2020 and was conducted by Anne Nelson. The notes of the meeting were at page 126. Mrs Nelson asked about the usual childcare arrangements for the claimant's grandchildren, and the claimant explained the reasons the parents were unavailable and why she was required to look after them on that particular occasion. The only other two questions asked were *"Why did you not alert a senior staff member?"* and, *"what was the correspondence* [sic] *between yourself and the owner of the business?"* The claimant explained that she had informed Teresa Fusco, and that Mr Ferguson had offered to take her to see her grandchildren. At the end of the meeting, the claimant said that she had brought a letter in for Mr Ferguson to read and placed a sealed letter on the table. In cross examination, Mrs Nelson said that she read the letter after the claimant had left the meeting but before she took the decision to uphold the appeal. She did not however question the claimant on any part of the letter or investigate any of the points raised before taking the decision to uphold the dismissal.

49. Mrs Nelson wrote to the claimant on 20 June 2020 (page 127-128) upholding the decision to dismiss and, among other things, stated *"Prior to and at the meeting you have not presented me with any new materials to convince me that you did not:*

1. *admit to wrongdoing*
2. *put the residents and staff at risk due to your actions*
3. *chose to use public vehicles to come to the meeting*

These were the basis of the decision to dismiss you and due to having no new evidence the original decision stands."

50. Again, the reasons relied on for upholding the decision to dismiss were not consistent with the allegations relied upon prior to the disciplinary hearing; there was still no explanation as to precisely what the claimant was alleged to have admitted by way of wrongdoing; the allegation that the claimant used public vehicles to come to the meeting was not put to the claimant either at the disciplinary or the appeal hearing; and the breach of government guidelines allegation was not relied upon at the appeal. The key reason relied upon was that the claimant *"put the residents and staff at risk due to* [her] *actions*". This was the one consistent theme throughout the disciplinary procedure.

51. Mrs Nelson was a poor witness for the respondent. In cross-examination a series of questions were put to her as to whether she was concerned about aspects

of the investigation and disciplinary process, and as to whether she had considered various matters which it appeared to the tribunal she would be required to consider if she were making a fair and objective consideration of the matter. These included: Were you concerned that Mr Ferguson took the claimant to her daughter's house and that this was not covered at the disciplinary stage? Did you consider whether Mr Ferguson driving the claimant to her daughters might reduce her blameworthiness? Did you consider whether the claimant caring for grandchildren might fall within any of the exceptions of the stay-at-home order? Were you concerned that the investigation and disciplinary hearings were conducted by the same person? Did you consider the claimant's previous employment conduct?" In response to each of those questions, Mrs Nelson simply replied, "*No*". She added, in respect of the claimant's employment history, "*We were trying to keep everyone safe not considering her past."*

52. The failure to give consideration to the claimant's employment history was not an insignificant omission. Aside from the fact that the claimant had a good employment record with the respondent, she had in her own words "*never been in any trouble*" during a forty year employment history. She was conscientious, hardworking and, when called upon by the respondent, she had agreed to work within the confines of the care home, in part at least, to assist her work colleagues and employer during the pandemic. These factors were not given any consideration. Indeed, the tribunal was not persuaded from Mrs Nelson's evidence that she gave any proper consideration to the relevant issues before her. She was, it must be added, in a difficult position given that she was in a less senior position to the person who had taken the decision to dismiss, Mrs Garrett, and to Mr Ferguson, the director and owner who had already concluded that the claimant had *"lied"* and *"put the care home at risk."*

Conclusions

53. In respect of sections 98(1) and (2) Employment Rights Act 1996, the tribunal was satisfied that the reason for the claimant's dismissal was conduct. Mrs Garett had formed a view that the claimant had put the home at risk and this was the principal reason for the dismissal. No other reason was advanced by the claimant.

54. Turning to whether the respondent acted reasonably in accordance with section 98(4) Employment Rights Act 1996, this was a case with serious procedural flaws. The person conducting the disciplinary hearing, Mrs Garrett, also instigated the investigation, having concluded as early as 18 May 2020 that the claimant, *"had been to babysit her grandchildren… this was a high-risk as Helen had previously informed us that her son-in-law (the father of the children) worked at a home in Southport where a lot of residents had died from Covid along with a member of staff."* The fact that Mrs Garrett made the initial allegation, took the decision to suspend, investigated the matter, and conducted the disciplinary hearing was a breach of the ACAS Code of Practice which specifically states, *"where practicable, different people should carry out the investigation and disciplinary hearing."* The respondent's own disciplinary guidance stated, *"The person conducting the disciplinary hearing should not have been involved in the investigation in any capacity"* (page 81). There may be circumstances in which this is not practicable but no such circumstances was advanced or relied upon in this case.

55. Mrs Nelson, who dealt with the appeal, was at a less senior level than the dismissing officer which was not in accordance with the respondent's own disciplinary guidance (page 82). There were other managers in the care home and, again, no explanation was advanced as to why other managers were not involved in the matter or why a less senior person than the dismissing officer considered the appeal.

56. The allegations which were put to the claimant were not the same as the reasons relied upon for dismissal. The allegation that she put staff and residents at risk by taking a taxi to attend the disciplinary and investigation meetings was not even put to her before the decision was taken to dismiss, nor was the matter covered at the appeal hearing. The finding that she had "*admitted wrongdoing*" was not explained and was not, in itself, a reason for dismissal.

57. The disciplinary and appeal hearings are best described as perfunctory, a matter of a few minutes in each case. This would not render the dismissal procedurally unfair since some hearings, where the matter at issue is already established or is very straight forward, might only require a few minutes. This was not the case here however, where there were four allegations for the claimant to answer and she had made some fairly detailed submissions in writing which required at least some exploration. Only two questions were recorded as having been put to the claimant at the disciplinary hearing and only two matters were addressed at the appeal hearing. Many relevant questions were not put and the tribunal were not presented with any evidence that the respondent had given any proper consideration to, or investigation of, the representations made by the claimant in her letters of 28 May, 11 and 19 June 2020 in which she raised a number of relevant points. The tribunal held that those representations were not genuinely considered by Mrs Garrett and, in the case of the representations in the later correspondence, Mrs Nelson.

58. The tribunal is required to have reference to Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, the key principle of which is that the band of reasonable responses test applies to procedural issues as well as to the substantive decision to dismiss. The tribunal held however that the procedural flaws in this case were so fundamental that they rendered the dismissal unfair. Further, the tribunal held that the test in British Home Stores v Burchell [1980] ICR 303 was not satisfied. The investigation was so lacking that it could not be said to be within the band of a reasonable investigation, there was a very clear impression that the respondent had pre-determined the outcome of both the disciplinary and appeal stages. The strongest indicators of this were in the original note of Mrs Garrett from 18 May in which she had already essentially concluded that the claimant had put the staff and residents at risk; the note of Mr Ferguson (the respondent's owner) on the claimant's letter of 28 May 2020 in which he stated that she "*lied*"; and the perfunctory nature of the investigation and the hearings. The tribunal held that there was no genuine or proper consideration of the case at all at the appeal stage, Mrs Nelson having admitted in cross examination that she did not give any consideration to a number of relevant factors.

59. Turning to the substantive reasons for the dismissal, with reference to the matters relied upon by the respondent when taking the decision to dismiss and upholding the decision on appeal. The use of the taxi, which was not even put to the claimant as an allegation, was not in the view of the tribunal a ground for a gross misconduct dismissal. Having regard to the principles enunciated in Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT, the tribunal is required to take particular care not to substitute its view for that of the respondent. The difficulty for the respondent was that it was not properly explained why it took the view that the use of the taxi was a gross misconduct offence at all. There was no evidence before the tribunal that there was any prohibition on care workers using public transport to travel to work either within any government guidance or within the respondent's own policies or procedures. Even if any such guidance existed, it was not communicated to the claimant and she was not given any instructions upon how to travel to the meetings. The meetings took place outdoors in a gazebo where the participants were socially

distanced and the claimant wore a mask. The respondent made no attempt to conduct the meeting remotely. In respect of the alleged "*admission of wrongdoing*", for reasons already outlined, this is not in itself a grounds for dismissal. The only reason relied upon of substance therefore was the allegation that the claimant had put staff and residents at risk by associating with, or coming into contact with Mr Skidmore who worked at another care home at which residents had died of Covid-19.

60. The tribunal held that there are a number of mitigating factors which were not properly taken into account by the respondent when assessing this matter. Firstly, the claimant was required to attend her daughter's house to look after vulnerable children and secondly the director and owner of the home Mr Ferguson gave her a lift to the house for that purpose. Mr Ferguson claimed to not know that he was taking the claimant to her daughter's home and said he believed he was taking the claimant to her own home to take care of her grandchildren. Even if that were the case, he was aware that he was taking the claimant to look after her grandchildren and therefore implicitly had given her permission to do that. If he were concerned about the "*Cherry Tree bubble*" to which he frequently made reference in his evidence, it was not explained why he apparently did not make any effort to establish where exactly the claimant was going, who else she was likely to meet there (assuming young children could not make their own way to someone else's house), or who else the grandchildren themselves might have come in to contact with who were not within the "*Cherry Tree bubble*". If there was any kind of policy in place to prevent mixing with people from outside the care home, these were the kind of basic enquires an employer in those circumstances would be expected to make.

61. The tribunal held that the respondent did not have any coherent policy or procedure in place, whether written or otherwise, to expressly prohibit its employees from come into contact with people outside the care home. It was clear during the course of the evidence that at least some of the respondent's staff did come into contact with other people from outside of the care home. Mr Ferguson himself admitted that he had a conversation at the care home with the husband of one of the staff who did not live within the case home, whom the claimant knew only as "Scott". In cross examination, Mr Ferguson said he could not recall whether the conversation took place inside the care home or out on the patio, but he thought it took place on the patio. The tribunal accepted the claimant's evidence that Scott attended the care home on a number of occasions and on one occasion ate a meal in the resident's dining area.

62. The tribunal also accepted the claimant's evidence that Mrs Garrett's husband, Lee, who also lived in the home during the lockdown period went out to buy bottle of Prosecco, which was not an essential journey in line with government regulations in place at the time. It was also accepted by Mr Ferguson that, during the first period of lockdown, he attended a barbecue at Mrs Garrett's home where members of her family were present. When it was put to him that this was a breach of the Government Regulations in place at the time he replied, "*Possibly so but we regarded it as safe*" and "*We regarded it as being in our bubble*". Other members of staff were allowed to enter and leave the home and, the tribunal accepted the claimant's evidence, that they were sometimes brought into work by their partners and no attempt was made to monitor with whom they had contact when outside of work. One employee, referred to as Becky, was brought to work by her mother-in-law with whom she did not share a home.

63. When challenged on these points and when questioned as to why there was no written policy in place to control the contact which staff had with people from outside

the care home, both Mr Ferguson and Mrs Garrett said it was very difficult to keep track of the Government Guidelines since they "*kept changing*". This might well have been correct, but it did not explain why the respondent did not itself conduct a full risk assessment at the outset of the pandemic and properly communicate it to their staff. Given that Mr Ferguson and Mrs Garrett were having difficulty following the Government Guidance, it might also have been expected that they would extend rather more latitude to the claimant when assessing whether she had deliberately breached any rules or guidelines.

64. It was pointed out in cross examination that the term "*Bubble*" was only used by the Government from June 2020 onwards when parts of the original lockdown restrictions were relaxed. It was suggested that the "*Cherry Tree Bubble*" was a phrase which the respondent had relied upon only after the claimant's dismissal. The respondent denied this but it was not able to refer to any contemporaneous document in which the "*Cherry Tree Bubble"* was referenced. The tribunal found that, In so far as the "*bubble*" existed at the time of the claimant's dismissal, then it was nebulous and there was a lack of consistency in how it was applied to staff members.

65. The tribunal found another aspect of the respondent's defence difficult to comprehend. A large part of Mr Ferguson's evidence related to the requirement upon the claimant to shield, and this also featured in Mrs Garrett's evidence who said that *"Since* [the claimant] *has brought this claim…I have become aware that* [her] *medical position was much more serious than I had known in May 2020 and that she had placed the residents of the Home at a much more and more* [sic] *significant risk than we had known."* It was established in evidence however both that the respondent was aware that the claimant suffered from an underlying health condition relating to her kidneys, and that they were advised of the medical advice given to the claimant to socially isolate.

66. After the claimant had moved into the care home, on or about Tuesday 24 March 2020, she received a letter from Liverpool University Hospitals which, among other things, stated that the claimant was to "*Begin prolonged social isolation for at least 12 weeks to protect your health*". The claimant informed Mrs Garrett about the content of the letter and handed the original letter to her. Mrs Garrett confirmed in evidence both that she had received the letter and that she was aware of the claimant's underlying health condition. No attempt was made by the respondent to carry out any risk assessment in relation to the matter and the claimant was not advised that she should not remain within the confines of the care home in the manner which the respondent now appeared to be suggesting within these proceedings. The respondent was, it seems, content for the claimant to remain at work for as long as it was of benefit to their business operation. In any event, this point was not relied upon as a reason for the dismissal or by way of a Polkey argument and so it was not clear why the respondent sought to focus upon it in their evidence.

67. Having regard to all the circumstances of the case, the tribunal held that the decision to dismiss was not within the band of reasonable responses of a reasonable employer and that the respondent failed to act reasonably under section 98(4) ERA 1996. The claimant was unfairly dismissed.

68. The tribunal invited submissions on Polkey and contributory fault and indicated that it would, if required, seek to make appropriate findings which would assist the parties in advance of any subsequent remedy hearing.

69. The tribunal were of the view that the one area in which the claimant might still be found to be blameworthy, assuming the respondent had followed a fair procedure and investigation, was that she came into contact with Mr Skidmore within the confines of her daughter's home on the afternoon of 17 May 2020. If the respondent had approached the matter with an open mind and conducted a fair procedure then there was at least a chance that it would have concluded that the claimant's actions put the residents and staff at some increased level of risk. Mr Skidmore was working in a care home which had suffered from an outbreak of Covid-19 and the claimant admitted going in to the house and having contact with Mr Skidmore in the kitchen for a few minutes when she did not have to meet with him in the house at all. If she could leave the grandchildren unattended for a couple of minutes whilst in the house, she could easily have waited outside the house and entered it immediately after Mr Skidmore had left.

70. The claimant's evidence before the tribunal was that she only spoke with Mr Skidmore for two minutes and was socially distanced throughout the conversation. It is possible that this respondent acting reasonably may not have accepted that explanation. Allowing for that, and the heightened level of sensitivity of a care home operating during a pandemic, the tribunal find that the chances of the claimant being dismissed in this case, assuming this respondent had acted reasonably, to be 25%. This shall be applied as a Polkey reduction.

71. In respect of contributory fault, the tribunal held that no further reduction shall be made. The tribunal accepted the claimant's explanation of the circumstances in which she was required to attend her daughter's home to care for young children, and that she had a very brief conversation with Mr Skidmore in circumstances in which they were socially distanced. This finding also takes account of the need to avoid imposing a double penalty upon the claimant who has already been the subject of a Polkey reduction.

72. Turning to the wrongful dismissal claim, the tribunal find that the respondent did not show that the conduct of the claimant was such as to fundamentally repudiate the contract of employment. On the balance of probabilities, the tribunal did not find that the claimant lied to the respondent or that she placed the respondent's staff or residents at any significant risk in the circumstances summarised in the preceding paragraph. Nor was there any coherent policy or procedure in place which the respondent demonstrated was breached by the claimant, let alone one which may have amounted to a contractual term. The tribunal find that the claimant was dismissed in breach of her contract of employment and she is entitled to her notice pay.

73. The case shall be listed for a remedy hearing. In the meantime, the services of ACAS remain open to the parties.

Employment Judge Humble

18th July 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 19 JULY 2021

FOR THE TRIBUNAL OFFICE

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