EMPLOYMENT TRIBUNALS

Claimant: **Ms Fry**

Respondent: **Cherish Cymru Ltd**

Heard at: **Cardiff (by video)** **On: 8 January 2021**

Before: **Employment Judge Harfield**

Representation:
Claimant: In person
Respondent: Mr Kiff (also as a litigant in person)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that:

1. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed.

2. The respondent is ordered to pay the claimant compensation for unfair dismissal in the sum of £600.00 basic award and £111.43 compensatory award.

3. The recoupment regulations do not apply.

4. The claim for a statutory redundancy payment is not well founded and is dismissed.

REASONS

Introduction

1. By way of a claim form presented on 24 January 2020 the claimant complained that she had been unfairly dismissed from her post as a carer with effect from 8 January 2020. That was the date on which she said she received a letter terminating her employment following a meeting with Mr Kiff on 24 December

2019. The claimant also indicated she was bringing a claim for a statutory redundancy payment.

2. On 21 February 2020 the respondent presented an ET3 response form resisting the complaints. The matter was originally due to be heard on 19 May 2020 but the full hearing was postponed and converted to a case management telephone hearing because of the Covid 19 pandemic. I made some case management orders to get the case ready for this relisted hearing which ultimately took place by way of video hearing due to ongoing public health restrictions.

3. I had before me a bundle containing both parties' documents extending to 91 pages. The bundle included the written witness statements for Mr Kiff, Ms Fry and her mother, Mrs Fry. I heard oral evidence from these witnesses and Ms Fry and Mr Kiff were given the opportunity to make closing comments. In the event they had little they wished to say to add to what was already before me. I reserved my decision as Mr Kiff was due to leave for a vaccination at 2pm and bearing in mind the current state of the pandemic and his occupation I did not wish to obstruct that process.

4. In my case management order of 19 May 2020 I identified that Mr Kiff position was that the claimant was dismissed for "some other substantial reason" and that the decision to dismiss was based on a combination of factors:

- He believed that the claimant had lied in the meeting on 24 December saying that she had not agreed to cover two calls for service users on 4 December 2019. (It is not in dispute that two visits to service users were not covered by any employee of the respondent that day and also that one of the service users was later found to have fallen - albeit it is not known exactly when that fall happened or whether there is any link to the non attendance);

- He had longer running concerns about the claimant's sickness record and reliability and he considered it was getting worse;

- The claimant's reaction in the meeting and, in particular, what he considered was a lack of remorse relating to the service user falling over. He said that was the straw that broke the camel's back;

- Overall, he said he had a loss of confidence in the relationship with the claimant as employer and employee or the claimant's attributes for working in the caring profession.

5. In my case management order I identified the following liability (i.e. do the claimant's claims succeed) issues to be determined:

Unfair Dismissal

(a) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was some other

substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (for the reasons set out above). The claimant asserts that there was no fair reason for her dismissal or alternatively that the reason was redundancy.

(b) Where the respondent's reasoning (or part of it) is related to alleged concerns about the claimant's conduct the respondent must prove it had a genuine belief in misconduct. The Tribunal will also assess whether the respondent held any belief in misconduct based on reasonable grounds, having followed a reasonable investigation.

(c) The claimant challenges the fairness of the investigation/dismissal process. The burden of proof is neutral but it helps to know the challenges to fairness. Here the claimant identifies:

(i) That she was invited to a return to work meeting not a disciplinary hearing;

(ii) That there was delay/ she was left in limbo without work or without being told that she was dismissed until she received the letter on 8 January 2020;

(iii) She was not told the full basis of the alleged lack of confidence.

(d) Was the dismissal fair or unfair in accordance with section 98(4) ERA? Was the decision to dismiss a sanction within the "band of reasonable responses" for a reasonable employer?

Redundancy payment

(e) Was the claimant redundant in the meaning of section 139 ERA in that:

(i) the respondent was to cease to carry on business for the purpose of which the claimant was employed by him;

(ii) The respondent was to cease to carry on that business in the place where the employee was employed;

(iii) The requirements of the business for employees to carry out work of a particular kind was to cease or diminish;

(iv) The requirements of the business for employees to carry out work of a particular kind in the place where the claimant was employed was to cease or diminish.

Relevant legal principles – liability

6. Section 94 ERA gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

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

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

7. Under section 98(1)(a) of ERA it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At that stage, the burden of showing the reason is on the respondent. If discharged, the burden of proof when assessing fairness under section 98(4) is neutral.

8. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

> *"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."*

Conduct dismissals

9. In cases involved alleged misconduct the tribunal must have regard to the test set out in British Home Stores v Burchell [1980] ICR 303 (often referred to as the "Burchell test.") In particular, the employer must show that the employer genuinely believed that the employee was guilty of the conduct. Further, the tribunal must assess whether the respondent had reasonable grounds on which to sustain that belief, and whether, at the stage when the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

10. The Tribunal must also have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is 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 that band, it is unfair.

11. The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.) Such an approach also applies to the assessment of any other procedural or substantive aspects of the decision to dismiss an employee for a misconduct reason.

12. As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the investigation must be looked at as a whole when assessing the question of reasonableness: (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399). When assessing whether a dismissal is unfair a relevant consideration can be whether the employee or their representative, during the course of the disciplinary process, asked for a particular investigative step: Stuart v London City Airport Limited [2013] EWCA Civ 973.

13. In Strouthos v London Underground Limited it was emphasised that disciplinary charges against an employee should be precisely framed and that normally only those matters formally identified as the disciplinary allegations should form the basis for a dismissal. I also remind myself of the decision in South West Trains v McDonnell [2003] EAT/0052/03/RH and in particular that:

> *"Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"*

14. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary process may be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage.

15. If the Burchell test is answered in the affirmative the Tribunal must still determine whether the decision of the employer to dismiss rather than impose a different sanction (or no sanction at all) was a reasonable one. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. In the context of section 98(4) the Tribunal should therefore consider:

    (a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and

    (b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is the employee's attitude towards their conduct.

Trust and Confidence Dismissals

16. There have been a number of cases in which the higher courts and tribunals have considered situations where an employer claims to have dismissed an employee not directly for a reason related to conduct or capability, but for what section 98 terms "some other substantial reason" ("SOSR") in the form of an irretrievable breakdown in working relationships or loss of trust and confidence in the employee. In Ezsias v North Glamorgan NHS Trust [2011] IRLR 550 the Employment Appeal Tribunal recognised an important distinction between dismissing an employee for his conduct in causing the breakdown of relationships, and dismissing him for the fact that those relationships had broken down. The Tribunal in that case found that the latter had been the reason, even though as a matter of history it was the employee's conduct which had in the main been responsible for that breakdown in working relationships.

17. In the Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11 the Employment Appeal Tribunal acknowledged that where the substantial reason relied upon (such as a breakdown in trust and confidence) is a consequence of conduct there is a clear analogy to a dismissal for misconduct. The Employment Appeal Tribunal therefore accepted that, whilst each case depends on its own facts, it can be appropriate for a Tribunal to consider what

happened in the lead up to dismissal (as would happen in a misconduct case) such as suspensions, warnings and the general procedure followed.

18. In Lund v St Edmund's School, Canterbury UKEAT/0514/12/KN the Employment Appeal Tribunal held that if the employer initiates a procedure which is a disciplinary procedure for misconduct the ACAS Code of Practice applies, even if the outcome of that procedure is a dismissal not for misconduct but for SOSR.

19. There have also been warnings from the Employment Appeal Tribunal about the danger in employers being able to reply upon a loss of trust and confidence as a means of avoiding the obligations which arise when the real concern is misconduct. Comments to that effect were made by the President of the EAT, Underhill P, in A v B [2010] ICR 849, upheld on appeal under the name Leach v Ofcom [2012] IRLR 839. 27.

The Acas Code of Practice on Disciplinary and Grievance Procedures

20. Any provision of a relevant ACAS Code of Practice which appears to the Tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992).

21. The ACAS Code of Practice on Disciplinary and Grievance Procedures provides, amongst other things, that:

- "Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted";
- "It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at the disciplinary hearing";
- "In misconduct cases, where practicable, different people should carry out the investigation and the disciplinary hearing";
- If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification";
- "Employers should allow employees to be accompanied at any formal disciplinary meeting";

- "The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses";
- "The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal."

Findings of fact

22. As set out above, in an unfair dismissal case I do not get to decide for myself afresh what happened, and whether I would have dismissed the claimant. Instead the focus is upon what was the respondent's reason for dismissing the claimant and when the respondent acted reasonably (applying the range of reasonable responses test) in treating it as a sufficient reason for dismissing the claimant. Part of that analysis includes looking at the procedure the respondent followed. Bearing in mind what I have to decide, and applying the balance of probabilities, I make the following findings of fact.

23. The claimant started working for the respondent in the Autumn of 2017. There were no contractually agreed minimum hours of work but the claimant worked on average 37 to 40 hours a week, taking home about £1300 gross and £1200 net pay a month. The respondent is a company providing care services for vulnerable adults. At the time in question they had about 52 members of staff. The management team was made up of Mr Kiff, his business partner Alison, and the office manager, Charlotte. They had no internal or external HR advisor at the time.

24. The claimant's attendance history was causing the respondent some concern. I do not have a full account from either party about this. However, it did not seem to be in dispute that during her employment the claimant was sick or absent on around 15 occasions covering approximately 57 days. It also did not seem to be in dispute that in the past the claimant had received some kind of warnings about her attendance in meetings held in December 2018 and July 2019 [51]. The claimant's perspective was that being ill was outside of her control and to an extent to be expected when she was working in a caring environment.

25. In July 2019 the claimant had had some absences and said her GP had mentioned she could have norovirus. She said that the GP was writing a letter with his concerns. Mr Kiff was concerned about whether it was safe for the claimant to be in work if she potentially had norovirus and asked for permission to contact the claimant's GP [74]. He states that he then did not receive contact from the claimant's GP. The absences that I do know about also include on 15 November 2019 when the claimant did not attend training as she had a cold [43].

26. The claimant had periodically expressed concern about the work she was being given to take service users to social events and the mileage that this was

incurring which was affecting her car and her insurance [38, 39, 40]. She felt she was disproportionately being given this type of work.

27. Other workers were expressing to Mr Kiff some frustration about the claimant's attendance record (which meant that cover had to be provided). It was said to him that the claimant could be seen posting updates on social media that may not match what the claimant was saying about her inability to work. Mr Kiff looked at the claimant's public Facebook page and saw a post from the 26 November 2019 [44] showing a picture of the claimant smiling which he thought was inconsistent with her claimed absence that day with toothache [44] and the claimant asking for cover for 27 November 2019 on the basis that she had been at the hospital all night with her mother [46].

28. On 3 December 2019 the claimant was attending a call at a service user's home and her car broke down. She called her mother to come out and help her. Her mother also telephoned the RAC who said it may take up to 6 hours to come out to them.

29. There is a fundamental difference between each parties' position as to what happened next. The claimant says she told Emma, who worked in the respondent's office, that she could not work the next day (4 December 2019) as she would not have a car and she did not have insurance to cover her to borrow her mother's car. The claimant states that Emma telephoned her at about 2:30pm to state that they would sort cover for the calls the next morning and to let them know as soon as possible the next day if the claimant's car was fixed so that she could then pick up calls again later that day. There are no written records before me of any messages between the parties on 3 December 2019. The claimant's witness statement refers to her being "hounded" in whats app messages to drive her mother's car and that she told them no on several occasions. In her oral evidence she said that was incorrect and that the exchanges on 3 December 2019 were by phone call. The claimant says she could not afford to pay for the insurance cover to drive her mother's van.

30. The respondent says that it was only agreed that the claimant would be taken off shift for the remainder of 3 December 2019 and that the claimant would borrow her mother's car for the first two early morning calls the next day on 4 December 2019. The respondent says it was agreed that the claimant would then go and get the part needed for her car later on 4 December.

31. On 4 December 2019 at 9:11am the claimant sent a message to the office saying the starter motor in her car had gone and she was going to Cardiff with her mother to get a replacement. There was then an exchange about whether the claimant could still cover the night of 4 December using her mother's car and the claimant said she could not as she was not insured [55]. The claimant was then asked to call into the office to see Mr Kiff "as you used Mum car yesterday and this morning." The claimant replied with confirmation that she had bought the part the night before and said "I cant use cars that I'm not insured on as for yest morning yeah I took a risk I cant afford anymore" [56]. There is a gap then in the message records that I have but shortly thereafter at 10:14 the claimant wrote "As I said this morning emma covered them she said yest on phone…" At 10:25 the claimant was told she was being taken off the rota until she had sorted her

car and seen Mr Kiff. The claimant asked what she needed to see him for and that "I'm getting sick of these threats." She was then asked if she had gone to her calls that morning. She replied to say "No how could I without a car emma new this yest after when she rang me said she cover." She sent through a call log of a call from 14:35 for previous afternoon for a call lasting 1 minute [57 and 58].

32. At 12:21 Mr Kiff emailed the claimant [59] saying

"I have just been informed that you did not attend your first 2 calls this morning after you agreeing to do them yesterday. Unfortunately the gentleman is now on the floor and waiting for an ambulance. I am sorry but this is totally unacceptable and this will need to be discussed with you. As mentioned earlier we will cover the rest of your shifts for this week and not put you on a further rota until we have had a disciplinary meeting with you. I would be grateful if you could indicate days/times that you will be available to come to the office for the above meeting once your car I suitable to drive."

33. The claimant replied to say that the respondent was well aware that she did not have a car the day before. She said "Emma was told I couldn't do my morning an as my mum said in the background your not taken my car your not insured emma agreed to cover them an let her know about tonight as I did this morning." She said "I have full evidence I could not attend the calls this morning as you were very much aware of that! That was up to you to sort my shift out this morning as you was more than enough time yesterday when I broke down at 14:00. Don't you DARE blame me for [service user's] fall this morning I take no responsibility for that whatsoever! You should've taken the responsibility to cover these calls this morning. Knowing full well my car was off the road 14:00 yesterday. Knowing you was just down the road could have the decency to come and help me. Yet all you've done this morning is inundate me with messages and now blaming me for a client's fall this morning. Now I'm sorry this is unacceptable behaviour towards me and very… harassment if the family would like to contact me or I them no problem what so ever I can give them the full evidence."

34. Mr Kiff emailed again at 12:54 to say:

"you agreed to do the 2 calls in the morning so it is not unreasonable for us to expect you to attend the calls. He may still have fallen if you had attended but we will never know. I think our work relationship is deteriorating and attitude towards providing care is not acceptable so will wait to hear from you re disciplinary meeting and go from there."

At around the same time there was also a telephone call between the claimant and Mr Kiff.

35. A disciplinary meeting was originally arranged for 5 December 2019 [60]. The claimant did not attend as she said she was going to get some legal advice before attending a meeting [62]. The claimant also visited her GP who signed her off work with "stress at work" [72]. The claimant posted her sick note on to Mr Kiff who received it on 6 December 2019. On 9 December 2019 the claimant

asked for a letter to attend an investigation meeting not a disciplinary meeting. Mr Kiff responded to say that he would invite the claimant to attend a meeting once her sick note had run out or the claimant said she was fit to return to work. He said he did not want to add to the claimant's stress [64].

36. There were some further emails between the parties about arrangements for the meeting. On 17 December 2019 Mr Kiff emailed the claimant to say "Im happy to have a return to work meeting on the 24th, we would though need to arrange a disciplinary meeting so happy to do both on the 24th or shall we arrange a time/date for the disciplinary meeting at the return to work meeting." The claimant responded to say "Ok do the both on 24th" [65]

37. There is a transcript of the meeting on 24 December 2019 which the claimant recorded without Mr Kiff's knowledge or consent [77 – 82]. There was a discussion about the claimant, from Mr Kiff's perspective not turning up for work. The claimant gave her account that Emma had told her that she would get cover for the morning calls and for the claimant to let her know about the night run. The claimant said "well I've got it all on my phone." Mr Kiff did not ask her for any phone records. He said that people had said the claimant had agreed to do the call. He acknowledged that he did not know if the service user in question would have ended up in hospital in any event. The claimant persisted in saying that she had not agreed to do the calls and Mr Kiff's colleague Charlotte said "do you think it is wise to get Emma in here to talk about it?" Mr Kiff said no. Charlotte also checked with the claimant whether she had stuff on her phone. The claimant again commented "yes she rang me at 14:32 and messages."

38. There was also a discussion about the claimant's sickness record with Mr Kiff saying that she had hit a trigger point and had 10 absences in 10 months. Mr Kiff says that as a company they were losing confidence in the claimant, particularly in her doing the work when he was giving it to her. The claimant said that these were things outside of her control as she did not know when her car was going to break down or when she was going to become ill.

39. Mr Kiff also said he felt the claimant's emails and messages were coming across as aggressive. He also referred to the fact that he had been shown things on social media, and that some of the days the claimant had been off work she had been updating her profile pictures and going on Tinder. Mr Kiff explained to me that the reference to social media was the day he looked at the claimant's Facebook profile when she was off work with toothache. He said that he had not looked at her profile on Tinder at all, and that was simply what he had been told by another member of staff. In the meeting on the 24 December Mr Kiff also referred to the claimant having complained about the amount of driving she was having to do and the claimant not coming to training.

40. At the meeting on 24 December, Mr Kiff said that he was going to have a think about things in the next few days as the claimant was not on the rota the next week in any event. He said "if you was to ask me to give you work I would say NO." He said that he would send the claimant something in the post the following week but he again said he had a lack of confidence in the claimant and that he did not have a good feeling about her commitment to the company at that time. He also signed the claimant back as fit to work.

41. Mr Kiff decided to reflect on the situation before reaching his decision which he did cover the Christmas period. The claimant was not on the rota for that week or the following week starting on 30 December 2019 as the claimant was on sick leave when those rotas were completed. This meant that the claimant was left without work from 5 December 2019 onwards and without any income in the meantime and that, in conjunction with a growing expectation that Mr Kiff was likely to dismiss her, she started to look for work elsewhere.

42. On 2 January the claimant emailed to ask why she did not have a rota for the following week. Mr Kiff responded to say that "Hours have been a bit lower and unfortunately haven't got hours for you next week. Unfortunately also my confidence in you attending the calls is still low as discussed in the meeting last week." That same day he wrote a letter to the claimant [14] saying:

"TERMINATION OF EMPLOYMENT

It is with regret that following the disciplinary meeting on the 24th December 2019 I have thought long and hard and unfortunately have come to the decision to terminate your employment with Cherish Cymru."

No reason was given for the claimant's dismissal in the letter. The claimant was not offered any right of appeal.

43. The claimant did not receive the letter until 8 January 2020. On 6 January 2020 the claimant emailed to ask if she was being put on the rota on Wednesday [49]. On 7 January the claimant asked to be sent her certificates [50].

44. Despite the documents being relevant, the claimant did not disclose any documents in these proceedings relating to her new employment or her job search. In her evidence she was somewhat vague about what had happened and when. It ultimately appears, and I make a finding of fact that, the claimant attended for interview with her new employer on 5 January 2020. She then attended a paid manual handling course with her new employer on 8 and 9 January 2020 (which coincided with receipt of the dismissal letter). She was paid about £30 a day for the manual handling course. In her new job, also as a carer, she had otherwise earned a better hourly rate than she did with the respondent. She started work with the new employer on 12 January 2020.

45. Mr Kiff told me in his oral evidence that he had heard parts of the telephone conversation passing between the claimant and Emma on the 3 December. He said that the calls not being covered came to light the next morning as one of the service users was visited by his cleaner at about 10am and was found to have fallen. The cleaner called the respondent. The next carer was due in at about 11:30 am and when she attended she could see in the record book that no one had attended the early morning visit. Mr Kiff then attended the property himself and by then the ambulance crew had arrived. On his return to the office he said that he was told by his partner Alison and Emma that the claimant had said she would cover the morning calls on 4 December. Mr Kiff did not do any other investigations or ask those involved to write witness statements. He accepted that he did not send the claimant a formal invite to the disciplinary hearing and

that he had not formally informed her of all the allegations she would be raising, such as the attendance concerns. He accepted he did not formally forewarn the claimant he was considering dismissal as a possible sanction. He accepted that his dismissal letter did not give a reason for dismissal. He said that the incident in question had been very stressful for him and his business. He accepted that he did not ask the claimant for the messages or call log on her phone or obtain them himself from the respondent's records, although he questioned what assistance they would offer. He said that prior to deciding to dismiss the claimant there was a general discussion in the office with his partner Alison, Emma and Charlotte the office manager. Mr Kiff said that they expressed reservations about confidence in the claimant's future with the respondent, particularly relating to her reliability and having to sort cover. Mr Kiff said that Emma and Charlotte had to cover the claimant's calls and deal with other staff members complaining about having to provide cover for the claimant. He said that ultimately he made the decision to dismiss. Mr Kiff said that the last straw was the incident on 4 December but that the claimant was on the radar in respect of her sickness and absenteeism records.

Discussion and conclusions

Unfair Dismissal - Liability

46. In my judgement Mr Kiff dismissed the claimant for the following reasons:

(a) He believed that the claimant had agreed to cover but had then not attended the two service user calls on the morning of 4 December 2019;

(b) He did not believe the claimant was telling the truth above the arrangements for cover on the morning of 4 December 2019;

(c) He considered the claimant displayed a lack of remorse for what had happened to the service user who fell;

(d) This was all against a background, from Mr Kiff's perspective, of having increasing concerns about the claimant's sickness and absenteeism records and a growing sense from his perspective that the claimant could be unreliable in covering shifts;

(e) Ultimately, he decided that he had lost overall confidence in the claimant's reliability that she would attend work and cover calls and whether she demonstrated the attitude he was looking for in employees as carers for vulnerable adults.

47. In my judgement the main operative factor in Mr Kiff's mind when deciding to dismiss the claimant was his belief that the claimant had agreed to cover the two calls on the morning of 4 December, that she had not done so, and that he believed the claimant was not telling the truth about having agreed to work them. This relates to the claimant's conduct and I therefore find that the principal reason for the claimant's dismissal was conduct and not "some other substantial reason." Whilst I accept that conduct conclusion reached by Mr Kiff, operating on the wider background, led him to conclude that he had lost confidence in the

claimant, that does not, in my judgement, make the principal reason for dismissal fall outside of being "conduct." Applying the analysis in Ezsias, Mr Kiff dismissed the claimant because of his belief in her misconduct which led him (in conjunction with the wider background) to lose confidence in her; he did not dismiss the claimant simply because of the fact of a lack of confidence alone disassociated from its root cause.

48. Applying the Burchell principles, I also find that Mr Kiff genuinely held the above beliefs. However, I do not find that he reached those genuine beliefs were reasonably held in the sense that they were based upon a reasonable investigation. In reaching that conclusion I have reminded myself of the importance of applying (and have applied) the range of reasonable responses test and the fact that the respondent is a relatively small company with limited resources and with no in house HR provision.

49. The claimant in this case has said that she did not understand that the meeting on 24 December 2019 was a disciplinary meeting as opposed to being a return to work meeting. I do not agree with that submission as it is clear from the emails exchanged that Mr Kiff told the claimant it was both and she acknowledged that it was both. The respondent did not, however, write to the claimant with a formal invitation to that meeting setting out what the specific allegations were that she was being asked to answer, enclosing any evidence relied upon and notifying the claimant of her right to be accompanied. The claimant was also not told she was facing the potential sanction of dismissal. This would be a matter of good employment practice and is within the Acas Code of Practice. Mr Kiff told me that he was aware of the Acas Code of Practice but had not looked, at the time, at its particular terms. In my judgement, any reasonable employer in the respondent's position, employing around 50 workers, even if it did not have its own internal or external HR function, would have familiarised itself with the Acas Code of Practice and followed its main guiding principles. The respondent would reasonably have been able to access, understand, follow and have time to follow the core principles enshrined in the Code.

50. This is important to the fairness of the investigation because it allows an employee to understand the particular allegations that are being made that the employee is being asked to answer in sufficient time in advance of the meeting itself. Here, whilst I accept that the claimant would reasonably have understood she was being asked to answer what happened about cover on the 3 and 4 December 2019 (including that it was being said she had agreed to cover the calls but then did not do so), Mr Kiff put other allegations to the claimant at the disciplinary hearing the claimant did not have any forewarning about. That included the tone of the claimant's emails and messages to him, her sickness and absence record (including his concerns that the claimant's social media activity may not match with her sickness and absence records) and his other concerns about the claimant's reliability and commitment. Any reasonable employer in the situation would have told the claimant in advance about what allegations were going to be discussed.

51. In my judgement a reasonable employer in the respondent's circumstances and with the respondent's resources would also have conducted more by way of a formal investigation before reaching a decision in the claimant's case. Whilst I

can understand Mr Kiff's desire not to bring Emma into the claimant's disciplinary meeting as he was concerned it could escalate into an argument, any reasonable fair minded employer would have at least taken a written account from Emma as to her version of events. This would have enabled the claimant to comment upon it, set out her points of disagreement and question it. In turn it could also be compared against the claimant's version of events before a decision was made. The same would apply to Alison who it is said witnessed the call between the claimant and Emma. It may well be that going through that process fairly and reasonably there would have been more questions to ask the claimant, Alison and Emma about the sequence of events before a decision was fairly made. One possibility, for example, is that given the claimant had at some point been using her mother's van to cover some calls on the 3 December, there was a communication breakdown between those involved in exactly what and what not the claimant was covering. In my judgement, Mr Kiff proceeded on the mindset throughout that the claimant was not telling the truth without there being a open minded investigation. Any reasonable employer in the respondent's position would not have done so.

52. In my judgement a reasonable investigation would also have included obtaining and reviewing a copy of the whats app messages and the call logs. Whilst there are no recordings of the telephone calls on 3 December and the whats app messages relate to the next day, they did still have some relevance. The call logs from the 3 December would show the sequence of events in terms of phone calls and whether they matched what the witnesses were saying about what was talked about in terms of cover and when. The whats app messages from 4 December show the claimant consistently saying that Emma had said she would arrange cover for the two morning visits. Likewise they show the respondent's office's understanding that the claimant was due to cover the calls. The messages therefore do not definitively answer the question of exactly what was said or agreed on 3 December but they are relevant evidence as to, for example, whether there is consistency in individual's accounts. They should reasonably have been considered, provided to the witnesses for comment, and weighed into account when reaching a decision. These evidence gathering tasks would not have been a difficult or time consuming task for the respondent to undertake.

53. I do note in this regard that it appears that Charlotte, who accompanied Mr Kiff to the claimant's disciplinary meeting was alert to these types of investigatory issue. The transcript shows her clarifying with the claimant that she has records on her telephone and also asking whether Emma should be spoken with. This seems to demonstrate that Charlotte at least was alert to the potential need to carefully obtain and assess the two competing accounts.

54. There are also some additional procedural matters which I consider also point towards unfairness. Firstly, in my judgement, any reasonable employer in the respondent's position would have considered whether, in accordance with the Acas Code, two different individuals should conduct the investigation and then make the disciplinary decision. Whilst I accept that the respondent had a limited management team, they had Charlotte available who was the office manager, and who was in the disciplinary meeting itself. The respondent also potentially had available Mr Kiff's business partner, Alison. In my view this would have rendered the process a more fair minded one. Secondly, the letter of dismissal

did not set out the reasons for dismissal which as a matter of inherent fairness (and under the Acas Code) should be done. The claimant was also not offered any right of appeal which any reasonable employer in the circumstances would have also provided. That goes hand in hand with providing reasons for dismissal, as otherwise it is difficult for an employee to make a meaningful appeal.

55. I do not criticise the respondent for waiting until 24 December 2019 to conduct the disciplinary meeting, as it was reasonable to wait for the claimant to be well enough to attend the meeting. I also do not consider it unreasonable for Mr Kiff to have taken some time to reach a decision over the Christmas period between 24 December and 2 January 2020. However, I do consider that a reasonable employer would have taken steps to promptly communicate the decision to the claimant bearing in mind she was not on the rota for receiving work. This could have been done by emailing the claimant the dismissal letter or at least sending it first class or recorded delivery.

56. Taking a step back and weighing all of the factors into account, including the size and administrative resources of the respondent and the equity and substantial merits of the case, in my overall judgement the respondent acted unreasonably (in the sense it was outside the band of reasonable responses) in treating the conduct reason as sufficient reason for dismissing the claimant. The complaint of unfair dismissal is well founded and succeeds.

57. I would add that even if I had found that the principal reason was "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" it would have been unlikely to significantly change the above analysis and outcome in this case. Similar principles to the Burchell analysis would still have applied. Moreover, applying Lund, bearing in mind the respondent invoked disciplinary proceedings against the claimant, the Acas Code of Practice would still have applied.

Unfair Dismissal - Remedy

58. Where an unfair dismissal claim is successful and the claimant seeks a remedy of compensation under section 118 ERA the award must consist of a basic award and a compensatory award.

59. The basic award is governed by sections 119 to 122 ERA and is calculated in the same way as a statutory redundancy payment. The claimant had two years complete service. She took home around £1300 gross pay a month which equates to £300 a week gross pay. She is entitled to two week's pay producing a basic award entitlement of **£600.00.**

60. The compensatory award is governed by sections 123 to and 124 ERA. "Section 123 says where relevant:

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include –

a. any expenses reasonably incurred by the claimant in consequence of the dismissal, and
b. subject to subsection (3), loss of any benefit which might reasonably be expected to have had but for the dismissal."

61. The claimant says that she is seeking:
- Compensation for loss of earnings, including the working which was taken off her. She refers to losing work over a 6 week period;
- The loss of her vehicle due to wear and tear due to all the mileage she put on it whilst working for the respondent;
- Sick pay for the period 5 December to 17 January 2020;
- Compensation for the stress she suffered and the fact she feels she has been bullied in the past.

62. As I explained to the claimant at the hearing I do not have the power to award compensatory in an unfair dismissal claim for the majority of the losses that she is claiming. I can only compensate for financial losses suffered which flow from the dismissal. The compensation the claimant seeks for the depreciation in the value of her car does not flow from her dismissal; it relates to the nature of her work whilst she was employed by the respondent. Likewise I do not have any power in a compensatory award to compensate for lost pay or lost sick pay that the claimant says she suffered *before* she was actually dismissed. I also do not have any ability in an unfair dismissal claim to make an award for non financial losses such as stress and injury to feelings.

63. In terms of the financial losses that flow from the actual dismissal, these are limited. The claimant's dismissal took effect on 8 January 2020 when she received the dismissal letter from the respondent. The claimant started new employment at a higher rate of pay on 12 January 2020. She also attended a partially paid manual handling course on 8 and 9 January 2020.

64. The claimant was out of work for 4 days. When working for the respondent she earning approximately £300 gross pay a week. Over 4 days that equates to £171.43. The claimant also received approximately £60 for attending the manual handling course in that period. This means that her losses sustained were the gross figure of approximately **£111.43**. I award the claimant that figure by way of a compensatory award. I am awarding it on a gross basis because whilst the claimant did not bring a separate notice pay claim, my understanding is that HMRC are likely to deem the first part of any compensatory award for lost earnings as being the equivalent to either contractual or statutory notice pay and therefore taxable. This means that once taxed the claimant will end up with the correct sum in her pocket.

65. Mr Kiff in his submissions said that he still felt he had ultimately made the right decision in having dismissed the claimant. I have given consideration as to whether I should make a so called, "Polkey" deduction to the compensatory award. That can apply where the Tribunal considers the question of whether an employee would still have been dismissed even if a fair procedure had been

followed. Considering the guidance given by Employment Appeal Tribunal in paragraph 54 of Software 2000 Limited v Andrews [2007] IRLR 568 I have decided not to make such a deduction as I consider that the nature of the evidence before me is to too speculative such as to reach a sensible prediction of what would have happened had a fair procedure been followed. Moreover, given the limited amount awarded overall do not consider it would be just and equitable to do so. A deduction for contributory fault was not pursued. I would in any event not make a deduction for contributory fault under either section 122 or 123(6) ERA as on the evidence before me, in particular not having heard from the office staff concerned, I am unable to conclude as a matter of fact that the claimant committed culpable or blameworthy conduct or that it would be just and equitable to make such a reduction on that basis .

66. The claimant was not in receipt of any social security benefits and therefore there is no recoupment order.

Redundancy payment

67. I have found that the principal reason for the claimant's dismissal was conduct and not because of, for example, a reduced requirement on the respondent's part for employees to carry out work of a particular kind. I therefore do not find that the claimant is entitled to a redundancy payment under section 139 ERA as her dismissal was not wholly or mainly attributable to any of the factors set out in that section. The claim for a statutory redundancy payment is therefore not well founded and is dismissed. In any event it would have been extinguished by the basic award in the unfair dismissal claim.

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Employment Judge R Harfield
Dated: 19 January 2021

JUDGMENT SENT TO THE PARTIES ON 21 January 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche