EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102261/2020

Held by Cloud Video Platform (CVP) on 25 and 26 February 2021

Employment Judge B Campbell

Ms Nicola McConnell	**Claimant** **Represented by** **Ewan Mowat** **Solicitor**
Partners For Inclusion	**Respondent** **Represented by** **Andrew Munro** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The Claimant was unfairly dismissed contrary to section 94 of the Employment Rights Act 1996, and the Respondent is ordered to pay the Claimant the sum of £5,690.11 as compensation; and

2. The Respondent did not breach the Claimant's contract of employment by electing not to provide notice or payment in lieu upon dismissing her and that claim is dismissed.

REASONS

Introduction

1. This claim arises out of the Claimant's employment by the Respondent which began on 1 August 2011 and ended on 16 December 2019 with her dismissal. The Claimant asserts that she was unfairly dismissed and that the Respondent separately breached her contract by making no payment in respect of her notice period.

2. It had been decided in advance that evidence in chief would be taken by way of witness statements. By this method evidence was given by three witnesses for the Respondent, namely Ms Fiona Thomson, Area Facilitator, Ms Dale Anderson, Senior Development Leader and Ms Michele Munro, Director of Operations and the Claimant gave evidence on her own behalf. The parties had helpfully prepared an indexed and paginated joint bundle of documents. Numbers in square brackets below are references to the page numbers of the bundle. The Claimant also provided an updated schedule of loss which superseded the version in the joint bundle. The key values within it were agreed by the parties.

3. All of the witnesses were found generally to be credible and reliable. The parties were not in direct conflict over much of the evidence and the case turned more on matters such as the severity of the sanction imposed and whether the Respondent had treated the Claimant consistently with other employees in allegedly comparable circumstances. The parties' representatives provided oral submissions which were noted and where appropriate they are referred to below.

Legal Issues

4. The legal questions before the tribunal were as follows:

   4.1. It being agreed that the Claimant was dismissed on 16 December 2019 by reason of her conduct, a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ('ERA'), did the Respondent meet the requirements of section 98(4) ERA so that the dismissal was fair overall; and

   4.2. It being agreed that the Claimant was contractually entitled to eight weeks' notice of termination of her employment, by giving no notice of dismissal or payment in lieu, did the Respondent breach the Claimant's contract of employment?

   4.3. If yes to either, what compensation or damages should be awarded?

Applicable Law

5. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

6. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

7. An employee will be entitled to notice of termination of their employment based on the terms of their contract or the provisions of section 86 ERA, whichever is the more generous. Unless the employer brings the contract to an immediate end by reason of the employee's material breach, it must make a payment equivalent to the wages it would have paid had the notice period been served. It is settled law that where an employee commits an act of gross misconduct the employer may be able to treat this as a fundamental breach of contract, and by immediately ending the contract in acceptance of that breach, it is released from the obligation to pay notice.

Findings of Fact

Background rules and procedures

8. The following findings of fact were made as they are relevant to the issues in the claim.

9. The Claimant was an employee of the Respondent from 1 August 2011 until 16 December 2019. The Respondent is a registered charity and provides support to members of the community who have special needs. The Claimant was a support worker. Both parties were subject to various rules of the Scottish Social Services Council ('**SSSC**'), including its **Code of Practice** [121-134].

10. The circumstances of this case concern the Claimant providing support to a man who in this judgment will be referred to as 'AB'. He has learning difficulties and requires 24/7 support, which was provided by various members of the Respondent’s staff at different times. The Claimant supported AB for approximately 10 hours per week and had been supporting him for 8 years.

11. The support given to AB by the Respondent included at home, such as preparing meals and helping with dressing, personal hygiene and cleaning, and also outside in the community such as going for a walk, shopping or visiting a restaurant.

12. AB's diet must meet certain conditions, particularly in relation to the consistency of his food and drink. He cannot chew food normally and can only be given soft food in small pieces. His drinks require to be thickened, although he is able to drink fizzy drinks. If his particular needs are not accommodated there is a risk he will choke.

13. A number of sets of rules and other documents applied to the Respondent and Claimant in relation to the provision of support to AB.

14. The Respondent prepares a **'Service Design'** document for each service user, which records his or her history with the service. The Service Design document for AB was provided [156-188]. It was updated twice in 2020 in such a way that the previous version existing at the time of the Claimant's dismissal was not available.

15. As with other service users, a **'Support & Protection & Whistleblowing Workbook'** was maintained for AB. This documented his particular needs and risks and was a way of noting concerns about his wellbeing, including potential or actual abuse.

16. The Respondent also maintained a **'Working Policy'** document for each service user, including AB [191-211]. This document would also be updated so that it provided a current and accessible guide to the service user and their needs for any relevant purpose. One such purpose is to allow each support worker to provide a consistent level and type of care to the service user. The version provided to the tribunal was that which was last updated in October 2019.

17. Additionally, the Respondent had in place a **'Team & Organisational Responsibilities'** document [240-258]. This recorded further practices and rules which would apply to support workers involved with AB.

18. In conjunction with that document the Respondent requires its support workers to complete a **daily diary** for each service user, summarising their routine and activities, together with comments about their general wellbeing. Any particularly noteworthy incidents would be logged. Entries from of AB's diary for 17 November 2019 [259-260] and 9 December 2019 [334-336] were reproduced.

19. AB was annually assessed to establish whether any '**CALM**' de-escalation measures should be in place for him. An assessment on 24 April 2019 [189-190] recognised that certain of his behaviours warranted de-escalation strategies being in place.

Events of 17 November 2019

20. AB regularly attended an afternoon disco held at a Community Centre in Irvine going by the name of 'Johnnie's Music Group'. This was specifically arranged for local people with particular support needs, who each would attend along with a support worker or similar carer. This would include individuals supported by staff of other similar organisations to the Respondent. The Claimant had attended a number of these events with AB, as had other support workers employed by the Respondent on different occasions.

21. AB attended 'Johnnie's' on the afternoon of Sunday 17 November 2019 with the claimant. He has his own car although is unable to drive it. His support workers including the Claimant were able to drive it for him. He was driven to and from Johnnie's by the claimant.

22. AB required to have what was referred to as an 'outdoor bag' whenever he left his home for an outing. It was to contain a change of clothes, medication (principally Lorazapam which is used to treat anxiety) and a snack which could be used as a diversion. The Claimant brought AB's outdoor bag to Johnnie's on 17 November 2019 and left it in his car which was parked outside the venue. This was her normal approach. She would not bring the bag into Johnnie's, or another venue as a general rule, as AB tended to be food-orientated and could be known to fixate on the bag, knowing there was a snack in it. She would bring the bag into a place such as a restaurant if she had to park further away. Her experience had been that AB had not needed his medication for a number of years since when he flew on an aeroplane for the first time, and likewise a change of clothes. She considered having the bag in the car was acceptable and appropriate.

23. On 17 November 2019 AB was at Johnnie's, arriving with the Claimant between 1 and 2pm, and leaving around 2.50pm. The Claimant was with him in the main hall where the disco was taking place throughout, save on two occasions. The first occasion occurred when her daughter telephoned her on her mobile to report that her (i.e. the daughter's) father had suddenly died. He was the Claimant's former partner. The news came as a shock to both the Claimant's daughter and the Claimant herself. On answering the call, the Claimant left the hall to speak to her daughter and comfort her. She spent between ten and twenty minutes on the call. Whist doing so she stood at the set of double doors leading into the hall and looked through their windows. She could see AB inside the hall most but not all of the time when doing so, as he and others were moving around.

24. The Claimant re-entered the hall but a short time later had to leave AB again in order to make an urgent visit to the toilet. She was suffering from diarrhoea. She was again outside of the hall for between 10 and 20 minutes. She was unable to see AB for that whole time.

25. At certain other times whilst in the hall, the Claimant used her mobile phone to send and receive text messages to and from her daughter.

26. Under normal circumstances the Claimant would have asked a fellow employee of the Respondent, failing which another support worker, to monitor AB if she unexpectedly had to cease watching him herself. On both occasions on 17 November 2019 she was distracted and not thinking clearly, and did not ask anyone else to keep check on AB. She did not know every other support worker employed by the Respondent and did not recognise any of them at Johnnie's on that afternoon, although there were some present. She was unable to distinguish a support worker employed by the Respondent from one who was not.

27. While the Claimant was out of the room the first time, AB picked up another person's can of fizzy soft drink. He tried to drink from it but was prevented by another support worker. He walked away.

28. While the Claimant was out of the room on the second occasion, AB was seen observing another person's pack of 'Pringles' crisps. Johnny Caddell, the organiser, also saw this and moved the Pringles out of his reach.

29. The Claimant was not made aware of the above occurring in her absence and assumed nothing untoward had happened. She brought AB home from Johnnie's and continued her shift with him in a normal fashion. She completed his daily diary [259-260] which made no reference to her absences from the hall at Johnnie's or anything which occurred during that time.

Events after 17 November 2019 and investigation

30. Some other employees of the Respondent had been at Johnnie's on 17 November 2019 with their respective service users, and had seen the Claimant there with AB. Some of them had seen AB being left unattended and were motivated to report this to the Respondent. Linda Steven gave a written statement on 19 November 2019 [261], Cheryl Allison reported what she had seen via a WhatsApp message on 19 November 2019 as she had gone on holiday abroad [262] and Liam McGill gave a statement on 20 November 2019 [264]. A statement was also taken on 20 November 2019 from Johnny Cadell, the person who runs the event [263].

31. The Claimant herself was asked to give an initial statement about the events and did so on 21 November 2020 [265]. She did so to Rebecca Clark, Team Facilitator and Linda Allan Area Facilitator. On conclusion of the meeting she was suspended on full pay pending further process.

32. Ms Linda Thomson was asked to conduct a formal investigation into the Claimant’s conduct relating to the event at Johnnie's. The Claimant was asked by letter dated 22 November 2019 [272-273] to attend an investigatory interview with her on 10 December 2019. The letter, from an HR officer Christine Edmund, confirmed that the Claimant was under paid suspension.

33. Ms Thomson held an investigatory phone call with Johnny Caddell on 27 November 2019, which was noted [274-275]. He approved the note taken save for two corrections he made by email dated 10 December 2019 [276], namely that blinds fitted to the windows of the hall doors would occasionally be lowered by others accidentally, and that he did not know who all of the support workers assigned to AB were.

34. Ms Thompson also spoke to Chris Love, another support worker with the Respondent by telephone on 27 November 2019 [278]. He had accompanied AB to Johnnie's on other occasions. He said that AB needed to be observed closely as he had a tendency to take others' food and drink or look in people's bags for sweets.

35. Ms Thomson also spoke to Stephen Cochrane, a support worker employed by the Respondent, on 27 November 2019 [280]. He had attended Johnnie's with AB. His view was that AB should never be left unattended and needed to be watched at all times, even if from a short distance, as he could take things off people triggering an aggressive reaction, or try to remove his clothes. He also said that AB might check to see where members of the Respondent's staff were before trying to take others' things. He mentioned that choking was a hazard for AB, which might not be noticed if his support worker was not paying attention. He would explain to another staff member if he needed to go to the toilet so that AB could still be watched.

36. Also on 27 November 2019 Ms Thomson spoke to Evan Goodwin, another of the Respondent's support workers with experience of AB. He stated that he would not leave AB unattended in case he picked anything up. In a follow-up conversation on 5 December 2019 [283], Mr Goodwin notified her of two occasions he had remembered when he was with AB at Johnnie's and had to leave him unattended. The first was to answer a work call, when he stepped out of the hall and observed AB through the windows of the doors. The duration of the call was not noted, although he had said he 'popped out' of the hall. On the second occasion he had to fetch the janitor to deal with someone's spilled drink on the floor. He left the room for around a minute to do so. He had asked Johnny Caddell to keep an eye on AB as he went.

37. Ms Thomson spoke to Terry Wylde on 28 November 2019 [286-288]. He was also a support worker with the Respondent who at times had gone to Johnnie's with AB. Mr Wylde had not been there on 17 November 2019 and so had not observed anything directly. He reported that two people who had been there had raised with him that AB appeared not to have been with a support worker the whole time. He said that he would keep an eye on AB at all times as 'he will try it' or will see food and 'go for it', and look to see if he was noticed. He would only leave AB to visit the toilet and would ask a work colleague to watch him if so.

38. Ms Thomson interviewed Linda Steven, support worker on 29 November 2019. She confirmed she had not met the Claimant before and did not speak to her on the day, but worked out who she was. Her recollection was that the Claimant spent time on her personal mobile phone texting while in the hall. She said that just as the regular raffle was beginning, AB was trying to get other people's drinks and crisps. After the raffle AB took an opportunity to reach for someone else's can of cola and a support worker from another service had to stop him. She said she looked for the Claimant at this point but couldn't see her. She recalled it being around 10 minutes from then before the Claimant returned to the room. She said that after a short spell the Claimant left the room again from 10-15 minutes, and when she returned she and AB left. Ms Steven said she herself would normally ask a colleague from the Respondent to cover for her if she needed to use the toilet. She said that 'other people' (i.e. outside of the Respondent's staff) complained about AB being unsupported. No-one had shown aggression towards AB during the Claimant's absences, but people were watching him to see what he did.

39. Ms Thomson met with Cheryl Allison on 2 December 2019 [295-296]. She explained that she had sent the WhatsApp message on 19 November 2019 as what had happened was bothering her. She said AB's team member was 'on her phone the whole time' and had left the room after the raffle 'for 15-20 minutes or maybe longer'. She also said AB drank from someone's can of juice. When asked what support for AB at Johnnie's usually looked like, she replied that 'you need to watch him closely' as he is always 'up to mischief'.

40. Ms Thomson interviewed the Claimant on 3 December 2019 [298-303]. The Claimant confirmed she had supported AB for 8 years, that she knew that it was wrong to have left AB unattended and that normally it was necessary to 'keep an eye' on AB at all times. She explained the reasons for the two occasions when she had to leave AB unsupervised. She said her mind was not really 'in it' and just panicked because of the shock of the news her daughter had given her. She would normally 'jump to attention' if an incident occurred with her service user or one of a colleague. She disputed sitting using her phone the whole time she was in the hall, but agreed she had exchanged some text messages with her daughter after their call. She would normally ask someone to watch AB if she had to go to the toilet, but didn't on this occasion as her head was in a different place. Her daughter needed to hear her voice to calm her down. Once that had been done, the Claimant felt able to return to her work and didn't feel sufficiently affected herself that she needed to be relieved by a colleague. She was aware she could have called someone to take over from her. She described what had happened from the point of leaving Johnnie's. Nothing untoward or unusual took place.

41. After a break in the meeting Ms Thomson asked the Claimant about AB's outdoor bag. The Claimant confirmed she usually kept it in AB's car. If there was a chance that AB needed medication she said she could almost always anticipate that and lead him back to the car to receive it. She was aware of the bag containing soft sweets as a distraction if AB was not behaving appropriately, but said she was always able to persuade him and walk him out to the car. If she required to fetch a change of clothes she would ask a colleague to stay with AB whilst she did so. She felt that she and AB 'gelled' and there was a high degree of understanding between the two.

42. There was discussion about the CALM measures in place for AB [189-190]. The Claimant believed they would not be called into action for her. She did not however know how they could be used to protect AB or others if she was not present.

43. Ms Thomson concluded her investigation by preparing a report [306-309]. She set out a number of 'Conclusion[s]' which included that the Claimant had put AB and others at risk of harm and potentially raised AB's anxiety level, increasing the likelihood of CALM de-escalation measures having to be used. She also believed the Claimant had put AB at risk by having his outdoor bag in his car rather than with her in the building. She considered that AB had been at risk of choking through drinking someone else's drink or eating their food. She recommended that there was a disciplinary case for the Claimant to answer.

44. Ms Thomson also made a number of recommendations for the Respondent itself to implement. Those are set out in the last page of the report, and are in the nature of suggestions of updates and other changes to the Respondent's various working documents.

Disciplinary Hearing and dismissal

45. The process was handed over to Ms Dale Anderson, Senior Development Leader with the Respondent. She decided to invite the Claimant to a disciplinary hearing on 16 December 2019. She sent an invitation letter to the Claimant to that effect [310-312] enclosing the investigation materials which the letter listed. The first page of the letter specified in two bullet points the accusations she had to answer, namely that she twice left AB unsupported at Johnnie's on 17 November 2019 potentially putting him at risk, and she contravened the Working Policy by leaving his outdoor bag in his car.

46. The Claimant attended the disciplinary hearing on 16 December 2019. She chose not to be accompanied by a person of the type permitted. Ms Anderson chaired the meeting and notes were taken by Fiona Campbell, who prepared a typed version [313-314]. The hearing was short. The Claimant admitted what had happened factually. Despite the invitation letter raising that there was a possibility of a finding of gross misconduct, and with it a decision to dismiss her, she felt this wording was more of a formality and that the situation was not that serious. She expected that having been frank about her lapses, she would receive a final warning and be allowed to atone by way of further service without repetition of such incidents. Ms Anderson however did think the matters were serious and considered that the Claimant was not viewing them seriously enough.

47. Ms Anderson felt she needed to adjourn the meeting to consider how the discussion had gone. After a ten-minute break she returned to the meeting and confirmed that she had taken the decision to dismiss the Claimant for gross misconduct. The decision was effective immediately and the Claimant was given 7 days to appeal it. The meeting ended.

48. Ms Anderson confirmed her decision in a letter to the Claimant dated 17 December 2019 [315-316]. She stated that the Claimant had admitted to leaving AB unsupported twice on 17 November 2019, she had breached the Working Policy and caused risk by leaving AB's bag in the car, that there had been a full investigation and that the Claimant had been given the opportunity to respond, including raising any mitigating factors.

49. In that letter Ms Anderson went on to say she did not get a sense of the Claimant understanding the seriousness of her actions and the risk being created for AB and others. She believed there was sufficient evidence uphold all of the allegations raised and that the Claimant's actions constituted gross misconduct. She said that summary dismissal was an appropriate penalty and that she no longer believed the Claimant was suitable to work with vulnerable adults which the Respondent supports. In her evidence to the tribunal, she clarified that she believed the Claimant had committed an act of gross misconduct on each of the two occasions she left AB unsupervised, and that the transgression in relation to the outdoor bag was an act of misconduct short of gross misconduct.

50. The letter also confirmed the Claimant's employment had been terminated the day before and provided details about final payments and the issuing of a P45. Ms Anderson stated that she was bound to refer the matter to the SSSC and re-stated that the Claimant had 7 days to appeal against her decision.

Appeal

51. On 31 December 2019 the Claimant emailed a note to Ms Michele Munro confirming her wish to appeal [317]. She said she believed no reasonable employer would dismiss her in these circumstances and emphasised that it was a personal emergency which had required her to leave AB on the two relevant occasions. She was aware other support workers were in the room and did not believe AB was in any danger. She raised that his bag was easily accessible when in the car. She believed her dismissal was 'extremely unfair'.

52. Ms Munro acknowledged the email that day and confirmed that despite it reaching her more than 7 days after the dismissal letter, she would hear the appeal. She sent a letter dated 7 January 2020 inviting the Claimant to an appeal hearing on 15 January 2020 [319]. In it Ms Munro gave the Claimant the opportunity to provide a written submission.

53. The appeal hearing was at some point rescheduled to 20 January 2020. The Claimant further emailed Ms Munro on 19 January 2020 to expand on her

reason for appealing. She first emailed at 12.23pm and then sent a second email with additional text at 1.29pm [321-322].

54. The appeal hearing took place on 20 January 2020. In addition to the Claimant and Ms Munro, Fiona Campbell attended to take notes. A minute of the meeting was prepared [323-326].

55. Ms Munro said she was not going to go over every aspect of the case but asked the Claimant if she had anything further to bring, or was unsure of any aspect of the process so far. The Claimant said she hadn't really understood the process and didn't feel she had been able to put forward everything she needed to. Ms Munro gave consideration to the Claimant's email of 19 January 2020 and some points were discussed and clarified. Ms Munro raised that the Claimant had not asked a colleague to cover for her when she left the hall. The Claimant confirmed that she knew other support workers from the Respondent were in the room but she didn't know who any of them were. She agreed that there could have been 'an incident' with AB whilst she was not present with him. The Claimant stated that whilst the call from her daughter had come as a shock at the time, she had recovered from it such that she could continue with the rest of her shift as normal and didn't need to call for someone to relieve her. She also referred to an incident at Johnny's six weeks before when AB had been supported by another support worker, and had managed to snatch some crisps which weren't his and eat them (although the evidence of those present was that he did not manage to eat them before being diverted). She referred to a further incident when AB had been left unsupported by another support worker and had managed to eat five tangerines (in fact it was four satsumas) including their skins, but no disciplinary action had resulted. She stated she was being treated too severely. Ms Munro said that it would have helped had these incidents been raised earlier, but that she would look into them.

56. There was also discussion about the training the Claimant had received, and the medication which was kept in AB's outdoor bag. The Claimant clarified that

she would not have administered it to AB in a busy hall, but instead would have led him out to the car in any event. Ms Munro said this was contrary to the Working Policy. The Claimant did not explicitly agree that was so, but did acknowledge that not having the bag close to hand was an 'oversight'. She also said that the incident of AB taking and trying to drink someone else's drink could have had 'a very different outcome'. The Claimant agreed.

57. When asked if she had anything further to add, the Claimant stressed that whilst she had been entirely at fault on 17 November 2019 and had not handled matters very well, she had given the Respondent 8 years of loyal service. She had had initially panicked when her daughter called. There had been no previous disciplinary incidents. Ms Munro emphasised that the contents of AB's CALM assessment indicated he could lash out at others, and that the service the Respondent undertook for him was '24/7', meaning that he was in effect never to be left unsupported.

58. The Claimant referred to a third incident involving a service user being left unsupported, this time by a manager, for 20 minutes in a car and the staff member not being dismissed. She said the Respondent was not applying rules consistently 'across the board'.

59. Ms Munro ended the meeting, saying that she would consider everything discussed and issue a decision in writing which would be final.

60. Ms Munro considered the three incidents which the Claimant was raising as examples of other employees allegedly being treated more leniently than her in comparable circumstances.

61. The **first incident** involved a disciplinary matter arising in November 2015. It was Ms Munro herself who chaired the disciplinary hearing which dealt with it and she recalled the details. There were two disciplinary allegations against a Team Leader, one unrelated to the circumstances of the Claimant’s case and the other as the Claimant had referred to, involving them leaving a service user in their car for 20 minutes outside someone's house while they (the Team

Leader) spoke to the householder at their front door. Although the Team Leader could see the service user at all times and they appeared to be safe in the car, there was concern over where the car was parked. The Team Leader was given a written warning lasting 12 months. A redacted copy of the outcome letter was provided to the tribunal [328-329]. The Team Leader knew the Claimant and had confided in her about the process around the time it took place. The Claimant therefore knew of it in November 2019.

62. Had the incident happened in November 2019, Ms Munro would have dismissed the employee. She considered that updates to the SSSC Code made in the interim placed clearer emphasis on the individual responsibilities of support workers as distinct from those of the service they worked for, and the conduct would be such a serious breach of those standards that dismissal would be the appropriate response.

63. The **second incident** involved a colleague of the Claimant's accompanying AB to Johnnie's on 13 October 2019. AB grabbed a packet of crisps from the tuck shop whilst being supervised and burst them open. The crisps were taken from him before he could manage to eat any. The support worker made a note in the daily diary [332-333]. No decision was taken to initiate a disciplinary process. The Claimant knew about this in November 2019.

64. The **third incident** took place on 9 December 2019, and thus after the Claimant had been suspended but a week before her disciplinary hearing. She found out about it between her disciplinary hearing and her appeal. Whilst at home, AB had not made it to the toilet quickly enough and his support worker, Chris Love, had to undertake some resultant cleaning. As this was taking place AB entered his kitchen and gained access to his fridge, then took out and ate four satsumas without removing their skins. The fridge is fitted with child locks which Mr Love had forgotten to secure. The Working Policy states at section 6 under the heading 'Kitchen' that the kitchen door should be locked at all times, the fridge has child locks which should be latched and that AB shouldn't be in the kitchen unsupervised. This occurrence was recorded in the daily diary [334-336].

65. Ms Munro identified a further past disciplinary incident which she took into account. This involved a member of staff being dismissed summarily for gross misconduct by letter dated 2 October 2017 [330-331] for twice leaving a service user in their vehicle unsupported. These incidents followed a complaint by the Care Inspectorate about the individual being left alone in that way. The Claimant was unaware of the existence and details of this process until the dismissal letter was provided as part of the disclosure process in the lead up to this hearing.

66. Having looked into the previous cases the Claimant had raised, and a further one she herself was aware of, and considered the discussion which took place at the appeal hearing, Ms Munro decided not to uphold the appeal. She believed this was appropriate given the duties imposed on service users and services themselves by the SSSC Code, and that it was consistent with the October 2017 dismissal.

67. Ms Munro confirmed her decision to the Claimant in a letter dated 27 January 2020 [327]. This concluded the disciplinary process.

Discussion and Conclusions

General reasonableness of the Respondent's process

68. The parties were agreed that the Claimant had been dismissed because of her conduct, but disagreed over whether the requirements of section 98(4) ERA had been satisfied.

69. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. That decision requires three things to be established for a conduct dismissal to be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

70. It is necessary to look at the two key disciplinary matters in turn when considering whether the *Burchell* test was met.

71. In respect of the **first allegation**, namely leaving AB unsupported on two occasions on 17 November 2019 at Johnnie's, Mr Mowat for the Claimant did not argue that the *Burchell* test had not been met in any particular way. The Claimant admitted the conduct of which she was accused, save as regards the precise duration of her absences. There was no need to take further steps to establish what had happened beyond those that the Respondent did take. The Respondent clearly did believe this conduct took place and that it amounted to gross misconduct.

72. In terms of whether the Respondent had reasonable grounds for considering the Claimant's actions to be gross misconduct, it had a sufficiently clear picture of what had happened and there existed a framework of external and internal standards and other relevant material against which that conduct could be evaluated. This included in particular the SSSC Code, the Working Policy and CALM assessment. The Respondent was entitled to find that the Claimant's conduct was gross misconduct in this context. Although the Claimant may have been forgiven for wishing to speak to her daughter given the nature of the call she received, or for visiting the toilet, the Respondent was entitled to balance what she did and in particular the lengths of those absences against the very particular requirements of the service user and find that the Claimant could and should have done more to ensure AB was adequately supervised, and that she ought to have appreciated the seriousness of her omissions.

73. Therefore, the *Burchell* test was met in respect of the first allegation.

74. The **second allegation** was that the Claimant had breached the Working Policy by leaving AB's outdoor bag in his car outside of the venue on 17 November 2019, rather than having it close to hand inside the venue. Mr Mowat argued that although the Respondent believed the Claimant was guilty of misconduct, it could not have reasonably formed that belief because the Working Policy did not by its wording place such a requirement on a support worker and the Claimant did not know by any other way that there was such a

requirement generally, if indeed there was one. She therefore did not know she was doing wrong.

75. The Working Policy is a detailed document 21 pages long. It *"has been written to provide a clear framework for [AB]'s supporters to enable them to support him in a way that makes sense to him."* The Respondent also says within it that *"It is important that the information contained within the working policy is followed and used consistently by each member of the support team."* It is a clear and evidently helpful and important document for the Respondent to have in place, but it does not say anything about where his bag should be kept.

76. The Claimant had a particularly good working relationship with AB and experienced fewer issues when supporting him than others. Few interventions were required and when they were, she was effective in dealing with them. She had not needed to administer his medication or use his change of clothes under normal circumstances for some time. When the bag was nearby AB could become preoccupied with the snack which he knew it contained. Based on her experience of supporting AB her decision not to bring the outdoor bag into Johnnie's on 17 November 2019 was appropriate. She explained her position to the Respondent in the disciplinary process.

77. The Respondent's belief that the Claimant had committed an act of misconduct was not based on reasonable grounds and the *Burchell* test was not met in relation to the second allegation. This is despite any apologies by the Claimant for her approach to Ms Anderson and Ms Munro during the disciplinary and appeal hearings. Doing so did not outweigh the significant evidence to the contrary, and particularly the fact that the policy so heavily founded upon did not contain wording creating the rule said to have been broken.

78. Had the Claimant only been dismissed for the second allegation her dismissal would have been unfair based on the above. However, the employer's reason for dismissal is the particular group of matters it relies on as a whole. That was predominantly the subject of the first allegation, supported by the second. Even if the latter was not in itself grounds for dismissal, which effectively was recognised by Ms Anderson, the Claimant was dismissed based on the whole set of allegations relied on, and overall the Respondent's approach met the *Burchell* test (per ***Robinson v Combat Stress UKEAT/0310/14***).

The band of reasonable responses

79. In addition to the *Burchell* test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

80. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

81. It is also important that it is the assessment of the employer which must be evaluated. As Mr Munro raised in his submissions, whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard.

82. Mr Mowat argued that the features of this case meant that the sanction of dismissal fell outside the band of reasonable responses. It was, he said, simply too harsh in the circumstances. He made particular reference to the nature of the reasons for the Claimant leaving AB on the day in question, and the type of event in question, which was an enclosed environment where a number of other experienced care workers were present.

83. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the Claimant was within the band of reasonable responses open to the Respondent in these circumstances. In particular, whilst it was entitled to have some sympathy with the Claimant regarding the unexpected and saddening phone call she received, or the need for her to use the toilet facilities, it was also entitled to consider (as it did) those factors against such matters as the external standards and regulations it and its employees are subject to in this particular sector, the service user's particular needs, the level and type of risk which would attach to AB being left unsupervised, the duration of the absences and the fact that the Claimant took no steps to ask for assistance in covering for her to the extent those absences were justified. In doing so the Respondent clearly took something close to a 'zero tolerance' approach to lapses in the supervision of those subject to its care with needs such as AB had. That may not have been justified in every employment setting, but was for this particular employer.

84. Therefore, whilst dismissal of the Claimant may have been towards the higher end of the band of reasonable responses, it did fall within that range on the evidence in this case.

Consistency

85. Part of the Claimant's case was that she was treated inconsistently with other employees of the Respondent. A dismissal which on the face of it may appear fair can be rendered unfair by being inconsistent with comparable treatment by the employer of its other employees. Mr Mowat for the Claimant recognised that tribunals are restricted to the extent they can compare different scenarios in order to conclude that an employer acted inconsistently to the detriment of a particular claimant.

86. The EAT decision in ***Hadjioannou v Coral Casinos Ltd [1981] IRLR 352*** confirms that an inconsistency argument can only be well founded if one or more of the following apply:

    a. The Respondent has treated conduct similar to that which the current employee is accused of more leniently in the past, thus creating an expectation of how it will be dealt with in later cases;

    b. Previous treatment of similar conduct goes so far as to suggest that conduct is not the real reason for dismissal in the current case; and/or

    c. Employees in 'truly parallel' circumstances are treated differently.

87. Mr Mowat's submission was that the 'first incident' from November 2015 that Ms Munro was asked to consider fell into the first and third of those categories, and that the 'third incident' on 9 December 2019 fell into the third category. Mr Munro's submission was that the circumstances of either event were not comparable to those leading to the Claimant's dismissal. In particular, the first incident was justly viewed less seriously since the service user was in the sight of the employee the whole time, and in any event Ms Munro had confirmed she would now consider that conduct worthy of dismissal given expansion of the SSSC Code. Mr Munro added that the third incident took place in AB's home and therefore involved less risk. In both cases the support worker was in closer proximity to the person in their care than the Claimant had been to AB.

88. The question of consistently can be finely balanced. It is unlikely that two disciplinary incidents will ever be identical in all respects, but the more alike they are, the stronger the argument that the earlier sets a level of expectation as regards the employer's treatment of the later (i.e. the first category in *Hadjioannou*) or that two particularly similar acts of potential misconduct should result in the same outcome (the third *Hadjioannou* category). This will be a question of degree.

89. On the evidence in this case it is found that the Respondent did treat the Claimant inconsistently with both the employee given a warning on 15 November 2015 and the one supervising AB on 9 December 2019.

90. As regards the first of those, the evidence of Ms Munro is noted, and particularly what she had to say about potential factual distinctions between that scenario and that of the claimant. It is recognised that the Team Leader had the service user in view from a short distance substantially the whole time they were speaking to another individual, albeit that the duration was comparable to the Claimant's absences on 17 November 2019. However, what is more relevant is that this comparator was more senior than the claimant, that the Claimant personally knew of the situation and its outcome (and therefore did have her expectations influenced by that knowledge) and that the Claimant would not have known that Ms Munro, or for that matter any other senior employee of the Respondent, would or might have treated the same incident as meriting dismissal at the time of her own misconduct because of a reconsideration of personal standards brought about by the updating of the SSSC Code.

91. There was therefore adequate evidence that the Claimant had been led to believe she would not be dismissed for her own conduct on 17 November 2019. This is consistent with her evidence about what she expected to be the result of her disciplinary hearing and influenced how she conducted herself in that hearing. This comparator falls within the first, but not the third category of permitted comparators in *Hadjioannou* – it set expectations regarding treatment of conduct which the Claimant relied on but it was not factually similar enough to be a truly parallel case.

92. As regards the second comparable case, it is found that this was a set of truly parallel circumstances to those of the claimant. That does not mean, or require, that the two events were the same in very detail. Clearly they were not. However, the issue in both was the risk to the same service user when left unattended. The Respondent places great importance on this particular individual being under constant supervision because of his needs and habits. That principle was central to its justification for the Claimant's dismissal.

93. Further, the primary risk in both situations was the same, namely that AB might come to harm through choking on food or drink which was unsuitable for him. The precise amount of time that AB was left alone by Mr Love while performing other duties is not documented, but clearly it was long enough to be comparable in the sense that AB was able to enter the kitchen, access the fridge and eat four satsumas with their skin on. Mr Love admitted to not locking the kitchen and the fridge, thus being in breach of the Working Policy.

94. Whilst, as submitted by the Respondent, the Claimant was at home rather than in public at this time, meaning that the risk of him harming others was removed, that likely increased the risk that he would not have been prevented from choking at an earlier point because he was alone in the kitchen.

95. The degree of difference in treatment of the two employees also cannot be overlooked. The Claimant was dismissed whereas her colleague was subject to no action at all.

96. Therefore, by reference to both the November 2015 and December 2019 incidents, the Claimant was treated inconsistently by being dismissed rather than, say, being issued with a warning as she had expected.

97. Further, it is found that the degree of inconsistency is so material as to render the Claimant's dismissal unfair.

98. For completeness it is noted that the Claimant's second suggested comparator, namely the situation which arose on 13 October 2019, did not go towards demonstrating that the Respondent had treated her inconsistently. AB was being supervised on that occasion and was quickly dealt with by the support worker in attendance.

99. Similarly, the further example Ms Munro looked into from October 2017 does not either hinder or help the Claimant's case. First, she did not know of it and therefore it could not have influenced her expectations. Secondly, on the limited information provided, the disciplinary sanction was imposed after an external complaint which effectively served as a warning shortly before. That in itself set it apart from the Claimant's case.

Contributory conduct

100. It is necessary next to consider whether any award of compensation should be reduced to reflect the degree to which the Claimant's own conduct contributed to her dismissal. This duty falls on a tribunal whenever findings are made suggestive of contributory conduct, and in any event both parties raised the issue in in their submissions.

101. A tribunal may reduce both a basic and compensatory award to reflect contributory conduct. There are slightly different considerations for each, but the broad approach is the same, namely what is a just and equitable approach to take. According to the Court of Appeal in ***Nelson v BBC (No.2) [1979] IRLR 346*** in order for a reduction to the compensatory award to be appropriate, the conduct in question must be culpable or blameworthy, it must have caused or contributed to the dismissal and the reduction must be just and equitable.

102. That approach is effectively distilled into four separate questions (as per ***Steen v ASP Packaging Ltd UKEAT/23/11***) which are dealt with as follows:

a. **What is the conduct said to give rise to contributory fault?** In this case, it is the admitted actions on 17 November 2019 which made up the two disciplinary allegations put to the claimant, namely leaving AB unsupervised twice and omitting to bring his outdoor bag into the venue;

b. **Was that conduct blameworthy?** It is found, consistent with the reasoning above in relation to the principal discussion on fairness, that the conduct which formed the basis of the first allegation was blameworthy but that the actions relating to the second allegation were not;

c. **Did the blameworthy conduct cause or contribute to the dismissal?** Clearly the answer is yes and this was not a disputed issue;

d. **If so, to what extent should the award be reduced, consistent with what is just and equitable?** This question requires analysis of the specific facts and circumstances of the case. The Claimant's contributory conduct played a large part in the decision to dismiss her but it was not the entirety of the Respondent's reason for doing so. The contributory element of her conduct may have justified her being dismissed fairly were it not for the Respondent's lack of consistency and the consequences of that. A significant reduction is appropriate and it is decided that this should be **75%**.

103. Although the same detailed analysis is not required in relation to a basic award, and a broader approach can be taken, it is generally unusual for a different reduction to be applied. There is no reason in this case to view the relevant background differently and accordingly the basic award should also be reduced by 75%.

Breach of contract claim/wrongful dismissal

104. The additional claim of wrongful dismissal must be considered separately. This has to be evaluated on a different common law basis to the approach taken in the unfair dismissal claim. Not all of the relevant principles and considerations are common to both.

105. It is determined that the Respondent was not in breach of the Claimant's contract by dismissing her summarily and without notice pay. The Claimant fundamentally breached her contract with the Respondent by way of the conduct described within the first disciplinary allegation. That conduct was admitted by the Claimant and there was no dispute over whether it occurred. It was an essential term of the contract that she ensures AB was adequately supervised whenever she was in the role of his support worker, and she breached that term. The Respondent brought the contract to an end because of it. It was therefore released from the obligation to give notice or payment in lieu.

106. Although the Claimant's dismissal was found to be unfair in the statutory sense, that is not inconsistent with this finding. The consistency issue which went against the Respondent in her statutory claim is not a determining factor in the common law analysis required to determine her wrongful dismissal claim.

Calculation of award

107. Mr Munro had helpfully confirmed that the key values set out in the Claimant's most recent schedule of loss were agreed.

108. The Claimant's basic award entitlement was calculated to be **£2,783.40.**

109. The Claimant's net loss of earnings between her dismissal date and 1 March 2021 (i.e. effectively the hearing date) was £14,564.55. In addition, she had lost out on her employer's pension contributions over the same period, valued at £701.19. However, those figures excluded the eight-week period immediately after her dismissal in which she was claiming damages for wrongful dismissal. Accordingly, her losses to the hearing under her unfair dismissal claim are higher by the equivalent of eight weeks' net pay and employer pension contributions, equal to £2,207.52. Thus, the total figure is **£17,473.26.**

110. Her future net wage loss and pension loss were £264.81 and £11.13 per week respectively. No argument was made that the Claimant had failed to mitigate any of her losses. She receives a carer's allowance of £260 per month but would have been able to earn that even had she continued to work for the Respondent, and so it should not be deducted from any award now made.

111. She also sought **£350** in respect of the loss of her employment rights.

112. On the basis that a compensatory award is appropriate, it is necessary to calculate a reasonable period of loss. That should recognise the degree to which the Respondent has deprived the Claimant of paid work, but up to a sensible point. The Claimant has been out of work for well over a year now, which is not necessarily through any fault of her own in the current climate. Equally, a Respondent is entitled to argue that at some point it should cease to be effectively paying for its mistake.

113. Considering the above and all of the circumstances of this claim, the Claimant is awarded compensation from her dismissal date until 29 March 2021. This therefore includes four weeks of net losses for the month of March amounting to **£1,103.76**. It is hoped that at that point or shortly thereafter her ability to secure alternative work would be improved by virtue of the resolution of this claim and increased activity in the economy and job market generally.

114. Adding the figure immediately above to her losses to 1 March 2021 produces the figure of £18,577.02. Adding the basic award results in a total of £21,360.42. It is this figure to which the 75% discount for contributory conduct should be applied, which leaves £5,340.11 remaining.

115. The final step is to add the amount for loss of employment rights, bringing out a final total award of **£5,690.11**. This is the amount the Respondent is ordered to pay.

Employment Judge: B Campbell
Date of Judgement: 19 March 2021
Entered in register: 1 April 2021
and copied to parties